

**2<sup>ND</sup> BIENNIAL WAR CRIMES CONFERENCE:  
'Justice? – Whose Justice?  
Punishment, Mediation or Reconciliation?'**

**3 to 5 March 2011, Institute of Advanced Legal Studies**

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*Introduction*

The plans for this event had been laid at the end of the first War Crimes conference in 2009, with the objectives of hearing back from some delegates then present and exploring both new areas not represented in 2009 and, above all, questions asked in 2009 which needed consideration in more depth. This dictated the theme of the second War Crimes conference, 'Justice – *Whose Justice?*' as well as its establishment as a regular biennial event at the Institute of Advanced Legal Studies (IALS), working in collaboration with SOLON and the CCBH, now at Kings College London. IALS provided the premises and conference management dimension. The Conference Committee (IALS Associate Research Fellows Judith Rowbotham and Lorie Charlesworth, who are also SOLON Directors, together with IALS staff including Belinda Crothers, the IALS Events Manager) thus applied to the Human Rights Consortium (HRC) for funding to enable the attendance of key overseas speakers. In response to the call for papers, the Committee were overwhelmed with the number of important papers and produced from these offerings a rich and complex programme which clearly reflected the theme's human rights dimensions. We are thus gratefully indebted to the HRC of the School of Advanced Study, in the University of London, for their generous funding of £1,500. This enabled us to part fund several of our speakers who we knew would find it almost impossible to find funding for themselves from other sources. The fact that no premises or substantive organisation costs needed to be factored in meant that conference delegate fees were kept to a minimum and, in line with the IALS mission, was intended only to enable the conference to break even (which it did).<sup>1</sup> We were unsuccessful in other funding bids, both because of the straitened times and because we are not a

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<sup>1</sup> Cissa Wa Numbe, Shirley Randell, Silke Studzinsky, Gopal Siwakoti, Christopher Mahony were among the important speakers aided by the generosity of the Human Rights Consortium.

'standard' conference, but an interdisciplinary one. Thus we were unable to offer more financial support, which enhances our gratitude to the HRC still further. We also thank those universities and institutions which did provide support to our speakers and our delegates, to enable such a distinguished and useful mix to be at the conference. Our other collaborators, acting as endorsers of the conference, included (also from the School of Advanced Studies) the Institute of Commonwealth Studies, Institute for the Study of the Americas plus the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Sweden.

#### *The Conference Context and Content*

Again, as the responses to the Call for Papers came in, we were delighted to see that we had a diverse mix of experience and expertise with academics and practitioners, covering the anticipated fields of law, history, politics and anthropology but also including journalism and heritage this time. We had a number of 'repeat' speakers, reporting on developments in their areas in the last two years, but we also had new contributions. Again, we decided to keep the numbers of non-speaker delegates down, to promote that same level of genuine debate that had characterised the event in 2009, in the hopes that we would again elicit ongoing practical and theoretically-based exchanges of ideas, experience and practice. However, this was even more difficult than it had been when preparing for the 2009 conference, because we had around 140 high quality proposals and we would like to take this opportunity of thanking those who submitted proposals yet who were not selected by us. The committee agonised over the choices and rejections were never on the basis of lack of quality but rather lack of space and funding within the limits of the conference. However, a particular delight this time was to welcome speakers and also delegates from so many overseas locations. From Nigeria, from Singapore, from Japan as well as the USA and Europe, they came. We also were pleased that not only students and academics came but also practitioners – indeed we were humbled that the majority of the overseas delegates were practitioners looking to take home insights from this event. We welcomed them all, as well as our speakers, in the knowledge that their range of experience and perspectives could only enrich the conference and that if they hoped to learn from us, we knew we would learn from them.

A conference with such a challenging subject might be expected to be a sombre affair, but as in 2009 the conference was lively, stimulating and uplifting, because of the

admirably passionate commitment demonstrated by all, fuelling a set of challenging and positive debates. The delegate on the Ashgate stand commented on the 'buzz' of the conference, saying it was the most stimulating she had ever attended. No easy answers or solutions were proffered, but a will to advance understanding, to take on board the views of others and to make changes that would make a difference were all tabled during these three, hectic and intense days.

The conference opened with a rather different plenary session to that originally envisaged, as Jose Pablo Baraybar (EPAF, Peru) was unable to attend due to circumstances entirely beyond his control! However, we include in this issue of the *Journal* a reflection on the work done by JP and EPAF, resulting in the well-deserved award of the Judith Lee Stronach Human Rights Award for 2011 so that we can take note of the continuing and much needed efforts by this inspiring man and his equally inspiring and dedicated group.<sup>2</sup> We also learned that another plenary speaker, Lesley Abdela, was laid low on a bed of illness, and so also unable to attend, to our considerable regret.

