

**Interest Group Discussion Session Papers
Moderator Comments**

**INTERNATIONAL CRIMINAL JURISDICTIONS:
NUREMBURG TO THE HAGUE¹**

Remarks of Professor John Dugard²

The moderator, Professor John Dugard, Centre for Human Rights, University of Pretoria, addressed three issues in the field of vertical international criminal law in the context of Martti Koskenniemi's paper: (1) the integrity of international tribunals; (2) limitations on international accountability, and (3) the state of due process of law in international criminal law.

On the first issue, that of the integrity of international tribunals, the establishment of international criminal tribunals was perhaps the greatest achievement of international law of the past twenty years. After years of failure and debate following Nuremberg and Tokyo, the creation of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC) had breathed new life into international criminal law. These courts were truly international tribunals with jurisdiction over international crimes and were staffed by international judges. The tribunals for Sierra Leone and Cambodia were more controversial, but these 'mixed tribunals' at least applied both international criminal law and national criminal law, had some international judges and had jurisdiction over crimes committed over a substantial period of time. Regretfully, the same could not be said of the Special Tribunal for Lebanon. This would apply only national law, not international criminal law, and one should have wondered whether a court with both national and international judges was the appropriate body to apply this law. Its jurisdiction was limited to those responsible for the killing of former prime minister Rafiq Hariri and related acts of terrorism. It did not include serious violations of international criminal law (crimes against humanity and war crimes) committed by Hezbollah and Israel at about the same time and in the same region. It may be wondered whether the Security

¹ Cite as: John Dugard, 'International Criminal Jurisdictions: Nuremburg to the Hague' 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.

² Reported by: Mr Francesco Messineo and Ms Sarah Nouwen.

Council acted in good faith when it established an international tribunal for the murder of Hariri but completely ignored the closely related atrocities that followed this assassination in the context of a broader regional conflict.

Another issue related to the integrity of international tribunals concerned the composition of these courts. In his view, such courts should ideally consist of national criminal court judges, criminal law practitioners and academics trained in international criminal law and international law. He stressed that diplomats and government law advisers lacked both the skills and perceived independence required for international criminal tribunals. He noted, however, that many states – particularly European states – had not hesitated to nominate to these tribunals their diplomats and legal advisers, and had seen them elected, especially in the ICC. Some of the diplomats had a legal training, but in the ICC a judge had been appointed without any legal training of any kind. Another example was the appointment of a Zimbabwean judge, the recipient of a farm from President Mugabe, as an *ad litem* judge in the important *Gotovina* case before the ICTY. Hersch Lauterpacht in *The Function of Law in the International Community* had envisaged an important role for what Ronald Dworkin described as the Herculean judge in the world order, substantially contributing to international dispute settlement and international justice. Consistently with this vision, international criminal tribunals should make sure that only qualified and independent persons of integrity were appointed as judges. Governments should be more careful generally about the nomination of persons to judicial office. He referred to the decision of the UN Administrative Tribunal to screen candidates and asked why this was not done for international criminal courts, in particular the ICC.

On the second issue, that of the limitations on international accountability, he warned against the prematurely optimistic view that the creation of international criminal tribunals, in particular the ICC, meant the end of impunity and brought about international accountability for international crimes. In fact, what had happened was that a group of 106 like-minded states had produced an ICC to try their nationals and those who committed international crimes on their territories. Over eighty states, including the worst violators of human rights and international humanitarian law, were not parties to the Rome Statute and showed little interest in becoming parties. He conceded that there was the possibility of a Security Council referral, but he noted that the Darfur situation had thus far been the only and not very successful instance. This was the price paid for opting for a court based on a multi-national treaty rather than one established by the Security Council under Chapter VII of the UN Charter.

As other limitations on international accountability Professor Dugard mentioned the non-surrender agreements concluded by the US with other states, the silence of the Rome Statute on the acceptability of amnesties and the *Arrest Warrant* decision of the International Court of Justice (ICJ). In particular, he criticized the latter judgment for granting unconditional immunity to incumbent heads of state and government and other officials before national courts. That decision had ignored the issues of *jus cogens* and complementarity. According to the principle of complementarity in the ICC's Rome Statute national courts should be the first to prosecute international crimes.

Turning to the third issue, that of due process and international criminal law, he noted that the ICTY, the ICTR and, most recently, the ICC had displayed a scrupulous regard for due process of law, at times leading to outcries from victims of atrocities. As an example he mentioned the recent ICC decision that Mr Lubanga had been denied the right to a fair trial. Professor Dugard contrasted this with the attitude of states and international organisations towards those suspected of terrorism, as illustrated by Guantánamo Bay, the extension to 42 days of detention without trial in the UK, the decision of the House of Lords in *Al-Jedda v. Secretary of State for Defence*, the listing procedures employed by the UN Security Council and the EU, and the national legislation enacted to implement Security Council resolutions 1368 and 1373 on terrorism. He realised that states preferred to deal with terrorism under national law, which gave them greater discretion. But he added that the notion of justiciability that featured so prominently in Lauterpacht's *Function of Law in the International Community* was threatened by anti-terrorism measures where governments preferred to deal with terrorism by political, extra-legal means. In Professor Dugard's view, the inclusion of terrorism in the ICC Statute would ensure that terrorists and their supporters are at least accorded due process of law protections that those guilty of the most horrendous crimes – genocide, crimes against humanity and war crimes – receive. But this issue and the question of amnesty, he lamented, were not on the agenda of the Review Conference of the Assembly of States Parties, which seemed stuck on the issue of the definition of aggression.

Undoubtedly the world was not a better place today than it was in 1998 when the ICC Statute was adopted. There was little evidence that the developments in international criminal law had had a major deterrent effect on international crime – with the possible exception of generals spending holidays at home rather than abroad and having become even more reluctant to leave office, after the precedents of Pinochet and Taylor. As for the other aim of the ICTY and ICTR, to bring about national reconciliation, he pointed out that they had failed in that respect, too.

International criminal law had made progress in the past twenty years, but there was still a long way to go and not too much cause for optimism.

