

## CAN INTERNATIONAL COURTS DO JUSTICE?


*In January 2009, a symposium in Oxford explored the question: 'Can international courts do justice? Conceptions of justice in responding to conflict'. Phil Dines attended and reports on the event.*

The symposium, organised by the Foundation for Law, Justice and Society, coincided with the start of the International Criminal Court's (ICC) first trial – of Thomas Lubanga, the Congolese rebel leader accused of using children in armed conflict – a reminder of the real-world significance of the issues.

The event opened with a lecture by Mark Drumbl (professor of law and director of the Transnational Law Institute at Washington and Lee University) entitled 'Justice after atrocity: a cosmopolitan pluralist approach'. He questioned the reductionism of existing orthodoxies of international criminal law, outlining a proposal for reform in cases concerning genocide and mass atrocity, to expand the lexicon of international justice beyond the courtroom. He showed how questions of victimology are not adequately addressed by criminal law, since crimes against humanity are, by definition, crimes in which we are all victims. Drawing on the Lubanga trial, in which child soldiers were called as prosecution witnesses, he demonstrated the moral complexity of such cases, given that many perpetrators, including Lubanga, were children when they committed their crimes and were forced into joining military training camps.

Recognising collective responsibility in cases of collective violence was of paramount importance, he argued: '... criminal law builds on a major fiction: namely that, as Nuremberg intoned, wide-scale atrocity is the crime of men... Atrocity is also the product of groups, of acquiescent bystanders, of collective action, of colonial histories and blood diamonds, and of the passivity of foreign states.'

Professor Drumbl went on to claim that the criminalisation of certain individuals, embodied in the mandate of the ICC, prompts scepticism towards alternative mechanisms that may be used in the quest for justice, many of which are preferred by afflicted populations. His proposal for a cosmopolitan pluralism involved a nuanced vision in which universal norms regarding accountability for extreme evil are operationalised through diverse mechanisms that will vary according to the context. Whilst acknowledging the tension that this theory gives rise to, he asserted its validity since, though atrocity violates universal norms, it is also a profoundly local matter, and to achieve true reconciliation within the afflicted community, local extrajudicial mechanisms – such as truth commissions and public enquiries – must be incorporated into the international justice narrative.

The lecture, organised in collaboration with the Centre for Socio-Legal Studies and Transitional Justice Research at Oxford University, was followed the next day by a roundtable of experts from academic, legal and practitioner communities, including a former senior lawyer at the ICC, Morten Bergsmo; the director of Human Rights Watch, Tom Porteous; and Ben Shepherd of the Foreign and Commonwealth Office. 

## THE DATA CRISIS IN THE UK

*Data security is a concern that pervades all aspects of society. Jamie Grace, lecturer in information law and data protection at Derby University, examines the current state of data protection and anticipates future problems.*

The mess we're in

In many ways, issues of data protection are becoming ever more prominent in society as the 21st century progresses. I recently gave a public lecture in an attempt to highlight to my students and colleagues what the mainstream media has increasingly managed to achieve: to put issues of data protection, and conjoined issues of privacy, into the position of one of society's newest woes. The European Court of Human Rights might agree we live in a country today where privacy is given too little emphasis – a suggestion made in a press release from the courts following the recent decision handed down in *S & Marper v UK*:

In conclusion, the Court found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, failed to strike a fair balance between the competing public and private interests, and that the respondent State had overstepped any acceptable margin of appreciation in this regard.<sup>1</sup>

The Data Protection Act 1998 is intended to protect – along with the common law doctrine of confidentiality and the evolving doctrine of privacy – certain aspects of our private sphere of life and, technically speaking, all of our 'personal' or 'sensitive personal' data in the hands or control of others. But all is not well with this data protection and privacy framework.

High-profile losses of personal data by public and private-sector organisations are making the British public ill-at-ease with a perceived increased risk of identity fraud – all set against a contextual background of economic hardship and recession. This, then, is our 'data crisis' – it is a crisis of confidence in the state and in the state's intentions in protecting our security as individuals.