*Different Perspectives: Different Understandings*

As a result of the necessary changes to the plenary structure of the conference, Dr Gopal Siwakoti consented to show the drama documentary that his NGO, Inhured, had created for a Nepalese audience, since it was also available in an English language subtitled format with some English voice-over commentary. 'Journey to Justice' explored the need for a full and transparent transitional justice scheme in Nepal to ensure the maintenance of human rights there, using a dramatised reflection on the war crimes that had characterised Nepal's civil war. The documentary aimed to 'inform, educate, inspire and encourage everyone to seek the truth, prosecute the perpetrators, undertake comprehensive reparation and advance institutional reform for securing justice to victims, lasting peace and reconciliation in a post-conflict and divided society like Nepal'. Gopal Siwakoti and his colleagues insist that 'Informed participation... is vital' to any post-conflict reconciliation initiatives, as it is the only way to safeguard human rights. For non-Nepalese Western orientated viewers, the challenge lay as much in the choice of format, because this was no quietly restrained production, but one which insisted on

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<sup>2</sup> See the contribution 'Are We Perfectible?', Rebeca Blackwell.

displaying a representation of the violence that had taken place in order to make its point. Nor did it use 'great actors' to do a very difficult task, but it was honest and straightforward in making its points. In many ways, such a film could be more informative, and more instructive, of attitudes outside the West towards human rights issue than a more smoothly-made professional Western effort could have been. It was agreed in debates during the conference that a circulation of such indigenous productions would certainly promote a better engagement with the local cultural understandings and perspectives on conflict and could so provide an invaluable aid for those from the West going to, say, Nepal as in this case, to work for NGOs or as part of various diplomatic, legal and military missions to a particular region. Thus it was a good start to a conference which sought to question the nature and formats of justice and its delivery in an international context.

The Round Table on 'Practical Issues in Assessing Justice' which followed illuminated this aspect particularly strongly, but also brought up (as in 2009) the importance of a consciousness of the *language* of rights and of justice – and the need to achieve an understanding of the different concepts which were being expressed through apparently similar phraseologies by the different parties involved in identifying war crimes and seeking justice for the victims thereof in ways that reinforced, rather than diminished, the rule of law. Chaired by MP Rory Stewart, and led by Yolanda Foster (Amnesty) and Mark Hull (a military historian from the US Army Command and Staff College), the wealth of practical experience and insight displayed by these three stimulated a hard-talking debate. Rory Stewart used his impressive knowledge of both Iraq and Afghanistan in particular to shape the debate, amply aided by the complementary experience of Yolanda Forster and the perspective of Mark Hull, with his responsibility for training US personnel on their way to these regions. Stewart's point about the need for any Western nation to have a properly informed and so, a properly confident diplomatic and military when engaging in the international arena was a theme highlighted by commentary from non-Western speakers throughout the conference. The only regret was that his political duties meant this was the only session he could attend, and this prevented him from being a most useful delegate throughout the conference – in saying we need more politicians like this, we make a comment that is regardless of party or nation. He made a brief but memorable contribution, and we shall hope to interest him further in subsequent events. In assessing the key question for the conference, we do need figures who recognise the extent (in Stewart's case, very

considerable), but also the limits, of their expertise and consequently, the need to listen more – and have the ability to take informed advice to try to discover who are the best people to listen to in any situation. Yolanda Foster's comments underlined the importance, in this context, of the work of Amnesty and its passionate commitment to an even-handed investigation of local situations

At the same time as the Round Table, another very important session was taking place focusing on Bangladesh and the War Crimes Tribunal there. The perspectives on this process were provided by Md Shahinur Islam, the Registrar of the Bangladesh ICT, and by a returning speaker, Toby Cadman<sup>3</sup> with Steven Kay QC and John Cammegh, all acting for Jamaat-e-Islami as a defendant before the tribunal. The issue here was the 'fairness' of the tribunal – a constant theme for the conference. A particular problematic for the Bangladesh process is the time elapsed since the events being focused on, since they occurred during the Liberation War of 1971, again addressing through this case study example the issue of time as a factor in such prosecutions. With the process in its early stages still, we look to hearing more on the progress of the Tribunal in the context of these debates at the proposed 3<sup>rd</sup> Biennial War Crimes Conference, to be held at IALS in 2013.

### *Revisiting the Themes*

Two themes which had been important in 2009 were present more implicitly than we had originally expected. The war crimes trials in Bosnia Herzegovina which had been so substantial a feature in 2009 were revisited, but their contribution was more as a starting point for other reflections: we think it will be vital to revisit the area in 2013, after the conclusion of the mandate in 2012. Equally, Guantanamo Bay did not feature as a topic for major discussion in its own right, partly because Candace H Gorman had to withdraw at the last minute due to the need to remain in the US to help her remaining Guantanamo client, Ali Hamza al Bahlul in his appeal – and it is worth looking at Candace's blogspot contributions, and through that at the judgment and the reactions to it: [gtmoblog.blogspot.com](http://gtmoblog.blogspot.com). All being well, we shall hope to return to something which is a serious issue for the health of international justice in 2013, when we will hope that Candace can attend.

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<sup>3</sup> Toby Cadman was a speaker in 2009 on the Bosnian War Crimes trials, in his previous capacity as advisor there.

