Workshop Report

New Terrains? Assessing the Diverse Functions of International Courts & Tribunals


Workshop organized by:
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Law enforcement, dispute settlement, constitutional and administrative reviews were the generally-agreed categories used to describe the variety of tasks and functions that courts have to fulfil nowadays. In the context where international law progressively intersects with international politics, the number of international courts proliferates. This greater relevance has resulted in greater scrutiny and, in some instances, mounting scepticism. Against this background, Käte Hamburger Kolleg / Centre for Global Cooperation Research (KHK/GCR21) organized the workshop on ‘New Terrains? Assessing the Diverse Functions of International Courts & Tribunals’ on 24th-25th November 2016 at Wissenschaftszentrum (WZB) in Berlin. Conceptualized by Professor Christian J. Tams from the University of Glasgow, the workshop aimed to evaluate commonalities and distinctions of different courts and tribunals outside the field of dispute resolution. It also intended to identify open questions and to stimulate future research on the ‘new terrains’ of courts’ functions.

While the topic of the workshop well reflects the interconnection between the research conducted at KHK/GCR21 and WZB, in his opening remarks Dr Markus Böckenförde, Executive Director of KHK/GCR21, stressed on the timeliness of the topic. Furthermore, he posed the question whether or not the traditional four categories of tasks still hold in the changing global context. The workshop was divided into four sessions. Professor Bruno Simma, Former Judge at the International Court of Justice and currently Professor of Law, University of Michigan, chaired the first session on ‘Beyond Dispute Settlement: What are international courts’ key contributions to international relations?’ The second session, chaired by Professor Cecilia Marcela Bailliet, Professor of International Law, University of Oslo, explored the topic of ‘Regime Design: original Intent, mission/function creep and ‘guarding the guardians’”. In the third session, Professor Michael Zürn, Director of the Research Unit Global Governance at WZB, chaired the discussion on ‘Legitimacy: international courts and the exercise of international public authority’. The closing fourth session, chaired by Tams, addressed the topic of ‘Studying International Courts and Tribunals: lost in diversity?’.

Session1: Beyond Dispute Settlement: What Are International Courts’ Key Contributions to International Relations?

Providing impulse for the discussion of the first session, Dr Martins Paparinskis, Reader in Public International Law at the University College London, presented different ways to categorize the roles courts, e.g., public (setting out legal frames) vs private role (dispute settlement). The diverse categorization raises a question whose perspective of interpretation matters more, the court itself or
conflict parties. Courts' increasing contributions further generate fundamental challenges both to the perception of legal matters and the jurisdiction for international legal order. When courts are involved in IR matters, the cases are less considered a political issue but rather perceived as a legal one. This shift in reasoning and perception also lead to greater risks of institutional role corruption in which the importance of their existence could range from “important but not indispensable” to “sine qua non”. As the courts proliferate, Paparinskis asked how this web of courts would fit in the global governance architecture and whether their jurisdiction should be rearranged thematically, regionally or in other manners.

The pursuing discussion probed firstly whether the outlined contradictions are at all contradictory or whether the expanded jurisdiction of courts merely reflects and are consequences of increasing challenges amidst general IR political climate which leads to higher anticipation for court establishment. Secondly, participants cautioned against the risk of institutional nominalism adding that the observed backlashes might stem from the application of outdated framework. Since global governance is moving towards regional integration, courts’ institutional changes both in quality, i.e. contributions, and quantity are linked to the new world of international law rather than the interwar global political structure. Thirdly, the passiveness and activeness of the courts themselves in carrying out duties as well as in their institutional evolution were discussed: how actively or passively different courts receive cases and is it the courts’ task to keep extending boundaries of their own functions? Fifthly, participants drew attention to the importance of domestic perspectives when discussing international courts. Matters reaching international courts have their origin in certain locality. This builds the basis for power relationship between international courts and internal affairs i.e. domestic resource competition. The final issue raised concerned the ‘non’ function as participants debated whether there are functions that courts should refrain from exercising.

Session 2: Regime Design: Original Intent, Mission/Function Creep and ‘Guarding the Guardians’

The second session started with the input by Dr Aletta Mondré, Lecturer, and Dorte Hühnert, Researcher at Institute of Political Science, University of Duisburg-Essen. Elaborating on ‘legitimacy’ of various international courts’ functions, both of them criticized the concept of legitimacy itself to be unhelpful for the analysis as it contains ambiguousness and leaves rooms for different interpretations. Both panellists continued by discussing backlashes of courts’ expanding role. Negative reactions of constituencies range from withdrawing their participation in the courts to challenging courts with their non-appearance.
Mondré and Hühnert further pointed out the overestimated effects of international courts. To them, more often than not the courts’ conclusion is not meant to be the main goal to achieve rather a means to another end. The instrumentalization of the courts could merely be an effort to bring the matter to international attention.