### Why the phrase 'data crisis'?

Authors like Mick Cavadino and Jim Dignan have described a 'prison crisis' as a constant threat to our criminal justice system well enough to make it a real concern, even if they were not the first to describe it so.<sup>2</sup> In a similar vein, I believe we are engaging with a 'data crisis' in the UK. We have a toxic mix of factors, namely: too many data controllers; too much data unsecured; too many new databases for this state agency or that; and too many unscrupulous or negligent individuals.

### New powers?

How should the Government go about cleaning up this toxic mix of too little regulation, too little enforcement and too few resources? It may be a case of the Government's own watchdog, the Information Commissioner's Office (ICO), not having enough money to spend. The ICO's own auditors don't think it will be able to cope with demand on its resources, so the crisis is going to get a lot worse before it gets better.<sup>3</sup> But, if there is not enough money sloshing about for the ICO to perform its role correctly or effectively in future, what hope is there in the current financial and economic climate, when what capital there is actually available to government would arguably be best spent elsewhere to win votes and help businesses?

### Jack Straw and s 77 of the CJIA 2008

It may not be for much longer that these high-profile losses of personal data by organisations are regarded as data crises as opposed to 'data crimes'. Section 77 of the Criminal Justice and Immigration Act (CJIA) 2008 and s 55 of the Data Protection Act 1998 between them will now provide for custodial sentences of up to two years for committing the offence of 'obtaining or disclosing' personal data. The role of the media in provoking the uptake of this increase in sentencing powers goes without saying – witness s 77(4) of the CJIA 2008. Indeed, Jack Straw is under a legislative duty to consult 'media organisations' as he considers appropriate. Barack Obama was praised for the way he marshalled new media to help him crush John McCain in the key demographic of younger people and some commentators have

Responding to the points raised by Professor Drumbl, the participants discussed the issues confronting international courts and tribunals and drew on case studies from Africa, the former Yugoslavia, Iraq and Cambodia to assess how effectively these bodies have delivered justice. Phil Clark, research fellow in courts and public policy at Oxford and workshop convener, drew on his fieldwork in Uganda and Rwanda in his comments regarding the International Court of Justice, which, he claimed, often served as a forum for 'war by other means', because protagonists use the international courts as arenas to play out existing conflicts. Clark also cited the trial of Thomas Lubanga, arguing that this type of criminal justice does not resonate with the people of the Democratic Republic of the Congo who are demanding some evidence of collective state responsibility for the conflict.

Leslie Vinjamuri of the School of Oriental and African Studies argued that the ICC has become an unintegrated tool of coercive diplomacy. She criticised the idea that, by indicting individuals, such as the President of Sudan, Omar al-Bashir, pressure can be brought to bear upon leaders such that they will lose domestic support and be removed democratically, since this process is dependent on the operation of high-functioning democratic institutions which are often lacking in the developing countries and failed states most afflicted by such problems.

This view was partially shared by Payam Akhavan, professor of international law at McGill University and former first legal advisor to the Prosecutor's Office of the International Criminal Tribunals for Former Yugoslavia and Rwanda. He agreed that the ICC could only achieve so much through its indictments, but

added that it must hold to account world leaders and send the message that genocide does not pay as an instrument of power. Citing the case of Sudan, he argued that the indictment of al-Bashir has brought pressure on him to find a scapegoat to mitigate his culpability, and has thereby severed the destructive alliance between the government and the Janjaweed militia accused of carrying out atrocities in Darfur. However, Phil Clark observed that there has been no lessening of the violence in Darfur despite this dissociation of the Janjaweed and the state, and he questioned whether the ICC is not, in fact, 'somewhat of a toothless tiger'.

The afternoon session was opened by Adam Branch of San Diego State University who critiqued the fact that the ICC has concentrated its prosecutions in Africa and, in so doing, effected Africa's political subordination through the evisceration of the principle of non-intervention of state sovereignty. This interpretation was rejected by Akhavan, who characterised the ICC as a fledgling institution operating against overwhelming odds rather than a powerful body bent on colonialisation.

