Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ

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I. Introduction

In its judgment of 26 February 2007 (*Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*), the International Court of Justice (ICJ) made frequent reference to the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY).

In a number of cases, the Court has referred to the Tribunal's interpretation of general notions of the Genocide Convention. This was done mainly in part IV of the judgment, which concerns the identification of the law applicable to the dispute. Notable examples are the passages in which reference to the case law of the ICTY was made in order to determine whether the notion of genocide includes ethnic cleansing (§ 190), whether negatively defined groups come within the purview of the Convention (§ 194) and the 'substantiality' of the part of a group to be destroyed (§ 198). A reading of these passages conveys the impression that these references served the aim of enhancing the persuasiveness of the interpretation which the ICJ itself was ready to embrace.

More numerous are the references to the fact-finding of the Tribunal as an authoritative source of evidence. Although the Court carefully refrained from attributing binding value to these findings, it seems nonetheless to consider that facts ascertained by the Tribunal, in discharging its function as a criminal court of justice, do not need to be further proven.

Finally, the Court referred largely to ICTY determinations in which the Tribunal assessed the legality of conduct under obligations contained in the Genocide Convention which address individuals as well as states. Examples abound in part VI, in which the ICJ

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considered whether the alleged conduct constituted genocide under the Convention. Just to mention a few examples, §§ 281-ff refer to the case law of the ICTY in order to determine the degree of clarity necessary for finding that a specific *mens rea* existed; §§ 300-ff do the same in order to determine the material deeds which, accompanied by an appropriate *mens rea,* would constitute an act of genocide.

In the situations briefly mentioned, the ICJ carefully abstained from any comment which could be read as implying that findings of the ICTY are binding upon the Court. However, in all but one case, the views of the two courts coincided perfectly. The only – but noteworthy – exception is the reference to the test employed by the ICTY in order to determine the attribution to states of actions carried out by individuals. In §§ 396-ff of the decision, the Court focused on whether conduct amounting to acts of genocide performed by individuals not having the status of state organs should be attributed to the FRY. In order to make that determination, the Court expressly departed from the test adopted by the Court of Appeals of the ICTY in the *Tadic Case*,[1] a test universally known as the "overall control" test, and relied instead on the classical test enshrined in Article 8 of the International Law Commission's *Draft Articles on State Responsibility*, commonly known as the "effective control" test. Yet the Court felt it necessary to justify the failure to comply with the ICTY case law, and dwelt at some length upon the difference between the two tests and their propriety in relation to the law of State responsibility.

Speaking in general terms, the Court concluded at § 403 that:

> "The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the Tadic case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. The Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the

[1] **ICTY, Appeals Chamber**, *Tadić Case*, IT-94-1-A, *Judgment*, 15 July 1999.

resolution of which is not always necessary for deciding the criminal cases before it".[2]

This short but meaningful excerpt gives us two pieces of information. First, it tells us that, in deciding a dispute between States, the ICJ gives a certain value – although it is not clear precisely what that value is – to the findings of the ICTY on matters which come within the jurisdiction of that tribunal and which might be of relevance for the settlement of the dispute. Second, the ICJ tells us that it will give no value to findings of the ICTY on matters falling outside the jurisdiction of that Tribunal. This passage seems thus to stress the varying degree of authority of the decisions of the ICTY in proceedings before the ICJ. More precisely, the authority of the Tribunal would depend on whether, in deciding a certain question, the Tribunal remained within the scope of its jurisdiction, as ascertained by the ICJ.

The interest of this observation speaks for itself. In situations in which the two courts are called on to qualify legally the same or analogous conduct under rules which are formally different, although of identical content, pertaining respectively to individual and to State responsibility, an analysis of the scope of their respective jurisdictions might serve to avoid overlapping judicial findings. Comprehensively considered, these two contentions may be taken as expounding a new method for handling the conflict arising from the exercise of overlapping jurisdictions.[3] Instead of looking at the effect of diverging decisions, this new methodology seems rather to focus on the normative interplay between the diverse acts which establish different bases of jurisdiction. By assigning authority only to those decisions taken

[2] The reasons for denying legal value to the criterion of overall control, applied by the Court of Appeals in the *Tadic Case*, were further clarified by the Court. According to it, "the 'overall control' test [was not only] employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide"; rather, "the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs", an issue for which, according to the ICJ, the ICTY did not have jurisdiction.

