

Defending the Indefensible?

Former International Tribunal Defense Lawyer Demands Justice for All

By Abirame S and Marius Smith

Even in the halls of the courts of international justice, those who choose to defend alleged war criminals are not necessarily the most popular people. One such person is Judge Howard Morrison, a UK circuit judge and international law expert who worked as a defence lawyer in international criminal tribunals for almost a decade. If Morrison's speech to the Castan Centre in March was any indication, however, it seems that the pressure of such a role has not deprived him of his sense of humour. Before moving on to the weighty topic of the evening, he paused to observe that the results of a Californian study suggested that it didn't matter what he said because three quarters of us would spend the lecture immersed in their our erotic thoughts.

Morrison drew on his experience to address the lack of justice often inherent in international tribunals, the enactment of anti-terror legislation and the recent trial and execution of the former Iraqi dictator, Saddam Hussein.

While it is easy to label alleged human rights abusers as "evil", Morrison said that such labels often feed the prejudice of those involved in the trial process and distort the integrity of that process. The status of international criminal tribunals as protectors of international justice is compromised, Morrison suggested, if they fail to respect basic human rights. Morrison stated that human rights entailed "an equality of esteem for one another", regardless of whether they were victims or perpetrators of human rights violations. However, Morrison acknowledged the difficulty in obtaining sympathy for accused in international tribunals. To illustrate his point Morrison drew an analogy between the perpetrators of human rights abuses and scorpions. Getting support for a campaign to save scorpions would be far more difficult than getting support for saving koalas.

However, Morrison noted that the situation for defendants has improved since the Nuremberg and Tokyo criminal tribunals, which had no proper appellate procedures and arguably created retrospective criminal laws. He said that the Geneva Conventions had created greater protection for the accused, yet institutional prejudice against alleged perpetrators remains far from eradicated.

Morrison also argued that international tribunals are inherently difficult to manage. Most consist of a mix of lawyers and judges from the common and civil law traditions. In Morrison's view, the resulting confluence of "opposing views of judicial philosophy" tend to undermine procedural rights associated with the adversarial legal system. Anecdotally, Morrison made some startling revelations about the way defense counsel were treated in the ICTY tribunals. For example, important documents that prosecutors had exclusive access to were not disclosed despite repeated requests for

these documents. Corruption among witnesses and even tribunal lawyers was also often an issue. In Morrison's view, it was preferable for the prosecution to fail in the odd case than to risk the dignity of the court. However he acknowledged that international tribunals were subject to political forces. For example, it was clear that the Kigali government in Rwanda would withdraw its support if the tribunal did not convict alleged Hutu perpetrators, or if it charged Tutsis. Loss of government support would result in the tribunal being shut down. To date not a single Tutsi has been indicted but the tribunal had a mandate and the duty to treat both sides equally and investigate all human rights abuses, however unpopular it may be with any particular set of vested interests.

Morrison also cautioned against impressions created by the media. For instance, during the trial of Saddam Hussein, Saddam only interrupted the court on one day for a total of nine minutes. Yet the media broadcast seven minutes of his interruption and nothing of the rest of his testimony or the other 5 hours of court proceedings. Thus it was important to distinguish between the highly subjective impressions given by the media as opposed to the reality of the situation. It was also important for critics to be balanced and realistic. There was no international court that had the power or jurisdiction to try Saddam for instance, yet many who should know better still maintained that he should have been tried by the ICC which in reality had neither geographical nor temporal jurisdiction. Many observers had complained that Human Rights Watch [that had remained silent in the aftermath of the execution without trial of the former Romanian President and his wife], did or would not properly recognise the real efforts made by the Iraqi High Tribunal to give Saddam an open and public trial possible due to the antipathy against the American led invasion of Iraq. A fair approach should be indivisible.

On a domestic note, he cautioned against some of the risks of "anti-terror" legislation, pointing out that such legislation was often unnecessary when most terrorist acts could easily be prosecuted under existing criminal legislation. Moreover, anti-terrorism legislation tended to blur the line between intelligence – which is often unreliable – and evidence. It was also easy to vilify alleged offenders by labelling them as terrorists as a pejorative rather than descriptive nomination.

In conclusion, Judge Morrison reiterated that however "bad" an accused seemed, a fair trial must be an absolute minimum guarantee. He called upon international courts to maintain high standards; to try accused persons in a way that the international community could be proud of. He encouraged us, his audience, to "throw stones into the pool of complacency". Revisiting his opening quote Judge Morrison affirmed that the international community owed alleged perpetrators, "if nothing more, nothing less than equality".

