

MEMORANDUM
To the Deputy Prosecutor
International War Crimes Tribunal
Rwanda

ISSUE # 4

Hierarchy of Sources for Choice of Law at the
International Criminal Tribunal for Rwanda
And Yugoslavia

VOLUME ONE

Doris W. Gelbman
New England School of Law
January 9, 2004

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Memorandum

To: Deputy Prosecutor of the International Criminal Tribunal for Rwanda
From: Doris W. Gelbman, New England School of Law
Date: 19 December 2003

I. QUESTION PRESENTED

What is the Hierarchy of Sources for Choice of Law at the International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Tribunal Yugoslavia (“ICTY”); Does Article 38(I) of International Court of Justice (“ICJ”) apply?

II. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A choice-of-laws problem arises anytime there are actors from different states, states with substantial interests in a given event, or when the occurrence of an event allows for more than one forum to exert jurisdiction over actors. As an example, a crime committed in Burundi, by a citizen of Rwanda, under the aegis of the Rwandan government tried in Arusha would necessarily bring up conflicts as to whether the domestic criminal, procedural or evidentiary laws of Burundi, or Rwanda, or laws defined in International treaty, or the laws of the forum of Tanzania, may be applied.

To solve choice-of-laws problems one must examine the theories for resolving the conflicts as well as the sources available. However, the question is posed asking for a hierarchy, rather than a system. The definition of the word hierarchy, “the arrangement of objects, elements, or values in a graduated series,” indicates that under a hierarchical system, some laws would be given more importance than others.¹ Hierarchy then, already defines the system to resolve conflicts.

¹ *Webster’s Third New International Dictionary of the English Language, Unabridged*. (Philip Babcock Gove PhD. Ed. Merriam Webster, Publisher, Springfield MA, 1986).

This paper proposes that no such hierarchy of international law currently exists. After exploring some of the potential sources of law the ICTR may draw upon, four of the non-hierarchical theories for resolving choice-of-law problems, and applying some hypothetical facts to each to test the outcomes, this paper concludes that no single system is likely to be the definitive ‘best’ model. In the end, this writer argues that it is possible to create a new model from parts of the older systems to fit the new ‘globalized’ nature required by war crimes and human rights law.

III. LEGAL DISCUSSION

a. Examples of contexts in which choice-of-law problems arose or might arise.

In most cases where choice-of-law issues arise, determinations of nationality, territoriality and jurisdiction are used to challenge the applicable law or the competence of the court. It should be noted from the outset however that, since the ICTY and ICTR are organs of the United Nations (“UN”) and so far have always applied international law consistent with humanitarian principles (e.g., excluding death penalties for defendants), it has generally been in defendants’ best interest to accept the tribunals’ choice of law.

Having said that, in a few instances, there are cases in which the tribunal’s choice of law – international law - was challenged on the basis that no international conflict was underway. That is to say that the tribunal’s jurisdiction, their authority to try the criminals before them, did not exist. The theory being that if no international conflict could be found, then no law under which the defendants could be indicted would have applied, for example for genocide, or extermination. There can be no international war crime without an international conflict.

1. The Celebici Case - ICTY

All of these problems were raised due to issues of territoriality and nationality. In the case of *Prosecutor v. Delalic* (the “Celebici” case), the Prosecutor charged defendants with grave breaches of the Geneva Conventions of 1949 under Article 2 of the ICTY Statute and under Article 3 of the ICTY Statute for acts allegedly conducted against Bosnian Serb detainees in a prison-camp near the town of Celebici, Bosnia-Herzegovina.² Convicted at trial, the defendants appealed their convictions on two grounds. First, they challenged whether the conflict surrounding the events constituted an armed international conflict, which subjected them to prosecution under the international law underlying the ICTY statute, namely the Geneva Convention. Second, they questioned whether the victims, because they were the same nationality (Bosnian) as the defendants were even among the protected class under those Geneva Convention provisions.³

In considering the first issue, the *Celebici* appellate chamber considered two earlier decisions, *Tadic* and *Aleskovski*, which turned on similar questions of whether an international dispute was under way. The chamber followed those decisions, and found that there was an armed international conflict in the former Yugoslavia and that international, rather than Bosnian, law applied.

In the *Tadic* case, the Appeals Chamber had to decide if, in an apparently internal armed conflict, armed forces may be regarded to be under the influence of a foreign power, thereby

² International Criminal Tribunal for Yugoslavia, *Judicial Supplement ICTY, The Prosecutor v. Zejnil Delalic, Zdravko Mucic (a/k/a "Pavo"), Hazim Delic, Esad Landzo (a/k/a "Zenga") - Case No. IT-96-21A, Feb/Mar 2001* <<http://www.un.org/icty/Supplement/supp23-e/index.htm>> (last updated Feb. 20, 2001).

