International Courts and Tribunals: Their Roles Amidst a World of Courts

David D. Caron
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by 
David D. Caron¹


Introduction

Professor Bianchi, Professor Lalive, distinguished guests, ladies and gentlemen, friends.

I deeply honored by the invitation of the Lalive firm and the Graduate Institute to give this year’s lecture. The Graduate Institute in my estimation possesses the finest faculty of international law, politics, history and economics. In this series, its unique place in academia is partnered with very best of legal practice, the Lalive firm. Over my career I have had the pleasure of knowing several members of that firm -- Michael Schnieder, Teresa Giovannini, Viejo Hessikanen to name a few. All are fantastic lawyers: ethical, skilled, and a pleasure to be around. I suppose this is to be expected of Lalive lawyers. As the students here today likely feel -- as we grow into the field of international law, there are persons who occupy a place beyond all others. For me, Professor Lalive was, and is, such a giant. To be here today with him is a distinct pleasure and honor.

It likewise is a pleasure to return to Geneva, I spent a fantastic seven years commuting here (by fantastic, I refer to being here, not the commuting) working with the United Nations Compensation Comission, as did many

¹ President, American Society of International Law; C. William Maxeiner Distinguished Professor of Law, University of California at Berkeley.
others present today. It is a gracious city, a beautiful city and for me, a city that inspires and calls to all that I feel is best in me.

Let me add that I am particularly delighted to be in a city where there resides one of the largest concentrations of members of the American Society of International Law outside of the United States. As I hope my talk conveys tonight, it is my firm belief that we as international lawyers share not only the language of law, but also a vision of global order under law and with justice. ASIL attempts to involve, and support the work of, our sister societies around the world, and it deeply appreciates the support of our members wherever they are found.

Finally, before I start I must tell you that although my parents are from Quebec, they did not teach me French and I regret I have not learned it on my own. But given that I was a mischievous child, I did learn several colorful rude French words as they tried to civilize me. I particularly recall a note of frustration in their voices as they referred to me as “un petite cochon.”

[Thesis, Structure of the Talk]

I find tonight’s task daunting because of the double challenge of first addressing the theme of this lecture series – namely the interface of public and private international law, and second to be, as is appropriate with a lecture such as this, insightful, provocative and entertaining. So tonight, as befits the scope of inquiry at the Graduate Institute, I attempt to step back and reflect on the big picture, and in particular to look from the perspective of the task of international courts and tribunals at the structure of emerging global governance. And let me emphasize that I said global governance, I did not use the term global government. Indeed, a major belief that pervades my talk
tonight is that the nation state is not withering away, but rather will remain as the primary instrument through which all efforts at global governance will be attempted. I do not say this simply as an acknowledgement of reality, but also as a desirable outcome. We should not seek the end of the nation state, but rather we should strive for its transformation into a responsible agent of coordinated global governance.

My lecture tonight can be seen as inspired by two images. The first image I offer you is of a world of nations often on the brink of violence with an international court providing an institution that could mitigate such violence.

The second image comes from my experience with the World Economic Forum’s Global Agenda Council on the International Legal System that first
met three years ago. One of our first tasks was to assess the state of the international legal system. At first, the discussions of the Council were somewhat optimistic noting the extraordinary growth in ICTs over the past two decades. But as the Council considered the range of policy challenges facing the globe, it also occurred to us that these international CTs did not really satisfy the rule of law needs of any serious attempt at getting at the main challenges facing the globe, and that therefore we needed to recalibrate our vision of the international legal system to be one where ICTs, and national legal systems -- each in appropriate spheres, each with appropriate roles – operated together to bring about the measure of coordinated global governance absolutely necessary to address a world where the limits of our environment are patently clear, where economic chaos propagates itself from one nation to another, and where terror and organized crime move, even thrive, within the liberal order we have sought for so long.

Tonight, not quite a century after Lauterpacht’s book, I would like to return the question of what it is that international courts and tribunals do, what should they do. I seek not only to recapture that which drove our predecessors to desire these courts and tribunals, but also to place them in the new order emerging. My suggestion to you tonight is that the roles these courts played in the past remain for the most part, but that they have gained new roles and these new roles are a manifestation of a world where states not only coexist and cooperate, but also a world where the state remains not only the central political entity, but also is an entity that can not separate itself from activities within other states. Let me emphasize, I did not say inseparable from other states, but rather inseparable from activities within other states. It is in part this distinction that replies to the spirit of these lectures, namely to look deeply
as the interface of the public international law and private international law fields.