[3] There are, indeed, appreciable differences between that case and the previous cases in which the ICJ felt enabled to ascertain the validity of decisions of other international tribunals. See, in particular, the decision of 18 November 1960 in the case of the *Arbitral Award made by the King of Spain on 23 December 1906* (*Honduras v. Nicaragua*), in which the Court accepted a claim to review the validity of a previous international decision. Indeed, the ICJ reached this conclusion when it found that its jurisdiction covered a dispute arising from a "disagreement existing between them with respect to the Arbitral Award", as stated in the agreement constituting the legal basis of the jurisdiction of the Court. In the same vein, in the judgment of 12 November 1991, in the case of the *Arbitral Award of 31 July 1989* (*Guinea-Bissau v. Senegal*), the Court concluded that the parties had conferred upon it jurisdiction to decide on the nullity of the previous decision and not on its merits. In particular, the Court concluded that it could not review the determination of the Arbitral Tribunal on its own jurisdiction. "By proceeding in that way the Court would be treating this request as an appeal and not as a *recours en nullité* [the Court had] simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction." (§§ 46-47).

by the "competent" judicial organ, and, correspondingly, by denying such authority to decisions taken by the "incompetent" organ, this approach, instead of settling conflicts, would prevent them from arising. This approach, which seems to take shape for the first time in the *Genocide Convention Case*, seems very promising and worthy of being further explored. However, the road toward recognition of this methodology as a working instrument for avoiding conflicts of jurisdiction is very tortuous and may reveal technical and theoretical difficulties. In the present contribution, I will present some preliminary reflections on this methodology, and I will try to examine some of its merits and limits. Further, I will try to apply this methodology to certain categories of conflict in order to explore its scope and implications. These sparse reflections are by no means intended to constitute a complete frame of reference for a multifaceted issue which, in my view, can hardly be captured by a unitary methodology.

II. The confrontation between the ICJ and the ICTY: Was there a conflict of jurisdiction?

Inconsistency between decisions taken by two of the most respected permanent (or semi-permanent) judicial bodies of the international legal order was by and large referred to in the legal literature as one example of conflicts which may lead to the fragmentation of international law.[4] Yet, not every inconsistency between decisions of different judicial organs constitutes a conflict of jurisdiction. Therefore, the first step in the analysis is to determine whether a true conflict between the two courts has arisen, which needs to be settled.

Diverging interpretations of a legal rule in the context of different dispute-settlement procedures do not generally create a true conflict of jurisdiction.[5] It may be regrettable that different jurisdictions do not agree on a given interpretation of the same rule, but the conceptual difference between diverging interpretations and conflict of jurisdiction is well

[4] See the Study of the International Law Commission on Fragmentation of International Law, finalized by Martti Koskenniemi. **ILC**, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law - Report of the Study Group*, **UN Doc. A/CN.4/L.682**, §§ 49-ff. However the Study expressly avoids dealing with conflicts of jurisdiction.

[5] There is, however, a certain tendency on the part of international courts to show deference to the jurisprudence of other judicial or quasi-judicial bodies in order to determine the law applicable to a certain conduct. In its advisory opinion on the 9 July 2004 on the *Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* the Court made frequent reference to the jurisprudence of the Human Rights Committee (see, in particular, §§ 109-ff of the opinion), giving the impression that the interpretation adopted by a specialized body such as the HRC has a particularly strong force of persuasion.

rooted in theory and in judicial practice, and no further discussion of this question seems necessary.

More problematic by far are the situations belonging to the second and third classes referred to above. Independent fact-findings made, respectively, by the ICTY and by the ICJ may lead to different assessments of fact. Independent legal assessments of the same conduct may lead to diverging conclusions with respect to the legality of that conduct. For example, the ICTY could decide that certain conduct attributed to individuals amounts to acts of genocide, whereas the ICJ could decide differently with regard to the same conduct where it is attributed to a State.

Even in situations of this kind, one could wonder whether we are really in the presence of a true conflict of jurisdictions. The answer would probably be negative if one assumed a strict notion of conflict, which would require the concomitant presence of the three classical tests: the same parties, the same object, and the same legal ground. It is easily demonstrated that the situations referred to above do not meet these criteria, as both the parties and the object of the two proceedings are necessarily different. In one forum the proceeding seeks to ascertain the criminal responsibility of individuals, whereas the other concerns an interstate claim and implicates the rules on State responsibility.