³ International Criminal Tribunal for Yugoslavia, *The Prosecutor v. Delalic (Celebici Case), Case No. IT-96-21-A, Appeal Judgment* <<<http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220e-1.htm>> Feb. 20, 2001

altering the status to that of international conflict.⁴ The question arose because the territories in conflict had devolved from the former Yugoslavia, a single sovereign state, into several territories with religious factions and ethnicities vying for control and attempting to establish sovereignty in each area under their command. The tribunal found that the defendants were sufficiently under the control of outside influences (the Federated Yugoslav Republic, the remaining rump state) and, although there was disagreement as to what the correct test measured the sufficiency of foreign influence to make the conflict international, the appeals chamber settled the matter by deciding that “in the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of *overall control* by the State.”⁵ The Appeals Chamber in *Tadic* further found that there was the requisite overall control over the Bosnian-Serb army so the conflict met the criterion to be considered an international conflict.⁶ In *Celebici* the Appeal Chamber simply applied *Tadic*’s “overall control” test and found accordingly that it too qualified as an international conflict and is therefore subject to international humanitarian law.⁷

The second issue, whether the victims were among the protected class under the Geneva Convention, was directly dependent for its resolution on how the court viewed the issue of nationality of both victims and perpetrators. The Appellant-defendant argued that the trial chamber’s determination that the victims were among the class protected by the Geneva Conventions was “(1) contrary to the “traditional rules of treaty interpretation ” and (2) inconsistent with the national laws of Bosnia and Herzegovina on citizenship.”⁸ It found that, “

⁴ International Criminal Tribunal for Yugoslavia, *The Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Judgement, <<http://www.un.org/icty/tadic/appeal/judgement/index.htm>> July 15, 1999

⁵ *Id.*

⁶ *Id.*

⁷ *The Prosecutor v. Delalic*, supra.

⁸ *Id.*

the traditional rules of treaty interpretation’ should be applied to interpret strictly the nationality requirement set out in Article 4 of Geneva Convention IV”. The word “national” should therefore be interpreted according to its natural and ordinary meaning” [footnotes omitted].⁹ The prosecutor countered that in an earlier appeal heard by the same tribunal, the appeal chamber had found that “the legal bond of nationality was not regarded as crucial ... i.e., that there was no intention at the time to determine that nationality was the sole criteria” and that “ adopting the appellants’ position would result in the removal of protections from the Geneva Conventions contrary to their very object and purpose.” [footnote omitted].¹⁰ To determine the proper interpretation of “nationality” under the Geneva convention, all parties –appellant, appellee and the Appeals Chamber all agreed that the proper measure was Article 31 of the Vienna Convention on the Law of Treaties of 1969, entitled *Interpretation of Treaties*.¹¹ The Appeals Chamber, guided by Article 31, found that the victims’ “nationality” should be interpreted in light of “the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds.” In other words, in this instance, international law rather than domestic Bosnian law would determine the nationality of the defendants and victims.¹²

In all of these instances, the choice of law is decided based upon the facts of each case and rules distilled from earlier, similarly factual situations, rather than from the application of a particular choice of law theory. Time and other resources expended in making the various written and oral arguments, researching each of the potentially applicable laws as well as the

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *The Prosecutor v. Delalic*, supra, *The Prosecutor v. Dusko Tadic*, supra and International Criminal Tribunal for Yugoslavia, *The Prosecutor v. Aleskovoski*, IT-95-14/1, <<http://www.un.org/icty/alekovski/trialc/judgement/index.htm>> 25 June 1999.

deliberations and time required to formulate opinions may have been unnecessarily wasted. If a standard theory of choice-of-law could be pre-selected, and be applied like a template, the tribunal could save significant time and resources in resolving such issues

2. The Ruggiu Case - ICTR

In another example, the conflicts were only potential for they were never raised, probably because international law was more favorable to the defendant than alternative rule of law. Hypothetical applications of the models suggests how different choice of law rules would operate.

In *Prosecutor v. Ruggiu*, the nationality of the defendant could have been a potential issue in addition to as the application of international over domestic law. In this case, the defendant, Georges Ruggiu was a Belgian national, arrested in Mombasa, Kenya, and tried under international law at the ICTR in Arusha, Tanzania for crimes committed in Rwanda.¹³ Ruggiu was a broadcaster at the notorious RTLM radio station, and used the airwaves to incite and encourage the massacre of Tutsi citizens of Rwanda, as well as attacks on Belgian forces. Ruggiu also admitted to making statements against Belgian influence in Rwanda.¹⁴

Ruggiu ultimately pled guilty to one count, direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute; and one count of Crimes against Humanity (Persecution), a crime punishable under Article 3(h) of the Statute.¹⁵ In its discussion of the seriousness of the crime under Count 1 (incitement), the trial chamber refers to the Rwandan Penal Code, saying,

[T]hat direct and public incitement or provocation is a form of complicity. In fact, Article 91 subparagraph 4 provides that an accomplice shall mean “A person or

¹³ International Criminal Tribunal for Rwanda, *The Prosecutor v. Ruggiu, ICTR-97-32-1, Trial Chamber Judgment* <<http://www.ictr.org/ENGLISH/cases/Ruggiu/judgement/rug010600.htm>> June 1, 2000.

¹⁴ *Id.*

¹⁵ *Id.*

persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such action, without prejudice regarding the penalties to be applicable to those who incite others to commit offences, even where such incitement fails to produce results.”¹⁶

No further mention is made of the Rwandan law that apparently influenced the court as to the seriousness of the crime and Ruggiu was apparently never tried by the Rwandan national courts under the Rwandan penal code. Could Ruggiu, in the absence of an incitement law in the international framework, have been prosecuted on incitement charges under the then existing Rwandan domestic law against incitement? A hypothetical application of these facts to different choice-of-law theories may yield different results.

Belgium, which might have sought jurisdiction because Ruggiu was a Belgian national and some of his broadcasts incited violence against Belgians, did not prosecute him in Belgium, Rwanda or elsewhere under international law or Belgian law. As a Belgian national who committed crimes against Belgians, there would have been two bases of national interest for Belgium.¹⁷ A nation’s interest in adjudication becomes a factor because when determining appropriate choice-of-laws, some theories examine the national interests of parties claiming jurisdiction or standing.

b. The Sources of Applicable Law

Conflicts arise because more than one source of law is available to a court due to issues of nationality, territoriality or locus of events. The ICTR has any number of sources law available to it.

