

THE IMPACT ON THE INTERNATIONAL LEGAL
SYSTEM OF THE GROWTH OF
INTERNATIONAL COURTS
AND TRIBUNALS

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By the time this issue of the Journal is published, my recently concluded series of lectures on the subject of this symposium also will be published.¹ Those lectures focus on many of the questions the organizers posed for this symposium. Certainly, the topic addressed by the symposium is large, important, and difficult. The views that I bring to this area may not address adequately or resolve all of the issues. This is particularly true because the participants at this symposium have brought their own special expertise and perspectives. Hopefully, the efforts I have invested in studying this subject will provide a better understanding of the impact that multiple international tribunals may have on the international legal system.

Since I cannot reproduce my Hague lectures here, persons interested in the evidence and more developed analyses on which the conclusions I discuss below are based should examine the written Lectures found in the Collected Courses (Recueil des Cours) of the Hague Academy. Here, I will summarize the conclusions reached in the lectures and also address some additional views that I formed subsequent to delivering those lectures, especially as a result of participation in the symposium.

When one begins to examine the recent proliferation of international courts and other tribunals, this development must be put into its proper historical context. Obviously, the existence of a standing international court of general jurisdiction is a creation of the twentieth century. Prior to the establishment of the Permanent Court of International Justice

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1. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, in 271 RECUEIL DES COURS 101 (1998) [hereinafter Hague lectures].

(PCIJ) after World War I, many ad hoc tribunals had been used. Even after the PCIJ was established, a variety of international tribunals continued to provide forums for third-party settlement of international disputes. After the International Court of Justice (ICJ) was established at the conclusion of World War II, ad hoc tribunals also continued to be used, albeit with less frequency. Consequently, the International Court never has stood alone as the sole tribunal to settle disputes in accordance with international law. It always has coexisted with other third-party dispute settlement forums. Recent developments are changing the international environment as a result of the establishment of more permanent tribunals and, perhaps, the use of fewer ad hoc tribunals. In very recent years, the rate of change from ad hoc to permanent tribunals appears to be increasing dramatically.

Thus, states involved in international disputes have a greater range of third-party dispute settlement vehicles than heretofore. Many legitimate reasons help explain why states and other members of the international community could prefer to have available a variety of international tribunals to resolve their disputes. They include, but are not limited to, the desire for secrecy, control over the membership of the forum, panels with special expertise or perceived regional sensitivities, preclusion of third state intervention, and forums that can resolve disputes in which non-state entities may appear as parties.

If states prefer a system with multiple options for third-party settlement of international disputes, the question arises as to whether a hierarchy may be established among them. It is clear to me that the international community will not and cannot establish such a hierarchy of international tribunals that would place the ICJ or any other tribunal at the apex of international law serving as the "Supreme Court of International Law." While the reasons may be many, two primary reasons are: (1) the fact that a universal, or near universal, agreement of states to anoint any particular forum with this status seems practically and politically impossible, and (2) such a Supreme Court would undermine the community's desire for diverse forums since many of the perceived advantages of such forums would become impossible to attain within such a hierarchical structure. Review by a court of general jurisdiction would compromise the very features that make the alternative forums

attractive in the first place, such as the special qualities of the panel members. Thus, a significant number of independent international tribunals will remain a part of the international legal system for the foreseeable future.

Consequently, the question arises as to whether the proliferation of international tribunals threatens the coherence of the international legal system. Not only may a cacophony of views on the norms of international law undermine the perception that an international legal system exists, but if like cases are not treated alike, the very essence of a normative system of law will be lost. Should this develop, the legitimacy of international law as a whole will be placed at risk. My Hague lectures examine that question from a theoretical perspective, but I undertook a predominantly comparative law analysis of several major doctrines of public international law as treated by several international tribunals. Those doctrines included the law of treaties, sources of international law, state responsibility, compensation for injuries to aliens, exhaustion of domestic remedies, nationality, and international maritime boundary law. I considered the jurisprudence developed by the ICJ, the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the dispute settlement forums of the World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT), the Iran-United States Claims Tribunal, ad hoc tribunals established to decide disputes involving international law, and several administrative tribunals of international organizations, among others. I concluded that, in those core areas of international law, the different international tribunals of the late twentieth century do share relatively coherent views on those doctrines of international law. Although differences exist, these tribunals are clearly engaged in the same dialectic. The fundamentals of this general international law remain the same regardless of which tribunal decides the case.

