

SCENARIOS OF JURISDICTIONAL OVERLAP AMONG INTERNATIONAL COURTS*

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In December 2005, the International Court of Justice (ICJ) delivered its judgment in the case brought by the Democratic Republic of the Congo against Uganda for, *inter alia*, massive human rights violations.¹ Throughout 2005, the International Criminal Court (ICC) had been investigating human rights abuses allegedly committed in the same two African countries.

Then, in February 2006, the ICJ commenced new public hearings for claims of genocide brought by Bosnia and Herzegovina against Serbia and Montenegro.² Meanwhile, in another courtroom in The Hague, the International Criminal Tribunal for the former Yugoslavia (ICTY) was continuing the trial of Slobodan Milošević, the former president of the Federal Republic of Yugoslavia, for crimes including genocide in Bosnia and Herzegovina.

The overlap between these international courts is no longer hypothetical and it deserves to be critically examined.

When Professor Charney conducted his impressive study in 1998 entitled, “Is International Law Threatened by Multiple International Tribunals?,”³ his conclusion was optimistic. He found that these tribunals were engaged in the same dialectic. The variety of courts did not pose a threat to the coherence of the international legal system. In short, in his words, “the more the merrier.”⁴

But, eight years later the landscape is different – the ICC did not even exist eight years ago. It is also now apparent that the subject-matter jurisdictions of international courts can overlap, and they can and do end up analyzing the same situations. Admittedly, they are coming from different perspectives and issuing different remedies, but the ICJ is applying the *same* substantive law on the use of force, the conduct of hostilities and the meaning of international crimes as the ad hoc tribunals and the ICC.

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¹ *Armed Activities on the Territory of the Congo (Merits) (Democratic Republic of the Congo v. Uganda)*, [2005], online: ICJ <<http://www.icj-cij.org/docket/files/116/10454.pdf>available>.

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [*Bosnia Genocide case*].

³ Jonathan I. Charney, “Is International Law Threatened by Multiple International Tribunals?” (1998) 271 *Rec. des Cours* 101.

⁴ Jonathan I. Charney, “The ‘Horizontal’ Growth of International Courts and Tribunals: Challenges or Opportunities?” [2002] *A.S.I.L. Proceedings* 369.

In opposition to domestic legal systems which have rules of procedure governing the relationships among courts, international courts are operating independently. There are no avenues of appeal, formal notions of precedent, or official modes of coordination. There are no rules on what should happen when more than one court has jurisdiction over the same conflict, when courts reach inconsistent decisions, or how one court should treat the decisions of another court.⁵

In this presentation, I will examine three scenarios of jurisdictional overlap⁶ among the ICJ, ICC and *ad hoc* tribunals.

I will not examine the issues raised by jurisdictional overlap in the context of other international courts. Nonetheless, I believe that these issues are also relevant to the internationalized tribunals in Kosovo, Timor-Leste, Sierra Leone and Cambodia. Besides, the role of the regional human rights courts of Europe, the Americas, and Africa would be interesting to consider. Arbitral commissions, such as the Eritrea-Ethiopia Claims Commission, have also been dealing with cutting-edge questions of international law. The ICJ and International Tribunal for the Law of the Sea (ITLOS) both deal with the law of the sea. Finally, national courts have been engaging with international law through the exercise of universal jurisdiction or under the complementarity regime of the ICC. But these are questions for another time and place.

I. Scenarios of Jurisdictional Overlap

I have invented three scenarios to consider how jurisdictional overlaps could arise and then be resolved.

1. An international criminal court faces a previous decision by the ICJ (**A**);
2. The ICJ faces a previous decision by an international criminal court (**B**);
3. An international criminal court faces a previous decision by another international criminal court (**C**).

Under each scenario, challenges arise on two levels: principle and fact. Issues of principle are raised when two or more courts disagree on the state of the law. Issues of fact present themselves when the courts differ on the specific facts of a situation or the application of the law to those facts.

⁵ See Jenny Martinez, "Towards an International Judicial System" (2003) 56 *Stan. L. Rev.* 429 at 431.

