

The 47th Annual Conference of the Canadian Council on International Law: Navigating the Frontiers of International Law

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Introduction

The 47th Annual Conference of the Canadian Council on International Law (CCIL) was held on November 1st and 2nd, 2018, at Global Affairs Canada in Ottawa. The theme of this year's conference, *International Law at the Boundaries*, allowed a symposium on the pressures under which the international legal order currently operates. Experienced speakers from all over the globe and evolving in diversified areas including criminal law, foreign relations, international humanitarian law, trade and investment and legal history, touched upon many different subjects that are extremely relevant in the light of our current political climate.

The CCIL Conference is a key event for all Canadian scholars, practitioners and students interested in international law. Held annually since 1972, its theme is always topical and sparks the discussion on current affairs and latest developments in international law. The first Annual Conference was also held in Ottawa and was themed *New Approaches to International Law*.¹ At the time, the conference only hosted 80 attendees, who were mainly academics and government representatives, and the discussion revolved around a paper written by Allan Gotlieb and Charles Dalfen,² raising questions about the foreign policies of former Prime Minister Pierre Elliott Trudeau's administration. This year, hundreds of people were present on the morning of November 1st in the Victoria Hall, reflecting the success of the event.

This article highlights the important issues that were addressed at the 2018 Conference. The diversity of the chosen topics in the following pages are connected by a common thread: this paper focuses on the transnational challenges pertaining to human rights, international criminal law and general international public law. Trade and investment law issues were set aside for purposes of brevity. This review aims at informing anyone

* This article and the students' attendance to the 47th Annual Conference of the Canadian Council on International Law, in the framework of the Canadian Partnership for International Justice and of Professor Julia Grignon's academic research "Extraterritoriality of Human rights in Armed Conflict", was supported by the Social Sciences and Humanities Research Council of Canada.

¹ D. M. McRae, *Annual Conference of the Canadian Council on International Law*, 10 Canadian Yearbook of International Law, 278, 1972, page 278.

² Allan Gotlieb and Charles Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law*, American Journal of International Law, 67:2, 1973, 229-258, online: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/national-jurisdiction-and-international-responsibility-new-canadian-approaches-to-international-law/AF8692555C473825F1FOF66EBDC9D3AF>

interested in these issues, and in particular those who did not get the opportunity to attend this national event, by addressing in a rather comprehensive way the emerging problems and solutions discussed at the 47th CCIL Annual Conference.

I. Setting the Tone for a Boundary-Centered Conference

The 2018 edition's keynote speeches, by Professors Harold Hongju Koh and Jutta Brunnée, set the tone of the conference by exploring various topical aspects of international boundaries. Both took place in the afternoon, respectively on the first and second day of the event and emphasized the importance of transnational issues within the current political context.

A. Keeping Multilateralism Alive

Mr. Harold Hongju Koh, Professor of law at Yale University and recipient of the Secretary of State's Distinguished Service Award for his role as State Department Legal Adviser, subjugated his audience while discussing Trump's administration with much needed humor. The issue of Donald Trump ignoring international law has been recurrent since his election in 2016, but Mr. Koh emphasized that there is still hope to have that his conduct will not be imitated by many states and that multilateralism will continue to prevail.

The President of the United States has created massive disruptions in international law by multiplying crisis, notably in North Korea and Iran. However, many institutions are working in the opposite direction and their actions are creating a pattern that is increasingly difficult to ignore. According to Professor Koh, Trump's show of power is inappropriate. The expert used the comparison of Mohammed Ali's rope-a-dope signature move to reflect that Donald Trump has been punching himself out, not only by expending energy and capital on various initiatives, but also by creating hebdomadary crisis that do not advance his or his party's chance for re-election. On the other hand, Barack Obama and Hillary Clinton's "smart power" doctrine is much more suitable to address international challenges. This doctrine, which consists of a combination of "hard" and "soft" power, has been described by the *Center for Strategic and International Studies* as "an approach that underscores the necessity of a strong military, but also invests heavily in alliances, partnerships, and institutions of all levels to expand one's influence and establish legitimacy of one's action".³ Professor Koh defended this doctrine and insisted that transnational cooperation between States is essential to strengthen the rule of law. The increase of authoritarian trends give rise to legal and political issues that require to overcome boundaries and ensure an effective collaboration between States.

³ Center for Strategic & International Studies, "CSIS Commission on Smart Power: a Smarter, More Secure America", The CSIS Press, 2007, p.7, online: <https://carnegieendowment.org/files/csissmartpowerreport.pdf>

Enumerating many of the president's infamous incidents, such as his goal to disengage from multilateralism initiatives, his ongoing promotion of unilateralism by placing "America first", his absolute disregard for the rule of law and his withdrawal from global leadership, all while denigrating knowledge, science, and diplomacy, Professor Koh reassured the audience by stating that there is still hope to have. He affirmed that Trump's daily tweets must be differentiated from the concrete actions the Republicans have actually taken, and that for now, there seems to be more fear than harm.⁴

The leading expert in public and private international law, national security law, and human rights ended his speech with optimistic views of the future as a global community. Reiterating the importance of doing the right thing, he reminded the audience that even if something can be considered "lawful", this does not mean that it will necessarily be beneficial for our society.

B. The Perenniality of International Law Amidst Change

The second keynote speaker, Professor Jutta Brunnée, Professor of law at Toronto University, is expert in international climate change law. Her book *International Climate Change Law*⁵ was awarded the American Society of International Law's 2018 Certificate of Merit in a specialized area of international law. She is also co-author of *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010),⁶ which received the American Society of International Law's 2011 Certificate of Merit for preeminent contribution to creative scholarship.⁷

Professor Brunnée was consistent with the usual aim of the keynote speeches of the CCIL as it explored new developments in international law. Titled "Challenging International Law: What's New?", her analysis brushed upon the current challenges of the international legal order and depicted them in a larger historical, social and political context.