The workshop was brought to an end by Morten Bergsmo who gave an insider's perspective into the working of the court. He acknowledged that, whilst certain quality control procedures could be improved to help prevent, for instance, the reversed testimony of one of the first child witnesses in the Lubanga trial, the court is an institution that should be commended for maintaining its independence in the face of strong political pressure on various fronts.

A full report of the workshop, plus transcripts and podcasts will be available at: [www.fljs.org/drumbl](http://www.fljs.org/drumbl).

noted that he may be held sway to public opinion on the web. One of the many ways that the election of Barack Obama as president has echoed that of John F Kennedy is his use of a new medium that will forever change politics. For Mr Kennedy, it was television. For Mr Obama, it is the internet.<sup>4</sup> Our politicians, it seems, are now able to dispense with consulting public opinion and go one better; consulting the views of the organisations who do so much to form public opinion in the first place.

### New threats?

The case of Baby P, a terrible tragedy, is perhaps a good rallying point for supporters in Government of the children's information database ContactPoint. Not to suggest that the current Government is terribly Machiavellian, but the tragedy that befell Baby P is certainly the latest in a series of shocking incidents, including the Soham murders and the case of Victoria Climbié, that have featured an element of data protection in the debate surrounding and following each occurrence. But ContactPoint is itself criticised widely as a serious risk to safety for children – an issue stemming from concerns over personal data security. Ever-present terror is the governmental argument in support of the tabled Communications Data Bill that would see details of all electronic communication transactions recorded by companies under a new legislative duty – a move some will undoubtedly see as fundamentally Orwellian in nature.

*Connecting for Health* is a new agenda to make the NHS healthier, wealthier, and ultimately wiser:

Modern computer systems, called the NHS Care Records Service, are being introduced in the NHS over the next few years. The computer systems are designed to hold [patients'] information securely and in confidence. They can be used by those treating her wherever she needs care. They can also make it easier to collect information on a group of patients and use it in other ways to improve health and care.<sup>5</sup>

But there is much concern amongst commentators, not only over issues of compromised patient confidentiality, but also over information security and potential losses of the most sensitive personal data. Richard Thomas, the current Information

Commissioner, has commented that it wouldn't harm the public overly much to be unaware of newer, bigger, more invasive databases or 'data sharing' initiatives, but he has stated that organisations that flout data protection law will be punished as aggressively as possible, presumably *pour encourager les autres*.

This is hardly joined-up thinking. Thomas and Walport have suggested 'that people are generally less concerned about (and possibly less aware of) the information flows that facilitate the provision of goods and services to them'.<sup>6</sup> But, when these complex information flows are halted, causing them inconvenience, or are compromised, causing them harm, then they'll notice.

### Yes, we can - a model for change?

Greater ICO powers of investigation and audit may well yet be offered to the government watchdog – the ICO has flatly stated it welcomes plans from the Ministry of Justice to afford it these extra powers. Combined with a greater allocation of resources for the ICO, these powers might see greater success, if not immediately creating a drop in the rate of media-inflated data crises, then creating a wider culture, at least amongst public-sector organisations, towards efforts to ensure organisational data protection compliance and best practice.

The present global financial crisis sees our current Government let off the hook with regard to issues of privacy, but concerns are still percolating through a general atmosphere of worry. Come the next General Election – whenever it may be and whoever wins – privacy and data protection look to be issues that will not simply fade away.

- 1 ECtHR press release: [www.echr.coe.int/echr](http://www.echr.coe.int/echr) (accessed 10.12.08).
- 2 See M Cavadino & J Dignan (2002) *The Penal System* (1st edn) Sage.
- 3 See para 6 of the ICO Audit Committee, 2007/8 Report, available from [www.ico.gov.uk](http://www.ico.gov.uk) (accessed 9.12.08).
- 4 C C Miller, 'How Obama's internet campaign changed politics', *New York Times*, 7 November 2008, from [www.nytimes.com](http://www.nytimes.com).
- 5 *Connecting for Health* (2008) NHS, p 6.
- 6 R Thomas (Information Commissioner) and M Walport (July 2008) *Data Sharing Review Report*, para 2.15