However, Cambodia was a major theme raised first in 2009 and one to which we returned in 2011 in much more substantial detail. As well as Silke Studzinsky, who had spoken in 2009, a number of other speakers explored progress over the last two years in this particular trial process. The different perspectives on the relative 'success' of the Cambodian initiative was instructive of the dilemmas posed by the justice process in bringing war criminals to trial, especially – as noted above with Bangladesh – where a significant lapse of time before the initiation of any justice process hinders the proper processes of law. There was also the issue of identifying the appropriate targets for prosecution and the scope that prosecutions should include, as Warren Binford, in her discussion of the Khmer Rouge's use/corruption of children underlines. She argued powerfully that, for instance, existing law would have provided a solid foundation for the prosecution of 'Duch' to have focused more firmly on this dimension to his crimes – and yet, there was a lack of will on all sides to deal with the issue of children in war, something that had a resonance for other areas such as Uganda, of course as the paper by Daniel Ruhweeza underlined. Most sadly informative in this context was Silke Studzinsky's relative pessimism about the prospects of the delivery of justice by the ECCC, even while she insisted on the importance of making the attempt. It was instructive to be reminded just how difficult the delivery of a worthwhile outcome is, despite the high hopes with which an initiative like the Cambodian tribunal can start out. There is clearly

#### *Human Rights and War Crimes: Theories and Practices*

The human rights dimensions to the formats for the delivery of justice was another constant issue debated – with consideration being particularly given to the concept of justice – how 'international' is justice, was a key question, regularly directly or implicitly voiced. Promoting a theme which was first aired at the 2009 conference, a regular question asked was whether the ICC could have a real role which is recognised and accepted by post-conflict populations? Jeanne Woods, for instance, questioned the long-term positive impacts of the effectiveness of the ICC and the impression given by current prosecutions that there are certain states and individuals who are, for reasons perceived to lie within an unjustly differential made between Western and African states, considered to have impunity from prosecutions. Craig Ruttan focused on case studies from Sudan and Uganda to critique the actual contributions of the ICC to furthering

justice in Africa. He fully accepted the Court's commitment to the 'five pillars of peace-building'; security, economic development, political arrangements, justice, and reconciliation, and acknowledged that while challenging they were well-established standards for the delivery of justice both nationally and internationally. However, he argued that the experiences of his two case studies revealed the inflexibility of the court as currently constituted and its consequent inability to take account of important developments arising from local realities. For him, the International Criminal Court was too rigid an institution to address war crimes given the reality that there was generally not a broad and apolitical acceptance of its rubrics. He wanted its success; he feared that unless it changed this could not happen.

The points made by speakers present was further emphasised by a paper, read *in absentia*, from Daniel Ehighalua.<sup>4</sup> He highlighted an issue which came up regularly, both in papers and in discussions, that there appeared to be a Western conceptualisation of what constituted justice which was inflexible and so there was a constant potential for collisions between how many African states and individuals conceptualised peace and justice. While it was generally agreed that peace could never be traded for justice, there was less clarity on precisely what constituted justice. Ehighalua, in common with others, commented on an African perception that the ICC was at a crossroads. Would it prove possible, in the process of dealing with likely upcoming interventions by the court, to re-engage with a debate about topics such as impunity in ways that can restore confidence amongst African states in the work of the court? These issues remain at the core of the future and success of the ICC, and not just in African perceptions.

There are, as delegates commented, real difficulties not only in defining what constitutes a war crime in theory but also relating that theory to the realities of war crimes, taking into account how different groups understands events within the cultural spaces

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<sup>4</sup> To the embarrassment of the conference organisers, the UK government's Borders Agency refused Dr Ehighalua's visa on the grounds that they felt he was unlikely to return to Nigeria: We can only apologise to him for such a clearly flawed decision, especially given his ability to access visas to the USA and other parts of the world in very recent time! It robbed the conference of an important contribution, because although a version of the paper could be read, the expertise and judgments Daniel would have provided in debate was missing. It is anticipated that his paper will be a chapter in the forthcoming volume, however, enabling his comments to have a proper circulation. We should note that the Agency's decision was discussed at the conference, and the negative implications for good scholarship and for the UK's reputation more widely was made very forcefully to the various Foreign Office officials who were present.

constituted by the local/national and the international. After all, punishment in one sense actually legitimises a crime by providing it with a substantive legal identity – but how does (should) that identity relate to traditional indigenous comprehensions of a crime and a more universal or international comprehension, and does it matter?

### *Media and War Crimes*

The way in which justice is understood by different audiences was highlighted particularly through the Round Table session run by Wanda E. Hall (Interactive Radio for Justice) and Milica Pesic (Media Diversity Institute) which became a plenary, replacing Lesley Abdela's planned talk. It proved to be a most thought-provoking and stimulating session, revealing the different agendas, experiences and pressures placed on journalism in an era when journalism is expected by many to act as the repository and guardian of 'truth'. In this context, the questions raised by an examination of the role played by journalists in shaping popular understanding of war crimes and their perpetrators were vividly illuminated by Milica Pesic's comments on her own experiences as a Serbian journalist, pointed up by video clips from that conflict. She reflected with great honesty and courage on her role as a journalist in that conflict, in order to pose the question that few of us would previously have posed: can journalists who are not political spokespeople for a regime, and simply in the ordinary course of their duties as employees of a media company of some kind, conduct themselves as journalists in ways that amount to war crimes? Does misrepresentation, misinformation and unreliable propaganda, such as seriously distorts the realities of a conflict situation, amount to a war crime if it helps to sustain and justify a conflict? There was no easy answer here, but in raising the role of propaganda and journalism as propaganda in war, some uncomfortable questions for those in that profession were raised. Reportage of the recent events in Libya from supporters of the Qaddafi regime and also from Syria as we write this report, as well as media depictions of what is going on more widely in the Middle East and North Africa, in Burma and Pakistan – and in Northern Ireland – underlines the need to consider the importance of good and 'bad' media practice in both conflict and post-conflict situations, as an important underpinning to any successful management of the rebuilding of societies.

