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# Introduction

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Most if not all domestic justice systems have complex and often confusing judicial structures, a web of courts and tribunals, nested in hierarchies, with varying levels of responsibility, specialization and authority. These institutions sometimes have ancient origins, reflected in archaic traditions, terminology and even modes of dress of those who populate them. They are in a constant process of reform, with older bodies being reconfigured or abolished, their replacements taking on responsibility for new legislative initiatives that are dictated by social change and evolving values.

Two important distinctions stand out when international courts and tribunals are set alongside their national counterparts. Firstly, at the international level, the traditions are recent, to the extent that they exist at all. The oldest of the international courts and tribunals that is still operational, the International Court of Justice, is barely 70 years of age. Secondly, although hierarchies and specializations exist at the international level, as they do within domestic legal structures, there is no unifying body at either the legislative or the judicial level with the ability to resolve disputes about jurisdiction or to impose coherence in the case law. Moreover, much of the development of international courts and tribunals in recent decades has been asymmetrical. International law, and its institutions for judicial settlement of disputes, has a quality sometimes described as ‘fragmentation’ that distinguishes it from national legal systems, although this is not to say that the latter do not have their own elements of inconsistency.

More than half a century ago, when the system of international courts and tribunals was still in its infancy, Wilfred Jenks pointed to the development of ‘a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law’.<sup>1</sup> The development and growth of international courts and tribunals in

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<sup>1</sup> Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *British Yearbook of International Law* 403, cited by Martti Koskenniemi, ‘Report on the Fragmentation of International Law: Difficulties arising from the diversification

recent times is the inexorable consequence of the progressive development of international law. In 2000, Gerhard Hafner prepared a paper for the International Law Commission that attributed this both to the proliferation of international regulations and to an 'increasing political fragmentation', something he juxtaposed with 'growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction'. Professor Hafner concluded that 'presently, there exists no homogeneous system of international law'.<sup>2</sup> Rather than any consolidation or unification, it seems likely that in the coming years we will see more international courts and tribunals. Moreover, with their diversified functions and expanded access as described by Yaël Ronen in her contribution to this volume, those that currently exist are destined to be increasingly busy. Proliferation and fragmentation are not the same thing, something noted by Karin Oellers-Frahm in her chapter. Nor is either phenomenon an inherent defect or flaw but rather they are elements that are 'value neutral'. Both words suggest stigma, however. It might be better to reserve the use of the term proliferation to the issue of weapons of mass destruction.

That international law is adjudicated by courts and tribunals seems a rather trite or self-evident proposition. Yet in its early centuries, international law developed without judicial institutions for its enforcement. This was frequently criticized as a shortcoming. Indeed, the relative absence of mechanisms for adjudication of disputes prompted some critics to dismiss the discipline of international law as unworthy of the label 'law' at all. HLA Hart was dismissive, relegating international law to a secondary status as a somewhat 'primitive' form of real law, citing the inadequacies of its judicial mechanisms, as Mary Ellen O'Connell and Lenore Vanderzee have pointed out.<sup>3</sup> But such views are increasingly isolated.

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and expansion of international law' (International Law Commission, 13 April 2006) UN Doc A/CN.4/L.682 [6].

<sup>2</sup> 'Report of the International Law Commission on the work of its fifty-second session (1 May–9 June and 10 July–18 August 2000)' (2000) UNGAOR 55th session supp 10 UN Doc A/55/10, 143.

<sup>3</sup> Mary Ellen O'Connell and Lenore Vanderzee, 'The History of International Adjudication' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 40–61, 41, citing HLA Hart, *The Concept of Law* (Clarendon Press 1961).

Alongside the growth in international litigation, the huge role that international law plays outside the courtroom should not be gainsaid. It is invoked, discussed and debated by diplomats, politicians, journalists and civil society advocates. International law guides the operation of international organizations, including their relationships with member states and other participants. Moreover, international law is not without significance in national litigation, where there has never been any doubt about the existence of courts and tribunals. Nevertheless, law inevitably generates disputes that cannot be resolved in a fair and satisfactory manner by national judicial institutions. So it is that international law, towards the end of the eighteenth century, turned to the problem of judicial settlement of disputes about rights and obligations.

## 1. BEGINNINGS: INTERNATIONAL LAW BECOMES INTERNATIONAL JUSTICE

There is evidence of ‘international’ adjudication at the time of the ancient Greeks.<sup>4</sup> Medieval forms of international tribunal apparently tried individuals accused of violations of the laws and customs of war, although these remain isolated examples.<sup>5</sup> Arbitration seems to have been quite widespread during the Middle Ages, although it fell into disuse. The treaties of Westphalia, generally cited as the birth of modern international law, committed the parties to the peaceful settlement of disputes by means of ‘amicable settlement or legal discussion’.<sup>6</sup> At about the same time, Oliver Cromwell encouraged the inclusion of arbitration clauses in international treaties that he negotiated with foreign powers. The idea of international adjudication was also promoted by publicists, notably Emmerich de Vattel. A century later, Benjamin Franklin spoke of ‘the discovery of a plan which will induce and oblige nations to settle their disputes without first cutting one another’s throats’. He asked: ‘[w]hen

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<sup>4</sup> David J Bederman, *International Law in Antiquity* (Cambridge University Press 2001).

<sup>5</sup> Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (Stevens and Sons Ltd 1968) vol II, 463; M Cherif Bassiouni, ‘From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court’ (1997) 10 *Harvard Human Rights Journal* 11.

<sup>6</sup> O’Connell and Vanderzee (n 3) 43.

will mankind be convinced that all wars are follies, very expensive, and very mischievous, and agree to settle their differences by arbitration?<sup>7</sup>

Jay's Treaty, adopted in 1794 by the United States and the United Kingdom, is acknowledged as the beginning of international arbitration. John Jay, then the Chief Justice of the United States Supreme Court, had been sent to London by President Washington to settle differences with the British that, if left unresolved, might lead to further armed conflict. James Brown Scott paid great tribute to this pioneer of the peaceful settlement of international disputes. In negotiating the treaty that bears his name, 'an imperishable monument to his wisdom and humanity', Jay not only 'preserved peace' but 'he introduced into the practice of nations the greatest agency for maintaining peace'.<sup>8</sup>

The Treaty conceived by Jay contemplated the establishment of mixed commissions to settle disputes.<sup>9</sup> Much of the border between Canada and the United States was delineated in this manner. Success brought emulation and during the nineteenth century many such arbitration bodies were established. After the American Civil War, a commission meeting in Geneva awarded the United States very substantial compensation for damage caused by ships sold by Britain to the Confederate rebels.<sup>10</sup> The *Alabama* case has been cited by the International Court of Justice as authority for the proposition that 'in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction', summarized as the principle of *la compétence de la compétence*.<sup>11</sup> Going beyond its role in lawmaking, it played a seminal role at the institutional level, as Tom Bingham pointed out:

[i]t was the experience of this tribunal which inspired the Tzar and President Theodore Roosevelt to seek, in the Hague Conferences of 1899 and 1907, to

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<sup>7</sup> Cited in James Brown Scott, *The Status of the International Court of Justice* (Oxford University Press 1916) 7.

<sup>8</sup> *Ibid* 9.

<sup>9</sup> Treaty of Amity, Commerce and Navigation (concluded 19 November 1794) 8 Stat 116 UKTS 105.

<sup>10</sup> *Alabama Claims (United States of America v Great Britain)* (Arbitral Tribunal, Decision 14 September 1872) reprinted in John Basset Moore (ed), *History and Digest of the International Arbitrations to which the United States has been a Party* (United States Government Printing Office 1898) vol I, 572.

<sup>11</sup> *Nottebohm Case (Leichtenstein v Guatemala)* (Preliminary Objection) [1953] ICJ Rep 111, 119. See the chapters in this volume by Karin Oellers-Frahm and Luiz Eduardo Salles for discussion of *compétence de la compétence*.

explore means of making international arbitration more effective. On these foundations the Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice were in due course to be built.<sup>12</sup>

Arbitral tribunals, like the one that ruled in *Alabama*, were temporary and ad hoc in nature, dependent upon prior conventional arrangements. Progressive development of international law, nourished by the success of arbitration, led to proposals for a permanent institution. The initiative is credited to a proposal from Sir Randal Cramer at the 1894 session of the Interparliamentary Union, held in The Hague. The following year, in Brussels, the Union adopted a formal proposal for a permanent international court. In this way, a civil society organization set the stage for states to establish the first of the genus that we now call international courts and tribunals.

The 1899 Hague Conference was convened at the initiative of the Russian Czar. His initial letter of invitation spoke of peaceful settlement of disputes, but through the modest measures of ‘good offices’ and ‘facultative arbitration’. The American delegation came to the Conference with instructions to promote a permanent court of arbitration, although credit for the initiative seems to be due to the British Ambassador to Washington at the time, Sir Julian Pauncefoot. Ambitious proposals to create a permanent international court or arbitration body did not rally sufficient support. Compromise was reached on the establishment of arbitration tribunals by states, composed of ‘judges of their own choice and on the basis of respect for law’. Pursuant to the provisions of the 1899 Hague Convention for the Pacific Settlement of Disputes, the Permanent Court of Arbitration was created.<sup>13</sup>

So began a tradition of peaceful settlement of disputes by judicial means, before a court or tribunal set up with the consent of the parties. The Permanent Court of Arbitration did not have any inherent or core jurisdiction. States Parties to the Convention had agreed on the establishment of the Permanent Court but they had made no undertaking to submit to it certain categories of disputes. Moreover, the institution was really more of a panel or assembly of arbitrators from whom states involved in

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<sup>12</sup> Tom Bingham, ‘The Alabama Claims Arbitration’ (2005) 54 *International and Comparative Law Quarterly* 1, 24.