¹⁶ *Id.*

¹⁷ *Id.*

1. The ICTY offers guidance as to ICTR's appropriate choice of law.

The statute of the International Criminal Tribunal of Yugoslavia (ICTY), on which the statute establishing the ICTR is patterned, offers an instructive model for choice of law problems. The ICTY statute creates both an administrative structure for the tribunal as well as substantive law.¹⁸ Some authorities question the authority of the UN Security Council's authorization to "legislate" substantive law in this manner.

The power to create a forum with its own administrative structure is granted in Article VII of the UN Charter which provides that the UN may create such subsidiary organizations as may be found necessary (in addition to the International Court of Justice).¹⁹ As a subsidiary organ of the UN, the ICTY is therefore subject to the UN Charter first and foremost. As to the substantive provisions of the ICTY statute, the power for the UN Security Council ("UNSC") to "legislate" international criminal law is questionable since the ICJ in article 38 of *its* statute already defines the sources of international law.²⁰ Accordingly, the substantive portions of the ICTY's statute may be considered a restatement of already existing conventional and customary international criminal law, simply incorporating all of the relevant sources of law applicable to the Tribunal.²¹ Significantly, the statute of the ICTY specifically excludes some provisions and slightly alters others.²²

The Security Council adopted the ICTY statute in resolution 827 (1993) as reported by the Secretary General, which also contains the Secretary-General's commentary made upon the

¹⁸ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, (Transnational Publishers, Inc. 1996), 251.

¹⁹ UN Charter, Article VII, reprinted in *International Law, Selected Documents, 2003-2004 Edition*, (Barry E. Carter, Aspen Publishers, 2003), 4 and Bassiouni, *supra* at 251.

²⁰ Bassiouni, *supra* at 251.

²¹ *Id.* at 253-254.

²² *Id.* at 254-56

statute.²³ The UNSC resolution, the statute, and the commentary that accompanies the ICTY statute have been adopted as the authoritative source of law for the ICTY.²⁴ In 1992, the Security Council also established a “Commission of Experts” (Resolutions 780 (1992)), and their reports on the ICTY statute are also considered authoritative by inference.²⁵ Thus the interim and final reports of that body and their annexes have been incorporated into the body of law considered authoritative for the ICTY.²⁶

2. The ICTR Should Generally Apply Customary International Humanitarian and Criminal Law

International law is the law designated by the ICTR’s statute (“the Statute”) as the primary source of law for use by the ICTR. Article 1 of the Statute limits the court’s competence to “serious violations of *international humanitarian law* [emphasis added].²⁷ Domestic national or local law references, by contrast, are conspicuously absent from the Statute. No reference to national or local law appears in the Statute’s articles dealing either with competence or jurisdiction (personal, territorial, temporal or concurrent).²⁸ One reason for this may be that the application of customary international law favors uniform rules and standards rather than potentially diverse national laws.²⁹ Moreover, while Rwanda was a party before 1996 to conventions that provide a prosecutorial framework for crimes such as genocide and torture, it had not provided legislation to enable national authorities to pursue individuals for war crimes.³⁰

²³ *Id.* at 257.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ International Criminal Tribunal for Rwanda, *Statute Of The International Criminal Tribunal For Rwanda* <<http://www.ictt.org/ENGLISH/basicdocs/statute.html>> Oct. 28, 2003.

²⁸ *Id.*

²⁹ Virginia Morris & Michael P. Sharf, *International Criminal Tribunal for Rwanda*, Volume 1, (Transnational Publishers, Inc.1998) at 120.

³⁰ *Id.* at 119

Rwanda could not prosecute the 1994 crimes under such laws after the fact without risking challenges based on charges of creating “ex post facto” laws. Prosecution under existing customary international law avoids this potential challenge.³¹

What then is customary international law? According to experts, the International Court of Justice statute, Article 38 is – “regarded as an authoritative statement on the sources of international law.”³² Article 38 reads in pertinent part:

- The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. International custom, as evidence of a general practice accepted as law;
 - c. The general principles of law recognized by civilized nations;
 - d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.³³

Article 38 itself provides no hierarchy of these sources.³⁴ It does not define what acceptable “custom” might be, or if it has greater power than treaties or conventions. It does not indicate what “general principles of law” are nor what weight they should have relative to the other sources of authority. In some cases, judges have construed “general principles” to mean “principles from developed legal systems,” in deciding, for example, to bar actions after too much time has passed (statute of limitations principles), or that a defendant’s own words or acts prevent him from claiming something different in his

³¹ *Id.* at 122

³² Valerie Epps, *International Law*, (Caroline Academic Press, 2001) at 21.

³³ International Court of Justice, *Statute of the International Court of Justice, Article 38*. <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> viewed Oct. 3, 2003.

³⁴ *Id.*

pleadings or testimony (estoppel).³⁵ The statute, however, sets forth no definitive guide to how such principles apply.