She assessed that the current dynamics might be understood as a recalibration of international law. Historically, the more forcefully multilateralism was deployed, the most tenuous it became, even though human rights have been challenged in many countries, including Western democratic States. With the current political context, from Brexit to Trump, to newly appointed Jair Bolsonaro in Brazil, what the international community is witnessing is rare, but not unprecedented. Even if the very foundation of international law

⁴ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. rec. 1974, par. 43.

⁵ Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law*, Oxford, Oxford University Press, 2017, 416 pages.

⁶ Stephen J. Toope and Jutta Brunnée, *Legitimacy and Legality in International Law, An Interactional Account*, Cambridge University Press, 2010, 436 pages.

⁷ American Society of International Law, *ASIL Certificate of Merit and Special Book Award*, p.2, online, <https://www.asil.org/sites/default/files/ASIL%20Book%20Awards.pdf>

is currently being disputed, the eminent specialist reminded the audience that similar crisis have been faced in the past. For instance, the renowned scholar Wolfgang Friedmann pointed out in 1964 that “in the last half-century, the nature and structure of international society has undergone fundamental transformations which, though far from completed, have already profoundly modified the substance and structure of international law”.⁸ The international legal system is continuously capable to evolve, and even if there are concerns about its perenniability, it is possible to rely on international actors to conserve its solid basis. Even when universal values are contested, the importance of a shared notion of legality ensures a certain order in conflictual international interactions.

Similarly to Mr. Harold Koh, Professor Brunnée hopes that the concept of multilateralism in international law will be envisioned as a collective practice by scholars, students, practitioners and citizens. When asked by the audience why so little time was accorded to the topic of climate change in her discourse, she admitted that even if it should be at the center of our preoccupations, the subject is unfortunately being diverted by political issues and conflictual international relations. As eloquently put by the scholar: “one way or another, we are facing a transformation of the international legal order. We have to be prepared for that”.

Both keynote speakers stressed that the current transformation of the legal order tend to push international law to its limits, both figuratively and literally. The featured panelists explored various boundary-related issues showing the limitations of the current system, thus giving a wide and cross-cutting comprehension of specific subjects and maintaining a certain consistency throughout the 2018 Conference.

II. Comparative Foreign Relations Law, an Ever-Expanding Field

On November 1st, the traditional opening plenary presented a discussion evolving around the emerging field of comparative foreign relations law. The panelists are contributors to a forthcoming publication by Oxford University Press entitled the *Oxford Handbook of Comparative Foreign Relations Law*, edited by Curtis Bradley.⁹ The originality of this work stems from the diverse nationalities and backgrounds of the authors, who compare how different countries and supranational institutions exercise their authorities in international law issues, such as signing treaties or withdrawing from them. Further, the field of comparative foreign relations law is relatively new in the legal sphere and is likely to evolve rapidly in a near future.

⁸ Wolfgang Friedmann, “Half a Century of International Law”, *Virginia Law Review*, Vol. 50, No. 8 (December 1964), pp. 1333-1358, p. 1334.

⁹ A draft of the first chapter of the book is available online: <https://law.duke.edu/cicl/oxford-handbook-comparative-foreign-relations-law/>.

The panel, composed of Curtis Bradley (Duke Law School), Charles-Emmanuel Côté (Laval University), Joris Larik (Leiden University) and Hannah Woolaver (Cape Town University), moderated by Kristen Boon (Seton Hall University), highlighted the importance of considering governmental customs and practices, as not all transnational issues are decided before international courts. The emerging field of comparative foreign relations law will facilitate the practice of international lawyers, helping them analyze foreign governments' policies. It will also help target and determine the authority of certain international bodies to conclude multilateral agreements. It will further be useful in the examination of the proper role of courts in transnational cases. As the panelists discussed the margin of discretion exercised by executive branches and the different approaches of states when applying international norms, it became clear that domestic policies have an important effect on geopolitical status of countries and their relations with others. This interesting and original field of studies that is comparative foreign relations law is a vehicle that can be used to increase constitutional protection in enforcing respect of international law. In these tumultuous times, cross-boundary cooperation is crucially needed, especially when it comes to foreign relations law, to ensure the respect of international agreements.

The opening plenary paved the way for discussions throughout the conference, on the necessity of cross-border cooperation between states and non-state actors, as multilateralism is constantly challenged.

III. International Indigenous Law at the Boundaries: Historical Rights, Topical Issues

When it comes to boundaries and international law, many important and topical issues pertain to the rights of indigenous peoples, and particularly mobility rights. This topic was addressed by the panel titled "International Indigenous Law at the Boundaries – Plurinationalism in Theory and Practice: The Example of *R. v. Desautels*". The panel was composed of both law academics and practitioners, namely Heather Cochran (Officer of the Attorney General of British Columbia), Kerry Sloan (Faculty of Law, McGill University), John Hopkins (University of Arizona) and Laurie Sargent (Justice Canada). Oonagh Fitzgerald, from the Center for International Governance Innovation, chaired the panel.

The rights of indigenous peoples are very topical in Canada as the Truth and Reconciliation Commission was established in June 2008. The Commission, which aimed at shedding light on and seeking reconciliation for the human rights violations perpetrated in the Indian Residential Schools, delivered its report in December 2015. This report includes 94 recommendations, and while some of them have successfully been adopted, many others have not or are still in the process of being implemented today. Prime Minister Justin Trudeau seems to put a lot of faith in the outcomes of this Commission, as he strongly expressed his vision of a plurinational reconciled state on September of 2017. In this

speech, delivered before the United Nations General Assembly in the context of Canada's 150th anniversary, he highlighted many struggles currently faced by indigenous peoples in Canada and envisioned the United Nations Declaration on the Rights of indigenous Peoples¹⁰ (UNDRIP) as "a way forward".¹¹

Barely two months after this powerful speech, on the 28th of December 2017, British Columbia Supreme Court rendered the judgement *R. v. Desautel*,¹² which is intrinsically related to the role of boundaries in international law. Heather Cochran, who was Counsel for the appellant in this case, explained the key issues of this case.

