
Prepared by: Carlos J. Bichet Nicoletti

Introduction

In my capacity as a recipient of the ILA Scholarship for the participation in its 78th Biennial Conference, I submit the present report that details succinctly some of the most relevant aspects experienced in the Conference. It is fair to say that the Conference having two programs, those of the respective Committees and Study Groups on the one hand, and the superb academic program prepared by the Australian Branch on the other, presented a highly diverse academic offer which not only captivated different interests in our field but also represented the most topical aspects of the historical moment and the most up to date discussions in the discipline.

Given the ample set of discussions, relevant practical problems, and theoretical conundrums analyzed intensely in the brief spam of one week, I have divided my report not in a chronological order but giving precedence to the distinction between Committee discussions and panels I attended. In that sense, the first part of my report deals with the open working sessions attended in the Committees on Complementarity and International Criminal Law, Use of Force, and Islamic Law and International Law.

The second part of my report then deals with the academic program organized by our host, the Australian Branch, especially certain panels and conferences that dealt with particular research and academic interests such as the challenges of international law in transitional settings (the case of Colombia), new challenges in international criminal law, or women in international law, amongst others.

The last section of my reports ends with the conclusions in which I aim to provide some thoughts on how the Conference met its goal of addressing globally the proposed theme, ‘Developing International Law in Challenging Times’.
1. The Committees.

1.1 Complementarity and International Criminal Law

One of the most interesting discussions, relevant to my current research interests, occurred early in the first day of conference in the ILA Committee Meeting on Complementarity in International Criminal Law. The Committee had a broad mandate to study the issue on complementarity and the mainstreaming of international criminal law in national prosecutorial efforts, nonetheless one of the most important theoretical aspects discussed, around which revolved the open discussion, was the notion of ‘positive complementarity’.¹

The Report addresses mainly how domestic courts have internalized international standards manifested in the Rome Statute and introduces the concept of ‘accountability gaps’ in the case of countries where we can find an absence either in criminal investigations or prosecutions for alleged international crimes (which are usually, but no completely accurately equated to those that are within the subject matter jurisdiction of the International Criminal Court). In this limited sense (addressing just the first part of its mandate) the Committee’s report entails a broad empirical assessment of how prosecutions (if any) have been carried out in a diverse array of national jurisdictions, an exercise that was much needed in evaluating the current standing of the interaction between international and domestic criminal law.

As the report clearly and humbly states, this leaves important normative questions out of the picture (for subsequent discussions) that are precisely around which revolved the substantial part of the discussions in the Sydney meeting. First, what we can collectively (as the ILA) understand by ‘accountability’, and second, which responses might be ‘acceptable’ by the international community in filling that gap.

This of course is an exercise in extreme generalization and certain nuance is in order. Both questions have been proven difficult to address, especially because it is my understanding that they cannot be solely tackled from the realm of the law. Philosophers, anthropologists, political scientists, ethicists, peace scholars, and yes, lawyers have all tried

¹ The fact that the discussion centered around the issue of positive complementarity is telling of the vexing theoretical questions that this issue arises, especially given the fact that the Report explicitly stated that it would focus on the first part of the mandate, leaving this question for subsequent meetings. See: ILA Draft Report on Complementarity in International Criminal Law, p. 5 at http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Complementarity.pdf (Consulted, September 14, 2018).
to come up with answers to either ‘radical evil’, grave human rights violations, international crimes or political and moral wrongs without providing a definite answer. On the other hand other questions also arise from this theoretical and practical issues like the relationship between a normative conception of justice and its relationship with the concept of accountability for instance, or the interaction between criminal investigations and prosecutions and other mechanisms, be it institutional, legal or political arrangements with try to deal with these issues, such as truth commissions, amnesties, or the so-called ‘traditional’ or ‘informal’ mechanisms.

