YOUNG LAWYERS ON THE RULE OF LAW

AN INTERNATIONAL PERSPECTIVE

EDITED BY NICK CLARK

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

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Young Lawyers on the Rule of Law

An International Perspective

Edited by
Nick Clark

A joint initiative of the
Rule of Law Institute of Australia
&
the **NSW Young Lawyers**
International Law Committee

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Prosecuting Crimes in International Courts

Preface

This eclectic collection of articles and will give you a sense of the breadth of issues concerning the rule of law in an international law context. It is hoped that this publication will be used by students and the community to learn more about international law and the importance of the rule of law as a tradition, theory, and practice.

The Rule of Law Institute of Australia is proud to support such an interesting range of articles that discuss and explore international law of the past, present and future. We first and foremost thank the authors for their time and effort in researching and writing articles, and the NSW Young Lawyers International Law Committee for partnering with the Institute to produce this publication.

The work of the Institute's Policy Officer in 2016, William Shurbb, in editing, revising and managing the initial publication of these articles on the Institute's website made this publication possible. His careful, methodical and incisive approach to writing and the issues discussed was instrumental in many of the articles within.

Nick Clark
Education Director - Rule of Law Institute of Australia
April 2017

About the Rule of Law Institute of Australia

The Rule of Law Institute of Australia was established in 2009 to promote and uphold the Rule of Law in Australia. It delivers educational seminars on current legal issues in schools across Australia, and a program called the Law Day Out which is a guided tour of courts in throughout NSW by one of the Institute's facilitators where high school students meet a judge, barrister or solicitor, and observe legal cases.

For more information about the Institute visit **www.ruleoflaw.org.au**

Message from the Past Chair of the NSW Young Lawyers International Law Committee

NSW Young Lawyers is the largest young professionals organisation based in Sydney, representing the interests of Australian legal practitioners under the age of 36 or in their first five years of practice as well as all law students within the State. he International Law Committee of NSW Young Lawyers, comprised of over 1250 members, monitors developments in international law affecting Australia and Australia's distinctive contributions to international legal development and offers the opportunity for members to discuss international legal issues in a collegial environment. he Committee is a platform for establishing links with other like-minded organisations both within Australia and overseas. he Rule of Law Institute of Australia is one such organisation that the Committee has had the privilege to partner with on various projects since 2015.

A primary focus of the Committee is to broaden knowledge and awareness of international law within the legal profession and the wider Australian community. This publication created with the works of International Law Committee blog interns at the Rule of Law Institute of Australia is a vital resource for engaging the wider community, especially legal studies teachers and students of legal studies. The online publication simultaneously promotes the outstanding work of the interns in their discussion of rule of law issues and provides interested community members with up to date case studies on international law issues.

Achinthi Vithanage
Chair (April 2015 - April 2017)
NSW Young Lawyers International Law Committee

For more information about NSW Young Lawyers visit
www.younglawyers.com.au

The 50th Anniversary of the International Bill of Rights

William Shrubb
16 December 2016

Today marks the 50th anniversary of the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[1]. Together with the Universal Declaration of Human Rights (UDHR) and the two Optional Protocols to the ICCPR, these Covenants are known as the International Bill of Rights.

The adoption of the Covenants, however, is just one part of their story.

After the war

Second World War
a war in the Pacific, Europe, Africa and the Middle East between the Allied powers, chiefly the United States, United Kingdom, France and the USSR against the Axis powers: Germany, Japan and Italy.

Arbitrariness
the quality of something being random or based on whim, rather than a system that is consistent and governed by rules.

After the Second World War, the international community made a conscious decision to turn away from the arbitrariness that had appeared to characterise earlier eras of international relations, and avoid the outbreak of a third world-consuming conflict in as many generations.

They put much of their efforts into drafting the UN Charter, which would provide the machinery and processes through which international relations would function after the war. One of the intentions behind the United Nations was

> *"To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women of nations large and small."*

As part of this, one of first acts of the UN General Assembly was to proclaim the Universal Declaration of Human Rights in December 1948. This document was aspirational, but remained legally unenforceable.

Soon after, therefore, work began on drafting an international treaty that would place legal obligations on nations to respect and promote human rights. However, political differences between Soviet-aligned and American-aligned nations meant that so-called 'civil and political rights' (such as the rights to liberty and security of the person, freedom of movement, and freedom of speech) and 'economic, social, and cultural rights' (such as the right to work, the right to health, and the right to education) were divided into two separate treaties.

The treaties were stalled over these differences for some years. The first drafts of them were provided to the UN in 1954, but it took a further 12 years of negotiation to get them adopted. At the same time, an 'optional protocol' to the ICCPR – establishing a formal complaints mechanism – was adopted.

Adoption and coming into force

The treaties were finally 'adopted' by the UN General Assembly on 16 December 1966. This means that the General Assembly passed a resolution confirming the wording of the treaties and formally opening them for signature, ratification, or accession by individual nations.

However, the treaties were not yet legally binding.

Multilateral treaty
A treaty to which more than two countries have ratified. Contrast with "bilateral treaty" which is a treaty between two countries.

It is common with multilateral treaties for there to be conditions placed in the treaty that say it shall not be legally enforceable on countries until a certain number of countries sign up to the treaty. Of course, there is nothing to prevent countries from behaving as if the treaty were already legally enforceable, but it provides some level of protection for countries that they will not be held legally accountable to standards that nobody else in the world has signed up to.

Article 49 of the ICCPR says:

> *The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.*

Article 27 of the ICESCR says the same thing.

This means that the treaties only came into force when 35 countries agreed to be legally bound by them. Although today there are 168 parties to the ICCPR, and 164 parties to the ICESCR, it took a long time for those numbers to accrue.

The treaties were adopted in December 1966, but they did not enter into force until January (ICESCR) and March (ICCPR) of 1976.

The Covenants and the rule of law

The connection between human rights and the rule of law is not as clear as some scholars or commentators would like it to be.

For a start, human rights laws are not always necessary to the rule of law. Australia, with its notable dearth of federal human rights protections, nevertheless lays good claim to be a society governed – albeit sometimes fitfully – by the rule of law.

Nor, where human rights laws are implemented, are they always sufficient for the rule of law. The exemplary human rights protections of the North Korean constitution would seem adequate evidence of that.

Human Rights in North Korea
The author means here that while the North Korean Constitution contains human rights protections - human rights are not enforced or protected in North Korea.

See for more information the *United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*

Nevertheless, there are important links between the two concepts, and the two Covenants provide examples of that. They are notable for three main reasons.

First, they, and the other human rights treaties that have come after them, provide evidence – however weak the

cynics may deem it to be – that equality before the law is now an incontestably critical part of international legal and political discourse. Gone are the days when the dignity and worth of individuals was openly and earnestly believed to be tied to their race, sex, gender, religion, class, or any other denominator. Of course, discrimination still persists, but the Covenants are a move in the right direction.

Secondly, the Covenants and their optional protocols provide forums for citizens to seek recognition of their rights in the face of government action. They bring a measure of publicity and empowerment to individuals struggling against oppressive governments.

Thirdly, the Covenants crystallise which human rights people are entitled to, and provide a starting-point for discussion on which human rights people should be entitled to.

Sir George Rich, the former High Court Justice, once spoke of the differences between the "lofty clouds whence constitutional precepts are fulminated" and the "sordid intercourse of human affairs", and the difficulties caused when lofty precepts are brought down to human level.[2]

The Covenants are an attempt to do exactly that. The sweeping statements of the UDHR are inspiring – as they are meant to be – but the world needs more workmanlike explanations of human rights in order to effectively combat the exercise of arbitrary power. The Covenants, and the principles and case law generated in their interpretation, go some distance towards filling that gap, and bring human rights protections down from the 'lofty clouds' into actual human experience. For this alone, they are an important addition to, and protection of, the rule of law at an international level.

Notes

[1] The ICCPR when spoken is spelt out, however, people often pronounce the acronym ICESCR as: *"eye-sess-ka"*
[2] *James v Cowan [1930] HCA 48.*

What is customary international law?

Joshua Wood
14 March 2017

> *'The most difficult thing about international law is finding it.'*
> *- Professor G.R. Watson of Columbus School of Law*[1]

Perhaps the field where this rings most true is that of 'customary international law'. Despite appearing in treaties, international court decisions, and United Nations resolutions (and in fact being older than the United Nations itself), customary international law is a concept rarely discussed in mainstream public discourse. Yet it has profound consequences for the international rule of law.

Defining Customary International Law

Like many concepts of international law, there is unfortunately no comprehensive definition of customary international law to which there is total agreement. The closest we have to a universal definition is "international custom, as evidence of general practice of law" found in Article 38 of the Statute of the International Court of Justice and adopted by nearly every country (or 'state') in the world as members of the United Nations.

One authority that has attempted to build upon this (rather limited) definition is the International Court of Justice (ICJ), which was set up under the Statute. Despite

being unable to create legally binding precedents (Statute Article 59), the ICJ is the "principal judicial organ" of the United Nations and its decisions tend to be followed by other international courts.[2] Its decisions are therefore of great influence for international legal scholars and jurists.

The ICJ and Customary International Law

In *North Sea Continental Shelf* the ICJ explained that there are actually two types of customary international law.[3]

The first, often overlooked, type comprises legal rules that are logically necessary and self-evident consequences of fundamental international legal principles. For example, because it is a fundamental legal principle that each state is sovereign, it is logically necessary (and thus customary international law) that the sovereignty of each state extends throughout that state's own borders.

The second type, which is the focus of this article, comprises rules called "*opinio juris*" ('an opinion of law'). To be considered opinio juris a rule must satisfy two criteria:

1. It is settled and uncontroversial practice of states to act (with general consistency – *Nicaragua v. USA*)[4] in obedience to the rule; and
2. States obey this rule because they consider themselves legally bound by it (i.e. not just because of tradition, politeness, or convenience).

The ICJ has said that evidence of satisfaction of these criteria mainly comes from how states physically act (*Libya/Malta*),[5] but it can also come (to a lesser extent) from the treaties they adopt and other governmental actions.[6]

Some opinio juris rules are sensible and unsurprising – for example, that acts of self-defence must be necessary and proportionate (*Nicaragua v. USA*[7]).

Others are much more niche, such as Costa Rican inhabitants' right to subsistence fishing on their side of the San Juan River border with Nicaragua (*Costa Rica v.Nicaragua*).[8]

The Problem of Clarity in Customary International Law

Considering that the binding rules of *opinio juris* are created solely on the basis of what states believe and how they act, we can see why academics have variously described customary international law as "scattered"[9], "primitive"[10], and "mysterious"[11]. Any unwritten body of law that materialises and develops on this basis is bound to be blurry and raise awkward questions.

How many states have to act in a certain way for it to become customary?

At what point does a state acting differently cease to be illegal and become a new rule?

Who represents a state's real motivation?

Is it not paradoxical that a state has to believe a rule is legally binding before it actually becomes law?[12]

All this uncertainty creates significant problems for the rule of law. If a law cannot be readily knowable or ascertainable, states cannot adapt their behaviour and the law cannot be applied uniformly and fairly.

The United Nations, in its defence, acknowledged this problem back in 1947 when it created the International Law Commission to "consider[s] ways and means of making the evidence of customary international law more readily available". Over the past seventy years the International Law Commission has made undeniable progress by attempting to 'codify' (record) customary international law.[13] However this effort, by its nature, is retrospective and fleeting. Even if every aspect of customary international law were codified today, this would merely be a snapshot of *opinio juris*. As soon as state behaviour alters, which is inevitable given social and governmental change, *opinio juris* by definition will re-formulate. Any codification of *opinio juris* is therefore prone to go out of date and cause even greater confusion. Indeed, even if there were a way to keep a written and accessible code completely up to date, this would actually serve to exacerbate the other negative trait of

customary international law: it binds states without express consent.[14]

Consent and International Customary Law

It is commonly said that the international community is 'anarchical', in that there is no layer of higher government with absolute power to treat states like citizens. This is in a way unsurprising, since most states could (if pressed) rely solely on themselves for survival. States are thus in a position, unlike individual humans, to refuse the benefits and reciprocal responsibilities of participating in a community under law.

In recognition of this reality, it has long been a tenet of international law that a state must expressly consent to a rule (by, for example, signing a treaty) before it can be legally bound by the rule.

Customary international law not only upsets this idea of consent, it does it by stealth.

The ICJ, Consent, and Opinio Juris

At first, in some of its earliest decisions, the ICJ acknowledged the importance of consent when it suggested a state could exempt itself from an *opinio juris* rule if that state had expressly and repeatedly rejected the rule's application from inception ("persistent objector") (*United Kingdom v.Norway*[15]).

Soon thereafter, however, the ICJ reversed position and has since frequently ruled that states cannot opt out of customary international law either in full or in part. Opinio juris rules are instead equally and wholly binding on all states (*North Sea Continental Shelf*[16], *Canada/ United States*[17]), even in disputes where both sides believe otherwise (Nicaragua v. USA[18]). The consent of the state is, quite clearly, not required.

Indeed, most worryingly, customary international law can render meaningless a state's choice to join (or not join) a treaty, despite treaties being the most basic legal expression of a state's consent. For, under the customary international law system, the widespread adoption of a

treaty can be taken as evidence that the rules agreed to in that treaty are *opinio juris* – and therefore binding on all states regardless of whether they adopted the treaty itself (*North Sea Continental Shelf*).[19] *Opinio juris* rules can even come from treaties that are not in force (*Libya/Malta*)[20] and old discarded drafts of treaties (*Libya/Tunisia*[21]). A state is not necessarily shielded even where it has adopted a different treaty that directly contradicts the *opinio juris* rule (*Nicaragua v. USA*[22], *North Sea Continental Shelf*[23], *Costa Rica v. Nicaragua*[24]).

Some *opinio juris* rules, in fact, go so far as to literally render treaties void. Called "*jus cogens*" ("compelling law") and recognised by the Vienna Convention on the Law of Treaties (VCLT), these are customs considered so fundamental and universally accepted (such as the prohibition of torture – *Belgium v. Senegal*[25]) that they can only be modified or superseded by a change in jus cogens itself (VCLT Article 53). Any part of a treaty that attempts to contravene a *jus cogens* rule is automatically invalid (VCLT Article 71), even if the treaty preceded the rule. Concerningly, for such a powerful concept, the ICJ has not provided clear criteria as to how *jus cogens* principles arise,[26] even despite the International Law Commission acknowledging as far back as 1966 that the existence of *jus cogens* makes the idea of states' consent "difficult to sustain".[27]

Now it is true that it is the states themselves that allow this customary international law regime to continue. Legally speaking, were enough states willing to withdraw from or re-write the VCLT (and any other treaties like it), the states could dismantle the customary international law regime or at least give themselves greater power of consent. Instead the states have done the opposite – close to 2/3 of UN members have ratified the VCLT – and, ironically, the ICJ has deemed the VCLT itself to contain *opinio juris* and as such binding on all states (*Costa Rica v. Nicaragua*).[28]

Admittedly, therefore, it cannot be said that the customary international law regime is being forced wholesale on the states. The states did, at least to begin with, give their consent to exist under the customary international law

regime in the first place. By failing to take that control back, the states have in a sense continued that consent.

