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Gonzaga Journal of International Law, vol. 10, pp. 202-226.

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WHAT CAUSED THE MULTIPLICITY OF INTERNATIONAL COURTS AND TRIBUNALS?

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Cite as: Firew Kebede Tiba, *What Caused the Multiplicity of International Courts and Tribunals?*, 10 GONZ. J. INT'L. L. 202 (2006), available at <http://www.gonzagajil.org>.

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I. INTRODUCTION

The proliferation of international courts and tribunals alias, the multiplicity of international judicial forums, is one of the topical issues in international law. This development in the realm of international dispute settlement comes, according to Phillippe Sands, at the fourth phase in the development of international adjudication. International disputes prior to 1899 were adjudicated almost exclusively between States, with some

exceptions.¹ For instance, the mixed tribunals established pursuant to the Jay Treaty of 1794 between the U.S. and Great Britain allowed for individual claims to be brought before the tribunal. The move to the second phase came with the decision in 1899 to establish the Permanent Court of Arbitration (PCA), which was done “with the objective of facilitating an immediate recourse to arbitration for international differences” that could not be settled by diplomacy.² The permanent nature of the PCA makes recourse possible at all times as opposed to setting up new institutions as incidents arise.³ Even if the PCA⁴ is not considered a permanent tribunal with permanent judges, it is regarded as an important point in the history of modern international dispute settlement.⁵ A truly ‘international’ court would have had to wait until the end of World War I.⁶ The third phase in the history of international adjudication commenced in the 1940s and 1950s with the establishment of the International Court of Justice (ICJ), the European Court of Justice (ECJ), the European Commission and Courts of Human Rights. This phase lasted up to the early 1980s, and encompassed also the establishment of the International Centre for the Settlement of Investment Disputes (ICSID). The fourth phase as Sands argues was decisively initiated by the creation of the International Tribunal for the Law of the Sea (ITLOS). Although the ITLOS became operational in 1996 the adoption of the 1982 Convention for the Law of the Sea signaled an entry in

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1. *E.g.*, Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=129> (establishing mixed tribunals consisting of members appointed by Great Britain and the U.S. and an impartial umpire to decide claims by nationals of each State).

2. Convention for the Pacific Settlement of International Disputes, Jul. 29, 1899, art. 20, available at www.pca-cpa.org/ENGLISH/BD/BDEN/1899ENG.pdf. [hereinafter CPSID].

3. *Id.*

4. Permanent Court of Arbitration, <http://www.pca-cpa.org/ENGLISH/GI/#History> (last visited Oct. 3, 2006) (the PCA was established by the Convention for the Pacific Settlement of International Disputes for resolving disputes between states).

5. The original purpose was not accepted. On this point, “T.M.C. Asser of the Netherlands expressed his dissatisfaction in the following way: ‘Instead of a Permanent Court, the Convention of 1899 only created the phantom of a Court, and impalpable ghost, or, to speak more plainly, it created a clerk’s office with a list.’” P.H. Kooijmans, *International Arbitration in Historical Perspective: Past and Present, Comments on a Paper by Professor L.B. Sohn*, in INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 23 (A.H.A. Soons ed., 1990).

6. Permanent Court of International Justice (PCIJ), *Overview*, <http://www.indiana.edu/~league/pcioverview.htm> (last visited Sept. 26, 2006) (Permanent Court of International Justice established under auspices of the League of Nations in 1920); see also Central American Court of Justice, <http://www.worldcourts.com/cacj/eng/index.htm> (last visited Sept. 26, 2006) (Central American Court of Justice functioned between 1907-1918).

to a new phase. This phase is characterized by compulsory jurisdiction and the granting of binding decision making power to judicial institutions, as is now also reflected in the provisions of the WTO's Dispute Settlement Understanding (DSU). In this last phase the creation of the International Tribunal for the Law of the Sea provoked a lot of debate among scholars, judges and practitioners. One of the outspoken commentators against its establishment was Judge Shigeru Oda of the ICJ who believed that the work of the ITLOS could be perfectly handled by the ICJ without a need for the establishment of a new tribunal.⁷

Put in context, this proliferation of international courts and tribunals has to be seen as a part of the greater picture of the proliferation of international organizations. This in turn needs to be seen in the context of a growing interdependence between countries and international cooperation that necessitates an institutional mechanism to regulate these new areas of cooperation. According to Blokker, "there is one fundamental overarching explanation that is usually summarized in catch words such as globalization and interdependence" and which effectively means that "an increasing number of state functions can no longer be performed in splendid isolation."⁸ Hence globalization has its own share in the creation of more international courts and tribunals.

