



CO-ORDINATING INTERNATIONAL JUSTICE SYSTEMS

Presentation to CMJA Conference

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By

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The advantage of speaking on an assigned topic that is suitably vaguely worded is that it gives one the greatest latitude to interpret it; to roam far and wide. When I was asked to speak on this topic I thought I should do just that. But the time constraints permit me only to do three things. Firstly, to touch briefly on some aspects of the relationship between domestic and international law. Secondly, to look at some of the ways in which my court, the CCJ, has treated with some of the challenges that have emerged in the “co-ordination” of that relationship and thirdly, to look at the cross-pollination that has occurred between civil law and common law traditions.

As the world becomes more of a global village, it has become increasingly necessary for rules to be created to guide and regulate the conduct across national boundaries of persons and states. It has also become necessary to facilitate the peaceful resolution of tensions and disputes that will invariably arise among states and other international actors. By the same token, tribunals must be created to interpret and apply the relevant rules and to resolve the disputes that arise.

These tribunals need not be courts. Many states (and other international actors) these days agree to refer for adjudication disputes concerning important areas of life and, for this purpose, they have accepted the compulsory jurisdiction of international tribunals.¹ This has resulted in a proliferation of international tribunals. These bodies operate independently from each other and address an increasing volume and complexity of international norms. Contributing to the proliferation of international tribunals has also been the following factors, namely a greater commitment to the rule of law in international relations; the easing of international tensions; the positive experience of international actors with some international courts and tribunals and the unsuitability of the International Court of Justice to decide certain disputes.²

* I gratefully acknowledge the tremendous assistance given to me by Ms Tanya Alexis in the preparation of this presentation

¹ *The Competing Jurisdictions of International Courts and Tribunals*. By Yuval Shany. Oxford, New York: Oxford University Press, 2003.

² *Ibid*

The Caribbean Court of Justice (or “the CCJ”), the court on which I sit, has encountered the challenges involved in co-ordinating justice systems that exist across national boundaries. We do so in unique ways because the court itself is special. It is two courts in one. That is to say, the Court exercises two distinct jurisdictions. In one sphere of its operations it is a final appellate court hearing final appeals from Caribbean States. In its other distinct jurisdiction, it is an international court interpreting and applying a regional economic integration treaty. The Court therefore functions in the same way as the UK Supreme Court or the Australian High Court does and then it also functions in the same manner as does the Court of Justice of the European Union or the Court of Justice of the Economic Community of West African States.

In one of the first cases to come before the court, the court acknowledged and referenced “the tendency towards globalisation in the regulation of matters such as crime, trade, human rights and the protection of the environment, to mention but a few.”³ That case, *Attorney General v. Joseph & Boyce*⁴, was itself a case where we had to look at the relationship between domestic law and international law in the context of human rights. The issue in the case was whether a State could lawfully execute two men who were convicted murderers who had exhausted all their domestic appeals but who still had pending a petition they had filed before an international human rights body – the Inter-American Commission on Human Rights. The Commission was established pursuant to a treaty that had been ratified by the State in question. But the provisions of the treaty had not been incorporated into municipal law. The argument of the State in that case was that because the Inter-American treaty had not been domesticated, the men could not derive any rights from it and there was therefore nothing to preclude the State from executing them.

The issues before the court arose in the context of a decision by the constitutionally established Mercy Committee. The men had sought clemency from the Mercy Committee. The Mercy Committee took a decision not to exercise clemency and to authorise their execution. Death warrants were read to the men. Before they could be executed, the men launched constitutional proceedings to have their execution stayed. Now, the Constitution of the country contained a clause ousting the jurisdiction of the Court in relation to decisions of the Mercy Committee.

³ Ibid, [50]

⁴ *Attorney General v. Joseph*, [2006] CCJ 1 (AJ)

The question for my court was how to reconcile all of this, namely: On the one hand there was: the desire of the State to execute the men; the Constitution's ouster of the Court's jurisdiction over decisions of the Mercy Committee and the fact that the Inter-American treaty provisions were not part of the country's domestic law. On the other hand there was the pending nature of the men's international petition; and the fundamental right, embodied in the domestic Constitution, that gave everyone a right to the protection of the law.