[3 Preliminary Points]

Before I turn to the roles of ICTs in the past and most importantly those of our emerging future, I have three preliminary points so as to introduce our topic further.

[First Preliminary Point – Direct and Consequential]

First, what are international courts and tribunal for? If function follows form, then their immediate direct function is that of resolving disputes. But is the resolving of a dispute the only function, or is the resolution of a dispute a ‘means’ whereby yet other functions are achieved? Indeed, are political functions served merely by creating the institution? And here when speaking about the judicial function of a court, I find it helpful at a general level to distinguish between the immediate “direct” function of deciding a case -- or of answering a question presented -- and the consequential function for society of the court doing so. For example, when a court decides a contract dispute by the application of the law to the facts, it as a consequence promotes economic relations generally by making contracts enforceable. An international example can be found in the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea of 1 February 2011 where the Chamber self reflects in a section of the opinion entitled the “Role of the Chamber in advisory proceedings.” The Chamber writes

26. The advisory jurisdiction is connected with the activities of the Assembly and the Council, the two principal organs of the Authority.
The Authority is the international organization established by the Convention in order to “organize and control activities in the Area” [citation omitted.] In order to exercise [the Authority’s] functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber is part of the system in which the Authority’s organs operate, but its task within that system is to act as an independent and impartial body.\(^4\)

In other words by acting as an independent and impartial body (the direct function), the Chamber consequentially furthers the Authority’s function of organizing and controlling activities in the Area.

Although this may seem obvious, let me say it raises one of the deepest divides in deliberations where there is a tendency for some judges to make the consequential function a part of their direct function perhaps so stating in their award while there is a tendency in other judges to believe that the consequential function can only be achieved by faithful adherence to the direct function, that is, to merely decide the case. An example of this tension can be felt in the 2002 Order of the International Court of Justice in the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo \textit{v.} Rwanda). The application to the ICJ by Congo dated 28 May 2002 alleged “massive, serious and flagrant violations of human rights and of international humanitarian law.”\(^5\)

The application was accompanied by a request for interim measures that the Court denied less two months later in its Order of 10 July 2002 on the ground

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\(^5\)\textsuperscript{5}
that there was not a *prima facie* basis for jurisdiction. The Order at paragraphs 54 and 55 read:

54. Whereas the Court is deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there;

55. Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court;

Judge Buergenthal of the Court agreed with the denial of the request but objected to these and other similar paragraphs in part because:

My objection to these paragraphs is not to the high-minded propositions they express. Instead, I consider that they deal with matters the Court has no jurisdiction to address once it has ruled that it lacks *prima facie* jurisdiction to issue the requested provisional measures.⁶

He goes on

the Court's own "responsibilities in the maintenance of peace and security under the Charter" are not general. They are strictly limited to the exercise of its judicial functions in cases over which it has

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jurisdiction.⁷

In other words, faithful adherence to the direct function suggests that the Court not gratuitously say things that it believes advances the consequential function. The consequentialist function is not the court’s direct function.

Why did the Court say more than it needed to? Did it feel a responsibility beyond its direct function of deciding the case in front of it. Judge Koroma, for example, also agreed with the denial of the request, but regarding these same paragraphs, he expressed the opinion that the Court had through the *obiter dicta* in the paragraphs discharged its responsibilities in maintaining international peace and security and preventing the aggravation of the dispute.⁸

[2nd Preliminary Point – The Nail and the Screwdriver]

This discussion of courts and the use of force leads to my second preliminary point. And I will call this my nail and screwdriver point That is, the old story is of the man who has a nail to drive, but has only a screwdriver and thus proceeds to use the wrong tool for the task. In considering judicial function, we must carefully consider the range of institutions that were available to fulfill a consequentialist function.

For example, textbooks of international law often place the Permanent Court of Arbitration in the chapter on dispute resolution and state that the successor to the Permanent Court of Arbitration was the Permanent Court of International Justice and today is the International Court of Justice. I agree with the statement in terms of the direct function of deciding cases. But I disagree in

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terms of the consequential function of mitigating the horrors of war. During the second half of the 19th century, the conviction that an international court could help avoid war in the world was particularly strong. The PCA represented a step in that direction. The successor to the PCA in terms of avoiding war was not only the PCIJ, but rather the entire League of Nations structure, and currently, the function of avoiding war is addressed directly by the U.N. Security Council and consequentially by the ICJ.