As a way of promoting understanding and involvement in the process of reconstruction post-conflict civil societies, the promotion of the ordinary voice in and through the media

was shown to have been a key strategy used by Interactive Radio for Justice in the presentation from Wanda Hall. This project closed in July 2011, some five months after the conference, but its web page is still active, at <http://www.irfj.org/>, and we would strongly urge people to look to it as a model for further efforts in other regions. Perhaps, as reconstruction efforts begin in Libya, it provides a pattern for achieving what the interim government insists it is striving to achieve in the shape of a Libyan democracy which is genuinely inclusive. Focusing on regions where the ICC is investigating serious war crimes, such as Ituri, DRC, ordinary citizens were encouraged by the project to use the resources of a radio network to ask questions of their leaders, regional and national, that were important to *them*. These were not necessarily the great questions of state that were voiced in public statements, but they reflected the everyday concerns of the man and woman on the street, in the market and in the home. As the website shows, people wanted to know from their leaders more about the restoration and continuing progress of initiatives to promote ordinary justice as well as the progress of justice for victims of war crimes. The project offered an opportunity for a dialogue between government figures and the ordinary citizen which would have been difficult to organise in any other way.

Given the importance that emerged during this conference of considering the role, impact and responsibilities of the media, it was a particular shame that Kris Wetherholt, the Co-founder and Chairman of the The Humanitarian Media Foundation (HMF) / HMF and the Editor of the *Journal of International Media and Information Policy* could not be with us due to a last minute family emergency, but we do hope to see her in 2013!

#### *'Victims' and Survivors*

An associated dilemma highlighted in the opening video also continued to inflect the presentations and considerations – the question of personal responsibility for war crimes, and consequently, the issue of who were the 'real' victims. Child soldiers, for instance, forcibly recruited and corrupted but growing up to continue to commit crimes. We were fortunate enough to have not only two important papers from Warren Binford and Daniel Ruhweeza but also Judge Kyrie James to aid our debates in this area.<sup>5</sup> Where should the emphasis lie? On these children as perpetrators or as victims? One certain conclusion from the debates was the importance of discovering strategies which

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<sup>5</sup> There was a subsequent conference on Child Soldiers organised by Kyrie James in May 2011, which we hope will produce some important results.

would help such children to become survivors, not permanent victims – a trope that was also important for other victims of war crimes, particularly women who were victims of rape as a weapon of war.

Indeed, as anticipated, there was in the conference considerable stress on the importance of remembering the gender dimension, and in particular its impact on women as victims in conflict and the obstacles in the way of such women emerging as survivors instead. This perspective was included in a number of important papers. Daniela Nadj provided an analysis of sexual violence jurisprudence, which looked at its interpretation by international criminal jurisprudence, and asked telling questions about how current practices, such as those pursued by the International Criminal Tribunal for the Former Yugoslavia in dealing with rape and sexual violence against women, were positively effective for those concerned. It is important, as she stressed, not to be too confident in the ability of international law, working in local contexts and complicated by the impact of local cultural realities, to provide justice. The stress on ethnicity, for instance, as in the case of the former Yugoslavia, could be said to have hindered, not helped, the campaign for gender equality because of the consequent perpetuation of hierarchical and dichotomised gendered subjectivities; subjectivities that have, in reality, done little to dispel deeply entrenched stereotypes of women in international law. If they are present in the law, how can they be combated by women seeking to become survivors and not victims of sexual violence, was the question that was raised by this important contribution. Theresa de Langis was equally challenging in her reflections on the realities of post-conflict Afghanistan, in what was for one author of this report a saddening reminder of the conclusion by Lesley Abdela that she was less hopeful about the impact of her work there than in any other post-conflict area where she had worked. The danger identified by de Langis, on the basis of compelling evidence, was that any international efforts to guarantee women's rights in Afghanistan would be sacrificed on the altar of expediency – viz, a desire by Western powers to emerge with a 'peace' deal involving the Taliban. Niaz Shah in a challenging paper on Taliban attitudes to war had already pointed out that in his judgment (one shared by Onder Bakircioglu of Queens University Belfast in his assessments of the concept of just war in Islam), the Taliban code was at odds with both Islam and the international law of armed conflict. Was there, in that likelihood, any real prospects of peace going hand in hand with justice for Afghan women?