What should worry proponents of the rule of law, though, is the poor quality of this continued consent. Given that *opinio juris* is not easy to measure or monitor accurately, it is difficult for states to give informed consent. Meanwhile, in the instances where *opinio juris* is clearly defined and therefore more easily invoked, the regime's incrementalist nature (a decade being a "short period" of time even if new state behaviour is consistent and widespread (*North Sea Continental Shelf*)[29]) means a state can be 'locked' into those rules for as long as it takes for the rest of the international community to change behaviour. All the while, states do not have the luxury that humans do (in theory at least) of being able to move to jurisdictions with more agreeable laws.

Conclusion

Customary international law is, evidently, a troublesome issue for the rule of law. Few legal regimes claim the ability to 'discover' and apply amorphous laws to every state on the planet, no matter the ambiguous discretion involved and the inability of those on the receiving end to predict it. Fewer still can claim the ability to impose laws on states without express consent and in contradiction to international treaties.

To be sure, were customary international law in the hands of a universally-recognised judicial body with a well-defined mandate to use it, it would be a powerful legal tool in holding to account renegade states that create transnational problems and reject basic human ideals. But amidst the current reality, with supranational bodies worldwide in crises of legitimacy and the existing regime of international customary law opaque and non-consensual, it is one that international jurists today would be ill-advised to use.

Notes:

1. Quoted GR Watson *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreement* 308 (Oxford University Press, 2000); cited in Rosenne, S 2004 *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers, p. 47.
2. Rosenne, S 2004 *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers, p. 101.
3. *North Sea Continental Shelf*, *Judgment, I.C.J. Reports 1969*, p. 3. at para 39, 77.
4. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at para. 186.
5. *Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment, I.C.J. Reports 1985*, p. 13, at para 27.
6. Wood, M. 2014, *Second report on identification of customary international law*, International Law Commission, Sixty-Sixth Session, Official Records of the General Assembly (A/CN.4/672) at para. 41.
7. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at para. 176, 194, 237.
8. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213. at para 144.
9. Rosenne, S 2004 *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers, p. 36.
10. Kammerhofer, J 2011 *Uncertainty in International Law: A Kelsenian perspective*, Routledge, p.72.
11. Lepard, BD 2010 *Customary International Law: A New Theory with Practical Applications*, Cambridge University Press, p. 31.
12. Kammerhofer, J 2011 *Uncertainty in International Law: A Kelsenian perspective*, Routledge p. 78-80.
13. Rosenne, S 2004 *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers, p. 36, 57-59.
14. Rosenne, S 2004 *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers, p. 40.
15. *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116 at p. 131; cited in Lepard, BD 2010 *Customary International Law: A New Theory with Practical Applications*, Cambridge University Press, p. 37 and in Gunaratne R 2008, 'Anglo Norweigan Fisheries Case (Summary on Customary Law)' *Public International Law*, web log post, 22 April 2011, viewed 31 January 2017, https://ruwanthikagunaratne.wordpress.com/tag/persistent-objector/
16. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3. at para 63.

17. *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246.

18. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at para. 184.

19. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3. at para 63

20. *Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment, I.C.J. Reports 1985*, p. 13, at para 26-27.

21. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18 at para. 49, 109; cited in Rosenne, S 2004 *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers, p. 37.

22. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at para 174-175

23. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3. at para 63-65.

24. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports* 2009, p. 213. at para 35-36.

25. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p 422. at para. 99.

26. Rosenne, S 2004 *The Perplexities of Modern International Law,* Martinus Nijhoff Publishers, p. 361-363.

27. International Law Commission, 1966, *Report of the of the International Law Commission on the work of its Eighteenth Session*, 4 May – 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/ Rev.1) at page 247.

28. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at para. 47.

29. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3. at para 74.

Business and the Rule of Law

Halyna Danylak
17 September 2016

Public support for the rule of law by business is a relatively new concept and it is fast gaining traction. Recent developments at the international level and domestically in Australia are shining light on how initiatives to strengthen the rule of law can give business more certainty to invest and grow.

In this blog, I articulate the business case, as well as the direction of international policy and leadership on this topic. I then turn to critically examine the status quo in Australia and point to opportunities where business can take action to improve the rule of law and in turn, improve its own long-term profitability and sustainability, as well as Australia's reputation as an attractive place to do business.

The business case

The 'rule of law' involves complex legal ideas. This can make it difficult to fully appreciate the scope of its relevance to business confidence. So let's break it down. In real terms, strong rule of law fosters an enabling environment for economic activity by:

Ensuring accountability
Jurisdictions with public institutions, which are effective, accountable, transparent and inclusive, lay the foundations for peace and stability. Businesses are attracted to investing in these jurisdictions as the stability

provides them with the confidence to make long-term investment decisions. Strong rule of law also helps to promote equality, legal identity and empowerment, which in turn, encourages full economic participation and improved productivity.

Supporting access to justice and elimination of corruption

Jurisdictions with high levels of access to justice and low levels of corruption are attractive to do business in, as they create a level playing field and result in cost-savings. Business has more confidence to invest and grow where investments do not hinge on bribes and where mechanisms exist to recover stolen assets and combat illicit financial and arms flows.

Providing certainty on intellectual property and business transactions

When making investment decisions, business looks for certainty in enforcing contractual, intellectual property and other associated rights. This relates back to the basic rule of law principle that the law is capable of being known by all and is enforceable against all.

Fairness and transparency in dispute resolution

Day-to-day, businesses are focused on growing through core activities. Litigation is a hindrance to this growth. Business leaders therefore look to invest in jurisdictions with an independent judiciary; speedy and cost-effective dispute resolution mechanisms, which will enable them to get back to running their businesses faster.

Rule of law and business in Australia

What sort of rule of law issues concern Australian businesses?

Intellectual property rights

These have been the topic of various high-profile legal disputes. This can be illustrated with the Phillip Morris tobacco plain packaging international arbitration, where the Commonwealth Government enacted public health policy and legislation, but in doing so, arguably failed to consider the full scope of its international treaty

obligations. Equally, film, music and software piracy in Australia has resulted in drawn out intellectual property disputes such as the Dallas Buyers Club litigation, where currently the film production company is at pains as to how to most effectively enforce its rights against 4,726 internet users! Compounded, these issues can raise rule of law risks with regard to intellectual property protection in the minds of prospective investors.

Government tender reversals
These are starting to effect perceptions of sovereign risk in the minds of international infrastructure constructors. Although one would hope the Victorian Labor Government's decision to scrap the East-West Link upon election (once contracts had been issued) was an isolated case, the ACT Opposition party's threat to cancel the Canberra Light Rail if elected, feeds uncertainty into the minds of would-be tenderers that contracts will not be honoured when doing business in Australia.

Access to justice
This is reportedly an issue for small and medium businesses, which make up 95% of the Australian economy and are the 'missing middle' in terms of access to justice. Often they do not have the financial resources to enforce their rights against bigger corporates. In the age of 'digital disruption' this may be preventing entrepreneurial start-ups from enforcing their intellectual property against larger conglomerates and thereby, stifling innovation.

A recent survey of 301 companies ranks Australia as second only to the People's Republic of China for perceived rule of law risk for foreign investors. Eight per cent of respondents cited rule of law as a significant issue in Australia, with greatest concern over enforcing intellectual property rights. Disconcertingly, the study was undertaken before recent development such as the East-West Link cancellation.

Opportunities for Australian business

An opportunity therefore exists for affected businesses to take action and support the rule of law in Australia, to improve their own confidence to invest and grow, but

to also improve the performance of their industry and in turn, the Australian economy. This might be in the form of promoting transparent business activities or including pro bono services as an ordinary part of business costs. When considering international expansion, Australian businesses could consider promoting more rule of law capacity building projects in overseas jurisdictions, in order to reduce the need for international arbitration.

Businesses internationally have shown great leadership on how business can support the rule of law as a complement to government action. As a result, they have gained the confidence to further invest and grow in operating jurisdictions. It is now up to Australian businesses to harness international momentum and follow this lead by actively engaging in a dialogue with government to promote the rule of law.

The Nuremberg Trials

William Shrubb
31 September 2016

Today is the 70th anniversary of judgment being handed down in the main Nuremberg trial, the trial of high-ranking alleged German war criminals, as well as seven organisations, by the International Military Tribunal (IMT).

Second World War
a war in the Pacific, Europe, Africa and the Middle East between the Allied powers, chiefly the United States, United Kingdom, France and the USSR against the Axis powers: Germany, Japan and Italy.

This trial was only one of many war crimes trials conducted in Germany and Japan at the end of the Second World War. However, it is the most famous because it was the only trial conducted by all of the victorious Allied powers together, and it dealt with the highest ranking German officials.

What were the accused charged with?

The 24 accused were senior German political, military and industrial leaders, and were charged with four crimes:

1. Participating in a conspiracy to commit crimes against peace, war crimes, and crimes against humanity;
2. Committing crimes against peace;
3. Committing war crimes; and
4. Committing crimes against humanity.

'Crimes against peace' refers to the planning, preparation, initiation, or waging of a war of aggression. 'War crimes' refers to acts committed in violation of the laws of war, including, for example, killing surrendered combatants, or using torture. Both of these categories of international crime pre-dated the Second World War, and had relatively clearly defined content.

The Holocaust and Final Solution
The Holocaust was the name of the genocide committed by the Nazi Government which led to the systematic extermination of approximately 6 million Jews in Europe, as well as many other groups considered to be racially inferior. The Final Solution was the name of the policy/plan, implemented in stages, to deport and exterminate the Jews in Europe.

However, these two categories alone were not sufficient to cover the full range of behaviour and actions of Nazi Germany. In particular, they did not cover actions undertaken as part of the Holocaust or Final Solution. They also did not cover the treatment of other civilian populations by the Nazis. The Allied powers were determined that these actions should also be publicly and legally condemned. Therefore, a new category of international crime, 'crimes against humanity', was defined as:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Where did the IMT's jurisdiction come from?

The jurisdiction of the Tribunal was a tricky issue. Not only was the behaviour captured by 'crimes against humanity' not explicitly criminalised before the war, leading to some concerns about retrospective legislation, but the grounds upon which the Allies could judge the Germans were also unclear.

The Instrument of Surrender signed by the Germans in Reims on 7 May 1945, and again in Berlin on 8 May 1945, included a provision to the effect that the terms and conditions of this surrender did not prejudice the terms and conditions that may be included in any later, more encompassing, surrender document. That later surrender document – the Berlin Declaration of 5

June 1945 – purported to dissolve the Nazi regime, and replaced it with the Allied Control Council, made up of representatives from the four Allied powers – the United Kingdom, the United States, the Soviet Union, and France.

In consultation with this Council, the four Allies then executed the London Charter, which set up the IMT for the "prosecution and punishment of the major war crimes of the European Axis." The trials were to be conducted before a panel of judges, not a jury, and the defendants were allowed to present evidence and cross-examine witnesses.

What happened at the trial?

Of the 24 accused war criminals, only 21 made it before the court. Nazi party secretary Martin Bormann and the head of the German Labour Front Robert Ley both committed suicide before the trial began. Bormann was, nevertheless, convicted in absentia. In addition, German industrialist Gustav Krupp was deemed medically unfit for trial. Prosecutors tried to substitute his son Alfried, who had run Krupp during the war anyway, but the swap was rejected by the panel of judges.

Convicted in Absentia
Where a person accused of a crime is found guilty of a crime despite not being in the custody of authorities.

Bormann, Adolf Hitler's personal secretary, was convicted in absentia and sentenced to death. In the 1970s Bormann was found to have committed suicide attempting to evade capture by the Russians while fleeing Berlin in 1945.

12 defendants were sentenced to death, three to life imprisonment, and four to limited prison terms. The remaining three were acquitted.

The Nuremberg trials and the rule of law

Despite concerns about retrospective criminalisation and unclear jurisdiction, the trial by the IMT unambiguously marked a watershed moment in the international rule of law. Whether or not Allied revenge and punishment on Nazi Germany was inevitable after the war, it was, for the first time in history, channeled through legal institutions.

Retrospective Criminalisation
A law which makes an act criminal, even though in the past, when the act was committed, it was not a crime under the law.

While murder is a crime in most if not all jurisdictions in the world - crimes against humanity, while involving killing, was not a defined in law as a crime at the time of the Holocaust.

The four victorious powers made a conscious decision to arraign criminals before the eyes of the world, provide them with some mechanism by which to defend themselves, and proceeded to outline, often in painstaking

and confronting detail, the charges and evidence against them.

At the end of a war that will be remembered around the world for its brutality, its barbarism, its ruthless unfeeling inhumanity, the IMT represented a flawed but determined first step back to a world of law, justice, and rectitude.

The Truman Proclamation and the Rule of Law

Laura Hugh
28 September 2016

Seventy-one years ago today, Harry Truman made the United States Presidential Proclamation No. 2667, now known as the 'Truman Proclamation'. The Proclamation marked a significant development in, and contribution to, the law of the sea, being the first time a coastal state had asserted its right to a specific offshore resources area, distinctive from the idea of a territorial sea.

The Law of the Sea prior to the Truman Proclamation

Eurocentric
that which focuses on European nations, culture or interests.

Up until the mid-twentieth century, the law of the sea, such as it was, was Eurocentric. Beginning in the Middle Ages, many European states exerted control over activity on the oceans, due to their power and advanced maritime technology.[1]

This conflict caused by this activity culminated in the Papal Bull of Pope Alexander VI, giving effect to the Treaty of Tordesillas in 1494, which sought to split the world into Portuguese and Spanish territory, with the view to permitting territorial expansion and conquests over the seas, without perpetual conflict between those two powers.

However, the Treaty of Tordesillas fatally ignored the increasing claims of other European countries. The 'mare clausum' ("closed sea") policy of the Portuguese and Spanish, where they asserted the right to exclude other European powers from the waters in 'their half'

of the globe, was never going to be compatible with the rising aspirations of the rest of Europe. These conflicts culminated in the publication of Dutch scholar Hugo Grotius' Mare Liberum ('The Open Sea'), which asserted the freedom of the seas, and, in particular, the right of the Protestant Dutch colonies to participate in the lucrative trade with the 'East Indies', today's Southeast Asia, which was in Portugal's designated sphere of control.

In response to Grotius' claims, the English scholar John Selden's work, Mare Clausum ('The Closed Sea') was published in 1635. In this work, Selden asserted English dominion over the seas around the British Isles, and sought also to prove a long-standing state practice of dominion over oceans.

From the seventeenth to nineteenth century, the view of freedom of the seas was well-respected.[2] However, debate continued between these two poles, eventually settling somewhere in the middle. In 1702, another Dutch scholar, Cornelius van Bynkershoek, proposed what became known as the 'three-mile rule': a country's dominion over the seas surrounding it extended only so far as the range of its coastal cannons, or about three miles.

