

Commentary

## **‘EXTRACURRICULAR INTERNATIONAL LAW’ - A SEMINAR WITH MARK DRUMBL**

*Adina L. Nistor\**

Keywords: Alien Tort Act; International Criminal Law; Mark Drumbl; ICTY; ICTR; ICC; International Tribunals.

### **Introduction**

On the 19<sup>th</sup> of April 2017, The Graduate School of Vrije Universiteit Amsterdam organized a masterclass with Prof. Mark Drumbl, who presented and discussed one of his latest articles, entitled ‘Extracurricular International Criminal Law’.<sup>1</sup>

Dr. Mark Drumbl is a professor of law and the director of the Transnational Law Institute, Washington & Lee University. He has held visiting appointments and has taught intensive courses at law schools world-wide, including Oxford University (University College), Université de Paris II (Panthéon-Assas), Vrije Universiteit Amsterdam, University of Ottawa, Masaryk University, Trinity College-Dublin, University of Western Ontario, University of Melbourne, Monash University, Vanderbilt University, University of Sydney, and the University of Illinois.

Professor Drumbl's research and teaching interests include public international law, global environmental governance, international criminal law, post-conflict justice, and transnational legal process. His work has been relied upon by the Supreme Court of Canada, the United Kingdom High Court, United States Federal Court, and the Supreme Court of New York in recent decisions. Professor Drumbl recently published articles that examine: (1) how U.S. judges rely on international materials in Alien Tort Statute litigation<sup>2</sup>, (2) how law should approach victims who victimize others in periods of atrocity<sup>3</sup>, (3) historical work that unpacks the

---

\*Adina Nistor is the Associate Chief Editor of *Amsterdam Law Forum* (2016-2017). She holds a Master's Degree in *International Crimes and Criminology* from Vrije Universiteit Amsterdam.

<sup>1</sup> M.A. Drumbl, ‘Extracurricular International Criminal Law’, *International Criminal Law Review*, 16 (2016), pp. 412-447 (Available at <http://law2.wlu.edu/faculty/facultydocuments/drumblm/extracurricularintcrimlaw.pdf>).

<sup>2</sup> Idem.

<sup>3</sup> M.A. Drumbl, ‘Victims Who Victimise’, *London Review of International Law*, 0 (2016), pp. 1-30 (Advance Access) Published June 28 2016 (Available at <http://law2.wlu.edu/faculty/facultydocuments/drumblm/victims.pdf>).

contributions of the Supreme National Tribunal of Poland to the development of international criminal law<sup>4</sup>, and (4) transnational justice.<sup>5</sup>

In ‘Extracurricular International Criminal Law,’<sup>6</sup> Prof. Mark Drumbl traces the role of the international criminal courts and tribunals’ (ICTs) jurisprudence in domestic civil litigation in the United States conducted under the Alien Tort Statute (ATS). Through ATS, victims of human rights abuses can file tort based lawsuits in US federal courts for violations of the laws of nations. The author identifies three main areas around which the ICTs jurisprudence gravitates: (1) aiding and abetting as a mode of liability; (2) substantive legal elements of genocide and crimes against humanity; and (3) the availability of corporate liability. Given the ICTs’ limitations in terms of prosecuting perpetrators of international crimes, domestic civil courts remain as important avenues for victims to address human rights abuses through domestic tort claims. The experiences of US courts of general jurisdiction as receivers of international criminal law instruct upon broader patterns of transnational legal migration and reveal an unanticipated extracurricular legacy of international criminal courts and tribunals.<sup>7</sup>

The article discussion started with a brief presentation on the Alien Tort Statute (ATS). Through the ATS, the US federal courts have original jurisdiction over any civil action by non-citizens of the US, for a tort committed in the violation of the laws of nations or a treaty of the US. The original purpose of the ATS was to offer a response to the international norm violations at the time, especially piracy on the high seas.