*Gendering Reconstruction*

The importance of promoting women's access to post-conflict reconstruction as a key element in women's access to justice was also a theme in Shirley Randell's plenary, which provided a controversial and provocative survey of the realities of events in post-conflict Rwanda. She started by highlighting the use of rape as a weapon of war and its consequences, but pointed out that the combined realities of a genocide policy that had particularly targeted men with post-conflict prosecutions of so many surviving male perpetrators had created an almost unprecedented set of practical opportunities for women to participate fully and appropriately in the rebuilding of civil society. Pointing to a 56% representation of women in parliament, she argued that there had been a genuine re-conceptualisation of gender roles in the country. By highlighting women's historical roles as behind-the-scenes advisors, women had been able effectively to argue for gender equality in the present. This had been a strategy which had enabled development of laws to protect women, but also enabled the participation of women working in civil society organizations at local levels in projects to rebuild and unify communities. In practice, this has aided development of entrepreneurial projects, where women affected by the genocide, survivors and wives, mothers, daughters and sisters of victims have come together with wives of perpetrators, drawing on the local *umuganda* tradition of community work. The importance of the context provided by international laws as a guarantee of such projects has been aided also by legal clinic approach whereby, amongst other things, the robustness of some detailed laws related to cases of rape are in progress to assist this process. Shirley thus argued that for all its ongoing problems, one thing Rwanda did represent was an effective gender-mainstreaming approach. Unlike some other post conflict societies (such as those that would have been highlighted by Lesley Abdela, notably including Iraq), Rwandan women were able to demonstrate they possessed not only political will but also economic success. She argued that she did not want to portray Rwanda as utopian, but she did think – for all the criticisms voiced of President Kagame as well as the continuation of patriarchal ideologies in many areas – that it was important to acknowledge the degrees of success that had been achieved. She argued, amongst other things, that it had been an important aspect of post conflict reconstruction that there was now a willingness to overlook much of the past patterns and histories of atrocity, because women, as key victims on both sides, were actively in agreement. They were not forgotten victims, but

survivors and agents of their own choices in this area at least. This provided an interesting echo of Cissa Wa Numbe's closing plenary.

*Justice, Truth and Reconciliation*

The consideration of media links with a point made by several other speakers that belief in the fairness of the processes involved in post-conflict reconstruction is essential to a broad acceptance of the outcomes. Considerations of the media presentation of conflict events also raises another uncomfortable consideration – how far is 'justice' allied to 'truth', or what might be considered an honest balance of culpability and complicity? The responses of several practitioner delegates suggest that there is no easy answer to this. Several insisted on the importance of incorporating the international understanding, but others insisted that the challenge to traditional systems was counterproductive. Complementing this, Patryck Labuda reflected on what he identified as the in-built failure mechanisms in the Democratic Congo Republic's Truth and Reconciliation Commission set up in 2003 in a thorough discussion of a Commission that has normally received little publicity, because of its failure. Did it provide a model warning lesson for other initiatives, or was it the exception that tested the rule? In another session, Heather Devere, of the New Zealand National Centre for Peace and Conflict Studies, considered the problems and opportunities of transitional justice, especially given the need to make it both credible and acceptable to local communities by developing formats which recognise traditional local expectations of 'justice' while enabling a scenario which permits war crimes to be tried effectively. She reflected on examples of work in locations as diverse as the Solomon Islands, in Papua New Guinea and Sierra Leone. Stressing the need for promotion of culturally sensitive contextualisations of transitional justice, she was relatively positive about the prospects. By contrast, some other presenters were less certain about the impacts of transitional justice and of strategies such as Truth and Reconciliation Commissions. What can you do for people who have a different ontology for the dispensation of justice, particularly when the general interpretations of the differences between international and indigenous justice delivery posit the former as encapsulating retribution (possibly life-long) and the latter as relying on forgiveness and reparation as mechanisms for reintegration into communities? In a wryly amusing reflection based on his own experiences, Lyal Sunga asked whether Truth and Reconciliation Commissions did work to serve the ends of justice, or did they instead, as Labuda had argued, hinder, obstruct or subvert it? Could they be effective alternatives to

criminal prosecutions, allowing a better way of post-conflict society rebuilding? A key problem was the issue of either impunity or the issuing of amnesty, and how these could fit into the equation. Highlighting the inherently unstable and contested nature of 'truth', he suggested ten principles as the way forward. Their adoption, he hoped, could work to optimise the potential for such commissions to provide a real alternative to prosecutions, genuinely contributing to justice, peace and human rights. Further details of these cannot be included here without damaging the presentation of them and their justification, for reasons of length, but they will feature in the future War Crimes volume.

Reflections put forward by Rod Rastan (ICC) and the LSE's Tim Allen (kindly standing in at short notice for Adrawa Lawrence Dulu, who had had to remain to deal with a human rights crisis in southern Ethiopia) also crucially focused on an accompanying trope, that of truth (or reality) and justice, in the manner of delivering justice and the dilemmas involved in seeking to respect and promote local sensitivities. Once again, the role of the ICC was a key issue. In a measured contribution, Rastan pointed out that the task of the ICC was an almost impossible one – because not just had the official systems of law and order broken down in regions where the ICC was active, but also the mundane daily realities of orderly daily behaviour within communities. If international intervention had to be unusual, effectively a last resort, the fact that this often represented an internal crisis ensured that the weight of local and international expectations could be extremely problematic for judges. Expanding on this, Allen's passionately felt survey of the principles he identified as underlying the work of the ICC identified many flaws in the international mechanisms for the delivery of justice but insisted that despite the 'relative' nature of justice so promoted, it was sounder and less susceptible to politicisation than a reliance on the so-called 'traditional' rituals of justice, because of the practical informality and lack of uniformity that habitually characterised such rituals before the disturbances of conflict. He insisted that the tendency to 'invention' of a universality for such rituals was a dangerous threat to effective post-conflict justice management and the potential for successful reintegration of offenders into society. For Allen, as for many delegates, the flaws of the ICC were not so severe a problem to the delivery of justice as a reliance on the alternatives would be.

