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Introduction

It is a great honour and a pleasure to participate in the Annual Symposium of the NYU Journal of International Law and Politics. Having recently taken up my duties at the United Nations, I am very happy to have this opportunity to acquaint myself with NYU and to benefit from its proud tradition of international law scholarship.

In speaking today, I will draw upon my experience as an Irish, European and international lawyer. I hope that this will offer some useful insights in our discussion of the dynamic relations between domestic and international courts and tribunals.

The proliferation of international courts and tribunals

This issue is, of course, part of the broader discourse on the nature of international law. We live in a time when lawyers speak of a proliferation of international courts and tribunals, a natural offshoot of the increase in transnational forms of governance and co-operation between States. As relations between States are placed on a formal footing in various spheres, such as trade and the environment, they are accompanied by specialised international methods of dispute settlement. This plays an important role in legitimising transnational structures and maintaining the rule of law in

international relations. Moreover, individuals have greater interaction with the international legal order, both as rights-bearers under international humanitarian law and international human rights law, and as bearing responsibility under international criminal law. This also contributes to the rule of law, ensuring that State sovereignty cannot place individuals entirely beyond the reach of international law in appropriate circumstances.

We must bear in mind that this expansion of the international judicial architecture is of course accompanied by an ever increasing scope and density of international norms.[1] This raises important questions for the international lawyer, for example whether the risks of fragmentation and the spectre of "self-contained regimes" in international law are real or imaginary.

These questions are also of concern to domestic judges and lawyers. To quote Justice Sandra Day O'Connor, "understanding international law is no longer just a legal specialty, but a duty we all share."[2] Domestic legal systems may feel under stress, as the influence of international law upon a State's internal rules and policies continues to grow. There may be a fear that judicial competence is creeping upward, fuelled by a traditional conception of domestic and international courts standing in a hierarchical relationship. Equally, the reliance of international law on municipal courts for its implementation may suffer greatly if the international legal system *appears* fragmented to those who enter it as unfamiliar terrain, even if that is not the reality. In considering relations between international and domestic courts, we should remain conscious of the overriding obligation to justice and the rule of law at all levels of adjudication.

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[1] Dupuy, "The Unity of Application of International Law at the Global Level and the Responsibility of Judges" [2007] 2 *European Journal of Legal Studies.* Available on-line at www.ejls.eu.
[2] (2002) 24 *American Law Institute Reporter* (Summer, No 4.)

Lessons from the European Union legal system

These issues are not of course new, though the language we employ to discuss them has of course evolved. One of the early challenges for the European Community was recourse by individuals to national laws, before national courts, in order to challenge the validity of EC measures. Clearly, allowing this possibility would have posed a serious threat to the supremacy and uniformity of Community law. The response of the European Court of Justice was to preserve these characteristics of the Community legal order, yet not to function as a "self-contained regime". It concluded that respect for fundamental rights formed part of the general principles of Community law, stating that:

> "The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[3]

This reconciles the claims of the national legal cultures and traditions of the Member States with the autonomy of the Community legal order. It prevented the fragmentation of Community law which would have occurred if national courts had been free to review EC measures against the yardstick of domestic human rights protections.

The European Convention on Human Rights, to which all Member States are parties, is similarly treated as a source of the fundamental rights guaranteed in the Community legal order.[4] Indeed it could be regarded as the primary source as it represents a European-wide consensus on certain rights. This

[3] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraphs 3 and 4.
[4] Case 4/73, *Nold v Commission* [1974] ECR 491.

helps to avoid disharmony between the Community law obligations of Member States and their obligations as parties to the Convention. This accommodation of the ECHR within the Community legal order has been reciprocated by Strasbourg. The basic position in ECHR jurisprudence is that the transfer of powers to an international organisation (such as the European Union) is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.[5]

A conciliatory approach of this kind does not, of course, prevent tensions from emerging, but there are established principles in place to resolve such conflicts.

While the European Union is of course *sui generis*, this experience of multi-level judicial governance can offer useful comparative lessons in other fields. Conflicts of judicial competence, both horizontal and vertical, might be resolved in appropriate circumstances by sufficient guarantees that shared norms, with unity of interpretation, will be applied in the competing legal space. This approach is of benefit to the rule of law and to the individual – a clear division of competences, roles and responsibilities means that each court cannot defer making a decision on the basis that it is for the other to do so.

