

THE AMERICAN SOCIETY OF INTERNATIONAL LAW AND THE RISE OF INTERNATIONAL COURTS AND TRIBUNALS: AN EVENTFUL CENTURY

The lecture was given at 9:00 a.m. on Thursday, March 30, by David D. Caron of the University of California at Berkeley School of Law. Moderating was Thomas Buergenthal of the International Court of Justice. Providing commentary was Christine Van den Wyngaert of the International Criminal Tribunal for the Former Yugoslavia.

FRAMING POLITICAL THEORY OF INTERNATIONAL COURTS AND TRIBUNALS: REFLECTIONS AT THE CENTENNIAL

*By David D. Caron**

At the start of the last century, contributors to the *American Journal of International Law* often wrote of international arbitral tribunals (and, shortly thereafter, an international court) from the inside: they wrote of cases, of procedure and of substantive law. If one used the phrase “international court and tribunals,” then everyone was in agreement that that meant interstate ad hoc arbitration, arbitration under the auspices of the Permanent Court of Arbitration, or, a few decades later, the Permanent Court of International Justice.

Today, arbitrators, foreign ministry officials, scholars, secretariats and non governmental organizations at locations around the world are designing and using courts and tribunals. They are considering creating a new court or tribunal, changing the rules of the game for one that exists, or arguing a particular case before another. They are doing this more than perhaps at any other time in history.

It should not be surprising therefore that the scholarly literature of the past decade in the *Journal* and elsewhere has not only been about cases and procedure, but also has attempted to understand this growth in courts and tribunals, to explain their variety, to assess their effectiveness and to think in systemic terms about their interrelationships. Yet, and perhaps not surprisingly, not only has the field of tribunals and courts grown but that shared assessment of what counted as a court and tribunal at the start of the last century has become quite murky, to say the least.

A theory requires some agreement about what is being explained or understood by the theory, yet present scholarship when attempting to theorize about courts and tribunals is rarely clear about the “what.” Are all the courts and tribunals comparable? That of course depends on the question one is asking. But which are commensurate for which purposes? What are the functions of courts and tribunals? How can one seek to assess effectiveness, if one does not know the functions served by the institution? As the canary in the cave provided a signal of danger to miners, so does the existence of questions such as these signal the lack of an adequate framing theory for study of courts and tribunals.

A number of articles in usually a single breathless paragraph note that there are “now more than fifty international courts, tribunals, and quasi-judicial bodies, most of which have been established in the past twenty years,” that international private arbitration is on the rise, and that national courts increasingly are faced with “applying international law.” Perhaps these are just broad statements to emphasize the dynamic nature of the field and to

* C. William Maxeiner Distinguished Professor of International Law, University of California at Berkeley; Vice President, American Society of International Law.

convince the reader that the article is worthwhile. Yet, and this was particularly troubling, a leading U.S. casebook of International Law embraces a similar inclusionary approach. The chapter on international dispute resolution begins with the International Court of Justice, jumps to European Court of Justice, shifts from there to what starts as a historical section on interstate ad hoc arbitration but slides without explanation or distinction into an extended introduction to private commercial arbitration, the 1958 New York Convention with extracts of cases between two private parties, and from there progresses to NAFTA, the WTO and ends with the enforcement of foreign judgments in national courts.

In opposition to the decision to mention everything, some limit the scope of the field of courts and tribunals, for example, to where the court or tribunal is created by treaty. But is a focus on the legal nature of the constitutive document helpful or merely convenient? The growth of the tribunals certainly is not driven directly by whether it was created by a treaty, contract or statute, but by some broader set of impulses.

So as we move as scholars into building theories of courts and tribunals, we need inquire into the boundaries of the system to be explained, and, in particular, into the forces, the interests, and the actors that drive the system. When, if ever, are national courts a part of the field? When, if ever, are ICSID arbitrations, investor state arbitrations under national court supervision or private international commercial arbitration a part of the field? How should we think about the place of human rights institutions in contrast to those concerned with economic matters? Is it something about the subject matter of the dispute or nature of the parties to the dispute? Is it something about the institution?

Within the limits of this brief lecture, I offer what can only be a sketch of such a frame in which my prime object is to identify different generating impulses for courts and tribunals in the international arena. It is not an effort to theorize about which of several forms is chosen ultimately, but instead to understand the impulse to create a court or tribunal at all and therefore the contours of the phenomena we study.

By “courts and tribunals,” I mean a set of institutions, whether they be anchored in public international law or national law, or be private arrangements reinforced by national law, that address disputes that may be of international significance. I have three points.

My first point is that courts and tribunals in the international arena are the manifestation of several, not one, phenomena and our understanding can be made richer by reference to different traditions of theory.

The existence and potential of courts and tribunals, *as institutions*, is determined in significant measure by the surrounding political context. Given this proposition, let us undertake a thought experiment as to the surrounding political context in which courts and tribunals arise.