Mr. Richard Desautel was a citizen of the United States and a member of the Lakes Tribe of the Colville Confederated Tribes. He lived on the Colville Indian Reserve in Washington State in the United States of America, and on the 1st of October, 2010, he shot and killed a cow elk near British Columbia, in Castlegar. He reported the kill to wildlife conservation provincial officers and was then charged with "hunting without a license and hunting big game while not being a resident of British Columbia, contrary to ss. 11(1) and 47(a) of the Wildlife Act".¹³ Before the British Columbia Provincial Court, he argued that he was "exercising an aboriginal right to hunt for ceremonial purposes guaranteed by [section] 35 of the Constitution Act, 1982"¹⁴ and that "the relevant sections of the Wildlife Act to him constituted an unjustifiable infringement of that right".¹⁵ The Court accepted this defence, and Mr. Desautel was acquitted of all charges on March 27, 2017. Before the British Columbia Supreme Court, two main questions of law were debated. First, is an aboriginal group that does not reside in Canada entitled to the constitutional protections provided by s. 35 of the 1982 Constitution Act? Second, is the right asserted by Mr. Desautel incompatible with Canada's sovereignty? The reasoning of the Court comprised two steps, Ms. Cochran explained. Afterwards, the Court adopted a purposive approach in relation to s. 35 and questioned the legal implications of the term "Aboriginal". It then concluded that "the Sinixt, of whom Mr. Desautel is a member are an aboriginal people of Canada"¹⁶ and that Mr. Desautel was therefore entitled the constitutional protections of s. 35. The right to hunt was judged a necessary mobility right, as "hunting rights necessary imply to have physical access", affirmed Ms. Cochran. Also, the Court proceeded to a review of the relevant jurisprudence and found that it did not support the view that the Mr. Desautel's right was incompatible with the sovereignty of Canada. The Court actually "consider[ed]

¹⁰ *United Nations Declaration on the Rights of Indigenous Peoples Act*, A/61/295, 2007.

¹¹ Justin Trudeau, Prime Minister of Canada, *News: Prime Minister Justin Trudeau's Address to the 72th Session of the United Nations General Assembly*, online: <https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeaus-address-72th-session-united-nations-general-assembly>.

¹² *R. v. Desautel*, 2017 BCSC 2389.

¹³ *Ibid.*, par. 1; *Wildlife Act*, R.S.B.C. 1996, c. 488.

¹⁴ *Ibid.*, par. 2.

¹⁵ *Ibid.*, par. 24.

¹⁶ *Ibid.*, par. 90.

it unnecessary and inappropriate to consider the nature and extent of an aboriginal right to cross the international boundary".¹⁷ In sum, the ruling of the British Columbia Provincial Court was upheld and Mr. Desautel's acquittal was maintained. Ms. Cochran stressed that even if this decision remains unobserved by now, it nevertheless constitutes a precedent for other eventual similar cases.

The abovementioned UNDRIP also has important implications with respect to indigenous law and boundaries. Its Article 36 proclaims rights for indigenous peoples, and "in particular for those divided by international borders, [...] to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders." Laurie Sargent reminded that even if the Declaration constitutes soft law and is not legally binding, it is widely perceived as particularly legitimate due to the circumstances of its adoption. As a matter of fact, it was adopted by the United Nations General Assembly on September 13, 2007, by an overwhelming majority of 144 states in favor, 4 votes against and 11 abstentions. Canada casted a vote against, together with Australia, New Zealand and the United States. Despite this initial reluctant attitude to the Declaration, Canada's attitude has changed in recent years, as shown by the 2017 Prime Minister Trudeau's speech. Ms. Sargent affirmed that a lot is currently being done in Canada to implement the Declaration, as recommended by the report of the Truth and Reconciliation Commission, and that there is hope that the social context for indigenous communities will ameliorate itself in a near future.

In his intervention titled "Unbounded: Transborder Indigenous Nations and the 'Postnational' State", Kerry Sloan discussed many of the cross-border issues that have been faced in the last decades and centuries by Mohawks and Crees due to the establishment of borders that were not theirs. Historically, indigenous peoples have been going back and forth the boundaries to meet up. As these cross-borders meetings often included trade, Canada and the United States were concerned that indigenous people could supply guns and ammunition on the other side of the border. Therefore, for decades, Aboriginal peoples faced issues including losses of territory, mobility, identity and connections. The implementation of the UNDRIP by Canada and the United States could make a difference in acknowledging the mobility rights of indigenous peoples. However, new issues will arise if Canada implements the UNDRIP while the United States do not. At a time when Bill C-262 has successfully passed the third reading in the Senate in May 30, 2018,¹⁸ this eventuality is more likely than ever before. "What is happening here is a legal dialog",

¹⁷ *Ibid.*, par. 122.

¹⁸ House of Commons of Canada, *BILL C-262 - An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* (third reading), online : <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

affirmed Mr. Sloan, and this issue definitely deserves to be followed closely in the next few months.

The Canada-United States border is not the only one to be porous. John Hopkins also discussed the situation of the Rio Yaqui Basin and the Yaqui Peoples of Arizona and Sonora, near the U.S. - Mexico border. The Yaqui people originate from the Mexican desert of Sonora, but after many conflicts with this State, they migrated North reaching what is now considered to be Arizona. Most Yaquis now live in a reservation, and have their own government, law, police and services. However, they legally remain American citizens and are subject to American law. Yaquis thus represent a particularly interesting example of the impacts that boundaries can have on indigenous peoples and of the way it can alter their rights guaranteed in international law. This particular indigenous group is a perfect example of the numerous transnational and bilateral challenges that can occur when a border separates a community, and the innovative solutions taken by international lawyers to face those issues.