However, an increase in the number of international law tribunals, absent an effective hierarchical system that would produce definitive answers to differences over norms of international law, means that complete uniformity of decisions is impossible. On the other hand, it is clear that ongoing international tribunals tend to follow the reasoning of their prior decisions. Furthermore, the views of the ICJ, when on point, are given considerable weight, and those of other interna-

tional tribunals often are considered. Thus, the variety of international tribunals functioning today do not appear to pose a threat to the coherence of an international legal system.

The future is difficult to predict. Nevertheless, it is not clear that in the future significant numbers of new tribunals will be created. We may be approaching the end of the trend to establish new international tribunals, especially standing tribunals. Based on past lessons, however, the maintenance of a similar number of tribunals, or even an increase, should not present problems for international law, although risks do exist.

One strength of the multiplicity of international tribunals is that it permits a degree of experimentation and exploration, which can lead to improvements in international law. The lack of a strictly hierarchical system provides international tribunals with the opportunity to contribute collectively ideas that might be incorporated into general international law. It also facilitates the evaluation of those ideas by the international community as a whole. Ultimately, one would expect that the best ideas will be adopted widely, contributing to the body of international law. In some cases, however, unique solutions for special circumstances may be the better alternative. An overly strict hierarchical structure for international decisions could place undesirable constraints on the development of general international law and specialized law for specific areas.

It is also difficult to argue that these forums have taken cases away from the ICJ, thereby denying the Court its rightful role in the adjudication of international law. Nor does it appear likely that a decline of the ICJ is on the horizon, even with the increased number of forums deciding international legal issues. Instead, in recent years, the ICJ has had the heaviest caseload in its history.² Furthermore, during this period,

2. As of October 1998, twelve cases were pending before the ICJ. This is one case short of the highest number of cases the ICJ ever had on its docket, and it reflects the relatively high number of cases carried by the Court during the 1990s. *Address by the President of the International Court of Justice, Judge Stephen M. Schwabel, to the General Assembly of the United Nations* (visited Oct. 27, 1998) <<http://www.icj-cij.org/icjwww/ipre.../SPEECHES/SpeechPresidentGA98.htm>>; *Consequences that the Increase in the Volume of Cases before the International Court of Justice has on the Operations of the Court*, Report of the Secretary-General, U.N. Doc. A/53/326/CORR.1 (Nov. 5, 1998) at 2 [hereinafter *Consequences*]. See also P. H. F. Bekker, *The 1995 Judicial Activity of the Interna-*

the ICJ has been called upon to decide some of the hottest cases from the perspective of international politics that it ever has faced.³

Nonetheless, it is true that a comparison of the number of cases handled by the ICJ and those handled by the highest courts of states, or even several other standing international dispute settlement tribunals shows that the ICJ's caseload is relatively low.⁴ Based on this fact, one can argue that the ICJ remains underutilized. Nevertheless, judges on the Court consider the number close to the limits of the Court's capacity. It is possible, however, for the Court to streamline its procedures in order to handle more cases. The schedule for submitting memorials, counter-memorials, and other documents is usually long and established specially for each case. There are no limits to the lengths of those documents. Hearings before the Court can take many weeks. The Court's normal internal processes for reaching a decision and writing judgments is labor-intensive for all the judges and consumes considerable time. Furthermore, separate and dissenting opinions can be of enormous length.

tional Court of Justice, 90 AM. J. INT'L. L. 328 (1996); R. Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L. L. 493, 494 (1995); K. Highet, *The Peace Palace Heats Up: The World Court in Business Again?*, 85 AM. J. INT'L. L. 646 (1991).