The First Step: Anarchy and the Interstate Image

To begin our thought experiment, we draw on international relations and assume that a basic feature is the condition of anarchy; that is, a world of independent states and the absence of any overarching sovereign. This is the interstate image contained in traditional public international law.

Let us as an initial matter add a relatively strict condition of separateness: namely that although the governments interact, the populations of these states do not interact nationally to any significant degree. Thus people do not travel to another state, there is no trade, and there is no foreign investment. There *is* some sense of what transpires in other

countries. War is still possible in this model. Under a structural realist view, states would be driven by the need to survive, and would, for example, seek alliances. The institutionalist, even with the separateness condition we've imposed, would expect some international organization so as to gain the benefits of cooperation. The realist would not disagree with that possibility, but would emphasize that such organization is subordinate to, i.e., does not fundamentally alter, the anarchical context and the overall impulse toward survival created by that context.

What can be predicted about courts and tribunals? First, we need acknowledge that the scope of the subject matter of disputes obviously has been dramatically reduced by the condition of separateness. Trade disputes are not present, investment disputes are not present, private international commercial arbitration is not present. Similarly, the international relevance of national courts, although not eliminated, is reduced. Second, to the extent that the function of courts and tribunals is to serve as a means for resolution of conflicts, some interstate disputes remain despite the separateness condition. We might expect an interstate ad hoc arbitration to address a border question, an institution such as the United Nations Compensation Commission to address claims for compensation for injuries arising from war, a tribunal such as the Nuremberg Tribunal to address charges of war crimes, or the International Court of Justice to address a claim of breach of a pledge of one state to another.

As to when we might see such institutions, rather than negotiation or other means of conflict resolution, a common realist description (consistent with domestic theories of conflict resolution) of the impulse to create and commit to such an institution is one of utility, an assessment of interests and likely outcomes. The outcome of this utility analysis is often the conclusion that the process would be consensual and, in the legal literature, that consent would be forthcoming only when that at stake is not of particular significance.

The utility argument has appeal, but two important caveats are appropriate. First, I find the idea that tribunals will exist only for disputes of little significance a simplistic application of utility and perhaps reflective of an American tendency. It would seem entirely possible, for example, that the relatively weak members of a community may agree to a court and tribunal even about very serious matters because other circumstances exist, for example, the presence of more powerful states recommending such consent. Second, a utility assessment analysis usually assumes that the function of creating the court is to solely resolve the dispute. Yet a common explanation for the impulse to create the International Criminal Tribunal for the Yugoslavia is that in face of being unwilling to really do something, namely send in troops, it was valuable to create an ad hoc tribunal. In other words, the political functions served by creating a court may be quite distinct from the function one would imply from the stated mandate or form of the institution. So, a utility analysis focused on resolution of particular dispute underestimates the possibility that unrelated circumstances will trigger the creation of a tribunal or court, but correctly predicts that as those circumstances disappear, so too may a part of the enthusiasm for the tribunal created.

Thus the impulse amidst anarchy is one of assessing one's interests which suggests (1) an assessment that is highly contextual and extending beyond the relationship of the disputing parties or the matter at dispute, and (2) an inclination to not be amenable to open ended pre commitments where assessment is not possible, unless again the context indicates the value of such precommitment.

The point here is not to review theories of international relations, but rather to emphasize: (1) the limited scope of this system in the sense that use of courts and tribunals is consensual and not common, (2) the theoretical frame draws from, and seek a coherence with the various

theories of international relations, and, to an extent, institutional economics, and (3) this model, particularly with the separateness condition, clearly does not reflect the complexity of what is occurring in the world at present, but rather reflects classic arbitration and adjudication of interstate disputes.

A Misstep: One Sovereign

Before lifting the separateness condition, let us take a misstep that is instructive. An obviously inappropriate image for our system would be to assume the presence of an overarching sovereign, the opposite of anarchy. If there was only one state in the world, we would be attempting to construct a theory of courts that operate in that state. And to the extent that there were levels of federation within this state, we would in Hart and Weschler's terms seek a principle of "institutional settlement" for the interaction of the levels of this system. There are in this sovereign model no international courts and tribunals, there are simply courts and tribunals.

The value of this misstep for our present inquiry is two fold. First, the logical source for theorizing would be political science theories regarding domestic courts, not theories regarding international relations. We thus open the possibility of another tradition of theorizing, although I have not shown it to be applicable yet. The second value of this misstep is that we are confronted with a very curious observation: In the anarchical interstate image we expected courts and tribunals to be exceptional; while in the sovereignty image, courts abound. Why would there be such an abundance of courts domestically?

The literature offers two explanations for the abundance of courts and tribunals domestically. One explanation is from political science where there is a small but significant set of writings offering a political theory of national courts. The seminal work in the field is Martin Shapiro's 1983 work "Courts: A Comparative and Political Analysis." Shapiro offers a top down explanation for the abundance of courts where he argues that a primary function of courts, particularly when viewed in historical terms, is not that they resolve disputes but that they provide a reliable mechanism to the sovereign for social control. In other words, courts are the means by which the state rules *through* law. The criminal law is a prime example of rule through law.