A hierarchy of international law sources as defined in Article 38 might be inferred by interpretation. The means of interpreting treaties is defined in Vienna Convention on the Law of Treaties, Section 3 Article 31, *General Rule of Interpretation*, simply states in its first provision:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³⁶

Although Article 38 does not specify the relative importance of any of the sources it lists. A structural argument, however, based on that those items listed first might be made. That is, those items listed first, by virtue of their position, should be accorded greater importance. Such an argument was put forth in the landmark American case *Marbury v. Madison* that, among other things, established the authority of the Supreme Court.³⁷ In *Marbury*, Chief Justice John Marshall interpreted a provision of the US Constitution listing sources of law such that the US Constitution has precedence over other sources merely by virtue of its being listed first. Marshall writes:

[T]hat in declaring what shall be the supreme law of the land, the ***constitution itself is first mentioned***; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, ***have that rank***. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions,

³⁵ Epps, *supra*, at 21

³⁶ *Vienna Convention on the Law of Treaties* § 3, Art. 31, *General Rule of Interpretation* reprinted in *International Law: Selected Documents, 2003-2004 Ed.* (Barry E. Carter, Philip R. Trimble & A. Curtis, Eds., Aspen Publishing, 2003) 58.

³⁷ *Marbury v. Madison* 5 U.S. 137 (U.S. Dist. Col., 1803)

that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.³⁸ [emphasis added]

Similarly, Article 38 could be interpreted in such a way that “international conventions have precedence over “international custom” and so on.

3. National or Local Laws of Rwanda or Interested Parties May Also Be Applied by the ICTR.

Local laws may be applied by the ICTR as well. One of the provisions of Article 38 of the ICJ statute defining international law reads: “the general principles of law recognized by civilized nations,” which may be interpreted to include national laws of Rwanda and surrounding countries.³⁹ Much of the local laws of the region are taken directly from legal systems of former colonial rulers. Thus, each of these countries’ local laws would be considered “general principles of law recognized by civilized nations.” Under this interpretation, Rwandan as well as the neighboring states of Burundi, Tanzania, the Democratic Republic of Congo and Uganda could apply. Thus the various systems incorporated would look like this:

Table-1⁴⁰

<i>Country</i>	<i>General Principles of Law On Which System is Based</i>
Rwanda & Burundi	German and Belgian civil law systems and customary law
Democratic Rep. of Congo	Belgian civil law system and tribal law
Uganda	English common law and customary law
Tanzania	English common law

³⁸ *Id at 180*

³⁹ ICJ Statute, *supra*.

⁴⁰ Central Intelligence Agency, *CIA World Factbook*. webpages for Rwanda, Burundi, Dem. Rep. of Cong, Uganda and Tanzania, <<http://www.cia.gov/cia/publications/factbook/>> Jan. 1 2003, updated weekly.

a. Jurisdiction and Enforcement of Judgments.

It is almost impossible to evaluate choice-of-law problems without simultaneously considering issues regarding how the court exercises jurisdiction and how judgments are enforced.⁴¹ Jurisdiction may be derived by several principles. First, jurisdiction may arise under the Territoriality Principle. Exclusive jurisdiction under this principle may exist when an act occurs within a jurisdiction defined by a territory with distinct boundaries, a known population and a government which can act independently.⁴² Jurisdiction for many of the crimes that might be tried by the ICTR thus might also come under the jurisdiction of the the national courts of Rwanda or the Garacaca Courts. Second, jurisdiction may arise under the Nationality Principle, whereby a state's laws may be exerted extraterritorially to its own citizens abroad. A citizen of country A, for example, who commits a crime in country B, may simultaneously be subject to prosecution under local (country B) laws and in local courts(country B) under the laws of his place of citizenship.⁴³ Third, jurisdiction exists under the Effects principle, whereby a state may exert extraterritorial jurisdiction if the conduct of actors has an effect on it, its citizens or its policies. In the famous "Lotus" case, a French Captain of a French vessel was criminally prosecuted after a wreck on the high seas with a Turkish vessel under Turkish criminal law. The International Court accepted as established "that the courts of many countries ... interpret criminal law in the sense that offences the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the

⁴¹ Stanley E. Cox, *Substantive, Multilateral and Unilateral Choice of Law Approaches*, 37 *Williamette L. Rev.* 171 (Winter 2001).

⁴² *American Banana v United Fruit*, 213 US 347 and Mark W. Janis, *An Introduction to International Law*, 4th Ed. (Aspen Publishing, 2003) at 318

⁴³ Mark W. Janis, *An Introduction to International Law*, 4th Ed. (Aspen Publishing, 2003) at 318-322.

national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.”⁴⁴

Finally, there is the principle of Extra-national and/or Extra-territorial jurisdiction in international law – or “universal jurisdiction.” This situation occurs if the perpetrator is found in the prosecuting state’s territory even though the individual is a national of another state and even if the crime was committed on another state’s territory.⁴⁵ In such cases crimes prosecuted under international law are unique in that jurisdiction is conferred on all States to prosecute and punish all perpetrators. As an example, using the principle of universal jurisdiction, Israel tried Adolph Eichmann in 1961 and later John Demjanjuk in 1988 for crimes against humanity committed during World War II.⁴⁶ These crimes occurred years before Israel even existed as a nation much less had courts or a functioning justice system capable of prosecuting such crimes.⁴⁷ In these cases, the crimes took place in Europe, not Israel and neither the defendants nor the victims were citizens of Israel.

The ICTR’s jurisdiction is defined in the ICTR statute in Articles 5 (Personal Jurisdiction), Article 7 (Territorial and Temporal jurisdiction) and Article 8 (Concurrent Jurisdiction). Articles 8 and 9 (Non Bis Idem) also define the relationship between the National Courts and the ICTR.