IV. International Legal History at the Boundaries

Another interesting approach to the complexities of cross-border problematics was through a historical lens. Chaired by Christopher Waters (University of Windsor), the panel “New Scholarship in International Legal History” showcased new research fields within international legal history, thoroughly examining and questioning the boundaries in international law. First, Beverly Jacobs (University of Windsor, Faculty of Law) discussed the Haudenosaunee Great Law of Peace as constitutive of international law before giving the floor to Gary Luton (Global Affairs Canada, Treaty Law Division) who provided a brief overview of Canadian diplomacy pertaining to international treaties between 1937 and 2016. Finally, Ali Tejpar (Norton Rose Fullbright), pointed out Canada’s violations of international law during the 2014-2016 Ebola outbreak. The discussions ended with Jennifer Orange (University of Toronto, Faculty of Law), who explained how human rights question State sovereignty.

The Great Law of Peace is the oral constitution of the Haudenosaunee Confederacy, itself composed of six nations, namely the Mohawk, Onondaga, Oneida, Cayuga, Seneca, and Tuscarora peoples. Beverly Jacobs argues that this constitution is considered international law. Recorded and transmitted by the media of wampum belts made of shells coming from the Atlantic sea, traces of these legal norms, that were transmitted throughout the centuries, still subsist. Marks of early treaties concluded with colonial powers can also be perceived through these wampum belts. When asked how the Haudenosaunee cultures lives on today, Ms. Jacobs affirmed that it never stopped existing; it simply has been missing for decades the necessary structures to be properly enforced. The example of the Great Law of Peace

depicts an important limit of the international legal system as enforcement mechanisms are still absent in certain spheres.

The Director of the Treaty Law Division at Global Affairs Canada, Gary Luton, discussed his recent paper titled “A Historical Survey of Canadian International Treaty Diplomacy”.¹⁹ “Treaties, he explained, are central to the concept of diplomacy in public international law.” Canada’s history when it comes to treaty making is particularly interesting: its transition from a colony to a Dominion, to a Nation State, is a historical evolution that is far from being tranquil. However, Mr. Luton’s presentation focused on the 1967-2016 period, in which Canadian international law treaties continued to flourish, as they had started to since the post-World War II period. The number of Canada’s potential treaty partners expanded a lot during this period, and recent survey data indicates that the 2,026 treaties entered into force between 1967 and 2016. Approximately three quarters of these treaties were bilateral, with the remainder being multilateral agreements. A decline in multilateral treaty activity towards the end of the Cold War was followed by an increase in the late 1980s and early 1990s. In sum, history has shown that the treaty-making activity in Canada, which is arguably the epitome of the exercise of the State sovereignty, is very much conditioned to external factors such as financial crises and the international political context.

As important as treaties are in international law, their violation does not inevitably entail serious consequences. Ali Tejpar, articling candidate at Norton Rose Fulbright, discussed Canada’s violation of international law during the 2014-2016 Ebola outbreak. He had previously published a paper on this subject in November 2017 with Steven J. Hoffman in the *Canadian Yearbook of international law*.²⁰ According to the World Health Organization (WHO), this Ebola outbreak was “one of the most challenging global health threats the [United Nations] has ever faced”.²¹ West African countries such as Guinea, Sierra Leone and Liberia were affected the most, but industrialized States were also touched, which led the WHO Director General of the time, Margaret Chan, to qualify the situation of “Public Health Emergency of International Concern” (PHEIC).²² According to Article 43 of the International Health Regulations (IHR), adopted by State Parties pursuant to Article 21 of the WHO’s Constitution, in situations of PHEIC, States can adopt health measures that go beyond the WHO’s recommendations, but only if these measures are supported by three

¹⁹ Gary Luton, “A Historical Survey of Canadian International Treaty Diplomacy”, online: https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.18_Luton.pdf

²⁰ Ali Tejpar and Steven J. Hoffman, “Canada’s Violation of International Law during the 2014–16 Ebola Outbreak”, *Canadian Yearbook of International Law*, vol. 54, 2017, pages 366-385.

²¹ WHO, *Ebola Situation Report* (30 March 2016), online: <http://apps.who.int/ebola/ebola-situation-reports>

²² WHO, *Statement on the 1st meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa*, 2014, online: <https://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>

criteria.²³ First, Mr. Tejpar explained, public health rationales must support the State's actions. Second, "available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies" must be provided. Third, WHO's guidance or advice is necessary. In the context of the 2014-2016, at least 58 States adopted additional health measures including travel bans to and from Ebola-affected countries. Canada was among these countries. However, Mr. Tejpar found that the travel restrictions and airport screening policies implemented by the Canadian government were "contrary to the consensus views of public health authorities, the best available scientific evidence on disease transmission, and the WHO's guidance or advice"²⁴. In sum, the 2014-2016 Ebola crisis was "a disaster for the IHR and demonstrated the WHO's inability to enforce it", affirmed the speaker.

The last speaker presented a different outtake of cross-border challenges by presenting an intriguing area of international law, that few practitioners and academics know about: the reality of international human rights law museums. According to the International Council of Museums (ICOM), a museum is a "non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment".²⁵ Expert Jennifer Oranges' intervention focused on human rights museums, which are a relatively recent phenomenon as they developed in the 25 last years. Now established on a wide range of countries, these museums address many aspects of human rights, but with a main focus on non-discrimination. According to Ms. Orange, human rights museums are at the boundaries of State sovereignty, as these organizations enter into binding agreements with foreign entities, take actions that may have diplomatic implications, can condemn States' actions, and sometimes even intervene to protect artefacts during armed conflict. However, museums are often controlled by States when their actions interfere too much with their policies: museums can often face censure or financial cuts; they can even face harassment such as privation of water and electricity supplies. Ms. Orange concluded that human rights museums can exist "as long as they do not challenge too much the policies and will of the power in place in the State in which they operate", and expressed her increasing skepticism concerning the real actual powers of human rights museums to challenge the established power.