The later part of the nineteenth century saw a re-thinking of whether freedom of the seas should continue to be respected in circumstances where a coastal state needed to defend itself, and an increasing embrace of Bynkershoek's 'three-mile rule'. Coastal states started to claim rights to waters alongside their coasts, similar to claims made over certain land territory. These became known as 'territorial sea' claims, with coastal states being permitted to exercise jurisdiction and control over an area for reasons including access to fisheries and security.[3] Nevertheless, the size of these claims remained relatively small.

The First World War
A global war involving, among other countries, the United Kingdom, France, Russia and the United States, against Germany, Austria-Hungary and the Ottoman Empire.

Following the First World War, the establishment of the League of Nations provided an opportunity for the international community to codify developments in international law.[4] In 1924, the League of the Assembly appointed a Committee of Experts regarding the law of

the sea, and in particular, the territorial sea and the status of foreign vessels.[5] In 1930, 44 states attended the Hague Codification Conference, convened by the League of Nations. However, due to an inability of attending states to reach agreement on the law of the sea, no treaty was produced.

State practice continued to develop following the conference, with many states making claims to territorial sea zones. The start of World War II put further codification attempts on hold.[6]

The Proclamation

It was in this atmosphere of differing state practice, and an increasing trend towards territorial sea zones, that President Truman made his proclamation at the end of World War II in 1945.

Within the Truman Proclamation, the US made the following points:

1. There is a global need to source new supplies of petroleum and other similar resources;
2. Experts (at the time) believe such resources exist in the continental shelf off the coasts of the US;
3. The development of technology would soon make access to such resources possible;
4. Jurisdiction over such resources would be necessary to ensure they are not wasted;
5. It is reasonable and just for a coastal State such as the United States to exercise jurisdiction over the natural resources of the subsoil and seabed of its continental shelf, because the effectiveness of conserving such resources depends on 'cooperation and protection from the shore';
6. Further, the continental shelf can be regarded as an extension of the land-mass of a coastal nation; and;
7. By virtue of ensuring its own protection, a coastal State keeps close watch over activities off its shores, which extends to continental shelf resources.

The US concluded that natural resources 'of the subsoil

and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to its jurisdiction and control'.

It conceded that by its Proclamation, free navigation of the high seas would not be affected, but noted that where the US continental shelf overlapped with those of another State, the two States would determine an appropriate boundary according to fair principles.

The Law of the Sea Post-Proclamation

The Truman Proclamation was an unprecedented development in the law of the sea, and sparked similar claims by other states in the following years.

This trend received official endorsement by virtue of its consideration at the First United Nations Conference on the Law of the Sea (UNCLOS I),[7] and codification in the Convention on the Continental Shelf, which was concluded on 29 April 1958, and entered into force on 10 June 1964. This was significant in that it reflected the development of customary international law and state practice.[8]

This position articulated in the Truman Proclamation has now been codified within article 77 paragraph 1 of the 1982 United Nations Convention of the Law of the Sea ("Convention"), which provides:

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

Ironically, despite its contribution to the development of the Law of the Sea, the United States is not yet a party to the Convention.

The Proclamation and the rule of law

The Proclamation raises some important issues about state practice, codification, and the rule of law at the international level. From one perspective, the Truman Proclamation reveals the great potential for influential state practice to become endorsed by the international

community and subsequently codified. But often, state practice is not codified or accepted as readily as it was in the case of the Proclamation. This further raises the question as to whether there will ever be a rule of law at the international level, or whether international law will continue to be shaped predominantly by the (often economic) interests of powerful states.

From another perspective, the contribution of the Proclamation to the development and codification of the law of the sea cannot be underestimated. The codification of international sea law, despite constantly being challenged insofar as enforcement is concerned, is important for reasons of clarifying state conduct in respect of the sea, and ensuring clarity in understanding rights and responsibilities owed to the international community. While the codification of the law of the sea in the Convention is by no means a panacea for all law of the sea related issues, it provides a clear point from which continuing state practice, interpretation and the rulings of international tribunals can continue to develop in an accountable, logical and universally-communicative way.

Notes

[1] Rothwell, Donald and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2016)

[2] Ibid 4.

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] Ibid 5.

[7] Geneva, 24 February to 27 April 1958.

[8] Rothwell and Stephens, op. cit., 8.

The Annexation of Goa

Joshua Wood
1 August 2016

On 17-18 December 1961, after many years of diplomatic wrangling and civil agitation, India forcibly entered and occupied the Portuguese colonial enclave of Goa and its surrounding areas. By the cessation of hostilities, the 451-year colonial reign of Portugal over the region had ended and Goa was absorbed into the Republic of India.

This article will examine the legal context of India's annexation and the consequences it had for the international rule of law.

"Legal" declarations of war

Since the end of the Second World War, the recognised framework for determining the legality of war between countries has been the Charter of the United Nations, and, by extension, the rulings of the UN itself.

One of the Charter's most important rules is Article 2(4), which makes "the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations" by a country illegal.

The Charter only allows two exceptions to this blanket ban:

- Using force in self-defence to an "armed attack" (until the Security Council has dealt with the conflict in question), in Article 51; or

- Using force that has been approved by the Security Council, in Article 42.

The 'Security Council' referred to was set up by the Charter and, uniquely amongst the UN's institutions, is given the authority to make legally binding decisions for all UN members. By contrast, for example, the General Assembly can give only "recommendations" and the International Court of Justice can bindingly arbitrate only between members that have consented to its jurisdiction (otherwise it only gives advisory opinions).

India and Goa

In order for its use of force in Goa to be considered legal under the Charter, then, India had to argue one of three things:

Its use of force was not "against" any other state, because Goa was really part of India; Its use of force had the approval of the Security Council; or, its use of force was in self-defence to a Portuguese "armed attack".

India, by and large, pursued the first line of argument. Its delegate in the Security Council debates argued, without citing specific laws, that it was the colonisation by Portugal of Goa that was illegal and thus Goa was "not Portuguese by any manner of means". As a legal consequence, its Defence Minister argued, "India had not violated any one's [territorial] integrity".[1]

However, at the time Goa was recognised by the international community as a part of the Portuguese colonial empire. Just a year earlier the General Assembly had declared Goa a "Non-Self-Governing Territory" under Portuguese administration, which gave Portugal extra responsibilities under the Charter. That same year the ICJ acknowledged Portugal's sovereignty over Dadra and Nagar Haveli, two Portuguese possessions in India with the same colonial history as Goa. Therefore India's first possible (and main) argument was out.

Next, and unfortunately for legal clarity, disagreement at the time prevented the Security Council from reaching a decision on the Goa conflict (and the ICJ was not asked

to arbitrate or provide an advisory opinion). So the second argument was not available.

Finally, India appeared not to argue self-defence to a Portuguese "armed attack". The closest it came in the debates was to remind the Security Council of instances of Portuguese "provocation" and "aggression" over the years of colonial subjugation and India's unsuccessful diplomatic demands for Goa's return.

By all conventional interpretations, therefore, India's annexation of Goa breached Article 2 of the Charter.

So how else did India legally justify its annexation?

India argued that Portugal had failed its administrative responsibilities to Goa required under General Assembly Resolution 1514, which was passed in 1960 and, although a "recommendation", arguably became binding "international custom" by 90% of the then UN members voting for it. This Resolution required that "immediate steps" be taken "to transfer all powers" to the people of Non-Self-Governing Territories (like Goa).

However, nothing in Resolution 1514 suggested that a failure to comply meant the administrating power could have a Non-Self-Governing Territory unilaterally seized and absorbed by another country.[2] Indeed General Assembly Resolution 1541, which was also passed in 1960 by three-quarters vote, said that the integration of a Non-Self-Governing Territory with an existing State "should" come about from the territory freely expressing its wishes democratically. Portugal had refused to hold a referendum in Goa but, again, the Resolution did not provide any punishment for this transgression.

Apparently sensing that conventional international law was stacked against his country, the Indian delegate to the Security Council remarked:

> *If any narrow-minded, legalistic considerations – considerations arising from international law as written by European law writers – should arise, those writers were, after all, brought up in the atmosphere*

of colonialism…[the tenet that] colonial Powers have sovereign rights over territories they won by conquest in Asia and Africa is no longer acceptable. It is the European concept and it must die.

Response of the international community

What is remarkable about the Goa incident is that the international community, without changing a letter of this law, chose to bend these rules in India's favour.[3] Not only was Goa gradually recognised by the community as a legal part of India,[4] but, within 18 months of Goa's annexation, the Security Council was imposing sanctions on Portugal for continued colonial repression elsewhere.[5]

Nor was the law changed retrospectively to exonerate India; in 1967 the Security Council noted the "inadmissibility of the acquisition of territory by war", making no apparent distinction between lawful war, unlawful war, and/or war in the pursuit of decolonisation.[6] Ironically this resolution was passed with the help of India, which from 1966 to 1990 was respected enough to be elected to the Security Council on five separate occasions. Eventually this bending of the rules culminated in 1974 in Portugal itself recognising Goa as a part of India.

But what is even more confusing for rule-of-law proponents is that this rule-bending did not set a legal precedent. The General Assembly repeatedly endorsed the right of subjugated peoples to achieve decolonisation "by all available means",[7] yet no exception has been made again for the forcible annexation of a Non-Self-Governing Territory by its former owner.[8]

In 1982, for example, the Security Council rejected Argentina's attempted annexation of the UK's Falkland Islands, despite the Goa precedent being discussed and several members accepting Argentina's argument that the territory belonged to it.[9] Similarly in 1975, the Security Council, whilst noting Portugal's failure (again) to uphold its administrative responsibilities, unanimously denounced Indonesia's annexation of East Timor.[10]

Legitimacy over legality

How can we reconcile this with our understanding of the rule of law? India seemed to violate its legal obligations, and yet it suffered no sanction.

The Indian delegate's quote above about international law picks up on one of most fundamental tensions of the rule of law: the stability that it brings simultaneously prevents and exacerbates inequality. On the one hand the rule of law protects the most vulnerable from predation and double-standards, but on the other hand stability entrenches the status quo and pre-existing inequality.

The current system suffers from the same problem. Despite providing legal protection for all nations (including those without powerful armies), the UN Charter also legalised and entrenched the territorial dominance of the stronger nations of its day, not least the colonial powers of western Europe. By arbitrarily deeming 26 October 1945 as the breaking point from the conquest of the past (and previous unsuccessful efforts to govern it), the UN Charter effectively denied conquered nations the opportunity to forcibly reclaim territory that had itself previously been taken away by force.

Although we cannot know what was in the minds of the international community in 1961, it appears that Goa was an *ad hoc* effort to alleviate this paradox on the basis of morality and legitimacy, rather than strict legality.

In truth, the world has changed drastically in the past 55 years since the *ad hoc* interpretation of Goa. Perhaps the next time it is faced with the choice of either bending the law or lastingly reforming it with clarity, we'll find the United Nations has too.

Notes

[1] Quoted in Wright, Q 1962, "The Goa Incident' AJIL 56 (1962) 617, 622; cited in Korman, S 1996 *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Clarendon Press Oxford, p.268.

[2] Quoted in Wright, Q 1962, "The Goa Incident' AJIL 56 (1962) 617, 625-6; cited in Korman, S 1996 *The Right of Conquest: The Acquisition*

of Territory by Force in International Law and Practice, Clarendon Press Oxford, p.271.

[3] Gray, C 2008, *International Law and the Use of Force*, Oxford University Press, New York, 3rd edition, p.65.

[4] Korman, S 1996, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice,* Clarendon Press Oxford, p.273.

[5] Milano, E 2006, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*, Martinus Nijhoff Publishers, Leiden, p.120.

[6] Milano, E 2006, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*, Martinus Nijhoff Publishers, Leiden, p.108.

[7] Gray, C 2008, *International Law and the Use of Force*, Oxford University Press, New York, 3rd edition, p.62.

[8] Gray, C 2008, *International Law and the Use of Force*, Oxford University Press, New York, 3rd edition, p.65

[9] Korman, S 1996, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Clarendon Press Oxford, p.279.

[10] Milano, E 2006, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*, Martinus Nijhoff Publishers, Leiden, p.194.

Muhammad Ali and Equality Before the Law

Robert Size
12 August 2016

A key principle of the rule of law is that 'the law is applied equally and fairly, so that no one is above the law'. The death of Muhammad Ali two months ago made me reflect upon this principle. Without it, Ali may never have rumbled in the jungle. He may never have reclaimed the world heavyweight title that was taken from him when he refused to fight in the Vietnam War. He may have spent more of his best years out of the ring and caught up in court or even locked in jail.

This article examines the 1971 decision of the Supreme Court of the United States of America in *Clay v United States*. This is the decision that overturned Ali's conviction for evading the Vietnam draft. Ali's story and the Court's reasoning demonstrate two things. The first is the way in which those in positions of power can conspire to undermine the rule of law. The second is the way in which the rule of law can come to the rescue when power is placed in the hands of those with the integrity to uphold it.

Resisting the draft

Cassius Marcellus Clay Junior was classified as eligible for military service in February 1966. By this time he had become a member of the Nation of Islam and taken the name Muhammad Ali. He was also the boxing heavyweight champion of the world.

Ali declared that he would refuse to serve in the United States Armed Forces and applied for classification as a

conscientious objector. When his application was denied by the local draft board, he appealed to the Kentucky State Appeal Board. The Appeal Board referred his file to the Department of Justice for an advisory recommendation.

The Department of Justice appointed a retired judge to conduct a hearing on the 'character and good faith' of Ali's objections. This judge heard testimony from Ali's parents, from one of his lawyers, from a minister of his religion, and from Ali himself. He also had the benefit of a full FBI report into Ali's objections that had been prepared prior to the hearing.

The judge concluded that Ali was sincere in his objection to participation in war on religious grounds and recommended that his conscientious objector claim be sustained. But the Department of Justice ignored his recommendation. It wrote a letter to the Appeal Board advising it to reject Ali's claim because he didn't meet the three required legal criteria discussed below. The Appeal Board then denied Ali's claim without providing him with a statement of its reasons.

When Ali was ordered to report for induction in 1967 he refused to take the traditional step forward when his name was read out. As a result he was convicted of draft evasion by the District Court for the Southern District of Texas. An all-white jury imposed the maximum sentence: five years' imprisonment and a $10,000 fine. At the same time, he was also suspended from boxing, stripped of his title and forced to surrender his passport.

Ali appealed to Court of Appeals for the Fifth Circuit but that court affirmed his conviction.

He then appealed to the Supreme Court.

At the Supreme Court

The Supreme Court upheld his appeal.

First, it set out the elements that an applicant had to satisfy in order to qualify for conscientious objector status:

1. Conscientious opposition to war in any form;
2. Opposition based on religious training and belief; and
3. Sincerity.

The Court then reviewed the Department of Justice's letter to the Appeal Board. The letter said that Ali's beliefs 'do not appear to preclude military service in any form,' that his opposition was based on 'political and racial objections to the policies of the United States' rather than religious training and belief, and that he had not 'consistently manifested his conscientious-objector claim'.

At the hearing the United States Government conceded that Ali's opposition to war was sincere and based upon 'religious training and belief'. But it maintained its position that Ali was not opposed to war 'in any form' and argued that Ali, as he had stated that his religion forbid him from fighting in any war other than a holy war, was selectively opposed only to certain wars.