The political authority from which jurisdiction is derived is the UN, as the Statute was created by resolution of the UNSC. Because the ICTR statute emanates from the UNSC

⁴⁴ *Lotus*, P.C.I.J. ser. A., no. 10. (1927) cited in *ICI Ltd v Commission of the European Communities* (C48/69) [1972] C.M.L.R. 557, 604

⁴⁵ Virginia Morris & Michael P. Sharf, *International Criminal Tribunal for Rwanda*, Volume 1, (Transnational Publishers, Inc. 1998) 305-06.

⁴⁶ Michael P. Scharf, *The ICC's Jurisdiction Over The Nationals Of Non-Party States: A Critique of the U.S. Position*, Law & Contemporary Problems. (Winter 2001), 67 at 82.

⁴⁷ *Id.*

resolution and is endorsed by the General Assembly (“GA”), it is binding on all states party to the Charter.⁴⁸ Furthermore, the Rwandan government granted jurisdiction to the ICTR by requesting the resolution that created the ICTR.⁴⁹

The creation of the ICTR statute by Security Council resolution is particularly significant with regard to jurisdictional matters for reasons that extend beyond the Rwandan borders. Had the tribunal been created by means of reciprocal treaty, it would have required ratification by all parties involved, including Rwanda and the surrounding countries of Burundi, Congo, Tanzania, Zaire, and Uganda, which would have been a long and complicated undertaking.⁵⁰ Lacking ratification by these parties, the tribunal would lack the jurisdiction required to proceed.⁵¹ By creating the tribunal through resolution in the UNSC, the Statute becomes binding for all States.⁵²

As to enforcement of judgments, if no agreement is provided through bi- or multi- lateral treaty, there is also no means of enforcing a judgment from one country to another. Thus if jurisdiction were granted to a domestic court only, or if the international tribunal was achieved through treaty rather than UNSC resolution, a judgment of the tribunal would be unenforceable outside the jurisdiction issuing it. Therefore, the choice-of-law applied should be one that binds

⁴⁸ United Nations. *United Nations Security Council Resolution 955*. Adopted by Security Council at Meeting 3453. <<http://www.un.org/Docs/scres/1994/scres94.htm>> Nov. 11, 1994; ICTR Statute *supra*; and Virginia Morris & Michael P. Sharf, *International Criminal Tribunal for Rwanda, Volume 1*, (Transnational Publishers, Inc.1998) at 100.

⁴⁹ UNSC Resolution 955, *supra*.

⁵⁰ Virginia Morris & Michael P. Sharf, *International Criminal Tribunal for Rwanda, Volume 1*, (Transnational Publishers, Inc.1998) at, 99-100.

⁵¹ *Id* at 100.

⁵² *Id*.

all countries with an interest in matters being heard at the tribunal, thereby giving them added incentive to enforce the judgments of the tribunal.⁵³

b. Four Choice of Law Theories Applicable to ICTR

Four basic choice of law models could apply in the ICTR. These are:

i. Lex Fori (Unilateral Approach)

In this model, different laws that may be applicable are considered serially. Since more than one law may be considered and none are necessarily mutually exclusive, a set of rules must consistently be applied concerning which law takes precedence. Under this model, that “forum preference” is established as the dispositive factor and the laws of the forum are uniformly preferred in such cases.⁵⁴ This is essentially the approach taken in the *Celebici* cases. Since the forum was an international tribunal, the court, in examining the facts of the case(s) determined that the appropriate law to apply was, not surprisingly, its own.

The decision in the *Celebici* line of cases could easily have been otherwise, had the court decided that no international conflict had taken place. The tribunal would then have had to decide it could apply different (i.e. domestic) laws. The likely outcome would have been “no,” since it is unlikely that any of the former Yugoslavian territories had statutes that would have provided, for example, for prosecution for genocide. The defendants would have had to be acquitted or tried under local laws (such as murder or rape) in the local forum. This result would have undermined much of the purpose for an international tribunal. Local courts, juries, witnesses and judges, faced with intimidation, bias and other problems might have threatened the fairness of the process.

⁵³ Cox, *supra*.

⁵⁴ Lea Brilmayer, *Conflict of Laws* (Little Brown & Co. 1995) at, 17-18 and Cox, *supra*.

The *Ruggiu* case was also tried on a forum law basis, where the forum was the ICTR and the law was international humanitarian/war crimes law. Under lex forum, had Ruggiu been tried in a Rwandan court under the already existing Rwandan penal code laws of incitement, he would also have been subject to the sentencing under Rwandan laws which might have allowed for a death penalty. Because Ruggiu a Belgian national and committed crimes against Belgians, he might have been tried under Belgian law that might have achieved an entirely different result presuming appropriate Belgian laws existed to indict him. Had Belgium decided to extradite Ruggiu before the ICTR or Rwanda managed to claim jurisdiction, and it turned out the **no** appropriate forum law applied to his crimes, Ruggiu would likely be a free man today.

Ruggiu points out one of the weaknesses of forum law, the possibility of “forum shopping” for the law that best suits the parties. In this particular case, presumably the use of international law best suited both parties. But had it been in Ruggiu’s interest to select a Belgian forum rather than ICTR (or Rwandan national courts) he might have surrendered to them first and avoided prosecution altogether or at least received a lesser sentence as a result of different laws. In the worst case, if the forum selected has no applicable law, the case must be dismissed.