In most cases, the proliferation of international organizations directly contributed to the proliferation of international courts and tribunals. For instance, the proliferation of administrative tribunals and those tribunals created under the auspices of regional integration agreements are some of such cases. This development is what Georges Abi-Saab characterizes as a law of legal physics, where "to each level of normative density, there corresponds a level of institutional density necessary to sustain the norms".⁹ While the need for new courts could be justified by the creators in each case, the fact that they are attached to international organizations instead of standing alone is explained more by economic justifications than other considerations. As Hugh Thirlway notes, from the experiences of PCIJ and ICJ, the "most practical method of financing a tribunal is through the budget of an international organization, thus tapping the purses of member States

7. Shigeru Oda, *The International Court of Justice viewed from the Bench (1976-1993)*, in 244 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9 (1993-VII); but see Jonathan I. Charney, Editorial Comment, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69 (1996).

8. Niels M. Blokker, *Proliferation of International Organizations: An Exploratory Introduction*, in 37 PROLIFERATION OF INTERNATIONAL ORGANIZATIONS, LEGAL ISSUES I, 11 (Niels M. Blokker & Henry G. Schermers eds., 2001).

9. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 925 (1999); see also YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 3 (Ruth Mackenzie & Cesare Romano Philippe Sands eds., 2003).

who may not be interested in contributing to an international judiciary as such.”¹⁰

While the above general statements could apply to the whole phenomenon, it is also important to look for specific reasons that are often invoked for the creation of multiple international courts and tribunals. How do we go about it? One appropriate question that could be raised is why States create many more new international tribunals instead of strengthening the “principal judicial organ” of the United Nations? That calls for the examination of what Lauterpacht calls “historical” and “functional” reasons underlying the proliferation.¹¹ Further, as Rao reminds us, these additional tribunals are not created wantonly. The need for their establishment is carefully considered and the state representatives who lobby for these tribunals are conscious of the need to avoid duplicating the efforts or supplanting the stature of the ICJ.¹² Thus, in the following sections I will focus on these specific reasons. It is not the purpose of this short essay to examine the implications of the proliferation of international judicial forums on the integrity of public international law.¹³

At the same time, in addition to the unsuitability of the ICJ for the needs of some countries, there are other reasons responsible for the creation of alternative judicial forums. These include, among others, the fact that there have been some fundamental changes in international law and relations, and the success of some courts as an inspiration for the creation of more courts. I will also discuss the reasons that underlie the preference for *ad hoc* and quasi *ad hoc* judicial forums over the permanent forums as this development characterizes the multiplicity of forums.

10. Hugh Thirlway, *The Proliferation of International Judicial Organs: Institutional and Substantive Questions, The International Court of Justice and Other International Courts*, in 37 PROLIFERATION OF INTERNATIONAL ORGANIZATIONS, LEGAL ISSUES 251, 255 (Niels M. Blokker & Henry G. Schermers eds., 2001).

11. ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 14-15 (1991).

12. See Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation*, 25 MICH. J. INT'L L. 946 (2004).

13. See generally Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2004); Gerhard Hafner, *Pros and Cons Ensuing From Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2004); Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2 J. INT'L CRIM. JUST. 300 (2004); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002); Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919 (1999); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791 (1999).