In addition, to the extent that the substantive law reflects the views of an element of society either in terms of its interests or, more subtly, its view of the world, then the law and courts, if captured by that element, enable that element to gain a measure of social control, or what Shapiro terms regime enforcement. An example used by Shapiro is the law favoring creditors. Shapiro would argue that no matter how independent and impartial the court is, the debtor knows that the substantive law is against them and, indeed, the mechanistic vision of a court applying the law only ensures that the court will be a trustworthy agent of the state. For Shapiro, it is thus no surprise that courts and "rule through law" can be found in all countries.

Another explanation for the abundance of a broader range of institutions—arbitration, insurance and courts—can be found in the economics literature. This is a bottom up explanation where these institutions are to be expected to exist since they serve as means to avoid contracting problems, avoid transaction costs, make commitments more credible, generally increase the efficiency of interactions among members of a group, and thereby allow the gain possible from cooperation.

There are two points that deserve emphasis in this sovereignty model. First, courts are abundant and a prime explanation is that courts are a means of social control. Second, thus in speaking of "rule through law," not "rule of law," the abundance of courts domestically

does not contradict their rarity in international arena in the sense that rule through law does not imply that either the state or ~~the~~ its officials are subject to the courts domestically: “rule through law” domestically and anarchy internationally are consistent in that they both leave the sovereign free, internationally vis a vis other sovereigns and domestically vis a vis its subjects.

The Second Step—Adding Transnational Activity

With these top down and bottom up driving forces for domestic courts in mind, let us return to our modeling thought experiment and as the second step let us lift the separateness requirement—in other words, goods, capital and people begin to move. In doing so, we now have added whole categories of disputes not present in the interstate model and, importantly, the real parties in interest to disputes often will not be states. Moreover, given the much greater number of actors and transactions now involved, we could predict that there will be a much greater number of disputes than existed in terms of interstate disputes.

I have approached the lifting of the separateness requirement in this circuitous way in order to emphasize that two different things may happen as the requirement is lifted and that that difference, a difference in emphasis in some respects, helps us think about the scope of the study of courts and tribunals and the forces that drive the phenomena we encounter.

We have two possibilities: It may be the case that the potential for courts and tribunals to deal with these transnational disputes will be dominated by the anarchy model (and thus be exceptional). Or it may be the case that the potential for courts and tribunals to deal with these transnational disputes will be driven by the same forces that lead to an abundance of courts and tribunals domestically.

Clearly, the interstate model could (and, as a historical matter, did) develop doctrines to address certain disputes arising out of transnational activity. The claims of nationals characterized as interstate claims through diplomatic protection and espousal, for example, were on occasion addressed through courts and tribunals.

My argument is that it is also plausible (and analytically valuable to consider) that the efficient and dominant set of courts and tribunals (national court litigation and private international arbitration) existing to address these transnational disputes is an extension of domestic courts and tribunals rather than an effort of the interstate model to deal with transnational activity.

In the top down “rule through law” explanation, even while acknowledging that there is by definition no overarching sovereign, it is quite plausible that two or more states would share the same interest in internal social control and would seek to coordinate their efforts at such control by coordinating their respective courts or by creating shared institutions. In the face of state interpenetration, state cooperation and treaties may not only result in a diminishment of sovereignty, but also be a means to strengthen one’s sovereignty.

The coordinated pursuit of transnational criminal organizations is an example of this coordinated sovereignty. Lifting of the separateness requirement allows for transnational crime. Since states have a quite similar interest in the control of crime and a quite similar view of what is crime, this is a strong case for coordinated sovereignty where the prosecutions of the national courts of each coordinated sovereign potentially satisfies the shared social control objective of each sovereign.

Coordinated sovereignty will be strongest when it serves to make both sovereigns stronger. But that strong form happens in only a few cases. In other cases, coordination may benefit particular citizens of a sovereign while not necessarily strengthening the sovereign.

As to economic transnational economic activity, if we start with only transactions between private parties, again states will have a similar interest in extending their domestic vision of the value of courts outwards in coordination (although this is weaker than the criminal context). And that top down impulse would simultaneously be complemented by the bottom up explanation of economics in terms of a demand for institutions such as private international arbitration or coordinated transnational litigation to make more efficient such transnational activity.

The coordinated construction of a de facto global transnational system of courts and tribunals in this view is driven by the interpenetration of national systems by a variety of actors. This is not to say it is not inefficient or spotty in its coverage, but that it is there. Coordinated sovereignty may be effectuated by treaty, for example, the 1958 New York Convention. But that is merely the device facilitating coordinated sovereignty and does not alter the driving forces leading to the creation of such a system.

