

ACTIVITIES

I. ACTIVITIES OF THE INTERNATIONAL LAW ASSOCIATION OF JAPAN

THE FIFTEENTH ACADEMIC CONFERENCE
(2007)

Date: April 21, 2007

Place: Sanjo Kaikan, University of Tokyo

The Common Theme: Procedural Issues in International Adjudication

Morning Session:

Chair: Professor Kazuya Hirobe, Seikei University

Speaker: Professor Hisakazu Fujita, Kansai University

Afternoon Session (1):

Chair: Professor Takane Sugihara, Kinki University

Speaker: Professor Chikako Taya, Hosei University

Speaker: Professor Kanako Takayama, Kyoto University

Afternoon Session (2):

Chair: President Terumi Furukawa, Fukuoka Jogakuin University

Speaker: Professor Hironobu Sakai, Kyoto University

Speaker: Professor Shunichiro Nakano, Kobe University

Structure and Function of International Criminal
Justice: Cooperative Relationship of the ICC and the United Nations
Hisakazu Fujita, Kansai University

In the present world, different international tribunals or organs have giving different interpretations of international law principles or rules, which has provoking the problem-oriented argument of fragmentation of international law. Following to the Report of the Study Group of the ILC (Fragmentation of International Law (A/CN.4/L/702)), the paradox of globalization has led to its increasing fragmentation — that is, to the emergence of specialized and relatively autonomous spheres of social action and structure. (par.5) International criminal law seems to belong to one such specialized system. It gives legal expression to the “fight against impunity.”(par.10.)

The problem of the ICC treated here is concerning the relationship between the ICC and the UN (Security Council): One is a cooperative relationship (referral problem) and the other a concurrent or prevailing one. How to establish the ICC is decisive to see its structure and function. While the ad hoc tribunals such as the ICTY and the ICTR were established by UN Security Council resolutions acting under Chapter VII of the UN Charter and therefore considered as a subsidiary

organ of the Security Council, the ICC was established by a treaty (the Rome ICC Statute) as an independent organization having a legal personality. From this, the structure, power and function of these bodies are different. For example, while the ICTY has concurrent or prevailing jurisdiction over national penal tribunal, the ICC complements national penal tribunals. Another is the difference of an aspect of the trigger mechanism, that is, referral and/or deferral to the ICC by the Security Council.

The ICC may exercise its jurisdiction (with respect to a crime referred to in Article 5) if “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations” (Article 13(b)). This power of referral is not given by the Rome Statute but by Article 39 of the Charter. The Security Council may determine such a situation as a threat to the peace, and decide its referral to the Prosecutor as measures to maintain or restore international peace and security. The Security Council may refer not only a situation but also a particular case if it composes a threat to the peace. As an example of the first referral, the SC Resolution 1593 (2005) on Darfur, “Acting under Chapter VII of the Charter of the United Nations”, decides “to refer the situation in Darfur since July 1, 2002 to the Prosecutor” of the ICC.

As the effects of the referral to the conventional regime of the Rome Statute, the jurisdictions of the ICC may be extended by some derogations from principle regulating jurisdiction of the ICC (Article 13). Further, in deciding the referral, the SC resolution may decide that member States should not exercise their national penal jurisdictions over such a case.

On the other, by the principle of *Kompetenz-Kompetenz*, the ICC has the power to control the legality of the referral of a situation by the Security Council. However, it is very doubtful for the ICC to control from the viewpoint of international law a threat to the peace on which the Security Council has wide discretionary power.

On the obligation to cooperate with the ICC in its investigation and prosecution of crimes (Article 86), the Security Council may take even enforced measures in case of non-cooperation of the member States, regarding it as a threat to the peace.

As to the question of deferral, by Article 16, “No investigation or prosecution may be commenced or proceeded with (under this Statute) for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

While it is not clear whether the situation of deferral being regarded as a threat to the peace is caused by the investigation and prosecution in the ICC or by the political backgrounds, the implementation of the resolution on deferral may

determine the member States do not cooperate with the ICC against the terms of deferral. The ICC cannot control in fact the legality of such deferral.

In conclusion, while the ICC has been established by a conventional basis in fragmentation of international law, it may approach to the so-called world penal court only by the intervention of the Security Council through the trigger mechanism of the ICC. That is, the ICC may have jurisdiction to all States as well as all natural persons in the world by the referral of the situation to the ICC by the Security Council. However, the intervention — referral and deferral — of the Security Council represents the coordinating or subordinating relations between the ICC and the UN. The value-choice of peace or security in the international community seems to prevail over that of justice by the ICC.