II. WHY NOT PROMOTE THE INTERNATIONAL COURT OF JUSTICE AS A SOLE JUDICIAL FORUM?

A. Historical Reasons

The historical argument often advanced is an obvious one and is most commonly cited. A representative argument is made by Elihu Lauterpacht, who writes that “the use of other means of third-party settlement had been an established feature for nearly a century and a half before the PCIJ was brought in to existence in 1920.”¹⁴ He briefly narrates the history of international adjudication starting with the Jay Treaty and a number of mixed arbitral tribunals and mixed claims commissions that were implemented before and after the First World War. To illustrate, he cites several high profile cases that found their way to arbitral tribunals instead of the International Court of Justice.¹⁵ There is no doubt that these tribunals functioned alongside the short lived Central American Court of Justice, the Permanent Court of International Justice, and later with the International Court of Justice. It is also true that arbitration clauses will continue to be part of new treaties to be negotiated as an important means of dispute settlement. But is it the same thing as the inflationary tendency we see today in the number of standing international courts and tribunals?

It is possible to argue that the arbitral tribunals view their role as one of resolving the particular dispute at hand without feeling the need to pronounce a law for the international community. But at least permanent courts like the ICJ perceive their role as entities involved in the process of the progressive development of international law.

Arbitration tribunals are also perceived as resolving disputes based on both legalistic and non-legalistic methods.¹⁶ In principle, both arbitral

14. LAUTERPACHT, *supra* note 11, at 14. See also Article 21 of the 1899 Hague Convention for the Pacific Settlement of International Disputes, which provides “[t]he Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal.” CPSID, *supra* note 2, at art. 21 (meaning Member States could by agreement take their dispute to forums other than the Permanent Court of Arbitration).

15. *Id.* at 10-11 (“a fisheries dispute between France and Canada; land boundary disputes between Egypt and Israel, Argentina and Chile and India and Pakistan; maritime boundary dispute between Guinea and Guinea-Bissau, Iceland and Norway, Argentina and Chile, and between France and Britain; a dispute relating to the destruction of the Rainbow Warrior between New Zealand and France; the interpretation of two air service agreements between France and the United States; disputes between Portugal and Liberia and between Ghana and Portugal about the application of the ILO Abolition of Forced Labour Convention; a dispute concerning the use of waters of Lac Lanoux between France and Spain; a dispute relating to a denial of justice between Greece and the United Kingdom; a dispute relating to the rate of exchange applicable to an intergovernmental financial agreement between Greece and the United Kingdom; a dispute within UNESCO relating to eligibility for re-election to the Executive Board; and a dispute relating to gold looted by Germany from Rome”).

16. Manfred Lachs, *Arbitration and International Adjudication*, in INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 37, 41 (A.H.A Soons ed., 1990) (“some arbitral

tribunals and permanent courts can decide *ex aequo et bono*, based on the consent of the parties. But the flexibility attached to the establishment and operation of arbitral tribunals gives the impression that they are more disposed to decide cases on *ex aequo et bono* than the permanent courts. This may be a reason why their jurisprudence attracts less attention and scrutiny. The fact that these tribunals are low profile and do not attract much attention, and that their proceedings are often held in camera, has enabled them to live peacefully alongside with permanent tribunals.

Further, when these tribunals existed along side the permanent tribunals, most of the arbitrators were selected from the former or serving judges of the PCIJ or ICJ who would ensure that their determination was in consonance with that of the judicial institution to which they were affiliated.¹⁷ The fact that these arbitral tribunals work outside an institutional framework means that they are not expected to jealously guard or assert an institutional independence like is evident in some standing international tribunals. In some of the standing tribunals it has been observed that there is a tendency that “each institution speaks its own professional language and seeks to translate that into a global Esperanto, to have its special interests appear as the natural interests of everybody.”¹⁸

There is also a difference between the nature of adjudication and arbitration and the perception associated with both methods of dispute settlement mechanisms in terms of their outcomes. Compared to the awards of arbitral tribunals, the decision of a permanent judicial body like the ICJ is said to have the following three advantages.¹⁹ First, an award given by such an organization wields great authority.²⁰ This is probably because of the ICJ’s position as the most senior and principal judicial organ of the United Nations. Second, an award greatly contributes to the “development of a permanent and uniform jurisprudence.” Finally, “one is certain to avoid any difficulties which might arise in the case of and at the time of constituting

tribunals, even in the modern context, do not have to be guided solely by law); *but see* I. Brownlie, *Arbitration and International Adjudication, Comments on a Paper by Judge M. Lachs*, in *INTERNATIONAL ARBITRATION: PAST AND PROSPECTS* 55, 58 (A.H.A. Soons ed., 1990) (“I regard arbitration in the twentieth century as essentially the same process as adjudication.”).

