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Looking Up, Down and Across: The ICTY's Place in the International Legal Order

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I. INTRODUCTION

A variety of institutions give effect to international law through third-party enforcement. The number of these institutions steadily has increased since the adoption of the Charter of the United Nations; so much so that international lawyers now speak of a "proliferation" of dispute resolution institutions.[1]

Regional and international dispute resolution institutions have been created in a variety of ways: as permanent entities by specific treaty (International Criminal Court (ICC)); as part of the Charter framework (International Court of Justice (ICJ)); by special understanding (the World Trade Organization (WTO) Dispute Settlement Body); by the Security Council as temporary entities (International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY)) or as a subsidiary organ (United Nations Compensation Commission (UNCC)); by specific reference in a general treaty (International Tribunal for the Law of the Sea (ITLOS)); by reference in regional trade agreements (NAFTA dispute resolution processes; European Union institutions); or by special treaty between the United Nations and a nation-state (Sierra Leone Tribunal). Arbitration and extrajudicial entities also contribute to the expanding number of transnational institutions called upon to resolve cross-border disputes. Furthermore, national courts also enforce international law; in fact, they are doing so with greater frequency.

International criminal law represents a particularly fertile area of institutional expansion. Here, the ICTY is an important player. Now

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1. *See* Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 680 (1999) (citing *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, AM. SOC'Y INT'L L. BULL. 9 (1995)).

celebrating its tenth anniversary, the ICTY is tasked with the adjudication of serious breaches of international humanitarian law – war crimes, genocide, crimes against humanity – that have taken place in the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) since January 1, 1991.[2] The ICTY's jurisdiction is limited to natural persons.

The ICTY, however, is not the only legal institution that will adjudicate responsibility for these tragedies. It is, in fact, just one element of a much broader institutional constellation. For example, national courts are involved in both civil and criminal matters. There have been extraterritorial criminal prosecutions in Germany and national prosecutions in the Federal Republic of Yugoslavia (FRY, renamed on February 4, 2003 as Serbia and Montenegro) and Croatia. U.N.-assisted hybrid criminal tribunals operate in Kosovo; so, too, do ordinary domestic courts. Civil cases – for example, *Kadic v. Karadzic*[3] – have been adjudged in the U.S. Moreover, the ICTY recently adopted Rule 11*bis*, which permits the referral of a case under indictment to the authorities of a state of which the accused is a national or where the crime was committed, so that those authorities "should forthwith refer the case to the appropriate court for trial."[4]

The institutional constellation adjudging tragedy in the former Yugoslavia also includes the International Court of Justice (ICJ), which is involved in reparative claims invoking state responsibility in a number of matters involving the FRY, Croatia, and Bosnia and Herzegovina. There also is a chance that the new International Criminal Court (ICC) may become involved in the sad event that new breaches of international humanitarian law occur as of July 1, 2002, in the states emerging from the former Yugoslavia. It remains unclear how the ICTY shall interface with the ICJ or the ICC.

As such, a diverse array of institutions is involved – whether by design or by request – in dispensing justice for the former Yugoslavia. This Article posits that this diversity creates a need for the ICTY to assess its own place and role. In so doing, it needs to: (1) look downwards and contemplate its interface with proceedings, whether criminal or civil, undertaken by national courts; and (2) look across (or up?) to international institutions, in

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2. The ICTY can impose sentences of imprisonment. *See* Statute of the ICTY, U.N. Doc. S/RES/827 (1993), art. 24(1) *available at* http://www.un.org/icty/basic/statut/stat2000.htm (last visited Feb. 4, 2003). In addition to imprisonment only, the ICTY can order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. *Id.*, art. 24(3).

3. 70 F.3d 232 (2d Cir. 1995), *cert. denied* 518 U.S. 1005 (1996).

4. *See* ICTY Rules of Procedure and Evidence, Rule 11*bis*(A), *available at* http://www.un.org/icty/legaldoc/index.htm (last visited on Feb. 21, 2003). In determining whether or not to refer, the ICTY Trial Chamber shall "consider the gravity of the crimes charged and the level of responsibility of the accused." *See* Rule 11*bis*(C).

particular the ICJ (which is being called upon to resolve state responsibility civil claims), with a view to crafting a healthy relationship.

The fact that the tragedy in the former Yugoslavia is being redressed through such a diverse palette of institutions raises a number of difficult questions. First among these is an inquiry regarding the effects of enforcing international law through a decentralized, horizontal pattern of diffuse institutions. There are strengths to decentralized enforcement, insofar as it can facilitate flexible, specialized, and contextual legal responses. It can increase the sheer number of legal institutions, thereby augmenting the extent to which the conflict in the former Yugoslavia is legalized. It can promote specialized adjudication, which develops expertise and professionalism that, in turn, appreciates respect for adjudicators among litigants. However, there may also be weaknesses, insofar as decentralized enforcement may lead to inconsistencies that arguably could weaken predictability and certainty in international criminal law.[5] Which is more germane to the legitimacy of international law: context or consistency? Breadth or depth?

Theodor Meron observes that the ICTY already has produced more precedent that all the previous international and domestic war crimes cases combined.[6] But how does this precedent fit within the universe of international criminal law and the cosmos of international law generally? Moreover, although the focus of this Article is limited to the ICTY specifically and international criminal law generally, it is relevant to claims for judicial harmonization in many other areas regulated by international law, including the law of the sea,[7] international human rights law,[8] and

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5. *See, e.g.*, Shane Spelliscy, *Note: The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143 (2001) (discussing the "proliferation problem" arising from the "explosion" in the number of international dispute resolution mechanisms and suggesting this may undermine the certainty and credibility of international law).

6. Conference Program: "The ICTY at Ten," at the New England School of Law in Boston, Mass. (Nov. 9, 2002) (on file with the New England Center for International Law and Policy).

7. For discussion of fragmentation, judicial overlap, and possible forum shopping arising from the activity of ITLOS, *see* Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 809, 809 (1999). *See also* Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the* Southern Bluefin Tuna Cases, 43 HARV. INT'L L. J. 541 (2002) (commenting on potentially divergent rulings regarding the evidence for a provisional measure and whether the precautionary principle has become part of customary international law).