I do not argue that the presence of a transnational system of courts and tribunals alters the fundamental condition of anarchy. The Iran-United States Claims Tribunal, for example, can be seen as a complex interstate institution designed to deal with the shedding of relations between the United States and Iran as a consequence of the Iranian Revolution and the collapse of the otherwise applicable coordinated sovereignty. Forum selection clauses, foreign judgments and arbitral awards would no longer be enforced in the same way after the 1979 revolution.

What becomes apparent instead is that as we come to understand why courts exist domestically, we also come to appreciate that *some* international arrangements are coordinated extensions of those domestic functions so as to address the reality of state inter-penetration. In essence, the cliché that international politics are domestic politics writ large applies equally well in the area of courts.

My second point is that these two images, that of interstate and transnational, of anarchy and coordinated sovereignty, are simultaneously at play and in a dynamic relationship with each other.

Together, the interstate and transnational models suggest there are two sets, possibly overlapping, of courts and tribunals, where the transnational set of courts and tribunals includes aspects of national courts and arbitration subject to national supervision. Together, these two models perhaps encompass much of the complexity of what we see transpiring. Together, they suggest that we should expect courts and tribunals to be simultaneously rare and abundant depending on whether we believe the question to be addressed to have more of an interstate or transnational character. The presence of two generating models suggests that scholars take care in selecting ~~selection of~~ courts and tribunals appropriate to the purpose of their examination.

Not only are there two models present, these models are in a dynamic relationship with each other. For example, a century ago the interstate set of courts and tribunals dealt—more than today I would argue—with the transnational disputes of the day. For example, the Trail Smelter arbitration between the United States and Canada in the first half of the 1900s, an ad hoc interstate arbitration, involved an essentially private transnational nuisance dispute that was elevated to an interstate level because of an inability at the time to trans-nationally litigate the matter, because there was a lack of coordinated sovereignty. Although the possibility of espousal certainly continues, much of what might be addressed through espousal today is instead addressed through mechanisms such as national courts, international commercial

arbitration or investor state arbitration. The two models thus interact in terms of a shifting of dockets.

An implication of the emergence and growth of the transnational set of courts and tribunals therefore is that a part of the docket of the interstate courts and tribunals does not materialize. Indeed, some interstate institutions may lose significance if there is a significant migration of their docket as disputes are instead handled at their more immediate, and therefore arguably more proper, level. The content of an interstate array of courts and tribunals will change as either national legal systems or the de facto transnational system comes to provide the primary means for resolution of certain disputes.

Conversely, it may be that the function of some interstate courts and tribunals will be not to decide disputes as an initial matter but rather (1) to oversee the resolution of disputes at these other levels or (2) to provide a backup for resolution in the event of failure at the other level. Indeed, the concept of complementarity in the International Criminal Court can be seen as an example of an institution designed to handle certain disputes when the otherwise applicable national criminal system is inadequate or unwilling.

My third and final point concerns the place of human rights institution and investment arbitration and their relation to rule of law.

There are many institutions that have not been placed into this framing set of ideas. Two important groups are human rights institutions and investment arbitration. Both of these areas are similar in that the defendant is the state and in this sense both of these areas implicate the “rule of law.” Both areas involve claims against the state or officials of the state. Both involve the effort to hold the state accountable. Yet while investment arbitration in terms of agreements to arbitration is globally on the rise, human rights institutions remain essentially regional and of varying strength.

Coordinated sovereignty in the human rights area does not appear to provide the same impulse it does in other areas and a prime reason is that “rule of law”—unlike “rule through law”—is not universally present among the nations of the world. To the extent that “rule of law” is present in the member states of a given region of the world, then there may be the requisite circumstances for coordinated sovereignty. The obvious example is Europe. Indeed, membership in the Council of Europe, in which the European System of Human Rights is nested, requires that existence of the rule of law in an applicant state.

Given that investment disputes also involve a host state as respondent and the same limitations on “rule of law,” how do we explain the greater abundance of agreed referrals to tribunals in investment disputes than for human rights in some regions? One explanation can be made by reference to Shapiro’s idea of social control and regime enforcement. In this sense, investment arbitration can be seen, not exclusively—but significantly—as the coordination of capital exporting countries. A second explanation emphasizes the transnational character of investment arbitration, in distinction to the internal character of human rights. In this sense, it is that differences in the reliability of, “rule of law,” particularly vis a vis foreigners, that demands the establishment of arbitration with rather strict obligations. Indeed, under this view, the Australia-U.S. Free Trade Agreement’s reliance on each other court’s is the exception that proves the rule.

In conclusion, I would emphasize three points.

First, a central value of the view offered today is that it points to a divide amongst courts and tribunals that flows not from formal criterion but rather from the identification of different

driving forces. In light of the different generating impulses and depending on the examination, it would not make sense to compare the creation of courts and tribunals in the interstate model and with those in transnational model. Similarly, the functions served may be different and the basis for considering effectiveness should thus be more nuanced.