Prof. Drumbl explained that the process of bringing claims under the Tort Act has taken place in three distinct stages. During the first period of time, right after the ATS was passed, a relatively small number of cases were brought. Jurisprudence started to solidify only after 1979 with the *Filartiga* case, which involved torture in Paraguay.<sup>8</sup> During this stage, individuals came forward with cases that concerned violations of the laws of nations and against individuals who were direct perpetrators of the offences. The author offered as an example a real-life scenario where victim and perpetrator, both from Ethiopia, met face to face in the US, in an Atlanta hotel by pure coincidence, where one was working as a waitress and the other as a bellman. During this first wave, a significant number of cases involved individuals who stood trial for the human rights abuses committed outside of the US, after their identity had been revealed to their former victims in a completely accidental way. The victims generally filed claims for serious international crimes: torture, crimes against humanity and a variety of other international crimes.

The second wave of ATS cases discussed during the presentation involved individuals who filed lawsuits not against direct alleged perpetrators of international crimes, but against corporations.

---

<sup>4</sup> M.A. Drumbl, ‘Stepping Beyond Nuremberg’s Halo: The Legacy of the Supreme National Tribunal of Poland’, *Journal of International Criminal Justice* (2015) (Available at <http://law2.wlu.edu/faculty/facultydocuments/drumblm/beyondnuremberg.pdf>).

<sup>5</sup> M.A. Drumbl, ‘Transitional Justice Moments’, *International Journal of Transitional Justice* (2016), 10, pp. 203-210 (Available at <http://law2.wlu.edu/faculty/facultydocuments/drumblm/transnationaljusticemoments.pdf>). For more information on Prof. Drumbl see his profile at Washington and Lee University School of Law (Available at <https://law2.wlu.edu/faculty/profiledetail.asp?id=11>).

<sup>6</sup> *Supra* note 1.

<sup>7</sup> M.A. Drumbl, ‘Extracurricular International Criminal Law’ *International Criminal Law Review* 16 (2016) 412-447, p.412.

<sup>8</sup> M.A. Drumbl, ‘Extracurricular International Criminal Law’ *International Criminal Law Review* 16 (2016) 412-447, p.416.

The businesses were accused of aiding and abetting – through services or projects that facilitated the commission of the human rights abuses - the direct perpetrators of the crimes. These trials mostly targeted extractive industries (mining, oil and gas).

Drumbl noted that ATS cases raised two significant doctrinal questions. The first question explored the way in which customary international law violations are defined, specifically what constitutes the exact point when an incidence of violence becomes an international law violation. The second question addressed the extent to which the alleged wrongdoing needs to affect or concern the United States. In fact, in 2013, a US Supreme Court decision restricted the ATS' jurisdictional scope. From that moment on, ATS cases had to involve matters that directly touched or concerned the US. In practice this meant that when the perpetrators of an international crime were American citizens, but the crime itself took place outside US borders, then the case was largely considered unactionable in the US due to jurisdictional challenges.

The focus of his presentation was closely tied to the first question: what is a customary international law violation. In order to explore a possible answer to it, Drumbl scrutinized a number of ATS cases in order to identify what the judges themselves had turned to in order to base their decisions. As the guest speaker also discussed in his article, when determining whether or not a particular form of violence rises to the level of a customary breach, American judges have routinely cited case-law and materials of the International Criminal Tribunals, such as the International Criminal Tribunal of Former Yugoslavia (ICTY), the International Criminal Tribunal of Rwanda (ICTR), and of the Special Court for Sierra Leone (SCSL). To a lesser extent, but nevertheless often enough referred to is the Rome Statute of the International Criminal Court, and the judgements of the post-WWII Military Tribunals.<sup>9</sup> What the author found particularly interesting was to observe how national judges receive and make use of the legacy of the International Criminal Tribunals. Drumbl then discussed three major findings related to this specific practice of the American judges.

### **I. The role of ICTs in ATS**

First of all, Drumbl observed that in spite of the different mandates of the International Criminal Tribunals, American judges of general jurisdiction generally consider the tribunals as constituting a common system. Therefore, according to Drumbl, it would appear that the more congruence there is between the tribunals considering a specific point of law, the higher the chance of that particular rule of application to be considered as customary international law.

The author considers that in turn this raises other questions about the developments of international law concerning its progressive or regressive development. He noted that the common assumption is that the law is fixed and it expands through progressive development, through bricolage in which progressive opinions push forward the path of the law eschatologically into more enlightened spaces. However, he underlined that the legal jurisprudential development that he observed in these ATS cases might lead to legal erosion in cases of progressive bricolage in that judges may find that a norm loses its legal solidity if it is evolving regardless of the evolutionary direction. The guest speaker then discussed a certain preference of the American judges for the ICTY legal materials, which stands out, although, as mentioned earlier, they generally view the tribunals as a common system.