I adhere to the notion that the concept of ‘positive complementarity’ helps mediate all these questions in a dialogical manner between international institutions (primarily the International Criminal Court), and national responses to egregious crimes. In this sense, the issue goes beyond a mere discussion on a jurisdictional rule, to a more robust and normative discussion on how (and when) international law addresses globally these problems in interaction with domestic law. As for this matter, the ILA can expect interesting and productive discussions for the upcoming years.

1.2 Use of Force
It is without a doubt that when it comes to understanding, interpreting and assessing the scope on the rules of the use of force in international law, relevant and even heated discussions will always be at the forefront. In the last couple of decades, the international community has seen the formation of at least two camps on this matter. For some, the rules are clear and without a doubt crystallized in the framework provided by Article 2.4 and Chapter VII of the UN Charter and the real problem arises on the interpretation and application of the facts to a particular armed ‘incident’ (broadly speaking), for this camp any use of force beyond the scope of these prescribed rules is illegal. Scholars in the other camp interpret that in regard to the general exception outlined in Article 51 of the Charter in regard to self-defense, the wording of the text states that it is a mere recognition of a customary norm that can change over time and interpret the general prohibition in a less strict sense as the scholars in the first camp.

Taking into consideration this small but highly relevant underlying conceptual issue in mind, it is important to point out that the adopted resolution by the ILA Committee on the
Use of Force, and endorsed collectively in our closing session, stresses the fact that the rules outlined in the Charter are clear and identifies problems in interpretation with decision-makers at the political level. In others, most of the problems arising from the use of force in international relations are not related to the lack a proper legal framework.

Having said this, it is important to point out that the cornerstone of the Committee’s mandate for the Sydney meeting revolved around addressing the potential overlap (or not) of the concept of aggression as an international crime within the subject matter jurisdiction of the International Criminal Court (Article 8 bis of the Rome Statute) and the definition of aggression under general public international law and its relevance for the use of force.

On this issue, the Committee was definite in endorsing the position (adequately) that Article 8 bis:

‘neither affects the definition of ‘act of aggression’ within the meaning of Article 39 of the UN Charter nor should it lead to a diminished appreciation of the prohibition of the use of force under Article 2(4) of the UN Charter and customary international law, and the constraints on States resulting therefrom.’

Finally, as to my report on this meeting, an interesting issue arise when discussing the wording of the Resolution. The drafters wanted to point out in the resolution that the ‘rules on the use of force’ are the ‘cornerstone’ of the Charter, a wording that finally made it to the last draft and was adopted, not without objection from some delegates that rightly pointed out that what is usually considered as the cornerstone of the Charter are not per se the rules on the use of force (which scope would go beyond Article 2.4 only), but the general prohibition on the use of force as such. It may sound a little irrelevant for some, but in my opinion stressing the prohibition as such gives credence to the main objective for which the United Nations were created, international peace and security and emphasizes the major shift in international law which occurred with the adoption of the Charter, the general outlawing of the resort to force as a valid mean of pursuing international relations, the main paradigm shift of the last century in international law.

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3 Id. Operative point (d).
1.3 Islamic Law and International Law

The Committee on Islamic Law and International Law had interesting discussions around the international standards associated with the right to freedom of expression and Islamic law. Since the famous ‘turn to history in international law’ and the surge of a theoretical discourse that accentuates the need for approaches that go beyond ‘western-centric’ conceptions of international law, the need for diversifying and amplifying what we understand for international law and international community and how it articulates with major cultural and philosophical differences is one of the ways in which we can attain a rules based order in a pluralistic world. Thus, the work of the Committee is of paramount importance in understanding how a substantial part of the world sees international law and human rights, in fact, as declared by the Committee in its resolution ‘Islamic law is a principal legal system of the world, within the meaning of Article 9 of the Statute of the International Court of Justice’.4

Apart from the specific callings on respecting the rule of law and freedom of expression and the recognition on how blasphemy laws when abused may undermine this freedom and ‘prevent or punish criticism of religious or political leaders’,5 what was highly interesting for me (and constitutes the distinctive factor in its view of international law) is the express recognition for ‘the need for a responsible exercise of the freedom of expression in particular with regard to the freedoms and rights of others’.6 Even though this recognition for responsible exercise of rights is implicit (and explicit in some cases) in many legal systems throughout the world, its presence in the resolution is a testament to the communitarian tradition of Islam and the concept of duties towards the community found in different philosophical conceptions, and which is sometimes a critique towards liberalism and the ‘west’.