The Court took the view that even convicted murderers were entitled to enjoy the right to the protection of the law; the constitutional ouster clause concerning decisions of the Mercy Committee could not be employed to extinguish a person's enjoyment of that fundamental right; the treaty establishing the Inter-American System may not have been locally incorporated, but it still yielded, at a minimum, certain legitimate expectations which the State had to respect; and the enjoyment by the men of their right to the protection of the law made it incumbent upon the State to wait a reasonable period of time for the international body to give its decision on the pending petition, before the State could consider executing the men. This was a case where, in other words, in order to advance the rule of law generally, the court was obliged to find a way to harmonise and co-ordinate the enjoyment of rights on the international plane with the exhaustion of rights on the domestic plane.

International dispute settlement mechanisms have been generally welcomed as an indication of the strengthening of an international rule of law, but there are certain concomitant risks and challenges that have become apparent⁵. International law, after all, is not "a comprehensive body of law consisting of a fixed body of rules applicable to all states". Here there is no centralised legislative organ.⁶ Each of the various international courts and tribunals is typically invested with its own unique scope of subject-matter and jurisdiction. Each is independent and autonomous and is anxious to robustly assert its independence. This can easily lead to conflicts and overlaps among the jurisdictional ambits of the different existing courts and tribunals.

A circumstance that neatly illustrates all of this was the cases concerning Article 36 para. 1(b) of the Vienna Convention on Consular Relations.⁷ This Article has to do with the provision of

⁵Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions', 5 Max Planck Yearbook of UN Law (2001) 67.

⁶ Ibid

⁷ See the discussion of this issue by Karin Oellers-Frahm, above

consular assistance in those instances where a person is detained in a foreign state. The Article requires the foreign state to inform the detainee of his or her rights under the Convention and also to comply with certain other obligations. Several questions arose from the Article. Did an individual have justiciable rights under the Convention that could be invoked by his or her State? What consequences should accrue from the failure by the State detaining the person to render the requisite assistance to the detainee?

In 1997 Mexico requested an advisory opinion from the Inter-American Court on these issues. But not long after this, Germany brought proceedings against the USA before the International Court of Justice on the very same issue. The case before the ICJ concerned two German citizens, Karl and Walter LaGrand, who were due to be executed by the United States and who had not been informed of their consular rights under the Convention. So, basically, the same question was pending simultaneously before the ICJ and the Inter-American Court, namely whether article 36 para. 1(b) of the Convention gives a detainee on foreign soil the right to have his consular authorities informed without delay of his detention.

Now, in the hierarchy of international courts, it goes without saying that the ICJ stands at the very top of the ladder. It is the World Court. One may have expected that while the two courts were similarly engaged with the same issue, the Inter-American Court would decline to rule, would stay its hand and await the decision of the ICJ. The Inter-American Court did consider whether it should wait. It took the view, instead, that although, in principle, it could decline to give an advisory opinion, there was no reason to do so in this case. The Inter-American Court noted that the purpose of its advisory function is to assist the American States in fulfilling their international human rights obligations and to assist the various organs of the inter-American system to carry out the functions assigned to them in this field.⁸ As far as that court was concerned, the fact that the same question was also pending before the ICJ in a contentious case could not restrain it from exercising its advisory jurisdiction because it was an "autonomous judicial institution"⁹.

⁸ Advisory Opinion OC-16/99 of 1 October 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*,

http://corteidhoea.nu.or.cr/ci/PUBLICAT/SERIES_A/A_16_ING.HTM at [59]

⁹ *ibid.*, [61]

As to the dangers of conflicting interpretation of the same provision by two international bodies, the Inter-American Court noted that this possibility was a "phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated ... Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law"¹⁰.