The author noted that certain judges consider ICTs cases and materials as direct sources of international law and that in other instances judges refer to them as evidence of customary international law. In Drumbl's opinion, it is worthwhile to point out that national approaches

---

<sup>9</sup> Drumbl, *supra* note 1, p.413.

in enforcing these particular ATS mandates create a context in which sometimes they actually misapply or misunderstand the sources of international law. In his opinion, what is lacking is a broader conversation about what sources represent customary international law and how can that be determined. He also underlined that there is a high diversity among the American judges regarding what they determine to be customary international law. He further explained that certain judges are extremely purposive in regards to how the case law of the International Criminal Tribunals supports findings of customary law violations.

While Drumbl applauded the way in which ICTs jurisprudence and legal materials impact the outcome of the national tort cases, he nevertheless warned that some of the judge's interpretations about the ICTs legal materials are inaccurate. He noted that at the opposite spectrum are the judges who act in an eliminationist way where they regard findings that are agreed upon as settled norms of customary international criminal law as not being so, thus denying their existence. When such interpretations and misinterpretations take place in the context of international law, this provokes a different series of questions concerning the universalizing aspirations and in many ways requirements of a form of overall consistency.

## **II. Customary International Law and the ATS**

The last part of the discussion focused on customary international law as it is viewed through the lenses of the American judges. Specifically, Drumbl discussed the particular issues that judges refer to the most in reaching their decision. The author identified three main areas of interest: aiding and abetting as a mode of liability; substantive legal elements of certain crimes, particularly crimes against humanity where the author believes that the reference to the work of the international is caused by the absence of an international treaty on crimes against humanity, like there is for genocide; and corporate liability.

The guest speaker brought forth the fact that on this latter point it is the defendants who are now using international law to suggest that they do not have the personality to actually be sued civilly for human rights violations. In his opinion, international law seems to be regressing from domestic law when it actually comes to issues of responsibility and justice for human rights violations as it is invoked in order to avoid liability that otherwise might well be available under domestic law.

According to Drumbl, this gives rise to broader questions about the rush to codify international law and of considering it as an accomplishment. The guest speaker returned to the question whether international law is regressing or progressing when an international law concept is applied at the national level. As can be seen from his article as well, Drumbl wonders whether this diffusion of international law is not harmful as it causes fragmentation and with this in mind, to what extent should international judges be mindful of the fact that international jurisprudence can be used in extremely different national settings, including by a corporate defendant as a basis to justify their lack of legal responsibility.<sup>10</sup>

Another point raised by the author during the discussion was that domestic judges seem to receive the assessments of international judges in terms of international law but the reverse is often less true. He ended the presentation by discussing the common-law method of cherry picking international decisions and outcomes in order to justify a preordained outcome that they might want to arrive at in a particular dispute.

---

<sup>10</sup> Drumbl, *supra* note 1, p.413.

## **Conclusion**

Finally, Mark Drumbl concluded the presentation by raising a number of issues concerning the legacy of the ICTs and their purpose of not only punishing the perpetrators of international crimes, but of building a 'jurisprudential web' in the penal law area that is later rewoven by judges of general jurisdiction. The guest speaker launched a series of questions that opened the floor for debate, such as: what are the professional obligations of judges in those particular contexts? Is it right for judges of general jurisdiction to be international law interpreters, enforcers, to do so nihilistically, to do so in great fragmentation? And what story does that tell us about how international law should spread?

The presentation was followed by a vivid Q&A session where members of the audience discussed how international law is applied at the national level in their own countries, specifically in Indonesia and Colombia and some of the challenges that arise in the process. The guest speaker and the participants of the seminar engaged in an open discussion about international law in national settings and fragmentation, about international law undergoing a progressive versus a regressive path, and what is the legacy of the international criminal courts and tribunals.

*The article 'Extracurricular International Criminal Law' is available to read at <http://law2.wlu.edu/faculty/facultydocuments/drumblm/extracurricularintcrimlaw.pdf>.*