²³ IHR, Art. 43(2)(a), (b) and (c).

²⁴ TEJPAR and HOFFMAN, *op. cit.* note 20, p.382.

²⁵ International Council of Museums, ICOM Definition of a Museum, online: <http://archives.icom.museum/definition.html>

V. Boundaries at the Heart of Human Atrocities: the Plight of the Rohingya

On November 1st, 2018, the last panel of the day entitled “The Role of International Criminal Law and the International Criminal Court in Responding to the Alleged Crimes Perpetrated against the Rohingya”, was organized and funded by the Canadian Partnership for International Justice (CPIJ). This pan-Canadian organization brings together leading Canadian academics and non-governmental actors to contribute to strengthening access to justice for victims of international crimes. The Partnership was actively involved in the recent proceedings pertaining to the Rohingya situation before the International Criminal Court (ICC), which led it to organize this panel to discuss the potential role of the ICC in respect to this situation. The panelists were Kyle Matthews, Executive Director of the Montreal Institute for Genocide and Human Rights Studies (MIGS) at Concordia University, together with CPIJ Co-Researchers Payam Akhavan, Professor at McGill University, and Valerie Oosterveld, Professor at Western Law University. The discussion was moderated by CPIJ Co-Director Fannie Lafontaine, Professor at Laval University.

Even though this topic is thoroughly discussed in the academia, a brief contextual setting was in order. The Rohingya are one of the numerous minorities in Myanmar. While the predominant religion is Buddhism, Rohingya represent the highest percentage of Muslims in the country. At the beginning of 2017, their number was estimated at around one million,²⁶ and the majority lived in Rakhine State, which is near the Bangladesh border. Kyle Matthews emphasized that as a minority, they have a long history of being targeted. As soon as Myanmar became independent from Great Britain in 1948, various measures were adopted to gradually deny their citizenship. As early as in 1948, the Rohingya were not registered as one of the country’s 135 official ethnic minorities.²⁷ In 1982, the Citizenship Law officially revoked their citizenship to the Rohingya, thus creating a whole group of stateless people. The Myanmar authorities now refuse to use the term “Rohingya” and rather refer to them as “Bengali”, asserting that they are not Myanmar citizens but illegal immigrants from Bangladesh. In 2017, the Rohingya were described as the “most persecuted minority in the world” by the U.N. Special Representative of the Secretary-General on sexual violence in conflict, and it is estimated that 727,000 Rohingya have crossed Myanmar’s border towards Cox’s Bazar, Bangladesh, between August 5, 2017, and September 27, 2018.²⁸ Mr. Matthews explained that the Rohingya situation is of particular interest for Canada, as Myanmar’s political leader, Nobel Prize winner Aung San Suu Kyi, was conferred an honorary Canadian citizenship in 2012 for her decades-long fight for democracy in Myanmar. Thus, facing this major crisis, Prime Minister Justin Trudeau appointed Bob Rae as Canada’s Special Envoy to Myanmar, who, from October

²⁶ BBC News, *Myanmar Rohingya: What you need to know about the crisis*, 24 April 2018, online: <https://www.bbc.com/news/world-asia-41566561>

²⁷ 1948 Union Citizenship Act, Act No. LXVI of 1948, enacted on 8 May 1948.

²⁸ Inter Sector Coordination Group, *Situation Report Rohingya Refugee Crisis*, 27 September 2018, online: https://reliefweb.int/sites/reliefweb.int/files/resources/iscg_situation_report_27_sept_2018.pdf

2017 to March 2018, assessed the events that led hundreds of thousands of Rohingya to flee their homes. He produced an extensive report in April 2018. Aung San Suu Kyi later became the first person to be deprived of the Canadian honorary citizenship, following the unanimous vote by the Canadian Senate on October 2, 2018.

In recent years and especially in the last few months, an increase in the intensity of the Rohingya persecution was made possible notably through the circulation of hate speech on social media. In particular, Facebook's role in the proliferation of violence against the Rohingya is blatant: at the beginning of the crisis, this social media only had two Burmese-speaking content review for its over than two billion users. In March 2018, U.N. Myanmar investigator Yanghee Lee claimed that Facebook had played an important role in spreading hate speech in this country: "it is actually the first time ever that the [United Nations] has called out a social media company for having some role in the atrocities", Mr. Matthews emphasized. The expert strongly called for more corporate accountability for organizations such as Facebook and highlighted their duty not only to react to hate speech, but also to prevent its circulation by tracking, identifying and exposing potential sources.

What are the options in order to achieve accountability for crimes committed against the Rohingya? According to Professor Payam Akhavan, "ultimately, individual criminal responsibility can only be achieved through the International Criminal Court." Having extensive knowledge of both the international criminal justice system and of the Rohingya situation, being a former United Nations (UN) Prosecutor at the Hague and having recently visited the Kutupalong Rohingya refugee camp in Bangladesh, he emphasized that the question of the ICC jurisdiction in that particular case was as complex as crucial. The complexity of the legal issue stems from the fact that the Rohingya are being deported from Myanmar, a State not Party to the Rome Statute of the ICC, to Bangladesh, which is a State party. This situation led the ICC Prosecutor to make use for the first time on 9 April 2018 of Article 19(3) of the Rome Statute, to present to the ICC Pre-Trial Chamber a request for ruling on whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people. Members of CPIJ submitted a request for leave on 25 May 2018, which was accepted on 29 May 2018, and therefore intervened as *Amici Curiae* in the proceedings. Finally, on the 6th September of this year, the ICC, significantly drawing on CPIJ's observations, declared itself competent to hear of the Rohingya situation. "It [was] the first time that the Pre-Trial Chamber delivered what is in fact an advisory opinion", precised Professor Akhavan, and "Canadian participation in these proceedings was quite important and significant." He finally reminded that regarding the crime of deportation, the permanent or temporary character of the intended deportation is irrelevant. Thus, the subsequent existence of a repatriation agreement between Bangladesh and Myanmar could not prevent the responsibility of Myanmar officials to be retained.