3. See, e.g., *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 1996 I.C.J. 803 (Preliminary objections of July 11); *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240 (Preliminary Objections of June 26); *Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.)*, 1986 I.C.J. 14 (Judgment on Merits of June 27); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24); *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 (Feb. 3); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.)*, <<http://www.icj-cij.org/icjwww/idocket/iluk/ilukjudgement>>, (Preliminary Objections of Feb. 27, 1998); *Oil Platforms (Iran v. U.S.)*, <<http://www.icj-cij.org/icjwww/idocket/iop/iopframe>>, (Counter-claim Order of Mar. 10, 1998); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 4 (July 8); *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8); *Vienna Convention on Consular Relations (Para. v. U.S.)*, <<http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe>>, (Provisional Measures of Apr. 9, 1998).

4. Since its establishment in 1946, the Court has dealt with 77 contentious cases and 23 requests for advisory opinions. *Address by the President of the International Court of Justice*, *supra* note 2. See also *Consequences*, *supra* note 2, at 2; A. EYFFINGER, *THE INTERNATIONAL COURT OF JUSTICE 1946-1996* 369, 374-384 (1996).

It may be difficult to change the traditional procedures of the Court in fundamental ways. Even if the Court were willing to do so, it is not clear that states would be amenable to substantial changes that might promote such efficiency objectives. When sovereign states litigate against each other, they do not want to be constrained by procedures that restrict their ability to present their cases as fully and completely as they wish. The reasons for this attitude are closely related to international relations and domestic political sensitivities. Similarly, too much expedition on the part of the Court might derogate from the legitimacy that the Court's judgments must attract. In fact, the fullness and deliberative character of the ICJ may be essential to attracting certain cases to the Court as well as adding to the authority of its decisions.

That is not to say that the Court should not be able to proceed with dispatch as needed, or that its overall procedures can not be improved. It demonstrated recently, for example, that it could move quickly to issue an indication of provisional measures of protection in the *Vienna Convention on Consular Relations Case*.⁵ This example also demonstrates the delicacy of the ICJ's authority. The Court did move rapidly to indicate provisional measures of protection instructing the United States to take all measures at its disposal to prevent the execution of Mr. Breard by the State of Virginia. Nevertheless, the U.S. Executive Branch did not take as forceful a position as it might have taken to obtain a delay of the execution, the United States Supreme Court declined to order a stay of the execution, and the Governor of Virginia refused to delay the execution.⁶ An international culture that gives automatic and

5. Vienna Convention on Consular Relations (Para. v. U.S.), *supra* note 3.

6. *Para. v. Allen*, 949 F. Supp. 1269 (E.D.Va. 1996), *aff'd* 134 F. 3d 622 (4th Cir. 1998), *cert. denied sub nom. Breard v. Greene*, 523 U.S. 371 (1998); Brief for the United States as Amicus Curiae at 49-51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390 and 97-8214); *Statement by Governor Jim Gilmore concerning the Execution of Angel Breard, Commonwealth of Virginia, Office of the Governor Press Office* (April 14, 1998); Letter from Madeleine K. Albright, Secretary of State to James S. Gilmore, III, Governor of Virginia (April 13, 1998). For a discussion of the legal issues arguing that the U.S. failed to take the actions it could under U.S. and international law, see Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679 (1998); Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998);

full authority to the ICJ's utterances does not exist. This suggests that substantial changes to expedite ICJ procedures in order to increase the Court's capacity may not be wise.

Indeed, the ICJ has taken steps to improve its procedures, but the international community has also implicitly resisted strengthening the Court. Thus, the Court has taken steps to increase the efficiency of its internal procedures, urged the litigating states to submit clearer, more succinct written pleadings, and made its orders and judgments quickly and easily accessible to all through its new web site.⁷ On the other hand, the U.N. has placed significant budgetary constraints on the Court, thereby hampering its ability to manage its increased caseload. The gross disparity in the funds appropriated to the ICJ (\$11 million) as compared to those appropriated for the International Criminal Tribunal for the former Yugoslavia (\$70 million) appears to reflect a lack of interest on the part of the international community to strengthen the ICJ to a point where it might serve as the Supreme International Court.⁸ Rather, it reflects a continuing international support for a variety of international tribunals. The overwhelming support given to the establishment of the International Criminal Court (ICC) at the 1998 Rome Conference provides further confirmation of this conclusion.⁹