Rules of Evidence in ICTY and in ICC: Privileged Information

Chikako Taya, Hosei University

Investigative clues of war crimes in the conflict zones such as Bosnia, are often brought about to the Prosecutor's knowledge, for example, by the UNHCR, which has its own task to protect refugees. Such information, although very useful in establishing the truth for criminal justice, should be given certain degree of privilege under judicial procedure to reconcile with other important objectives carried out by the UNHCR.

ICTY Rules 70, 97 address this concern, and ICC Statute Article 54 3 (e), ICC Rules 82, 73 deal with this matter.

But they do not meet the real needs of the present situation and are expected to evolve in future. For example, ICC Rule 73 mentions the ICRC only, considering its longstanding history and recognition by the international community. But some privilege should be considered for the UNHCR and perhaps even for NGOs such as Médecins sans Frontières. And in this context, it is worth paying attention to the ICTY Appeal Chamber's decision on subpoena of Randal (Washington Post correspondent; Brdjanin Case) which gives larger testimonial privilege for journalists than traditionally admitted confidential sources.

It says qualified privilege should be considered to war correspondents because of the fact that if they are forcibly brought before the International Tribunal on a routine basis, then they are to be perceived as potential witnesses for the prosecution and their ability to obtain information and thus inform the public on issues of general concern would be significantly damaged.

Procedural Issues in International Criminal Justice:
From the Viewpoint of Criminal Law

Kanako Takayama, Kyoto University

The Diet is currently passing the bill for the "Law on Cooperation with the ICC" (promulgated May 11, 2007). The main purpose of international criminal justice has been to overcome the "culture of unpunishment." With that regard, the ICC gives priority to national criminal jurisdictions using the principle of subsidiarity. At the same time, the ICC aims to achieve a higher level of protection of human rights than other international tribunals. The Rome Statute gives great consideration to the rights of defendants as well as those of victims. Despite political restrictions, great hopes are entertained of the role of the Court.

The procedure of the ICC stands between the Anglo-Saxon adversarial system and the Continental-European inquisitorial system. The Rome Statute itself has as many as 128 Articles and prescribes the details of its proceedings. It makes a contrast to the "case-law" approach adopted by other international tribunals. Nevertheless, even the Statute together with other rules of the Court have not clarified everything. The Court must concretize its proceedings through practice.

The procedure of the ICC consists of investigation, confirmation of the charge by the Pretrial Chamber, the trial and appeals. Since the ICC does not have any executional power, its workability depends much on the cooperation of member and non-member states.

Our bill concerns mostly this part of the Statute. The Japanese legislature chose a clever way to minimize the law by quoting the existing laws on international cooperation so that the structure of our criminal law and criminal procedure remains untouched. However, there are some discrepancies between the new bill and the existing system, such as non-application of limitation and double criminality, and admission of guilt.

New Functions of the Provisional Measures
by the International Court of Justice

Hironobu Sakai, Kyoto University

The International Court of Justice affirmed a legally binding effect of the provisional measures in *LaGrand* case, so that the Court might assure to implement them effectively, for preserving the rights of the parties in the judicial process. Despite its original significance, however, the object of the provisional measures has already expanded into the non-aggravation of disputes, even into the protection of human rights and the respect of humanitarian law, as the substantive rules of international law have developed in such areas. Moreover, this situation may produce

opportunities in which the parties can use the provisional measures politically and even arbitrarily.

Facing such possibly unilateral abuses of provisional measures by the parties, the Court rather tends to make use of this institution as a tool for managing overall conflicts between them. Even if the urgency should be lacking, or if any *prima facie* jurisdiction should not be established in the incidental phase, the Court has expressed its views toward the dispute in question in the reasoning of the order, not in its operative part; it “welcomes” the (re)start of the negotiation between parties outside the Court, or expresses “the great concern” about the grave violations of human rights or the use of force, and so on. Some cases reveal that the Court may play the role of a conciliator, and in others as a rigid proclaimer of law, though both reflect the positive intervention by the Court in order to lead parties to the final solution of the dispute between them. This operation of the provisional measures can be considered as a part of the new functions for dispute management by the Court.

Provisional Remedies in International Commercial Arbitration and Anti-Suit Injunction

Shunichiro Nakano, Kobe University

Under the Japanese arbitration law, the arbitral tribunal may order an interim measure of protection at the request of a party. The law contains no express provision on its execution, which shall be understood to exclude the enforceability of such an order. In the Resort Condominiums Case of 1993, enforcement of a foreign tribunal's provisional remedies under the NY Convention was rejected by the Australian court. However, if there are good reasons to grant an arbitrator power to order provisional remedies, it would be desirable to make them enforceable in order to enhance their effectiveness. In Germany (Article 1041 CCP), Switzerland (Article 183 PIL), the Netherlands (Article 1051 CCP) and Singapore (Article 28 ArbL) such measures can be enforced if they are ordered in the domestic arbitration procedure. In 2006, the “Revised articles of the UNCITRAL Model Law on International Commercial Arbitration” and Article 593 of the new Austrian CCP opened the way to the international enforceability of such measures, which would contribute to the effectiveness of international commercial arbitration. From the theoretical viewpoint, the court's jurisdiction to order provisional remedies should be restrained if the arbitral tribunal is in a position to grant effective measures.