Another aspect worth considering is whose policy interests are best served by the forum selected. In *Ruggiu*, because it was not challenged, all parties’ interests in capturing, prosecuting and sentencing Ruggiu were served. But if another forum had been selected, such as Belgium, and had Ruggiu’s case been dismissed or he were acquitted, Belgian interests have taken precedence over those of Rwanda or the international community. Moreover, if only one jurisdiction's interests are served, other states lack incentive to enforce a judgment. Under such proceedings, the Rwandans might simply have refused to serve him up to the Belgians if it was not in their interest to extradite him back to Belgium for trial.

ii. The Classical Model

Under the “Classical Model” or the “Multi-lateral system,” classifications and sub-categories of each type of substantive law (e.g., Criminal law, Torts, Contracts) are established. Then sets of “connecting factors” are determined for each category or subcategory. Under the classical system, devised by Savigny, there were four connecting factors: Domicile, Situs (location as in permanent site of property), Place of Transaction and Place of Litigation.⁵⁵ A series of rules is then drawn up for each category of a law, matching a “connecting factor” to the legal category. For example, in torts, a personal injury case would have a connecting factor of “place of injury,” and the rule assigned would designate that the law of location of the accident would be the choice of law applied in a personal injury case.⁵⁶

In such a system, personal jurisdiction is limited to forums that have a legitimate interest in the underlying controversy, (either because of policy or because of the interest of its citizens as victims or suspects). Alternatively, when competing interests of the parties must be balanced, one may use a forum that is completely neutral.⁵⁷

Under such a system, the examples under application might be classified in a broad category of “criminal” cases and then sub-categorized into war crimes, crimes against humanity or other subcategories (such as incitement or inchoate crimes such as conspiracy or attempt). The connecting factors might very much resemble those used for a tort case, e.g. place of injury, which here would be massacre, torture, attacks on civilian populations etc. Jurisdiction could be asserted by any number of forums that have a legitimate interest – on behalf of international or national policy, nation or territory where the crimes occurred, nationality of victims, nationality of defendants, or a neutral forum such as an international criminal court.

⁵⁵ Friedrich K Juenger, *Choice of Law & Multistate Justice* (Martinus Nijhoff Publishers, 1993), 47-76

⁵⁶ *Id* at 41-42

⁵⁷ Cox, *supra*.

Were the *Celebici* case to be tried under such a system, the available forums might be: Yugoslavia, Bosnia-Herzegovina, Serbia (all of which have a “national” interest), an International Tribunal, or a neutral third-party country balancing all interests. Since the connecting factor chosen for this example is the locus of events, the law applied would be Bosnian. This would have had a very significant impact on the outcome since under the Bosnian law, both defendants and victims were Bosnian there would have been no international conflict and the Geneva conventions or customary international law (Nuremberg for example) could not have been invoked. Since Bosnian law at that time held no provisions for crimes such as genocide or extermination, there would not have been any indictable war crimes. Defendants might, however, have faced prosecution under Bosnian laws against murder, rape, assault, or incitement.

The outcome under this system is highly dependent on the “connecting factors” chosen regardless of the forum. The choice-of-law is always going to be determined for each type of law and its associated formula for selecting the law rather than by any unique characteristic of the forum.

If the rule designating the “connecting factor” in war crimes cases were changed to “domicile” of victim in many circumstances a different outcome might result (The outcome in the *Celebici* case would not change since both victims and defendants were Bosnian domiciliaries). In the *Ruggiu* case however, different outcomes arise if the connecting factor is the locus of the crime. On one hand, if the connecting factor were the locus of crime, then Rwandan incitement laws would have applied rather than international law. If, on the other hand, the citizenship of defendant (or perhaps that of the victims, since some victims were Belgian) were the “connecting factor,” then *Belgian* law could be applied.

iii. The Substantive Model

Under the substantive model sovereignty is deemed irrelevant with respect to choice of law since a court in any location applies the “best law.” Since sovereignty is not a factor, there is no need to assert personal jurisdiction.⁵⁸ In other models, jurisdiction rests on the principle that a sovereign must have some authority in order to bring a party into its courts and try that party under that sovereign’s laws. Substantive choice theory could realistically only be applied in particularly multi-national cases since no sovereign interest or power is asserted⁵⁹ In a less strict model, the court is at liberty to choose among the laws of any of the competing interests – domestic or international – to reach the best result under the selected law or set of laws.⁶⁰

In some respects, the idea of the irrelevancy of sovereignty squares with the manner in which the UN-based tribunals and international courts are established and now operate. The UN itself is not a “sovereign” that laws in potential conflict with sub-national sovereign entities comprising a larger body. It is not comparable to the US Federal government, for example, which is a sovereign entity that is in potential conflict with the sovereign states that comprise it. Furthermore, Article 38 of ICJ would support this approach given its broad definitions of what law may be applied. It provides a mechanism for the court to apply whatever law would achieve the best result.

The great difficulty with this model is who, and under what guidelines, determines the “best law”? From a practical standpoint, this system only works where parties agree upon the choice of law is the best law. In some respects, that is the case with the ICTY and ICTR tribunals. In fact, one may assume that the reason that conflicts which might otherwise have

⁵⁸ Cox, *supra* at 192.

⁵⁹ Id. at 173-74

⁶⁰ Id.

arisen in *Ruggiu* did not arise simply because the prosecutor and defendant agreed that international laws were the “best law” under which to prosecute Mr. Ruggiu.

The defendants in the *Celebici* case would probably had a more persuasive argument under a substantive model, which would have allowed for the choice of Bosnian law to decide the nationality of the parties. Had that been the case, they would then have been shielded from prosecution even if the “best” law regarding war crimes was the Geneva Conventions, since this law would not have been applicable since there would have been no victim of another nationality (as determined by Bosnian law).

