

Interest Group Discussion Session Papers  
Group Discussion

**INTERNATIONAL CRIMINAL JURISDICTIONS:  
NUREMBURG TO THE HAGUE<sup>1</sup>**

*Group Discussion<sup>2</sup>*

The Rapporteur, Ms Elisabeth Wilmschurst, Chatham House and UCL, referred to the overall theme of the conference, noting that Lauterpacht might not have written much about international criminal law but that his work resonated in the field. Commenting on Professor Dugard's introduction, she raised the question of what the Lebanon tribunal would do in case there was insufficient evidence for any of the crimes within its jurisdiction. With respect to the professionalism of the judges she commented that the UK had put forward a criminal lawyer for the position of a judge and had proposed mechanisms to secure the quality of the judges, but that these had not been used by the Assembly of States Parties. On the issue of immunity, she differed from the view of Professor Dugard. In her view, the law should not go beyond what states were prepared to agree in this context. In fact, the ICC might well be considered the high water mark of a now slightly declining interest of states in these matters.

The theme of the conference was the function of law in the international community. A relevant issue in this context was the tension between peace and justice, which had arisen in all situations the ICC had looked at. An extreme current example was the announced application by the ICC prosecutor for an arrest warrant against Sudanese President Bashir. Alex de Waal in the Washington Post of 28 June 2008 had warned against the catastrophic effects such a request would have: was this a dilemma the ICC prosecutor should take into account, or should the areas of law and politics be separated with other institutions, for instance the Security Council under article 16 of the Statute, dealing with the politics?

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<sup>1</sup> Cite as: 'International Criminal Jurisdictions: Nuremburg to the Hague - Discussion' in James Crawford and Margaret Young (eds), *The Function of Law in the International Community: An Anniversary Symposium*, (2008), Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law. Available at [http://www.lcil.cam.ac.uk/25th\\_anniversary/book.php](http://www.lcil.cam.ac.uk/25th_anniversary/book.php).

<sup>2</sup> Reported by: Mr Francesco Messineo and Ms Sarah Nouwen.

**Ms Mahmoud Arsanjani, United Nations Office of Legal Affairs**, held that international criminal law and its tribunals could not be seen as operating in a vacuum. Their function had to be related to the rest of the international legal system, whose primary function was the maintenance of peace, security and minimum order. This problem was clearly raised, directly and indirectly, at the Rome Conference. In fact, whenever criminal tribunals acted in a way conflicting with the basic function of the international community, or otherwise undermined the latter's important responsibility for peace and security, they acted as agitators.

Too often the Rome Statute and the ICC were analyzed as if they were one and the same. But the former was a treaty and the latter merely an institution to implement it. On one hand, the treaty certainly had already made a fundamental contribution to the international legal system: for instance, domestic criminal law had to be readjusted and it had rendered certain crimes no longer acceptable, even when committed by the political leadership. On the other hand, whether the Court could provide a useful contribution still remained to be seen.

**Professor William Schabas, Irish Centre for Human Rights**, observed that even though Hersch Lauterpacht was not thinking of international criminal law when he wrote his *Function of Law in the International Community* in 1933, his legacy for international criminal law was nonetheless fundamental. It had been Hersch Lauterpacht who had suggested the expression "crimes against humanity", asked by Robert Jackson in the context of the London International Conference on Military Trials of 1945 for a term nicer than "atrocities".

The *ad hoc* tribunals, too, had faced the problem of the relationship between peace and justice. For example, ICTY Prosecutor Richard Goldstone was asked by the then Secretary General of the UN, Boutros Boutros-Ghali, why he had not informed him before issuing indictments. Goldstone had replied that he was just a prosecutor, not someone who would have to think of political consequences. Another example related to the Special Court for Sierra Leone. In 2003 they had secretly indicted Charles Taylor. When Taylor went to a peace conference in Ghana, the Special Court made the indictment public, hoping that he would be arrested. Not only did this plan not work out, it also put an end to peace negotiations resulting in even more deaths. When asked for justifications for messing up peace negotiations Prosecutor David Crane first provided the Goldstone-answer, but then added that that one cannot negotiate peace with characters such as Charles Taylor, because he would have betrayed the other party anyway. This was venturing into African politics. It may be questioned whether a prosecutor was more knowledgeable than the African Presidents involved in the negotiations to make such an assessment. In fact, once

again, in Uganda, people in the ICC's Office of the Prosecutor thought they understood the political situation, but they did not. In sum, this was a problem that still needed resolution and which would soon again arise in Darfur. Louise Arbour would also have said something along the lines of "we are just prosecutors". But at the same time prosecutors get into politics.

