Canadian Council on International Law
Conseil canadien de droit international

44th Annual Conference
Canadian Council on International
International Law: Coherence or Chaos
November 5 - 7, 2015
Ottawa, Canada

International Criminal Courts – A Critical Assessment

Speakers:

- Chair Hugh Adsett (Moderator), Deputy Legal Advisor with DFATD
- Aido Zammit Borda, Senior Law Professor in international law, Anglia Ruskin University
- Yota Negishi, PhD Candidate at Waseda University
- Yang Liu, Visiting post-doctoral fellow at Harvard Law School
- Jure Vidmar, Professor of Public International Law, Maastricht University

The following presentation critically assesses the international criminal court system. Each of the four speakers expanded on each of the following four paradigms:

1) Comparative versus Universalistic Models in International Criminal Adjudication;
2) Constitutionalism versus Fragmentation Models in International Human Rights Law;
3) Regime Complex, Network and the Doctrine of Ethnic Cleansing; and
4) International Court of Justice and Judicial Restraint.

Comparative versus Universalistic Models in International Criminal Adjudication

Our first speaker analyzed a paradigm focusing on the advantages and disadvantages of using a comparative law model as opposed to a traditional international law model in international criminal adjudication. Comparative law provides a deeper understanding of multiple legal systems and legal cultures. The comparative law approach encourages an understanding of the interactions between international law and local, municipal systems. Conversely, the traditional international model suggests applying a more universal, normative order rather than urging a deeper understanding of different legal cultures.

The vast majority of scholarship on the subject suggests that comparative law has had a limited impact on international criminal adjudication. In part, comparative law is designed to show courts how to borrow legal concepts from one culture and apply them in another legal culture. This approach has been applied in international criminal adjudication rather infrequently. International lawyers are often uncomfortable with the idea of "culture" in international decision making, preferring a more uniform approach. International adjudicators also lean towards more neutral approaches, avoiding a focus on one particular legal system over another. Thus, the preferred international practice model appears to favour the more traditional, universalistic paradigm which is put forth as being more legitimate.

There are three (3) main reasons why international criminal judges are reluctant to undertake a comparative law analysis in international adjudication:

1) Resource limitations – There is a concern that a focus on varied languages and cultural differences may cause delays. Further, judges may appear to be biased in their decision-making should they reference jurisprudence from their own countries, jurisprudence with which they are most familiar and likely to rely upon.

2) Legal reason – International criminal courts are bound by their own statutes, frameworks, and principles of legality, and decisions are expected to be strictly confined within these limits. A study of practices in the Former Yugoslavia examined sentencing practices in the ICTY or other courts as well as sentencing practices in courts in other international jurisdictions. Some courts felt that the International Criminal Tribunal of Yugoslavia should only refer to its own prior decisions, while other courts had no issue with the more comparative approach.

3) Epistemological Reason – There are a many comparative law theories, and courts often find it difficult to know which theory to embrace. Though there are definite interactions between local, municipal and international laws, courts do not wish to appear as though they are preferring one legal system over another. Thus, courts prioritize breadth over depth with a view to appearing more legitimate.

Constitutionalism versus Fragmentation Models in International Human Rights Law

Mr. Negishi discussed how human rights courts are important as the ultimate interpreters of law. International human rights courts are expected to ensure the consistency of international law

instruments, while also supporting the integration of regional conventions into international law. The following compares and contrasts the use of Constitutionalism versus Fragmentation in international human rights courts.

Constitutionalism involves interpreting regional conventions to ensure consistency in international human rights law. Fragmentation focuses on more varied interpretations of these conventions. When courts produce varied decisions, this can lead to fragmentation in international jurisprudence. This type of criticism has previously been directed at the International Criminal Court. However, other scholars suggest that the fragmented approach has its strengths as it promotes pluralism in jurisprudence between both a constitutional and fragmented approach. For example, both the ECHR (European Convention) and ACHR (American Convention) are open to multiple analytical approaches when it comes to interpreting international human rights law. Thus, it has been suggested that a pluralistic approach between both the constitutional and fragmented models should be embraced.

The *pro homine* principle promotes interpreting law in a way that most favours individuals and is a model often used by international human rights courts. The principle promotes a pluralistic approach in legal decision making. If international human rights law is at risk of being compromised in any way, the principle promotes a focus on creating the most favourable norms in jurisprudence, while also guaranteeing the protection of human rights. Therefore, the *pro homine* principle can protect the most favourable aspects of both constitutionalism and fragmentation

Regime Complex, Network and the Doctrine of "Ethnic Cleansing"

Mr. Liu described the concept of "Regime Complex" which is the network that includes multiple international legal bodies including the International Criminal Tribunal in Yugoslavia, the European Court of Human Rights, the International Court of Justice, the United Nations Security Council and various other bodies. The following discusses the interactions of the regime complex, particularly between the international courts and UN political organs on the particular issue of "ethnic cleansing", asking whether these interactions should be altered. The discussion surrounding ethnic cleansing became the subject of international discussions more prominently in 1992.

A 2007 International Court of Justice case, "Bosnia and Herzegovina v Serbia and Montenegro", the term "ethnic cleansing" was defined as follows, "Ethnic cleansing means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."

Various decisions on ethnic cleansing have been made by a number of international human rights courts between 1995 to 2015. There were disparities between these courts, showing no coherence in the use of the term "ethnic cleansing". The United Nations Security Council uses the term "ethnic cleansing" when discussing war crimes and breaches of international humanitarian law,

but rarely incorporates the term into a discussion on genocide. The International Court of Justice has decided that "ethnic cleansing" does not satisfy the definition of genocide as there is insufficient information to satisfy the core elements of the offence. However, among international bodies, the ICTY has had the most opportunity to influence international jurisprudence on ethnic cleansing, often citing its own previous cases in later decisions. Consequently, the ICTY is the body most likely to impact any legal doctrine on ethnic cleansing.

International Court of Justice and Judicial Restraint

Finally, Mr. Vidmar discussed the relationship between the ICJ and the concept of judicial restraint. The ICJ has often been criticized for using excessive judicial restraint in its rulings. It may be argued that the court's restraint and conservatism promotes the coherence of international law. Still, the ICJ's conservative approach is not always viewed as practical by many self-contained regimes of public international law including specialized tribunals that develop their own rules and refer to their own decisions in later jurisprudence. For instance, the European Union courts are viewed as more activist in their rulings when compared with the ICJ. Further, given the lack of available ICJ case law, many international courts have referred to jurisprudence preceding the existence of the ICJ. For example, the 1927 *Lotus* case (France v Turkey) discussed state sovereignty and was presided over by the then Permanent Court of International Justice. The *Lotus* case is often referred to by many courts for its discussion of the concept of "self-determination". In rare cases, the ICJ exhibits some activist elements. For example, in the 1995 East Timor Case (Portugal v Australia), the ICJ confirmed East Timor's right of self-determination, displaying some degree of judicial activism. Generally, however, the ICJ is viewed as the guardian of coherence in international law, providing a necessary counterbalance to the activism within the more specialized courts and tribunals.

The CCIL thanks and congratulates all Rapporteurs for their participation in the program for this year's Conference.