⁶ There are two types of jurisdictional overlap. First, and more rare, the same facts and legal issues may come before two or more courts. Second, the same rule of law is interpreted or applied in a divergent manner by different courts.

A. An International Criminal Court Faces a Previous Decision by the ICJ

In this scenario, we can imagine the ICTY facing the decision of the ICJ in the *Bosnia Genocide* case before it delivers its own judgment on the individual criminal responsibility of Milošević for genocide in Bosnia.

The first question for the ICTY would be: Should statements of principle by the ICJ on the substance of international humanitarian law be given particular consideration? Or is the ICJ's decision irrelevant because it deals with inter-state disputes, not the punishment of individuals?

In this scenario, the ICTY has three options. First, it could consider the ICJ's decision to be an irrevocable statement of law. This is unlikely given the independence of the ICTY from the ICJ. The ICTY Appeals Chamber in the *Čelebići* case has stated:

[T]his Tribunal is an autonomous international judicial body, and although the ICJ is the 'principal judicial organ' within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.⁷ [Footnotes omitted]

Second, the ICTY could develop its own interpretation of the legal principle in question. International criminal courts have distinct origins from the ICJ and are concerned with specialized issues of international criminal law. It makes sense for them to be cautious to not take legal standards that were developed for states and apply them to individuals. This independent approach has already been taken by the ICTY in its 1999 *Tadić* Judgment.⁸ The Appeals Chamber held the ICJ's *Nicaragua*⁹ "effective control" test for attributing the conduct of a non-state paramilitary organization to a state was "unconvincing".¹⁰ The Appeals Chamber developed its own, less stringent standard of "overall control". Nonetheless, the significance of *Tadić* tends to be overstated—it is the exception rather than the rule. There are actually very few examples of such criticism of ICJ jurisprudence.

Third, the ICTY could request an advisory opinion from the ICJ. One problem with this option is that the ICJ is not suited to handling a large number of requests for advisory opinions. The advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹¹ was delivered by the

⁷ *Prosecutor v. Zejnil Delalic*, IT-96-21-A, Appeal Judgment (20 February 2001) at para 24 (ICTY, Appeals Chamber).

⁸ *Prosecutor v. Tadić*, IT-94-1, Appeal Judgment (15 July 1999) (ICTY, Appeals Chamber).

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 392.

¹⁰ *Prosecutor v. Tadić*, IT-94-1-T, Judgment (15 July 1999) at para. 116 (ICTY, Appeals Chamber), online: ICTY <<http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>>.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] I.C.J. Rep. 136.

ICJ in a record time of seven months. This timeframe is acceptable where only states are affected, but if it is the ICC or ICTY making the request, the defendant's right to a fair and expeditious trial would be compromised.

Needless to say, even though it is not an advisory opinion, the ICJ hearings on the *Bosnia Genocide* case are taking place 13 years after the initial application. In 2000, one of the defendants in the *Kvočka* case at the ICTY moved to halt the proceedings because one of the issues in the trial was the subject of the ICJ's *Bosnia Genocide* case. The Appeals Chamber rejected the request. It held that suspension of the proceedings could impact adversely on the defendant's right to a fair and expeditious trial. When the defendant offered to waive this right, the Appeals Chamber held that this right could not be waived.¹²

The next question for the criminal court would relate to the facts: How should an international criminal court appraise a previous decision by the ICJ as regards the facts or the application of the law to the facts? An important consideration is the different standards of proof in civil and criminal jurisdictions. The ICC and ad hoc tribunals must be convinced that material facts are proven beyond any reasonable doubt for them to be accepted. The ICJ, on the other hand, adopts a more flexible standard: the graver the charge, the higher the standard of proof. ICJ judgments speak in terms of being "satisfied" or "convinced" that a fact is proven or finding 'sufficient' evidence.

A specific concern is that ICJ typically obtains all of the evidence through the submissions of the parties. It does not go to the field, re-interview dubious witnesses, or test every document for authenticity. The Court has the power in article 50 of its Statute to request an enquiry or expert opinion, but this has been rarely used and was not invoked in the *Congo v. Uganda* case despite the contentious facts at issue. In some cases, the ICJ has called witnesses to testify before it, but this is unusual.