**Ms Wilmshurst** agreed that this was an unsolved matter and noted that people tended to blame the prosecutor or the institution. But in the case of the ICC, art. 16 of the Rome Statute allowed the Security Council to step in and ask the Court to suspend investigations and prosecutions. On one view, prosecutors should avoid any politics. But there was also the view that the bringing of criminal proceedings would always be intrinsically political, because the choice of a few among millions of cases was bound to be influenced by factors other than merely limited resources.

**Ms Emanuela-Chiara Gillard, United Nations Office for Coordination of Humanitarian Affairs**, pointed out that the ICC Prosecutor gets involved in ongoing conflicts. This affected the work by humanitarian organisations. Since on the ground all internationals were considered as one and the same group, humanitarian organisations might be seen as providing information to the ICC, which increased the risk of their operations.

**Professor Charles Garraway, British Red Cross**, noted that, despite the misguided opinion of some lawyers, it was not they who ruled the world. Rules only worked insofar as the community accepted them, as the example of the rise in knife crime in London clearly showed: when entire communities abandoned the laws, citizens started carrying knives to protect themselves, regardless of the sanctions threatened or imposed. International criminal law only worked in situations where crimes were the exception rather than the rule, otherwise the system would simply be overwhelmed. This is why a holistic approach was needed: all agencies and disciplines available should be employed to solve the underlying problems.

**Professor Alain Pellet, Université Paris X-Nanterre**, declared himself more and more concerned that international criminal tribunals may not be answering the real needs of the international community. He shared Professor Dugard's concerns about the composition of the tribunals, a problem which extended beyond criminal jurisdictions to the whole of international law, certainly to the International Law Commission (ILC) and perhaps even the ICJ. Even more worrying, despite the large number of ratifications of the Rome Statute, the ICC still did not represent the international community, but only a number of virtuous states. Professor Pellet had tried his best to advance the creation of the court by a joint resolution of the Security Council

and the General Assembly, but had received no support in this endeavour. His most serious concern related to the jurisdiction of the Court. In this respect, the rules of the Rome Statute were unsatisfactory, and their practical implementation worse. If one took seriously the idea that those three or four crimes which were of interest to the international community should be tried internationally, the inclusion of certain crimes in the Court's jurisdiction was wrong: war crimes should not have been included in the Statute, because they were not necessarily of concern of the international community as a whole as for instance genocide was. On the debate between peace and justice, there was no alternative to the approach taken by Richard Goldstone, because it was the only way to take seriously the idea of accountability for international crimes. Crimes of concern to the international community as a whole were always and by definition an obstacle to peace.

**Sir Nigel Rodley, Professor, University of Essex; Member, Human Rights Committee,** observed with concern that ten years after the Rome Statute, the discussion today had already moved in the direction of trashing it. The ICTY and ICTR had been established because of failure to do something about the conflicts in the former Yugoslavia and Rwanda. Since that provided rather selective justice, a permanent institution was needed. A court that stood back waiting until crimes had been committed and would prosecute only once peace had arrived lacked legitimacy. The ICC was established as part of a bigger picture to end impunity. Impunity should not be too easily traded for temporary and often spurious peace agreements.

It would be best to have a general clause against amnesty in the Rome Statute, but there was a high risk that if the Review Conference dealt with it, the result would not be satisfactory. Amnesties were the expression of the inability and unwillingness of a domestic system to conduct trials. As such they were the best manifestation of the need for an international criminal court. Parties could make their deal at the national level, but the international community would not have to acquiesce.

