



Centre for
**Global
Cooperation
Research**

Report of the 20th Käte Hamburger Lecture

The Place of International Courts and Tribunals in Contemporary International Relations: Functions and Motivations

with Prof. David Caron

24th November 2016, Berlin





*The 20th Käte Hamburger Lecture in the Superior Court of Justice, Berlin was addressed by **David D. Caron**, Professor at the Dickson Poon School of Law, Kings College London. Caron currently serves as a Member of The Iran United States Claims Tribunal in The Hague. His discussant was **Tanja Aalberts**, who is director of the Centre for the Politics of Transnational Law and conducts research in the programme Boundaries of Law at the Free University Amsterdam. **Christian J. Tams**, Professor of International Law at the University of Glasgow and a qualified German lawyer, moderated the lecture.*



In his welcome remark, **Markus Böckenförde**, Executive Director of the Käte Hamburger Kolleg/ Centre for Global Cooperation Research, introduced the Centre and thanked the president of the Superior Court of Justice, Dr Bernd Pickel, for hosting this event. He emphasized the significance of the Superior Court of Justice for court history especially during and in the aftermath of the Second World War.

Christian J. Tams introduced the lecture topic by reviewing functions and motivations that led to the establishment and the work of international courts in IR. After a few decades on the rise, courts are now facing backlashes. New challenges demand courts to perform diverse functions. At the same time, every person perceives courts to have different functions: as agencies, as law makers, as regime-stabilizer and as institutions that deliver justice as well as alternative options. The following keynote lecture by David Caron explored these various functions of courts.

The Functions of Courts

David Caron started his speech with the investigation of courts' role. To understand courts, it is important to review their functions. Caron distinguished three main functions of international courts. First, there is the legal or juridical function, which is the most visible one and defines what courts do. Second, the social function defines the role that courts play in the society. Caron termed the third function as political motivation, which looks into reasons for courts' existence and their jurisdiction, especially in international context. He then moved on to discuss two distinctions: legal function vs social function and social function vs political motivation.



Differences between Legal Function and Social Function

What do courts do? There can be a social or political function that society decides to be fulfilled by an institution, a court. Therefore, courts are institutions. Yet, this begs further questions about why this institution has to be in the form of a court and why a social function should be given to a court.

From courts' perspective, their direct function is legal tasks: to solve individual disputes. Any social function to be carried out by courts is implicit e.g. to provide capacity for private litigants and to settle disputes. Economists say that one of the most important functions of a court is to make private promises credible. With this credibility, people can enter into transactions much more confidently and efficiently. This ability to rely on promises of others in a predictable way is essential for the emergence of economy. By fulfilling its legal task, the court indirectly expands its role in dispute. To perform social functions indirectly is more efficient because if the court tried to do the social function directly, it might actually undercut its own ability to do so.

To explain the authority function of courts, Caron used the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in 2011. The Chamber self-reflected its task by saying that its advisory jurisdiction is connected with activities of the assembly and the council, which are the two principal organs of the authority. Both are not courts. The authority is a body that has jurisdiction to watch over activities on the seabed as a political legislative matter. In this case, the authority is an international organization. So that the authority could exercise functions probably with the UN Convention to the Law of the Sea, the authority may require assistance of an independent and impartial traditional body. Courts can help the chamber by acting as this independent and impartial body, so that the chamber can consequentially further its authority function of organizing and controlling activities of the seabed.

Caron noted that there is a tendency for some judges to let social functions influence what they believe their direct function should be. At the same time, some of other judges consider that the social function can only be achieved by faith or by the traditional function. As an example he raised a case from the



International Courts of Justice which concerns armed activities on the territory of the Congo. It was created in 2002 because of massive serious violations against human rights. The ICJ statement declared that the court is deeply concerned by human tragedy and also that it is mindful of the purposes and principles of the United Nations and of its own responsibilities for peace and security under the statute of court. Despite this, the court denied provisional relief, because there is no jurisdiction in this case.

Quoting Judge Buergenthal, who agrees with the denial, Caron emphasized that courts' responsibilities in the matter of security and peace are not general. They are strictly limited to the exercise of their traditional function. Furthermore, court does not make unnecessary statements, only because such statements may advance a related social function. Caron then referred to Judge Koroma who complemented that the court has nevertheless discharged its responsibilities to maintain international peace and security matters. Closing his first impressions on courts' functions, Caron referred to Karen Alter's theory explains four functions of courts: Enforcement, Dispute Settlement, Constitutional and Administrative Review.