Anti-suit injunctions could be a useful tool to prevent vexatious foreign court litigation that is incompatible with the arbitral agreement between the parties. Contrary to the German High Court decision of 1996, it will not violate judicial sovereignty of the forum state, as far as the object of the order and its enforcement is located within the territory of the rendering state. However, considering the

effectiveness and quickness of the procedure, anti-suit injunctions would be more adequately granted by the arbitral tribunal itself, as the SGS Case of the ICSID arbitration suggests.

ACTIVITIES OF THE OFFICE IN 2007

1. The General Meeting of the Japan Branch was held on April 21, 2007 at Sanjo Kaikan, Tokyo.
 - a. With regard to fiscal year 2006 :
 - (i) The financial account of the Japan Branch for fiscal year 2006, audited by Mr. Masaki Orita and Mr. Akira Kawamura, Auditors, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved by the Meeting.
 - (ii) The general affairs of the Branch during this term were reported by Professor Naoya Okuwaki, Secretary-General.
 - (iii) The academic activities of the Branch during this term were reported by Professor Yuji Iwasawa, Director of Planning.
 - (iv) The publication of Number 49 of *The Japanese Annual of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
 - b. With regard to fiscal year 2007 :
 - (i) The budget for fiscal year 2007, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved by the Meeting.
 - (ii) The general affairs scheduled for this term were presented by Professor Naoya Okuwaki, Secretary-General.
 - (iii) The academic activities scheduled for this term were presented by Professor Yuji Iwasawa, Director of Planning.
 - (iv) The progress of the editorial work for Number 50 of *The Japanese Annual of International Law* and Volume 51 of *The Japanese Yearbook of International Law* was reported by Professor Akira Kotera, Editor-in-Chief.
2. Council Meetings were held twice for fiscal year 2007 and dealt with the following matters.
 - a. At the first regular Council Meeting of 2007 held on April 21, 2007 at Sanjo Kaikan, Tokyo :
 - (i) The financial account of the Branch for fiscal year 2006 and its budget for fiscal year 2007 were reported.
 - (ii) The general affairs of the Branch for fiscal year 2006 and the program for fiscal year 2007 were approved.
 - (iii) The academic activities of the Branch during fiscal year 2006 and the program for fiscal year 2007 were approved.
 - (iv) The publication of Number 49 of *The Japanese Annual of International*

Law and the progress of the editorial work for Number 50 of *The Japanese Annual of International Law* and Volume 51 of *The Japanese Yearbook of International Law* was reported on.

- (v) The following persons were admitted as new members of the Branch.
- James Hartley, Second Secretary, New Zealand Embassy
 - Chikako Taya, Professor, Hosei University
 - Kazuyori Ito, Lecturer, University of Shizuoka Prefecture
 - Tomonori Mizushima, Associate Professor, Nagoya University
 - Kenzo Tada, Associate Professor, University of Teikyo-Heisei
 - Dai Tamada, Associate Professor, Okayama University
 - Yoshiaki Sato, Lecturer, Hiroshima City University
 - Tomoko Fukamachi, Lecturer, Fukuoka International University
 - Yuraka Yoshizawa, Senior Research Fellow, Research Institute of Capital Formation
 - Koji Nishimoto, Lecturer, Senshu University
 - Takashi Miyazaki, Professor, Nagoya Keizai University
 - Philipp Osten, Associate Professor, Keio University

b. At the second Regular Meeting of 2007 held on October 29, 2007 at Gakushi Kaikan, Tokyo

- (i) The financial condition of the Branch was reported on.
- (ii) The general affairs of the Branch was reported on.
- (iii) The academic activities of the Branch were reported on.
- (iv) The progress of the editorial work for Number 50 of *The Japanese Annual of International Law* and Volume 51 of *The Japanese Yearbook of International Law* was reported on.
- (vi) The following persons were admitted as new Members of the Branch
- Mika Hayashi, Associate Professor, Kobe University
 - Tetsuya Toyoda, Lecturer, Akita International University
 - Huang Renting, Associate Professor, Tezukayama University
 - Mitsuru Kurosawa, Professor, Osaka University

NOTICE

Professor Emeritus Ko Nakamura of Keio University passed away on February, 2007, at the age of 79. He has been a member of the Council of the Japan Branch since 1988.

(Kazuhiro Nakatani)