Second, the identification of the transnational set of courts and tribunals as a distinct group opens another tradition of theorizing, in particular theories of courts within national systems. In that literature, the discussions of the functions of domestic courts in the political science literature are generally richer than that employed in our theorizing about courts and tribunals thus far. Viewing courts not only as providers of conflict resolution, but also as a means of social control and as a source of law making—and that these multiple functions can be conflict with one another—can be helpful to our exploration of courts and tribunals.

Even when not directly applicable, the political science literature concerning national courts may *with care* be a useful stimulant to our thinking about interstate courts. For example, if one views a court as an institution, then it makes sense that a sovereign looking to assign a function to some institution may assign a function to a court even though it is not particularly well suited for that function. In this instance, this proposition does not only appear applicable to the interstate context, it may be even more likely that additional functions are placed on international courts and tribunals because of the general paucity of international institutions. Thus a century ago, it was hoped that international courts would not only resolve disputes but that they would bring about the end of war. Was the thought that prevention of war could be the function of a court naïve or was it in part the consequence of there not being another institution to prevent war. Did the emergence of the Security Council in some respects lift some of this expectation from international arbitration and international courts? Similarly, it is interesting that some commentators place on international criminal tribunals not only the function of deciding the merits of particular charges of war crimes, but also the functions of providing a historical account and of aiding reconciliation. Are these functions appropriate for an institution in the form of the court or are the functions placed there primarily because institutions that would better accomplish those functions do not exist?

Third, the assertion that the two models exist in a dynamic relationship as the depicted by my re-imagining of the Trail Smelter arbitration suggests that the perspective of these two models offered allows for a general revisiting of the history of courts and tribunals in the international arena.

The future of international courts and tribunals will be determined by changes in the surrounding political context and the major change in this regard will be the wider presence of rule of law. It is the rule of law domestically that will allow for greater coordinated sovereignty. Thus at our centennial, we are appropriately brought to the rarity and importance of rule of law.

BRIEF OBSERVATIONS

*By Thomas Buergenthal**

As I listened to David Caron's interesting lecture, some questions kept coming up in my mind. For example, do we really need, or why do we need, a general theory for or of international courts and tribunals? That is never really explained.

* Member, International Court of Justice.

Let me ask also whether it really matters in the long run, or what the significance is of knowing, whether the states that decided to establish an international court had other motives or reasons in mind for creating it than the settlement of individual or interstate disputes or to punish individual wrongdoers, particularly if there is an independent need for settlement of disputes or the punishment of wrongdoers, and the court is discharging those functions satisfactorily? Put another way, what do we gain from the knowledge of the states' motives?

Since David's lecture has taken more than the allotted time, I shall stop here rather than make the comments I had prepared. This will enable Judge Van den Wyngaert at least to make the presentation she was asked to make.

**INTERNATIONAL CRIMINAL COURTS AS FACT (AND TRUTH) FINDERS
IN POST CONFLICT SOCIETIES: CAN DISPARITIES WITH ORDINARY
INTERNATIONAL COURTS BE AVOIDED?**

By Christine Van den Wyngaert[†]

I want to make three points in connection with David's lecture, looking at his subject from my own perspective, i.e., that of a judge in an international criminal tribunal. First, I want to consider the specific function of international criminal courts and tribunals as "truth finders." Secondly, I will examine how international criminal courts fit into David's theoretical picture of "top-down" versus "bottom-up" judicial bodies. Thirdly, I wish to convey some of my concerns arising from the multiplication of proceedings (criminal and civil) arising from the same facts before different international courts and tribunals.

International Criminal Courts as Truth Finders

A new feature of the international legal order in the past few decades has undoubtedly been the reemergence of international criminal courts, with the ad hoc criminal tribunals of the United Nations (the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)), the regional mixed international tribunals (Sierra Leone, Cambodia, East Timor), and the permanent International Criminal Court (ICC). The driving impulses behind the creation of these institutions may, as David mentioned in his lecture, differ from those behind the classical international courts and tribunals. One of the functions of international criminal law courts is that of providing a historical account and achieving reconciliation of post-conflict societies that have gone through a painful episode of mass atrocities.

This is something which they share with another newcomer in the international legal order, truth and reconciliation commissions (TRCs), which in part originate from the same generating impulses. The latter may even be complementary to international criminal adjudication, as Tom suggested in his Holocaust memorial lecture, wondering whether the post-World War II criminal proceedings in Nuremberg should not have been complemented by a truth commission that could have examined the greater patterns of the historical truth behind the holocaust.¹

According to some, international criminal courts have, as far as truth finding process is concerned, little to add to the "truth" as it is revealed by journalists or historians, who base

[†] Judge, International Criminal Tribunal for the Former Yugoslavia; Former Judge *ad hoc*, International Court of Justice.