<sup>13</sup> Convention for the Pacific Settlement of International Disputes (1899) (concluded 29 July 1899) 32 Stat 1779 UKTS 9. See Jean Pierre Adrien François, ‘La Cour permanente d’arbitrage, son origine, sa jurisprudence, son avenir’ (1955) 87 *Recueil des Cours* 1, 457.

litigation could select those by whom they would be judged. As James Brown Scott explained:

[i]t is natural that delegates should seek to magnify their work; but by using language unjustified by the facts of the case, they have created the impression that a court exists for the trial of cases; that this court is permanent, that it is 'accessible at all times', whereas in fact they only created a list or panel of arbiters from which a temporary tribunal could be formed for the trial of a case and which, like a mixed commission, passed out of existence when the award was rendered.<sup>14</sup>

The issue of a full-fledged international court returned at the second Hague Conference, convened in 1907 on the initiative of the American President Theodore Roosevelt. On the instructions of Secretary of State Elihu Root, the United States prepared a draft agreement for a permanent judicial institution with a 15-judge bench rather than a much larger panel, as was the case with the 1899 Convention. Final agreement on the proposal could not be reached, however, and the 1907 Conference confined itself to the adoption of a *voeu* for the creation of a permanent 'Court of Arbitral Justice'.<sup>15</sup> The 1899 Convention was renegotiated and some technical improvements were made to the Permanent Court of Arbitration, which was by then already operational.<sup>16</sup>

Between the first and the second of the Hague Conferences, the Russian diplomat Fyodor Fyodorovich Martens suggested that a home be built for the Permanent Court of Arbitration. The Scottish-American millionaire Andrew Carnegie came up with the money for the building. It was designed by the French architect Louis M Cordonnier. What might be called 'Carnegie Hall for international lawyers' was completed in 1913. The iconic building, today the seat of the International Court of Justice, is located close to the boundary between The Hague and the seaside municipality of Scheveningen.

After the First World War, the unfinished efforts of the Hague Conferences were renewed. This led to the establishment of the Permanent Court of International Justice. But before its creation had been agreed, there were initiatives for another type of international court, one with jurisdiction to judge individuals for international crimes. At the

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<sup>14</sup> Scott (n 7) 19.

<sup>15</sup> Ernest Nys, 'The Development and Formation of International Law' (2012) 6 *American Journal of International Law* 279, 306–10.

<sup>16</sup> Convention for the Pacific Settlement of International Disputes (1907) (concluded 18 October 1907) 36 Stat 2259 UKTS 6.

preliminary peace conference meeting in Paris in early 1919, the Commission on Responsibility was asked to inquire into and report upon '[t]he constitution and procedure of a tribunal' to deal with the responsibility of the authors of the war and alleged violations of the laws and customs of war.<sup>17</sup> Early in its work, the United Kingdom submitted detailed proposals for the establishment of an 'International Tribunal' to be 'composed of representatives of the chief Allied States and the United States for the trial and punishment of offences against the laws and customs of war and the laws of humanity'.<sup>18</sup> The British draft included provisions governing applicable law, penalties, procedure and rules of evidence. In its final report, the Commission noted that all of the victorious powers were in a position to hold trials before their domestic courts. Exceptionally, for example where the victims were nationals of more than one country or where 'having regard to the character of the offence or the law of any belligerent country, it may be considered advisable', trial would be held before a 'high tribunal'. It would be composed of three persons appointed by each of the governments of the United States, the British Empire, France, Italy and Japan, and one each from Belgium, Greece, Poland, Portugal, Romania, Serbia and Czechoslovakia.<sup>19</sup> The American representatives issued a dissenting opinion. They had unsuccessfully proposed that the Commission contemplate 'a tribunal of an international character' to be formed by a union of existing national military tribunals or commissions.<sup>20</sup> 'To the unprecedented

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<sup>17</sup> 'Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919' (1920) 14 *American Journal of International Law* 95.

<sup>18</sup> 'Annex IV to Minutes of Second Meeting, Memorandum Submitted by the British Delegates' in *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Minutes of Meetings of the Commission*, Paris Peace Conference Doc 181.1201/16 (National Archives Microfilm 820, roll 142), General Records of the American Commission to Negotiate Peace 1918–1931, Records Group 256, National Archives at College Park MD, 27–33, 31.

<sup>19</sup> 'Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919' (n 17) 122.

<sup>20</sup> 'Proposition of the United States Delegation' in *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Minutes of Meetings of the Commission* (n 18) 55–6; 'Minutes of the Fourth Meeting, March 13, 1919, at 10:30 a.m.' in *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Minutes of Meetings of the Commission* (n 18) 57–61.

proposal of creating an international criminal tribunal ... the American members refused to give their assent', states the minority opinion.<sup>21</sup> Furthermore, 'the American representatives felt very strongly that too great attention could not be devoted to the creation of an international criminal court for the trial of individuals, for which a precedent is lacking, and which appears to be unknown in the practice of nations'.<sup>22</sup>

The view of the United States prevailed within the Council of Four, where the idea of an international tribunal was rejected with the exception of the prosecution of Kaiser Wilhelm II.<sup>23</sup> Pursuant to article 227 of the Treaty of Versailles, the former emperor was to be tried 'for a supreme offence against international morality and the sanctity of treaties' before a 'special tribunal' to be 'composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan'. The refusal of extradition by the Netherlands, where the Kaiser had found asylum, meant that this tribunal was never created.

The issue of criminal prosecution by a genuinely international tribunal returned in the negotiations of the peace treaty with Bulgaria. The Greek Foreign Minister, Nicolaos Politis, also speaking on behalf of Romania and the Serb-Croat-Slovene State, presented a proposal to the Commission on Responsibility that 'deliberately set aside the system adopted in the Treaty with Germany', premised on trial by national military tribunals of the Allied and Associated Powers, 'as they preferred the system of an international tribunal which had been unanimously adopted by the Delegates of all the countries which were, apparently, to be signatories of

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<sup>21</sup> 'Memorandum of Reservations Presented by the Representatives of the United States to the Commission on Responsibilities' (1920) 14 *American Journal of International Law* 95, 129. See also the account of the negotiations by Robert Lansing to his American colleagues: 'Minutes of the Meetings of the Commissioners Plenipotentiary, Wednesday, March 5th, 1919' in *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference 1919* (United States Government Printing Office 1945) vol XI, 93–7, 93.

<sup>22</sup> 'Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919' (n 17) 145.

<sup>23</sup> See Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment* (Oxford University Press 2014) 50–52; Jackson Nyamuya Maogoto, 'The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction' in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law* (Torkel Opsahl Academic EPublisher 2014) vol I, 171–94, 185–9.

the Treaty with Bulgaria'.<sup>24</sup> When the proposal for an international tribunal moved to the political level, however, there was great resistance. British Foreign Secretary Arthur Balfour recalled that the March report of the Commission on Responsibilities had favoured an international tribunal similar to what was being proposed by Greece, Serbia and Romania. He said he did not know why that proposal had not been adopted 'but it must certainly have been based upon strong arguments. For this reason, he was not inclined to adopt a contrary principle.'<sup>25</sup> Italy said it was 'indifferent' and, with that, Georges Clemenceau, who was the President of the Peace Conference, declared that the approach taken in articles 228 to 230 of the Treaty of Versailles would be followed in the Treaty of Neuilly-sur-Seine, governing the peace with Bulgaria.

Nearly a year later, as the last of the treaties was being negotiated with Turkey, the debate about an international court resumed. The initial draft synopsis of the Turkish treaty provided for '[a]n adaptation of the articles in the conditions of peace with Austria, Bulgaria and Hungary',<sup>26</sup> which were derived from articles 228 to 230 of the Treaty of Versailles. However, the British Foreign Minister Lord Curzon said that the relevant provisions were not 'sufficiently wide, and would not, in the case of Turkey, cover the massacre of the Armenians'.<sup>27</sup> The matter was referred to a reconstituted Commission on Responsibility, meeting in Paris. It responded to Curzon's concerns with the following provision, to which nothing similar appears in the earlier peace treaties, 'in case the Supreme Allied Council should intend to insert in the Conditions of Peace a clause

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<sup>24</sup> 'Minutes of the Twelfth Meeting [of the Commission], July 15, 1919, at 11.00 a.m.' in *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties: Minutes of Meetings of the Commission* (n 18) 177–82, 179.

<sup>25</sup> 'Notes of a Meeting of the Heads of Delegations of the Five Great Powers Held in M. Pichon's Room at the Quai d'Orsay, Paris, on Friday, July 25, 1919, at 3:30 p.m.' in *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference 1919* (United States Government Printing Office 1946) vol VII, 254–68, 260.

<sup>26</sup> 'Draft Synopsis of Treaty of Peace with Turkey' in *Documents of British Foreign Policy, 1919–1939* (Her Majesty's Stationery Office 1958) first series vol VII, 125–8, 127.