*The Importance of Historicising Considerations of War Crimes*

Tim Allen's interdisciplinary contribution was one of those which also reminded participants of the importance of seeing the issue of war crimes in historical perspective, and not just as a recent issue. However, it also reminded us of the importance of comprehending law and its basic tenets, including the significance of understanding through law what constitutes a war crime and differentiates it from ordinary criminality. If the terminology of war crimes is recent, the law and the issues involved are not. Both David Fraser and Lorie Charlesworth made this point very forcefully in their presentations. Fraser's plenary, contextualising and taking further his recent book, discussed the importance of retaining a historical dimension, because – apart from anything else – chronological time was too readily susceptible to the diminishing of the issues. His powerful justification of the war crimes trials in Australia in the 1980s and 1990s emphasised that without a historical contextualisation of such events (ones which, relatively speaking, could be dismissed as minor), the action of the Australian state in launching the prosecutions of Ivan Polyukhovich, Heinrich Wagner and Mikhail Berzowsky could have seemed vengeful and disproportionate as well as being irrelevant to contemporary Australian reality. The invocation of both a historical methodology to contextualise the operation of the law and a historical chronology serves to remind us that there are certain types of criminality which transcend such national boundaries, and justifies the use of the law to launch prosecutions – especially if that is supported by evidence and by the desire of victims. Dan Plesch's paper examining the lessons provided by the United Nations War Crimes Commission of 1943-48 for current practice by international tribunals was a further reinforcement of that point; with his emphasis on the reality that the UNWCC, drawing on the past to comprehend what was going on in the closing days of the Second World War, drew up robust theories and principles which have been used since in developing the protocols and practices used for war crimes prosecutions.<sup>6</sup> Linking to this, both Lorie Charlesworth and Daniel Marc Segesser stressed the importance of recognising the individual contributions made by lawyers, prepared to dedicate themselves to providing a legally sound and robust framework in which international tribunals could work. This was further enhanced by Simona Tobia's paper that highlighted the reality that international tribunals, working in languages not necessarily accessible to all participants, relied heavily on translators for the provision

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<sup>6</sup> Dan Plesch sent a copy of the PDF from the UN archives of the United Nations War Crimes Commission 1943-1944 to delegates, and Judith Rowbotham is happy to pass on to anyone.

and verification of evidence, and to enable the full participation of all, defendants, witnesses and prosecutors, in the trial process.

*Case Studies from History*

History, in other words, reminds us constantly of the need and legitimacy of using the law to deal with war crimes, and of the significant roles taken by outraged legal experts. Does it need a sense of outrage for war crimes prosecutions to be effective? But what, then, are the dangers of outrage inflecting or distorting the evidence or the legal process inappropriately? The evidence of this strand in the conference was broadly reassuring, in that it demonstrated that there is a historical tradition of such outrage being tempered by a determination to observe the rules of law in order to avoid being identified with the perpetrators. But there are dangers also that, over time, there can be an ahistorical reinterpretation of past events and the legal reactions to them. Sascha Bachmann provided a highly provocative revisiting of the legacy of Nuremberg in the light of the current international management of the war on terror and the responses of the USA in particular. The importance of detailed and legally-sophisticated historical studies of key cases, and the dangers of reinterpreting the past using present politically-inflected judgments, was further underlined by the contributions from Bill Bowring and Szymon Janczarek, discussing the work of the European Court of Human Rights in relation to *Kononov v Latvia* (17 May 2010). This discussion did, in some ways, provide an uncomfortable challenge relating to the need for consistency in the development of the principles of international law. Crucial to their complementary reflections, drawing on different experiences (academic and practitioner), were questions about the principles of legality and how these related to the prosecution of war crimes. For them, and as Bill Bowring trenchantly pointed out for Russia, the application of international criminal law by human rights courts was problematic given that the proceedings could also credibly be interpreted as an actual attack on human rights, given Kononov's case that his actions had not constituted an offence under either domestic or international law at the time of their commission; meaning that the verdict in this case highlighted a serious lacuna in the reach of European human rights law, with implications for the legitimacy of the management of war crimes prosecutions in Kosovo. This was an important consideration, given the points made by the contributors in the panel on the aftermath of the International Criminal Tribunal for the Former Yugoslavia, currently completing its mandate. The creation of the War Crimes Chambers of the State Court of Bosnia and Herzegovina was shown as facing very real challenges in establishing itself as a durable

entity, as much for financial reasons as for anything else. Iva Vukusic, presenting in 2011 and reflecting back on the conclusions of the previous conference, commented on the crucial importance of preserving the archives of the work done by the ICTY, pointed out that financial constraints were a serious obstacle to the preservation of an important resource for the conduct of future tribunals globally. In debating where the responsibilities lay for the preservation of such archives of mass atrocity and criminality, Arnaud Kurze's paper acted as a warning of the likely politicisation of the 'truth' of such events if such archives are not carefully preserved and made readily accessible. But all this leaves open the will of the West, particularly at a time of recession, to commit the resources to safeguard such resources.