8. *See generally* Monica Pinto, *Fragmentation or Unification Among International Institutions: Human Rights Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 833 (1999); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999).

international trade law;[9] discussion also is relevant to foreshadow how the new ICC could interface with other legal institutions – in particular the ICJ – in a variety of areas, including the sharing of evidence.

II. LOOKING DOWNWARDS

As mentioned previously, criminal prosecutions are being heard at the national level in each of the states that have emerged from the SFRY. National authorities in the FRY also are proceeding through non-prosecutorial legal initiatives, such as a truth commission. Criminal prosecutions also have taken place in foreign national courts, for example in Germany. The German judgment for genocide, *inter alia,* was grounded on theories of universal jurisdiction.[10]

The Security Council contemplated how the ICTY should interface with national courts. Article 9(1) of the Statute of the ICTY provides that it "and national courts shall have concurrent jurisdiction [for the prosecution of] persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991."[11] However, this concurrent jurisdiction sharply is qualified by the fact that the ICTY shall have primacy over national courts whose deference to the ICTY may be secured at any stage of the procedure.[12] The primacy of the ICTY further is preserved by article 10, on *non-bis-in-idem*, which provides that no person shall be tried before a national court if that person already has been tried by the ICTY, but a person who has been tried by a national tribunal subsequently may be tried by the ICTY if a number of conditions are met.[13] Accordingly, an acquittal by a national court may be reviewed by the ICTY whereas an acquittal by the ICTY is non-reviewable by any national court.

These are the basic rules. The practice, however, is less rigid. In fact, there is considerable evidence of a willingness by the ICTY to adjust its statutory position of primacy over national prosecutions to one of

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9. For discussion of the WTO, *see* John H. Jackson, *Fragmentation or Unification Among International Institutions*: *The World Trade Organization*, 31 N.Y.U. J. INT'L L. & POL. 823 (1999).

10. *See* State Attorney's Office v. Jorgic, Higher State Court of Dusseldorf, 2 StE 8/96 (1997) (applying F.R.G. Penal Code para. 220(a) on genocide). Jorgic was convicted on 30 counts of murder and 11 counts of genocide and was sentenced to life in prison. *See* DAMROSCH ET AL., INTERNATIONAL LAW: CASES & MATERIALS 1318 (4th ed., 2001). Maxim Sokolovic was convicted of complicity in genocide and sentenced to nine years imprisonment in November 1999. *Id.*

11. Statute of the ICTY, *supra* note 2, art. 9(1).

12. *See* Statute of the ICTY, *supra* note 2, art. 9(2); ICTY Rules of Procedure and Evidence, *supra* note 4, Rules 9-11 (on deferral of national proceedings).

13. *See* Statute of the ICTY, *supra* note 2, art. 10(2).

complementarity to national prosecutions.[14] In this sense, the creation of the ICC, for which the notion of complementarity is central, may well influence the practice of the ICTY.

To be sure, ICTY officials initially were skeptical of national legal intervention, particularly by national courts in the former Yugoslavia. This skepticism derived from a number of sources: the institutional limitations of those courts, concern regarding ethnic bias and neutrality, and also a desire to protect fledgling international processes. However, in the wake of comments by observers and some dissonance from local communities, ICTY officials progressively moderated their approach to national institutions.[15]

This moderation has given rise to some formalization. The ICTY Rules very recently were amended to permit the Trial Chamber to refer an indictment to national authorities.[16] Moreover, ICTY President Judge Jorda has demonstrated a particular interest in referring some cases to a special chamber in the State Court of Bosnia and Herzegovina created to try serious violations of international humanitarian law.[17] This would allow prosecutions to proceed through a multi-tiered structure. The most serious offenders (perpetrators who "most seriously violate international public order") would face the ICTY, intermediary level accused the State Court, and local courts would handle low-ranking accused.[18] The ICTY would oversee the trials of the State Court, and the State Court would oversee the local trials. The State Court – "a national institution accorded a limited and provisional international character in order to guarantee its impartiality"[19] – would only have jurisdiction over those cases referred by the ICTY.[20] Judge Jorda points out: "It is essential to work with the existing organs and judicial institutions – if only by assisting them – since they constitute essential reference points for all citizens . . . justice must be brought steadily closer to the people."[21] It is unclear when these reforms shall be

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14. *See infra* note 16.

15. *See infra* notes 17-21.

16. *See* ICTY Rules of Procedure and Evidence, *supra* note 4, Rule 11*bis*. Rule 11*bis*(F) states that, at any time before a national court acquits or finds a defendant guilty, the ICTY Trial Chamber may revoke the referral and assert primacy over the national proceeding. *See id.*, Rule 11*bis*(F).

17. *See* ICTY Press Release JDH/P.I.S./690-e, Address By His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, (July 26, 2002) [hereinafter Jorda Address], *available at* http://www.un.org/icty/latest/index.htm (last visited Feb. 21, 2003).

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

implemented, as ICTY officials must first determine whether the State Court retains the requisite level of credibility.

Moreover, it must be underscored that control of the transfer process remains within the purview of the ICTY.[22] Accordingly, the ICTY will "oversee[] the proper conduct of the . . . trials."[23] Judge Jorda notes that:

> [The ICTY] should be authorised to ensure that the accused answer before the national courts for all of the crimes in the Prosecutor's indictments, that the victims and witnesses are duly protected and, in broader terms, that the national trials are conducted in accordance with the international norms regarding the protection of human rights.[24]

In sum, several rules have been developed regarding the relationship of the ICTY with local and national institutions when it comes to the adjudication of individual criminal responsibility for mass atrocity in the former Yugoslavia. Looking downwards, international tribunals formally have jurisdictional primacy over national or local courts in the criminal adjudication of such wrongdoing, although there is evidence that this primacy may be thawing.[25] There is, therefore, some jurisdictional ordering.

There also is some ordering regarding the specific interpretation of law that each entity is to formulate. By virtue of Rule 12 of the ICTY Rules of Procedure and Evidence, "determinations of courts of any State are not binding on the ICTY."[26] As such, the ICTY is not compelled to follow national decisions regarding important legal findings (for example, the existence of genocide in Bosnia and Herzegovina). In practice, though, the ICTY may take a less categorical approach, insofar as it may be influenced by a national court's important pronouncements in the area of international criminal law.[27] What about the other side of the coin, that is, to what extent are national courts to take judicial notice of ICTY findings? There is considerable evidence that national courts, even in the U.S., are making

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22. *See also* Rule 11*bis*.