2. The Academic Program

5 Idem.
6 Idem.
2.1 International Law and the Challenges of Transition to Peace: Colombian Perspectives.

This particular panel was interesting for me in various ways. First, it delved in one of the most intricate dilemmas in designing and implementing models of transitional justice, the balance between peace (the ending of violence) and accountability for grave human rights violations and international crimes. Second, it had an almost all-Colombian panel or with academics based in Colombia and it was organized by the recently established ‘Colombian Branch’ of the International Law Association, which I welcome with excitement as the proximity of my own country, Panama, may open the possibilities of collaborations and joint participations in the future.

As for the first issue, the balancing of peace of justice, all of the panelists had to deal with the backdrop of the current political situation in Colombia, where the new government has been a strong critic of the Peace Process with the FARC in general, and with its flagship accountability mechanism the Special Jurisdiction for Peace, in particular, something that was present in their remarks.

Also present in their interventions was the possibility of interaction between the Inter-American Human Rights System and the Special Jurisdiction in Colombia. In the past decades, the Inter-American Courts of Human Rights has become a bulwark of judicial accountability for gross human rights violations in transitional scenarios and its decisions, especially in pointing out the incompatibility of amnesty laws with the American Convention of Human Rights, have been amply discussed even beyond the Americas. Nonetheless, the Concurring Opinion of five judges in the Case of the Massacre in El Mozote and Nearby Places vs. El Salvador (2012) leaves the possibility open for discussing amnesties in the context of peace agreements, an issue that will surely come up in the near future at the IACtHR in regard to Colombia.

Lastly, as expected, the panelists placed a special emphasis on the issue of reparations. In order to do this, once again they used the IACtHR as point of reference. The Inter-American Court has been known for ordering an ample array of reparations going beyond mere restitution (which is virtually impossible in cases involving grave violations of human rights) into the realm of compensation, satisfaction, rehabilitation, and guarantees of non-repetition involving not only the allocation of pecuniary compensation but other forms of
symbolic interventions and even thorough legal and judicial reforms. At the domestic level, the transitional process in Colombia is expected to combine forms of administrative and judicial reparations using the Inter-American system as a point of departure.

2.2 Teaching and Education in International Law
The divide (be it fictional or real) has ever been present in our discipline and the Conference had a good balance in the presence of highly qualified practitioners and distinguished scholars in most of its panels, nonetheless as a young scholar and aspiring academic the discussion on teaching and education in international law was one to which I was particularly attracted.

The panel had the virtue of presenting academics from developing countries and experiences in the planning of courses and writing of textbooks in international law and its sub-disciplines.

Professor Fagbayibo’s intervention on the use of pre-colonial epistemic principles in teaching international law in Africa proposed interesting discussions on how prevalent cultural practices and epistemic views have in how Africa sees international law today, something that can also be said in different post-colonial contexts. In the case of Africa, and particularly in transitional scenarios and civil war, the communitarian principle of ‘ubuntu’ (I am because we are) has played an important role in how these societies deal with their past.

Professor Collins’ explained how different challenges regarding technological advances, terrorism, and gender violence are pressing the need for redesigning courses on International Humanitarian Law that go beyond the classic portrayal of IHL as a water-tight legal regime applicable in the time of armed conflict.