<sup>27</sup> 'British Secretary's Notes of an Allied Conference held at 10, Downing Street, London, S.W. I, on Saturday, February 21, 1920, at 4 p.m.' in *Documents of British Foreign Policy, 1919–1939* (n 26) first series vol VII, 189–92, 191.

dealing with the prosecution of the responsible authors of the massacres in Asia Minor'.<sup>28</sup> Draft article 2(a) included the following:

The Allied Powers reserve to themselves the right to appoint the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such tribunal.

In the event of the League of Nations having created without undue delay a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognize such tribunal.<sup>29</sup>

When the draft was discussed at a meeting of ambassadors and foreign ministers held on 23 March 1920, the British Solicitor General Sir Ernest Pollock pointed out that because the massacres referred to were those committed during the continuance of the war only, '[i]f it was desired to hold the power in reserve after the treaty in force, in order to safeguard the Armenians against future atrocities, and to try the authors of them', an additional text would be required.<sup>30</sup> This remarkable suggestion, to create what could have been the first international criminal tribunal with prospective jurisdiction during peacetime, like the International Criminal Court today, was not pursued. With some minor drafting changes, article 2(a) became article 230 of the final text of the Treaty of Sèvres. Although signed by representatives of Turkey, following a change in regime the Turkish Government announced that ratification of the Treaty of Sèvres was not possible.

The reference to a League of Nations tribunal in article 230 of the Treaty of Sèvres reflected discussions already underway aimed at the creation of the permanent international court. Its establishment had been provided for in article 14 of the Covenant of the League of Nations. In February 1920, the Council of the League appointed an Advisory Committee of Jurists, chaired by Baron Edouard Descamps of Belgium. Its work was completed swiftly and by the end of 1920 the Statute of the Permanent Court of International Justice was opened for signature and

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<sup>28</sup> Jules Cambon to Lloyd George (11 March 1920) United Kingdom National Archives, Cabinet Memorandum CAB/24/101.

<sup>29</sup> Draft Articles with Regard to Penalties, United Kingdom National Archives, Cabinet Memorandum CAB/24/101.

<sup>30</sup> 'British Secretary's Notes of a Conference of Ambassadors and Foreign Ministers, held in Lord Curzon's Room at the British Foreign Office, Whitehall, London, S.W. I, on Tuesday, March 23, 1920, at 4 p.m.' in *Documents of British Foreign Policy, 1919–1939* (n 26) first series vol VII, 591–6, 594.

ratification.<sup>31</sup> There was insufficient support to endow the Permanent Court with a criminal chamber.<sup>32</sup> The following year, the judges were elected and by 1923 the Court was ruling in its first cases. During the inter-war years, the Permanent Court dealt with a wide range of issues in cases filed pursuant to the Covenant of the League of Nations and various bilateral treaties as well as ad hoc agreements. The Court issued advisory opinions at the request of the League of Nations as well as judgments in contentious cases. It was formally dissolved in 1946 and replaced by the International Court of Justice, a principal organ of the United Nations to which all members of the organization belong.

The aftermath of the Second World War also produced two international military tribunals that administered criminal justice. The parties before these courts were the accused persons and the prosecutors designated by those who had set up the tribunals. Nicolaos Strapatsas points out, in his contribution to this volume, that the principle of individual criminal responsibility for such crimes represented a departure from the absolutist conceptions of state sovereignty that prevailed after the First World War. This glorious experiment revived discussions about a permanent international criminal court. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 09 December 1948, contemplated establishment of such an institution.<sup>33</sup> However, in the early years of the Cold War, the General Assembly essentially suspended work on the project.<sup>34</sup> Tensions between the two blocs made progress impossible, both sides being afraid they might create a tool that could advantage the other. The General Assembly did not resume its consideration of the proposed international criminal court until the end of 1989, as the fall of the Berlin Wall marked the close of the short twentieth century.<sup>35</sup> Within another ten

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<sup>31</sup> Statute of the Permanent Court of International Justice (1920) (concluded 16 December 1920, entered into force 20 August 1921) 6 LNTS 379, 390.

<sup>32</sup> 'Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General' (International Law Commission 1949) UN Doc A/CN.4/7/Rev.1, 8–12.

<sup>33</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948) (concluded 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 6.

<sup>34</sup> 'Draft Code of Offences Against the Peace and Security of Mankind' (4 December 1954) UN Doc A/RES/897(IX).

<sup>35</sup> 'International criminal responsibilities of individuals and entities engaged in illicit trafficking of narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes' (4 December 1989) UN Doc A/RES/44/39.

years, the Rome Statute of the International Criminal Court had been adopted.

## 2. DEFINITION AND NOMENCLATURE

Before attempting to identify and classify the international courts and tribunals, the boundaries of the field need to be discerned. This is not as simple as it might seem. It may be tempting to adopt the approach of United States Supreme Court Justice Potter Stewart, who said (speaking of attempts to define pornography) that 'I know it when I see it'.<sup>36</sup>

Christian Tomuschat has proposed the following: '[i]nternational courts and tribunals ... are permanent judicial bodies made up of independent judges which are entrusted with adjudicating international disputes on the basis of international law according to a pre-determined set of rules of procedure and rendering decisions which are binding on the parties.'<sup>37</sup> Another definition, with many similarities but certain differences, has been advanced by Cesare Romano, Karen Alter and Yuval Shany:

In the scholarly literature, there seems to be consensus that international adjudicative bodies are:

1. International governmental organizations, or bodies and procedures of international governmental organizations, that
2. hear cases where one of the parties is, or could be, a state or an international organization, and that ...
3. are composed of independent adjudicators, who ...
4. decide the question(s) brought before them on the basis of international law ...
5. following pre-determined rules of procedure, and
6. issue binding decisions.<sup>38</sup>

Unlike Professor Tomuschat, Romano, Alter and Shany have not insisted upon the permanent nature of the court or tribunal. The exclusion of temporary institutions may appear helpful because it eliminates the multitude of arbitral panels, set up on an ad hoc basis and in which the

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<sup>36</sup> *Jacobellis v Ohio* (1964) 378 US 184, 197 (Stewart J concurring).

<sup>37</sup> Christian Tomuschat, 'International Courts and Tribunals' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) vol V, 499–514, 499.

<sup>38</sup> Cesare PR Romano, Karen J Alter and Yuval Shany, 'Some Key Definitions and Concepts' in Romano, Alter and Shany, *The Oxford Handbook of International Adjudication* (n 3) 3–26, 6.

parties consent in whole or in part to the composition of the bench. However, such a criterion also removes virtually all of the international criminal tribunals with the exception of the International Criminal Court.

As a general rule, international courts and tribunals apply international law. But the subject matter jurisdiction may not always be a useful indicator. The Special Tribunal for Lebanon, established by resolution of the United Nations Security Council, employs a *sui generis* procedural model and is confined to prosecution of crimes under Lebanese law.<sup>39</sup> Even the Rome Statute authorizes the International Criminal Court to apply ‘as appropriate, the national laws of States that would normally exercise jurisdiction over the crime’.<sup>40</sup> The Caribbean Court of Justice hears disputes under the constitutive treaty of the Caribbean Community but it is also a court of last resort with appellate jurisdiction from the civil and criminal courts of its Member States. This latter function replaces the anachronistic mechanism of appeals to the Judicial Committee of the Privy Council, a legacy of British colonialism.<sup>41</sup> Just as international courts often apply national law, the reverse is also true: national courts apply international law.

Perhaps the most decisive definitional element is the first one identified by Professors Romano, Alter and Shany: ‘international governmental organizations, or bodies and procedures of international governmental organizations’. In other words, an international court or tribunal is an institution created by the governments of sovereign states, generally by means of a treaty or convention, such as the Charter of the United Nations, for the International Court of Justice; the European Convention on Human Rights, for the European Court of Human Rights; and the Rome Statute of the International Criminal Court, for the International Criminal Court. An international court or tribunal may also be created by an inter-governmental organization. Examples include the International Criminal Tribunal for the former Yugoslavia, established by the United Nations Security Council; and the United Nations Administrative Tribunal, a product of the United Nations General Assembly. More unusual is

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<sup>39</sup> Statute of the Special Tribunal for Lebanon (30 May 2007) UN Doc S/RES/1757 (2007) annex. See Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014).

<sup>40</sup> Rome Statute of the International Criminal Court (1998) (concluded 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 21(1)(c).

