Recent case-law of the ICJ and its significance for International Law

OC - (ILA-14132) - REFLECTIONS ON THE RECENT CASE-LAW OF THE INTERNATIONAL CRIMINAL COURT: JUDICIAL RESTRAINT, JUDICIAL ACTIVISM, OR PROACTIVE JUDICIAL POLICY

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Abstract

The judges of the International Criminal Court (ICC or Court) can pursue different approaches when dealing with high-profile criminal cases before them: judicial restraint, judicial activism, or what Judge Kooijmans has labelled 'proactive judicial policy'. In the present paper, the recent case law of the Court is analyzed in this light. In delineating the contours of the Court's interpretative practice, it is suggested that while ensuring that the procedural rights of the defendants and obligation of receiving fair trials are fully respected, the Court should, wherever possible, by a careful judicial policy interpret international criminal law progressively. With this in mind, it is contended that the field of international human rights law in particular offers quite some room for progressive interpretation of the Rome Statute. One such area where the ICC judges could take proactive interpretative approach to further clarify, elucidate and develop international law is the vexed issue of intersectionality and challenges surrounding the application of the concept in the context of the law of genocide and of persecution. Being mindful that their capacity of extending the scope and reach of the Court's jurisdiction and the rules they are entrusted to interpret and apply is limited by legal, societal, institutional and policy constraints, the ICC judges should use their freedom of interpretation wisely and in a manner that seeks to enhance perceived (legal and social) legitimacy and effectiveness of their decisions. Ultimately, it is argued that in deciding particular cases, the Court should also give guidance and provide clarification on complex questions which are of great importance in present-day international society but still are largely obscure from a legal point of view.

The objective of this contribution is to reflect on the dimensions and ‘boundaries’ of the international criminal judges’ freedom of interpretation by examining the law and practice of the Court with respect to three distinct interpretative attitudes to international criminal law – judicial restraint, judicial activism and ‘proactive judicial policy’. In order to frame the parameters of this discussion, Section 2 of the paper begins in a familiar fashion, with an attempt to elaborate working definitions of judicial activism, judicial restraint, and proactive judicial policy. Section 3 embarks on a brief analysis of certain constraints that derive from the Rome Statute and confine the ICC judges’ behaviour, including their freedom of interpretation. Section 4 turns from framing the discussion to a detailed exploration of the contours of the practice of judicial interpretation at the Court. In this section, recent case law of the Court is analysed in light of the three judicial trends in order to assess the Court’s role in the development and enrichment of the law. Finally, in Section 5 some tentative conclusions are offered.

The paper finds that the ICC judges’ freedom to liberally and purposively interpret the definition of crimes, modes of liability, or defences is rather limited, as is their capacity to adapt or amend substantive, procedural and evidentiary rules. Yet, as it can be viewed from the Court’s jurisprudence discussed in the paper, the ICC judges have nonetheless been able to find ways to express their interpretative creativity, at times even with bold manifestations of judicial activism, thus developing the law in unexpected directions.

Palavras-chave : International Criminal Court, judicial restraint, judicial activism