The Inter-American Court consequently rendered its advisory opinion and found "that Art. 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that the said rights carry with them correlative obligations for the host State"¹¹

The ICJ subsequently held that the United States had not only breached its obligations to Germany as a State party to the Convention, but also that there had been a violation of the individual rights of the detained persons. The ICJ also noted that, "Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked before the ICJ by the national State of the detained person."

Happily, the ICJ's decision on the merits were consistent with the IACtHR's. But the then President of the ICJ, Gilbert Guillaume, pleaded for greater dialogue among international courts and tribunals. He noted that "The proliferation of International Courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases..." A dialogue among judicial bodies is crucial..., he stated¹².

This danger of conflicting decisions between international bodies is quite evident. Conflicting jurisprudence can erode the cohesiveness and consistency of international law. It can lead to the development of mutually exclusive legal doctrines. It can also encourage forum shopping as well as a multiplication of proceedings before different forums. Left unchecked, it could threaten the universality of international law. The wastage of judicial resources and the possibility of divergent outcomes can contribute to fragmentation of international law and the weakening of the coherence and credibility of the law as a whole¹³.

¹⁰ Ibid para [61]

¹¹ Ibid para 141(1)

¹² Statement of the President of the ICJ to the UN General Assembly of 26 October 2000

¹³ Eva Kassoti "Fragmentation and Inter-Judicial Dialogue: the CJEU and ICJ at the Interface", *Journal of European Legal Studies*, Vol.8 No. 2 (2015) pp. 21-49.

These fears are not hypothetical. For example, there is a multinational company based in Geneva called *SGS (Société Générale de Surveillance SA)*. SGS brought international arbitration proceedings against Pakistan in one matter¹⁴ and the Philippines in another¹⁵ arising out of alleged breaches of Bilateral Investment Treaties (“BITS”). Two arbitral tribunals of the International Centre for the Settlement of Investment Disputes (ICSID), came to different results over the interpretation of jurisdictional provisions in the respective Bilateral Investment Treaties (“BITS”). In the 2003 *SGS v Pakistan* decision, the arbitral panel interpreted provisions in a BIT in a manner that suggested that it lacked jurisdiction to adjudicate. But this interpretation was rejected by another ICSID tribunal in the *SGS v Philippines* decision although it involved an identical dispute settlement provision of the Agreement between the Swiss Confederation and the Republic of the Philippines.¹⁶

Earlier I alluded to the challenges that sometimes face domestic common law courts as their jurisprudence intersects with international law and the decisions of international tribunals. The source of the tension, especially in common law states, is clear. Domestic tribunals should strive faithfully to apply international law and, as far as possible, interpret domestic law in a manner that is consistent with international law. But equally, domestic courts have a responsibility to be faithful to and to apply the domestic laws and the Constitution of which they are an integral part. There are occasions when it may simply not be possible to reconcile the two things.

The Caribbean Court of Justice faced this dilemma when we had occasion to overrule the effect of a decision of The London Court of International Arbitration. That Arbitral Panel had determined that the State of Belize should pay substantial damages for dishonouring certain promises its Prime Minister had made to two commercial companies. The promises were contained in a Settlement Deed. The Deed provided that the Companies should enjoy a unique and extremely favourable tax regime specially crafted for the companies. The problem was that the terms of this Deed were completely at variance with the tax laws of Belize and the Deed and its provisions were never brought to the attention of the Belize legislature, far less

¹⁴(Objections to Jurisdiction) Case No. ARB/01/13 (*SGS v Pakistan*)<https://www.italaw.com/sites/default/files/case-documents/ita0779.pdf>

¹⁵(Objections to Jurisdiction) Case No. ARB/02/6 (*SGS v Philippines*), <https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf>

¹⁶ *Ibid* at paras 131-135.

legislated. Indeed, the Deed had been negotiated in stealth by the companies with the then Prime Minister. The new tax regime was enjoyed by the companies for two years until after general elections in Belize a new Administration was sworn in. The new Government discovered the secret agreement and repudiated the provisions of the Deed. In one of its clauses the Deed provided for international arbitration before the LCIA. The companies accordingly proceeded to international arbitration.