This conclusion, coherent as it is from a formalistic perspective, does not intuitively meet the sense of coherence one would expect when approaching legal questions. To condemn individuals for conduct which, attributed to States would not give rise to responsibility, seems to contradict basic requirements of logic to which, one would expect, every system of law should be subject. Indeed, in a number of legal traditions, quite sophisticated conflict-avoidance techniques have been developed so that the independent assessment of diverse legal consequences flowing from the same conduct does not lead to incoherent judicial decisions. For example, this concern is at the origin of the rule which, in a number of countries from the civil law tradition, requires courts assessing the civil consequences of conduct amounting to crimes to accept the factual and legal assessments of that conduct already made by criminal courts.

It does not seem unreasonable to draw a conceptual analogy with the case at hand, where the same conduct may simultaneously give rise to a double set of legal consequences:

criminal responsibility for individuals, and State responsibility for those States to which this conduct is attributed. After all, on a number of other occasions, international tribunals have accepted a broader notion of legal conflict for a variety of aims. In the case at hand, quite unusual in international practice, the identical issues, in spite of the formal differences between the parties and object, would plead for the unity of the legal assessment of the same conduct under the same rule of law.

However, it would be overly simplistic to push the analogy further, to the point of transposing automatically at the international level solutions adopted at the state level. What seems natural in an integrated legal order, in which different proceedings are part of the same judicial function, may not be assumed to be natural in the international legal order. In spite of the fact that both the ICJ and the ICTY are judicial organs of the United Nations, it would be inappropriate to refer to them as organs of one and the same system of administration of justice. The reasons which could be relied upon in order to dismiss this conclusion are well known and need not detain us. The acknowledgement of the typical dynamics of the international legal order induces one to look elsewhere in order to find a remedy for what appears to be a logical gap in that order.

III. Judicial discretion or conflict-avoidance technique?

The first explanation that crosses one's mind of the quite ambiguous passage of the Genocide Convention is that the Court, by deciding the degree of deference to be afforded to a finding of the ICTY, did not intend to point to a new conflict-avoidance technique, but, more simply, was exercising its judicial discretion. In other words, absent a conflict, or absent a firmly rooted legal basis for a conflict-avoidance technique, the ICJ may have referred to the Tribunal's case law as an argumentative device, primarily useful for enhancing the persuasiveness of the ICJ's decisions and for buttressing the logic underlying its reasoning. By showing that a certain solution was adopted by a different judicial authority, the ICJ can rely on the moral authority of the Tribunal and in this way it can avoid elaborating its reasoning in full detail. The idea that the ICJ, the only existing international court of universal jurisdiction, should pay attention to the case law of specialised courts when settling disputes touching upon subject matter that come even partially within their ambit is spread widely among international law scholars.

Even if above reading were the correct one, the solution adopted by the Court would still be important. Indeed, the Court not only showed deference to the decisions of the ICTY but also enunciated a test designed to give guidance for future cases as to the type and degree of deference which should be used: a very unusual step for the ICJ.

The existence of such a form of pre-determination makes it difficult to adopt definite conclusions as to the nature of that test. It presents elements of judicial discretion as well as of a true conflict-avoidance technique and, possibly, is more akin to the latter than to the former. There was no need, for a court of justice exercising its judicial discretion, to stress the *ultra vires* nature of a finding of another court in order to deviate from it and to embark upon a different course. The emphasis on the limited scope of its jurisdiction could indicate that the Court did not feel confident enough to rely only on its subjective appreciation in disregarding the authority of the Tribunal, and needed to rely on a more objective element (to the extent that concluding that another tribunal has made an *ultra vires* determination can be regarded as "objective").

It seems risky to draw from this short and quite mysterious passage more implications than it can offer. However, it certainly seems to reveal a tendency to ground the authority of the ICTY on more solid footing than that offered by uncertain mechanisms which some might call judicial discretion and others may prefer to label as comity.[6]

One is therefore tempted to advance the hypothesis that this passage of the judgment, perhaps beyond the subjective intention of its judges, foreshadows a methodological approach which can be useful in case of jurisdictional overlaps. I propose therefore to explore this perspective (although only hypothetically) with a view to determining, to a certain degree of precision, how to devise an instrument of coordination that would vest decisions of the ICTY with a conditional authority in proceedings before the ICJ.