In March 2017, an Independent International Fact-Finding Mission was established in Myanmar by the U.N. Human Rights Council, with the mandate of establishing “the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar”.²⁹ Professor Valerie Oosterveld explained that this fact-finding mission showed that sexual and gender-based violence (SGBV) was not only widespread against the Rohingya, but that it had been normalized for years before the start of the mass expulsions. “SGBV is used on a massive and widespread scale in targeting the Rohingya in Myanmar”, she insisted. Cases of rape and other sexual crimes such as forced nudity and sexual slavery are rampant, the Rohingya women aged from 13 to 25 years old being the main targets, including pregnant women. SGBV is often accompanied of other forms of violence: for instance, victims are often cut and bitten to show branding. According to Professor Oosterveld, 80% of all survivors interviewed in Bangladesh refugee camps had been raped and gang-raped, and many victims have become pregnant. Many men and boys also suffer SGBV, often in detention context.

Professor Oosterveld welcomed the work of this fact-finding mission, as it is particularly important to collect information and evidence pertaining to SGBV, as close as possible to the time it was perpetrated, in order to preserve the detail of this type of violations. However, that evidence needs to be collected in a gender-sensitive way. She explained that it is important to differentiate the collection of information and the collection of evidence. While “collection of information involves to speak to victims of SGBV in order to gain a solid picture of what has happened, [...] collection of evidence may require *not* speaking to victims of SGBV in order to not contravene the do no harm principle in evidence collection”, the expert explained. “In other words, collection of information may occur right away, and collection of evidence may require a delay in speaking to victims of SGBV.”

But why is it useful to collect evidence of SGBV crimes if the Pre-Trial Chamber of the ICC declared that the Court is competent over the crime of deportation? The expert presented three main reasons. First and foremost, the existence of SGBV committed against the Rohingya can constitute evidence to prove that the crime of deportation took place. Second, the crime of persecution, like the crime of deportation, can start in one jurisdiction and end in another. Given the fact that the Rome Statute of the ICC explicitly includes gender as a ground for persecution constituting crime against humanity, there could be a possibility that the ICC eventually declares itself competent over the crime against humanity of persecution, building on its decision based on jurisdiction rendered on September 6, 2018. Third and lastly, the international criminal law jurisprudence pertaining to other inhumane acts has historically been very helpful to prosecute the wide range of

²⁹ United Nations Human Rights Council, *Independent International Fact-Finding Mission on Myanmar*, online: <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>

SGBV that occur and that do not fall within the ambit of another listed crime. Therefore, it is not impossible that an international criminal tribunal makes use of this concept in the future to prosecute SGBV that was and that still is currently being committed against the Rohingya.

Panel chair Fannie Lafontaine concluded the discussion with her view that the Rohingya situation “exemplifies the promises of international criminal justice as well as its failures”. The Rohingya persecution, which was notably carried out through a weapon that know no boundary, namely social media, eventually took the form of deportation. The jurisdiction of the ICC was an issue until the Court finally declared itself competent over the crime of deportation, a situation that could also impact on SGBV, a reality that are still facing the Rohingya people.

VI. Extradition in Canadian Law: Necessary Reforms in the Light of the Diab Case

The topic of the panel that took place on the morning of November 2nd, namely “Extradition After Diab”, was at the intersection between Canadian national law and international law. The discussion that took place highlighted important boundary-related issues pertaining to human rights in Canada in the light of the Diab case. After an introduction by the panel’s moderator Craig Forcese, law professor at Ottawa University, panelist Don Bayne presented the key issues of the emblematic Diab case, which shed light on the serious flaws within the Canadian legal framework of extradition. Being Diab’s lawyer as well as a renowned criminalist lawyer partner at Bayne Sellar Ertel Carter Law Firm, Mr. Bayne had extensive knowledge of the case. Mr. Rob Currie and Ms. Joanna Harrington, respectively professors at the Schulich School of Law and the University of Alberta, then discussed Canada’s extradition laws and the pressing need for reform.

Hassan Diab is a Professor of Sociology at the University of Ottawa. Born in Lebanon, he lived part of his life in the United States and became a Canadian citizen in 2006. Two years later, on 8th October, 2008, the French government requested his extradition due to his alleged implication of the bombing of a synagogue in Paris in October 1980.

Mr. Diab’s journey reveals the flaws in Canada’s extradition process. The defendant had to claim his innocence tirelessly, throughout the entire process, even if the suspect of the bombing was first identified as a man aged 40 to 45 years, while Mr. Diab was only 26 at the time. France’s evidence against him mostly relied on the expertise of two graphologists, who found resemblances between the suspect’s writing and what they thought was Mr. Diab’s writing. It was later proven that the sample analyzed had not even been written by Mr. Diab, but by his wife. In other words, evidence was cruelly lacking. However, after a lengthy extradition procedure, a decision was rendered by Canadian authorities in June 2011. The judge of the Ontario Supreme Court that heard the instance explicitly stated that

“the case presented by the Republic of France against Mr. Diab is a weak case [and that] the prospects of conviction in the context of a fair trial [...] seem[ed] unlikely”,³⁰ but that “[t]he law is clear that in such circumstances a committal order is mandated”.³¹ Extradition was actually ordered by Canada’s Minister of Justice Rob Nicholson in April 2012. Mr. Diab’s appeal before the Ontario Appeals Court was unsuccessful and the Supreme Court of Canada refused to hear the case. Mr. Diab was finally extradited in France in November 2014, and the investigation continued while he was imprisoned for three years and two months. Finally, investigation ceased when reliable evidence was found that Mr. Diab was not in France at the time of the bombing. He was therefore released due to a “lack of evidence” and returned to Canada in January 2018.