¹ Thomas Buergenthal, United States Holocaust Memorial Council Lecture: International Law and the Holocaust (Occasional Papers, 2004).

themselves on largely the same sources. I beg to disagree with that view. The truth finding process before criminal courts is of a different qualitative nature, because it is obtained through the specific rules of evidence that apply in criminal proceedings, above all the presumption of innocence and the prosecutorial burden of proof. What has been established by a criminal court following a correct procedure can therefore be said to be more “credible” in terms of its truthfulness than the truth produced by journalism or history writing. For example, for those who would wish to deny the Srebrenica massacre, it may have been easier to do so when only journalistic and historical accounts of the 1995 event were available than it is today after the judgments of the ICTY in which two panels of judges (first the Trial Chamber and thereafter the Appeals Chamber) found the facts to be established.

This function of truth finding, and the contribution to history writing that results from this, may be one of the core missions for international criminal courts. In post conflict societies, different versions of the traumatic events often compete with each other.² It is extremely difficult for national courts in a post conflict society to make an unbiased assessment of these different versions, especially shortly after the events. This assessment is, however, a crucial factor in the process of transition. Without it, post conflict societies will have little more than “annals” of these traumatic events, produced by journalists and historians.³

Through the process of judicial fact finding, international criminal courts help to sort out competing accounts of traumatic events in a conflict situation and to determine the account that will count as the official history that society. For the victims, it makes a crucial difference: if their history is narrated by the journalists and historians only, it will never have the same cogency as when resulting from a judicial proceeding. In other words, a judicial proceeding helps to turn the victim’s story into the official narrative of the post-conflict society. International criminal courts are probably better equipped for this task than national courts in the post conflict area, although, in the course of time, a combination of both is possible, as is shown by the example of the ICTY evolving from a top down to a bottom up international judicial institution (see below).

International Criminal Courts: “Rule Through Law” or “Rule of Law”?

If one attempts to fit international criminal courts and tribunals into David’s theory of generating factors that explain the existence of such courts, how do his top-down (rule through law) versus bottom-up (rule of law) generating factors apply to international criminal courts and tribunals?

The Nuremberg and Tokyo Tribunals were probably top-down institutions, by which the international community tried to impose the criminal norms of the new international legal order to a limited number of states only, i.e., the vanquished states after World War II. From that perspective, they were institutions of “rule through law.” On the contrary, the ICC, created by the Rome Statute (1998), is probably a more “bottom-up” type of international institution, based on the complementarity principle and hence on what David called “co-ordinated sovereignty,” in this case between states referring their cases to the ICC and the international institution itself. The same probably applies to recent mixed international tribunals such as the special courts for Sierra Leone, East Timor, Cambodia, and in the future possibly Lebanon.

² See M. J. Osiel, *Making Public Memory Publicly*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 217 (C. Hesse & R. Post eds., 1999).

³ The novelist V. S. Naipul describes Argentina as a society without a history, only annals. Osiel, *supra* note 2, at 232.

The ad hoc criminal tribunals of the United Nations (the ICTY (1993) and the ICTR (1994)), despite the fact that they do not carry the taint of “victor’s justice,” were initially probably rather “top-down” than “bottom-up.” They were indeed imposed on the states concerned (the state successors to the former Yugoslavia and Rwanda) by a Security Council resolution based on Chapter VII of the UN Charter. Yet they also show that international criminal courts may move from one model into the other. Whereas, at the moment of the creation of the ad hoc tribunals, the states concerned were either unwilling or unable (or both) to prosecute alleged suspects of genocide, war crimes, and crimes against humanity, they have, in the course of time, shown an increasing ability and willingness to prosecute these crimes domestically, certainly in the case of the former Yugoslavia. It is indeed one of the core achievements of the ICTY, in the wake of the completion of its mandate, to see that courts in the region are, by their own initiative, bringing proceedings against alleged suspects.

For example, as the case against the Vukovar Troika was proceeding before the ICTY in 2005,⁴ the War Crimes Chamber of the District Court in Belgrade was completing its own “Ovcara massacre-trial” involving 16 persons accused of participating in the same event in which the JNA officers of the Vukovar Troika were allegedly involved.⁵ As the Milosevic case proceeded before the ICTY and a video depicting the Scorpions’ executing Muslim prisoners was shown at the trial in The Hague in 2005, prosecutors in Belgrade picked up the case and started local proceedings against suspects shown on the tapes.⁶ In addition, since 2005 a formal procedure has been put in place by which the ICTY is now transferring cases to the region (under the new Rule 11bis of its Rules of Proceedings and Evidence). Cases have been referred to Bosnia and Herzegovina⁷ and to Croatia.⁸ As a result, something that started as a “top-down” institutional system gradually evolved into a “bottom-up” situation where states in the region are now taking up their own responsibility.

Towards a Clash Between International Courts and Tribunals?

Clearly, international criminal courts have a mission that is very different from that of human rights courts or traditional international courts that hear inter-state disputes. Nevertheless, there is a certain overlap between their jurisdiction, and with the multiplication of international courts of all three types (criminal courts, human rights courts, and traditional international courts), a risk of diverging and even conflicting jurisprudence may develop. This is due not only to the fact that these courts apply different sources of law, but also because they rely on different rules on evidence. It is therefore not excluded that the same facts, brought before three different types of courts, may result in quite different decisions.

