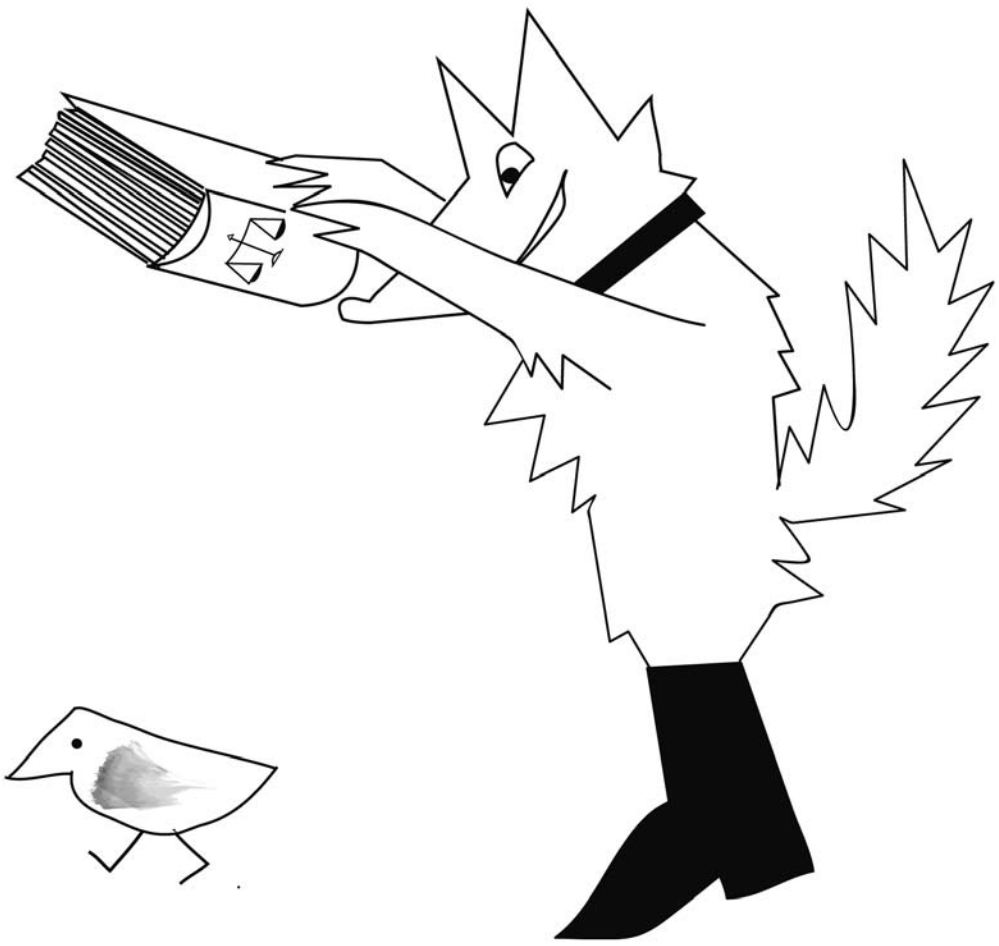
introduction

The Court lives in the real world. We must continue to provide that core predictability that distinguishes law from politics, but we have to do so in a way that is responsive to the legitimate needs and aspirations of the international community.

- Rosalyn Higgins, International Court of Justice, 2006



Power and participation in the 21st century

International law

Suzana Dudic
Guest editor

2006 marks the 60th anniversary of what, in its time, was declared 'the biggest trial in recorded history'. The International Military Tribunal for the Far East – which tried Japanese military and civilian leaders for war crimes, crimes against humanity, and 'crimes against peace' – surpassed the Nuremberg trial in duration (two and a half years), in the number of accused (28), in the number of presiding judges (11), and in the length of its judgment (over 1,200 pages). But compared to Nuremberg, which is widely seen as a watershed moment in international law, Tokyo remains obscure.

Some of the criticism leveled against the Tokyo trial (and possibly a partial explanation for its diminished representation thereafter) focused on legal lacunae. Defendants were charged with 'crimes against peace', which included 'waging a declared or undeclared war of aggression', but 'aggression' was left undefined. There were no technical rules of evidence, creating inconsistencies in the court's ad hoc decision-making. Cultural issues also arose, including the familiarity of the Japanese lawyers with the English language and the Anglo-Saxon legal system, and the accuracy of translations. Others were impressed by the irony of justices representing the US, UK, France and the Netherlands finding the defendants guilty of a conspiracy to dominate 'East Asia, the Western and South Western Pacific Ocean and the Indian Ocean, and certain of the islands in these Oceans.'