<sup>41</sup> Nadia Bernaz, *Elgar Companion to the Caribbean Court of Justice* (Edward Elgar Publishing 2016).

the case of a tribunal established by agreement between an inter-governmental organization and a sovereign state, the paradigm being the Special Court for Sierra Leone. Its statute is an annex to a treaty between the United Nations and the Government of Sierra Leone.<sup>42</sup>

The requirement that an international court or tribunal be established by two or more sovereign states, by an inter-governmental organization, or by an inter-governmental organization and a sovereign state, has the consequence of excluding a somewhat nebulous category usually described as ‘hybrid’ tribunals. Examples of such hybrid tribunals are the Extraordinary Chambers in the Courts of Cambodia and the *Chambres africaines extraordinaires* in Senegal. Although both tribunals have a substantial international presence, in that they apply international criminal law, include foreign judges, and are substantially funded from abroad, they remain national courts of the countries concerned. The Serious Crimes Panels in the District Court of Dili, East Timor and the Panels in the Courts of Kosovo are also given the label ‘hybrid’, although, like the Extraordinary Chambers in Cambodia and Senegal, they are established by the United Nations acting as provisional administrator of the territory, that is, as its government. To that extent, they are really more like national courts than international courts. Sometimes the Special Court for Sierra Leone and the Special Tribunal for Lebanon are branded as ‘hybrid’ institutions, but this is surely a mistake, given that they are created by the United Nations, albeit with the concurrence of the state concerned. When it mandated the creation of the Special Tribunal for Lebanon, the United Nations Security Council spoke of ‘a tribunal of an international character’.<sup>43</sup> But what the Secretary General then proposed,<sup>44</sup> and what the Security Council agreed to establish, was a genuinely international tribunal rather than one with an ‘international character’.

If the mode of creation of tribunals sometimes gives way to confusion, the question to be asked ought to be how they can be terminated. A truly international court or tribunal can only be closed down by the agreement of two or more states or by the act of an inter-governmental body. On the other hand, a national court, even one with international characteristics,

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<sup>42</sup> Statute of the Special Court for Sierra Leone (16 January 2002) UN Doc S/2002/246 (2002) annex.

<sup>43</sup> United Nations Security Council Resolution 1644 (2005) (15 December 2005) UN Doc S/RES/1644 (2005) [6].

<sup>44</sup> ‘Report of the Secretary-General on the establishment of a special tribunal for Lebanon’ (15 November 2006) UN Doc S/2006/893.

can be closed down in an exercise of national sovereignty. The Extraordinary Chambers in the Courts of Cambodia can be dissolved by Cambodian legislation, although this might put Cambodia in breach of obligations it has contracted with the United Nations. Were Cambodia to decide they should be brought to an end, the United Nations could not simply move the court to a safe haven somewhere else in the world without changing the nature of the institution. On the other hand, the Government of Lebanon is powerless to shut down the Special Tribunal for Lebanon. From the perspective of termination, there is no middle ground and no place for any 'hybrid'. A tribunal is either international or it is national.

The final criterion in Professor Tomuschat's definition is the ability of the court or tribunal to give a 'binding decision'. Explaining the requirement, he notes that some judicial institutions may also issue advisory opinions that are not, strictly speaking, 'binding'. However, the existence of such ancillary jurisdiction does not contradict the fact that they may also bind the parties to a case with a final judgment. The Statute of the International Court of Justice states, in article 59, that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'. In article 63, it provides that should a State Party to a particular convention decide to intervene in litigation before the Court concerning the construction of the treaty, 'the construction given by the judgment will be equally binding upon it'. Article 46 of the European Convention on Human Rights is entitled '[b]inding force and execution of judgments', and declares that '[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.<sup>45</sup> There are many other references to the term 'binding' in treaty law.<sup>46</sup>

International lawyers can sometimes be quite obsessed with the distinction between acts that are 'binding' and those that are 'non-binding'. For example, the notion that the Universal Declaration of Human Rights is 'not binding' whereas the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are 'binding' is soon learned by students in their introductory courses on international human rights law. But to

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<sup>45</sup> Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1994) (concluded 11 May 1994, entered into force 1 November 1998) ETS 155.

<sup>46</sup> Convention relative to the Treatment of Prisoners of War (1929) (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 343 arts 82, 96.

dismiss the Universal Declaration as being ‘not binding’ woefully understates its legal impact, just as describing the Covenants as ‘binding’ may tend to exaggerate their role, at least when compliance by states is examined. The Universal Declaration of Human Rights provides one of the bases for the periodic reports that states present to the United Nations Human Rights Council on their human rights compliance, known as Universal Periodic Review.<sup>47</sup> Without exception they all treat this as a strict obligation. The same can hardly be said of the conduct of States Parties with respect to the human rights treaties.

Perhaps ‘binding’ and ‘non-binding’ are not such useful concepts after all. The whole point of a legal rule is that it must be ‘binding’. Otherwise, it is not law. But what is ‘non-binding law’, if not an oxymoron? The rather crude binding/non-binding binary removes much of the nuance that contributes to an understanding of the impact of international law and, in particular, of its institutions for dispute resolution. In the context of international courts and tribunals, the main consequence of the term ‘binding’ appears to be the exclusion of bodies like the human rights commissions created by European, American and African regional human rights instruments, and the treaty bodies established by the universal human rights conventions. ‘Quasi-judicial’ is another label that is sometimes applied to such institutions. This is not really a precise use of a term that when employed in the context of national legal systems denotes a body with both judicial and administrative functions. Rather, the ‘quasi-judicial’ modifier seems to be applied to human rights commissions and treaty bodies in order, very unfortunately, to diminish their status and to suggest that they are second-class tribunals.

The terminology used when many of these institutions were established, several decades ago, is replete with what are now somewhat anachronistic euphemisms whose initial purpose was to appease reluctant states. The European Commission of Human Rights, which was essentially subsumed within the European Court of Human Rights in 1998 after more than forty-five years of activity, issued ‘decisions’ and ‘reports’ rather than ‘judgments’. The United Nations Human Rights Committee, established under the International Covenant on Civil and Political Rights, receives ‘communications’ rather than ‘petitions’ or ‘claims’, and it concludes with the issuance of ‘views’. But in practice

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<sup>47</sup> ‘Institution-building of the United Nations Human Rights Council’ (18 June 2007) HRC/RES/5/1 Annex I.A.1(b).

these bodies perform an adjudicative function. Today, even the International Court of Justice speaks of the ‘case law’ or the ‘jurisprudence’ of the treaty bodies.<sup>48</sup> Both the European Court of Human Rights<sup>49</sup> and the International Court of Justice<sup>50</sup> have referred to decisions by the Human Rights Committee as if they constitute judicial authority. In one of its judgments, the European Court of Human Rights spoke of a finding of the Human Rights Committee as being ‘an obiter dictum’, words normally used in a purely judicial context.<sup>51</sup>

Is the ‘case law’ of the human rights commissions and treaty bodies binding in the sense that the parties are required to comply? Some states would quarrel with the suggestion, but few would admit to defying rulings by the Human Rights Committee. When we compare this ‘soft’ case law with the more durable product of the European Court of Human Rights, it must be conceded that the successful applicant in Strasbourg is nevertheless without means of enforcing a ‘binding’ judgment, a matter that is left to a political organ, the Council of Europe’s Committee of Ministers. More than a decade ago, prisoners in the United Kingdom won the right to vote courtesy of the European Court of Human Rights, but they have yet to exercise it.<sup>52</sup> The challenge of enforcement of international judgments more generally is taken up by Richard Oppong and Angela Barreto in their chapter.

There does not appear to be any meaningful distinction between ‘courts’ and ‘tribunals’. Within international law the terms appear to be interchangeable, although that may not necessarily be the case at the domestic level. The reference to ‘courts and tribunals’ is generic in nature. Some institutions that belong within the rubric may bear some other name. For example, when it closed the international criminal tribunals for the former Yugoslavia and Rwanda, the United Nations

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<sup>48</sup> *Ahmadou Sadio Diallo (Guinea v DRC)* (Merits) [2010] ICJ Rep 639, 664 [66].

<sup>49</sup> See for example, *Šilih v Slovenia* (GC) App no 71463/01 (ECtHR, 9 April 2009) [111]–[113]; *Al-Saadoon and Mufdhi v UK* App no 61498/08 (ECtHR, 30 June 2009) [66]–[67] and *Al-Saadoon and Mufdhi v UK* App no 61498/08 (ECtHR, 2 March 2010) [97]–[98]; *Varnava and Others v Turkey* (GC) App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) [100], [103]–[107]; *Allen v UK* App no 18837/06 (ECtHR, 30 March 2010) [66]; *Bayatyan v Armenia* (GC) App no 23459/03 (ECtHR, 7 July 2011) [61]–[64].

<sup>50</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order of 30 January 2004) [2004] ICJ Rep 3 [100].

<sup>51</sup> *Bayatyan v Armenia* (n 49) [61].

<sup>52</sup> *Hirst v UK* (no 2) (GC) App no 74025/01 (ECtHR, 6 October 2005).

Security Council established a replacement institution named the International Residual Mechanism for Criminal Tribunals and commonly called 'the Mechanism'. It has a range of judicial responsibilities including holding criminal trials when necessary.<sup>53</sup> The European Union is establishing a criminal tribunal to be located in The Hague to be known as the Kosovo Relocated Specialist Judicial Institution.

### 3. A PANORAMIC VIEW OF THE LANDSCAPE

International courts and tribunals have been classified into five categories: inter-state judicial bodies, international criminal courts, judicial bodies of regional integration agreements, human rights courts, and international administrative tribunals.

The International Court of Justice, a United Nations organ, is described as an inter-state judicial body. With its seat in The Hague, the Court may issue judgments in contentious cases brought to it by states as well as advisory opinions when so requested by the United Nations General Assembly, Security Council and other United Nations bodies under special circumstances. All Member States of the United Nations are also parties to the Statute of the International Court of Justice, but that does not mean they are automatically subject to its jurisdiction. Article 34(1) of the Statute declares that '[o]nly states may be parties in cases before the Court'. However, it does not require that they be recognized as such by their participation in the General Assembly. The very first contentious case before the Court involved a dispute between the United Kingdom and Albania when the latter was not a Member State of the United Nations and a party to the Statute of the Court. Albania had been invited to appear before the Court by the United Nations Security Council, something that is provided for explicitly in article 35(2) of the Statute.<sup>54</sup> With near-universal membership in the United Nations, this no longer has the same interest that it did in the early years of the organization.