Mission Mismatched: Courts as Screwdrivers

Caron continued by addressing the topic of mission mismatched which can happen sometimes and has two consequences. First, it is paradoxical that in the international context, where there is no exactly legislation, the first institutions we see are courts. This poses the risk that society might overestimate the power of courts and their capacity to serve the social functions. Caron uses the metaphor of the screwdriver and the hammer. While hammering a nail into the wall with a screwdriver suggests the use of a wrong tool, it could be the only tool available at that moment. This example illustrates the dilemma of international courts. They were originally created so that war could be avoided. As there was no other tool for other conflicts, society used courts for many different kinds of disputes. Some very important tasks were given to courts, because there simply is no other (international) institution to transmit to.

The second consequence is that courts may corrupt themselves to adopt a social function, although the institution might be not suited for it. To relate to the





screwdriver-hammer metaphor again, if the screwdriver is always used for a mismatched function, it probably loses its original function. In case of the courts they will begin to lose their identity and their legitimacy.

The Difference between the Political Motivation for Creating an International Court and the Social Function

The term 'political motivation' is used here to refer to a political end that is both more mediate and contingent on facts. The term should be less directly related to the social function or the traditional work of courts. The decision of creating an international court or tribunal is much more complex than just rational reasons to solve a conflict. A rational choice for how a conflict should be best solved would be a better option. However, most of the times decisions are influenced by political motivation. The political motivation which has been the reason for creating the international tribunal is not necessary the served function. The political demand may dissipate over time and with that the political value of having that court diminished as well. This poses the risk that the initial consensus for the need of courts subsides.

Example: International Tribunal for Lebanon

To constitute theoretical thoughts of his lecture in a practical case, Caron used the case of the Special International Tribunal for Lebanon. On 14th February 2005, a terrorist act happened in Lebanon. A bomb explosion killed former Prime Minister Rafik al-Hariri and twenty-two other persons. Al-Hariri was a member of the opposition of the pro-Syrian government. After this tragedy, a discussion started about the need of an international tribunal to pursue the responsible persons for this attack. Following lengthy negotiations, the UN Security Council established a special international tribunal for Lebanon on 10th June 2007.

The legal or juridical function of this tribunal was to solve the case and to prosecute the perpetrators. The social function of this kind of courts was, according to Caron, to support the rule of law at a national level. Special tribunal would not be required in a country with fully functioning courts. In case of Lebanon, the rule of law in this time was precarious and international support was needed. So if national courts fail, the mission of the international courts is to



foster them. The political motivation in this case was very complex. First, in Lebanon existed a desire to bolster Lebanon's new freedom and sovereignty. The background is that Syria had significant influence on Lebanon for decades and at this time the question arose if Lebanon would relapse under its influence. The Syrian influence should have been reduced on the outside to make Lebanon within more united and sovereign.

In 2011, the focus of the lawsuit shifted. Instead of the state Syria, the international tribunal charged four individual members of the Hezbollah. At the same time, Syria re-emerged as significant influence in Lebanon. The situation became a complete different one than that in 2005 and changed the political motivation. A controversy arose about whether Lebanon would be obliged to extradite the defendants. This led to a fundamental dilemma for the special tribunal: If the tribunal insisted that the defendants have to be extradited, this would jeopardize the unity within Lebanon. The fact that the tribunal had to think about the consequences of their judgement showed that it reached a point where it was adopting a very complex version of trial.

Caron concluded his lecture by touching upon the elections in the US. He noted that the world is experiencing new terrains. Society has to face leaders that put national interests first. The academic community consequently needs to rethink international cooperation. Addressing the functions of courts and tribunals the questions resulting are: What do they need to address? Are international courts and tribunals capable to moderate occasional backsliding?

Comments and Discussion



Agreeing with Caron's overview of different functions of courts and the relation between them, Aalberts emphasized on the life of institutions. While institutions are embedded in society, on the one hand they have to stay apart of the society and on the other hand they cannot stay so far because then they get too abstract. Aalberts stressed that the pure law does not exist, law is the result of social life and it goes with it. In other words, law is to a large extent the effect of politics, because politics and law constitute each other. She summarized the main questions of the lecture and the following workshop: How are the courts'



functions changing and how did they change in new terrains? How is the relationship between functions and courts and the exercise of authority?

The discussion with the audience evolved around the following questions: To what extent can the distinction between the political, social and legal functions be maintained? In which cases are courts doing more than they should do? How did the public discourse evolve? Why are there special tribunals needed when both sides have a functioning judiciary?