Leiden Journal of International Law (2013), 26, pp. 777–781
 doi:10.1017/S0922156513000393

EDITORIAL

Daring Diversity – Why There Is Nothing Wrong with 'Fragmentation' in International Criminal Procedure

VOLKER NERLICH*

International criminal law has made impressive strides over the past twenty years. The 1990s and 2000s saw the establishment of ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR), the coming into being of the permanent International Criminal Court (ICC), and the birth of several internationalized 'hybrid' jurisdictions, notably the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). However, the dynamic development of international criminal law into a new branch of public international law has also led to some problems and confusion. The rules and principles developed by the newly founded international criminal tribunals have sometimes seemed at odds with accepted views on public international law more generally – raising fears about the 'fragmentation' of the law.[1] Perhaps the best-known example of this is the controversy over the 'overall-control' test developed by the ICTY Appeals Chamber in the *Tadić* case to determine under which circumstances armed forces may be considered to be acting on behalf of a third state, rendering an internal armed conflict international.[2] The *Tadić* test differed from the 'effective-control' test developed by the International Court of Justice (ICJ) in the *Nicaragua* case[3] and confirmed in the *Bosnia Genocide* case, where the ICJ specifically rejected the ICTY approach.[4] Also more generally, the discussion on 'fragmentation' and international criminal law continues;[5] recently, Elies van Sliedregt set out in these pages her vision of legal pluralism in international criminal law.[6]

The controversy over 'fragmentation' – which initially focused on the substantive law – has also reached 'international criminal procedure', i.e. the procedural law that

* Member of the Board of Editors; Legal Adviser, International Criminal Court. The views expressed are those of the author and cannot be attributed to the International Criminal Court

1 On the fragmentation of international law see M. K oskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 LJIL (2002), 553–79.

2 See ICTY, *Prosecutor v. Tadić*, Judgement, IT-94-I-A, 15 July 1999, paras. 88 et seq.

3 Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment, 27 June 1986.

4 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007, paras. 396 et seq.

5 See L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (2012).

6 E. van Sliedregt, 'Pluralism in International Criminal Law', 25 LIJL (2012), 847–55.

international criminal courts and tribunals apply. The first manifestation of this was the debate on 'witness proofing': in 2006, a pre-trial chamber of the ICC ruled that the prosecution and the defence could not 'proof' their witnesses before they appeared in court, that is, inter alia, meet with them in advance, allow them to read their previous statements, and ask the questions that will be put to the witness during examination-in-chief.[7] A relatively minor issue, one would think. The problem was: witness proofing was a long-accepted practice at the ICTY and ICTR.

The reaction followed immediately – chambers of both ad hoc tribunals affirmed their practice, rejecting the approach of the ICC,[8] and several articles and lengthy papers were published, including in this journal,[9] discussing the pros and cons of allowing or disallowing witness proofing. The number of publications on what appears to have been a relatively confined topic, and the ferocity of the debate, are explained in part by the fact that the decision on witness proofing was one of the first decisions of the ICC that attracted wider academic attention and that the ICC's approach was seen as evidence of a generally more 'inquisitorial' approach of the Court, in contrast to the more 'adversarial' ICTY and ICTR.[10] However, some authors expressly apprehended a 'widening procedural divergence' between the ICC on one hand and the ad hoc tribunals on the other hand.[11] Similar concerns on a more general level underlie a recent publication summing up the work of a major research project, which analysed whether there is a 'normative corpus' of 'international criminal procedure'.[12]

Despite these concerns, there does not appear to be a move towards uniformity in international practice – for instance, in relation to the question of witness proofing, even an ICC trial chamber recently took a decision *allowing* this practice – in clear contrast to the previous jurisprudence of the Court.[13] Should we be concerned by diverging procedural practices? Is 'fragmentation' of procedural law a problem for international criminal justice?[14]

---

7 *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Proofing, 8 November 2006, ICC-01/04-01/06-679.

8 ICTY, *Prosecutor v. Milutinović et al.*, Decision on Ojdanić Motion to Prohibit Witness Proofing, IT-05-97-T, 12 December 2006; ICTR, *Prosecutor v. Karemera et al.*, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006; this decision was confirmed by the ICTR Appeals Chamber, Decision on Interlocutory Appeal Regarding Witness Proofing, ICTR-98–44-AR73.8, 11 May 2007.

9 W. Jordash, 'The Practice of "Witness Proofing" in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice', 22 LJIL (2009), 501–23; R. Karemaker et al., 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence', 21 LJIL (2008), 683–98; K. Ambos, '"Witness Proofing" before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman', 21 LJIL (2008), 911–16.