States recognize the jurisdiction of the International Court of Justice in a number of ways, including a general declaration under article 36 of the Statute, a so-called compromissory clause in a specific international treaty and, although this rarely occurs, acceptance of jurisdiction in a specific case. In practice, the compromissory clauses in special treaties,

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<sup>53</sup> 'Establishment of the International Residual Mechanism for Criminal Tribunals with two branches' (22 December 2010) UN Doc S/RES/1966 (2010).

<sup>54</sup> *Corfu Channel Case (UK v Albania)* (Preliminary Objection) [1948] ICJ Rep 15.

such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Vienna Convention on Consular Relations, are the primary source of contentious cases at the Court. The Court's 15 judges are elected by the United Nations Security Council and General Assembly, and sit on a full-time basis. They may be joined, in contentious cases, by ad hoc judges if there is no judge with the nationality of one of the states involved in the litigation.

Two other important international courts belong to the category of inter-state judicial bodies, the International Tribunal for the Law of the Sea and the World Trade Organization Appellate Body. Their subject matter jurisdiction is specialized rather than general, as the names of the institutions indicate. Two courts within the category of inter-state judicial bodies no longer exist: the Permanent Court of International Justice, which was no longer operational after 1939 and ceased formally in 1946, and the Central American Court of Justice which operated during the first decades of the twentieth century. Several other similar institutions were contemplated but never established: the International Prize Court, conceived of by one of the 1907 Hague Conventions, the International Islamic Court of Justice, the Arab Court of Justice, and the Inter-American Court of International Justice.

Several regional integration agreements provide for judicial bodies. They deal mainly with disputes of an economic or financial nature, although they may also be involved in enforcing human rights norms, especially in matters of employment and non-discrimination. These include the Court of Justice of the European Union (formerly known as the European Court of Justice), the Court of the Eurasian Economic Community, the Caribbean Court of Justice, the Court of Justice of the Economic Community of West African States, the East African Community Court of Justice, the Court of Justice of the Central African Economic and Monetary Community, the Southern African Development Community Tribunal, the Court of Justice of the Common Market for Eastern and Southern Africa, the Common Court of Justice and Arbitration of the Organization of Harmonization of Business Law in Africa, the Court of Justice of the West African Economic and Monetary Union, the Central American Court of Justice, the European Free Trade Association Court, and the Economic Court of the Commonwealth of Independent States. Litigation before these bodies supplements the development of international economic law by the International Court of Justice, the International Tribunal for the Law of the Sea, the World Trade Organization Appellate Body and the international arbitral tribunals, as discussed in the chapter by Makane Mbengue.

There are several international criminal courts, the most important being the permanent International Criminal Court, headquartered in The Hague in a complex situated a few kilometres from the Peace Palace, which was inaugurated in April 2016. Several temporary or ad hoc tribunals have been created, with jurisdiction confined to specific territories and periods of time. The antecedents are, of course, the International Military Tribunal and the International Military Tribunal for the Far East, set up in the aftermath of the Second World War. After a 45-year period of hibernation, international justice was revived with the establishment by the United Nations Security Council of the ad hoc tribunal for the former Yugoslavia in 1993, and a similar body for Rwanda the following year. Two other United Nations tribunals were to follow: the Special Court for Sierra Leone and the Special Tribunal for Lebanon. Inherently temporary in nature, two of them are now closed and the others do not have many more years to run. To the extent that their work is not entirely finished, ‘mechanisms’ have been created should contingencies arise. The particular, sometimes frustrating, experience of counsel acting before such international courts and tribunals is explored in detail as a case study in this volume by an eminent practitioner, the late John Jones, and his colleagues.

To a limited extent the jurisdiction of some of the ad hoc criminal tribunals established by the United Nations overlapped that of the International Criminal Court. However, their existence was premised primarily on crimes that were not within the reach of the permanent institution, essentially because of gaps in temporal or subject matter jurisdiction. When the International Criminal Court was established, many considered that this would consolidate international criminal justice in a single location. However, it now seems that a degree of proliferation is inevitable. In 2014, the African Union adopted amendments to the Statute of the African Court of Justice and Human Rights, in an instrument known as the Malabo Protocol, extending the jurisdiction to cover a range of international crimes including those listed in the Rome Statute. The European Union has agreed to establish an international criminal tribunal to deal with serious crimes committed in 1999–2000 by members of the Kosovo Liberation Army.

The three human rights courts are regional in nature: the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples’ Rights. Each applies a specific human rights convention whose application is in principle confined to a particular continent. That is not quite true, however, with respect to the European Court. Its territorial jurisdiction may extend to the remnants of

European colonialism<sup>55</sup> as well as to the activities of European armies when operating abroad.<sup>56</sup> Such issues do not appear to arise with respect to the human rights mechanisms of Africa and the Americas. The oldest and largest of the regional human rights courts, and by far the busiest of all of the international courts and tribunals, is the European Court of Human Rights. With 47 judges and a staff of hundreds of lawyers, every year it deals with tens of thousands of applications alleging violations of the European Convention of Human Rights and its 17 protocols.<sup>57</sup> Most of its decisions are taken by individual judges, three-judge commissions and seven-judge chambers. Its largest judicial formation, the Grand Chamber, issues about two dozen judgments every year. These generally concern especially controversial issues or such initiatives as the reversal or progressive development of principles developed in earlier case law.

Finally, the landscape of international courts and tribunals includes a number of administrative tribunals whose remit concerns legal issues that arise within international organizations. There are several within the United Nations, including the International Labour Organization Administrative Tribunal and the United Nations Administrative Tribunal.

#### 4. A WORLD COURT FOR HUMAN RIGHTS

Given the existence of universal judicial institutions dealing with international law generally – the International Court of Justice – and criminal prosecution – the International Criminal Court – as well as specialized bodies in such areas as trade law and the law of the sea, the absence of an international human rights court with global jurisdiction is quite astonishing. It is all the more striking in light of the enormous success of the regional human rights courts, as Dinah Shelton demonstrates so eloquently in her contribution to this volume. To a limited extent, the International Court of Justice deals with the interpretation and application of human rights treaties as well as the customary law of human rights. Even before the establishment of the International Court of Justice, the

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<sup>55</sup> *Chagos Islanders v UK* App no 35622/04 (ECtHR, 11 December 2012) [39]; Louise Moor and AW Brian Simpson, ‘Ghosts of Colonialism in the European Convention on Human Rights’ (2006) 76 *British Yearbook of International Law* 121.

<sup>56</sup> *Al-Skeini and Others v UK* (GC) App no 55721/07 (ECtHR, 7 July 2011) [138].

<sup>57</sup> The most recent of the protocols, Protocol 16, is not yet in force. But there are actually 17 protocols, because Protocol 14bis followed Protocol 14.

Permanent Court of International Justice and specialized judicial bodies such as the Arbitration Court of Upper Silesia addressed petitions concerning the protection of persons belonging to national minorities.<sup>58</sup> However, human rights issues only come before the International Court of Justice in an inter-state context,<sup>59</sup> or in the form of a request for an advisory opinion from an organ of the United Nations.<sup>60</sup> On the other hand, the regional human rights courts offer to individual litigants a forum for the adjudication of their own grievances with states.

The idea of an international court of human rights was present in the earliest discussions within the United Nations on the content of the 'international bill of rights'. Indeed, even before the human rights mechanisms of the United Nations Charter had become fully operational, Australia had called for the establishment of an international human rights court at the 1946 Paris Peace Conference.<sup>61</sup> Early the following year, at the first session of the United Nations Commission on Human Rights, it returned to the project.<sup>62</sup> Australia's representative, Colonel William Roy Hodgson, raised the matter in the Drafting Committee sessions that took place in June 1947.<sup>63</sup> Supporting the Australian initiative, Belgium thought that the body should form a chamber within the International Court of Justice.<sup>64</sup> The initiative never gained sufficient

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<sup>58</sup> Georges Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia' (1935) 21 *Transactions of the Grotius Society* 27.

<sup>59</sup> For example, *Armed Activities on the Territory of Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep 168 [217]–[219]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* (Preliminary Objections) [2011] ICJ Rep 70.

<sup>60</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

<sup>61</sup> Anne-Marie Devereux, *Australia and the Birth of the International Bill of Rights 1946–1948* (Federation Press 2005).

<sup>62</sup> 'Draft Resolution for an International Court of Human Rights Submitted by the Representative from Australia' (5 February 1947) UN Doc E/CN.4/15. Also: Summary Record of the 15th meeting (23 June 1947) UN Doc E/CN.4/AC.1/SR.15, 2; Summary Record of the 16th meeting (24 June 1947) UN Doc E/CN.4/AC.1/SR.16, 1–5.

