

Symposium ICLN June 14th 2007
5 Year Anniversary ICLN

“The future of professions in international criminal law”

Michael Kennedy, President of the College of Eurojust

“Synchronisation of investigation and prosecution in an international context”

Hans Holthuis, Registrar of the ICTY

“Questions of international law in the support of international trials”

The ICTY consists of: Chambers, Registry and Prosecution. The function of the Registry is to support judicial activities. The Registry is a neutral organ of which the following tasks can be distinguished:

- a) court management, operate a ‘victims and witness unit’ and a ‘detention unit’
- b) provide a legal aid system, providing for counsel standards on basic requirements (such as rights of the accused)
- c) provide translation

Some of the decisions and policy the Registry had and has to decide on are entirely new and have never been encountered before. An example of this: how to decide on ‘forced feeding’ when a detainee is on hunger strike. Getting witnesses and victims to The Hague to testify is a huge logistical challenge. Rules and procedures for witness hearings have to be established. You have to think about things such as e.g. voice distortion. Investigators need to be briefed; the Registry is to provide psychological support. The Registry is also responsible for establishing 3rd country agreements to relocate witnesses that are intimidated.

Working for the Registry you must take into account prison rules and agreements. It is an ongoing challenge to convince a host city to realise what it means to have an international institution in its midst.

Wolfgang Schomburg, Judge at the ICTY Appeals Chamber

“Peculiarities of international trials”

Judge Schomburg points out that he speaks in his personal capacity and not on behalf of the ICTY, another UN organ or the UN in general. He indicates that his

remarks are not to be seen as criticism on the two tribunals – on the contrary – he fully supports the tribunals which he considers present a real breakthrough.

About the profile of a judge working on the supranational level and in an international environment; such a judge is a prisoner of his/her national legal system. A judge is to be elected by the General Assembly. Ideally this results in a selection of judges with a minimum of 5-7 years forensic or international experience. It is positive that in the statutes of the newest tribunal (Lebanon) it is stated that a judge needs to have extensive judicial experience.

Judge Schomburg points out that it should be possible to work together with institutions such as Europol, Eurojust and the Schengen Information System.

Language skills are highly important. We should be aware that almost no one is perfectly fluent in both court languages (English and French). Also we have to be aware that interpretation and translation mistakes happen. Therefore – to be sure of the content of documents- , Judge Schomburg argues, judges should be assisted by native legal experts.

All judges come from different legal systems and when we want to speak about legal systems in the future, a procedural law *sui generis* should be established. In such a general procedural law, elements of widely shared non-western legal systems such as the Shari'a could be introduced.

On the role of a judge, Judge Schomburg asks the question 'when deciding on the future of a human being, when knowing that evidence is available with the prosecution – can a judge intervene and ask for evidential documents?' Or is it so that 'what is not in the file, is not in the world'. Would an activist judge be preferential?

Some judges have difficulties to understand a system with hostile and friendly witnesses. For them any witness is just a witness and should not be labeled hostile or friendly. The sentencing practice also is a difficult exercise. The observation of Judge Simma (ICJ) that customary international law is nothing more than imagined by academics is exemplary for this.

Educational work of current international criminal law judges should lead towards better and broader education of judges. There is, according to Judge Schomburg, a need for vocational training before starting in the function of judge at an international tribunal. Next to this, continued education and a model code (harmonised) for criminal proceedings would be helpful. A UN institute for the training of judges should be established, the Syracuse Institute can serve as an example. The Hague, being the legal capital of the world, should strive to

establish educational facilities to serve its international legal community. Another point is the selection of judges, this should not (only) be administered via the recommendation of a selection panel.

Harmonisation of international criminal law is very important; we should arrive at an international criminal law that is worthy to bear the title.

Geert Jan Knoops, International defence lawyer and Professor of International Law

“What requirements has an international defence lawyer to meet from a professional point of view?”

Mr Knoops points out that ethical codes can make it difficult for lawyers to function in an international trial. When the ethical code of an international tribunal or court is incompatible with the national ethical code of a lawyer, there is no other choice than to withdraw from a trial before that court.

Theo de Roos, Professor in Criminal Law at Tilburg University

“Characteristics of International Criminal Law as a scientific discipline”

Discussion

Question to Judge Schomburg: “You mentioned the different legal backgrounds of different participants and that sometimes these differences were being stressed for political reasons. By whom was this done, for what purpose and with what impact?”

Reaction by Judge Schomburg: This is sensitive issue; there is a tendency to fight for one’s own system. Some say that the rules of procedure have been formulated in the US Ministry of Justice. Fact is that the tribunals are more based on common law than on civil law. Why neglect the legal system of the Shari’a? This can be considered a flaw in the system. Academics should develop procedural law sui generis. Different approaches in different tribunals should be combined to find the best common solution. The UN may develop an overarching system (rules of procedure and evidence) to fill in all the gaps. This should be delegated to academics.

Question to Michael Kennedy: “About the context (numbers) of human trafficking utilised by Eurojust; do they cover only human trafficking with the aim of sexual exploitation or do they also cover trafficking domestic workers, personnel of e.g. restaurants, bars and other types of workers?”

Reaction by Michael Kennedy: "Eurojust uses a wide definition, all smuggling on a criminal basis is considered human trafficking"

Question to Geert Jan Knoops: "When we take the Charles Taylor trial as an example; if an investigation team cannot provide sufficient evidence or documentation the prosecution complains. What if the defence counsel finds incriminating evidence - this may result in conflicting loyalties for the defence lawyer, how does he concur his ethical code of conduct with his legal obligations?"

Reaction by Geert Jan Knoops: I would have a moral problem but as a lawyer I cannot share the evidence with the Prosecution. The only solution would be to withdraw from the case since one cannot defend the defendant for 100% convinced when one is aware of this incriminating evidence.