The Arbitral Tribunal considered the issue but declined to hold that the Agreement was void on public policy grounds. It found the State of Belize in breach and awarded substantial damages against it. The companies then sought to enforce the arbitral award in Belize as a local judgment. Ordinarily, this would be a routine exercise. But on this occasion, the CCJ found that the underlying transaction giving rise to the arbitral award was void for public policy. The CCJ noted that under Belize's Constitution only Parliament could alter tax laws. A secret Agreement between a Prime Minister and a local company, purporting to make special tax laws for that company, so seriously violated the country's rule of law that the court could take no step to lend its imprimatur to that agreement. The court therefore held that the Award from the LCIA was unenforceable for public policy considerations.

So, here was a case that illustrated conflicting approaches of international and domestic tribunals towards the same subject matter. The arbitral tribunal's interpretation of the limits of Executive authority (or what in the UK is called the Crown's prerogative power) was at complete variance with the CCJ's. While the Tribunal was prepared to allow the Executive a broad, almost unlimited, ambit within which lawfully to contract, and to hold the State accountable for breaches of any such contract. The CCJ, on the other hand, held that the Executive's power to contract and the accountability of the State for Executive contracts were circumscribed by the provisions of the domestic Constitution. The CCJ considered that if it were to order the enforcement of the Award it would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce, albeit belatedly, in the violation.

One of the ways in which common law courts, in particular, seek to maintain consistency and stability in judicial decision-making is the application of the doctrine of *stare decisis*. The ability to take into account previous decisions, so that litigants in comparable situations to

previous litigants may expect to be similarly treated, is a principle that lends predictability to the law. Such predictability promotes public confidence in the application of the law.

Generally, however, international courts and tribunals are not usually subject to a system of *Stare decisis*. These bodies are “autonomous”, as was trenchantly observed by the IACtHR. They are not obliged to follow the decisions of other courts, even where there are bodies with greater specialities or experience in the relevant subject matter. They are not even obliged to follow their own decisions. Indeed, many of the statutes and rules of procedure of international tribunals expressly exclude any precedent effect of their judgments. Their decisions have no binding force except as between parties and in respect of a particular case.¹⁷

Notwithstanding the absence of a formal system of *stare decisis*, however, most international tribunals including the ICJ, tend to adhere closely to their own precedents in a system that is often referred to as *de facto stare decisis*¹⁸. And they usually would refer to their own decisions and only derogate from them in exceptional circumstances. They also concentrate narrowly on the case and the parties before them. They therefore tend to refrain from generalising their comments and decisions to cover situations not arising in the concrete case before them. In other words, they avoid making what we might call *obiter dicta*.

The Revised Treaty of Chaguaramas, the document that provides for the international treaty role of the CCJ, made an interesting design choice by expressly mandating in Article 221 that the judgments of the Caribbean Court of Justice constitute legally binding precedents for parties in proceedings before the Court. We have since confirmed in one case¹⁹, that our decisions are not only binding on all Member States, but that as a matter of law, the court itself is bound to rely on its previous decisions. The CCJ also actively cross references the jurisprudence of various international courts and tribunals, both those with similar subject matter jurisdictions

¹⁷ See for instance Article 59 Statute of the ICJ “The decision of the Court has no binding force except between the parties and in respect of that particular case; Art 53(1) of the ICSID Convention “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

¹⁸ M Busch, ‘Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade’ (2007) Int’l Organ 735, 741; Lindquist S, Gross F, ‘Stability, Predictability and the Rule Law: Stare Decisis as Reciprocity Norm
<https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf>

¹⁹ *Shanique Myrie v Barbados*

and those whose jurisprudence derives from a different legal domain but offer some relevance to the instant case.

