

The Caribbean Court of Justice: One Court with two Jurisdictions – A Unique Judicial Institution?

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Draft paper

7 February 2008

The purpose of this paper is, after briefly presenting why, when and how the Caribbean Court of Justice was created, to specifically show how *unique* the institution is, by examining its distinctive characteristics. Exercising both an appellate and an original jurisdiction, the institution functions as a *domestic* final Court of appeal *shared by several sovereign States* (appellate jurisdiction) and an *international* tribunal designed to settle disputes between the same sovereign States and, more generally, disputes related to the Caribbean Community (original jurisdiction). There is no equivalent institution in the world, which renders the study of the Caribbean Court of Justice particularly interesting from an international legal point of view and explains why “unique” is the adjective often used to describe the court.²

The creation of many new tribunals and special chambers over the past twelve years has challenged the traditional and fairly well-established categorization of international and domestic tribunals. The United Nations has established with several post-conflict States so-called internationalized or hybrid tribunals,³ including the Special Court for Sierra Leone, the Special Panels for Serious Crimes in Timor Leste, the ‘Regulation 64’ Panels in Kosovo and the Extraordinary Chambers in the Court of Cambodia. The War Crimes and Organized Crime Chambers in the State Court of Bosnia and Herzegovina and the Special Tribunal for Lebanon are other examples of the new hybrid or internationalized institutions. Primarily these are domestic institutions in which international judges and/or prosecutors together with management and support staff work. The internationalization of the procedural rules applicable in some of the aforementioned courts or chambers is also noteworthy. This new category of “hybrid tribunal” encompasses many different types of institutions

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² Sir David Simmons, *The Caribbean Court of Justice: a Unique Institution of Caribbean Creativity*, 29 *Nova L. Rev.* 171 (2004-2005), 173.

³ Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 *Am. J. Int'l L.* 295 (2003).

and, in practice, the extent of the international imprint varies from one institution to the other. Yet, it is accurate to talk about a new mixed model that challenges the traditional categories of domestic and international tribunals. This new model is characterized by the intertwining of domestic and international legal features.

In this context many questions can be asked about the Caribbean Court of Justice which was created in 2001. In this new Court, are the domestic and international legal features also intertwined or does it constitute another type of hybrid institution? In order to answer these questions, one needs to look at the criteria typically utilized to distinguish between domestic and international courts (1) and to compare them to the Caribbean Court of Justice's main features in order to identify the precise nature of the Court (2). Finally, the practical consequences of such nature will have to be considered, as well as another distinct feature of the Court, the fact that it is shared by distinct sovereign states (3).

1. The Criteria Relating to Domestic and International Courts

International courts can be described as “judicial bodies, composed of independent judges, whose tasks are to adjudicate disputes on the basis of international law according to a pre-determined set of rules of procedure, and to render decisions which are binding upon the parties.”⁴ Traditionally, an international court had to be set up on the basis of an international convention⁵ but this particular characteristic was called into question in the 1990s by the creation of two international tribunals by the United Nations Security Council, the International Criminal Tribunal for the Former Yugoslavia⁶ and the International Criminal Tribunal for Rwanda.⁷ As a result, establishment by an international treaty can no longer be considered an essential trait of international courts.

The criterion of the independence of the judges is debatable to the extent that it refers to the quality of the court and does not clearly play a role in the determination of the nature of the body as an international judicial one,⁸ and not

⁴ Christian Tomuschat, *International Courts and Tribunals*, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume II (1995), 1108.

⁵ Hermann Mosler, *Judgments of International Courts and Tribunals*, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume III (1995), 31.

⁶ UN Security Council Res. 808 (1993).

⁷ UN Security Council Res. 955 (1994).