**Professor Dugard** clarified that in his view the review conference should address the issue of amnesties. In certain circumstances amnesties might be acceptable, for instance the conditional amnesty that was part of the South African Truth and Reconciliation Commission process. Most people, however, opposed unconditional amnesties.

**Ms Suzannah Linton, University of Hong Kong** proposed reflecting on the basic functions of international law. It was extremely important to understand the domestic context within which

crimes had been committed and the aims of international criminal law when addressing those crimes. Would trying a minor warlord such as Lubanga have an impact on the population in the Democratic Republic of the Congo? The function of international criminal law should be that of a catalyst for changes within a society so that genocide and other crimes no longer occur. International institutions were often unable to achieve this. The focus should thus be on the territorial state to deal with the domestic order. On a more abstract level, one should also ask what justice means and to whom. International justice is formal justice, but not everybody buys into Western understanding of formal justice. Some countries cannot go down the route of international criminal law.

**Ambassador Matthew Neuhaus, Commonwealth Secretariat**, spoke of his recent experiences in Uganda and Rwanda. In both places international criminal justice was called into question as an expensive form of justice obstructing the resolution of problems. In Uganda, the President offered to use traditional justice mechanisms, as the Rome Statute supposedly provided for, but the ICC had been reluctant to address this issue. In Rwanda the Arusha tribunal was regarded poorly. Costing hundreds of millions of dollars, it had only led to very few convictions, while the traditional *gacaca* courts had addressed the issues for tens of thousands of people. The *gacaca* courts were overseen by internal justice mechanisms and the human rights commission. These courts were much better placed to render justice than a remote international criminal court. These remarks were not meant as an argument against the ICC, but those who believe in international criminal courts should take national instances seriously.

**Professor Vera Gowlland-Debbas, Graduate Institute of International and Development Studies**, focused on the relationship between the perception of legitimacy of tribunals and their establishment. Their legal bases were often hybrid. For instance, the Hariri tribunal in Lebanon was created through an insidious process: initially there was a draft agreement between the United Nations and Lebanon, but when it was not ratified in Lebanon for domestic political reasons the Security Council enforced it, simply changing the word “agreement” into “document”. The lack of a consensual treaty basis has impaired its legitimacy. The tribunal had ended up being a divisive factor in Lebanese politics.

**Ms Arsanjani** pointed out that as far as international organizations were concerned, international tribunals had had a negative impact on their work. The ongoing pressure on the ground to cooperate with the ICC had led to a problem of perceived neutrality, because all international personnel were perceived by local people as “UN staff”, and no distinction was recognized

between different institutions. Furthermore, a choice between ending impunity and peace was not available: the international community and the Security Council had to give their support for the enforcement of both. The Prosecutor had a lot of power, but had to fly on his own.

**Professor Dugard** noted that in the debate of the impact of justice on peace, most international criminal lawyers probably put the pursuit of justice above peace. But international criminal law should be seen in a broader context than international criminal jurisdictions. When the drafting of the Rome Statute was completed in 1998, the focus had been on the recent war in the Balkans. 9/11 had changed the entire situation. It had created the need to consider new types of crime falling outside the remit of international criminal courts, with the possible exception of the Lebanon court. Terrorism trials, too, required proper standards of justice. Or were suspects of terrorism destined to be tried by national courts?

**Ambassador Juan Antonio Yanez-Barnuevo of the Spanish Mission to the UN**, disputed Professor Dugard's clear-cut distinction between terrorism and Rome Statute crimes. While international terrorism as such did not appear in the Rome Statute, a number of delegations at the time of drafting had explained that such explicit mentioning was not necessary. An act of terrorism could amount to a war crime or, depending on the circumstances, a crime against humanity or even genocide, and then it would be covered by the Rome Statute. A number of commentators had made the same point. It had to be conceded that other acts of terrorism might not be covered.