We regularly cite, for example, judgments from the Court of Justice of the European Union (CJEU) in developing our own jurisprudence.²⁰ This approach of active engagement with the jurisprudence of other courts is mirrored by other international courts and is an important factor in counteracting the risk of fragmentation of international law²¹.

A critical factor for the integrity and legitimacy of international justice systems lies in the degree of confidence reposed in them by states. The absence or erosion of public confidence in an international tribunal or the exercise by States of naked power politics will naturally pose a serious challenge to the integrity of that tribunal. The International Criminal Court was and is still a noble idea. Here is a court dedicated to prosecuting individuals for the most heinous international crimes when national courts are unwilling or unable to prosecute such criminals or when the United Nations Security Council or individual states refer situations to the Court. But the Court is plagued with allegations from members of the African Union that it has not been even-handed in targeting Africa and African Heads of State while overlooking international crimes perpetrated elsewhere²². Now that the court is currently investigating alleged war crimes in Afghanistan, which would include any committed by US military and intelligence officials in the treatment of detainees, the present US Administration has denounced the court and made some rather ugly statements about it.

Questions as to the legitimacy of UN Security Council Resolutions have also been raised, at least in one notable case, in Europe. It will be recalled that in the wake of the 9/11 terrorist

²⁰ An instance of this occurred in *Trinidad Cement Limited and TCL Guyana Incorporated v Republic of Guyana*²⁰. Here, the CCJ was faced with the issue of what sanctions, if any, could be imposed for the breach of provisions of the Revised Treaty of Chaguaramas (RTC). The Revised Treaty contained no specific provisions on the issue. But we readily adopted the basic approach of the CJEU in C-6 and 9/90 *Francovich v Italy*. We held that the Revised Treaty is based on the rule of law and that this implies the remedy of compensation where rights which enure to individuals and private entities under the Treaty are infringed by a Member State.

²¹ *Supra* (n.3); Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators" *Journal of International Dispute Settlement*, Vol. 2. No.1 (2011), pp 5-23.

²² Discussion Paper, *The International Criminal Court, Africa and the African Union: What Way forward*, by Philomena Apiko & Faten Aggad European Centre for Development Policy Management No. 210 November 2016, last accessed 26 Aug 2018 <http://ecdpm.org/wp-content/uploads/DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf>; Catherine Gegout (2013) *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace*, *Third World Quarterly*, 34:4, 800-810, last accessed 26 Aug 2018 at <https://doi.org/10.1080/10426597.2013.800737>

attack in the USA, the Security Council instituted a raft of counter-terrorism measures.²³ These measures have obligated member states to take wide-ranging steps, including the imposition of asset freezes and travel bans on listed individuals and legal entities. There has practically been little recourse against the sanctions contained in these resolutions. But their legitimacy was challenged as being in violation of the right to access to a court and the right to an effective remedy,²⁴ both elements of which have been universally accepted as inherent facets of the right to a fair trial.

The hierarchy and legitimacy of these resolutions was tested in a case brought before the European Court of First Instance²⁵. In order to give effect to the Security Council resolutions, the Council of the European Union had adopted a regulation ordering the freezing of the assets of those on the list. The list included Yassin Abdullah Kadi, a resident of Saudi Arabia, and Al Barakaat International Foundation.

These persons commenced proceedings in the Court of First Instance (CFI) and requested annulment of the Council regulations on the ground that they infringed several of their fundamental rights including the right to respect for property, the right to be heard before a court of law and the right to effective judicial review. The CFI rejected these claims and confirmed the validity of the regulation, ruling specifically, that it had no jurisdiction to review their validity. On appeal, the Court of Justice of the European Union reversed this judgment and held, *inter alia*, that ‘obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty’. So, here was a decision that stated that core rule of law principles of the European Community could not be prejudiced by the resolutions of the United Nations Security Council. This decision was a clear rebuff to the United Nations. But it prompts the question whether such a rebuff would have been countenanced if it had been issued by the courts of a developing country.