Following their presentation, the plenary discussion picked up the confusion around the meaning of concept ‘legitimacy’. Discussants initially explained how the contested concept is important as it has the capacity to accommodate the changing context and needs in international politics. Furthermore, participants suggested the necessity to investigate the timing and the way ‘legitimacy’ is mobilized as well as the end this mobilization aims to achieve. For the courts, the legitimacy of their expanded functions is formed if these functions are performed to fill certain institutional gaps and these additional roles are not contested. Yet, consideration on legitimacy alone is insufficient. Connection between legitimacy, authority and power was suggested because ‘authority’ implies the ability to induce change. Finally, new perspectives to understand legitimacy were raised including the evolving sense of the concept which is constantly built and challenged; or the aspect of de jure and de factor authority it leads to.

Session 3: Legitimacy: International Courts and the Exercise of International Public Authority

Professor Antonios Tzanakopoulos, Associate Professor of Public International Law at University of Oxford, highlighted the aspects of regime design and the issue of underused courts in his presentation. His presentation proposed that the existence of international courts is the result of regime design and institutional setup. Through the aspect of cooperation, international courts are established as states make commitment to abide to law and in turn limit their power by choosing institutions to adhere to. In this sense, countries’ withdrawal from courts suggests their exit from cooperation effort. To elaborate on international public authority of international courts, Tzanakopoulos questioned why certain courts receive more cases whereas some new courts are rarely used. With examples in legal disputes on international trade and human rights where courts play an extensive role, he demonstrated that courts are used when parties disagree on other options and when the specific types of court are more opened for individuals’ access.

The plenary discussion of the session returned to the original basis for the existence of the international courts and the problems that arise in the course of its institutional evolution. Participants firstly suggested the need for distinction
between courts mandated with broader commitments and courts that are a by-product of agreement with mandates mapped out. Furthermore, discussants challenged the claim that only the ‘busy’ courts are the relevant ones, arguing that certain underused courts are bound by their original purposes and mandates. Secondly, while the main task of international courts are order and regime maintenance, the high number of courts and their subsequent fragmentation in jurisdiction lead to the compromised promise of the courts. The problems turn more complex when the courts move from bilateral to multilateral system and their mandates become ambiguous e.g. the prioritization between dispute settlement and regime stabilization. Thirdly, the problem of guarding the guardians was agreed by some participants to be institutional setback of international courts. Finally, the discussion addressed potential damage mitigation and how to achieve the system coherence as a whole.

Session 4: Studying International Courts and Tribunals: Lost in Diversity?

To address the problems in studying international courts, Professor Mikael Rask Madsen, Professor of Law at University of Copenhagen, drew attention to the conflation of issues surrounding the topic. This leads to the loss of conceptual clarity when investigating international courts. Assessing the discussion of the workshop, Madsen responded that mandates of the courts are to provide the society with alternative institution. Unlike other institutions, courts require cases to be able to exercise their authority and make contribution. Therefore, the topic of powerful vs sidelined courts are dependent on the number of cases filed. In conclusion, Madsen also questioned the extent to which categories of international court can be expanded.

In the final round of discussion, participants questioned firstly the usefulness of categories. As courts are context specific, comparison between regional and international courts cannot be sensibly made. While international courts involve states, sensitivity within regions is more apparent and divergence can; therefore, be more observed. In addition, the discussion questioned which categories could be feasible for the comparison. Origin of the institution was proposed to be more suitable category for analysis because ‘function’ could not serve as a clear categories e.g. since international courts are solving problems originated in other locality. In this context, discussants stressed secondly the importance of local aspect of international courts for the analysis. Thirdly, it was agreed that inflating institutional capacity of the courts led to difficulties in empirical tracing for the study. The closing discussion concentrated on the definition of ‘other’
functions since steps are taken outside the safe courts' function terrain as the categories include more judicial bodies. Recommendations were made whether the definition of concept can be derived through the consideration of the outcome of courts' function. Finally, participants raised the significance of disciplinary bias both legal and political when the roles of international courts are studied.