⁸ Moreover, even the role of the independence of the judges as a proof of the effectiveness of the international judicial body is questioned. According to certain scholars, the fact that the

even as a judicial one for that matter. Examining the composition of the body, however, may prove useful. If all the judges possess the same nationality, this is clear evidence that the court is a domestic one. Conversely, if each individual judge holds a different nationality, this is clear evidence that the court is an international one. But this is not a deciding factor in the sense that domestic law does not necessarily require a condition of nationality in order to be a member of the judiciary. In other words, foreign judges may sit on the bench of a domestic court without jeopardizing its domestic nature. Moreover, in international law, certain arbitral tribunals consist of one single judge. In those cases, there is only one nationality represented on the bench, but this does not question the international nature of the body.⁹

International courts adjudicate disputes “on the basis of international law”. The existence of “objective rules derived from general international law and treaty law effective between the parties, to guide the judges in determining the law applicable”¹⁰ appears to be a very important characteristic of the international judicial body. However, the distinction between domestic and international tribunals does not rest solely on the applicable law. Domestic courts in a number of states, particularly in Europe, directly apply international treaty and customary law on a very regular basis, while obviously remaining domestic judicial bodies. Hence, the nature of the law applicable is not an exclusive criterion. Nevertheless, ascertaining the nature of the law *primarily* applicable by the judicial body is a good way to distinguish between domestic and international tribunals. Whereas overlaps exist between the domestic and the international legal orders, they remain largely distinct; a given legal rule can in most cases be identified as coming from either a domestic formal source of law – Constitution, legislation, decree, case law,... – or an international formal source of law – mainly treaty and custom. A court primarily responsible for settling disputes according to international law is an international court, while a

judges must be independent is evidence for a virtuous court in the domestic sphere, but given “the profound differences between the settings in which domestic and international courts operate”, “independence *prevents* international tribunals from being effective” (Eric A. Posner and John C. Yoo, *A Theory of International Adjudication*, John M. Olin Law & Economics Working Paper No. 206 (2d series), February 2004, The Law School of the University of Chicago, *available at* <http://www.law.uchicago.edu/Lawecon/index.html> (last visited 30 January 2008), 6, 10).

⁹ Carlo Santulli, *Les juridictions de l'ordre international: essai d'identification*, XLVII Annuaire Français de Droit International 45 (2001), 49 ; Louis Cavaré, *La notion de juridiction internationale*, XII Annuaire Français de Droit International 496 (1956), 505.

¹⁰ Hermann Mosler, *Judgments of International Courts and Tribunals*, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume III (1995), 31.

court primarily responsible for settling disputes according to domestic law is a domestic court.

The existence of specific rules of procedure may also help in identifying whether a judicial body is a domestic or an international one, but this is not a deciding factor either. However helpful specific procedural rules may be, it is hard to think about rules that would be exclusively reserved for international adjudication. Moreover, certain international courts possess a rather complex set of procedural rules, most of them simply copied from domestic systems.¹¹

Another way to distinguish between international and domestic judicial bodies is to identify the name of the authority in which judicial decisions are made.¹² If the decision is made in the name of a domestic authority, the body that has made the decision cannot be an international judicial body, and vice versa. This criterion amounts to examining the following question; which legal entity is the court or tribunal a judicial organ of? The International Court of Justice is the principal judicial organ of the United Nations, hence automatically an international court. A domestic court of any state is a judicial organ of that state, hence automatically a domestic court. Although quite easy to use in theory, this criterion becomes harder to use each time it is in fact necessary, in other words when it is hard to categorize a particular organ.¹³

Since it is impossible to find a deciding criterion based on the nature of the organ in itself, it may be useful to turn to criteria based on the nature of the act produced by the organ - the judicial decision. The law applicable to the dispute, in other words the contents of the decision, was already pointed out as a useful yet not deciding criterion, given the inevitable overlap between domestic and international law in modern legal systems. The other options all concern the law that governs the decision-making process leading in turn to the decision, and more particularly, in order to determine if a court is domestic or international, one may attempt to identify which legal order attributed the judicial power, which order attributed to the decision its judicial authority and finally which order attributed the jurisdictional function to the tribunal that took the decision.¹⁴

¹¹ Carlo Santulli, *Les juridictions de l'ordre international: essai d'identification*, XLVII Annuaire Français de Droit International 45 (2001), 49-50; Louis Cavaré, *La notion de juridiction internationale*, XII Annuaire Français de Droit International 496 (1956), 508.