The starting point for this analysis is that such coordination was not achieved through procedural instruments, *i.e.*, through instruments aimed at establishing the legal effect of a judicial decision for a different judge. If this were the case, there would be a strong

[6] It is doubtful that there is any meaningful difference between comity and judicial deference on the part of a court of justice. In the case law of US courts, reference to comity was made, in a different context, in the famous case before the **Supreme Court**, *Hilton v. Guyot*, 1895, 159 US 113.

presumption that these effects would flow from the existence of a decision *independently* of the fact that it was pronounced within the scope of the judge's jurisdiction. The fact that the ICJ felt empowered to review this assessment cannot but point out that decisions of the ICTY do not have effect by themselves in proceedings before the ICJ. Thus, in order to explain the quite unusual stance of the ICJ we are induced to look elsewhere, and to see whether decisions of the ICTY, far from being considered for their procedural force, might be considered for their normative force, as rules of law binding among the parties of the proceedings before the ICJ. This would be a normative approach, which, instead of relying on the procedural effects of a judicial decision, tends rather to emphasise its normative force.

IV. Towards a normative approach?

From this perspective, one could assume that provisions conferring overlapping jurisdiction, and competing decisions of international judicial bodies, can be taken mutually into account by these bodies as rules applicable to the parties, which therefore enter into dynamic interrelations with other international law rules. It would be this dynamic interrelation, ultimately, which can explain the relevance of judicial findings of a court in judicial proceedings before another judicial body.

From this perspective, the value of findings of a court of justice in another dispute settlement procedure is not brought back to the effect of rules and principles relating to the effect of a judicial decision such as the rule of *res iudicata*. Rather, we are assessing whether this value cannot be explained by virtue of the effect which a rule of law exerts upon other rules of the same system. It is, in other words, the capacity of an international law rule to enter into dynamic relations with other rules of the same system. This element could recast the unity of the international order, potentially threatened as it is by the proliferation of international judicial bodies. This possibility has been explored, with varying degrees of success, in relation to the applicable law in a case before an international tribunal. The step I am now proposing to attempt would go a little bit further and would try to examine this possibility as regards coordinating the actions of a plurality of international tribunals. After all, a court, when determining the scope of its jurisdiction, must also take into account other international law rules in force among the parties. This is the rule which has been expressed, albeit in quite limited terms, by Article 31, § 3 (c) of the 1969 *Vienna Convention on the Law of Treaties*.

In the particular situation which prompted the current study, one may wonder whether decisions of the ICTY constitute binding legal rules for the parties to the proceedings in the *Genocide Convention Case*. A number of arguments can be made for answering the question positively. The Statute addresses obligations to states with regard to specific situations, such as, for example, the obligation to cooperate, in accordance with Article 29 of the Statute. Although no provision of the Statute explicitly imposes an obligation to recognise decisions of the Tribunal, it is meaningful to note that the obligation to cooperate was interpreted in quite broad terms by national laws carrying out that obligation, which proclaimed that judgments of the Tribunal are recognised within the internal legal order, for example as concerns their effect in municipal civil proceedings.[7]

As concerns, in particular, the parties to the proceedings before the ICJ, the binding force of these rules can be justified by a plurality of legal bases, such as the possible succession of the Federal Republic of Yugoslavia (FRY - Serbia and Montenegro) in the membership of the UN of the Socialist Federal Republic of Yugoslavia, or the retroactive effect of the membership of the new State in the United Nations, following its application of 27 October 2000.

The demonstration of this assumption might appear to require a lengthy technical explanation. However, such an explanation is unnecessary in the light of the holding of the ICJ, which found, at § 447 of its Genocide decision, that "from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having 'accepted [the] jurisdiction' of the ICTY within the meaning of Article VI of the Convention". In the same vein, one could conclude that the parties to the proceedings before the ICJ were, as from that date, bound by the Security Council Resolution 827(1993),[8] which confers jurisdiction on the ICTY in regard to individual conduct which can constitute genocide under the Genocide Convention, and by the decisions of that Tribunal, including

[7] For a clear example, see Article 26 of the **Austrian Federal Law on Cooperation with the International Tribunals**, 1 June 1996, which reads: "In proceedings before the Austrian courts relating to legal action taken against the convicted person by the victim, a final judgment of the International Tribunal shall constitute full proof of that which was declared in the said final judgment on the basis of evidence. Proof of the incorrectness of declarations is admissible".