10 See B. Van Schaack, 'Witness Proofing and International Criminal Law', 26 November 2008, available at www.intlawgrrls.com/2008/11/witness-proofing-international-criminal.html (accessed on 22 June 2013): 'In a series of procedural rulings, the International Criminal Court is asserting its inquisitorial character.'

11 See Karemaker et al., *supra* note 9.

12 S. Vasiliev, 'Introduction', in G. Sluiter et al. (ed.), *International Criminal Procedure: Principles and Rules* (2013), 7–8.

13 *Prosecutor v. Ruto and Sang*, Trial Chamber V, Decision on Witness Preparation, ICC-01/09–01/11–524, 2 January 2013; *Prosecutor v. Muthaura and Kenyatta*, Decision on Witness Preparation, ICC-01/09–02/11–588, 2 January 2013.

14 See C. Stahn and L. van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?', in Van den Herik and Stahn, *supra* note 5, 21 at 82: '[The approach of autonomous interpretation] creates the danger that international criminal courts and tribunals become

In this regard, it is useful to recall that procedural diversity across jurisdictions is the norm rather than the exception, even in cases with an international dimension. For instance, under private international-law procedure, a domestic court will apply the *lex fori* irrespective of the *lex causae*. Thus, depending on which court hears a given case, it may be determined according to completely different procedural rules. Similarly, there is no fixed set of procedural rules for international commercial arbitration. Rather, within certain confines, it is up to the parties to agree on the procedural law applicable to their case. This procedural diversity in private international law and international commercial arbitration does not appear to cause significant problems; on the contrary, procedural flexibility is one of the advantages of international commercial arbitration, as the procedural rules can be adapted to the specific needs of the case at hand. Similarly, the various human rights mechanisms each have their own set of procedural rules, without this causing any concern or apparent problems. No one would seriously argue that, say, the European Court of Human Rights should follow the same procedural rules as the Inter-American Court of Human Rights or that the failure to do so leads to 'fragmentation' of human rights law.

Procedural diversity also exists in the prosecution of international crimes before domestic courts. While domestic laws implementing substantive international criminal law should mirror, to the extent possible, the underlying international norms, it has never been suggested that in the adjudication of such cases, domestic courts should follow a set of common procedural rules. Such an approach would be highly problematic, given that the differences in procedural traditions are often expressions of cultural differences more generally.[15] It would be difficult, if not impossible, to find a set of procedural rules that fits all domestic jurisdictions.

There is, of course, a lowest common denominator for any criminal jurisdiction trying international crimes, be it domestic, internationalized or international: the accepted standards of international human rights law. For the ICC, the basic fair-trial guarantees of Article 14 of the International Covenant on Civil and Political Rights have been incorporated, with some slight modifications, into Article 67(1) of the Rome Statute. In addition, Article 21(3) of the Rome Statute provides that the 'application and interpretation of [the Court's applicable law] must be consistent with internationally recognized human rights'. The ICTY and ICTR also refer frequently to international human rights law as guidance on procedural issues.[16] However, international human rights law rarely prescribes what has to be done; it usually only sets boundaries within which each jurisdiction may find a model most adequate for its needs and traditions. For instance, the human rights protection system of the Council of Europe covers 47 countries with diverse procedural traditions. While the

increasingly self-centred. The application of "autonomous interpretation" may entail that courts are more preoccupied with developing or preserving their own identity, than with cohesion or the formation of a coherent international procedural system.'

15 See M. Damška, 'Structures of Authority and Comparative Criminal Procedure', 84 *Yale Law Journal* (1975), 480 et seq.

16 In *Naletelić v. Croatia*, Decision of 4 May 2000, Appl. No. 51891/99, the European Court of Human Rights found that the ICTY 'offers all necessary guarantees' for a fair trial.

https://doi.org/10.1017/S0922156513000393 Published online by Cambridge University Press

jurisprudence of the European Court of Human Rights may have resulted in some assimilation of the procedural laws, the differences between, say, criminal trials in Germany and in England remain distinct and visible – and both procedural approaches are per se compatible with the requirements of the European Convention on Human Rights.

