

## RAPPORT - 10-11 OCT. 2019 - REPORT

### LE DROIT INTERNATIONAL PUBLIC COMPARÉ / COMPARATIVE PUBLIC INTERNATIONAL LAW

On 10-11 October 2019, the International Academy of Comparative Law (IACL) and the Faculty of Law of the University of Geneva organized a conference on "Comparative Public International Law" (CPIL).

The President of the IACL Katharina Boele-Woelki offered a warm welcome to the audience and insisted on the need to develop a dialogue between public international law and private international law.

The keynote speech was delivered by Prof. Andrea Bianchi. Prof. Bianchi revisited CPIL Scholarship before offering an overall critical perspective on CPIL. He questioned whether CPIL could really be labeled as comparative law. To do so he *inter alia* invited the audience to reconsider John Reitz's 1998 AJCL contribution « *How to do comparative law* ». In this piece, Reitz identifies the common point of departure for the comparison: the *tertium comparationis*. In Bianchi's view, the difficulty of CPIL lies in the assumption that international law could be the *tertium comparationis* notwithstanding its inherent instability and evanescent condition.

The first panel was composed of Bérénice K Schramm, Maria Carmelina Londono Lazaro, Fuad Zarbiyev, Jean D'Aspremont and moderated by Alexandre Senegacnik. It offered a rather critical perspective when discussing whether CPIL constitutes a new discipline or a call to international lawyers. The panel appeared to ultimately call for caution. CPIL was not considered to be a discipline yet: one panelist argued that it was institutionally already very strong and close to a discipline. However, belief is an equally important component to establish a discipline. On this point, genuine belief in CPIL as a discipline was questioned. More generally it was highlighted that CPIL had become such a fashionable topic that one could even wonder whether it was even acceptable not to engage with it. Another panelist insisted that international law is rationally approached "as if" it were international; it could hardly be imagined that a government would on its own claim to present a "national approach" to international law. A panelist further wondered whether CPIL would not undermine the very purpose of international law. She advocated for a humanization of international law as an alternative. A final view offered the most critical view, with the understanding that CPIL could ultimately be a very dangerous endeavor through which certain lawyers from the "First World" attempt to define differences/resemblances for others. Such production of differences could be particularly problematic when presented under the guise of legal pluralism. The discussion with the audience offered a reminder that CPIL's aim was the opposite: it would precisely show the dominance of the "First World". It was also questioned whether the expressed fear would ultimately not over empower scholarship.

The second panel was composed of Beatrice Bonafe, Paolo Palchetti, Edward Kwakwa and moderated by Marila Rosado De Sa Ribeiro. It considered the use of CPIL in the making of international law. The panelists engaged with the different sources of international law: treaties, customary law and general principles of law. The use of comparisons was unsurprisingly recognized as a key element in the identification of both customary international law and general principles of law. The panelists appeared to agree that CPIL invited to consider the existence not only of national approaches but also regional approaches. The panelists offered different views as to the extent to which such regional approaches exist in practice. They seemed to exist in treaties related to certain specific questions.

The existence of regional customary law was not challenged as such. One panelist however argued that to this day, State practice rather indicates that claims about the existence of customary law are rarely limited to a regional focus. This aspiration to universality was once more discussed. The discussion focused on the work of the ILC in its identification of customary international law. CPIL was seen by some members of the audience as particularly relevant in this regard.

The third panel was composed of Judge Julia Sebutinde, Judge Linos-Alexandre Sicilianos, Serena Forlati, Guillaume Tattévin and moderated by Marcelo Kohen. It brought together different perspectives from the International Bench. Some doubts as to the very definition of CPIL were expressed. It was discussed whether there would in fact exist "one" international law to apply. Some panelists focused on practical examples to demonstrate how comparative approaches could bring more unity in procedural matters. One panelist exposed incoherent and divergent applications of one identical Law by different actors in the realm of international commercial arbitration. Both judges mentioned cases where international courts and tribunals have been comparing domestic legal systems. It was however stressed that judges do not necessarily have the "luxury" to conduct extensive comparative law analysis' within the straightjacket of their jurisdictional authority. At the end of the day, effectiveness of judicial proceedings could lead to unity. Similarity should prevail over division. This effectiveness can be enhanced by borrowing from each other instead of systematically trying to "reinvent the wheel". It was understood that some judges interpret and apply international law with a broader and open perspective. Comparison is seen as a necessity but one should focus on what is comparable.

The final panel was composed of Anthea Roberts, Andre Nollkaemper, Thomas Kadner Graziano, Lauri Mälksoo and moderated by Makane Moïse Mbengue. The panel discussed the specifics need and precautions to take when it comes to teaching CPIL. Teaching different perspectives was seen as necessary in order to become more conscious of one's own positions. Some panelists insisted on the fact that it is quite clear that international law can be seen as a fundamentally uniform system even though there exist many interpretations and application of it. Teachers have to emphasize the need to be aware and to understand differences when it comes to performing international law. It was stressed that such an exercise could hardly be done with big audiences of students. A panelist who teaches comparative law explained his method which aims to evidence how private and public international law interact. Ultimately, a panelist reflected on his own experience of learning to better understand international law through CPIL : this would be crucial in countries where the approach to international law is largely influenced by certain powerful States.

Prof. Diego P. Fernández Arroyo delivered the final conclusion of the conference. He explained the birth of this project with the need for the International Academy of Comparative Law to critically discuss CPIL. He understood that most panelists expressed doubts about whether CPIL would really be comparative law but in the end comparison remains the unavoidable and daily task of today's international lawyer. According to him, beyond any consideration about the necessity of CPIL as an autonomous field of research, comparison and dialogue are unavoidable at all levels of international law making – in particular between international and domestic courts and tribunals. This is true even for those who believe in a mono-systemic international law. All in all, CPIL can be just a fashionable entertainment but the good use of comparative methodology in international law is a must. We should keep the discussions on both topics alive.