Session 4

The Impact of International Human Rights Norms at the National Level

Judge Erik Møse and Judge Sanji Monageng

This session, led by two international judges with wide experience in national judiciaries, will approach the topic of how international human rights norms impact the law and practice of states from two different perspectives.

1) The first part of the session, led by Erik Møse, will ask participants to consider the various complexities of interpreting and applying international human rights norms at the national level.

States are under an obligation to respect and ensure human rights and to provide an effective remedy to those claiming that their rights have been violated, see for instance the International Covenant on Civil and Political Rights Article 2 and the European Convention on Human Rights (ECHR) Articles 1 and 13. Even though a state is expected to ascertain that there is normative harmony between human rights conventions and national law before ratification, experience shows that the impact of the conventions will be considerable for any country. It is virtually impossible to discover all possible discrepancies through an abstract review. Individual cases or general situations will inevitably lead to allegations that the conventions have been violated.

Although all branches of government have a responsibility to avoid human rights violations, an independent judiciary is indispensable to ensure that national legislation, regulations and decisions are in conformity with the conventions. The efficiency of such judicial control depends on whether the human rights conventions are weighty arguments (sources of law) before the courts. Incorporation is considered a particularly faithful method of implementation, and all 47 member states of the Council of Europe have now incorporated the ECHR. The conventions have particular impact when they take precedence in case of a conflict with domestic norms. This said, it is not always an easy task for national courts to lay down the precise requirements of the conventions. Opinions may differ as to whether they should find a violation when it is possible, but not certain, that the international courts will reach this conclusion.

National societies and international case law are not static. As it has often been said, the conventions are living instruments that must be interpreted in the light of present-day conditions. A “dynamic” or “evolutive” interpretation by international human rights courts and other supervisory bodies increases the impact of the conventions at the national level, but this must be balanced against the principle of subsidiarity. The margin of appreciation left to states varies according to subject matter. A recurring theme in discussions about the impact of international human rights norms is this balancing exercise.

The consequence of a human rights violation is that the respondent state may have to:
- award compensation for costs, pecuniary and non-pecuniary damage to the victims;
- adopt individual measures to comply with the judgment, for instance the reopening of a civil or criminal case at the national level, in conformity with the principle of restitutio in integrum;
adopt general measures aimed at preventing similar violations in the future or putting an end to continuing violations.

The last element is of particular importance with respect to states with a high number of repetitive cases. For instance, at the ECHR, ten states count for almost 80 percent of the workload, and many applications relate to issues where the Court has already found violations by the respondent state. Since 2005, an important tool has been the delivery of “pilot-judgments”, which contain recommendations or more detailed indications as to what measures the state should take within specific deadlines.

A crucial issue is the states’ willingness to abide with the case law of the supervisory bodies, irrespective of whether it is legally binding (judgments) or not (views, comments). Over the years, several measures have been adopted to improve the situation, both regionally and globally.

The influence of human rights case law is not limited to the states parties in specific cases. The other parties to the conventions have to follow the case law and adapt their legislation and practice in order to avoid similar violations. More generally, authoritative interpretations of human rights norms affect all states.

Questions to explore in the discussion could include:

a) To what extent does it matter that human rights conventions have been incorporated in the national legal order?

b) Should domestic courts choose a “dynamic interpretation” when interpreting human rights provisions?

c) Have the human rights supervisory bodies generally found the right balance between the protection of individuals and states’ margin of appreciation? Are any areas of particular interest in view of the principle of subsidiarity?

d) Is there a need for further reforms to ensure that the conclusions of human rights bodies are respected in practice?

e) How can we best absorb the increasing volume of human rights case law?

2) In the second part of the session, Sanji Monageng will address more specifically how states have responded to the complementarity and cooperation regimes in the ICC statutory scheme.

One of the responses concerning complementarity with the ICC that is seen at the level of states is the effort made by national jurisdictions to mount successful admissibility challenges to the ICC. Such efforts include incorporating parts of the Rome Statute into domestic law related to the core crimes within the Court’s jurisdiction, fair trial guarantees, and applicable penalties.
It is not yet clear in the ICC jurisprudence what exactly states need to demonstrate in order to mount a successful admissibility challenge. However, two recent judgments in the *Ruto et al* and *Muthaura et al* cases provide some clarification. These judgments concerned the nature of the case a state must be investigating in order to successfully raise an admissibility challenge before the ICC. The Appeals Chamber held that the investigation needed to concern the same person for substantially the same conduct. The Appeals Chamber confirmed the findings of the Pre-Trial Chamber II that the government of Kenya was not investigating the same cases as those before the ICC and thus could not challenge their admissibility.

Participants are also asked to consider how national practice has evolved in order to respond to the ICC cooperation regime. When a state becomes party to the ICC, its domestic law has to be capable of complying with ICC cooperation requests. Accordingly, joining the ICC affects domestic law on immunities, statutes of limitation, surrender of nationals, making resources available to the ICC’s Office of the Prosecution, etc.

Some of these potential domestic impacts can be seen through Pre-Trial Chamber I’s *Bashir* Immunity Decisions. These decisions concerned the very thorny issue of whether head of state immunity applies when the ICC issues an arrest warrant against a sitting head of state from a non-state party. In Pre-Trial Chamber I’s decisions, Chad and Malawi were referred to the UN Security Council for non-cooperation in the arrest of President of Sudan Mr. Omar Al-Bashir (who has two ICC warrants of arrest issued against him), holding that there is an exception to head of state immunity under customary international law when an international court seeks arrest for an international crime. Therefore, Malawi and Chad were not allowed to rely on Mr. Al-Bashir's head of state immunity when the ICC sought his arrest for crimes against humanity, war crimes and genocide.

Discussion questions may include the following:

a) How have complementarity requirements impacted domestic law in the home countries of participants?

b) How have the ICC’s cooperation requirements impacted domestic law in the home countries of participants?

c) What other challenges have states faced and what solutions have they reached in implementing their obligations under the Rome Statute?

d) The strictest consequences for non-cooperation in the Rome Statute refer the state in question to the Assembly of States Parties and/or UN Security Council. Are these measures adequate to respect and ensure domestic compliance?

e) To what extent should the complementarity analysis take into account whether a domestic trial is carried out consistently with international human rights norms? Does a failure to respect such norms mean that a state is not genuinely investigating or prosecuting the case?

f) Compare and contrast the ICC complementarity regime with the ICTY/ICTR concurrent/primary jurisdictions.
Readings


Optional additional readings

Prosecutor v. Ruto et al:
http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/appeals%20chamber/Pages/307.aspx

Prosecutor v. Muthaura et al:
http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/chambers/appeals%20chamber/Pages/274.aspx

Prosecutor v. Bashir (Malawi):
http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/Pages/139.aspx

Prosecutor v. Bashir (Chad)
http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/Pages/140.aspx