¹² Louis Cavaré, *La notion de juridiction internationale*, XII Annuaire Français de Droit International 496 (1956), 508-509.

¹³ Carlo Santulli, *Les juridictions de l'ordre international: essai d'identification*, XLVII Annuaire Français de Droit International 45 (2001), 50.

¹⁴ All these criteria are explored by Carlo Santulli, *Les juridictions de l'ordre international: essai d'identification*, XLVII Annuaire Français de Droit International 45 (2001), 56-61.

Although clear in theory, the determination of the legal order that has attributed the judicial power is not that easy to handle. For instance, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 provides for the possibility to create judicial bodies to settle disputes. The legal order that attributes the judicial power to these bodies is therefore the international order. Yet, such bodies may exercise their jurisdiction only when *and because* another act allows for it, often a contract, which is a domestic legal act. Thanks to the contract the dispute is brought before the judicial body. In that situation, it is unclear whether it is the treaty or the contract that attributes the power to decide. In fact, it is both.

The determination of the legal order that gives the decision its judicial authority appears also difficult although it may seem easy at first glance. A decision by an international tribunal is authoritative and binding because this is provided for in an international treaty. Conversely, a decision by a domestic tribunal is authoritative because it is rendered by a state judicial organ. Therefore, the decision carries with it the authority of the state. Faced with concrete cases, however, this criterion does not appear to be a definitive one either. For instance, there exist many international treaties that bind state parties to the treaty to implement, at the domestic level, judicial decisions of another state. In this example the obligation, resting on State A, to implement the domestic judicial decision of State B emanates from a treaty which undoubtedly is an international legal norm. Does this mean that the decision of the Court in State B is international? The answer to the question is no.

Finally, the only criterion left is the one that attempts to determine which legal order attributed the jurisdictional function to the tribunal that took the decision. The jurisdictional function consists of settling legal disputes - that is to decide which party's submission of what the law says is the right one. Coming back to the Convention of Washington example, the tribunals established have jurisdiction to settle international legal disputes, even if it is both thanks to the treaty and to another act that the tribunal can actually function in practice. Nevertheless the order that has attributed the jurisdictional function to the tribunals is the international legal order. Coming back to the treaties that bind states parties to it to act domestically so that domestic judicial decisions of another state be executed within their territory, they may give the authority to the decision of State B in State A, but it remains that that the order that has attributed the jurisdictional function to the domestic court of state B is that state's domestic legal order.

Therefore, in order to determine whether a tribunal is domestic or international, one must answer the following question: which order attributed the

jurisdictional function? Is it the domestic legal order or the international legal order?

Such an examination must not necessarily lead to setting aside the other criteria envisaged previously; the composition of the tribunal, the law applicable, the procedural rules and the authority in the name of which the judicial decision is made. Whereas none of them can be retained as a definitive criterion, they still enjoy some relevance. In fact determining if a court is domestic or international requires a simultaneous examination of a whole network of facts.

2. Applying the Criteria to the Caribbean Court of Justice

- (a) Composition
- (b) Law applicable
- (c) Procedure
- (d) Authority in the name of which the judicial decision is made
- (e) Order that attributed the jurisdictional function to the tribunal that took the decision

(a) Composition

The bench of the Caribbean Court of Justice is very diverse. The President of the Court, Justice Michael de la Bastide, is from Trinidad and Tobago and so is Justice Rolston Nelson. Justice Désirée Bernard and Justice Duke E.E. Pollard are from Guyana. Justice Adrian Saunders is from Saint Vincent and the Grenadines. Justice David Hayton, a national of the United Kingdom, was sworn in as a Judge of the CCJ by George Maxwell Richards, President of the Republic of Trinidad and Tobago, and so was Justice Jacob Wit, who is from the Netherlands Antilles and a Dutch national. This diversity would seem to imply that the CCJ is in fact an international tribunal.