17. Kingsbury, *supra* note 13 at 682 (“[T]he law of maritime boundaries is unusual, however: the dialogue has been mainly between the ICJ and *ad hoc* arbitral tribunals, some of which have contained serving or former ICJ judges; this is one of the very few areas in which the ICJ has thought fit to cite any tribunal other than itself . . .”).

18. Koskenniemi & Leino, *supra* note 13, at 578.

19. Official Documents, *Permanent Court of Arbitration—Circular Note of the Secretary General*, 54 AM. J. INT’L L. 934 (1960).

20. *Id.*; *but see* Brownlie, *supra* note 16, at 59 (“It pains me to offer different views to those of Judge Lachs, but I was not persuaded that it is obvious that the authority of decisions of courts of arbitration is different, that is to say less, than the decisions of a permanent tribunal”).

the body which will settle the dispute.”²¹ In light of what we are discussing here the first two reasons are very important and indicate why the parallel existence of arbitration did not and will not pose a serious problem that affects the coherence of international law. At least as the perception and the precedent value goes, states attach more importance to the decisions of the Permanent tribunals than ad hoc arbitration awards. The third reason is relevant when one looks at the practical difficulties involved in setting up arbitral tribunals.

Even within the framework of the United Nations Charter, the International Court of Justice, dubbed the “principal judicial organ” of the United Nations, is not the sole judicial organ, and states may still enjoy a “free choice of means for the resolution of their disputes.”²² “States may entrust the solution of their difference to tribunals other than the ICJ by virtue of agreements already in existence or which may be concluded in the future.”²³

B. Functional Reasons

1. Burden of work on the International Court of Justice

Lauterpacht writes that “if States were to submit all their justiciable disputes to the ICJ, that tribunal would be unable to cope with the burden of the work.”²⁴ It is a fact that the ICJ, given its resources, may not efficiently and quickly respond to the demands of its clients.²⁵ This problem is compounded as a result of the ICJ’s practice of sitting as a full bench of fifteen judges which contributes to the delay in handing down rulings.²⁶ But Lauterpacht himself doubts if States take the ICJ’s workload into account in making the decision to create new courts or take their case to another one.²⁷

Nevertheless, the ICJ is taking a series of measures to simplify its procedures and make it more accessible to the State parties.²⁸ In the Report

21. *Id.* These difficulties could consist of the time, effort and resources put into negotiating a treaty that establishes a new tribunal every time a dispute needs judicial settlement.

22. Manila Declaration on the Peaceful Settlement of International Disputes art. I, ¶ 3, art. II, ¶ 5, March 18, 1982, 21 I.L.M. 449.

23. *Id.* at art. II, ¶ 5.

24. LAUTERPACHT, *supra* note 11, at 15.

25. International Court of Justice, *Report of the International Court of Justice*, ¶¶ 38, 255 (2005), available at http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/iicj_annual_report_2004-2005.pdf. (The annual budget of the ICJ is less than one percent of the total budget of the United Nations).

26. LAUTERPACHT, *supra* note 11, at 16. The ICJ introduced chambers but that did not attract much interest and had problems in its operations.

27. *Id.* at 15-16 n. 46.

28. International Court of Justice, *supra* note 25, at ¶ 37.

of the International Court of Justice 2004-05, the President of the ICJ indicated that in December 2000, the Court revised certain provisions of its Rule and adopted various Practice Directions as of October 2001. Moreover, the Court also welcomed co-operation from certain parties to cases who have taken steps to reduce the number and volume of written pleadings, in addition to the length of their oral arguments, and who in some cases even provided the Court with pleadings in both of its official languages.²⁹ In July 2004, the Court adopted further measures, primarily regarding its internal functioning and provided practical methods for increasing the number of decisions rendered each year; thereby, shortening the period between the closure of written proceedings and the opening of oral proceedings.³⁰ This revision of rules by the Court to make itself more “customer friendly” is a good gesture in itself, yet it needs to be complemented by the efforts of the member States of the United Nations who could amend the Statute of the Court and provide it with more funds.