This almost led the Court to embark on an interpretation of the Qur'an and the implications of Ali's religious beliefs. But it did not have to do so. Ali's conviction was tainted by a more obvious deficiency: the fact that the Appeal Board had denied his claim without providing a statement of its reasons.

The Court held that, without reasons, it was impossible to determine which of the three grounds the Appeal Board had relied upon when it denied Ali's claim. It held that it was not even possible to determine if the Appeal Board had relied upon a legitimate ground at all. The principle that decisions made without reasons are illegitimate had been established by a series of judgments of both the Supreme Court and courts of lower jurisdictions.

The Supreme Court therefore unanimously reversed the judgment of the Court of Appeals for the Fifth Circuit and quashed Ali's conviction:

The long established rule of law embodied in these settled precedents thus clearly requires that the judgment before us be reversed.

It is so ordered.

Conscientious objection and freedom of religion

If Ali had been granted conscientious objector status he would not have been convicted. This is because section 456(j) of the Military Selective Service Act provided that a conscientious objector who met the above criteria could not be subjected to combatant training and service in the United States' armed forces.

Section 456(j) existed to ensure that the Military Selective Service Act was consistent with the First Amendment to the United States' Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…

The effect of the First Amendment is that the United States Congress cannot force a person to fight if refusing to fight amounts to the free exercise of that person's religion.

An American citizen has the right to claim that a law of the United States is restricting their religious freedom and along with it a right to have their claim properly assessed. The Appeal Board, in failing to provide reasons for its decision, did not properly assess Ali's claim. This meant that it was unclear whether or not Ali was a conscientious objector at the time of his conviction. In such circumstances it was beyond the power of a court to convict him of evading the draft.

Ali and the rule of law

The principle of the rule of law mentioned in the introduction to this blog is that 'the law is applied equally and fairly, so that no one is above the law'. Ali's case shows that the converse of this is just as important: that the law is applied equally and fairly, so that no one is below the law.

The Department of Justice, the Appeal Board, the District Court for the Southern District of Texas and the Court of Appeals for the Fifth Circuit were all more concerned with making an example out of the outspoken black Muslim than with the proper discharge of their powers. In failing to apply the law equally and fairly to his claim they treated him like he was below the law.

The Supreme Court ultimately rectified this lack of fidelity to the rule of law. But it is hard to interpret Ali's experience. On the one hand, justice prevailed and his conviction was overturned. On the other, he suffered four years of injustice in the interim and missed the best years of his fighting life.

Perhaps Ali himself can provide the answer. When asked if he would seek compensation for the loss of earnings he suffered whilst suspended he replied:

> *No. They only did what they thought was right at the time. I did what I thought was right. That was all. I can't condemn them for doing what they think was right.*

Ali also once said that champions 'have to have last-minute stamina'. Perhaps it is the same with the rule of law. It is true that Ali wasted his prime fighting years in court instead of in the ring. But at the last minute, in the chambers of the justices of the Supreme Court, the rule of law prevailed.

Medecins Sans Frontiers attack: mistake, war crime or both?

Laura Hugh
17 June 2016

Medecins Sans Frontieres
English translation: 'Doctors without Borders' is a non-government organisation that works internationally to provide medical humanitarian aid. They operate in areas of the world where there are humanitarian crises during armed conflict, epidemics, famines and natural disasters.

In the early hours of Saturday 3 October 2015, the United States military conducted a series of sustained airstrikes on a Medecins Sans Frontieres (MSF) hospital in Kunduz, Afghanistan. 42 civilians, including MSF staff, were killed. Dr Joanne Liu, president of MSF, condemned the attack as "an attack on the Geneva Conventions" and General Director Christopher Stokes stated that MSF is "working on the presumption of a war crime" having been committed by the US.

US officials initially denied responsibility. Six weeks later, they admitted that the attack had occurred due to repeated human error and mechanical failure, culminating in the wrong target having being hit. The findings of the US investigation into the attack were recently made publicly available, and concluded that certain US military personnel failed to comply with their rules of engagement and the law of armed conflict. However, the report also concluded that such failures did not amount to a war crime because the attack was a mistake and therefore lacked the requisite 'intention' requirement.

Under Article 8(b)(ix) of the Rome Statute of the International Criminal Court, 'intentionally directing attacks against hospitals and places where the sick and wounded are collected, provided they are not military objectives' amounts to a war crime. The Elements of Crimes Explanatory Note to the Rome Statute clearly sets out intention as the third element required in order for an act to constitute a war crime.

The US maintains that its mistaken attack on the MSF hospital, as a result of having misidentified it to be a military objective, means that its personnel who conducted the attack cannot be individually prosecuted for war crimes because they did not intend for the hospital to be the object of the attack. However, even if the US had mistakenly attacked the hospital despite having been provided with the MSF's GPS coordinates as a precaution beforehand, the fact that the attack continued for an alleged thirty minutes after the MSF first informed US and Afghan officials that the hospital was being mistakenly targeted raises serious questions as to whether the US had intended to target it.

International Humanitarian Law
A body of international law designed to limit the negative effects of armed conflict. A well known convention in International Humanitarian Law are the Geneva Conventions which provide protection for civilians, prisioners of war, and other non-combatants.

Under International Humanitarian Law (IHL), medical personnel and hospitals are afforded special protection from attack (Geneva Convention 1 articles 19, 33 and 34; Additional Protocol 1 articles 12, 14 and 16) and are regarded as civilians and civilian objects, respectively. Even in the unlikely event that a hospital is transformed from a civilian object to a military objective due to a change in its purpose, nature, location or use, parties to the conflict are required to take all feasible precautions to distinguish between military targets and civilians, and ensure proportionality – that is, that there is not excessive loss of, or injury to, civilian life compared to the anticipated military advantage to be gained from the attack.

Furthermore, if a hospital is being used to commit hostile acts outside its humanitarian function, international humanitarian law requires an advance warning to be given before it may be targeted. MSF denies that the Kunduz hospital was ever used for military purposes or to commit hostile acts, and maintains that no warning was received before the hospital was attacked.

The MSF attack raises two important rule of law issues:

1. the value of having independent institutions to determine questions of law (or fact); and
2. the importance of a fair trial (a trial that is fair, and is perceived to be fair).

Backlash from MSF and the international community following the release of the Pentagon's report suggests that the Pentagon is not perceived as sufficiently impartial, and was not an appropriate institution to be gauging US military compliance with International Humanitarian Law.

Instead, MSF has demanded an independent investigation by the International Humanitarian Fact Finding Commission (IHFCC), citing a lack of transparency in the US investigation, coupled with the disciplinary action taken against the US personnel who conducted the attack (according to the Pentagon report, such actions included suspension, letters of reprimand, formal counselling and retraining). However, the likelihood of such an investigation commencing is questionable, given the Commission has never before been used, and both the US and Afghanistan would have to agree to the investigation before it could commence.

The IHFFC was created by Article 90 of Additional Protocol 1 to the Geneva Conventions, and is a commission created to ascertain controversial facts in situations of mutual allegations and denials of violations under IHL. On its face, it appears to be a more logical institution for gauging US military compliance with International Humanitarian Law. However, the major drawbacks to the Commission include its consent-based safeguards for state sovereignty, which limit the Commission's ability to commence an inquiry into circumstances where one state that has recognised the Commission's competence by declaration, unilaterally requests an enquiry against another state that has made the same declaration. While the Commission may seek to conduct an enquiry on an *ad hoc* basis (meaning that a party to an armed conflict has not made a declaration to accept the Commission's competence) consent must first be sought. If consent is refused, the Commission is not permitted to commence an enquiry. Currently, only 76 states have recognised the Commission's competence, none of which include Afghanistan or the United States.

The question of how to improve compliance with IHL obligations is not a new one. One of the key proposals at

the 32nd International Conference of the Red Cross and Red Crescent was to create:

> *A non-binding voluntary mechanism which would bring states together to:*
>
> *(1) Exchange information and best practices on key thematic and technical issues; and*
>
> *(2) Participate in a voluntary self-reporting process on IHL compliance.*

The proposal was rejected, with the ICRC President Peter Maurer noting with irritation that:

> *Despite the rhetorical recognition that this is a problem, there is no real political will to engage substantively to make things better.*

In light of the tragedy at the hospital in Kunduz, the necessity of finding appropriate mechanisms and institutions to resolve international legal disputes is more pressing than ever. The failure to determine accountability for indiscriminate attacks by states and individuals alike sets a dangerous precedent.

Brexit and the Rule of Law

Halyna Danylak
27 July 2016

On 23 June 2016, the people of the United Kingdom voted to deliver the verdict on whether Britain should remain in the European Union. Now a matter for the history books, the 'Leave' camp won through, even if only by the barest of majorities. A Leave result seemed so remote only weeks ago; could this have been the definitive outcome?

Brexit
A neologism, a new word or expression, made up of two words: 'Britain' and 'exit'. Britain indicates the state known as the United Kingdom of Great Britain and Northern Ireland. Exit indicates the act of the United Kingdom withdrawing from the European Union in a formal legal sense.

Below, I consider Brexit through three different rule of law issues: the process, the arguments to Remain or Leave, and the implications of the Leave vote. Intelligent people have spent years formulating sophisticated arguments on whether Britain should Remain or Leave, and I want to understand the nuanced arguments on both sides through the prism of the rule of law.

The process

The Leave vote won by a majority of 51.9% – this led many people in the Remain camp to question whether they really have a mandate. How could a critical decision be influenced by the barest of majorities?

Let us consider the question from a rule of law perspective.

The European Union
An intergovernmental organisation based around political and economic agreements between member-states in Europe. Member-states of the EU are subject to EU law, and have obligations to allow freedom of movement, access to economic markets, trade and services between member-states.

The turning point of whether to stay in or leave the European Union has been a long time coming for the British people. Segments of the British population have been growing disenchanted with the EU membership obligations for years. In 2013, in an effort to neutralise the issue, Prime Minister David Cameron ran on an election platform promising to address the contentious

issues relating to Britain's EU membership, and to hold a referendum on whether to remain in or leave the EU.

After Cameron's election victory, the British Parliament passed the European Union Referendum Act 2015, which made full provision for the particulars of how the referendum would operate. The Parliament agreed the outcome of the referendum would provide an advisory directive on how the Parliament should act on the matter. In other words, the outcome of the referendum was not legally binding. There was widespread agreement on the wording of the question, and by all accounts it was clear and simple to understand. A campaign period of 4 months ensued, where both sides had equal opportunity to put forward their respective arguments.

On the day of the referendum, voter turnout was incredibly high at 72.2%, put in perspective by the turnout of 66.1% of eligible voters at the 2015 UK general election, which had been the highest in 18 years.

Let's consider how the Brexit process tracked against rule of law principles:

- The decision whether to Remain or Leave was made in an open and transparent way. Elected representatives of the people agreed to a referendum process and passed an Act of Parliament outlining how the referendum would work and how the Parliament would subsequently act.
- The Act of Parliament enabling the referendum was applied equally and fairly. Both sides had the opportunity to present their case, and robust processes were put in place to ensure an accurate voting result was delivered.
- The question on the ballot paper was clear and capable of being understood by all eligible voters.

So far, so good.

However, the close result has prompted questions around checks and balances, and, in particular, judicial review. Judicial review forms part of the separation of

powers, which prevents the Executive from exercising power outside the limits of its power. Could the courts be brought in if the British Government were to act in an unreasonable way on such a significant issue, either by ignoring the outcome of the referendum, or by making a decision that some believe is not substantially in the public interest, namely leaving the EU?

Emeritus Professor of International Public Law at Cambridge University, Phillip Allot, has argued that:

> *It is possible that a court might take the view that it is arbitrary and unreasonable and disproportionate, in the legal sense of those words, to base the vastly important decision to withdraw from the EU on the opinion expressed by a bare majority of people taking part in a referendum provided for in an act of parliament – but an act of parliament that makes no provision for the legal effect of that referendum – thereby ignoring the opinion expressed by a very large minority.*

Since article 50 of the Lisbon Treaty states withdrawal needs to be consistent with national law, then, as Professor Allot has said:

> *An unlawful decision under UK law [to leave the EU] would be invalid for the purposes of article 50.*

Obviously this would be a difficult case to run, but it is nonetheless an interesting rule of law critique to ponder!

The Leave and Remain arguments

As mentioned earlier, the Brexit referendum was precipitated by voter dissatisfaction at how EU membership was serving the British people. Both camps were seeking a mandate to strengthen the rule of law: the Remain camp favoured further EU integration and more fully developing a transnational rule of law, while the Leave camp perceived the rule of law to better function

if confined to a domestic sphere.

It is worth considering the strong rule of law points on both sides.

Remain:

- EU law as it stands is a patchwork legal framework. It has been unevenly developed, focused on economic development and human rights. Europe knows this and had Britain voted to remain, it is likely there would have been a strong push to provide for further integration, improved regulation and law-making, including in areas such as the environment and social policy.
- A large percentage of British law mirrors EU law. The laws are clear and capable of being known by everyone – an important rule of law principle. A 'Leave' vote would stir up all sorts of temporary rule of law problems, such as the disentangling of British and EU law and rushes in new legislation. Not only would the people be unsure of the law, but it is unclear how it would be adjudicated on by the judiciary.
- EU law provides more explicit protection of human rights and the rule of law, compared with the "unwritten" British constitution.
- Britain will continue to abide by many European legislative standards for trade reasons. However, by leaving the EU, it will have less say in the construction of these standards, forcing itself into the position of having to abide by rules it has no say in creating.

Leave:

- The biggest rule of law critique of EU institutions was their lack of accountability, especially the European Commission. The Commission is comprised of 28 Commissioners; one nominated by each Member State. It is the Executive arm of the EU and while it cannot foist laws on Member States, there are few checks and balances over it. Apart from the fact that it is not directly elected by the people, the Commission has been criticised for not being bound by the 'yellow' and 'orange' card system counties can use to express

disagreement with proposed legislation.

- EU institutions have been argued to stifle the rule of law due to the need for all 28 member states in the European Council to agree on regulations in particular areas. This can be problematic both in terms of reaching consensus but also results in the watering down of good policy and law-making.
- For the rule of law to effectively function, people should be willingly guided by the law. Evidence that this was such a sticking point for the British people was that part of the Prime Minister's 'Remain' platform included a comprehensive EU membership reform package.
- The fact that the institutions are not directly electable makes them particularly susceptible to lobbying from large multinationals. This has been highlighted as leading to policy agendas which reduce competition in the EU and prevent the full elected political spectrum from substantively contributing to law and policy-making.

Viewed through this prism, the Brexit result would appear to favour a return to domestic sovereignty and rule of law with a clear separation of powers. However, it doesn't mean that transnational rule of law is falling into disuse or that the British people are not ready for it. Instead, it reflects that the British people feel EU treaties and institutions do not offer the right model of transnational law for them. No doubt, the British people will continue their participation in the international legal system, albeit through other channels.

Implications of the Leave vote

The process to begin leaving the EU will be invoked once the British Government triggers article 50 of the Lisbon Treaty. However, there are certain rule of law hurdles Britain needs to overcome in the medium term. As I mentioned earlier, the conglomerate of EU laws that have morphed into British law will bring about uncertainty in terms of the complexities of disentanglement and interpretation.