<sup>63</sup> Summary Record of the 5th meeting (12 June 1947) UN Doc E/CN.4/AC.1/SR.5, 9–11. Also: 'Memorandum on Implementation Prepared by the Division of Human Rights of the Secretariat at the Request of the Drafting Committee' in 'Report of the Drafting Committee to the Commission of Human Rights' (1 July 1947) UN Doc E/CN.4/21 Annex H, 87.

<sup>64</sup> Summary Record of the 25th meeting (2 December 1947) UN Doc E/CN.4/SR.25, 7.

momentum, however, and a more modest substitute emerged. The International Covenant on Civil and Political Rights, adopted in 1966, entrusted implementation to the United Nations Human Rights Committee. It became operational in the late 1970s, with authority to adjudicate applications by individuals directed at States Parties. More than 100 states have given this contentious jurisdiction to the Human Rights Committee, in accordance with the Optional Protocol to the Covenant.<sup>65</sup> Similar mechanisms have been established pursuant to other United Nations human rights conventions.

But the original proposal for an international court of human rights has remained largely stagnant. In 2008, on the occasion of the sixtieth anniversary of the Universal Declaration of Human Rights, Switzerland revived the proposal and attempted to place it back on the international agenda. The idea had already been mooted by academics, notably Manfred Nowak and Martin Scheinin,<sup>66</sup> although not without scepticism in some quarters.<sup>67</sup> Maria Varaki, in her chapter, signals the hesitations of scholars such as Philip Alston. But there has been no serious attempt to explain the simple but enigmatic contrast between phenomenally successful regional human rights courts and the virtual dead letter of a similar institution at the global level. Perhaps success at the regional level can be explained by the importance that international human rights play in economic and political integration. In a sense, this provides the moral or spiritual compass for regional bodies and initiatives.

## 5. INTERNATIONAL JUDGES

Hundreds of judges now hold office in one or other of the international institutions. For some, this becomes a career spanning many years as they move from one institution to another. Judge Christine Van den Wyngaert has served on three international tribunals, starting her service as Belgium's ad hoc judge at the International Court of Justice, then for

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<sup>65</sup> Optional Protocol to the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 302.

<sup>66</sup> Manfred Nowak, 'It's Time for a World Court of Human Rights' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 17–33; Martin Scheinin, 'International Organizations and Transnational Corporations at a World Court of Human Rights' (2012) 3 *Global Policy* 488.

<sup>67</sup> Stefan Trechsel, 'A World Court for Human Rights?' (2004) 1 *Northwestern Journal of Human Rights* 1.

many years at the International Criminal Tribunal for the former Yugoslavia, and subsequently as a judge at the International Criminal Court where she now sits in the Appeals Chamber. Judge Mohammed Shahabuddeen sat at the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia, and he was elected to the International Criminal Court, although he never took office there.

This introductory essay is not the place to attempt to provide anything comprehensive about the international judiciary, especially because other essays in this volume address the subject. Giulia Pecorella identifies three of her heroes, Hersch Lauterpacht, René Cassin and Antonio Cassese. Each spent a portion of his career, not more than a decade or so, as an international judge. Each also made seminal contributions to international law while not a member of the bench. Joseph Powderly and Jacob Chylinski explore the subject of the women judges. In the century or more of the existence of international courts and tribunals, women have only managed to secure appointment or election to the international judiciary in the past few decades. Probably the first was Helga Pedersen of Denmark, who became a judge at the European Court of Human Rights in 1971. She was joined a few years later by Denise Bindschedler-Robert of Switzerland. The breakthrough at the International Court of Justice took longer. There, Suzanne Bastid was named an ad hoc judge for Tunisia in the early 1980s.<sup>68</sup> It was not until the turn of this century that the presence of women judges became prominent. The International Criminal Court took the lead. The Rome Statute requires a 'fair representation of female and male judges', a text that was criticized by some for failing to ensure parity. Later, the absence of a parity requirement proved a blessing when the election process resulted in a Court where women were a significant majority. Today there are 17 women judges at the European Court of Human Rights, out of a total of 47; six at the International Criminal Court, out of a total of 18; and three at the International Court of Justice, out of a total of 15. Other international tribunals are less impressive in this respect, with only one of 21 at the International Tribunal for the Law of the Sea, one of seven at the World Trade Organization Appellate Body and one of seven at the Inter-American Court of Human Rights.

Some international judges have distinguished themselves as leaders of their peers. In contrast with the general practice at the domestic level,

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<sup>68</sup> *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Tunisia v Libya)* (Judgment) [1985] ICJ Rep 192 [4].

where the senior judge of a Court is likely to be appointed by the executive branch of government, the presidents of international courts are usually elected by colleagues. They fulfil important administrative and extra-judicial functions, including those of a diplomatic nature. This seems particularly important when an international court is in its infancy. For example, Philippe Kirsch, a seasoned diplomat, spent most of his time as first President of the International Criminal Court helping the fledgling institution to navigate its way through the Scylla and Charybdis of the international legal and political system. Leadership extends to the courtroom, where some assume an important function in helping their fellow judges to reach agreement, minimizing dissent and effecting compromise. This is important for the credibility of international justice.

That is not to say that separate and dissenting opinions are not also important. In the early years of international courts and tribunals, there was some support for the notion that judgments should be unanimous. But there were three dissenters, on a bench of 12, on the first judgment of the Permanent Court of International Justice. A dispute between the United Kingdom and Germany based upon provisions of the Treaty of Versailles, the *SS Wimbledon* case concerned the refusal of the Kiel Canal authorities to allow entry to a British ship because it was carrying weapons destined for Poland. Germany took the view that this was consistent with its neutrality. The Court agreed that Germany was entitled to regulate its neutral status but held that the Canal, providing access from the North Sea to the Baltic Sea, was no longer an internal navigable waterway of Germany. Therefore, even its neutrality did not allow Germany to prevent passage by the ship.<sup>69</sup> Germany was entitled to appoint a national judge, and he dissented, as is often the case with ad hoc judges who tend to side with the party who appointed them.<sup>70</sup> Tom Dannenbaum's chapter discusses the issue of nationality of judges more generally. But two distinguished international lawyers who were elected members of the Court, Dionisio Anzilotti and Max Huber, also agreed with the respondent.<sup>71</sup> There were many dissenters at the Permanent Court and often the votes were very close.

In principle there should be an odd number of judges in order to ensure a clear result where unanimity cannot be reached, in the absence of one of the judges or where the appointment of an ad hoc judge may result in

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<sup>69</sup> *Case of the SS Wimbledon (UK, France, Italy and Japan v Germany)* (Judgment) (1923) PCIJ Rep Series A no 1.

<sup>70</sup> *Ibid*, Dissenting Opinion of Schücking J 43.

<sup>71</sup> *Case of the SS Wimbledon* (n 69), Dissenting Opinion of Anzilotti J and Huber J 35.

an evenly divided bench. At the International Court of Justice, this is solved by a provision of the Statute whereby '[i]n the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote'.<sup>72</sup> Fortunately, the provision is invoked very rarely.<sup>73</sup> In *SS Lotus*, a case that concerned the exercise of criminal law jurisdiction on the high seas based upon the nationality of the victim, the divided bench and resort to the casting vote has undermined the authority of the decision, although it is frequently cited even in modern times.<sup>74</sup> Judge Simma described *SS Lotus* as an 'old, tired view of international law'<sup>75</sup> and Judge Weeramantry warned the Court about construing *SS Lotus* 'so narrowly as to take the law backward in time'.<sup>76</sup>

What other international courts and tribunals will do in the event of such division given the silence of their statutes on this issue is unknown. That the three judges sitting in a trial chamber of an international criminal tribunal might each have a distinct opinion about the appropriate sentence, resulting in an impasse, seems to be a not implausible scenario, but the problem has yet to present itself. In three separate individual decisions, a majority of a Trial Chamber of the International Criminal Court granted a 'no case to answer' motion and dismissed all charges against the Vice President of Kenya. However, two of the majority judges did not seem to agree on the consequences of the decision, one considering that the accused was entitled to an acquittal, the other ordering that the decision be viewed as a 'mistrial', thereby reserving the right of the Prosecutor to launch the case anew should she so decide.<sup>77</sup> The intent was to circumvent what one of the majority judges described as the 'overly strict wording' of article 20 of the Rome Statute, where the

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<sup>72</sup> Statute of the International Court of Justice (1945) (concluded 26 June 1945, entered into force 24 October 1945) 15 UNCTAD 355 art 55(2).

<sup>73</sup> *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase Judgment) [1966] ICJ Rep 6 [100]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [105 (E)].

<sup>74</sup> *Case of the SS Lotus (France v Turkey)* (Judgment) (1927) PCIJ Rep Series A no 10.

<sup>75</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, Declaration of Simma J 478 [3].

<sup>76</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (n 73), Dissenting Opinion of Weeramantry J 526. Also: *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (Judgment) [2002] ICJ Rep 3, Joint Separate Opinion of Higgins J, Kooijmans J and Buergenthal J 63 [49]–[51].

<sup>77</sup> *Prosecutor v Ruto et al.* (Decision on defence applications for judgments of acquittal) ICC-01/09-01/11 (3 April 2016).

*ne bis in idem* rule is set out.<sup>78</sup> Should proceedings against the discharged accused ever be undertaken again, by the International Criminal Court or some other tribunal, judges will have to make sense of this ambiguous ruling.

