The contribution of international courts and tribunals to the methodology of international law

OC - (ILA-14148) - THE ROLE OF INTERNATIONAL COURTS AND TRIBUNALS IN THE ANALYSIS OF CUSTOMARY INTERNATIONAL LAW: A PLEA FOR GREATER METHODOLOGICAL RIGOUR

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Abstract

This paper critically evaluates the process of identifying, applying and interpreting customary international law by international courts and tribunals. It argues that courts and tribunals have become both terse and assertive in their analysis of the existence and content of customary international law. The paper draws on a number of examples from the jurisprudence of the International Court of Justice, the World Trade Organization dispute settlement mechanism, the European Court of Human Rights and investor-State arbitral tribunals. The paper's principal argument is that, irrespective of the jurisdictional limits and the particularities of the relevant applicable law, courts and tribunals should exercise greater caution in their analysis of customary international law, absent which they risk improperly assuming a law-making role. Equally problematic is the tendency of international courts and tribunals to rely extensively on the work product of the International Law Commission, which more often than not represents a compromise resulting from last minute decisions on what should be included in the text of an article or guideline and what should be included in the commentary, thereby representing progressive development of international law rather than its codification proper. This is a systemic issue and poses particular problems where the evidence of State practice and *opinio juris* is divisive or absent. Pronouncements of this nature by international courts and tribunals may influence the direction of subsequent State practice or even forestall the development of the law and prevent it from properly reflecting the reality of international affairs. An example of this issue is the way domestic courts rely on the pronouncements on customary international law of their international peers, rarely if ever questioning their validity. Restatements of this nature by domestic courts then constitute the relevant State practice, thereby creating a closed circle as far as the formation of customary international law is concerned. The paper concludes with a plea for greater methodological rigour when it comes to ascertaining the existence and content of customary international law.

Palavras-chave : International courts and tribunals, Customary international law, Methodology