Equally uncertain, is how the law might apply if the

United Kingdom breaks apart. Scotland and Northern Ireland have indicated their strong preference to remain in the EU and both would first have to go through self-determination processes to acquire statehood, as only the UK is a state in the eyes of international law.

One thing is certain, it's a thought-provoking time to be a rule of law observer.

The South China Sea Arbitration Case

William Shrubb
13 July 2016

Yesterday, a Dutch arbitral tribunal issued its final award in the long-running legal battle between the Philippines and China over territorial claims in the South China Sea.

The five-member tribunal, organised by the Permanent Court of Arbitration in The Hague, decided unanimously in favour of the Philippines, finding that China's claims to economic and historic rights in large swathes of the area were not legally founded.

The tribunal also found that China had violated the Philippines' sovereign rights in the area, had caused severe harm to the marine environment, and had generally behaved in a manner incompatible with its dispute resolution obligations (by, for example, consistently denying the jurisdiction of the tribunal, and refusing to participate in the proceedings).

The Philippines brought the case under the United Nations Convention on the Law of the Sea (UNCLOS) back in 2013, and it was the first time the difficulties surrounding the South China Sea had come before a legal forum.

UNCLOS, which was opened for signing in 1982 and finally became effective in 1994, is the premier treaty dealing with nations' legal rights and responsibilities on the oceans. It deals with diverse matters like free navigation through territorial waters, the laying of cables on the ocean bed, the duty of ships in international waters to render assistance, the conduct of scientific research in

oceans, and – most importantly for the South China Sea – territorial claims over marine areas.

UNCLOS introduced the current tripartite division of territorial claims over oceans. At its most basic level, a state's maritime claims are divided into:

- Territorial waters;
- Contiguous zone; and
- Exclusive economic zone.

Territorial waters are all the waters (and seabed) within 12 nautical miles of the coastline of a country. In these waters, a country is sovereign, and can use any resource or make any law regarding the area (with some exceptions, like the right of innocent passage of foreign ships through the waters).

The contiguous zone is the zone a further 12 nautical miles out from the territorial waters. In this area, a country can make laws regarding things like customs, immigration and pollution.

Finally, the exclusive economic zone extends 200 nautical miles out from a country's coastline. Within this zone, a country has exclusive rights to exploit natural resources, but other countries have navigation rights, and can also lay cables on the ocean bed.

One of the chief disputes in the South China Sea arbitration was whether certain islands claimed by the Chinese gave rise to these territorial and economic rights. In reality, the "islands" were a series of reefs, some transformed through dredging and land reclamation. The tribunal reviewed the law, and decided that these 'artificial islands' did not give China the territorial and economic rights that it claimed.

There is ongoing disquiet in the international community about whether China will accept the outcome of the arbitration, or whether the arbitral award may prove a trigger for further escalation in the already tense area.

The nine-year negotiation of UNCLOS (1973-1982) was

the first multilateral negotiation that China was involved in, after taking over "China's" seat at the United Nations from the Republic of China (Taiwan) in 1971.

China was a crucial player in determining the form of UNCLOS, as the Third World non-aligned nations argued with the United States and the USSR over the extent of territorial rights over coastal waters. China sided with the Third World nations, throwing its weight behind the more extensive definitions of territorial and economic rights.

Forty years later, however, it is finding that UNCLOS may not be operating quite how it would like.

The world will hold its breath to see whether the emerging superpower continues to abide by current international legal standards, or whether it begins to be more muscular in its pursuit of its national interests.

The international rule of law may hang on China's decision.

Dilma Rousseff and the Politics of Impeachment

Louise Lau
16 November 2016

Dilma Rousseff marks number 18 in a line of Latin American presidents who have left office for reasons other than losing an election since 1985. Through April and May, the National Congress of Brazil voted for Ms Rousseff's impeachment, alleging that she manipulated budget figures using public bank funds to improve perceptions about the Brazilian economy and further her 2014 re-election campaign. The calls for impeachment did not involve allegations of corruption or electoral fraud; they related to budgetary practices that are arguably commonplace across various levels of Brazilian government.

If it is any reflection of the social and legal gravity of Ms Rousseff's actions, only a handful of congressmen even mentioned the charge during their ten-minute declarations calling for impeachment. The point of distinction where Ms Rousseff stands in contrast to many of her accusers is that she has not misappropriated government funds for herself. Even her critics admit that she is 'one of the few politicians in Brazil not to accept bribes'.

The Brazilian pathway to impeachment operates as follows (assuming each step passes):

1. A two-thirds majority vote in the Chamber of Deputies (the lower house of Congress) passes to start impeachment proceedings.

2. A majority vote in the Senate confirms the Chamber of Deputies vote.

3. The President is suspended from office.

4. A vote in the Senate passes to indict.

5. A trial occurs in the Senate.

6. From the trial, a vote to impeach passes, occurring in the Senate.

Each of these dominoes fell for Ms Rousseff over this year. On the 17 April 2016, the Chamber of Deputies vote passed 367 to 137 (out of 513 members), easily exceeding the threshold required. On 12 May 2016, the Senate vote passed with another comfortable majority of 55 to 22. On the same day, Ms Rousseff was suspended from office.

Later on in August, the Senate voted for her indictment by 59 to 21, finding that there was enough evidence for trial. The trial occurred through the month and finally on 31 August 2016, the Senate voted, by another clear margin of 61 to 20, to impeach Ms Rousseff. She was officially removed from office. Now Michel Temer, the previous Vice President who acted in place of Ms Rousseff during these proceedings, has assumed office as President of Brazil. He will face re-election in 2018, before Ms Rouseff's term was set to end on 1 January 2019.

However, throughout the year Ms Rousseff and her supporters have claimed these proceedings are a 'coup' and 'conspiracy', designed to usurp her political power. After the impeachment, she maintained that Congress had 'condemned an innocent'. These are not the unfounded rally cries of a President caught red-handed; the alleged plotting and dealing of Mr Temer is a narrative that 'will be polari[s]ing for a long time in Brazil'. Ms Rousseff and her supporters claim that the new President saw this as an opportunity to take power in a plot that had been planned for months, especially after Mr Temer was implicated in the Petrobras scandal where billions of state oil money was routed through hidden accounts for kickbacks and bribes.

When Ms Rousseff entered office, she sought to 'clean house'; she was explicit from the start that corruption would not be tolerated in her government – the expectation was clear: if you were a minister or aide and accused of corruption, you had to resign. Six ministers left office under these conditions in the first year.

Like a contemporary morality play, the tragi-comedy of Brazil's recent politics offers a lens for us to question what it means to be a democracy in the 21st century. In the context of a government where no one seems to have clean hands, are checks and balances of government accountability morally neutral? The mechanism of impeachment demonstrates that even a head of state is not beyond the reproach of law. In principle, it is the rule of law at work. By all accounts, Congress complied with all legal requirements to remove Ms Rousseff.

But in practice, the moral grounding is not so clear.

The irony is fraught: over half of those in Congress are under investigation for charges including electoral fraud, corruption and even homicide; of the 21 deputies embroiled in the Petrobras scandal, 16 voted to impeach Ms Rousseff.

Brazil is a diverse nation, but Mr Temer had appointed an all-male, all-white cabinet in the interim phase. Venezuelan President Nicolás Maduro and El Salvadorian President Salvador Sánchez Cerén expressed their support for Ms Rousseff, despairing that one of the democratic strongholds of South America had been lost.

Ms Rousseff's impeachment has been called a 'misuse of democratic procedure', as it is ultimately more akin to a political attack than a demonstration of executive accountability. The Brazilian Congress has no mechanism of a 'no-confidence' vote and some contend impeachment was the next best tool for Congress to topple its leader for her unpopular economic policies. The democratic interests of the Brazilian people are not being best served by this impeachment; the general sentiment amongst critics and citizens alike is general distrust – there is scepticism about Brazil's political class

and commentators have labelled the situation everything from 'dysfunctional' to 'circuslike'.

The change in power was undemocratic in form and substance. Brazil now has a new President and leadership who were not elected by its people. On its face the new cabinet is less diverse. By implication, it is also less representative of the diverse and deeply unequal Brazilian populace and therefore less democratic. Public confidence has also significantly diminished due to the political turmoil over the past six months. Overall, this mechanism of government accountability, does not appear to actually do its job when it has effectively substituted 'one President tainted by scandal for another.'

The institutional legitimacy of the Brazilian government, the tenets of democracy and the ordinary citizens of Brazil have not positively benefited from this. With the wrongs of Ms Rousseff's economic administration and Mr Temer's alleged unscrupulous dealings, the situation appears like a choice of the lesser of two evils. Yet the biggest problem is that the Brazilian people, the citizens to which the government are accountable, were deprived of their choice. No elections were held to demonstrate the people's approval or disapproval of Ms Rousseff's actions; they were not able to exercise their civic voice to remove or retain their democratically-elected President in light of her actions.

The Brazilian Congress' use of impeachment procedures against Ms Rousseff reflects the rule of law in form but not substance. Democracy is more than utilising the mechanisms of executive accountability – these mechanisms must actually serve a public purpose and reflect an overall notion of democratic legitimacy.

Ms Rousseff's impeachment serves as a reminder that checks and balances do not exist in a vacuum; they should serve a greater purpose which supports the integrity of the democratic system and underpins the tenets of the rule of law.

Diagnosing corruption within judicial systems

Marina Kofman
31 August 2016

The judiciary plays a fundamental role in safeguarding the rule of law and access to justice.

Demonstrative of this fact is that all of the major indices on corruption, governance and the rule of law include indicators for corruption in the judiciary and/or judicial independence. An impartial and transparent judicial system facilitates access to justice by safeguarding due process of law during a trial. The judicial function thus builds public trust in institutions and serves to protect fundamental rights within a polity through its adjudicatory role. It also acts as a check on the power of the executive and legislative branches of government, ensuring the legitimacy of the actions of state institutions and the political system as a whole. As the saying goes, the judiciary is the organ that "watches the watchmen".

In the interests of weeding out corruption wherever it occurs in society, it is therefore essential to ensure the independence and accountability of the judiciary. If the judicial function becomes corrupted, to whom can the public turn for legitimate and effective redress?

The Judicial Integrity Initiative

The IBA Judicial Integrity Initiative (JII) is a project of the International Bar Association (IBA), in partnership with the Basel Institute on Governance, which aims to combat judicial corruption around the world. When they reviewed the extensive academic research already in existence in the area of judicial corruption, the IBA discovered that the missing element was reliable 'on the

ground' indicators to translate the concepts of a fair trial and an impartial judicial process into reality. In other words, we know there is a big problem with corruption, but until we know what the patterns and weak links are, it is challenging to develop effective measures to address the problem.

To counter this problem, the IBA conducted research around the world between June 2015 and January 2016, using a unique mix of an online surveys and in-country meetings, to gather information from legal professionals all over the world. Its goal was to identify:

- The most prevalent patterns in which corruption manifests in judicial systems;
- The corruption risks in the interactions among actors in judicial systems; and
- The risks arising at different stages of the judicial process.

The JII gathered empirical evidence to identify where specifically in the judicial system the biggest risks arise, what those risks were, and the role of different actors in corrupt conduct. For example, we know that bribery is an issue – but at what part of the trial process does it occur and which stakeholders in the judicial system does it most effect? Is it judges themselves, lawyers, prosecutors or court clerical staff? The results reflect a total of 1,204 survey responses from 31 countries, representing all regions of the world, different types of judicial systems and with varying reported levels of corruption.

Researching judicial corruption is particularly difficult because it is difficult to come by reliable information having regard to corruption's insidious nature and the powerful interests involved. Nevertheless, with acknowledged limitations, the research revealed some patterns. The enhanced diagnosis of the problem derived from this study will assist in developing appropriate measures to provide support to judicial systems, building upon the foundation that other organisations have developed through promulgating and promoting standards and guidelines in this space.

Findings

The tension between the constitutionally-guaranteed independence of the judiciary and the socially-demanded accountability is a distinctive trait of the judiciary that generates corruption risks.

This was demonstrated by the most prevalent reported forms of corruption: bribery and political influence, impacting on both independence and accountability. The research found that the types of cases where corrupt behaviours are most often perceived to occur are criminal cases, followed by general civil cases. The findings on bribery reported interference with judges in order to influence a decision, interference with lawyers in relation to their advice to a client and with court staff to tamper with evidence. It was reported that lawyers can play an active role in bribery as an intermediary of their client. Prosecutors were also susceptible to bribery to tamper with evidence.

Overall, the number of study countries rated as having perceived high levels of undue political influence or political interference was significantly higher than for those rated as having high levels of bribery occurring in their judiciaries.

In countries affected by corruption, the corruption is perceived as being associated with wealthy groups, and judges and prosecutors were the most at risk of undue political influence. Undue pressure to decide in favour of powerful political and economic individuals is the type of corruption for which the highest perceptions of incidence were reported, with the most diverse group of countries reporting this form of corruption, including countries from the Middle East and Europe. The judges who purportedly engage in corrupt conduct do so most frequently in their interactions with lawyers and other judges, pointing to weaknesses internal to the legal structure, as opposed to the direct pressure of approaches from external parties.

This brings into focus the role of the legal profession. External third parties may actively use lawyers as

intermediaries for corrupting other actors in the judicial system, for example by requesting their assistance in paying bribes. Conversely, lawyers might exact bribes for corrupt purposes such as mishandling a client's case on purpose.

There was only limited evidence of alleged corrupt conduct on the part of court personnel, who were more frequently reported to have been approached by external actors rather than actively seeking bribes themselves.

Further work

The JII will now move into its second phase to build strategies that benefit from the insights of the research findings. The challenge faced by lawyers in this space is only just being addressed, with anti-corruption guidelines for the legal profession in their infancy.

I hope that the IBA can leverage its reach and standing within the global legal profession to play a key ongoing role in combatting judicial corruption and legal sector corruption more broadly.

Deaf Jurors and Discrimination

William Shrubb

PART I

14 June 2016

Next month, the High Court will hear an appeal from the Queensland Court of Appeal concerning a deaf woman who was excluded from jury duty. The woman will argue that her exclusion constituted unlawful discrimination, in breach of Queensland's Anti-Discrimination Act 1991.

Last month, two deaf people from New South Wales won their appeals to the UN Committee on the Rights of Persons with Disabilities, after arguing that their exclusion under New South Wales' Jury Act 1977 amounted to a breach of their rights under the Convention on the Rights of Persons with Disabilities.

This article will briefly examine these three case studies, and discuss how they balance two key rule of law issues: equality before the law, and the right of people with disabilities to participate in the legal system, on the one hand, and the right of an accused to a fair trial, and public confidence in the legal system that conducts that trial, on the other hand.

Ms Lyons and the High Court

Ms Gaye Lyons is deaf. She can lip read, but her main method of communication is sign language – Auslan. As a result, when speaking with people who can't speak Auslan, she requires an interpreter.