Despite limitations and setbacks as illustrated by the above case, we have witnessed an overall expansion of third-party settlement of international disputes through law-based forums. This seems to reflect an increase in the role of international law in the settlement of international disputes and a healthy environment for this to take place. If it were otherwise, fewer

Jordan Paust, *Breard and Treaty-Based Rights under the Consular Convention*, 92 AM. J. INT'L L. 691 (1998); Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697 (1998); Frederic L. Kirgis, *Zschernig v. Miller and the Breard Matter*, 92 AM. J. INT'L L. 704 (1998). *But see* Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998). For a review of the entire facts of the case, see Jonathan I. Charney and W. Michael Reisman, *The Facts*, 92 AM. J. INT'L L. 666 (1998).

7. See <<http://www.icj-cij.org>>; Schwebel, *Address by the President of the International Court of Justice*, *supra* note 2; *Consequences*, *supra* note 2, at 5-6.

8. See *Consequences*, *supra* note 2, at 7; Schwebel, *Address by the President of the International Court of Justice*, *supra* note 2.

9. Rome Statute of the International Criminal Court, A/CONF.183/9 (July 17, 1998) <<http://www.un.org.icc>>.

states and other entities would submit their disputes to international law forums. This may reflect the fact that other international forums are necessary complements to the ICJ, especially in matters that involve issues less central to core state concerns or involve parties that are incapable of being litigants before the ICJ. The fact that only states may be parties before the ICJ may explain the creation of other tribunals and the fact that they attract so many cases.

The establishment and use of various third-party forums to decide questions of international law means that more international issues are being resolved pursuant to international law. This will add to the body of decisions based on international law that are authoritative and can be relied upon by the international community. Unfortunately, the ICJ is unequipped and unable to address all of these numerous and sometimes highly specialized issues. As a whole, the other forums complement the work of the ICJ and strengthen the system of international law, notwithstanding the risk of some loss of uniformity.

Certainly, the primary objective of the international legal system is to help the international community avoid disputes and, once a dispute arises, to assist in its resolution. The many available forums serve both functions. These forums usually are an integral part of international regimes. They often have compulsory jurisdiction over disputes that may not be within the ICJ's mandatory jurisdiction. In those situations, states know that if a dispute arises they could be forced to defend their actions before a tribunal. Since states wish to avoid being brought before third-party tribunals, this strengthens their motivation to avoid violations of their legal obligations. If they are accused of a violation, they will try to negotiate a diplomatic settlement of the dispute. Due to the litigation potential, a negotiated settlement is likely to be influenced by the relevant international law. Finally, if the dispute cannot be resolved diplomatically, the tribunal's jurisdiction may be invoked and the dispute settled by an award or judgment based on international law. As a consequence, the multiplicity of dispute settlement forums increases the likelihood that disputes will be resolved in accordance with international law, with or without litigation.

Notwithstanding determinations made by the other tribunals, the decisions of the ICJ are most significant when they

address general international law in well-reasoned judgments or advisory opinions. This is especially likely when there are few, if any, differing opinions by the participating judges. The fact is that the ICJ has a caché that makes its pronouncements on questions of general international law particularly significant. It is certainly within the ability of the Court to retain or even to build on this stature in order to provide the leading authoritative statements on general international law. The international community is predisposed to take the Court's views on this law quite seriously, and if the Court maintains a high level of competence and expresses its views in well-reasoned ways, it will continue to have an influence on the course of general international law that is well beyond its nominal jurisdiction. This is true notwithstanding the fact that the ICJ has not been endowed by the international community with the status of the Supreme Court of International Law with universal review authority. Thus, the Court has an important role to play in maintaining the coherence of international law even absent such jurisdiction. Both the members of the ICJ and the United Nations have the responsibility to assure that the Court continues to carry out this valuable function. Since the tribunals and attorneys involved in all of the international tribunals are usually well aware of the views of the other tribunals, especially those of the ICJ, these decisions are persuasive before other forums when the same legal issue arises. Thus, a significant amount of cross-fertilization occurs among international tribunals. In this environment, the ICJ remains a prodigious force. Judgments of the Court continue to be the most analyzed and the most frequently referenced of all the decisions by tribunals that address international law questions. This is unlikely to change in the foreseeable future.