23. Jorda Address, *supra* note 17.

24. *Id.*

25. There may be cause for concern about how complementary the notion of complementarity will prove to be. Although the ICC's approach to complementarity is sophisticated, it still may have a leveling effect on the uniqueness of national responses to mass tragedy. After all, national institutions will be encouraged to adopt prosecutions that look much like those at the ICC in order to minimize the risk of the ICC's finding that national approaches reveal an inability or unwillingness to investigate or prosecute, this being the trigger mechanism by which the ICC can oust national jurisdiction.

26. ICTY Rules of Procedure and Evidence, *supra* note 4.

27. For example, the German court's finding that genocide had been committed.

reference and relying upon ICTY decisions.[28] This may be particularly relevant for the Special Chamber for Bosnia and Herzegovina when it begins its work.

It should be emphasized that only in the area of criminal adjudication have special rules of co-existence been developed. Assuredly, civil claims are also heard in national courts.[29] Here, there is an absence of formalized hierarchy. The determination of responsibility therefore remains not only decentralized, but also uncoordinated. The lack of coordination triggered by civil suits in the U.S. federal courts has, in the past, prompted Anne-Marie Slaughter to query whether "plaintiff's diplomacy" was emerging: whereby individuals can, through the use of civil lawsuits, affect the conduct of foreign policy.[30] On another note, Slobodan Milosevic also has used Dutch courts and has endeavored to use the European Court of Human Rights in an attempt to review decisions regarding his extradition from the FRY to the Netherlands and his allegation that the ICTY has denied him certain due process rights.[31] It is unclear how such proceedings would stand in relation to the ICTY, or (had they been successful) what effect they would have on the ICTY's ability to carry out its work.

III. LOOKING ACROSS (OR UP?)

The parameters of the relationship between the ICTY and other international institutions, such as the ICC and ICJ, have not been defined. Linkages are at best sparse and hierarchies of appeal or review non-existent.

It is likely that ICC and ICTY will ultimately have an interface. In my

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28. *See* Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002); Doe v. Unocal, 2002 WL 31063976 (9th Cir. 2002); Regina v. Bartle, *ex parte* Pinochet, [1999] 2 W.L.R. 827, [1999] 38 I.L.M. 581 (1999) (U.K. House of Lords).

29. *See* Kadic v. Karadzic, 70 F.3d 232, 236 (1995). In that case, Newman C.J. referred to the campaign by the Bosnian-Serb forces as "genocidal." *Id.* at 237.

30. Anne-Marie Slaughter and David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFFS. Sept./Oct. 2000 at 102-03.

31. *See, e.g.*, Milosevic v. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *et al.*, Case No.: KG 02/105, Judgement in Interim Injunction Proceedings, (Hague District Court), 26 Feb. 2002, *at* http://www.asil.org/ilib/ilib0516.htm (last visited Feb. 22, 2003) (discussing the dismissal of Milosevic's application for provisional relief against the ICTY which alleges the ICTY has denied Milosevic the right to unhindered and confidential communication with his lawyers in the context of proceedings Milosevic has instituted before the European Court of Human Rights); Milosevic v. The Netherlands, App. No. 77631/01, EURO. CT. H. R. (Mar. 19, 2002), *at* http://www.asil.org/ilib/ilib0505.htm (discussing the dismissal of Milosevic's application for his failure to exhaust local remedies).

mind, this is not so much a question of jurisdictional overlap[32] as it is one of coordination regarding the substantive content of international criminal law. For example, will the ICC take ICTY decisions into account? If so, in what capacity? As precedent? Persuasive authority? Reference? On a normative note: *should* the ICC take these decisions into account? To be sure, there are statutory differences between the definitions of the crimes that fall within the compass of the ICC and those within the compass of the ICTY. Will these definitional discrepancies affect, or even void, the precedential value of the ICTY case-law? In many ways, the ad hoc tribunals fostered the creation of the ICC, so it would seem odd to disregard their judicial pronouncements in the ongoing pattern of accretion by which international criminal law is established.

The overlap between the ICTY and the ICJ is much more active. As is well known, a number of civil lawsuits have been filed with the ICJ, inter alia for declaratory relief and reparations arising out of alleged violations of the Genocide Convention committed on the territory of the former Yugoslavia.[33] Bosnia and Herzegovina filed such a claim against the FRY in 1993;[34] the FRY had filed a counter-claim in 1997, in which it requested

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32. Arguably, potential criminal law claims that arise following the entry into force of the ICC could be dealt with by the ICC or the ICTY. This depends in part on how long the ICTY stays in business and on the interplay between a specifically targeted ad hoc institution and a permanent general institution.

33. These are merely some examples of the increased number of humanitarian cases brought before the ICJ. These cases also include proceedings involving East Africa. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. (Feb. 14) (holding DRC successful in an application against Belgium regarding the quashing of an arrest warrant in Belgium against the incumbent Congolese Minister of Foreign Affairs for war crimes and crimes against humanity); *see also* Press Release 2002/37, I.C.J., The Republic of the Congo seises the International Court of Justice of a dispute with France (Dec. 9, 2002), *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-37_xx_20021209.htm (announcing that the DRC has filed an application against France regarding proceedings commenced in France against the Congolese Minister of the Interior for crimes against humanity and torture); Press Release 2002/15 (May 28, 2002) (announcing that the DRC has filed a claim against Rwanda for massive, serious, and flagrant violations of human rights and of international humanitarian law resulting from alleged acts of armed aggression since 1998).

34. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1993 I.C.J. 3 (Apr. 8). This case remains at the stage of preliminary procedural matters. Proceedings on the merits have not yet begun. On November 7, 2002, the ICJ concluded public hearings related to the FRY's application to revise a judgment in this case dated July 11, 1996, in which the ICJ had held that it had jurisdiction to deal with Bosnia and Herzegovina's claims. *See* Press Release 2002/31, I.C.J., Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections

the ICJ adjudge that Bosnia and Herzegovina was responsible for the genocide of Serbs, but the FRY withdrew this counter-claim on September 10, 2001.[35] On July 2, 1999, Croatia filed a claim alleging that the FRY is liable for infringements of the Genocide Convention by virtue of the activities of its armed forces and paramilitary detachments on the territory of Croatia from 1991 to 1995.[36] Croatia requests reparations as a remedy, which the FRY is alleged to be obliged to pay in its own right and as *parens patriae* for its citizens. In a similar vein, the FRY has claimed for violations of international law triggered by the allegedly unlawful use of force by a number of NATO countries involved in the "humanitarian armed intervention" bombings of the FRY in 1999.[37] Thus far, the ICJ has not pronounced on the merits of these cases as they have been mired in jurisdictional and preliminary challenges. But, eventually, the ICJ will have

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(Yugoslavia v. Bosnia and Herzegovina) (Nov. 7, 2002) *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-31_ybh_20021107.htm. The FRY's argument in favor of revision includes the question whether the FRY continued the international legal personality of the SFRY. On February 3, 2003, the ICJ denied the FRY's application for revision. *See* Press Release 2003/08, I.C.J., Application for Revision (Feb. 3, 2003).

35. *See* Order, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) 2001 I.C.J. General List No. 91 (Sept. 10) *at* http://www.icj-cij.org/icjwww/idocket/ibbyorders/ibby_iorder_20010910.htm (last visited Feb. 22, 2003).

36. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia) 1999 I.C.J. (July 2). This case, too, is at the stage of preliminary proceedings. The FRY presently is challenging the jurisdiction of the ICJ to adjudicate this dispute and the admissibility of the dispute. The ICJ has fixed April 29, 2003, as the time limit for Croatia to present its submissions in response to the FRY's preliminary objections. *See* Press Release 2002/34, I.C.J., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia) (Nov. 19, 2002), *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-34_cry_20021120.htm (last visited Feb. 22, 2003). Pursuant to Rule 79 of the ICJ Rules, the proceedings on the merits have been suspended in light of the jurisdiction and admissibility challenges. *See* Order, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia) 2002 I.C.J. General List No. 118 (Nov. 14) *available at* http://www.icj-cij.org/icjwww/idocket/icry/icry_orders/icry_iorder_20021114.htm/ (last visited Feb. 20, 2003).

37. *See* Press Release 2002/10, I.C.J., Legality of the Use of Force (Mar. 22, 2002) *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-10_yugo_20020322.htm (last visited Feb. 22, 2003). Claims against Spain and the United States were removed from the list when the ICJ held that it manifestly lacked jurisdiction. *See id.* On March 20, 2002, the ICJ extended until April 7, 2003, the time-limit originally fixed for the filing by Yugoslavia of written statements of its observations and submissions on the preliminary objections raised by the eight respondent states. *See id.*

to issue judgment.[38]

The ICTY Trial Chamber has convicted General Krstic of genocide for the 1995 Srebrenica massacre of Bosnian Muslim men and boys.[39] Krstic has appealed this conviction. The ICTY Prosecutor is prosecuting others for genocide, including – most famously – Slobodan Milosevic, the former leader of the FRY. Of the three sets of indictments against Milosevic, the only one charging the crime of genocide relates to atrocities committed during the Bosnian Wars of 1992-1995.[40] This specific indictment includes the Srebrenica massacre.[41] It therefore appears that findings of genocide will not arise in the context of crimes committed in Croatia or Kosovo. Accordingly, it may only be for the Bosnia and Herzegovina litigation that a finding of individual criminal responsibility for genocide may overlap with the work of the ICJ. This begs the central question: to what extent is the ICJ to abide by a finding by the ICTY that genocide took place in Bosnia and Herzegovina? To what extent does an acquittal in the Milosevic case – or a hypothetical overturning of the *Krstic* genocide conviction by the Appeals Chamber – oblige the ICJ to conclude that no genocide took place? Is the proof of "genocide" different for state-to-state reparative claims than for accusations of individual criminal responsibility?

Moreover, other disjunctures arise. What if the ICJ finds Croatia successful in its Genocide Convention claims? How would this interface

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38. Assuming discontinuances are not filed.

39. *See* Prosecutor v. Krstic, Case No.: IT-98-33-T, Judgement, 2 Aug. 2001, paras. 234, 239-40, *reprinted in* 40 I.L.M. 1346 (2001). This decision is not without controversy. *See, e.g.* William Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 47 (2001) ("As 'crimes against humanity,' the atrocities of July 1995 in Srebrenica surely qualify. But categorizing them as 'genocide' seems to distort the definition unreasonably."). Prior to the *Krstic* decision, the ICTY had dismissed indictments against Jelisic and Sikirica, two individuals separately charged with genocide. *Id.* at 29.

40. *See* Prosecutor v. Milosevic, Case No.: IT-01-51-I, Initial Indictment, 22 Nov. 2001, para. 32. As regards Croatia, the Prosecutor amended the initial indictments to reduce the scope of the case and not seek to prove that genocide was committed in relation to the Bosnian Croat population. *See* Prosecutor v. Milosevic, Case No.: IT-02-54-T, Scheduling Order Concerning Amending the Croatia and Bosnia Indictments, 22 Nov. 2001, *available at* http://www.un.org/icty/indictment/english/mil-ii011122e.htm (last visited Feb. 22, 2003).

41. In the *Krstic* case, the Prosecutor established many of the facts central to the prosecution of Milosevic for the Srebrenica massacre. *See* Krstic, 40 I.L.M. at 1346. Important among these facts is that the massacres were perpetrated by the Drina Corps of the Bosnian Serb Army under Krstic's command. *See id.* at 1372-77. Although it may be more difficult to connect Milosevic to the commission of these atrocities in Bosnia where he was not in *de jure* control, the fact that these atrocities have been linked to the Bosnian Serb Army (found in the earlier *Tadic* case to be under the overall control of the FRY) creates a trail that may well implicate Milosevic. *See* Prosecutor v. Tadic, Case No.: IT-94-1, Judgement, 15 July 1999, *reprinted in* 38 I.L.M. 1518, 1546 (1999).

with the Prosecutor's decision not to proceed with genocide indictments against Milosevic for his involvement in the Croatian violence? Would the Prosecutor then be moved to reconsider her position? On a different note, if the FRY claims against the NATO countries at the ICJ are successful, does this mean that the Prosecutor's decision not to criminally investigate NATO is to be reconsidered?