That judges may express their personal perspectives, even if they agree with the majority as to the result, or much of it, greatly enriches international jurisprudence. Of some judges, little is ever really known. They dwell in the anonymity of collective judgments. Others seem to relish the opportunity for individual expression. Mohammed Bedjaoui, whose contribution is discussed at some length in the chapter by Liliana Obregón, wrote of the ‘étonnement d’être des juges investis du pouvoir de juger les Etats, ces monstres immatériels auréolés de la souveraineté sacro-sainte’.<sup>79</sup> Notable individual voices include Judges Giorgios Pikiis and Anita Ušacka at the International Criminal Court, Judge Paolo Pinto de Albuquerque at the European Court of Human Rights and Judge Antônio Cançado de Trindade at the Inter-American Court of Human Rights and the International Court of Justice.

The chance to devote a few paragraphs to what might be called ‘maverick’ judges is irresistible. Such judges take the notion of dissent to a new level. First and foremost is Judge Radhabinod Pal, the jurist from India who served on the International Military Tribunal for the Far East. Judge Pal’s dissenting opinion is famous not only for its great length, exceeding the length of the majority judgment by an order of magnitude, but also for its revolutionary approach to the underlying premise of the case. He simply refused to participate in condemnation of Japanese leaders for war crimes perpetrated throughout the region during the Second World War.<sup>80</sup> ‘As a judicial tribunal, we cannot behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political though cloaked by a juridical appearance’, he wrote. He seemed haunted by the use of the atomic bomb in Hiroshima and Nagasaki, a subject to which he returned on more than one occasion in the dissenting opinion. Publication of the dissenting opinion by Judge Pal was apparently prohibited during the period of occupation and was said to be not readily available in a Japanese version until the mid-1970s.

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<sup>78</sup> Ibid, Reasons of Fremr J [148].

<sup>79</sup> Mohammed Bedjaoui, ‘Le cinquantième anniversaire de la Cour internationale de Justice’ (1997) 257 *Recueil des Cours* 20.

<sup>80</sup> Nakajima Takeshi, ‘Justice Pal’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff 2011) 127–44.

Judge El Hadji Malick Sow never managed to issue his dissenting opinion. He was an 'alternate' judge, added to the Special Court for Sierra Leone Trial Chamber bench in the case of *Charles Taylor* in the event that one of the three regular judges was unable to finish the work. Judge Sow was even present when the judgment was delivered, sitting in his gown alongside the three other members of the Chamber. By that point, at least in theory, his participation was entirely superfluous, or so his colleagues later contended. But if that was really the case, why was he there at all? Moreover, his name appeared on the final judgment although it was subsequently excised by the Registry, as if he was Leon Trotsky disappearing from the photos of the Central Committee meeting. After the unanimous verdict of guilt had been delivered but before the proceedings were adjourned, Judge Sow attempted to intervene. According to Judge Sow, the evidence was insufficient, and Charles Taylor was entitled to an acquittal. He said:

I disagree with the findings and conclusions of the other judges, because for me under any mode of liability, under any accepted standard of proof, the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.

While he was speaking, his colleagues rose and left the courtroom. The authorities stopped the proceedings, drew the curtains and turned off the microphones. Some days later, he was formally censured by his fellow judges. The pundits generally condemned Judge Sow's conduct, perhaps more because they resented the message of acquittal that it contained than that they objected to his irregular behaviour. Actually, there is no great clarity about the role of the alternate judge at an international criminal tribunal. At Nuremberg, the four alternates participated in the reading of the judgment as if they were full members of the bench. Setting aside the quite special and rather unimportant issue as to whether Judge Sow conducted himself appropriately, the fact remains that four judges sat throughout a lengthy and complex trial and one of the four believed the accused to be innocent of the charges. At the very least, that ought to raise concerns about the existence of a reasonable doubt as to the guilt of the accused. Judge Sow never offered a full explanation of his views. He provided an interview to a journalist, but it focused on his

difficulties with the other judges rather than his analysis of the evidence.<sup>81</sup>

There was one dissent at Nuremberg, by the Soviet Judge Iona Nikitchenko. He disagreed with his colleagues on the three acquittals, and on the imposition of life imprisonment rather than the death penalty with respect to Rudolf Hess.<sup>82</sup> However, what is most striking about the Nikitchenko dissent is not what it says but what it does not say. Like the majority judgment, Judge Nikitchenko's reasons are silent with respect to the Katyn massacre. At the insistence of the Soviet Prosecutor, Count III (war crimes) of the indictment of the International Military Tribunal charged the defendants with 'murder and ill-treatment of prisoners of war and of other members of the armed forces of the countries with whom Germany was at war, and of persons on the high seas'. It provided nearly two pages of particulars concerning 14 cases, some set out in considerable detail, 'by way of example and without prejudice to the production of evidence of other cases'. Among them was the following: 'In September 1941, 11,000 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk.'<sup>83</sup> These 19 words, in an indictment of some 65 pages, received disproportionate attention during the trial. Testimony of witnesses, for both the prosecution and the defence, consumed two entire hearing days of a trial that took about eight months in total.<sup>84</sup>

A fair reading of the evidence presented to the Tribunal leaves more than a reasonable doubt about German responsibility for a crime that Russia itself, since 1990, has accepted was actually perpetrated in 1940, when the region was under Soviet control. Much of the secondary literature, published many years after the Nuremberg trial and after the Russian admission, presents the two-day hearing of the witnesses as a clear victory for the Germans. For example, George Sanford wrote that

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<sup>81</sup> 'Justice Sow: Charles Taylor Should Have Walked Free' *New African Magazine* (London, 12 December 2012).

<sup>82</sup> *France et al. v Göring et al.* (1948) 1 IMT 342; *France et al. v Göring et al.* (1948) 22 IMT 411, 589.

<sup>83</sup> 'Indictment' (1947) 1 IMT 27, 54. Also, 'First Day, Tuesday, 20 November 1945, Afternoon Session' (1947) 2 IMT 57, 65.

<sup>84</sup> See William A Schabas, 'The Katyn Forest Massacre and the Nuremberg Trial' in Morten Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping (eds), *Historical Origins of International Criminal Law* (Torkel Opsahl Academic Publishers 2015) vol III, 249–97.

'[t]he German witnesses demolished the Soviet case against them'.<sup>85</sup> Allen Paul described the German testimony as 'a devastating response'.<sup>86</sup> However, observers at the time did not think the Germans had scored a goal. Colonel Harry Phillimore of the British War Crimes Executive reported back to London that 'the evidence emerged strongly in favour of the Soviet case and the German report was largely discredited and their evidence unimpressive'.<sup>87</sup> Correspondents of the major newspapers reached similar conclusions.<sup>88</sup>

Katyn is one of those rare crimes where there can only be two suspects. The Tribunal could not acquit the Germans without at the same time recognizing at least some validity to the thesis that the Soviets were responsible. Even taken at its lowest, it represented an abject failure of the Soviet prosecution to make out a case to which it had attached great importance. That the British, American and French judges opted to remain silent does not surprise, but Nikitchenko's decision to ignore the Katyn massacre in his separate and dissenting opinion is more intriguing. Comfortable with the fact that he was in the minority, a reference to German guilt would have cost him little and burnished his image in Moscow. If Nikitchenko is given the benefit of the doubt, his failure to mention Katyn in the judgment reflects the conclusions of a jurist of honesty and integrity. Perhaps Nikitchenko was the judicial equivalent of the Soviet Union's great musical genius Dimitri Shostakovitch, a consummate professional struggling to cope with pressures that no judge or artist should have to endure.<sup>89</sup>

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<sup>85</sup> George Sanford, *Katyn and the Soviet Massacre of 1940: Truth, Justice and Memory* (Routledge 2011) 141.

<sup>86</sup> Allen Paul, *Katyn: Stalin's Massacre and the Triumph of Truth* (Northern Illinois University Press 2010) 335. Along similar lines: Joseph E Persico, *Nuremberg: Infamy on Trial* (Penguin 1994) 359; Anna M Cienciala, Natalia S Lebedeva and Wojciech Materski, *Katyn: A Crime Without Punishment* (Yale University Press 2007) 232.

<sup>87</sup> 'Report from British War Crimes Executive, in Nuremberg, to Foreign Office' (6 July 1946) FO 371/56476.

<sup>88</sup> 'Katyn Forest Crime, Nuremberg Defence Refuted' *The Times* (London, 2 July 1946) 3; 'Murder of Polish Officers, Medical Conclusions at Nuremberg' *The Times* (London, 3 July 1946) 3.

<sup>89</sup> On Shostakovitch, see the recent novel by Julian Barnes, *The Noise of Time* (Jonathan Cape 2016).

## 6. FRAGMENTATION

It is inevitable that there will be overlaps in jurisdiction where several courts operate simultaneously. For example, it is sometimes the case that more than one international criminal tribunal can deal with the same situation. Both the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia were entitled to exercise jurisdiction over the territory of the former Yugoslavia for about a decade, beginning in 2002. The problem was theoretical because no prosecutions concerning post-2002 crimes perpetrated on the territory of the former Yugoslavia were undertaken by either institution. Had a difficulty arisen, a likely solution would probably have been found in the prohibition of double jeopardy (*ne bis in idem*), a human rights norm set out in several conventions as well as in the applicable statutes of the two tribunals.