2. Composition of the International Court of Justice

References have also been made to the composition of the ICJ as a factor inducing States to look for other venues for the settlement of their disputes even if it means creating new ones.³¹ This kind of reasoning is not confined to a particular group of countries. Most traditional grouping of states—the eastern bloc, developed and developing countries—had at different times invoked the composition of the ICJ as a factor adversely affecting their reliance on ICJ as a principal forum of choice. This is invoked in any one of the following ways.

The ICJ’s composition is limited to fifteen judges.³² In principle, an ICJ judge could be appointed from any member state of the United Nations.³³ In practice, however, nationals of the five permanent members of the United Nations Security Council are routinely elected.³⁴ There is also the established practice of what might be called special “reserved” seats that are, by apparent common consent, earmarked (allocated) for the new, *de facto* Big Powers of today, such as India and Japan.³⁵ Hence, few

29. *Id.*

30. *Id.*

31. *See generally* LAUTERPACHT, *supra* note 11, at 15-17.

32. STATUTE OF INTERNATIONAL COURT OF JUSTICE, art. 3, (June 26, 1945), available at http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#CHAPTER_I [hereinafter I.C.J. STATUTE].

33. *See* Cesare P.R. Romano, *International Justice and Developing Countries: A Qualitative Analysis (Continued)*, 1 THE LAW & PRAC. OF INT’L CTS. & TRIBUNALS 539, 578 n.145 (2002).

34. *Id.*; PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 282 (7th ed. 1997).

35. Edward McWhinney, *Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges*, 13 SYRACUSE J. OF INT’L L. & COM. 1, 11 (1986).

positions are left for judges from other States. This very fact itself may have had some influence over the decision to establish new tribunals.³⁶ It is likely that States would look for judges on the Bench with whom they could identify. This is not mitigated by the fact that a State appearing before the ICJ could apply for the appointment of an *ad hoc* judge in case it does not have its citizen sitting on the ICJ as a judge unlike its opponent.³⁷

This same apprehension also finds expression under the veil of regionalism. In this regard, Lauterpacht points to the observable fact that a number of States are reluctant to submit a matter which directly affects them to the decision of judges, most of whom have no connection with the region in which a dispute originates and some of whom one or the other side believes—rightly or wrongly—to be politically unsympathetic.³⁸ This is inspired by the desire to solve local problems locally in a tribunal that fully understands the context, the background, and other factors unique to the region. In this regard one notes the famous controversy between Latin American Countries and the ICJ regarding the issue of regional custom on Asylum Cases.³⁹ But, the regional prejudice is very capricious as it may be invoked either ways.⁴⁰ For instance, it is possible that the controversy in question involves the vital interests of the majority of States in the region or some of the states are involved in the problem in certain capacities. In such cases it is a good idea to put a tribunal in charge, which is detached from the region so as to avoid the problem of bias. Sir Robert Jennings cites the dispute between Argentina and Chile in the Beagle Channel case where both parties in principle agreed not to include a “Latin American” in the Arbitration.⁴¹ The feeling was then that any Latin American may take sides in this very well known and debated dispute between Chile and Argentina.⁴² However, the award by the arbitral tribunal failed to settle the dispute. A possible reaction to the failure of the Beagle Channel arbitration occurred in 1991 when Argentina and Chile submitted a dispute concerning the Laguna del Desierto area to an arbitral tribunal which was composed exclusively of Latin American judges.⁴³

36. Rao, *supra* note 12, at 946.

37. I.C.J. STATUTE, *supra* note 32, at art. 31; Romano, *supra* note 33 at 580 n.155. Both parties to a dispute may also apply for the appointment of *ad hoc* judge if they do not have their national sitting on the ICJ.

38. LAUTERPACHT, *supra* note 11, at 17.

39. But in some cases it is said that the ICJ had managed to handle similar cases coming from the same region, for instance the case between Honduras and El Salvador, *see* Robert Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, 9 ASIL BULL NO. 9, 442 (1995)

40. *See generally* Jennings, *supra* note 39.