Although it is unclear what precise weight the ICJ is to give to the jurisprudence of the ICTY,[42] if Slobodan Milosevic is convicted of genocide while the ICJ still remains seized of the matter, then it may be difficult for the ICJ to remain unaffected by the ICTY conviction, just as it will seem incongruous for the ICJ to ignore the *Krstic* conviction. After all, the ICJ is to apply judicial decisions as subsidiary means to determine rules of law and, within this process of application, it seems eminently reasonable for decisions of the ad hoc tribunals to be considered.[43] This triggers broader questions regarding the role of consistency and stability in international criminal law. Can the ICTY view what happened as genocide while the ICJ does not? Is that a desirable result? Should one judicial body trump the other; or can international institutions – assuredly, young institutions in a youthful area of law – remain viable by floating about heavily yet haphazardly, like Zeppelins?

Conceptual inquiries regarding the interface between the ICJ and ICTY emerge from these practice-oriented questions. The use of the ICJ invokes broader issues of state responsibility and reparative liability. This is important for those, such as I, who believe there is a place for diverse remedies for egregious human rights violations. However, shortcomings may inhere when these diverse remedies remain uncoordinated. Whereas the ad hoc tribunals impose penal sanction on individuals for individual criminal responsibility,[44] the reparative claims envisioned by the ICJ track more of a restorative approach that seeks to restitute the victimized societies for the harm they suffered and also oblige the aggressor group to disgorge benefits unjustly obtained. Nonetheless, ICJ decisions in matters

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42. More complicated: what effect should a finding of genocide by a national court have for the ICJ decisions? Given the civil responsibility nature of both claims, should the ICJ be influenced by the finding of the U.S. Second Circuit Court of Appeals in *Kadic* that the attacks of the Bosnian Serb army were "genocidal"? *See Kadic* 70 F.3d at 236-37; *see also* text accompanying *supra* note 29.

43. *See* Statute of the I.C.J., June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060.

44. *See* Statute of the ICTY, *supra* note 2, art. 7. The ICTY does have the power to order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. *See id.* art. 24(3). However, as the jurisdiction of the ICTY is limited to natural persons, this order can only be meted upon defendants. Moreover, any such order can only be made in addition to a sentence of imprisonment. *See id.*

of systemic human rights violations can be constructed as imposing collective punishment. This putatively would clash with a central goal of international criminal law, namely the avoidance of collective guilt. For example, the FRY is told by the ICTY that it can move on from the past if it cooperates in establishing Milosevic's individual guilt. But then it faces civil liability lawsuits at the ICJ which, if successful, could wipe out much of the resources needed to rebuild the country in the wake of the 1999 bombings and, thereby, affect all of its citizens collectively. This presents somewhat of a paradox. The FRY is instructed that the individual criminal guilt of a handful of people is necessary for the Serbs collectively to move forward but, if those findings of individual criminal guilt then establish legal elements of damage claims, then Serbs collectively will have to pay a heavy price. Inversely, would a finding by the ICTY that genocide was perpetrated by Bosnian Muslims put wind into the sails of the now discontinued counter-claim brought to the ICJ by the FRY against Bosnia and Herzegovina?

The Statute of the ICTY, along with its Rules of Procedure and Evidence, are silent on the interplay between ICTY findings of individual criminal responsibility and any subsequent findings of state responsibility. Article 25(4) of the Rome Statute of the International Criminal Court, however, specifies that individual criminal responsibility does not affect state responsibility.[45] State practice reflects the view that whereas individuals can commit criminal offenses, a state cannot (even though a state can face tortious liability). This may well be an attempt to insulate the entire state from the criminal activity of a few. But, this may construct a naive picture of the entire state as being held hostage by the criminality of a few. States do not incur additional responsibilities for committing a serious breach of a peremptory norm beyond that contemplated for any ordinary breach. Individuals may incur the additional responsibility of criminal punishment. Why should an entire state, which is after all the central actor in international law, be absolved of heightened responsibility through the prosecution of a handful of individuals, who are not traditionally recognized as actors under international law, because their conduct is egregiously criminal as opposed to just tortious (for which principles of state responsibility could render the entire state liable)?[46]

This quickly returns us to another important process question: Can the

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45. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9* (1999).

46. *See* Pierre-Marie Dupuy, *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUR. J. INT'L. L. 1053, 1060 n.22 (noting the reservation for the crime to the individual, most often at the cost of a destatalization of the action, which is nonetheless carried out on behalf of the state as its agent).

evidence proffered to secure Milosevic's individual guilt then be used to ground a damage award against the nation as a whole? Although the notion of state crimes is hotly disputed and largely eschewed by states,[47] it is unclear whether providing evidence of individual criminal responsibility in support of civil liability claims involving the state of which the criminal is an official equally would be eschewed. If the FRY cooperates with the ICTY and provides official documents subpoenaed by the ICTY, can these later be used as evidence by Bosnia and Herzegovina or Croatia in the ICJ claim? This would mean that cooperation with the ICTY could increase the likelihood of successful lawsuits against the FRY at the ICJ. Can the ICTY acquire evidence but then issue orders restricting other uses of that evidence? What would such an order mean for the ICJ? Given these considerations, the existence of the ICJ lawsuits may well serve as a disincentive for the FRY to cooperate with the ICTY. On a related note, could the FRY negotiate a discontinuance of the ICJ proceeding in exchange for enhanced cooperation with the ICTY in terms of documentary and testimonial evidence? This may raise difficult questions regarding the behavior actually incentivized by the decentralized structure of international adjudication. Initial appearances of increased legalization may only amount to smoke and mirrors, insofar as the scope of that legalization may be frittered away through sequential state bargaining and moral hazard.