An example where this could have occurred were the three cases resulting from the Kosovo crisis in 1999. This crisis gave rise to three different proceedings, one before the International

⁴ Prosecutor v. Mrkšić, Radić and Šljivančanin, No. IT-95-13/1-T (Oct. 26, 2005).

⁵ Mirosljub Vujović et al, Judgment (Dec. 12 2005) (fourteen persons were convicted, and two were acquitted); Milan Bulić, Judgment (Jan. 30, 2006); proceedings in *Saša Radak*, commenced on 7 July 2005, are continuing.

⁶ The “Scorpions” case (Slobodan Medić, Pero Petrašević, Aleksandar Medić, Aleksandar Vukov, and Branislav Medić).

⁷ Prosecutor v. Stanković, Decision on Referral of Case Under Rule 11bis, No. IT-96-23/2 (May 17, 2005); Prosecutor v. Stanković, Decision on Rule 11bis Referral, No. IT-96-23/2-AR11bis (Sept. 1, 2005); Prosecutor v. Mejakić et al., Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis, No. IT-02-65-PT (July 20, 2005); Prosecutor v. Mejakić et al., Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, No. IT-02-65-AR11bis.1 (Apr. 7, 2006).

⁸ Prosecutor v. Ademi and Norac, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, No. IT-04/78 (Sept. 14, 2005.)

Court of Justice (ICJ) (*Yugoslavia v. different NATO member states*),⁹ one before the European Court of Human Rights (ECHR) (victims of the NATO bombings in Belgrade versus a number of member states of the Council of Europe),¹⁰ and the third one before the ICTY (investigation by a committee, appointed by the ICTY Prosecutor). The ICJ and the ECHR declared themselves incompetent; the ICTY prosecutor concluded that there was no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign.¹¹ As a result, potential divergences between three different assessments of the same factual situation could be avoided in this case.

An emerging problematic area may be the cases brought before the ICJ that are based on facts that have already been, are still or will be, before the ICTY or the ICC. For example, the facts underlying *Democratic Republic of the Congo v. Uganda*¹² may partly overlap with the facts in the cases referred to the ICC by the DRC and Uganda respectively. Other examples are the *Bosnia and Herzegovina v. Serbia and Montenegro*¹³ and *Croatia v. Serbia and Montenegro*,¹⁴ based on facts that have been or are being adjudicated before the ICTY. Because the proceedings before the ICJ are not criminal proceedings, the rules of evidence that apply before the ICJ are not of a criminal nature. Accordingly, the presentation of the evidence is different: there is no “two case approach” with a case for the prosecution followed by a case for the defense. The evidence itself is different—there is no emphasis on oral evidence, and a wide use of documentary evidence is made. Concomitantly, there is a difference in the rules on admissibility, as there is no prohibition against hearsay before the ICJ.¹⁵ Above all, a different burden of evidence is applied: whereas in a criminal case there is a presumption of innocence, which means that a defendant’s guilt must be proven beyond reasonable doubt, the ICJ as a fact finder in a “civil case” can decide a fact to be established upon a balance of probabilities.

As a result, the same fact put before the ICTY or the ICC and the ICJ respectively may be differently assessed. For example, in *Democratic Republic of the Congo v. Uganda* (2005), the ICJ mainly relied on documentary evidence (MONUC reports, reports of special rapporteurs) to reach the conclusion that Uganda had violated, amongst other rules, certain provisions of the Geneva Conventions. A criminal court could probably not have reached this conclusion based on written evidence only. Such evidence would, as a rule, only be admissible if tendered through a witness who would be examined and cross-examined in court about the report.

The same evidence may be presented before both the ICJ and other courts, but the rules on its admissibility are different. In *Bosnia and Herzegovina v. Serbia and Montenegro* some of the evidence used by the parties in the ICJ proceeding had already been used in the

⁹ Case Concerning Legality of Use of Force (Serb. & Mont. v. Belg.), General List No. 105 (Int’l Ct. Justice, Dec. 15, 2004).

¹⁰ *Banković v. Belgium*, Admissibility, App. No. 52207/99 (Eur. Ct. H.R. Dec. 12, 2001).

¹¹ According to the ICTY press release, the prosecutor decided not to open a criminal investigation, which she announced in her address to the Security Council on June 2, 2000. Her decision was based on the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 8, 2000), reprinted in 39 ILM 1257 (2000), available at <<http://www.un.org/icty/pressreal/nato061300.htm>>.

¹² Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, General List No. 116 (Int’l Ct. Justice Dec. 19, 2005).

¹³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Yugo. (Serb. & Mont.)), Admissibility, General List No. 91 (Int’l Ct. Justice Mar. 20, 1993).

¹⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugo. (Serb. & Mont.)), General List No. 118 (Int’l Ct. Justice July 2, 1999).