My point is that international courts and tribunals, limited as they are, represent a judicial branch that is more robust than either those of an international legislative or international executive. Thus we must ask ourselves whether we turn to a court to accomplish a certain function because it is the best instrument to do so, or because we don’t have the most appropriate tool to do so. Recall the hammer and the screwdriver.

Indeed, a number of courts are created not because they are the best tool, but rather they are created because there is not hammer, or the international community is unwilling to use the hammers it has. An example is the International Criminal Tribunal for the Former Yugoslavia. The creation of the Yugoslav Tribunal story has been told by several contemporary insiders as a decision that responded to the arguments of some to hold war criminals accountable, but that it in fact was precipitated by a desire to do something -- anything -- given NATO’s unwillingness to really do something such as commit forces.9

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9 See, e.g., Patricia Wald, *International Criminal Courts – A Stormy Adolescence*, 46 VIRGINIA J. INT’L L. 319, 321 (2006)(although not a negotiator, Wald later served as Judge with the ICTFY and wrote “The Western democracies in 1993 were not yet ready to commit troops . . ., but they felt the need to do something.”)
To restate this preliminary point, the critical observation is that the role played by an international court may actually reflect the non-existence or the failure of an institution elsewhere. A further dramatic example well known to this audience is that private international arbitration is attractive not merely as an alternative to a court for reasons of speed or cost, but rather because in many cases there is no obvious court to be used. It may be that in a country such as Switzerland that domestic arbitration is chosen in lieu of the courts for reasons of speed, cost, or privacy. But in some developing countries, arbitration is chosen domestically by business as a way to run from corrupt or incompetent courts. In other words, the choice to create and use an international court may serve as a diagnostic lens on other portions of a system.

[3rd Preliminary Point – The Political Motivation]

The example of the ICTFY leads to my third and final introductory point, namely that we need distinguish between the political motivation to create an international court or tribunal and the direct function it will play once it is created. Although the political motive might seem similar to the consequentialist function of a court, let it suffice to say for the moment that it is less directly connected.

The academic literature tends to assume that the decision to create IC&Ts is to be viewed in terms of a rational actor weighing how it might best resolve a conflict arising in regard to a particular treaty regime, issue area or particular relationship. The literature does this despite the fact that the historical accounts of the creation of an ICT often involves a much more complex set of causal forces. I do not argue that the literature is necessarily incorrect. Rather, I assert that in fact states decide often to create an
international court or tribunal for reasons other than the function of resolving disputes.

For example, consider the string of decisions made to create international criminal tribunals in the last century. The assumption in much of the legal literature derived from the language of the constituent instruments is that the function of these institutions is twofold: (1) to hold war criminals accountable, and (2) to bring a measure of restorative justice. Yet these two functions often were only a part of the motives actually at play at the moment of creation. This is not to suggest that there are not some state actors or non state actors who sought accountability. Rather, it is to argue that a key force in each particular decision to take the route of creating an IC&T may have been something other than simple accountability.

Thus the story of the Nuremberg tribunal can be told as a decision prompted as an alternative to the views of some of the allies that the leadership of Nazi Germany should be summarily executed.\textsuperscript{10} As I mentioned, the Yugoslav Tribunal story has been told by several contemporary insiders as a decision prompted by a desire to do anything given NATO’s unwillingness to commit forces.\textsuperscript{11} The story of the decision to create the Rwanda Criminal Tribunal is one of shame for not acting in the first place and the demand that the developed world be consistent in its treatment of greater Europe and Africa. A part of the decision to proceed down the track that leads to the International Criminal Court can be told as one resulting from a contest for influence between the General Assembly and the Security Council given the


\textsuperscript{11} Patricia Wald, \textit{International Criminal Courts – A Stormy Adolescence}, 46 \textit{Virginia J. Int’l L.} 319, 321 (2006)(although not a negotiator, Wald later served as Judge with the ICTFY and wrote “The Western democracies in 1993 were not yet ready to commit troops . . ., but they felt the need to do something.”)
Council’s creation of the ICTY and ICTR. The decision to create the Special Tribunal for Lebanon is perhaps the ultimate example – where a primary motivating force behind that Tribunal for some was to diminish Syrian influence in Lebanon.

What is the significance of the fact that the functions served by the creation of an IC&T (i.e. the political motivation) may be different from the function served by the operation of the IC&T (i.e. the functions logically suggested by that which is created.)