(b) Law applicable

Article XVII of the Agreement Establishing the CCJ, entitled “Law to Be Applied by the Court in the Exercise of its Original Jurisdiction” reads as follows: “The Court, in exercising its original jurisdiction(...), shall apply such rules of international law as may be applicable.”¹⁵ When the Court exercises its appellate jurisdiction, it acts as the final Court of Appeal for the State from which the appeal originated. Hence, the law applicable to the dispute is then the domestic law of that state. Strictly speaking, this means that depending on

¹⁵ Agreement Establishing the Caribbean Court of Justice (2001), Article XVII (1).

which jurisdiction it is exercising the law applicable by the Court will be different and the Court will act as an international court or a domestic court. According to this criterion, the only logical conclusion that can be drawn is that the Court truly has a double nature and that it is impossible to make a firm determination of the nature of the Court. What can be categorized are its acts, its decisions, but not the Court itself.

(c) Procedure

Similarly, the rules applicable differ depending on which jurisdiction it is exercising. According to the Agreement Establishing the CCJ, the President of the Court, in consultation with other judges was responsible for establishing rules for the exercise of both the original jurisdiction of the Court¹⁶ and the appellate jurisdiction conferred on the Court.¹⁷ Although two different sets of procedural rules were adopted,¹⁸ a close examination reveals numerous similarities between them, with regards to various matters from filing of documents¹⁹ to representation by attorneys-at-law, for instance the rules pertaining to their exclusion for misconduct²⁰ or those regarding changes of attorneys,²¹ to mention but a few. As pointed out earlier, procedure before international courts did not develop in a vacuum. When states started to establish complex and permanent tribunals to settle their disputes, quite naturally, they were inspired by the rules applicable in their own domestic systems, which make it now impossible to identify rules that could be said to be truly of an international nature.

(d) Authority in the name of which the judicial decision is made

So far, only two states have accepted to make the CCJ their final Court of Appeal, Barbados and Guyana. For these countries, the CCJ is the final appellate body of the judiciary and, in that sense, the decisions made by the CCJ in the exercise of its appellate jurisdiction are made in the name of these countries, not in the name of CARICOM, let alone in the name of the Court. Conversely, when the Court exercises its original jurisdiction, it will surely

¹⁶ Agreement Establishing the Caribbean Court of Justice (2001), Article XXI (1).

¹⁷ Agreement Establishing the Caribbean Court of Justice (2001), Article XXV 7. (1).

¹⁸ The Caribbean Court of Justice (Original Jurisdiction), Rules 2006, 24 March 2006 ; The Caribbean Court of Justice (Appellate Jurisdiction), Rules 2005, June 2005.

¹⁹ Rules on Appellate Jurisdiction, Part 6, Rules on Original Jurisdiction, Part 9.

²⁰ Rule 4.5 on Appellate Jurisdiction, Rule 4.6 on Original Jurisdiction.

²¹ Rule 4.6 on Appellate Jurisdiction, Rule 4.7 on Original Jurisdiction.

render decisions in the name of the international organization of which it is the judicial body, the Caribbean Community.

(e) Order that attributed the jurisdictional function to the tribunal that took the decision

Article XXV of the Agreement Establishing the CCJ provides that “in the exercise of its appellate jurisdiction, the Court is a superior Court of record with such jurisdiction and powers as are conferred on it by this Agreement or by the Constitution or any other law of a Contracting Party”.²² In other words, the jurisdictional function of the Court, when exercising its appellate jurisdiction, seems to be given to it *both* by an international treaty, the Agreement, and domestic law, it consisting of constitutional or lower rank norms. Does this mean that the decisions of the CCJ in the exercise of its appellate jurisdiction are both domestic and international? This cannot be possible. In fact, the function of the Court when exercising its appellate jurisdiction is to settle domestic disputes, to decide which party’s interpretation of the domestic law is the right one. Of course, in doing so, the Court may base itself on international legal rules, but in the end the dispute that is being adjudicated is a domestic legal dispute. In the exercise of its appellate jurisdiction, then, the Court is a domestic tribunal. In the exercise of its original jurisdiction, however, the Court is an international tribunal because the Agreement Establishing the CCJ grants it the jurisdiction to settle international disputes, to determine which party’s submission is the right one under international law.

