Chapter Nine

Neither Here Nor There?
The Status of International Criminal Jurisprudence in the International and UK Legal Orders†

Robert Cryer*

I. Introduction

Most international lawyers are familiar with at least one embarrassing conversation with their national law colleagues. This is one in which the name of a doyen or doyenne of international law is dropped, and is met with a resounding ‘Who?’ There are three ways of avoiding this blush-inducing moment. The first is to not shamelessly drop the names of the great and good of international law in conversation. The second is to only do so with international lawyers. The third, and best, way of averting such an academic faux pas is to mention Colin Warbrick. The reason for this is simple. Awareness of his standing is not the arcane lore of international lawyers, but something that we can share with our municipally focused colleagues. Colin’s reputation is not merely that of a celebrated international lawyer, but of being an excellent lawyer per se.

Part of this relates to his personal approach to law which, whilst sympathetic to theoretical and conceptual analysis,1 is one based in a very practical appre-
ciation of the importance of ensuring that international law has enforcement mechanisms, including domestic courts. Colin is also an exceptionally warm and kind person, always willing to give of his time, and to offer kind and honest advice and support. In depth discussion of that, however, would not really be appropriate, even in a festschrift. Therefore I will concentrate on a topic which relates to other aspects of Colin’s work, in particular international criminal law, and elements of its application in domestic legal orders: The subject this chapter will seek to investigate is the normative status of the decisions of international criminal tribunals in the international legal order, and in the UK.

II. The Status of Jurisprudence in International Law

It is a commonplace that judicial decisions do not usually create general international law. This much is clear from Article 38(1)(d) of the Statute of the International Court of Justice. Nonetheless, it is a truism (because it is true) that case-law is frequently highly influential, either because it crystallises a nascent rule, or because it is referred to as shorthand for the position in international law. After all, where cases contain a detailed review of State practice and/or opinio juris, it is far simpler to refer to the relevant case than repeat the discussion it contains.

Such considerations hardly exhaust the debate though. There is also, for instance, the question of the status of a court’s case-law in its own legal system.


4 For reasons of space, this piece will limit itself, for the most part, to a discussion of the jurisprudence of the ICTY, ICTR and ICC.


6 The extent to which, for example, the Tadić case is referred in support of the position that individual liability exists in non-international armed conflict is not simply because of the inherent authority of ICTY decisions outside its own internal legal order. Tadić, despite the fact that it was a bold decision, is also authoritative because it was ‘carefully made’: see Warbrick (note 2), p. 257.

7 There is also the small matter of the entirely understandable temptation to locate the authority for a position externally.