There are at least two. First, because the political function served by creation of the international court or tribunal is not necessarily the function served by the operation of the international court or tribunal, the demand for creation function – and this is the important point – may dissipate over time with the consequence that the political value of the operational functions, the consensus as to the need for or value of the continuance of the international court or tribunal, may degrade over time. Second, we perhaps should assess the value of international courts or tribunals in terms of their success in meeting such non-related functions.

[Functions in a World of Coexistence and Cooperation]

Let me turn now to the main thesis of my talk tonight, namely that there is underway a transition in roles for ICTs as the global politics and needs shift.

The first image I mentioned is one in which independent sovereign states seek to coexist (that is, there various billiard balls do not hit one another creating chaos) and to cooperate (that these billiard balls move in the same direction). This is the image mot familiar to us. ICTs by deciding disputes clarify the law and expectations between states, by deciding upon disputes they
enable contracting, treaty-making, that would otherwise suffer from the inability to make credible promises, and to the extent that the decisions of these courts are viewed as correct and legitimate, it might allow the passion of national politics to be defused. In this image, states generally go about their own business, they need only not collide with one another and respect the promises they make to one to another. In this image, a claims commission is an institution meant to pick up the pieces of a collision between states.

In theory, there should not be that many inter state disputes. First, many disputes about cooperation can be worked out without going to an international court. Second, in a world with less 200 states, there are not that many parties.

What I would draw your attention to first -- diagnostically -- is that a significant portion of cases in international courts historically are not necessarily interstate, rather they are there because of failures elsewhere. A necessarily interstate dispute is one where the real parties in interest are states. They are cases I would suggest that go to the very definition of the state -- a case involving a foundational threat to the population or the territory of a state, a case regarding a customary or treaty based promise between states. Contrast with such disputes, cases based on espousal, where espousal is where a state claims that an unaddressed injury to one of its nationals is an injury to it. Many cases at the international level at the start of the 1900s involve espousal, the Mavromattis case in the PCIJ which involves a loss of a concession. Today that case in some countries might be addressed in national court, and more often would be addressed in international commercial arbitration. If it is the case that some disputes addressed at the interstate level primarily because of a failure at the national level or because international commercial arbitration was not yet fully in place, then it is also true that the growth of national courts that can be
trusted and the availability of international commercial arbitration an option has allowed a shift in dockets from the interstate to the national or private arbitral frameworks.

This is one of the great successes of private international law over the past half century. And thank goodness this shift occurred because one thing we have learned is that the public international courts and tribunals can not handle volume.

Putting aside a mass claims institution like the UNCC, we see repeatedly the fact that the vision of international courts intended to resolve disputes between less than 200 possible parties is not appropriate when the possible parties are the people of a region or the business of the world. One of the first decisions for a prosecutor in an international criminal court is who will be pursued because it is clear that he or she can not go after everyone. Indeed the jurisdiction of the Special Tribunal for Sierra Leone was limited to those most responsible for precisely this reason. This is the same realization that led Professor Wildhaber to seek to reshape the mission of the burdened European Court of Human Rights from one where potentially every person of greater Europe may seek to have their rights protected to a court which instead oversees whether the national courts of each member state is systemically failing to protect such rights.

[Functions in Coordinated Governance and in Global Governance]

My suggestion to you tonight is that the first image of managing interstate relations is still there, it is still alive and well, but as my example of the European Court of Human Rights suggested it is not the only story any longer, indeed I would say it is not the key image any longer.
In my opinion, the present time is not merely another moment, but it is a point of inflection – a turn in the river – of human events, although whether that turn is managed well or poorly is of course up to all of us.

Clearly, we are in time where technological change continues, as it has for over a century, to give us – and the law -- new challenges. The challenges are new, but that pattern is a continuing one. Also, since the end of the Cold War, the illusory concreteness of East and West has been replaced by a more complex and diverse world that is, once again, more regional and where differences are to be appreciated. But -- I would like to focus our attention on a different historical strand that is shaping the challenges we have before us and therefore the roles that are given to ICTs.