### *Evidence and Cultural Contexts*

Evidence, and what constituted evidence, were discussed in a number of interesting and challenging presentations. Melanie Klinkner discussed both the advantages and problems of forensic evidence when reflecting on the importance of forensic science to the success of war crimes prosecutions, while warning of the dangers of going beyond pure science. In a presentation that invoked memories of Jose Pablo Baraybar's powerful presentation in 2009, Frode Lindgjerdet brought together a key debate between Klinkner and Baraybar. Baraybar had argued that forensic science could not ignore cultural identity and needs in presenting its conclusions – that even if the results could not satisfy the evidentiary demands of a legal tribunal, some form of cultural recognition of an event involving human atrocity was crucial to enable victims to become survivors. Frode Lindgjerdet focused on the cultural and environmental damage done in conflict, looking at the damage done to community identity by the destruction or looting of important cultural symbols. It was a presentation that struck a chord with several there, invoking memories of the so-called Baedeker Raids on Britain in the Second World War when Hitler had hoped to undermine British commitment to the war through destruction of key cultural sites. But it had also a more contemporary resonance for delegates from Lebanon, for example; something that was subsequently further reinforced by the exhibition of surviving Afghan treasures organised by Rory Stewart at the British Museum this spring. As Lindgjerdet reflected, it was easy to overlook the longer term impact of such destruction in the context of the immediate pressures of war or later, of a need for humanitarian aid. Regina Rauxloh pressed this point home still further in her presentation on environmental damage as an accompaniment of modern warfare,

looking to the consequences for post conflict reconstruction via cases studies such as that of Vietnam. The economic, as well as cultural, consequences can be shown to be significant obstacles to the re-establishment of healthy communities and so, she argued, international law had to take such damage seriously as a war crime. Such arguments clearly made the conference think, especially in the light of the current conflicts in North Africa and the Middle East. It is difficult to see how the realities of war will persuade powerful nations that they should be thus likely, however, to be a continuing trope – what, at the next conference, will be perspective of the Libyan dimension we will hope for, or that of Syria?

### *Comprehending 'Justice'*

Relating to this, the issues of law and acceptable evidence generally, however, were also shown to be complex, especially given the need for reconciliation if post-conflict reconstruction is to be effective in the short, and enduring in the longer, term. Tim Hillier and Gavin Dingwall, and Asa Solway, amongst others, addressed the uncomfortable reality that there can be competing notions of justice in post-conflict situations. Solway pointed out, challengingly, that it was no asset to the reputation for delivery of balanced and impartial justice by international tribunals if defendants, especially those eventually convicted under international processes, were not provided with robust guarantees of their rights within the framework of their treatment within the legal process. Contextualising this still further, Dingwall and Hiller reflected on the practical implication for comprehensions of justice of the outcomes of tribunals where sentences for crimes committed in a conflict context were awarded more lenient sentences than domestic courts were awarding for similar offences.

The granting of impunity, officially or unofficially, to individuals and states was a recurring theme. Gary Baines, discussing the failure of the SWAPO government in Namibia, considered the negative consequences of a collusion between South Africa and the Namibian government to ignore the need for some form of post-conflict justice process. He acknowledged the difficulties, but warned of the dangers in terms of any guarantees of their human rights for ordinary citizens, in Namibia and elsewhere, of an effective burying of the issues. Daniel Ruhweza saw, in exploring the Ugandan scenario, a value for alternatives to the invocation of the international court system, as lying in indigenous justice mechanisms. Acknowledging their limitations, he argued that at least

in the aftermath of civil strife this was most likely to settle resentments and command respect – though Tim Allen’s paper directly challenged his conclusions. It is plain that more work and more experience needs to be drawn on to see where, or if, a tenuous balance between indigenous and international justice mechanisms could be achieved.

*Achieving a Balance in International Justice*

An interesting amplification of the difficulties of achieving a delivery of international justice which was accepted as ‘just’ by both local and international communities came with the session featuring Gopal Siwakoti and Chris Mahony, with chair and discussant Courtenay Griffiths QC. As well as the problems surrounding the speedy and effective collection of evidence, there was what could be regarded by one side or another as the ‘unfair’ criminalisation of scapegoat groups (as highlighted by Padraig McAuliffe for Cambodia) or individuals – again returning to the issue of the vulnerability of war crimes prosecutions to inappropriate politicisation. In examining the charges against Charles Taylor, Mahony identified differences between the justificatory rhetoric put forward by the UN Special Court for Sierra Leone in the Hague for the prosecution, and realities of atrocities having been committed by all parties involved in the Sierra Leone civil war. As Courtenay Griffiths asked, was this a case of partial victors’ justice, and so likely, in the long term, to damage the reputation of the mechanisms of international justice? If other leaders and states were demonstrably involved, should they benefit from impunity because they were still in positions of power? Impunity inflected our understanding of the position of Al Bashir, a point raised by Yassin M’Boge, who also addressed this as a problem which bedevilled the expectations of the ‘fair’ delivery of justice, including through the actions of Truth and Reconciliation mechanisms. After all, is amnesty a guarantee of future virtue? And, what was the responsibility of Western nations to support attempts by post-conflict states, such as Bangladesh, in seeking to bring those accused of war crimes to proper account through the formalities of a criminal justice system? As one Asian delegate commented, why should there be trust in African or Asian states, for instance, in a Western-dominated international community when there is a perception that Western nations do not live up to the standards they require of others, ‘protecting’ war criminals in their own borders from requests for extradition while demanding the surrender of prominent figures from non-Western states to the international justice process. It represented a problematic reality where the choice of those prosecuted represented a targeting of those who were relatively weak (Charles

Taylor had lost political power for instance) while the powerful enjoyed impunity from prosecution because of a lack of both international and national will to tackle the war crimes phenomenon impartially. Whether or not they were acquitted would be up to the courts, but potentially the prosecution of Bush, Blair or Pinochet for example, enabled by the international community would have a much more positively powerful impact than pursuing men like Musevani or Al Bashir.