The greatest weakness of this model – in a strict or more lenient form – is the lack of universality as to what constitutes “best law.” Unless each party to an international dispute (or interested party) is truly willing to cede all sovereignty to the forum to allow it to decide *each* issue according to the best law of what may be many choices, this model would be a procedural nightmare. Moreover, U.S. and most other nations likely would never accede to the “irrelevance of sovereignty.”

iv. The Depeçage Model

US Federal and State conflicts are settled under a system sometimes referred to as “Depeçage.” That is, the law of one jurisdiction is applied to decide some aspects, and laws of another to decide others. Much as the problems of multiple sovereigns (organizationally and territorially), diverse citizenship, and varied sources of law create conflicts in the international sphere, so too has the United States wrestled with such issues. How a nation made up of sovereign states, each with separate laws, and federal laws that, among other things, define citizenship, resolve such conflicts provides a useful comparison to the present problems.

The exertion of jurisdiction of a court and the choice-of-law it applies are closely linked in the US. In the US, jurisdiction concerns the power of a court to hear a case, while the choice-of-law determines the applicable law – that of one state over another or federal law - which any court may apply.⁶¹ These dual principles of jurisdiction and choice-of-law both rely in part on the US Constitution for resolution. The exercise of jurisdiction relies on the guarantee of Due Process for all citizens in the Bill of Rights, while the choice-of-law rests on the Full Faith and Credit Clause that requires all states to respect the laws and judgments of other States.⁶² In the US, modern jurisdiction principles are set forth in the case *International Shoe*, that stands for the premise that a state must have “minimum contacts” consistent with “fair play and justice” with a party before it may exert jurisdiction.⁶³ In subsequent cases, the US Supreme Court found that although a particular state may have an interest in a case and thus allowed them to apply forum law, it did not necessarily provide them with sufficient grounds for exercising jurisdiction over the defendant.⁶⁴ More recently however, the power of a state court to exert jurisdiction and apply its laws was strengthened. In *Hanson v. Denckla* the court held that:

The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant **purposefully avails itself** of the privilege of conducting activities within the forum State, thus **invoking the benefits and protections of its laws**”. [emphasis added].⁶⁵

⁶¹ Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. Colo. L. Rev. 9, 34-35 (1988) reprinted in *A Conflict-of-Laws Anthology*, p 374, Gene R. Shreve (Anderson Publishing Co., 1997).

⁶² U.S. Constitution Article IV, §1 and Fifth Amendment; Hay, *supra*.

⁶³ *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (U.S. 1945).

⁶⁴ *Hanson v. Denckla* 357 US 235 (1958); *Shaffer v. Heitner*, 433 US 186 (1977) and *Kulko v. Superior Court* 436 US 84 (1978).

⁶⁵ *Hanson v. Denckla* 357 U.S. 235 at 253, 78 S.Ct. 1228 at 1240 (U.S. 1958)

Thus, parties take certain actions within that jurisdiction which invoke the protections and privileges of that state, by virtue of residing within the borders, or doing business with a state. These can include accepting employment or acquiring a license of any sort. These actions automatically grant the state sovereignty over a defendant, by making it both beneficiary of, as well as subject to, state's jurisdiction and laws. This is a notion that may be applied to international choice-of-law problems.

As often happens in the U.S., actors reside in different states, or events occur in more than one jurisdiction and therefore more than one state's law may apply. In the US, cases between of different states may be brought in federal, rather than state, courts. This resolves jurisdiction, but not choice of law.

The Rules of Decision Act, a federal law, offers an answer for the choice of law. The Rules of Decision Act was originally adopted as a provision of the Judiciary Act of 1789, but is now a part of the United State Code.⁶⁶ The Rules of Decision Act provides that "*the laws of the several states*, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply."⁶⁷ Moreover, when a conflict between federal common law and state common law arose in *Erie Railroad v. Tompkins*, the Court held that when deciding diversity cases, federal courts apply state law.⁶⁸ *Erie* had a significant effect on the federal/state judicial dynamic. Essentially, *Erie* requires that unless there is an applicable federal law (including a provision in the Constitution, statute, or treaty) state substantive law applies. The Rules of Decision Act and *Erie* resolved the questions of substantive law. Neither addressed conflicts that concerning choice of procedure.

⁶⁶ 28 U.S.C. Section 1652.

⁶⁷ *Id.*

⁶⁸ *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

To resolve this issue, the U.S. Congress enacted the Rules of Enabling Act, which allows the federal government to legislate laws that may pre-empt state laws. Such laws are enacted to address areas where uniformity across all fifty states is desirable. Section 2072 of the Rules Enabling Act, entitled, "Rules Of Procedure And Evidence; Power To Prescribe" provides in pertinent part: "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the U.S. district courts (including proceedings before magistrates thereof) and courts of appeals."⁶⁹

One such situation is in the area of the federal court's procedures and evidentiary law. Under the Rules Enabling Act, the Supreme Court recommends and Congress may adopt rules governing court procedures. In this way, the Federal Rules of Civil Procedure (FRCP), Federal Rules of Criminal Procedure (FRCRP) and the Federal Rules of Evidence (FRE), and Federal Rules of Appellate Procedure (FRAP) were promulgated for application in all federal courts regardless of the district, state or circuit (appellate level) in which it hears cases.⁷⁰ In this way, a federal court, hearing a dispute between citizens of two different states may apply a single state's substantive law – for example in a contract dispute – while at the same time using a standard set of procedures and rules of evidence nationwide.

Hence, in the U.S. model, the choice of law in federal cases may be determined by state substantive law based upon principles of jurisdiction, even when applied by the federal court system. At the same time, the federal courts apply uniform federal procedural and evidentiary laws.