Lastly, Prof. Scott discussed the creation of a textbook from within theoretical approaches. In her view, which I find acceptable, every piece of legal scholarship, even textbooks, are not ideologically neutral and adhere to certain theoretical framework, even though some of them only implicitly.

2.3 Confronting Challenges in International Criminal Law.
As per my research interests, this was also a panel to which I was particularly attracted. It delved with issues in regard to gender violence and international criminal law, particularly
in the interventions by Dr. Grey and Prof. Chappell. Specifically, Prof. Chappell’s contribution centered around the recent acquittal of Jean-Pierre Bemba Gombo and the impact that this might have in the Democratic Republic of Congo, especially in the case of the huge victims’ movement mobilizations that have been around since the start of the trial, and in reparations programs that have already started on the ground and that may be impacted by the lack of individual criminal responsibility sanctioned by the ICC.

Prof. Nouwen’s intervention was highly interesting and highlighted some of the underlying theoretical issues that have been addressed in the Committee on Complementarity and International Law and in the Panel on Transitional Justice in Colombia by focusing on the contradictions that inevitably occur when thinking about normative responses to international crimes and gross human rights violations. These contradictions are particularly poignant when analyzing the adoption of the proposed convention on crimes against humanity. As rightly pointed out by Prof. Nouwen, this proposed Convention would adopt one response to Crimes Against Humanity, the jurisdictional response, ruling out or making it difficult for the adoption of other accountability mechanisms such as the highly regarded Truth and Reconciliation Commission in South Africa or the adoption of so-called traditional mechanisms like the gacaca courts in Rwanda, with all their concurrent and inherent critiques but that have been considered generally successful by the international community.

Prof. Guilfoyle ended the panel with an interesting discussion for the possibility of international prosecution of crimes committed in the case of Australian offshore detention facilities.

2.4 Women in International Law.

All of the topics on the Women in International Law Panel, apart from being appealing, engaging and current, were discussed by young women in academia, which is one of the most important sectors to support, especially in a historically male-dominated discipline such as ours. The topics revolved around the idea of gender perspectives in the use of force and corporate accountability in the relationship between business and human rights, and it is highly commendable for the ILA not only to have specialized panels such as this, but the mere fact that gender perspectives were discussed in multiple other panels and committees.
Dr. Jurasz’s contribution dealt with the so-called ‘just post bellum’, a concept borrowed from the ‘just war tradition’ and that currently outlines the legal regime involved with several distinct phases, from the termination of hostilities to issues of accountability and reparations for war crimes. In that sense, apart from the inclusion of a gender perspective to these topics, it is important to assess what specifically does the concept of just post bellum per se brings to the table that is not otherwise contemplated on how international law has dealt (and continues to deal) with the transitions from conflict to peace (and what exactly would that peace entail).

Conclusions: ‘Developing International Law in Challenging Times’.
As stated on the introduction to this report, it would be a monumental task to highlight every interesting discussion or amazing panel enjoyed during one tightly packed week in Sydney. The report just delves in some aspects that the writer finds particularly engaging, likewise, I could have pointed out the most updated discussions on the aspects of business and human rights, the conversations around Anthea Roberts’ remarkable book ‘Is International Law International?’, a question that permeated much of the other discussions throughout the Conference, new takes on the role of general principles of international law in current times, or the challenges that surround the Non-Permanent Members of the Security Council, just to mention a few, and I am still leaving outside the scope of my reporting the entire area of private international law!

I think that more than looking for major theoretical frameworks that can give fabulous answers to current challenging practical questions, the resilience and historical potential of international law to be a force for good resides in organizations such as the ILA and its work of bringing academics and practitioners from all over the world to engage in productive debate. It is this sense of community and fraternity that can catalyze responses to challenging times and that legitimizes our individual efforts and those of the International Law Association.

In the personal level, the Conference, its discussions, and the general work of the ILA has reaffirmed my commitment to the advancement of international law as the construction of a world order based on plural visions of the rule of law and peaceful coexistence.