Furthermore, the procedural law of the ICC itself fosters diversity. Contrary to the ICTY and ICTR, the Rome Statute and the ICC Rules of Procedure and Evidence allow for much more flexibility in the trial management. Depending on the directions given by the presiding judge under Article 64(8)(b) of the Rome Statute, the trials may take different forms. The ICC Appeals Chamber's jurisprudence has recognized this flexibility in the Rome Statute. For instance, in the *Bemba* case, the Appeals Chamber, while rejecting the Trial Chamber's approach to admit prima facie into evidence all items on the prosecution list of evidence as well as prior witness statements, hinted at the possibility that evidence may be submitted also outside the trial hearings, as long as some basic requirements are met.[17]

The inbuilt procedural diversity of the ICC may be the result of a compromise struck in the negotiations on the Rome Statute and, subsequently, in the negotiations on the ICC Rules of Procedure and Evidence.[18] However, it is also an expression of the realization that the best way of administering international criminal justice may not yet have been found. Thus, rather than having an inflexible set of procedural rule 'fragmentation', there should be room for new approaches. After all, international criminal procedure is a very young discipline, and future generations of practitioners and scholars may find better ways of adjudicating international crimes.

Finally, it could be said that the issue of 'fragmentation' does not arise for procedural law to start with. The concern over 'fragmentation' is essentially one about overlapping, but differing, rules. For instance, if the ICTY uses the 'overall-control' test to determine whether an armed group is acting on behalf of a third state, whereas the ICJ uses the 'effective-control' test, this could lead to confusion because similar issues are determined based on differing rules: one the one hand, the ICTY found that Serbia had sufficient control over the Bosnian Serb forces to render the conflict in Bosnia international; on the other hand, the ICJ found that Serbia did not have sufficient control over the Bosnian Serb forces to be held responsible for the genocide in Srebrenica. Thus, the question of 'fragmentation' is essentially that of how to resolve perceived or real conflicts of norms.[19] In relation to the procedural law of international criminal jurisdictions, however, there exist no such conflicts. The procedural regime of the ICC applies only to the ICC, just as that of the ICTY applies only to the ICTY. Thus, if the ICTY allows 'witness proofing', whereas the ICC does

17 *Prosecutor v. Bemba*, 'Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence"', ICC-01/05-01/08-1386 (OA5/OA6), para. 43.

18 See C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', 3 *Journal of International Criminal Justice* (2003), 603 et seq.

19 See International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006), available at www.untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf (accessed on 22 June 2013).

not, this simply means that the ICTY and the ICC adopt different approaches to the subject. It does not mean that there is a conflict of norms. The fact that there is no conflict becomes even more evident when one considers that there is no risk that a suspect could either be tried before the ICC or before the ICTY – the jurisdictions of the ICC and the ICTY simply do not overlap. Thus, the basic premise for the debate on 'fragmentation' does not apply to procedural law.

There is, of course, one argument against procedural diversity: international criminal law is a relatively small discipline and, in particular, as a practice area, remains a niche market. Therefore, only a few people will practice 'international criminal procedure' – and it may be considered inefficient to have different procedural regimes applying in the various international and internationalized jurisdictions. While, for instance, criminal lawyers practising in Germany are unlikely to practise also in England or France at other times of their careers, moves of staff between the various international and internationalized jurisdictions are frequent and are to be encouraged. From that perspective, it may be useful to have a more or less unified approach to procedure, so as to allow for such moves more easily, increasing quality in what is a small practice area. However, it must be underlined that this argument – valid as it may be – is of a socio-legal nature. From a normative perspective, there is no reason to be afraid of diversity.

The above argument suggests that, rather than focusing on the risks of 'fragmentation', the debate on the procedural law applied by international criminal jurisdictions should focus on improving *internal* coherence. For instance, the procedural law of the ICC, often the result of diplomatic compromise, is not free of inconsistencies. It is important to analyse such inconsistencies closely and develop tools to overcome them.[20] This analysis should, of course, include the analysis of the procedural practices of other international criminal jurisdictions, most importantly that of the ICTY and ICTR. However, the approach should be that of comparative law – identifying and analysing the similarities and differences of the procedural regimes. The various international criminal jurisdictions should consider what they could learn from each other – just as they also seek guidance from domestic practices; however, there is no need to have a unified 'international criminal procedure', nor is such unification even desirable. Thus, rather than fearing 'fragmentation', the focus should shift to 'comparative international criminal procedure'.[21]

20 For an interesting attempt to develop such a methodology see M. Klamberg, 'Unification or Fragmentation? Structural Tendencies in International Criminal Procedure', in Van den Herik and Stahn, *supra* note 5, 633 et seq.

21 As to the fear of 'fragmentation', it could even be said that the issue will die a natural death as the ad hoc international criminal tribunals and internationalized jurisdictions wind down their activities, leaving the ICC as the only international criminal jurisdiction.