¹⁵ There is no prohibition against hearsay before the ICTY either, but it is only accepted in a very limited manner.

criminal proceedings before the ICTY. A noteworthy example is the famous Scorpions video with powerful images displaying executions of Muslims by Serbian paramilitaries, so powerful that they triggered prosecutions in Belgrade and prompted a change of heart in part of public opinion that had hitherto disbelieved the Srebrenica massacre.¹⁶ This video, which was tendered as evidence in the Milosevic trial before the ICTY in 2005, was also submitted in evidence before the ICJ during one of the public hearings in 2006. It is interesting to note that this piece of evidence was declared inadmissible in the ICTY proceeding in 2005, albeit for purely technical reasons.¹⁷

Hitherto, proceedings before the ICJ did not address matters that were “purely” criminal. For example, in *Democratic Republic of the Congo v. Uganda*, the violations of international humanitarian law that the ICJ held to be established were of a non-criminal nature: the list of articles mentioned in the judgement does not comprise grave breaches. The DRC’s application was indeed based on the Geneva Conventions, which contain both criminal and (a tiny minority) of criminal provisions and are therefore “mixed” in nature.

Conversely, *Bosnia and Herzegovina v. Serbia and Montenegro*, although not a criminal proceeding strictly speaking, arises from a “purely” criminal convention, the 1948 Genocide Convention. The latter *only* contains criminal provisions, unlike the Geneva Conventions that are “mixed.” Even though the ICJ is not called upon to make findings about the “guilt” of Serbia and Montenegro, it has to determine whether the facts put before it constitute acts of genocide that can be attributed to the defendant state.

In assessing these facts, the ICJ must not apply evidentiary rules that are typical for criminal cases (presentation, admissibility, burden of proof). As in the DRC v. Uganda case, it can base its findings on documentary evidence only, without hearing the witnesses through which these documents have been tendered and without the evidence being tested through cross-examination. In doing so, the ICJ may accept as established, facts that would not be considered to be established by a criminal court.

Using documentary evidence without tendering it through witnesses who can be cross-examined may lead to a more “liberal” acceptance of evidence, as compared to the testing of the same evidence in a criminal proceeding. An example is the Dubrovnik case, in which a general of the Yugoslav Army, the JNA, was prosecuted for his involvement in the bombing of Dubrovnik on December 6, 1991, which seriously damaged this UNESCO-protected ancient city. The prosecutor’s allegation in the indictment was that 450 buildings had been destroyed or damaged by the JNA in the December 6 attack.¹⁸ This figure was drawn from a report made by UNESCO-experts short after the events.¹⁹ However, the ICTY trial chamber, after testing the evidence, only found 52 buildings and structures to have been damaged or destroyed (in whole or in part).²⁰ It would be interesting to see what the result in the DRC v. Uganda case would have been had the ICJ applied the same test to the MONUC report and other documentary evidence on which (some of) its holdings were based.

It could be argued that, given the fact that the ICTY is a criminal court and the ICJ a “civil” court, discrepancies between the holdings of both courts do not matter. Both courts

¹⁶ *Supra*, note 6.

¹⁷ Prosecutor v. Milošević, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case, No. IT-02-54-T (Dec. 13, 2005).

¹⁸ Prosecutor v. Strugar, Third Amended Indictment, No. IT-01-42, Schedule II (Dec. 10, 2003).

¹⁹ Bruno Carnež & Colin Kaiser, Report on the Status of the Cultural Heritage in the Old Town of Dubrovnik Following the Bombardments of October, November and December 1991, Exhibit P63.6, in *Prosecutor v. Strugar*, *supra* note 18.

²⁰ Prosecutor v. Strugar, Judgment, No. IT-01-42, para. 318 (Jan. 31, 2005).

are not bound by each other's jurisprudence, and it is therefore technically possible for the ICJ to decide that the Srebrenica massacre was not genocide, contrary to the *Krstic* judgement of the ICTY.²¹ It is also possible for the ICJ to reach the conclusion that the massacres in Western Bosnia (including Omarska), were indeed genocide, despite the fact that the ICTY in *Stakic* decided it was not.²²

Potential divergences are the natural consequence of the coexistence of different judicial institutions with overlapping jurisdictions. It is probably impossible to avoid them, given the different mandates of all these institutions and the different rules of evidence which they each apply. Yet they should, to the extent possible, be minimized. Too much difference in the assessment of the same facts, or in the interpretation of the law that is applicable to these facts, may not be easily understood by the general public and may weaken the image of international law as a body of rules governing international order and, ultimately also the moral authority of international courts and tribunals. It would be a pity if international courts and tribunals were to contribute to that image, thereby indirectly undermining that order.

²¹ Prosecutor v. Krstić, Trial Judgment, No. IT-98-33-T (Aug. 2, 2001); Prosecutor v. Krstić, Appeals Judgment, No. IT-98-33-A (Apr. 19, 2004).

²² Prosecutor v. Stakić, Trial Judgment, No. IT-97-24-T (July 31, 2003); Prosecutor v. Stakić, Appeals Judgment, No. IT-97-24-A (Mar. 22, 2006).