**Professor Dugard** replied that there indeed had been a debate among scholars on whether September 11 was a crime against humanity and thus potentially covered by the Rome Statute. But it was also true that states had preferred to deal with terrorism through national jurisdictions, which gave them much more freedom to act as they wished.

**Professor Schabas** warned not to expect too much of the upcoming Review Conference. The general consensus seemed to be not to open up issues in that forum. In his opinion it would not be necessary to include terrorism in the ICC Statute because there was no impunity gap for terrorism. Generally states were willing and able to prosecute terrorism, apprehension of terrorists being the only problem. As regards the Security Council's listing procedures the key problem was that not only the high level of due process of international criminal justice was absent, but the rule of law in its entirety. Some kind of judicial control was necessary in this respect, but it was not up to the ICC to decide on these issues. The ICC had rendered

noteworthy decisions a few weeks ago, first staying proceedings and then undoing that by not immediately releasing the accused. A Dutch lawyer could bring this before the European Court of Human Rights.

In the light of the distinction between law and politics, Professor Dugard pointed out that while the core crimes of international criminal justice were justiciable, terrorism was paradoxically treated as an extra-legal, conflict-related, non-justiciable issue.

**Professor Pellet** argued that while it might be possible to consider terrorism in some instances as a crime against humanity, the Rome Conference had formally refused to include terrorism in the Statute.

**Dr Bartram Brown, Chicago-Kent College of Law**, called for realism about international criminal law. International tribunals could not be expected to resolve every issue. It had already been a very difficult exercise to create the Court: for example, despite the initial proposals, the whole area of drug trafficking was excluded from the jurisdiction *ratione materiae* of the court. Much more time would be required before the court could reach its full potential. The Court was a baby that had to grow up.

**Ms Anne Lagerwall, Université Libre de Bruxelles** noted that there seemed to be consensus on the idea that the principle of complementarity was at the core of the ICC system. She wondered whether the practice of self-referrals might be at odds with this, potentially undermining the principle. Self-referrals could result in states using the ICC for internal political reasons.

**Ms Wilmshurst** recalled that the drafters of the ICC Statute had not contemplated the practice of self-referral. That did not mean that it was not possible. It was obviously highly convenient for the Prosecutor to know that the referring country would cooperate with the ICC, but it was true that this left open the possibility of political manipulation, as in Uganda. The Chambers had been very careful in their complementarity assessment. Despite the reservations of some commentators against self-referrals, they were a realistic way for the Court to start. The Court may soon move on to autonomous prosecutorial initiatives.

**Dr Ottavio Quirico, European University Institute**, remarked that to assess the role of international criminal law in domestic law it was necessary to deal with substantive issues. For

instance, what was the meaning of the expression “crimes of interest to the international community”? How would this relate to *jus cogens* and the relationship between individual and state responsibility? The ILC dealt with these two issues as separate ones, while their relationship should be the object of study. In turn, this could provide an answer to the question of the relationship between the ICC and the Security Council.

**Ms Arsanjani** noted that the idea behind the ICC was precisely that domestic courts were unable to deal with certain issues such as drug trafficking, but the Rome Conference had put this aside. Self-referrals, however, allowed states to shift the burden of prosecutions they were unwilling to carry out for financial or other reasons to the international community. This was why the practice of self-referrals had to be scrutinized to avoid a costly abuse of the court.

**Ms Wilmshurst**, concluding, noted that the discussion had touched upon many interesting questions. One dominant theme had been that of the relationship between peace and justice. In abstract, the two extreme positions were either that peace and security should take precedence over everything else, or that justice should (*fiat iustitia, ruat caelum*). How much should the Prosecutor involve its office in peace and security? The view attributed to Professor Goldstone was that the Prosecutor only follows the law. Other bodies, such as the Security Council, had a responsibility to step in when the political consequences of the Prosecutor’s action had to be taken into account. The Prosecutor could in some instances take some form of political advice, for instance timing, but there were logical and practical problems with this.

Despite the many critiques, the general gist of the discussion had not been critical of the project of international criminal justice as such, but rather of the impact the ICC sometimes had. Indeed, the positive results arising from the Statute were stressed.