41. *Id.*

42. *Id.*

43. Romano, *supra* note 33, at 580.

There is also a perception that some ICJ judges come from States in which the independence of the judiciary is exceptional and that those same States, in addition to others, have never been prepared to litigate their disputes in the Court.⁴⁴ This is a charge labeled against both countries of the eastern block and developing countries. In the countries of the eastern block, for ideological reasons, the independence of the judiciary as a concept developed by the western liberal democracies is not accepted. Most developing countries, in addition to being the satellites of the USSR, lacked the necessary legal infrastructure and political will to promote judicial independence domestically which, according to the west, deprives them the moral ground to have their citizens appointed to the “world court”. Further, big states like China, USSR/Russia, Japan, Poland, Brazil, and Argentina, who had judges on the ICJ bench, never appeared before the Court.

With the end of the Cold War, this claim is increasingly unfounded as witnessed by an increasing resort to the court. Even then, when one compares the actual number of judges coming from this block with that of those coming from Western Europe and the Americas, their ability to sway the decision of the court is miniscule. Furthermore, Edward McWhinney rejects the belief that was commonly held in the past in certain Western political circles that there is anti-western voting majority on the court.⁴⁵ In 1986, McWhinney observed that there was no automatic anti-western voting majority in the ICJ.⁴⁶ According to him, “the fact remains that no one group or block, even if it succeeded in imposing a national unity and marshalling all its votes on a particular issue, could command a judicial majority without engaging in major bridge-building and forming a coalition with other regional group’s members.”⁴⁷

This perception is misguided and a rhetoric to a certain extent as Malanczuk notes the fact that although some states are not prepared to appear before international tribunals either as plaintiffs or defendants, this is not necessarily caused by the desire to be able to break international law with impunity.⁴⁸ Nor, one may add, are judges hailing from such countries which are known to show prejudice against cases concerning their ideological adversaries.

Judges from third world countries are suspected of representing a “cultural background which tends to favour a drastic change in the substance of traditional rules to bring them in to line with present-day needs

44. LAUTERPACHT, *supra* note 11, at 17 n.49; see also Christian Tomuschat, *Settlement of Disputes*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 92, 98 (Rudolf Dolzer et al. eds., 1981).

45. McWhinney, *supra* note 36, at 15.

46. *Id.*

47. *Id.*

48. MALANCZUK, *supra* note 34, at 103.

of less developed countries.”⁴⁹ Hence, countries that uphold the more legalistic approach hesitate to bring disputes before the Court.⁵⁰ But do third world countries in the General Assembly of the United Nations abuse their voting power and block nominees from the Western countries? McWhinney concludes that this is not true. According to him, reason and empirical studies on the record of judicial elections show there is no organized and systematic “ganging-up” against western candidates by the new third world majority in the U.N. General Assembly.⁵¹ This is notwithstanding the fact that third world issues dominate the agenda of the General Assembly.

In conclusion, whether such perceptions are correctly held or not, there is no doubt that countries have at different times used this as a pretext for avoiding determination by the ICJ. Eventually, it is such perceptions that influence policies that determine the fate of international institutions.

3. Lack of Specialist Knowledge

The other obvious reason given for establishing new international courts and tribunals is the need for a specialized forum that is more capable of disposing specialized and technical legal issues.⁵² That means general forums like the ICJ are not well conversant with these technical and specialized issues. This argument is more pronounced in the areas of human rights and trade laws.⁵³ Nevertheless, the argument is not automatically accepted. For instance, Lauterpacht wonders how technical a legal issue could get and argues that ICJ has adequately decided cases dealing with delimitation of both maritime and land boundaries.⁵⁴ This is in reference to the establishment of the International Tribunal for the Law of the Sea, which was designed to deal with, among others, the issue of the delimitation of maritime boundaries. The fact that ICJ might be called upon to decide cases in an emerging area of international law for which there is no precedent may make its work more onerous but it does not make it impossible. This is because new courts will have to also grapple, like the ICJ, with the new legal principles that have never been tested.