Moreover, these questions operate not only on the bookends of practice and theory, but also the "in between," namely the substantive content of international criminal law. The notion that international legal institutions will never diverge from each other's pronouncements on matters of substantive law is belied by the fact that, on occasion the ICJ and ICTY have parted company.[48] The 2002 *Democratic Republic of Congo* v. *Belgium* majority opinion indicates that the ICJ is mindful of the contributions to international law made by the Statute of the ICTY and its

47. *See* Damrosch, *supra* note 10, at 968 (stating by way of example, that Article 19 of the 1996 ILC Draft Articles on State Responsibility, which had discussed international crimes, was strongly opposed by a number of governments in the Sixth (Legal) Committee, including the U.S.). This provision was dropped from the Draft Articles owing to this opposition. *See id.* at 701. One of the arguments raised against state criminal responsibility involves institutional redundancy, insofar as "existing international institutions and regimes already contain a system of law for responding to violations of international obligations which the [ILC] might term 'crimes.'" *Id.* at 699 (citing the U.S. position). Another concern is that "an individual criminal may be emboldened to attempt to shift a degree of responsibility away from himself and to the state by resort to a provision for state crimes." *Id.*

48. *See* Kingsbury, *supra* note 1, at 681; Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 R. DES COURS 101 (1998) (illustrating that while these partings exist, they are not rampant).

case-law.[49] However, it also is clear from that decision that the ICJ is not interpreting international criminal law in a manner as purposive as the ICTY.

Although differences constitute exceptions rather than the rule, they are important and influential. One oft-cited example involves the "effective control" test developed by the ICJ to assess when the conduct of a non-state paramilitary organization is to be attributed to a state actor. In the 1986 *Nicaragua* decision, the ICJ held that such attribution is to occur when the non-state actor falls under the "effective control" of the state actor.[50] In that case, the ICJ held that the conduct of the Nicaraguan *contras* was not under the effective control of the U.S. and, as such, the U.S. did not bear state responsibility for that conduct.[51] In 1999, in the *Tadic* decision, the ICTY Appeals Chamber critiqued this test, finding it to be "unconvincing . . . [given] . . . the very logic of the entire system of international law on State responsibility."[52] In fact, the ICTY suggested that a lower degree of control would be apposite in light of judicial and state practice (not to mention the purpose of the law of state responsibility), and offered an alternate formulation, which it called the "overall control" test.[53] The ICTY then applied this attenuated standard and held that the conduct of the Bosnian Serb armed forces in fact was attributable to the FRY as those forces were acting under the overall control and on behalf of the FRY.[54] Was it appropriate for the ICTY to make this criticism? The ICTY criticism of the fairly stringent ICJ test has not gone unnoticed in the discussion whether the acts of al-Qaeda were attributable to Afghanistan for the purposes of calling them an Afghan armed attack, thereby permitting the responsive use of self-defense. It appears that the more attenuated ICTY approach is attractive to many states in light of the national security threats posed by non-state terrorist actors. As such, this iterative development may facilitate the application of international law to new phenomena of international relations and national security; alternately, it may fritter away legalism in

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49. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. (Feb. 14), *at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.pdf (last visited Feb. 3, 2003).

50. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 at 108 (June 27).

51. *See id.* at 139.

52. Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Judgement, 15 July 1999), paras. 115-16. Spelliscy argues that the ICTY Appeals Chamber "essentially overruled" the ICJ precedent which had been followed by the ICTY Trial Chamber. Spelliscy, *supra* note 5, at 166.

53. Prosecutor v. Tadic, Case No.:IT-94-1-AR72, Judgement, 15 July 1999, para. 120.

54. *Id.* para. 162.

international law as states can shop from a multiplicity of legal approaches depending on their immediate political or strategic needs.

To emphasize for clarity: the dispute about "effective" or "overall" control is aberrational, insofar as in most cases the ICTY follows or views as persuasive the holdings and *dicta* of the ICJ. But the question persists: can the ICTY pick and choose which doctrine it likes or dislikes? Is this level of judicial independence desirable within an international legal framework? If one goal of law is to deter bad behavior, then it is necessary for such bad behavior to be precisely defined. In a well-known lesson from municipal criminal law, penalties that are not prescribed with certainty may be open to voidability based on vagueness.

Another interesting question is whether the ICJ's adjudication of the genocide cases will be affected by the ICTY's critique of its effective control test. In other words, if the ICJ is called upon to assess the attributability of non-state militias to a state (and it is likely that it shall have to make such an assessment in the Bosnia and Herzegovina and Croatia claims),[55] is it bound to reconsider its prior effective control test in light of the critique enunciated by the ICTY? Or will the ICJ simply ignore that critique? The ICJ may well suggest that the ICTY reformulation is appropriate for the context of attribution to a state of non-state actor conduct for purposes of individual criminal responsibility, but is not appropriate in the context of attribution to a state of non-state actor conduct for purposes of the civil responsibility of that state.

Moreover, it is not only the relationships among international adjudicatory institutions that call out for critical review, but also the relationships between these institutions, and international political institutions. Of particular concern here is the doctrine of judicial review. A case in point is the ICTY Appeals Chamber's 1995 decision in the *Tadic* case, in which it addressed a preliminary objection that required it to consider the constitutionality of the Security Council Resolution that created the ICTY.[56] The ICTY held that it was within its inherent powers as a judicial organ to decide matters pertaining to it own competence.[57] Some have criticized this decision. For example, Shabtai Rosenne has suggested that the ICTY should have asked the Security Council to request an advisory opinion from the ICJ about the constitutionality of its decision

55. For example, in the Croatian claims a central element of liability involves the FRY's responsibility for the activities of the JNA (Yugoslav People's Army) and paramilitary groups in Croatia.

56. *See* Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *reprinted in* 35 I.L.M. 32, 36 (1996).

57. *See id.*

to establish the ICTY.[58] Although Georges Abi-Saab posits that, under the circumstances, it would have been unlikely for the Security Council actually to have requested such an opinion, it may very well have been possible for the ICTY Statute to have been written to empower the ICTY itself to request opinions from the ICJ on "questions involving the interpretation of the Charter (or general international law)."[59] That this was not undertaken reinforces the fragmentary relationship among institutions and the reality that different institutions may be interpreting core documents in ways that are not necessarily coordinated.

IV. CENTRALIZATION OR DIFFUSION IN LEGAL INSTITUTIONS AND METHODS?

The international legal system, even in the narrow area of international criminal law, is grounded on a "horizontal engagement of ideas rather than a vertical engagement of authority."[60] The difficult question that arises is whether this grounding normatively is desirable.