In 1999, a reform of Canada’s extradition legal framework took place through the adoption of the *Extradition Act*.³² Even if a reform was needed due to the desuetude of many Canadian extradition treaties, the 1999 reform was even more so problematic as it transferred the decisional power from the hands of the judges into those of the Minister of Justice. In other words, this act “provides a two-stage process for the extradition of a person facing charges in a foreign country”.³³ First, the judicial phase and second, the executive or ministerial phase.

“The judicial phase involves an extradition judge conducting a hearing to determine whether sufficient evidence exists to justify committal for trial in Canada. The ministerial phase is triggered if committal is ordered. The Minister of Justice ultimately decides in his or her discretion whether the person sought should be surrendered to the requesting state: the *Extradition Act*, s. 40(1).”³⁴

This important discretionary power of the Minister arguably opens wide the doors for State arbitrariness and denial of fundamental rights. Further, the case of Hassan Diab is especially worrisome as it creates a precedent of extraditing when investigation is still ongoing in the country of extradition, which is expressly prohibited by Article 3 of the *Extradition Act*.

The reform of the extradition legal system should strive to rebalance the role between the Canadian courts and the Minister of Justice. In particular, extradition should be guided by fairness, balance and mostly, transparency. As governments have a commitment to protect basic human rights and the need to consider individuals and liberty rights should be at the

³⁰ *Attorney General of Canada (The Republic of France) v. Diab*, 2011 ONSC 337 (CanLII), para. 191.

³¹ *Ibid.*

³² *Extradition Act*, S.C. 1999, c. 18.

³³ *Attorney General of Canada (The Republic of France) v. Diab*, *op. cit.* note 30, par. 5.

³⁴ *Ibid.*

center of preoccupations. Nonetheless, the case of Hassan Diab exemplified the failure of Canada's extradition law to achieve fairness in a manner that is consistent with principles of fundamental justice, in such a way that the need for reform is incontestable. It is interesting to note that both academics and practitioners joined forces to denounce the profound problems in the Canadian domestic extradition laws and both urged for change.

This panel focused on extradition law but revealed simultaneously the political and legal difficulties that lie within bilateral agreements. Diplomatic considerations are assessed in such cases and clear legal solutions should be put in place preemptively to ensure that both rights and freedom are respected.

VII. The Security Council: an Organ in Crisis?

Maintaining peace and security is an overarching goal of the international community as a whole. The main organ entrusted with this responsibility is the United Nations Security Council (UNSC). However, according to many, this organ is currently facing important challenges and is arguably caught in a permanent crisis. This panel, entitled “Is the Security Council in Crisis?” allowed experts Eran Sthoeger, Greg Fox and Kristen Boon to express the interesting point of view that the UNSC is not in crisis, even though it faces important challenges, notably in relation to four areas. First, the Council has been taking different views than the International Court of Justice (ICJ). Second, the functioning of the Council including the veto powers allowed to specific States can arguably hinder its ability to take concrete action when needed. Third, the UNSC’s position when it comes to the use of force is unclear. Fourth, as far from being in crisis, the UNSC produces Resolutions who are consistently respected by States, in such a way that they can constitute customary international law. According to panelists, even given these controversial aspects of the UNSC’s action, this organ still cannot be considered to be in crisis. But first and foremost, the role and power of the UNSC was presented as a reminder and basis for the debate to come.

According to Article 39 of the UN Charter,³⁵ the Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”. This organ enjoys a wide authority as it is the only body in the world with the power to authorize the use of force. The Council may also

³⁵ *Charter of the United Nations*, 26 June 1945, R.T. Cam. 1945 no 7.

“decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”³⁶

Mr. Eran Sthoeger, Policy Analyst at Security Council Report, argued that an important controversial aspect of the Security Council’s action is due to the fact that in certain cases,³⁷ this organ has taken different views than those of the International Court of Justice. This reality has given rise to continuous debates on whether the Security Council should follow or not the ICJ’s jurisprudence, or *vice versa*. On one hand, actions taken by the Council against the Court’s jurisprudence can be viewed as unjust and lacking legitimacy, which can arguably put the Council in a situation of crisis. On the other hand, Mr. Sthoeger rather considered it understandable that the Council and the International Court of Justice share different views, as the former organ is political while the latter is judicial, and both share different mandates. According to him, the Council must not be subject to any limitation in the pursuit of its mandate to restore international peace and security.

Mr. Sthoeger also presented that the veto powers granted to five States in the UNSC do not have negative effects on the council’s ability to be efficient. On the contrary, it can help the UNSC operate consistently in some situations, such as in the case of Iraq: the Council refused to authorize the use of force and even if the invasion happened, it had voted consistently. To say that the Security Council is achieving its goal of maintaining international peace and security, when reality indicates that State parties are unable of reaching consensus, seems slightly farfetched. As for the topic of climate change, Mr. Sthoeger foresees negative impact on conflict with the rising of sea levels and temperature. He suggested that it will become a root cause of international and internal conflicts, naming as examples desertification and famine. The actions that may be taken by the Council are linked to the degree of control the international community actually wants it to have. If more and more desolating consequences are expected, such as submerged islands or the escalating numbers of refugees fleeing their country, the Security Council might consider the issue of climate change as a peace and security concern and might eventually take concrete actions if State parties collaborate.

³⁶ *Ibid.*, article 41.

³⁷ The Security Council has notably taken opposite views to those of the ICJ in Resolution 1368 (on individual or collective self defence) and Resolution 2249 (concerning the territory under the control of the Islamic State of Iraq and the Levant).