With some slight variations, this is a valid model for international cases. The UN for example could propose and pass a resolution analogous to some provisions of the US Bill of Rights to protect the human rights of all persons, as members of a universal citizenry. They might also establish universal rules of procedure and evidence to be applied in all UN-based courts. In the

⁶⁹ 28 U.S.C. Section 2072 (a)

⁷⁰ 28 U.S.C. Section 1652

US model, when a federal issue is in controversy, federal law is applied. Likewise, when international issues are in question, international law would be applied. But when citizens of different countries bring a dispute that is NOT covered by accepted international law (anything in Article 38 for example), then the laws of the nation-states of interested parties should be applied based on principles of jurisdiction.

Testing the examples above in application of this model, it should be said that it would be most appropriate only where the rule of law has broken down completely and the nations in question are still attempting to rebuild the national systems of justice. Otherwise there would be no point to bringing such cases in an international forum at all. Working in this way ensures the rule of law and safeguards the basic human rights of all parties, while simultaneously acknowledging the sovereignty and cultural norms of the local community. It should also be pointed out that in the U.S. model, some cases may be brought in either the federal or state courts (e.g., civil rights violations), while others must be brought in one or the other. In the international model, both international and local cases would be brought in the international courts, and only the choice of substantive law would differ.

In the *Celebici* case, the nature of the crime to be charged would have determined whether the defendants were charged under international laws or local criminal law, rather than the convoluted process of having to decide whether or not an international conflict was underway in order to apply international law. Simply charging an international criminal offence – genocide in this case – in an international forum would have invoked international law. To compare this to the US model, one might invoke federal law by exerting federal jurisdiction and charging the defendant with federal crimes of kidnapping rather than armed robbery (which would be prosecuted under state or local laws in the U.S.).

As an alternative, in *Celebici*, once the rule of local law had broken down, the prosecutor might have chosen not to charge an international war crime but instead applied Bosnian criminal statutes in the ICTY. Alternatively, had the court ruled that the Geneva Conventions did not apply to victim-citizens of the same country as the defendant; the international prosecutor may have indicted a Bosnian or Yugoslavian criminal charge in the ICTY. In this scenario, local law would be used to resolve substantive criminal issues, but the basic human rights of all parties would be protected by the “universal bill of rights,” as well as uniform rules of evidence and procedure to ensure fairness to both sides and consistency in sentencing.

The *Ruggiu* hypothetical under this model is also instructive. Had no appropriate incitement law been available under international (or Belgian) law, the ICTR may have brought him to trial under the Rwandan criminal incitement laws then in existence. At the same time, Ruggiu would have been subject to the ICTR’s rules and protections for procedure, evidence and sentencing. In particular, he would have been protected by international standards forbidding execution. What could not have happened in this scenario is the dismissal of Ruggiu’s case simply because international law lacked a provision for incitement under which he may have been prosecuted by the ICTR.

IV. CONCLUSIONS

It should be reiterated that it appears that to date, very few actual choice-of-law conflicts have arisen in either the ICTY or the ICTR. In almost all cases, no defendant (or other party, witness, or victim) has objected to the law applied. In the *Celebici* case the court’s determination to use international law over Bosnian law was established on the facts and precedent rather a particular theory of choice-of-law. There is also no currently

defined hierarchy of International law unless one is found in the order of Article 38's provisions.

The ICTR statute explicitly calls for prosecution of international humanitarian law.⁷¹ By implication this would mean the ICTR is to apply international law. However, if Article 38 of the ICJ statute defining the sources of international law is accepted as definitive, then it may also be read to include national (domestic) laws that are subsumed by categories Article 38(1)(c) concerning the "general principles of law recognized by civilized nations."⁷² Such a reading significantly broadens the pool of available law to include the local laws of the countries involved, as well as the law of their former colonial rulers on which those laws are based. Expanding available law also increases the potential for conflicts concerning choice of law.

Of the four principal models choice of law models examined, Lex Forum or unilateral, Classic or multilateral, Substantive and Depaçage and each has weaknesses and strengths. Of the four, the Classical system's with its various formulae for different categories and subcategories connected by different "factors" may provide the most definitive structure for establishing a system that would function among nations of diverse cultures and social mores. As a formula, rather than a set of considerations to be applied in each case, the rules need not be analyzed or changed on a case-by-case basis. The ICTR need only identify the category/sub-category of law, the connecting factor, and the facts of the case to determine a choice of law.

It is also possible to envision a model derived from parts of more than one system to establish a new model. Incorporating parts of the American choice of law model for a

⁷¹ Statute of the ICTR, *supra*.

⁷² Statute of the ICJ, *supra*.

federal state, together with the Substantive model's "best law" theory could produce consistent results that protect the civil and human rights of all parties and allows for the incorporation of principles of jurisdiction and national sovereignty. Consistency of results is ensured by uniform procedural and evidentiary results. By allowing the application of both customary substantive international law (if the dispute is an international one) or domestic substantive laws of one state (determined by the principle of personal jurisdiction) the "best result" is sought by reaching judgments that meet the policy goals of all interested parties. By achieving such results, the universal enforcement of judgments is much more likely, since each state with an interest in the outcome will be inclined to enforce a judgment where its policy goals have been met.

By creating a broad, flexible structure of choice-of-law rather, the ICTR would ensure a humane, morally and internationally acceptable "best law" under which a defendant may be brought to justice. At same time, such a system would guarantee that relevant decisions of procedure, evidence, and judgments remain uniform and fair to all parties.

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