Consideration of these elements lead to the same conclusion: the CCJ is both a domestic and an international Court. In that sense it is very different from the previous examples of hybrid Courts, that all involve domestic courts that have been internationalized through changes in the procedure and the law applicable to the disputes. But these disputes are domestic in nature and the function of these courts is to settle them based on domestic law. The CCJ, however, is not a tribunal in which domestic and international elements were mixed to create a third type of tribunal. The adjective “hybrid” means “of mixed character”.²³ The CCJ is therefore not a hybrid Court, since the two elements are not mixed but juxtaposed. In the Caribbean Court of Justice, domestic and international legal features are not intertwined, at least not formally, but they are side by side. In other words, the CCJ is not a mixed Court or a hybrid Court, it is, at least strictly speaking, a double Court.

²² Agreement Establishing the Caribbean Court of Justice (2001), Article XXV (1).

²³ Shorter Oxford English Dictionary, 2002.

Yet, it would be unrealistic to think that the exercise of the two types of jurisdiction by the same judicial body will be without consequences. Although clearly separated in theory, it will probably be difficult for the judges to maintain the two judicial functions of the Court strictly separated and points decided by the Court in the exercise of one of its functions are likely to be reused in the exercise of the other. Since domestic tribunals of different sovereign states as well as international tribunals tend to engage in transnational judicial dialogue,²⁴ while being physically separated, one can assume that in an institution where the same judges will settle both domestic and international disputes, many overlapping opportunities will arise and the odds of keeping the exercise of the two jurisdictions strictly separated are low.

3. Consequences of the Double Character of the Caribbean Court of Justice

The CCJ constitutes a unique field of scholarly investigation in the area of transnational judicial dialogue and all its implications have yet to be elaborated. First and foremost, it is double in nature, which means that, as underlined above, the same judges are at the same time international and domestic judges, therefore more likely to be influenced by both orders and in particular, more likely to use international law in their rulings, which is one type of transnational dialogue.

Second, the Court is shared by several sovereign states, which means that the same Court is the highest court of different sovereign states and that the same judges are the highest judges in more than one state. Given that transnational judicial dialogue consists of using decisions of courts in different countries, it is clear that the CCJ's potential for transnational dialogue is very high. In this case, actually, it would perhaps be more appropriate to talk about harmonization of the law of different sovereign states rather than mere dialogue.

Although not a new feature (the Judicial Committee of the Privy Council is also shared by distinct sovereign states), the fact that the CCJ is a Court shared by several independent states is worth commenting. Does that challenge the independence of states? The States that have accepted the appellate jurisdiction on the CCJ have renounced a great deal of their judicial sovereignty. Until where can a state go to strip itself from its sovereignty ? For a state, the

²⁴ Melissa A Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L. J. 487 (2004-2005).

pertinent question is where to draw the line between making use of its sovereignty and renouncing it?

CPIJ, *Case of S.S. Wimbledon*, UK, France, Japan v Germany (Poland intervening), 17 August 1923: “*The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty*”

In that context, what is the difference between the situation when the Privy Council makes decisions and the situation when the CCJ does? Some argue that since one is a legacy of colonialism and the other is the result of a Caribbean empowerment, the two situations cannot be equated. Is this relevant?

One of the arguments for the development of the Caribbean Court of Justice was that the decisions needed to be taken closer to the people, that there was a need for the development of a truly Caribbean case law, more in line with the peoples’ aspirations. This looks like a valid argument.²⁵ Yet, while it is undeniable that the Caribbean States (micro states) do share many common features in terms of culture and ways of life, they remain sovereign states and one may wonder if the creation of a Court common to all of them does not amount, albeit to a lesser extent, to reproducing the errors of the past- that is to impose on a state decisions that may suit the majority of others but not this one in particular.

It is all the more interesting that for some authors, strengthening sovereignty was a very important argument for the repatriation of justice in the Caribbean.²⁶

²⁵ Sir David Simmons, *The Caribbean Court of Justice: a Unique Institution of Caribbean Creativity*, 29 Nova L. Rev. 171 (2004-2005), 180-181.

²⁶ Sir David Simmons, *The Caribbean Court of Justice: a Unique Institution of Caribbean Creativity*, 29 Nova L. Rev. 171 (2004-2005), 182-183.