[8] **Security Council**, Resolution 827(1993), 25 May 1993, **UN Doc. S/RES/827 (1993)**.

those adopted before that date.[9] In § 445, *i.e.*, a few lines earlier in its decision, the ICJ had concluded that the Tribunal constitutes an "international penal tribunal" within the meaning of Article VI of the Convention, *i.e.*, a Tribunal having jurisdiction for individual conduct in breach of the obligation contained in the same convention which bestows jurisdiction upon the ICJ for State conduct.

V. Normative approach and dynamics of the international legal order

I propose now to go further along this line of argument and explore the implications following from the consideration of decisions of the ICTY as international law binding upon the parties to the dispute before the ICJ.

There does not seem to be any theoretical obstacle to regarding judicial decisions, from a normative viewpoint, as rules of law applying to specific situations and governing the individual, rather than general, conduct of its addressees. In such a case, the decisions of the Tribunal do in fact constitute rules of law, affecting the legal positions of the individuals tried by the Tribunal, but also of all the states bound by Resolution 827(1993) and by the Statute of the Tribunal, which are required by the Statute to recognize the decisions and to give them effect, if the need arises, within their municipal orders. From this premise, it follows that the ICJ, in deciding a dispute between parties, must take into consideration these decisions, as they may be relevant for settling the dispute, as part of its task of determining and applying the law in force between the parties.

From this perspective, therefore, decisions of the Tribunal do not constitute judicial determinations, but rather normative acts. Their effect must not be determined on the basis of the particular procedural mechanisms which are normally employed in order to determine the binding force of a judicial decision for another judge, such as the *res iudicata* rule and the like.[10] Such a search would be made in vain. Neither customary international law, nor the

[9] The Court deemed it unnecessary to determine whether the RFY failed to comply with its duty to cooperate with the Tribunal before 14 December 1995, since no failure to respect that obligation prior to that date was required by the Applicant (§ 447). Once could note that, even if it were ascertained that the obligation to cooperate with the Tribunal did not extend to conduct occurring before that date, the acceptance of the jurisdiction of the Tribunal implies that, after that date, all the decisions of the Tribunal adopted before or after the critical date became, by virtue of their *erga omnes* character, binding legal rules for the RFY.

[10] See **A. GATTINI**, "Un regard procédural sur la fragmentation du droit international", *Revue générale de droit international public*, 2006, Vol. 110, No 2, pp. 303-336.

particular provisions setting up the ICY and the ICTY, and establishing their jurisdiction, require either court to give deference to decisions of the other. However the jurisdictional 'splendid isolation' of either court may be tempered by the recognition that decisions of another court do exist, which are binding for the parties and which must therefore be considered by the other when deciding the case before it.

The existence of a procedural mechanism connecting the respective jurisdictions of the ICJ and of the ICTY would have given unconditional priority to decisions of one court upon the other. But the effect of a *normative* mechanism connecting the jurisdictions of the two courts is more nuanced by far. Decisions of the ICTY in proceedings before the ICJ enjoy, at best, a relative priority, in the sense that they must be taken into account as law in force between the parties, subject, as such, to the legal dynamics of the sources of international law. This might explain why the ICJ considered itself capable of ruling on the validity of these decisions, and, having found that they were taken *ultra vires*, to deny their effect in proceedings before it. The Court must have considered that decisions *ultra vires* constitute invalid law and therefore must be discarded. This seems perfectly consistent if one considers that these acts are not applied *qua* judicial decisions, but rather *qua* international law, and therefore, deprived of any procedural shield such as that afforded by the principle of the *res iudicata*.

The flipside of the normative approach to the overlapping jurisdiction is that, in the reverse situation, decisions of the ICJ should not constitute rules of law for the ICTY, which does not settle disputes among States but rather administers justice in the public interest.

VI. Decisions of the ICTY and Article 103 of the UN Charter

One may wonder whether, among the normative dynamics which help to shape the respective interplay of decisions of the ICTY and of the ICJ, the legal basis of their jurisdiction may play a role. The issue does indeed have some importance, as the jurisdiction of the two courts depends on acts having different legal value.