Accordingly, it appears at present that the Court's salience is not at substantial risk, and it continues to play the leading role in weaving together the strands of international law. These strands are found not only in the traditional primary sources of the law, but also in determinations by the ICJ and other tribunals where questions of general international law are addressed. Certainly, the ICJ is the only international court of general jurisdiction. Thus, matters often come before it to be decided only on the basis of general international law. All other standing tribunals are only presented with cases arising within the context of the treaty regime within which they

exist. This limited context constrains their ability to serve as the definitive forum for matters of general international law. That role is *de facto* reserved to the ICJ. It can take into account developments in international law across the entire spectrum of international relations. As a result, the ICJ's decisions reflect the perspective of a court unsullied by narrow limitations that a special regime may impose on a forum. Thus, its pronouncements on general international law necessarily are more persuasive than similar pronouncements given by tribunals with specialized jurisdiction and narrower perspectives. This strengthens the leadership role that the ICJ performs in the maintenance and development of general international law.

Other tribunals may decide disputes, but it remains for the ICJ to place its imprimatur on the law it examines, even if informed by decisions of other forums. In that sense, the other forums help to identify important issues of international law that deserve the attention of the ICJ. Even if it is not constitutionally established as the Supreme Court of International Law, by endorsing a particular interpretation of the law, the ICJ can strengthen a rule to the extent that states and other tribunals are likely to follow it.

Although the variations among tribunals deciding questions of international law are not so significant as to challenge the coherence of international law and its legitimacy as a system of law, the possibility that problems might develop in the future ought not be ignored. The various international tribunals other than the ICJ, which were examined in my Hague lectures, do have their own agendas. They were formed to serve the interests of the states that established them within the treaty regime for which they were created. The allegiance to that treaty regime may become greater than the allegiance to the international legal system as a whole. These specialized tribunals present the risk that their own centrifugal forces will drive them in directions away from the core of international law. As a result, these specialized tribunals could develop greater variations in their determinations of general international law and damage the coherence of the international legal system.

If a hierarchical judicial system for international law is not to be established, two factors will work as counter-forces against those centrifugal forces. First, the ICJ must continue

to maintain its intellectual leadership role in the field. If it does so, the other tribunals will be under pressure to abide by the ICJ's determinations on international law. Second, the other tribunals and the ICJ should be encouraged to increase the dialogue that already exists among them. The idea that all of these tribunals are engaged in a common endeavor would be emphasized. This might provide strong pressures against the centrifugal forces at work, while still permitting the independence of these specialized tribunals.

Additionally, the ICJ might write its judgments and opinions so as to appear more like a Supreme International Court and overtly consider alternative theories on the international law as used by the various other tribunals. Based on such express analyses, the ICJ could issue well-reasoned decisions in which the views of the other tribunals are considered. It is likely that such rulings would attract even greater significance than heretofore. An interpretation of a rule of general international law that was produced by a tribunal and subsequently examined and rejected by the ICJ would make it difficult for that tribunal to continue to maintain its view. In addition, tribunals may adhere more strongly to their views if endorsed by the ICJ. Other tribunals may also be further encouraged to adopt the views endorsed by the ICJ. Certainly, increased inter-court dialogue and deference, whether it be explicit or implicit, is important to avoid the potential centrifugal forces in question.

Despite this optimistic prognosis, as we enter deeper into a period of a multiplicity of standing international tribunals, risks are present. These tribunals, and the states that create them, could produce such diversity in international law that the coherence of this system of law might be threatened. States and the tribunals created by them should be sensitive to this undesirable possibility. While diversity, experimentation, and competition have value, the coherence of international law is important to the maintenance of a peaceful and beneficial international legal system. All of the participants in this system should be sensitive to the maintenance of an appropriate degree of coherence in order to avoid unnecessary risks. For these reasons, I conclude that the coherence of international law does not appear to be significantly threatened by the

increased number of international tribunals. However, all participants in the system need to be sensitive to the risks inherent in the decentralized system and be careful to avoid actions that might pull the system apart.