Ms Lyons was summoned to the Ipswich Courthouse for jury duty in 2012, but was excluded after she let the Deputy Registrar know that she would require an Auslan interpreter. The Deputy Registrar excluded Ms Lyons under section 4(3)(l) of the Jury Act 1995 (Qld), which provides that:

> *(3) The following persons are not eligible for jury service—*
>
> *…*
>
> *(l) a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror;*

The Deputy Registrar, Ms Britton, argued that Ms Lyons' requirement for an interpreter meant that she was incapable of effectively performing the functions of a juror. Ms Britton also said that there was no provision in the Jury Act to allow an interpreter to swear an oath, like jurors are required to do, and also that it was not possible to have another person in the jury room while the jury was deliberating, because this would undermine the confidentiality of jury deliberations.

Ms Lyons said her exclusion was in breach of Queensland anti-discrimination legislation, which effectively prohibits public officials from discriminating on certain grounds, including deafness.

Ms Lyons appealed Ms Britton's decision in the Queensland tribunals and courts three times, and lost each time.

The first time, a single member of the Queensland Civil and Administrative Tribunal found that, from the Deputy Registrar's point of view, Ms Lyons' deafness had not really been the issue – the point was that her being a juror would require another person to be in the jury room. Thus, the Deputy Registrar had not discriminated against Ms Lyons based on her deafness, but rather had treated her differently based on other grounds, which

were not prohibited under Queensland law. Even if the Deputy Registrar was wrong in her interpretation of the law, the single member said, it was not unlawful discrimination under Queensland law.

Ms Lyons appealed to the QCAT Appeal Tribunal.

The Tribunal noted that a subsequent Queensland Supreme Court decision in another similar case had proved the Deputy Registrar's interpretation of the law was correct – an individual who needed an Auslan interpreter could be excluded from jury service. In all other respects, the Tribunal affirmed the single member's decision.

Ms Lyons appealed to the Queensland Court of Appeal.

The Court looked at the two administrative decisions, and decided not to grant leave to appeal, because, in the words of Judge of Appeal Holmes:

> *I do not consider that the applicant's [Ms Lyons'] proposed appeal has sufficient merit to warrant the granting of leave to appeal.*

Ms Lyons having no further avenues of appeal in Queensland sought leave to appeal to the High Court in March this year. Indeed, the State of Queensland – her opponent in the High Court – encouraged the Court to do the same thing to Ms Lyons that the Court of Appeal had done: determine that she did not have reasonable prospects of success, and deny her leave to appeal.

The judges sitting on Ms Lyons' special leave application – Justices Kiefel and Nettle – thought differently, and granted Ms Lyons leave. Her case will probably be heard in late July.

Ms Beasley and Mr Lockrey

Ms Gemma Beasley and Mr Michael Lockrey are two deaf people from New South Wales. Back in April 2013, both of them appealed separately to the UN Committee on the Rights of Persons with Disabilities (CRPD) on

similar grounds to Ms Lyons.

Both Ms Beasley and Mr Lockrey had been summoned for jury duty by the Sheriff of New South Wales at different times. They both informed the Sheriff that they would require assistance – an Auslan interpreter, and real-time steno-captioning – in order to participate. Both were informed that the Sheriff had decided to exclude them under section 14(4) of the Jury Act 1977 (NSW), which provides:

> *The sheriff may exempt a person from jury service whether or not on the request of the person if the sheriff is of the opinion that there is good cause for the exemption.*

Section 14A of the Act sets out what constitutes "good cause":

> *For the purposes of this Act, a person has good cause to be exempted or excused from jury service if:*
> *(a) jury service would cause undue hardship or serious inconvenience to the person, the person's family or the public, or*
>
> *(b) some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror, or*
>
> *(c) a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror, or*
>
> *d) there is some other reason that would affect the person's ability to perform the functions of a juror.*

Both Ms Beasley and Mr Lockrey took their cases to the CRPD, alleging that New South Wales, and, by extension, Australia, was infringing their rights under the

Convention on the Rights of Persons with Disabilities, including the right to equality and non-discrimination under Article 5:

> *1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*
>
> *2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*
>
> *3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*

The CRPD agreed with Ms Beasley and Mr Lockrey, and found that Australia was in breach of its obligations under the Convention. It ordered Australia to take steps to compensate and reimburse Ms Beasley and Mr Lockrey for their legal costs, and also to take steps to permit them to participate in jury duty, and prevent the problem arising again.

The decisions were handed down on 1 April 2016.

Where to from here?

The recommendations of the CRPD are non-binding, which means the Australian government can ignore them. Indeed, the NSW Government did a similar thing in 2006: the New South Wales Law Reform Commission investigated the issue of blind and deaf jurors in 2006, recommending, amongst other things, that:

> *The Jury Act 1977 (NSW) should be amended to reflect the following:*

...

(d) that interpreters and stenographers allowed by the trial judge to assist the deaf or blind juror should swear an oath faithfully to interpret or transcribe the proceedings or jury deliberations;

(e) that interpreters or stenographers allowed by the trial judge to assist the deaf or blind juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements pertaining to the secrecy of jury deliberations;

(f) that offences be created, in similar terms to those arising under s 68A and 68B of the Act, in relation to the soliciting by third parties of interpreters or stenographers for the provision of information about the jury deliberations, and in relation to the disclosure of information by such interpreters or stenographers about the jury deliberations.

However, the New South Wales Government rejected these recommendations.

Similarly, Ms Lyons' case before the High Court may prove discouraging for disability advocates. The legal question of whether Ms Lyons' treatment constituted unlawful discrimination under Queensland legislation is a far narrower one than whether, or to what extent, people with disabilities should serve on juries, and what obligations governments around Australia have to facilitate their participation.

Jury participation and the rule of law

The issue of jury participation raises a number of important rule of law considerations.

On the one hand, few rule of law commentators would

accept that a society that continues to discriminate on the basis of physical disabilities is a society under the rule of law. Equality before the law – including equality of civic opportunities and obligations – is a fundamental aspect of the rule of law.

On the other hand, the right of an accused to a fair trial, and public confidence in the legal system that conducts that trial, is also fundamental to the rule of law. The extent to which accommodations can be made to facilitate people with physical disabilities participating in juries is a question that will need to be answered on a case-by-case basis. There can be no question that the information conveyed to a hearing juror is different from the information conveyed (through an interpreter or captioning) to a hearing-impaired juror. The question then becomes, to what extent does that difference begin to undermine the fairness of the trial, or public confidence in the system itself.

It is unlikely that the current provisions surrounding exclusion from jury duty in Australia will be seriously modified. They mark an improvement from the days of automatic disqualification for certain categories of people, but were intended to provide sheriffs and registrars with discretion to take into account individuals' capacities to effectively fulfil the responsibilities of a juror. On the other hand, the legal system is strengthened by the participation of citizens from all walks of life.

The High Court will have many issues to consider when it hears Ms Lyons' case in late July, and governments around Australia may have some work to do, if the Court decides to follow the CRPD, and demand greater accommodation be made for people who wish to fulfil their civic responsibilities, regardless of ability.

PART II

5 October 2016

Gaye Lyons took the Queensland Government all the way to the High Court this year, seeking to prove that her exclusion from jury service was unlawful discrimination based on her deafness. Just two months before her High Court hearing, two deaf people from New South Wales – Gemma Beasley and Michael Lockrey – had taken similar cases to the Committee on the Right of Persons with Disabilities and won.

The story so far

Briefly to recap, Ms Lyons was summoned to appear for jury selection at Ipswich Courthouse in 2012. When she turned up, she let the Deputy Registrar know that she would require an Auslan interpreter to be provided. The Deputy Registrar then excluded her from jury service under the Jury Act 1995 (Qld), on the grounds that she was:

> *Incapable of effectively performing the functions of a juror.*

Ms Lyons challenged her exclusion before a single member of the Queensland Civil and Administrative Tribunal, again before the Appeal Tribunal, and finally before the Queensland Court of Appeal. She lost each time. She was granted special leave to appeal to the High Court in March.

Ms Lyons before the High Court

All five judges of the High Court that heard Ms Lyons' case dismissed her appeal.

The plurality judgment – French CJ, and Bell, Keane, and Nettle JJ – considered that any suggestion that a non-juror can be present during jury deliberations "must be rejected". Their Honours said:

> *The common law has long required that the jury*

be kept separate. The possibility that, while the jury is kept together, one or more jurors may have communicated with a person other than a fellow juror (or officer of the court) is an irregularity which has been held to vitiate the verdict. The presence of a person other than a juror in the jury room during the course of deliberations is an incurable irregularity regardless of whether the person takes any part in the jury's deliberations. The prohibition on the presence of a 13th person in the jury room protects the jury from the suggestion of external influence and promotes the frank exchange of views.

The only recognised exception to that exclusionary rule was:

The officer who has the charge of the jury. That officer is permitted to communicate with the jurors with the judge's leave. The efficient conduct of the trial would be impeded were there no provision of that kind.

The plurality conceded that:

It may be, as the appellant submits, that the secrecy of the jury's deliberations would not be compromised by the presence of an accredited Auslan interpreter in the jury room during the jury's deliberations. Nonetheless… Queensland law does not permit an Auslan interpreter to be present during the jury's deliberations.

Therefore, the Deputy Registrar at Ipswich was exercising her powers according to law, and her actions did not constitute unlawful discrimination under the Anti-Discrimination Act 1991 (Qld).

Gaegeler J concurred with the plurality's findings,

only writing a separate judgment to further explore the statutory interpretation reasons why acting in accordance with the Jury Act did not constitute unlawful discrimination.

Deaf jurors and the rule of law

Ms Lyons' case, and others like it, have raised competing rule of law considerations from the beginning.

As our previous blog post noted, there is a clear tension between the benefit of properly representative juries and equality of civic obligations and responsibilities on the one hand, and the proper functioning of and public confidence in the jury system on the other hand.

In the case of the two deaf people from New South Wales the Committee on the Rights of Persons with Disabilities conceded that "the confidentiality principle of jury deliberations must be observed", but noted that:

> *The State party… does not provide any data or analysis to demonstrate that it would constitute a disproportionate or undue burden… [And] the State party does not provide any argument justifying that no adjustment could be made to enable the Auslan interpreter to perform his/her functions without affecting the confidentiality of the deliberations of the jury such as a special oath before a court.*

Therefore, the Committee found that the exclusion of deaf jurors amounted to disability based discrimination.

This finding is compatible with the High Court's judgment. As the High Court pointed out, there was no specific statutory provision that allowed the participation of an Auslan interpreter in the jury deliberations. Absent that provision, all that was left was a powerful and convincing common law history of rigidly excluding non-jurors.

However, the Court left open the possibility that the Queensland government – and any other government

in Australia – might choose to pass legislation to allow the participation of citizens like Ms Lyons who might otherwise be excluded.

For now, the High Court has spoken. Deaf people in Australia are unlikely to be able to participate in jury trials for the next little while, a fact that will not be well-received by the disabled community. However, the possibility still remains that legislatures could choose to prioritise representative juries and equal participation.

How the International Criminal Court Upholds the Rule of Law

Louisa Spiteri
9 November 2015

A key principle of the rule of law is that the law be applied equally and fairly, such that neither the individual nor the State is above the law. This is partly achieved through judicial systems that are independent, impartial, open, transparent, and provide a fair and prompt trial. These characteristics extend beyond the confines of national borders into the international sphere. From an international law perspective, the International Covenant of Civil and Political Rights requires that criminal proceedings be conducted by an 'independent and impartial tribunal' (Article 14). International jurisprudence has defined some of the features of 'independence and impartiality' as including security of tenure;[1] freedom from political influence/bias,[2] and respect for the separation of powers between the executive and judiciary.[3]

The International Criminal Court
An international court established by the Rome Statute which came into effect in 2002. The ICC investigates and tries individuals charged with the gravest crimes of concern to the international community, such as: genocide, war crimes and crimes against humanity.

The International Criminal Court (ICC) is one example of an international judicial body that aims to promote the rule of law, both in it's own jurisdiction, and indirectly in nation states. It strives to establish the rule of law by ensuring the most severe crimes of concern to the international community do not go unpunished. The ICC promotes respect for international law without usurping a State's sovereignty to investigate and prosecute crimes committed by its own nationals or on its own territory. This is achieved according to the principle of complementarity.

Definition

The principle of complementarity, enshrined in Article 1 of the Rome Statute (the Statute governing the ICC) recognises that the ICC will not unduly supersede or replace national courts. On the contrary, the ICC defers to the courts of national jurisdiction. Article 17(1)(b) provides that where a 'case has been investigated' and the 'State which has jurisdiction over it has decided not to prosecute', the case will be inadmissible in the ICC unless it can be shown that the State was 'unwilling or unable' to genuinely prosecute the accused. The principle of complementarity under Article 17 places significant emphasis on the validity of national judicial systems and their proceedings according to the standard of the rule of law. By examining the "genuineness" of national investigations and proceedings, the ICC upholds the rule of law internationally with the view to end impunity. The term 'genuinely' in Article 17 was chosen in preference to other terms, such as 'effectively.' The latter could have given the impression that a case would be admissible if the national system was, for example, proceedings more slowly (less effectively) than the ICC, or if the ICC could do a better job. Rather than competition for jurisdiction, the principle of complementarity aims to encourage and facilitate genuine national proceedings.

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.

There is a presumption that the ICC will be precluded from taking any action when a State has a functioning judicial system. Only if there is no relevant State criminal investigation or prosecution underfoot, or the national courts are clearly "unwilling or unable" to do justice, may the Court investigate the crime(s) (Article 17 & 18). Further, where a case has been investigated by a State, or where both an investigation and trial have been completed, the principle of *ne bis in idem* applies. *Ne bis in idem* protects a person from being tried before the ICC for conduct which has already been tried by the

ICC itself or by other courts in previous proceedings (including national proceedings). Exceptions include where the purpose of the national proceedings was to shield the person from criminal responsibility; where the proceedings were inconsistent with an intent to bring the person to justice; or where the judiciary lacked independence (Article 20(1) & (3)).

When does the ICC intervene?

The ICC has considered when a national judiciary is "unwilling or unable" to genuinely investigate or prosecute grave crimes. "Inability" may be due to a total or substantial collapse or unavailability of the national judicial system, such as where the State is unable to obtain the accused or the necessary evidence. More pertinent to discussions about the rule of law and abuse of power is where a State is "unwilling".

Unwillingness may be manifested through the granting of excessively generous amnesties or pardons with the practical effect being that the perpetrators are shielded from prosecution. Attempts to shield the accused are often due to the accused's links to the political party that has retained power in a post-conflict State. Other manifestations of unwillingness are suspiciously slow proceedings or a clear lack of independence of the judiciary. The ICC is not precluded from exercising jurisdiction where a State's unwillingness is clear, albeit implied (i.e. not expressly made). Indeed, in the case of The Prosecutor v. Germain Katanga, the ICC was interested in whether 'a State makes clear its unwillingness to bring the accused to justice',[4] and express statements were merely one manifestation of unwillingness.

The ICC seeks to balance the importance of state sovereignty with upholding the rule of law and seeking justice for the victims of war crimes. Truth and Reconciliation Commissions play an important role in aiding this process.