It is well known that the jurisdiction of the ICJ in the case at hand was based on the Genocide Convention, whose Article IX bestows jurisdiction upon the Court for disputes relating to the interpretation, application or fulfilment of the Convention. The competence of

the Tribunal is established by Resolution 827 (1993), and by the Statute attached thereto, which, in the relevant part, confers jurisdiction on the Tribunal in order to determine the criminal responsibility of individuals charged with conduct amounting to genocide.

At first sight, one could be tempted to conclude that the jurisdiction of the ICTY, having been conferred by a resolution of the Security Council, enjoys the special status of the obligations deriving from the Charter of the UN, which, as is well known, take priority over any other treaty obligation, by virtue of Article 103 of the Charter.[11] Moreover, as Resolution 827 (1993) was taken under Chapter VII of the Charter, decisions of a Tribunal pursuant to a competence decided by the Security Council should be considered as measures aimed at maintaining or restoring international peace and security; measures which, therefore, should be recognised as having a higher rank than simple measures aimed at settling a dispute between States.

In spite of its apparent logic, such a solution does not appear persuasive. Although one can accept that diverging assessments by the two courts as to the legality of conduct attributed to individuals and to states under the Genocide Convention can give rise to a conflict of jurisdiction, it is much more problematic to assume that such a conflict falls within the scope of Article 103 of the UN Charter. This provision seems, rather, to envisage a situation where the performance of a treaty obligation would affect compliance with obligations established by the Charter. The very strict sanction envisaged by Article 103 seems to indicate precisely that the mechanism set up by that provision is triggered only by a conflict potentially capable of affecting the implementation of the Charter.

Article 103 can be used to enhance the normative value of the rules establishing the Tribunal, and bestowing jurisdiction upon it, in the sense that States cannot, by special convention, disregard such rules and thus undertake an obligation not to recognise the competence of the Tribunal or the decisions taken by it. It is a much larger step to conclude that the Security Council, by creating a Tribunal with competence to ascertain the criminal

[11] In particular, the special status enjoyed by substantive provisions of the Genocide Convention, generally considered as having peremptory character, should not cover the provisions of the Convention conferring jurisdiction on the ICJ. In its decision of 3 February 2006, *Case Concerning Armed Activities on the Territory of the Congo, New Application: 2002, (Democratic Republic of Congo v. Rwanda),* the ICJ dismissed the idea that these provisions are so closely connected with the object and purpose of the Convention that they could not be subject to a reservation by the parties (see §§ 64-ff). The same rationale should exclude, *a fortiori,* their peremptory character.

responsibility of individuals, also intended to rule out the jurisdiction of other international courts, and in particular, of the ICJ, in the interpretation of the Genocide Convention. The aim pursued by the Security Council in creating the ICTY was that of conferring on it the necessary authority to try individuals charged with international crimes, and not to confer priority upon diverging interpretations of the Genocide Convention adopted by a Court in the context of an interstate dispute. If that had been the intention, the SC would undoubtedly have expressed it in much clearer terms. Moreover, there are no elements in the Genocide Convention which could be read as implying that findings of the ICTY enjoy a higher authority than findings of the ICJ.

VII. The normative approach and some of its implications

In this final section, I would like to point to some of the advantages and disadvantages of the normative approach to the study of the conflict of jurisdictions in international law. By no means are the observations which will be offered to the reader intended to constitute a general frame of reference. For this, I must refer to the many excellent contributions already existing, which have explored this complex topic in full detail.[12] For my part, I will be content to offer a cursory analysis of just some of the potentially infinite situations of jurisdictional conflict by referring to the most known recent practice and to illustrate the potential application of this methodology.

The general features of this approach should finally be clear. The normative approach consists of an analysis of the effects produced by provisions conferring jurisdiction on a tribunal, and by decisions of that tribunal, in a different dispute settlement procedure, *qua* international law rules in force among the parties. This effect is thus, in a certain sense, intermediate between the possible effect which would be produced by procedural means for coordinating competing jurisdictions, if existing, and the effect of a 'soft' means of coordination, such as comity and judicial discretion, the legal basis of which would be uncertain and the content of which would be indeterminate. It is of course possible that the parties, by conferring upon a tribunal the power to settle a dispute, also bestow upon it the power to disregard previous judicial decisions applicable *qua* international law in force among them. This is naturally a question of interpretation for each court of justice to decide,

[12] See, in particular, the comprehensive contribution by **Y. SHANY**, *The Competing Jurisdiction of International Courts and Tribunals*, Oxford, Oxford University Press, 2003.

taking into account all pertinent factors.