ICJ President Judge Guillaume has called for hierarchy among institutions and has expressed reservations regarding the creation of future institutions; he also has expressed concerns regarding specialized tribunals working in their own fields without paying sufficient attention to the effects that such work might have on international law and international relations in general.[61] He calls for a leadership role for the ICJ. Joining him in the call for the promotion of unification and the development of "vertical engagement of authority" are Georges Abi-Saab[62] and Pierre-Marie Dupuy.[63] Another observer posits that the absence of such a hierarchy will

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58. *See* Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 928 (1999).

59. *Id.* at 928-29.

60. Spelliscy, *supra* note 5, at 155-56.

61. *See* Press Release, UN, GA/L/3157 17th Meeting (AM) (Oct. 27, 2000), *available at* http://www.un.org/News/Press/docs/2000/20001027.gal3157.doc.html (last visited Mar. 21, 2003); Spelliscy, *supra* note 5, at 156. President Judge Guillaume's concerns resonate in the approach of the ICJ to ministerial immunities in the *Democratic Republic of Congo v. Belgium* case, in which the ICJ broadly interpreted the scope of immunities so as to reduce the scope of judicial review of ministerial conduct by foreign national courts exercising universal jurisdiction. This case was filed in response to a Belgian court's issuance of an arrest warrant against the incumbent Congolese Minister of Foreign Affairs. *See supra* note 33. The issuance of this writ reflects a broader trend in which municipal courts are more actively engaging in prosecutions regarding extraterritorial human rights abuses through universal jurisdiction.

62. Abi-Saab, *supra* note 58, at 929 ("The ICJ has to play this central role and act as a higher court ....").

63. *See* Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. &

prompt conflicting jurisprudence that will threaten the coherence of the international system.[64] Yet another commentator fears that fragmentation may induce and facilitate forum shopping, where "litigants well may conclude that substantially different outcomes could be reached from differing precedents and directives, and choose a forum accordingly."[65]

By and large, arguments in favor of stability, certainty, and predictability are familiar to and resonate quite well among lawyers, particularly common-law lawyers. To be sure, common-law lawyers have exerted considerable pull on international dispute resolution institutions, whether of the criminal ilk or involving other kinds of disputes (for instance, trade). There has been an injection of common-law methods into the methodologies of these institutions. One particular example is *stare decisis* (or, in the least, use of prior decisions involving similar facts to resolve present disputes). Usually the WTO Dispute Settlement Panels (and the Appellate Body) are guided by prior decisions, as are the ad hoc tribunals within their own Chambers and also *inter se*. Even though there is no formalized notion of *stare decisis* at the ICJ,[66] the ICJ frequently refers to and follows its prior decisions. Although one may speak of the use of precedent within a given society, it is quite another to expect precedent to apply across societies as necessarily would be the case in the application of one international decision to a subsequent dispute arising elsewhere in the world. But, as this discussion demonstrates, this in fact is the emerging pattern.

An even more ambitious reading of precedent intimates that the decisions of one institution may be used persuasively or precedentially among factually similar decisions adjudged by a different institution. This is not a case of precedent within an institution, but precedent within a system composed of different institutions. This takes us full circle to inquire what the ICJ ought to do with the findings of the ICTY, the ICTY with the findings of the ICJ and, down the road, what the ICC should do with ICTY findings and also with ICJ findings. This ambitious use of precedent arguably would promote the certainty of the international legal system at large and streamline international law such that it might be made more palatable to skeptical domestic audiences.

However, it is not altogether clear whether even a common-law lawyer would be uncomfortable with an absence of mandatory system-wide cross-

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POL. 791, 798 (1999).

64. *See* Spelliscy, *supra* note 5, at 143-45. Spelliscy is among the most adamant proponents for an organized international judicial system, and fears that the present "incoherence" will have "disastrous consequences." *Id.* at 171.

65. Morgan, *supra* note 7, at 548; *see also id.* at 550-51.

66. *See* Statute of the I.C.J., *supra* note 43, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

references in the diverse and cross-cultural domain of the international community. It is unclear whether different courts within common-law countries adhere to such cross-referencing, particularly in terms of the interface between civil liability and criminal responsibility.[67] A *civiliste* may be even less perplexed. By way of example, legal institutions in France do not operate in a strict hierarchy or web of mutual recognition.[68] Moreover, "[t]here exist multiple tribunals in horizontal systems without an overall hierarchy throughout the world's domestic legal systems, and these systems nevertheless maintain their legitimacy."[69]

It does seem ironic to speak of the need for consistency in the adjudication of systemic human rights abusers when the creation of ad hoc tribunals, as well as the determination of the "criminal" in international relations, seems to many to be anything but consistent. Also vexing in the predictability and certainty notion is the inevitable selectivity that tinges choices as to who is to be prosecuted in the already selective decisions of which tragedies should face judicial redress.

Nor are the benefits of hierarchy and certainty abundantly self-evident. In fact, religiously adhering to hierarchy and certainty may weaken the legitimacy of international legal intervention among local audiences by distancing those audiences from the locus of judicial decision-making. This particularly is the case in the "looking downwards" part of the analysis: in other words, the relationship between international and national or local institutions. Too rigid a hierarchy and too certain a precedent can create a uniformity that squashes local initiatives and may make it more difficult for international norms to be filtered through local cultures, which I posit (and have argued elsewhere with Rwanda and Afghanistan as case-studies) is a prerequisite for international norms to have meaning among local audiences.[70] In a very real sense, the merits of hierarchy and certainty are predicated on a perception that, following mass atrocity, uniform trials that look like meshed Anglo-American and Continental European (in all cases

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67. "One might point to the American system of state courts that, when making decisions on state law, may be in conflict with one another without being able to appeal for clarification to the Supreme Court." Spelliscy, *supra* note 5, at 153.

68. "Non-uniformity is also tolerated in the French legal system where the *Cour de Cassation*, the *Conseil d'Etat*, *Conseil Constitutionnel*, and the *Tribunal des Conflits* operate independently of one another." *Id.* at 153-54.

69. *Id.* at 153.

70. *See generally* Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221 (2000); Mark A. Drumbl, *Juridical and Jurisdictional Disconnects*, XII FINNISH YEARBOOK OF INTERNATIONAL LAW 131 (Kluwer Academic Publishing, 2002) (gen. eds. Martti Koskenniemi and Jarna Petman, U. of Helsinki, symposium eds. Chandra Lekha Sriram and Brad Roth); Mark A. Drumbl, *The Taliban's 'Other' Crimes*, 23:6 THIRD WORLD QUARTERLY 1121 (2002).