Greg Fox, Professor and renowned authority on international law and international organizations, discussed the position of the UNSC when it comes to the right of a government to invite another State to assist it in the use of force in a non-international armed conflict. He highlighted an important conflict on two schools of thought. On one side, the Nicaragua view, shared by the *Institut de droit international* (IDI), implies that a government has the right to invite another State to assist it in the conduct of hostilities in a non-international armed conflict. The consent of the State precludes the wrongfulness of this conduct, which would otherwise amount to a violation of Article 2(4) of the Charter of the United Nations. The Security Council must not be seen as being in crisis, as this type of intervention of a State on the territory of another State is perfectly legal and must not be seen as the UNSC's failure to act. Another controversial aspect of the UNSC's use of force pertains to the existence of its right to assist or restore democratically an elected regime. Professor Fox embraces the Democratic Legitimacy view and affirms that the UNSC has such authority. Finally, the power of the Council to counter attack by terrorist groups or their affiliates is also debated. Again, Mr. Fox considers that the Anti-Terrorist view permits to counter attack by terrorist groups or their affiliates, but this view is very controversial and there seems to be no agreement in the academic world. Professor Fox studied 44 cases to monitor the Security Council's reactions to each view and found that the UNSC tend to favor the Anti-Terrorist view even if the results of his research did not show a clear trend. The conclusion of his analysis tended to emphasize that in reality, it is impossible to say categorically that the Council clearly supports a particular view. Mr. Fox also emphasized the importance of the practice of the Security Council, as it helps to better understand the customary rules of international law, a topic that was followed his intervention.

It was Kristen Boon, Professor at Seton Hall Law, that explored the role of the Security Council as creating customary international law. Her study was designed to verify whether or not there were patterns across time and place that showed the creation of legal norms by the Security Council. Professor Boon proposed that there was consistency over time and in a geographical perspective, and thus, she deemed essential to consider the resolutions of the Security Council as customary international law. Even stating that it is uncontroversial that a resolution can create law, she presented her argument by offering, as an example, resolutions 748 (on the embargo against the Libyan Arab Jamahiriya), 2077 (regarding piracy in Somalia), 1546 (which endorsed the formation of a sovereign Interim Government of Iraq and welcomed the end of the occupation), and 2127 (which imposed an embargo on arms against the Central African Republic).

The panelists ended the discussion by examining Germany's future participation in the Security Council, as the country will join the council this year. As for the solution of enlarging State representation in the Council, they proposed that it would have negative

impacts, as discussions would become lengthier and would have a counterproductive effect. They also explored the possibility of the addition to the Council of an African country. Mr. Sthoeger argued that this inclusion, which would entail giving the power of veto to this new member, would be highly problematic. He explained his position by arguing that it is already difficult to reach consensus with five permanent members: adding an additional sixth one would heighten even more consensual decisions. Panelists generally agreed that adding member States to the Council was not a solution to improve its functioning.

In sum, the experts answered negatively to the question of whether or not the Security Council is in crisis. It is regrettable that Mr. Mohamed Helal, Assistant Professor of law at The Ohio State University Moritz College of Law and specialist in international public law, was not let into Canada to present his conference, as his presence could have brought a supplementary opinion to the debate.

XIII. Concluding Remarks

Boundaries are directly related to the exercise of State sovereignty, which is crucial in all spheres of international law. This being said, *International Law at the Boundaries*, far from referring to an abstract concept, was an excellent theme to gather a whole range of topical issues pertaining to international law in 2018. The current context of globalization, which leads to an increased porosity of boundaries, gives birth to a number of new issues, notably relating to extradition, treaty-making, partnered warfare, the action of the Security Council, the protection of international health, and the protection and respect of minorities such as indigenous and Rohingya peoples. Panelists of the 47th CCIL Conference brilliantly addressed these issues through different lenses such as foreign relations law, public law, history, as well as through international criminal and humanitarian law. Boundary-related challenges are thus extremely diverse and intersectional and allowed the Conference to reach a broader audience.

The phenomenon of globalization and the development of new technologies mark the beginning of a new era in international law. More than ever, international actors are required to adapt rapidly and envision original solutions to modern problems that have never yet been faced. Reaction to emergent issues is the precise *rationale* behind the existence of the CCIL Conference, as it was also demonstrated in 1972, at the very first conference, when panelists envisioned new approaches to international law. Following this first conference, Emeritus Professor Donald M. McRae formulated the following statement:

“It is hoped, [...] that future conferences and other activities sponsored by the Canadian Council on International Law will continue the overall high standard set by the 1972 Conference. If so, international lawyers in Canada

can look forward to a richer and more satisfying environment for their discipline than perhaps has been available in the past".³⁸

McRae's hope has arguably become true, as the high standard set in 1972 never lowered, thus contributing to create an environment conducive to the practice of law in Canada. It could be added that this environment benefits not only international lawyers, but also students: as a matter of fact, the CCIL now annually recruits student rapporteurs and bloggers, who report on various sessions on CCIL's website and on other media. Many students also have their attendance funded by external organizations: the Canadian Partnership for International Justice, notably, puts together every year a delegation of students who write blogposts on various platforms following their attendance. This illustrate the fact that the CCIL Conference has become an unmissable event for jurists as well as other professionals or future professionals, and that its influence reaches a much wider audience than only the attendees to the Conference.

The international community is currently witnessing a shift in the dynamics of international law. This change derives from an uprising of nationalist discourses in many countries and from a schism in the traditional and historical "big players", as the latter are yielding their power to new power States. In this context, consensus between States can seem harder to achieve. But there is still hope to have: despite frequent disruptions, the international legal system still strives to achieve accountability and the creation of the ICC just two decades ago is an outstanding example of State cooperation that appeared impossible not too long ago. International institutions can and will address increasingly complex cross-border issues that arise, and collaborative work will be crucial to their success. This CCIL Conference is one of many examples of the legal community reuniting to discuss the current problems to better envisage proactive solutions. This Conference is definitely a terrific platform that is as relevant in 2018 than it was in 1972.

³⁸ D. M. McRae, *op. cit.* note 1, p. 6.