Ultimately, three of the 11 judges disagreed with the majority judgment and issued separate dissenting opinions. The most famous – and controversial – was that of the Indian judge, Radhabinod Pal, who contested the very legitimacy of the trial, which he saw as another example of unequal relations between the West and Asia: 'When the conduct of the nations is taken into account... perhaps it will be found that only a lost cause is a crime...'

Many critics contend that international law is not only Eurocentric, but 'colonial' and 'discriminatory'. Students read in textbooks that international law emerged with the 1648 Treaties of Westphalia as a set of rules governing relations among 'modern' states in Europe following the Thirty Years' War. In contrast, the study of non-western legal orders – including those of ancient India and China, which developed systems of mediation, arbitration and customary law – remains largely the preserve of anthropologists, historians and archaeologists. Little is written about traditions and customs of international law from parts of the world that were 'effectively eclipsed, either *de jure* by way of colonisation or just *de facto*, by western dominance,'[1] or about how they eventually 'joined' the international legal system.

The 1689 Treaty of Nerchinsk, which established the boundaries between China and Russia, is an early example of a treaty based on 'sovereign equality' that included a non-European state as one of the parties. Many subsequent treaties, however, were anything but equal: the 1842 Treaty of Nanjing and the 1895 Sino-Japanese Treaty of Shimonoseki, to take but two examples, were imposed by force and remain testament to the use and abuse of international law to consolidate the interests of dominant powers. Today, similar charges are leveled at treaties administered by the World Trade Organization, such as the TRIPS agreement on intellectual property rights, which critics argue legitimises the transfer of wealth from developing to developed countries. Others contend that the West uses human rights to impose its own model of intra-state relations that ignores historical and cultural differences.

R-J Dupuy, at a 1983 colloquium in The Hague commemorating the 400th anniversary of Hugo Grotius' birth, when Chinese writings on international law were becoming more widely known, posed the question: 'Will the emergence on the international scene of cultural systems other than the western which prevailed so far... endanger the future of international law, or, on the contrary, add new currents to it, thus making it richer?'[2] The question remains. If international law follows international politics, how can international law be made truly 'international'? How is it international, and how international is it?

If politics is the catalyst for change in law, the horse driving the cart in the 21st century has moved far beyond 17th century Europe. The scope of international law now covers the 'internal matters' of states, the actions of individuals and corporations as well as inter-state relations. NGOs work at the grass-roots level for social justice, lobby governments and international organisations, and call public officials to accountability. One hundred states have ratified the Rome Statute establishing the International Criminal Court, thereby accepting its jurisdiction over war crimes, crimes against humanity and genocide. Notably absent from the list of ratifying states, however, are the US and Russia, as well as most Asian countries with the exceptions of the Republic of Korea, Cambodia, Timore-Leste, Mongolia, Tajikistan, Afghanistan and several South Pacific island states.

Beyond establishing legal responsibility and preventing impunity, judicial processes are also seen as key to establishing historical truth, enabling post-conflict reconciliation, acknowledging the suffering of victims of crimes and offering them a measure of redress – even decades after the crimes were committed. Following Nuremberg and Tokyo, as well as the UN-administered criminal tribunals for Rwanda and the former Yugoslavia, several so-called 'hybrid tribunals' have been created in an effort to bring the mechanism of justice closer to affected populations in countries that lack institutional capacity to cope with mass crimes. Ethel Higonnet argues that 'by integrating local norms, hybrid courts can bring culturally adapted justice to the people that international courts purport to serve but cannot reach.'[3]

Such a tribunal is being established in Cambodia, which will soon begin the trial of Khmer Rouge leaders for Pol Pot-era atrocities. Another is the Serious Crimes Unit in East Timor, which recently concluded efforts to try perpetrators of the violence that followed the 1999 referendum on independence. The latter had both international and national judges, and drew on international law as well as laws of the UN body administering the country. Under-funding and the failure of Indonesia to extradite senior military officials have, however, hampered the SCU's work, again underlining the importance of political will to enforce judicial processes. Recalling the words of ICJ Judge Higgins above, how the 'legitimate needs and aspirations of the international community' will be exercised in such cases within the existing structures of national and international legal systems remains unclear. <

Suzana Dudic works in the prosecutor's office at the International Criminal Court in The Hague. This introduction is written in her individual capacity.
suzanadu@tiscali.cz

Notes

1. Sik, Ko Swan. 2002. 'Wang Tieya and International Law in Asia'. *Journal of the History of International Law* 4, p.159.
2. Butkevych, Olga. 2003. 'History of Ancient International Law: Challenges and Prospects'. *Journal of the History of International Law* 5, p.212.
3. Higonnet, Ethel. 2005. 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice'. *Yale Law School Student Scholarship Series*. Berkley Electronic Press, Paper 6, p.2.