The human rights courts are also equipped with a codified solution to the problem of multiple applications. As a condition of admissibility of a petition, the Optional Protocol to the International Covenant on Civil and Political Rights requires that '[t]he same matter is not being examined under another procedure of international investigation or settlement'.<sup>90</sup> The instruments of other human rights tribunals contain similar provisions. In fact, this does not provide a perfect solution, because it sometimes remains possible for a litigant to file successive applications at different tribunals. A European applicant, for example, can submit a claim to the European Court of Human Rights and, when that matter is concluded, continue before the United Nations Human Rights Committee. This does not work in reverse, however, because the European Convention on Human Rights has a rule requiring claims to be filed within six months of the conclusion of national proceedings.<sup>91</sup>

When the International Law Commission considered the problem of fragmentation, it offered the example of environmental litigation concerning a nuclear facility known as the 'MOX Plant' located on the west coast

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<sup>90</sup> Optional Protocol to the International Covenant on Civil and Political Rights (n 65) art 5(2)(a).

<sup>91</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (concluded 4 November 1950, entered into force 3 September 1953) ETS 5 as amended by Protocol 11 (entered into force 1 November 1998) ETS 155 and Protocol 14 (entered into force 1 June 2010) ETS 194, art 35(1). An amendment to the Convention, not yet in force, reduces the time to four months: Protocol 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms (concluded 24 November 2013) CETS 213 art 4.

of Britain. Proceedings relating to the case were undertaken before an arbitral tribunal set up under Annex VII of the United Nations Convention on the Law of the Sea; under the compulsory dispute settlement procedure covered by the Convention on the Protection of the Marine Environment of the North-East Atlantic; and under the European Community and Euratom Treaties before the European Court of Justice.<sup>92</sup> Each of these three judicial bodies viewed the facts from a different perspective: law of the sea, pollution of the North Sea, and relationships within the European Union, respectively.

The problem is hardly unknown at the domestic level and there is no reason why its manifestation should be particularly different at the international level. Where there are overlaps in jurisdiction, practical solutions can be found, as Luiz Eduardo Salles points out in his chapter. Occasionally, there will be circumstances where conflict cannot be avoided. But that also happens in national justice systems. Classic norms that international law labels as ‘general principles of law’, such as *lex judicata* and *lis pendens*, are helpful here.

But what if different international institutions reach conflicting results in terms of legal principles? This situation has already arisen. International human rights bodies do not always arrive at the same conclusion about the content of fundamental norms formulated in more or less identical fashion. For example, the European Court of Human Rights has found that prolonged detention prior to execution (the ‘death row phenomenon’) constitutes a form of inhuman or degrading treatment or punishment.<sup>93</sup> The United Nations Human Rights Committee, applying a similar provision, has reached a different conclusion.<sup>94</sup>

In 1999, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia addressed the issue of the requisite degree of control by one state over armed forces operating in another state in order for there to be a finding that it was legally responsible for their conduct. Although the Appeals Chamber was determining issues of individual guilt rather than state responsibility, the question was relevant to the

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<sup>92</sup> Koskenniemi, ‘Report on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law’ (n 1) [10]. See also Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Erik Castrén Institute 2007).

<sup>93</sup> *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989) ECHR Series A-161.

<sup>94</sup> *Errol Johnson v Jamaica* Comm no 588/1994 (UNHRC, 22 March 1996) UN Doc CCPR/C/56/D/588/1994.

application of the grave breach provisions of the four Geneva Conventions, to which reference was made in article 2 of the Tribunal's Statute. In its important 1985 judgment in the case between Nicaragua and the United States, the International Court of Justice had ruled that the test was one of 'effective control'.<sup>95</sup> But the Prosecutor of the International Criminal Tribunal for the former Yugoslavia argued that the International Court of Justice was mistaken, and that the test should be a less stringent one of 'overall control'. The Tribunal concurred. It described the holding of the International Court of Justice as 'not persuasive' and declined to follow it.<sup>96</sup>

The International Court of Justice was not amused, and critics of the Tribunal judgment argued about the importance of coherence in the international legal order. It was not constructive for decisions of the International Court of Justice to be defied by other international courts and tribunals, they contended, especially those created within the United Nations framework. The detailed discussion of the matter by the Appeals Chamber seemed a bit indulgent, because a determination of responsibility under the grave breach provisions – whose utility at the Tribunal has been marginal – was not particularly important, and might have been artfully avoided so as not to conflict with the Court's ruling in *Nicaragua*.

Some years later, when it considered whether Serbia was responsible for genocide perpetrated in Bosnia and Herzegovina, the International Court of Justice returned to the question. As a general rule, it adopted the findings of fact and the application to them of international criminal law that had been made by the International Criminal Tribunal for the former Yugoslavia in its abundant case law. When it came to attribution of liability to Serbia, however, the Court reprised its formula in *Nicaragua*, politely chiding the Tribunal's Appeals Chamber for straying outside its area of expertise. Noting its respectful adoption of the views of the Appeals Chamber when matters of international criminal law were involved, the Court said it would not take the same attitude to 'issues of general international law which do not lie within the specific purview' of the jurisdiction of the Tribunal.<sup>97</sup> This is a sensible approach, and one not

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<sup>95</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 [115].

<sup>96</sup> *Prosecutor v Tadić* (Appeals Judgment) ICTY-94-1-A (15 July 1999) [137].

<sup>97</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [403].

unlike that adopted within domestic legal systems where even the highest courts will show a degree of deference for specialized tribunals.

## 7. THE POLITICAL ENVIRONMENT

Probably the biggest distinction between international courts and tribunals and their national counterparts in terms of how justice is rendered concerns the political environment. Although much international litigation is quite technical in nature, and may deal with essentially private interests, the concerns of states are never very remote. Even the work of the international criminal tribunals, although focused on individual culpability, usually amounts to an assessment of the behaviour of a regime, or that of the opponents of a regime. At the International Criminal Court, the Prosecutor selects the situations for trial. Ostensibly neutral and impartial, she is nevertheless compelled to make choices about the targets of her efforts. When ad hoc criminal tribunals are involved, the situation that is destined for prosecution is determined by the political body that creates the institution, generally the United Nations Security Council.

At the national level, critics sometimes complain that there is a different justice for the rich than for the poor. One of the aspirations of democratic governance is to reduce and ultimately eliminate any such distinctions so that, as article 7 of the Universal Declaration of Human Rights reminds us: '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'. This should also be true where international courts and tribunals are concerned. The most inspiring work of the international courts and tribunals occurs when they demonstrate their willingness to ensure that justice is done when the weak challenge the strong. At their worst, they sometimes manifest a degree of slavishness to powerful states, something that Michelle Farrell discusses in her chapter in this volume.

The International Court of Justice had a brilliant start in the *Corfu Channel* case, considered in Mónica Pinto's contribution which opens the collection. The case addressed rival claims by the United Kingdom and Albania respecting the presence of mines in the latter's territorial waters. Accepting the British claim, the Court concluded that Albania had breached the right of innocent passage. Albania argued that a subsequent and unauthorized minesweeping of the Channel by the Royal Navy was a violation of its sovereignty. In his concluding remarks during the oral hearing, Professor Pierre Cot, who was counsel for Albania, invoked the words used by the British Admiralty about taking Albania to the World

Court so that it could 'learn to behave'. But '[a]ll nations, Mr. President, large and small, strong and weak, must learn to behave themselves', he said.<sup>98</sup> The Court agreed: 'The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.' The Court warned that '[i]ntervention is perhaps still less admissible in the particular form it would take here' because 'from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself'.<sup>99</sup>

At the conference held by the International Court of Justice to mark its seventieth anniversary, in April 2016, Professor Christian Tomuschat spoke of how the Court was now 'truly global'. He noted the harm that had been done to the Court's image in the third world by its treatment of the South-West African cases, but cited the confidence that is now shown in it by developing countries. Indeed, the International Court of Justice is today busier than it has ever been. Its history is one of an ongoing quest for legitimacy, an issue discussed in the chapter by Yvonne McDermott and Wedad Elmaalul. The International Court of Justice had a promising beginning, and it was quite active during its first two decades. Possibly the willingness to condemn the United Kingdom in its first contentious case inspired confidence in the impartiality of the institution and its resistance to real or apprehended political pressures. But its failure to condemn the apartheid regime in the mid-1960s was followed by a drought that lasted two decades. Confidence only began to be restored in the Court when it ruled in favour of Nicaragua and against the United States in 1986.

The real challenge to international justice is not the removal of political factors. International courts and tribunals are in many ways analogous to constitutional courts within national justice systems, where the role of policy in the development of law is generally acknowledged. Tensions between the large and the small, the powerful and the weak, are inherent in the international order. The strongest in both economic and military terms seek to exercise control through international law but also through bodies like the United Nations Security Council where their hegemony is assured. Small and middle powers turn to international law

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<sup>98</sup> *Corfu Channel Case (UK v Albania)* (Oral Proceedings (second part) 25 March 1948, 9 April and 15 December 1949) [1950] ICJ Pleadings, Oral Arguments, Documents vol IV, 699.

<sup>99</sup> *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35.

and international judicial institutions in order to right the balance. Their equality finds protection in justice to the extent that it can bring the most powerful to heel. Justice is at its very best when equality under the law can be delivered effectively.