### *Justice at Work*

A further problem complicating effective delivery of justice was not addressed from the start as explicitly as originally hoped, due to the absence of Jose Pablo Baraybar. He had planned to challenge the audience to consider the reality that, because war crime victims are often 'the poor, the illiterate, and minorities', in other words precisely those individuals whose position in society ordinarily allowed for various violations of their rights, it was easy to perpetuate that label as a way to justify the delivery of justice over a sustained period of time. Lack of funds and will, as well as the difficulties of assembling evidence of a quality useful to the legal process, ensured that war crimes prosecutions were a long-drawn out process. If it can be cogently argued that there must be no time limitation on the potential for a war crime prosecution, is it justice to require that victims remain victims to justify and reinforce eventual prosecutions? This was the core of the challenge issued to us by Cissa Wa Numbe, in his powerful concluding plenary. In a moving and pointed plenary, he explained that he had come to us with a message from a group of women in DCR, who knew he was attending this event and wanted him to pass on their perspective. They had been raped, and they wanted – indeed they demanded – a voice in how the perpetrators had been caught and they wished us to understand that for them, justice lay not just in the formal processes of the law but in their ability to inflect the nature of the charges being brought.<sup>7</sup> For them, prosecuting for rape was not automatically the best way to deliver justice to them, and they were fully aware of this. The international community needed to listen to and

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<sup>7</sup> There is an interesting historical echo here of Victorian women in England who were raped and chose to bring charges against the perpetrators not of rape but of types of assault, in order to preserve their own standing in the eyes of their communities etc. See Kim Stevenson, 'The Respectability Imperative: A Golden Rule in Cases of Sexual Assault?' in I. Inkster (ed), *Golden Age? Britain 1850-1870*, (Aldershot: Ashgate Publishing, 2000) 237-248

respect the reasons why they made the choices they did; as they were the ones who had to live with the consequences of both the crimes and the prosecutions..

Cissa Wa Numbe shared with us his memories of the start of the conflict in DCR, and movingly explained why he had taken up the task of working for post-conflict justice. He was honest about the difficulties, but on the basis of his experiences, particularly in the DCR, he insisted that justice was being delivered on the ground, despite the constant political threats to that delivery. There were problems but there were also grounds for hope. However, further emphasising his opening message to us, he emphasised the need that he felt, and which the conference had reinforced, that there needed to be changes to the ideas and practices of the agencies for international justice, particularly the ICC. Accompanying and underlining his agenda of suggestions of urgently needed improvements to the agenda for international (or internationally-recognised) justice delivery for war crimes, was his continued insistence that we must move away from the easy rhetoric of victims. Echoing Baraybar in 2009, Cissa Wa Numbe challenged the audience to recognise the importance of the journey from victim to **survivor** of war crimes, urging the need for us to help to promote through the international sphere a willingness to enable victims to (re)establish themselves as citizens as a key human rights issue.

### *Conclusion*

The ultimate message of a conference that debated human rights in the context of deliveries of justice in relation to war crimes was the need for the Western elements within the international community, and particularly the ICC, to be more open to criticism, recognising when these were genuinely constructive in purpose and substance and likely to advance a global conceptualisation of human rights. The challenge will be how to achieve this. The West has to be willing to take action to end the perception that such states were above the mechanisms of international justice. There had also to be a recognition that justice was not about punishment but had to include recognising the human rights of victims in terms of satisfying their needs in order to facilitate their progress towards survivor status, so enabling them to participate in the reconstruction of their communities. This meant not only a more nuanced and sympathetic conceptualisation of what constituted justice, moving beyond the easy rigidities of punishment, but also an imaginative use of justice delivery systems, including the use of

ICC-managed mobile courts to provide a more local dimension to the delivery of justice, making it seem thereby both more accessible and more 'just'. But it would take money as well as will – and would that be forthcoming from various international agencies? The next conference in 2013, would need to return to these issues. Once again, we owe a great debt to the Human Rights Consortium, to our speakers and participants, so many of whom made huge efforts and considerable sacrifices to enable them to get here. They demonstrated the reality of a human rights agenda, and made the conference once again an inspiring, call to action!

In the interim, an edited volume drawing on both the 2009 and 2011 conferences will be published by Routledge in 2012/13, edited by Charlesworth, Kandiah and Rowbotham, which will aim to establish an interdisciplinary war crimes subject area. In addition, a special edition of *Law, Crime and History*, in 2012, will showcase key papers not included in the volume; and other papers will appear in the *Liverpool Law Review*.