However, the natural field of application of this methodology is that of the conflict of jurisdiction in the proper sense, in which diverging judicial decisions might place inconsistent obligations on the same parties. One could assume that decisions of a court of justice deciding certain aspects of a dispute can be taken as rules of law in force among the parties by another tribunal deciding a different but related aspect of the same dispute, in order to reach a complete settlement of the dispute. This effect can typically occur in the case of parallel proceedings, concerning the legality of the same conduct under a different, and possibly diverging, set of rules. Whereas it is very possible that all or some of the jurisdictions concerned will in fact have the competence to adjudicate the dispute in its entirety (applying, for this purpose, the entire body of international law), that may not always be the case. For example, a tendency gaining more and more ground in the jurisprudence of specialised tribunals is to consider that the dispute before them concerns only the legality of certain conduct under the constituent treaty, leaving aside the application of other international law rules which, comprehensively considered, could afford a justification for conduct inconsistent with that treaty and, thus, lead towards a definite settlement of the dispute.[13]

Irrespective of the merits of this tendency, there is a case for arguing that a remedy for the fragmenting effect which ensues from it can be found in the normative approach described above, which consists in interconnecting partial settlements of distinctive sub-issues of normatively complex disputes by using, as an interconnecting factor, the dynamics of substantive rules of the international legal system. One could well conclude that a decision of a specialised tribunal concerning the legality of conduct in its own sub-system can be taken into consideration as binding law among the parties, and that the decision may be applied by other tribunals if it is relevant for deciding the disputes before them.

From the same logical perspective, it does not seem impossible to make a further step forward and to assume that even the rules conferring jurisdiction on (and not only the decisions of) a specialised tribunal can be taken into consideration by another tribunal in order to delimit the sphere of its competence. As the identification of the scope of the jurisdiction

[13] One example might be the recent decision of the WTO Appellate body in the dispute between Mexico and the United States on the case *Mexico – Tax Measures on Soft Drinks and Other Beverages*. **WTO Appellate Body**, WT/DS308/AB/R, *Report,* 6 March 2006.

conferred on a court of justice more often than not entails the interpretation of treaty provisions, this operation can find its legal basis in Article 31 § 3 (c) of the 1969 *Vienna Convention on the Law of the Treaties*. Of course, this is an operation which cannot be accomplished in the abstract, but whose structural elements must be weighted in relation to the concrete case and in relation to the content of the rules conferring jurisdiction. It seems reasonable to assume that a tribunal having jurisdiction to settle a dispute among Member States of the EC must take into account, in determining the scope of its jurisdiction, Article 292 of the *Treaty Establishing the European Community* (EC Treaty), which provides that the parties have conferred exclusive jurisdiction to the ECJ for issues concerning the interpretation and application of EC law.[14] The diverging jurisdictional provisions could be construed consistently so as to avoid a conflict of jurisdiction from arising.

This phenomenon of cross-reference among international tribunals, sometimes enthusiastically welcomed as a fertilization of the international judicial function, obviously has limits. In particular, the normative approach described above, based as it is on the consideration of technical dynamics among sources or norms of the international legal order, requires, for its application, the identification of a well-grounded legal basis. It goes without saying that the judicial decisions can be applied as binding law for its parties only in judicial proceedings having effect for parties to the previous decision. I pointed out above that considering the ICTY decisions as law applicable in disputes among States before the ICJ does not entail that the reverse situation applies as well. Decisions of the ICJ cannot be considered as binding law in proceedings before the ICTY, for the simple reason that these proceedings are developed in the public interest and on behalf of the international community as a whole, thus excluding the legal relevance of special agreements among states.

An analogous rationale should have dissuaded the European Court of Human Rights (ECHR) from giving relevance, in deciding a question before it, to the international engagements of some parties to the European Convention only, such as the Member States of the EC. Indeed, this is precisely what the ECHR did in the *Bosphorus Case*.[15] In this case, as

[14] A variety of elements buttressing or weakening such a conclusion might come from a consideration of the full array of decisions which constitute the well known *Mox Plant* saga. For a complete reference to it, see **N. LAVRANOS**, "The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?", *Leiden Journal of International Law*, 2006, No 19, p. 223.