The ICTY or ICC would, at most, treat the ICJ's findings of facts as a factor to take into account. They may be guided by the ICJ's general findings (the existence of an armed conflict, the nature of the group targeted, the use of child soldiers), but will certainly not base any findings of individual criminal responsibility without more extensive and specific evidence tested in the courtroom through cross-examination.

B. The ICJ Faces a Previous Decision by an International Criminal Court

This is the first scenario in reverse. An example could be the ICJ facing the judgment of the ICTY in the *Milošević* case before deciding the *Bosnia Genocide* case. It could even be the ICJ facing the finding of genocide in Srebrenica in the *Krstić* case.

¹² *Prosecutor v. Kvočka*, IT-98-30/1, Decision on Interlocutory Appeal by the Accused Zoran Zigic Against the Decision of Trial Chamber I (25 May 2001) at para. 19 (ICTY, Appeals Chamber), online: ICTY <<http://www.un.org/icty/kvočka/appeal/decision-e/10525JN315907.htm>>.

As I sat in the public hearings of the *Bosnia Genocide* case on 27 February 2006, I noted that the Deputy Agent for Bosnia and Herzegovina regularly referred to the ICTY – he quoted Trial Chamber judgments, statements of the Prosecutor, and even statements by Milošević himself. He said that the full-text of ICTY material referred to in the hearings would be provided on CD-ROM. In April, witnesses will be called by both sides. One would expect that some of these witnesses would have previously testified before the ICTY.

A key question is how much attention and weight will the ICJ give to the findings of the ICTY? Should it consider those facts established, given the criminal procedure applied? Or should it consider the jurisprudence as being just one element among others to prove a fact? The ICTY has dealt with this question on an internal level through the introduction of Rule 94 in 1998 (“[a]t the request of a party or *proprio motu*, a Trial Chamber [...] may decide to take *judicial notice of adjudicated facts or documentary evidence* from other proceedings of the Tribunal relating to matters at issue in the current proceedings”). There are some advantages to accepting facts established by the international criminal courts because of their superior investigative mechanisms. However, these facts – aimed at individual guilt – may not always be helpful in proving state responsibility.

Moreover, the ICJ to date has rarely referred to the case law of other courts. The recent *Congo v. Uganda* judgment addressed pressing questions on the law of intervention and violations of human rights and humanitarian law—questions on which the ICTY has pronounced over the past decade. Nonetheless, only one Judge made reference to the ICTY in a separate opinion.¹³ The ICJ has tended to pay more attention to international arbitral awards. On some occasions it has even treated some as “precedents” on a par with its own prior decisions.¹⁴ This may be because arbitrators deal with inter-state disputes rather than crimes of individuals.

Article 25 (4) of the *Rome Statute of the International Criminal Court*¹⁵ makes a definite separation between individual and state responsibility: “[n]o provision in this *Statute* relating to individual criminal responsibility shall affect the responsibility of States under international criminal law”. One can see how a state’s responsibility would not be exhausted through the punishment of guilty individuals, and its duty to provide reparations would remain. However, many violations of international law could simultaneously constitute an individual’s crime and a state’s

¹³ *Armed Activities on the Territory of the Congo (Separate Opinion of Judge Simma) (Democratic Republic of Congo v. Uganda)*, *supra* note 1 at para. 23 (on the understanding of the scope of international humanitarian law developed by the ICTY Appeals Chamber in the *Tadić* case).

¹⁴ For example, the ICJ adopted the principle established in the *Island of Palmas (United States v. Netherlands)*, (1935) 2 R.S.A. 831, arbitration award by Judge Huber in the *Minquiers and Ecrehos* case regarding the intertemporal doctrine: *Minquiers and Ecrehos Case (Merits) (France v. United Kingdom)*, [1953] I.C.J. Rep. 47. See also, *Delimitation of the Continental Shelf (United Kingdom v. France)* (1977), 18 R.I.A.A. 3, reprinted in (1979) 18 I.L.M. 398, which was treated as precedent by the ICJ in *Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 58 at 62-63.