National Truth and Reconciliation Commissions

It is somewhat ambiguous whether National Truth and

Reconciliation Commissions constitute investigations/proceedings. These quasi-judicial bodies may lack various judicial features given that the very nature and purpose of these bodies is often to encourage perpetrators to tell the truth by shielding them from criminal responsibility. Such extrajudicial restorative and transitional justice mechanisms can fail the stringent tests contained within Article 17(1) and Article 20(3), even though they offer invaluable forums for social healing. The recovery of victims requires the restoration of the socio-political fabric; retributive prosecutions alone may not suffice to address the needs of victims in a post-conflict society. Nevertheless, the rule of law may still operate in conjunction with Truth Commissions. The admissibility of a case before the ICC should not undermine the continued operation of the Truth Commission for ongoing reconciliation, rehabilitation and restoration.

Notes

1. *Garcia v Peru* (Inter-American Commission on Human Rights, Case No 1/95 11.006, 17 February 1995), [VI 2(a)]; *Campbell and Fell v United Kingdom* (Judgment) (European Court of Human Rights, Case No 7819/77; 787/77, 28 June 1984) [78].
2. Ibid.
3. *Bahamonde v Equatorial Guinea* (United Nations Human Rights Committee, Case No 468/1991, 20 October 1993), [7.2].
4. *Prosecutor v Katanga and Chui* (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 16 June 2009), [88] (emphasis added).

Sentencing at the International Criminal Court

Louisa Spiteri
29 August 2016

A crucial element of fairness in the criminal justice system is proportionate, transparent, non-arbitrary sentencing. Punishment in the form of the deprivation of liberty—where liberty constitutes a fundamental human right – is of such serious import that, under the rule of law, the ability to administer criminal punishment must be constrained.

The International Criminal Court (ICC) is one example of an international judicial body that aims to promote the rule of law by ensuring the most severe crimes of concern to the international community do not go unpunished. Some necessary "constraints" on the ICC's ability to deprive an individual of their liberty include:

- that the sentence is determined in accordance with the Rome Statute;
- that it is pronounced in public; and
- that it is pronounced, wherever possible, in the presence of the accused, and the victims or their legal representatives if they have taken part in the proceedings.

In addition to the imposition of a prison sentence (the maximum of which is 30 years), the judges may impose a fine or forfeiture of the proceeds, property and assets derived directly or indirectly from the crime committed. In extreme cases, the Court may impose a term of life imprisonment. The Court cannot impose a death sentence.

On 21 June 2016, Trial Chamber III of the ICC, composed of Presiding Judge Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan), sentenced Jean-Pierre Bemba Gombo to eighteen years of imprisonment—the longest sentence to be handed down by the ICC since its inception in 2002. As the highest ranking military commander of the Congolese Liberation Movement (Mouvement de Libération du Congo or "MLC"), Mr Bemba was found responsible for two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging) committed in the Central African Republic between October 2002 and March 2003.

The ICC has emphasised that "the sentence must be proportionate to the crime and the culpability of the convicted person."[1] Proportionate sentencing is paramount to the attainment of fairness and equality in the judicial system, and consequently to the rule of law. Was the Bemba sentence proportionate?

Culpability of a commander

The Chamber convicted Mr Bemba under Article 28(a) of the Rome Statute as a person effectively acting as a military commander who knew that the MLC forces under his effective authority and control were committing, or were about to commit, the said crimes as a result of Mr Bemba's failure to properly exercise control. The Chamber noted that, "[i]n accordance with the principle of proportionality, a commander's key role in the events, as well as his or her actual knowledge, must be reflected in the sentence."[2]

Like other international tribunals, such as the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Extraordinary Chambers in the Courts of Cambodia (ECCC), the ICC reiterated that, in accordance with the principle of gradation in sentencing, "high-level leaders, regardless of the mode of liability, generally bear heavier criminal responsibility than those further down the scale. … [T]he culpability of a superior and his or her degree of moral blameworthiness

might, depending on the concrete circumstances, be greater than that of his or her subordinates."[3]

Retribution and deterrance

In its sentencing decision, the Trial Chamber referenced the Preamble of the Rome Statute, which establishes retribution and deterrence as the primary objectives of punishment at the ICC.[4]

The Chamber stated that:

> *Retribution is not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes. In this way, a proportionate sentence also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation. With respect to deterrence, a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence).*[5]

While no philosophy can explain punishment allocations perfectly, "consistent adherence to a punishment philosophy should enhance the coherence of ICC sentencing practice, … promote positive perceptions of the ICC's legitimacy, [and] … contribute to the ICC's central mission of building a community of shared criminal law norms at the global level."[6]

In order to determine an appropriate sentence, the Chamber explained that:

> *[T]he gravity of the crime is a principal consideration in imposing a sentence. In cases of command responsibility, the Chamber must assess the gravity of (i) the crimes committed by the convicted person's subordinate; and (ii) the convicted person's own conduct in failing to prevent or repress the crimes,*

or submit the matter to the competent authorities. Unlike aggravating circumstances, gravity necessarily involves consideration of the elements of the offence itself. [7]

After assessing the gravity of the crimes, the Chamber sentenced Mr Bemba to the following terms of imprisonment:

- Murder as a war crime: 16 years of imprisonment;
- Murder as a crime against humanity: 16 years of imprisonment;
- Rape as a war crime: 18 years of imprisonment;
- Rape as a crime against humanity: 18 years of imprisonment; and
- Pillaging as a war crime: 16 years of imprisonment.

The Chamber entered cumulative convictions for murder and rape as both war crimes and crimes against humanity (whereby both sentences will run concurrently), as all crimes were geographically and temporally connected and Mr Bemba's responsibility was based on the same conduct. Mr Bemba's culpability was deemed to be reflected in the highest sentence imposed (eighteen years for the crimes of rape).[8]

Once a sentence has been imposed, Article 78(2) of the Rome Statute requires a deduction of the time the convicted person has spent in detention upon an order of the Court. As such, Mr Bemba was entitled to credit against his sentence for the time he has spent in detention since his arrest on 24 May 2008— a deduction of eight years.[9]

Proportionality of sentencing

Was the Bemba sentence proportionate?

It has been suggested that:

"the Rome Statute does not provide sitting judges with enough guidance or assistance when handing

down sentences. Therefore, not only do sentences lack uniformity and predictability, but there is also a high probability that the sentence will be disproportionate to the severity of the crime." [10]

Leniency of sentencing is inconsistent with the norm of issuing penalties commensurate with gravity. Dissimilar sentences in like cases and lenient penalties for serious violations also raise questions of court bias and risk undermining the rule of law and institutional credibility. Criticism about the ICC's supposedly lenient sentences, especially by the "victim" State where the conflict occurred, is unsurprising in light of the fact that international sentences are shorter than sentences in many national systems.

However, one may argue that international criminal law is distinct from its domestic counterpart, rendering such comparisons inappropriate. The international criminal system is not a national system operating supra-nationally. Is it more appropriate to examine international sentences relative to one another rather than relative to domestic sentences? Such an approach may seem insufficient given the extreme, widespread harm caused by the acts or omissions of high ranking officials in conflict situations which often fundamentally disrupt the fabric of society.

While retributivist commentators lament the perceived under-punishment of international offenders, it has been argued that "a significant and underappreciated risk exists that judges intent on retribution will inflict more punishment than offenders deserve. This risk stems from international criminal law's dominant rhetoric of extreme gravity as well as the political narratives that tend to divide conflict participants into good and evil. Such rhetoric and narratives risk exaggerating the perceived culpability of at least some international offenders."[11]

The difficulty of sentencing these types of crimes is reflected in the dissatisfaction of the Prosecution and Mr Bemba's Defence who have both lodged Notices of Appeal requesting longer and shorter sentences respectively.[12] The

Defence's appeal was directed against the whole decision, arguing that the eight years Mr Bemba had already spent in detention were proportionate to the crimes he was convicted of. The Prosecution requested increasing the term of imprisonment to reflect the totality of Mr Bemba's culpability, as found by the Trial Chamber. The Prosecutor added that command responsibility is accorded parity with individual criminal responsibility both by the ICC's legal regime and the jurisprudence of ad hoc tribunals (ICTY and ICTR). Thus, trial judges may impose a term of life imprisonment for command responsibility. Independent of the outcome of the appeal, once Bemba has served two thirds of his sentence, the Court may review it and grant early release under Article 110 of the Rome Statute.

As the Bemba case demonstrates, achievement of proportionate sentencing that is in keeping with the rule of law may require increased specificity and clarity of sentencing guidelines and continued transparency in sentencing decisions, so that the international community can openly trace how judges determine sentences. This will help to ensure justice and accountability at the international level.

Notes

1. *The Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08, 21 June 2016, [11] footnotes omitted (hereafter, Bemba (Sentencing Decision)). See Article 81(2)(a) of the Rome Statute and Rule 145(1) of the Rules of Procedure and Evidence.
2. Bemba (Sentencing Decision), [60] footnotes omitted.
3. Ibid., [17].
4. Ibid., [10]. In particular, paragraph 4 of the Preamble of the Rome Statute states "the most serious crimes of concern to the international community as a whole must not go unpunished". Further, paragraph 5 of the Preamble states that, in establishing the ICC, the States Parties were "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".
5. *Bemba* (Sentencing Decision), [11] footnotes omitted.
6. DeGuzman, M 2014 'Proportionate Sentencing at the International Criminal Court', *Legal Studies Research Paper*

Series, Research Paper No. 2014-15, p. 2 (hereafter 'DeGuzman, 'Proportionate Sentencing at the International Criminal Court'')

7. *Bemba* (Sentencing Decision), [15] footnotes omitted.
8. Ibid., [95] footnotes omitted.
9. Ibid., [96] footnotes omitted.
10. Dubinsky, A 2007 'ICC Sentencing Guidelines', *Criminal and Civil Confinement*, Vol. 33, p. 636.
11. DeGuzman, 'Proportionate Sentencing at the International Criminal Court', p. 24.
12. *The Prosecutor v. Jean-Pierre Bemba Gombo* (Defence Notice of Appeal against Decision on Sentence pursuant to Article 76 of the Statute), ICC-01/05-01/08-3412, 22 July 2016; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Prosecution's Notice of Appeal against Trial Chamber III's "Decision on Sentence pursuant to Article 76 of the Statute"), ICC-01/05-01/08-3411, 22 July 2016.

The International Criminal Court and challenges to the international rule of law

Jack Maxwell
12 December 2016

The International Criminal Court (ICC) is a pillar of the international rule of law, but in recent months it has been rocked to its core.

On 12 October, Burundi moved to become the first country to leave the international Court, as its parliament voted to withdraw from the Rome Statute, the treaty establishing the ICC.

On 21 October, South Africa followed suit, formally lodging its instrument of withdrawal with the United Nations. Justice Minister Michael Masutha explained that South Africa's membership of the ICC clashed with its domestic law granting immunity to sitting heads of state. In June 2015, President Jacob Zuma raised international ire by refusing to arrest Sudanese President Omar al-Bashir, indicted for genocide, crimes against humanity and war crimes, while he was in South Africa for a summit.

On 24 October, the Gambia announced that it too was withdrawing from the ICC. Information Minister Sheriff Bojang declared the ICC 'an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans'.

Kenya and Namibia have suggested that they might join this African exodus.

These events underline the deep challenges the ICC faces in Africa. The Rome Statute entered into force on 1 July 2002. Since then, the ICC has opened 10 official investigations, nine of them in African countries. All of the 42 people indicted have been from African countries. As ICC President Sidiki Kaba noted recently, 'many Africans perceive the ICC to be an instrument of judicial imperialism which seeks to punish Pan-African leaders.'

But a closer look at the Court's record shows that the reality is more complex. Five of the nine investigations have been initiated by the country itself: the Democratic Republic of the Congo, Uganda, Mali and Central African Republic (twice). Another two – Libya and Darfur, Sudan – were referred to the ICC by the Security Council.

Meanwhile, the ICC continues its investigations into Western wrongdoing. On 14 November this year, the ICC's annual report stated that there was a 'reasonable basis' to believe that, in interrogating detainees in Afghanistan, members of the United States armed forces and the CIA 'resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape.' The Court is also examining claims of British war crimes in Iraq, and Russian complicity in crimes against humanity in Ukraine and South Ossetia, Georgia.

The ICC has its flaws. Its jurisdiction depends largely on consent. This principle reflects the importance of state sovereignty, but at its worst permits rich and powerful countries to defy the Court's mandate. The United States, Russia, China and India are not parties to the Rome Statute. The United States has gone a step further. Under the American Servicemembers' Protection Act, the President may use 'all means necessary and appropriate' to bring about the release of any United States or allied personnel 'detained or imprisoned by, on behalf of, or at the request of the International Criminal Court'.

The ICC is also, like most things in international relations, susceptible to the Security Council. As noted above, the Security Council may refer situations to the

ICC over which it would not otherwise have jurisdiction. It can also require the ICC to defer an investigation or prosecution for a period of 12 months, which may be renewed indefinitely. The five permanent members retain their usual veto powers over these resolutions. In 2014, for example, China and Russia barred referral of the situation in Syria to the ICC, despite credible allegations of genocide, war crimes and crimes against humanity. As President Kaba concedes, these institutional features give 'the impression that international justice applies double standards'.

Despite these limitations, the ICC remains crucial to the international rule of law. The conceit of the Rome Statute is that power must be subject to certain foundational rules: prohibitions on the most egregious violations of human dignity.

In the words of article 27, these rules

> *apply equally to all persons without any distinction based on official capacity*

Consistently with the principle of equality before the law, 'official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official' does not exempt a person from international criminal responsibility.

Finally, the ICC enforces these rules in accordance with the core requirements of a fair trial: the right to be informed of the charges one faces; the right to adequate time and facilities for the preparation of one's defence, including the right to counsel; the right to be present at one's trial and to examine the evidence put by the prosecution; the right to silence; the presumption of innocence; proof of guilt beyond reasonable doubt; an independent prosecutor, who is bound to investigate incriminating and exonerating circumstances equally.

Pursuant to the principle of complementarity, these rules are enforced primarily by a country's domestic courts, with the ICC a forum of last resort. As Luis Moreno

Ocampo, the Court's first prosecutor, stated:

> *the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.*

Ocampo's comment also points to how the ICC indirectly reinforces the international rule of law, by assisting 'the regular functioning of national institutions'. According to Elena Baylis, domestic courts in the Democratic Republic of the Congo have used the Rome Statute when prosecuting people for war crimes and crimes against humanity, incorporating its definitions of crimes and standards of due process. The ICC, and the international legal networks that have developed around it, can model and cultivate the rule of law in domestic legal systems around the world.

The discontent of Burundi, South Africa and the Gambia, among others, should spur on the ICC as an institution: to strive towards universality; to obtain the resources to fund investigations across the globe; to communicate the Court's values, principles and doctrines to an ever broader audience.

The ICTY and the Rule of Law

Uzma Sherieff
15 January 2016

The rule of law principle that ensures accountability to the law by both citizens and government has had an important role to play in ensuring justice for victims of war crimes.