A complementary relationship: enhancing the quality of justice

Beyond the European Union, there are other examples of judicial structures overcoming obstacles in order to operate in harmonious co-existence rather than conflict. One welcome development in recent years has been the re-

[5] *M & Co. v. Federal Republic of Germany*, 1990 Y.B. Eur. Conv. on H.R. 46, 52 (Eur. Commission on H.R.)

conception of domestic and international courts as standing in a complementary rather than a hierarchical relationship. This is a more accurate picture of the relationship between the two, not merely because of the reliance of international law on municipal legal systems for its implementation. For the individual, international courts are in many respects courts of final resort and its interaction with them will be much less frequent. Applicants before the European Court of Human Rights are required to have first exhausted any available domestic remedies, while the principle of complementarity underpinning the Rome Statute means that the International Criminal Court only acts where national courts are unwilling or unable to do so. Yet the very existence of these courts offers something valuable to the individual.

Human rights

Most human rights treaties will have inbuilt mechanisms to monitor a State's compliance. This possibility of looking beyond national organs to hold the State responsible offers an important protection necessitated by the nature of human rights themselves. As Hannah Arendt pointed out, the exercise of human rights is locally embedded and dependent upon the State for facilitation.[6]

The presence of an external supervisory mechanism is an added subsidiary check on the State, removed from the domestic pressures which may be placed on its own judiciary. In addition, the international human rights jurisprudence of specialised courts can provide important guidance to domestic courts in reaching decisions at national level. The domestic incorporation of the European Convention on Human Rights in both the

[6] See Klabbers, "Possible Islands of Predictability: The Legal Thought of Hannah Arendt" [2007] 20 Leiden Journal of International Law 1-23.

United Kingdom and Ireland gave rise to a new dynamism in national adjudication of matters raising fundamental rights concerns. In Ireland, the Convention rights are regarded by the national courts as augmenting, rather than conflicting with, the already extensive corpus of domestic constitutional rights jurisprudence. Moreover, the national court can perhaps achieve a more tailored application of principles stemming from Strasbourg jurisprudence, as it is not constrained by the doctrine of the margin of appreciation. Thus we see that the dynamic relationship between domestic and international courts may enhance the quality of justice for the individual.

International criminal law

In the field of international criminal law, the adoption of the Rome Statute has greatly contributed to the codification of international crimes, through both the definitions within the Statute itself and the carefully crafted and detailed Elements of Crimes. As the Statute's principle of complementarity means that national authorities bear the primary responsibility to bring perpetrators of international crimes to justice, States Parties must ensure that they have the requisite national legislative and institutional frameworks in place. The definitions in the Rome Statute are thus disseminated into the domestic criminal law of States Parties.
This co-ordination of international and national law increases the resources available to the international community in achieving the shared goal of ending impunity for the worst crimes against mankind.

The challenge of national implementation is being successfully addressed by practical measures of co-operation between the Court and national actors such as the electronic *Legal Tools* resource developed by the Office of the Prosecutor. Such co-operation greatly contributes to demystifying

international criminal law, and may improve cost-efficiency, legitimacy and the quality of justice for the individual at the national level, as well as achieving the harmonious application and consistent development of international legal principles. The complementary relationship of national courts and the ICC means that there is no gap under the Rome Statute in judicial competence over the worst crimes against mankind. This is an immensely valuable contribution to the international rule of law, as State borders cannot constitute an impermeable obstacle to the pursuit of justice for the victims of egregious crimes.

Conclusion

Justice is not exclusively dependent on either international or national courts, but on the vital contribution of each. The relations between international and domestic courts and tribunals are dynamic precisely because they are in a state of constant evolution. There are many positive examples of co-operation rather than conflict in various spheres of law, which may offer useful comparative lessons where difficult questions arise. We should welcome the challenges posed, as their resolution ultimately leads to greater clarity and unity in international law, assisting our efforts to promote the rule of law. To quote Martin Luther King, “true peace is not merely the absence of tension: it is the presence of justice.”