¹⁵ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002) [*Rome Statute*].

crime. A state cannot commit genocide without the actions of its leaders or agents. The clear separation is more difficult to make where the defendant was the head of state at the relevant time, such as Milošević. The adjudicated facts at the ICTY could contribute to a finding of state responsibility at the ICJ.

C. An International Criminal Court Faces a Previous Decision by Another International Criminal Court

An example of this scenario would be the ICC facing the ICTY's case law on genocide. In terms of determining legal principles, two questions arise: has international criminal law evolved between the moment when the ICTY began to render decisions and the establishment of the ICC? Should the ICC be given a priority position, considering the fact that it is the general jurisdictional body in international criminal law? It is interesting here to consider article 21 of *Rome Statute* on applicable law:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court **may** apply principles and rules of law as interpreted in **its** previous decisions.

Therefore, while the Court can look to its own decisions and national laws, *the Statute is completely silent on the relevance of the decisions of other international courts*. This is odd for two reasons. First, the ICC was not established in a vacuum; the negotiations over the *Rome Statute* closely tracked the development of the ad hoc tribunals and were no doubt influenced by the example set by ICJ over the past sixty years. Second, the ad hoc tribunals and the ICJ are actively involved in interpreting and applying the same substantive law as the ICC: the laws of international human rights and armed conflict as well as general principles of public international law.

The equivalent provision in the *Statute of the International Court of Justice*,¹⁶ article 38, takes a more realistic approach. Paragraph 1 (d) allows the Court

¹⁶ Annexe to the *Charter of United Nations*, 26 June 1945, 15 C.N.U.O.I. 365 (entered into force 24 October 1945).

to use judicial decisions – including those of international courts and tribunals – as a subsidiary means for the determination of rules of law. Despite the wording of article 21, the early practice of the ICC reveals a willingness to refer to the case law of other international courts, particularly the ICTY. This is not surprising given the fact that some judges and prosecutors previously worked at that Tribunal. However, quite apart from the natural tendency to refer to what one is familiar with, it is also likely that the decisions of other international courts are a relevant source of law.

The public decisions rendered by the Pre-Trial Chambers (PTC) of the ICC mostly deal with administrative matters such as status conferences and page limits. However, the decisions that have engaged in substantive legal discussion have referred to other international courts. In the decision of 20 October 2005 on the Prosecutor's application for leave to appeal, the Uganda PTC referred not only to the case law of the ICTY and ICTR but also to the Special Court for Sierra Leone. It deemed the case law "especially relevant" given the similarity of the provisions at issue.¹⁷

The Uganda PTC slightly retreated from this approach in its decision of 28 October 2005 on the question of redaction. It observed that the Prosecutor had relied on the case law of the ICTY and ICTR in his submission, and noted that the rules and practice of other jurisdictions are not as such "applicable law" before the Court and beyond the scope of article 21. The law and practice of the ad hoc tribunals could not *per se* form a basis for importing remedies into the *Rome Statute*.¹⁸

Once the ICC is conducting trials, it is likely that it will treat ICTY case law with caution in some areas where the law differs, such as with regard to crimes of sexual violence and modes of liability.¹⁹

In terms of the facts, it is very unlikely that the ICC and ICTY will deal with the same factual situations. The ICC will never inquire into the facts of the Yugoslav situation dealt with by the ICTY, unless fresh crimes are committed. However, it is possible that there could be some overlap in the future between the ICC and a new ad hoc tribunal created by the Security Council. This may have happened with the Darfur situation if the US had succeeded in its initial plan to create a new tribunal based in Tanzania administered by the UN and the African Union.²⁰

¹⁷ *Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58*, ICC-02/04-01/05 (19 August 2005) at para. 18 (ICC).

¹⁸ *Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification*, ICC-02/04-01/05-60 (28 October 2005) at para. 19 (ICC).

¹⁹ The *Rome Statute* and Elements of Crimes document reflect an expansive approach to crimes of sexual violence compared to the ICTY Statute. In addition, the definitions of superior responsibility and common purpose liability are different under the *Rome Statute*. The *Rome Statute* also includes crimes that do not appear in the ICTY Statute such as enforced disappearance of persons and the use of child soldiers.