Last year saw the 20th anniversary of the Srebrenica genocide, the pinnacle in many ways of a brutal and devastating conflict that upturned an entire region. The fateful anniversary brought many to consider what progress Bosnia has made in rebuilding itself after the 1992-1995 war. Has it been successful in developing peace and stability after an absolute breakdown of the rule of law? Has Bosnia, and the former Yugoslavia as a whole, successfully dealt with its tumultuous recent past?

For many, the answer is intimately tied to the work of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY was set up in in 1993, following conflicts in that region throughout the 1990s, in an effort to hold governments and their agents accountable for unlawful actions taken during those conflicts.

This article will consider the legacy of the ICTY, as it currently winds down its activities in The Hague. What was the ICTY created to do? Has it been successful? What kind of challenges has it faced? Finally, how has the ICTY been important in advancing the rule of law?

1993: A United Nations mandate

The ICTY was created in 1993, in the midst of the Bosnian

War, to investigate and prosecute war crimes, crimes against humanity, and other violations of international humanitarian law that were reportedly taking place in the former Yugoslavia.

The breakdown of the former Yugoslavia from 1991 into separate sovereign nations proved messy and violent, as ethnic divisions permeated borders, and shadows of history flared anew between Serbs, Croats and Bosnian Muslims. Reports of mass killings, forced displacement, and torture of civilians, first in Croatia and later in Bosnia & Herzegovina, deeply shocked the international community, which found itself confronted by images of detention camps and violence for the first time since the scenes of the Holocaust and World War II.

With the determination to prevent further atrocities and account for what had passed, the United Nations Security Council passed Resolution 827, formally establishing the ICTY . It was the first time that the Security Council had used its mandate for the 'maintenance of international peace and security' to establish an ad hoc criminal tribunal.

The ICTY was given a finite material and territorial jurisdiction, but an open-ended temporal jurisdiction: it could try individuals (rather than states or organisations) for war crimes, crimes against humanity, and genocide that had taken place on the territory of the former Yugoslavia, so long as these crimes had taken place on or after 1 January 1991.

The open-ended time frame has allowed the ICTY to investigate a broad range of alleged violations, including those arising from the later conflict in Kosovo, despite this not being originally envisaged by the Security Council.

Early Years

As was perhaps inevitable for a new venture of this scale and purpose, the ICTY struggled to fulfil its mandate and carve a place for itself in its early years.

With the war in Bosnia raging on, and the Dayton Accords not yet signed, the ICTY had a difficult time convincing countries suspected of harbouring criminals to turn them over to The Hague for trial.

Given the ICTY's lack of enforcement power, this meant that it did not hold any trials until 1996, and, even then, its first trials were of individuals such as Dusko Tadić, who bore only low- to mid-tier responsibility in the conflict.

The sensitivities of conflict also made it difficult for ICTY Prosecution investigators to collect evidence and find witnesses, as people were suspicious of the ICTY and its activities, or hesitant, for safety reasons, about becoming involved and giving public testimony.

On an institutional level, the ICTY was mired in political tensions, skepticism from all sides, United Nations bureaucracy, and a lack of sufficient resources.

With these factors ever present, it was imperative that the ICTY either build an independent, impartial and internationally-trusted name for itself to encourage State and witness cooperation, or fail its mandate completely.

From Small to Big Gains

The turning point for the ICTY arrived following the issuance of a string of high-profile indictments in 1999, including that of Slobodan Milosević, the then President of the Federal Republic of Yugoslavia.

The transfer of Milosević to The Hague by Serbian authorities in 2001, and the beginning of his trial in 2002, was a promising sign of a fresh start for the ICTY's relationship with the States of the former Yugoslavia. Serbia's cooperation, particularly, was, and would be, crucial for the ICTY's activities.

Milosević's trial was never completed, as he died in detention in 2008; however, the traction that his trial created arguably offered the ICTY both visibility and legitimacy, and paved the way for the high-profile

transfer and trial later on of Radovan Karadžić and Ratko Mladić, both trials being recently completed or underway.

Winding Down and Looking Back

As the ICTY nears the end of its Completion Strategy and winds down its activities, many things can be said of the legacy that it will leave behind.

The ICTY has been criticised for the length of its trials and the selectivity of its indictments, with critics arguing that defendants have not been offered fair and prompt trials.

It has also been argued that the ICTY has not been able to foster reconciliation in Bosnia or beyond, as ethnic divisions remain tangible in the former Yugoslavia. However, this was a significantly ambitious expectation of the ICTY.

With the wealth of its political and logistical obstacles considered, the ICTY has had a crucial role in shedding light on the atrocities of conflict, and giving a voice to victims on an international scale.

It has also vastly developed the jurisprudence on international criminal law, delivering landmark judgments, and broaching new fields such as the prosecution of conflict-related sexual violence.

Strengthening the rule of law

Finally, the ICTY has also crystallised the importance of fundamental rule of law principles, such as the impartiality of judicial proceedings, and the importance of providing every defendant a fair trial with strong defence representation, notwithstanding the political climate, or scale of evidence behind indictments for war crimes and genocide.

In recent years, the ICTY has begun transferring mid- to lower-tier cases to local war crimes prosecution bodies in Bosnia, Croatia, and Serbia, with the aim of helping strengthen a rule of law culture in these countries, at least with regards to war crimes.

While it remains to be seen whether this will have a lasting or embedded effect, perceptions and expectations of justice have certainly shifted considerably and favourably in the former Yugoslavia in light of the work of the ICTY.

Looking back on 20 years since the end of the Bosnian War, it is clear that there is much left to be done in Bosnia, and the region at large, to address both the past and the future. However, the ICTY has been a crucial instrument in the region's transition from conflict to post-conflict stability.

Despite its imperfections and challenges, the ICTY has been uniquely placed to give voice to victims, record experiences of conflict, and promote a fair and impartial standard of judicial proceedings internationally. Its work has solidified the principle that power is not above the law.

In doing so, it will leave behind a contentious but important legacy in the advancement of the rule of law and the global fight against impunity.

Justice and the Rule of Law in The Hague: The Trial of Ratko Mladić

Uzma Sherieff
27 January 2016

Last year, the world commemorated the 20th anniversary of the end of the Bosnian War. Although the Dayton Peace Accords ending the war were signed in November 1995, reminders of the Bosnian conflict are still very much present today.

One such reminder is the ongoing trial of General Ratko Mladić, former leader of the Bosnian Serb army, at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague.

Who is Ratko Mladić?

Amongst the many ICTY defendants to go on trial in The Hague thus far, Ratko Mladić is one of the most notorious.
Mladić was born in 1942 in Kalinovik, Bosnia, which was then part of Tito's Yugoslavia. His childhood was marked by the death of his father at the hands of pro-Nazi Croatian Ustaše troops in 1945. Mladić began his military career in 1961 as a regular officer in the Yugoslav People's Army.

As Yugoslavia began to disintegrate in 1991, and ethnic tensions in the region escalated, Mladić quickly rose within military ranks to become a general of the Yugoslav Army. He became widely known for his Serbian nationalist motivations.

By 1992, Bosnia was truly splintering.

A Bosnian Serb political faction, the Republika Srpska, had solidified and adopted a strong Serbian nationalist streak, sparking a direct conflict between Bosnian Serbs, and the Bosniaks and Croats within the country. Mladić was appointed leader of the new Bosnian Serb army, the Vojska Republike Sprkse (VRS).

The incidents that followed in the next three years under his leadership of the VRS have been widely condemned as some of the most egregious crimes against humanity to be seen since World War II.

Indictment, Search, and Capture

Mladić was indicted by the ICTY at the height of the Bosnian war in 1995.

However, the Tribunal's lack of enforcement measures immediately posed a difficulty: the actual arrest and transfer of Mladić to The Hague remained elusive. While the original indictment included charges of genocide, crimes against humanity, and a number of war crimes, these charges were further amended at the end of 1995 to account for the killings at Srebrenica.

Mladić was a key piece to the ICTY puzzle – his evasion of arrest for more than a decade struck at the heart of the Tribunal's mandate.

Mladić was eventually captured in hiding in May 2011 by Serbian special police forces in a small country town in northern Serbia. He was speedily transferred to The Hague, and, in 2012, eight years after his indictment was initially issued, hearings in the case of Prosecutor v Ratko Mladić began at the ICTY.

His ultimate arrest heralded a critical positive shift in attitudes towards the Tribunal in Serbia; after years of widespread reports that Mladić was being harboured by Serbian military forces, a demand by the Serbian leadership that all ICTY arrest warrants be complied with initiated a renewed search for the fugitive general.

Allegations against Ratko Mladić

The trial of Ratko Mladić centres on the charges of genocide, crimes against humanity and war crimes, which further include persecution on political, racial and religious grounds, extermination and murder, forced deportation, the taking of hostages, and unlawfully inflicting terror upon the Bosnian Muslim and Croat populations of Bosnia.

The case is founded upon the concept of individual criminal responsibility whereby, under Article 7(1) of the ICTY Statute, Mladić's planning, ordering, aiding, and abetting of a range of unlawful acts as leader of the VRS, allegedly makes him individually responsible for these crimes.

Mladić is further accused to have participated in a joint criminal enterprise, notably with former Republika Sprska President Radovan Karadžić, between October 1991 and November 1995, with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia & Herzegovina. He is accused of participating in specific joint criminal enterprises that aimed to:

Spread terror amongst the civilian population of Sarajevo, most notably through sniping, shelling and siege tactics;
Eliminate Bosnian Muslims in Srebrenica; and
Take UN personnel as hostages.

Issues at Trial

The prosecution case against Mladić seeks to establish his superior command and control over the unlawful acts committed by the VRS, and disprove the Defence claim that Mladić was a mere soldier following orders.

The case is certainly one of the largest the ICTY has ever conducted. The sheer volume of evidence brought by both sides, and the significance of the events the trial deals with, has left the trial still ongoing more than three years after its first hearing, with the current stage being the presentation of Defence witnesses.

The length of the trial has brought to light a critical conflict in rule of law issues at the ICTY.

On the one hand, a fundamental rule of law value is that justice is done through due process, wherein every aspect of the trial is conducted fairly and appropriately and the rights of all parties are respected and properly investigated.

On the other hand, however, another rule of law value is the accused's right to an undelayed and expeditious trial.

The trial of Ratko Mladić has reilluminated these issues, with concerns being voiced about delay due to procedural matters, oversights and the generally slow-moving nature of international justice.

Looking ahead

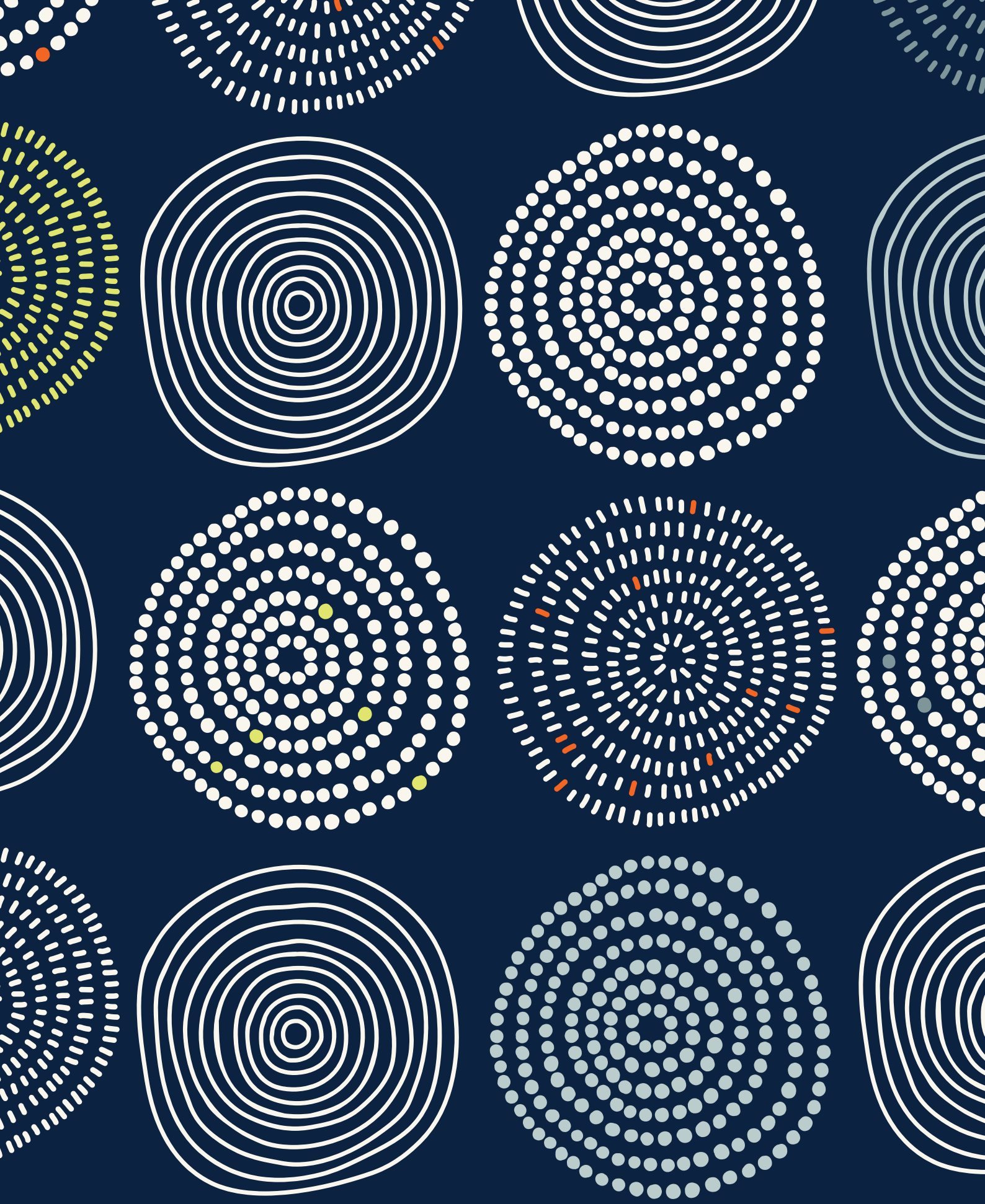
Ultimately, the difficulties of conducting an international trial must be remembered: while domestic trials can more readily be conducted expeditiously with immediate rights to access and evidence granted, the ICTY is tasked with dealing with an immense amount of material amidst international pressure, limited resources, and a challenging political climate in the Balkans, where cooperation is not always guaranteed.

While the question of what impact trials such as this have on post-conflict reconstruction awaits a conclusive answer, it is clear that the trial of Ratko Mladić has played a key role in the story of international criminal justice to date.

Ratko Mladić's arrest, capture and trial have been heralded as a triumph for the rule of law in Europe and the world over, as the victims of the Bosnian War are finally offered a semblance of justice and the opportunity for their stories to be documented.

Notwithstanding the challenges it faces, the Mladić trial process actively reinforces that crimes of war are an important matter for global justice.

Where the reaction of a civilised global community is to put perpetrators of war crimes to trial, it is clear that the rule of law has prevailed.



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