[15] **ECHR**, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi V. Ireland,* Decision of the Grand Chamber of 30 June 2005, on Application No 45036/98. For a comment, I refer to my note "Sulla responsabilità

is well known, the Court overruled its previous jurisprudence, according to which the existence of equivalent protection of fundamental rights under the EC Treaty and under the ECHR had the effect of limiting the exercise of its jurisdiction in regard to acts of the EC. While such a solution was technically questionable, the solution adopted in *Bosphorus* appears even more objectionable. In *Bosphorus,* the Court considered that the existence of a normative sub-system among some states parties to the Convention only, in which protection of fundamental rights is guaranteed "in a manner which can be considered at least equivalent to that for which the Convention provides jurisdiction" must be taken into account when interpreting the provisions providing for a justification to States' actions that are not in compliance with the Convention.

This line of reasoning indeed presents a certain analogy with the normative approach, with the important *caveat* that, in that case, the ECHR gave relevance not to a single decision, concerning the same or even analogous conduct, but rather to the *overall* jurisprudence of another tribunal. Regardless of the impact of that case on the very delicate balance between fundamental rights and States' interests as reflected in the Convention, this conclusion appears technically flawed, as it gives relevance to engagements binding to some parties only, in order to interpret general notions of the European Convention, applying to a wider circle of states. Thus, the *Bosphorus Case*, although inspired by the noble aim of avoiding a conflict between competing jurisdictions by giving relevance to the case law of another forum, and although applying an approach bearing some resemblance to the normative approach, cannot be considered an accomplished precedent in that direction and, rather, exemplifies the pitfalls of an incautious use of that approach.

VIII. Concluding remarks: Unity of substantive law as a remedy for jurisdictional fragmentation?

The adoption of a normative approach is not an all-embracing technique aimed at dealing with the problems arising in connexion with the proliferation of international fora. Still less is it a panacea for the looming fragmentation of international law which accompanies the growing tendency of establishing specialised tribunals for specialised sets of rules. No approach can cure the structural weakness of the international order and transform it

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internazionale per condotte di Stati membri dell'Unione europea: In margine al caso Bosphorus", *Rivista di diritto internazionale*, 2005, No 88, pp. 762-ff.

into a more integrated system such as those which lawyers are accustomed to observing at the state level and which they are often, albeit improperly, accustomed to using as a yardstick for legal research. More modestly, the normative approach can serve, in particular cases and under particular technical conditions, in order to bridge a gap in the exercise of different jurisdictions.

While the practical relevance of such an approach may be significant yet not overwhelming, it is also important from a theoretical point of view. There is a growing awareness that the existence of limitations on the jurisdiction of international judicial bodies should not, by itself, entail a corresponding limitation on the law applicable in order to settle the dispute.[16] Yet it is undeniable that the jurisdiction of international courts may be determined by the state in order drastically to narrow down the law which the courts are empowered to apply. The tendency of specialised courts to settle disputes under their respective constitutive treaties only, and thus to render awards which are structurally incomplete, endangers the unity of international law and makes it impossible to use it a remedy for the fragmentation of international judicial functions.

In this conceptual line of research, the adoption of a normative approach in order to determine the effect of judicial decisions in the context of other dispute settlement procedures may thus constitute a step forward. It may contribute to reaffirm the unity of the international legal order and the unity of law as a means to settle judicial disputes also by recourse to different means of judicial redress, and beyond the restraints, at least beyond some of them, which curtail the application of jurisdiction-regulating norms. The consideration of judicial determinations as part of the substantive law binding its addressees may perhaps serve the aim of recasting the unity of international law more than the search for means of coordination in the exercise of competing jurisdictions. In other words, this normative approach better serves the purpose of avoiding a fragmentation of international law than any attempt to use procedural remedies instead.

Thus, the attainment of a more in-depth knowledge of such an approach seems to be a task which is worth making investments in attention and energy. Though well beyond the narrow scope of the present, introductory, contribution, this is a task to which the

[16] See **E. CANNIZZARO and B. BONAFÉ**, "Fragmenting International Law through Compromissory Clauses?", *European Journal of International Law*, 2005, No 16, pp. 481- ff.

international legal scholarship might tend in the near future.