²⁰ US Department of State, Press Release, 055 (05), "Explanation of Vote on the Sudan Accountability Resolution" (31 March 2005), online: US Department of State <<http://www.state.gov/p/io/44388.htm>>.

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These three scenarios reveal some interesting trends. It appears that the international criminal courts will generally adopt a respectful position vis-à-vis the legal interpretations of the ICJ, but will treat any facts established in ICJ judgments with caution. The criminal courts are also likely to closely follow each other's jurisprudence unless their statutes differ. This could change when the ICC develops a substantial body of its own case law. The ICJ's position is harder to predict. To date it has hardly paid attention to the principles or facts established by the international criminal courts. The election of four new judges and a new president could lead to a shift in attitude. Moreover, the ICJ is now hearing a case where a party is heavily relying on the case law of another court.

What do these scenarios mean for the development of the international humanitarian law? I submit that there is small but real danger of the substance of the law being confused by inconsistencies between the ICJ and the international criminal courts. Consistency in legal reasoning is the very essence of law, especially the law we expect to protect us when all other forms of order have collapsed. The principle of legality could also be rendered meaningless by conflicting interpretations.

What, then, is to be done? Some scholars argue that all that is needed is a "minimal" model consisting of increased inter-court dialogue and the exercise of judicial discretion. Others suggest a middle way of applying certain measures of coordination or harmonization between diverse courts. A more radical view favors a "maximal" model of structural change: imposing a hierarchy on international courts and introducing mechanisms for appeal. The former Presidents of the ICJ, Judges Schwebel and Guillaume, advocated making the ICJ an international supreme court.

I believe such a maximal model would be destabilizing and unlikely to ever secure enough political support. But something more concrete than informal judicial dialogue is needed. Regular exchanges of information on an annual basis and in a conference setting would increase awareness of the jurisprudence of other courts. This would be simple to arrange in the case of the ICJ, ICC, and ICTY as they are all located in The Hague. There could also be formal inter-institutional agreements providing for the provision of information upon request or on a regular basis. Such an agreement has been concluded by the UN and ITLOS.²¹

The coherence of international law would also be enhanced by the active engagement of judges with the decisions of other courts. There needs to be full and frank acknowledgement that these courts are not acting in isolation. At the very least, the relevant case law of other courts should be addressed even if it is not accepted.

A good example of this can be found in the Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma in the *Congo v. Rwanda* case issued

²¹ United Nations and International Tribunal for the Law of the Sea, *Agreement on Cooperation and Relationship Between the United Nations and the International Tribunal for the Law of the Sea*, GA Res. 52/5218, UN GAOR, 52nd Sess., UN Doc. A/RES/52/521 (1998), article 4.

in February 2006. The Opinion referred to the practice of the Inter-American Court on Human Rights, the European Court of Human Rights and the Human Rights Committee on reservations to human rights treaties. The Judges said that “the practice is not to be viewed as ‘making an exception’ to the law” determined in the ICJ’s *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.²² Instead, they took the view that “it is rather a development to cover what the Court was never asked at the time, and to address new issues that have arisen subsequently”. They say the development of the law by the human rights courts does not create a “schism” but should be regarded as “developing the law to meet contemporary realities.”²³

Such analysis was absent from the main judgment of the ICJ, which made no reference to the human rights bodies. The spirit of this Separate Opinion – which sees the development of international law as a joint project and not the exclusive domain of any court – indicates a growing awareness of and respect for the contribution of other courts.

The Tower of Babel is not upon us. What we are seeing is a small but real risk of incoherence arising from jurisdictional overlaps. However, informed and mutually respectful decision-making by international courts will help keep that danger at bay.

²² Advisory Opinion, [1951 I.C.J. Rep. 15.

²³ *Armed Activities on the Territory of the Congo (New Application: 2002) (Judgment, Jurisdiction and Admissibility) (Democratic Republic of the Congo v. Rwanda)*, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, [2006] at para. 16, 22, 23, online: ICJ <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=crw&case=126&k=19>>.