Western) proceedings are the best way to achieve justice everywhere. This raises broader questions regarding the balance of determinacy and indeterminacy required for law to have maximal meaning among local audiences. Multiple proceedings alleging multiple causes of action that take place in multiple ways in multiple venues may well create more law addressing different aspects of a single tragedy which, in turn, may augment appreciation for law among afflicted peoples.

Religiously adhering to formalized structures also may inhibit the emergence of a greater number of institutions. From a strictly retributive point of view, the risks of disconnect may be outweighed by the benefits of a larger number of institutions that will be able to effect more justice in more ways in more places. Perhaps, for the moment, we simply should celebrate the fact that the expansion of the number of international tribunals evidences a growing willingness by states to settle their disputes peacefully through international law,[71] and be less anxious about conflicts regarding possible variance in the content of the international law that ends up being applied. In fact, these conflicts may reflect the diversity and vibrancy inherent in Oscar Schachter's "college of international lawyers," whose discussions and dissensus move the law incrementally (although perhaps occasionally in staccato fashion) toward a greater legitimacy than would top-down hierarchical *diktat*. As Jonathan Charney wisely reminded us, diversity is an inherent and valuable part of international law.[72]

Assuredly, in the determination of top-down *diktat* there persists one nagging question: which institution will be ensconced in the position of privilege? The answer is not clearly found in the UN Charter. In fact, the Charter does not foreclose a diffuse and diasporic approach to the adjudication of international disputes. Although Charter article 92 provides that the ICJ is to be the "principal judicial organ of the United Nations"[73] and Charter article 36(3) provides that legal disputes should as a general rule be referred to the ICJ,[74] Charter article 95 reminds us that this shall not "prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."[75] The ICJ is not the exclusive judicial organ; nor was it intended to operate as some sort of

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71. *See* Bernard H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 EUR. J. INT'L L. 353, 370 (1996) (suggesting that more legal dispute resolution institutions might enhance the role of international law in resolving disputes).

72. *See* Jonathan Charney, *Comment, The Implications of Expanding International Dispute Settlement: the 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 74-75 (1996).

73. U.N. CHARTER art. 92, para. 1.

74. *See id* art. 36, para. 3.

75. *See id.* art. 95, para. 1.

global supreme court.[76]

To be sure, the ICTY is a temporary institution and, as such, the challenges it poses also are temporary. However, it is unclear whether ad hoc tribunals will become extinct. After all, there may be cases where the ICC does not have jurisdiction and the international community elects to proceed through ad hoc institutions, special courts, or UN-assisted local initiatives. This appears to be the preferred approach of the United States. Accordingly, many of the concerns regarding institutional coordination will not disappear when the ICTY closes its doors. Moreover, international criminal proceedings will never replace national proceedings, nor is this even the intent of the ICC. Furthermore, the issues regarding the interplay between the ICTY and the ICJ foreshadow the interplay between the ICJ and ICC. Therefore, the question whether to connect the dots among the institutions adjudicating serious human rights abuses shall persist even in the age of the "permanent" ICC.

V. CONCLUSION

The purpose of this final panel of today's stimulating conference is to consider the "ICTY at Ten," with a view to the "Big Picture." From the perspective of the "Big Picture," the ICTY is one tree in a small grove of different species of trees. To some extent, some of these trees have developed rules of understanding as to how they operate in light of each other. These rules – whose content and effect should continue to be evaluated on an ongoing basis – cluster in the relationships between the ICTY and national or local courts. For their part, the international trees in this judicial grove have not formalized – let alone developed – formal ententes or memoranda of understanding *inter se*, nor is there much evidence of meaningful informal relationships. This is unsurprising, given that each of these entities "has its "own separate source of legitimization, or legal empowerment, which invests it with judicial power . . .."[77] In fact, it is difficult to envision a coordinated judicial approach, given the fact that each of these various institutions "exists as formally distinct from other mechanisms engaged in similar tasks and, often, interpreting the same body of law."[78] In some cases, this "same body of law" involves central notions of customary international law. Perhaps more importantly, these institutions each strive to promote justice for the same victims.

It is important to be mindful of the relative youth of international law, particularly international criminal law. Criticisms of fragmentation in the enforcement of international law must take this youthfulness into account.

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76. *See* Charney, *supra* note 72, at 72.

77. Abi-Saab, *supra* note 58, at 926.

78. Spelliscy, *supra* note 5, at 145.

In the halcyon days of the formulation of municipal law there were many institutions and many court systems enforcing norms in an often disconnected methodology. Over time, what grew out of this (for example in the old English courts) was a somewhat systematized construction of law applied through a bureaucratized, organized court system. Eventually this may come to international law. The process of iterative accretion may build regimented, hierarchical enforcement. On the other hand, it may not, given the importance of contextual enforcement to the meaning of international norms at the local level for local lives. After all, "law" may not require hierarchical enforcement in order to remain "law."

As part of this process of accretion, international lawyers may consider developing guidelines of understanding among international dispute resolution institutions. Such guidelines may mitigate the fragmentary effects of the proliferation of international dispute resolution institutions by offering some sort of structure that delineates the relationships of these institutions *inter se.* Guidelines of understanding could harmonize these relationships, or at least avoid the most pernicious effects of disharmony. At a minimum, they could create a forum – which presently is lacking – in which such discussions could occur. But, at the same time, these guidelines would not create a hierarchy, and their content could leave space for the diffusion and dissensus that may be important to the meaningful development and application of international law at the level where it matters most: that of the local community. The point is not to construct overnight a coherent international constitutional order. Accordingly, these guidelines should preserve the independence and discretion of each institution, as well as the ability of each institution to fashion law and remedies germane to the purpose of the institution and the needs of the population it is designed to serve. On the other hand, these guidelines could recognize that the work of each dispute resolution institution is part of a broader process of international legal "becoming" and, thus, each institution should explain why it chooses to depart from the approaches taken by others when it makes such a choice.

This is a task to which international legal academics may wish to turn. We have expended considerable creative energy and thought on how international criminal institutions should interface with national courts. This has given rise to the notion of complementarity. We now may wish to divert some of this energy – and lessons learned – to the context of the relationships among international and regional dispute resolution bodies *inter se.*

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