The shift in our time I wish to emphasize runs in the opposite direction to appreciation for diversity, namely we find ourselves more complexly tied to one another than ever before. Financial crises spread like viruses. The environment demands that we – the world as a whole – pay attention. Terrorism slips through the interstices of our modern world periodically making mockery of a normalcy we seek to recall. In this sense, although global governance once was concerned with international order solely in the sense of interactions between states as though they existed separately, today global governance also is concerned with governance of a complexly interactive interdependent world which happens to be divided politically and where much of the task of governing therefore is necessarily – and appropriately to be done by national governments. Global governance today therefore seeks agreement on the objectives and polices of national government. And even as such important matters are entrusted to the states, global governance recognizes that a few states will not be good partners and that quite a few states perhaps do not possess the capacity to carry out the tasks given them. Thus we see global
governance today also seeking to ensure that national governments possess the capacity, meaning that they possess a rule of law and regulatory machinery necessary.

Let us think diagnostically again, if we had a world of sovereign states all with robust internal rule of law (by which I mean that they would be viewed as possessing systems of independent and impartial tribunals that each state could mutually respect), one can imagine a world of courts where – (1) there is a system of private int’l law to coordinate the interactions of the various national legal systems, (2) there is framework to support international arbitration where it is used not as one’s only option but rather as an alternative to the coordinated national courts, (3) these is an array of international courts and tribunals to settle true interstate disputes and (4) there is an array of international courts and tribunals which by the selective resolution of disputes perform the consequentialist function of ensuring rule of law in each state remains robust. In essence, one might place Europe as moving toward this direction, and Wildhaber’s image of the European Court of Human Rights reflected the move of recognizing that international courts are not, and should not be thought of as the better court, somehow in opposition to the national courts, because the protection of human rights should be first and foremost the job of the national legal system, the international court in this image is a partner with the national court, forming a system, whereby the international court puts the national courts back on track if rule of law is tested or gives guidance if there is specific uncertainty. This concept is present in the notion of complimentarity in the ICC where the primary role of the national system is recognized and where the ICC acts primarily where the national is unable or unwilling to do so. Likewise, this concept is implicated in the willingness of
international courts to grant the margin of appreciation, the degree of discretion that is due a robust national legal system.

But this is not the world we have. Most importantly, we have we do not have in all states robust rule of law systems that are viewed as trustworthy, and therefore we have three consequences at least –

(1) There are zones with some rule of law where the role of ICTs shift, but there are other areas where nations have very little governance capacity and where national rule of law is weak. Following the cooperation and coexistence image, the international legal system in effect for those outside attempts to isolate this internal weakness. Disputes with those outside are pushed into the international arbitration system or recharacterized as interstate and moved up to the public international plane. But this strategy is not adequate in terms of the image of global governance if we are truly connected. If we do not turn a blind eye, then the fate of peoples within those boundaries become human rights question of concern to all. If a lack of governmental capacity and of rule of law means that the environment is destroyed, that joint solutions can not be pursued, then we have not isolated their weakness, we have only ignored its consequences for us all.

The absence of robust national rule of law means that there will be disputes in ICTs that are not necessarily at that level, espousal cases are one category mentioned already. But investment claims are another. The substance of the investment claim may reflect a breakdown in rule of law in the state involved, and likewise the capacity of the investor to invoke international arbitration under bilateral investment treaties without even exhaustion of remedies reflects a deep distrust of host country courts in at least some countries.
Conclusion

Thomas Holland, a British scholar of jurisprudence once wrote that international law “is the vanishing point of jurisprudence.”\textsuperscript{12} When I first read the quote in isolation, I took it as a critique of the reality of international law as law. But when read in full, he actually says two things. One point anticipates Lauterpacht: it is weakened by the lack “any arbiter of disputed questions.” But his other and main point is something quite different. His main point is that it is ironic that when and if international law succeeds in its task, it will “be not the triumph, but the extinction of International law, which can subsist only between States . . .” I agree with the first point, but not the second.

More likely than global government is global governance where states remain the key actor, but an actor who governs responsibly under law, carrying out the jointly conceived policies of the international community, policies that will preserve human dignity, that will make our economies more resilient, that will allow our world to be sustainable and that grants us freedom from fear. I have suggested a world of courts what would look like then. It is a world where the role of international courts and tribunals does not vanish but rather matures. It is an image where international courts are not envisioned as in opposition to national courts, but rather as working with national courts. To manage this transition is our challenge. We are only a part of the way there, to go further we must encourage the capacity for governance and rule of law generally, incrementally expanding the zone of rule of law in the world. For international law and its courts to succeed, it and they will in time need to let go – a little bit.

\textsuperscript{12} \textsc{Sir Thomas Erskine Holland}, \textit{The Elements of Jurisprudence} 392 (13\textsuperscript{th} Ed., 1924).