It is judges who interpret and apply rules and who give or refuse appropriate remedies. The promotion of confidence in international justice systems can be advanced by ensuring transparent mechanisms in the nomination and appointment of judges of international bodies.

²³ Resolutions 1267 (1999) and 1373 (2001)

²⁴ Hierarchy in International Law: The Place of Human Rights Erika De Wet and Jure Vidmar

²⁵ *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351 (“the Kadi decision”)

As one commentator noted, ‘if good candidates are not put forward, or do not come forward, the election procedure cannot lead to good results’²⁶ In this regard there has been a consistent call for greater transparency in the international judicial selection procedures, for the depoliticization of the selection process and the strengthening of the independence of international courts.

The Agreement establishing the CCJ was careful to ensure a non-political, transparent and ostensibly merit-based approach to the selection of the President and judges on that court. The CCJ positions are advertised and applicants are interviewed and selected by a Commission comprised mainly of representatives of Lawyers Association, Law schools and civil society. The judges are appointed by the Commission and have security of tenure.

Cross-pollination of legal norms

There is a distinct tendency toward cross-pollination of legal norms, both substantive and procedural. Globalisation, instantaneous global communication, the ease with which courts and tribunals can access each other’s decisions, have encouraged common approaches to legal effectiveness. International courts and tribunals have no qualms now in adopting procedures and remedies that are borrowed from each other’s legal traditions.

For instance, the tendency towards a *de facto stare decisis* to which I earlier alluded is but one element of this. In human rights adjudication especially, one frequently sees domestic and international courts alike relying on the judgments of other municipal and international courts. When the Supreme Court of Kenya²⁷ held that the mandatory death penalty violated fundamental rights and freedoms it relied on, inter alia, cases from India, from the Eastern Caribbean Court of Appeal²⁸, from the European Court of Human Rights²⁹ and from the UN Human Rights Committee³⁰. This kind of cross-pollination is gradually resulting in the global

²⁶ M. Wood, ‘The Selection of Candidates for International Judicial Office: Recent Practice’ in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge) Thomas A. Mensah* (The Hague: Martinus Nijhoff Publishers, 2007) 357–8.

²⁷ in *Francis Karioko Muruatetu & Wilson Thirimbu Mwangi v Republic [Writ Petition No.15 of 2015*

²⁸ *Spence and Hughes v. The Queen* Crim. App. Nos. 20 of 1998 and 14 of 1997, judgment rendered Apr. 2, 2001 (E. Carib)

²⁹ *Kafkaris v. Cyprus (Application No. 21906/04)*,

³⁰ (Eversley) *Thompson v. St. Vincent and the Grenadines*, Communication No. 806/1998, UNDoc. CPPR/C/70/D/806

acceptance of “intransgressible principles of law” which are accepted/applicable on both the domestic and international planes. On the international plane, it has been suggested that this practice is promoted by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires judges to take into account, together with the context of 'any relevant rules of international law applicable in the relationships between the parties'.

The final point I would like to make relates to the relationship between the common law and civil traditions. To a certain extent each of these systems have been enhancing their procedures by borrowing from each other. For example, towards the turn of the last century, common law courts began reforming their procedural rules to embrace greater written procedures such as the prior service of witness statements and the adjudication of issues on paper without an oral hearing, these were all measures borrowed from the civil law tradition. On the other hand developments in criminal procedures in the civil law tradition have led in some civil law states to the embrace of rights of cross-examination that are a feature of the common law adversary trial.

Yesterday as I listened to the presentation from Lady Dorrian about the taking of evidence from children and other vulnerable witnesses it occurred to me that she was describing a method of eliciting truth that was almost closer to that of the civil law investigating judge than of a common law adversarial cross examination.

At the end of the day, justice is about fairness; about effectiveness; about efficiency; about institutional and individual integrity. No one system has a monopoly on these attributes and if in order to achieve these objectives it is necessary for us to reach outside traditional sources, then surely this would enure to the enhancement of the rule of law.