Nonetheless, the case for specialized tribunal is stronger where it can be foreseen that there will be a number of cases with similar issues, decided over a relatively short period of time, and in which the knowledge gained in

49. Tomuschat, *supra* note 44, at 98.

50. *Id.*

51. McWhinney, *supra* note 36, at 16.

52. See e.g., LAUTERPACHT, *supra* note 11, at 17; SHANY, *supra* note 9, at 4.

53. Human rights is not a technical area of law, but it is argued that it is a specialized branch of law whose interpretation is not amenable to the practice of treaty interpretation by the ICJ, which is more conservative.

54. LAUTERPACHT, *supra* note 11, at 17. One may also add that the ICJ has dealt with several human rights cases so far both in its contentious and advisory opinion proceedings.

deciding one case will be directly relevant in deciding other such cases.⁵⁵ Thus, it is justified to establish claims commissions to deal with cases that arise from the same events. Even for the sake of expediency, a tribunal that deals with very similar cases can dispose of the cases more efficiently. But an important concession must be made that no matter how learned the judges of the ICJ are, they cannot be experts in all of the ever-expanding and emerging fields of international law.

States also choose to establish and utilize the services of specialized tribunals, which tend to be smaller and, therefore, cheaper and more expedient than the procedure used before larger courts like the ICJ.⁵⁶ Furthermore, the more specialized a tribunal, the more it offers the opportunity for control over the outcomes of the proceedings.⁵⁷

4. Lack of Trust

It is also asserted that a lack of trust in the ICJ as an impartial forum by a group of countries has contributed to the desire to push for alternative forums for the settlement of their disputes. This group, in particular, consists of the newly independent countries. The landmark decision that defined the relationship between the ICJ and these newly independent nations for the decades ahead was that of the South West Africa case Second Phase.⁵⁸ This case was brought by Ethiopia and Liberia, objecting to South Africa's extension of its apartheid policies to its mandate territory, South West Africa (now Namibia).⁵⁹ In the Second Phase of the South West African case (1966), ICJ's President at the time, Australian Sir Percy Spender, had cast the second tie breaking vote resulting in a court majority which led to the dismissal of the case filed by Ethiopia and Liberia for their lack of legal right or interest in the case.⁶⁰ This decision was widely interpreted in the General Assembly of the United Nations as a legal sanction for the continuance and extension of Apartheid in Southern Africa and thus an application of a "White Man's" law.⁶¹ Consequently, for two more decades, countries from the developing world were shunned away from the ICJ.

Developing countries were not the only ones that felt disappointed by the rulings of the ICJ. The United States' position in the Nicaragua case is one prime example. In that case, the U.S. felt that the ICJ was biased against it which led to the United States' withdrawal of its recognition of the

55. LAUTERPACHT, *supra* note 11, at 18.

56. See MALANCZUK, *supra* note 34, at 103.

57. *See id.*

58. Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).

59. *Id.*

60. Romano, *supra* note 33, at 585 n.168. By eight votes to seven the Court found that it had jurisdiction to adjudicate upon the merits of the dispute.

61. McWhinney, *supra* note 36, at 16.

Court's optional jurisdiction clause.⁶² Admittedly, even if it is difficult to establish a more direct link between the dissatisfaction of the States on the ICJ, it is difficult to rule out the possibility that the negotiation and the establishment of the International Tribunal on the Law of the Sea is not prompted by the mood that prevailed in those days.

Rao summarily dismisses the disenchantment with the decisions of the ICJ as an insignificant reason because disenchantment with outcomes is not unique to the ICJ or to judicial tribunals in general; rather, disenchantment is a common consequence of most permanent institutional bodies.⁶³ This is rather an understatement of the impact that the South West African case had on the prestige and acceptability of the ICJ. The reasoning also underestimates what a perception of bias could mean for the legitimacy of a judicial institution, which is the principal judicial organ of the United Nations as compared to the decisions of political institutions.

Nevertheless, today the docket of the ICJ is at its busiest stage.⁶⁴ Judge Shi Jiuyong, the former President of the ICJ, recently said that “[w]hereas in the 1970s, the Court had very few cases on its docket, and from 1990 to 1997 it had between nine and 13, the number of cases before the Court has oscillated between 21 and 25 in recent years.”⁶⁵ There are indications that presently most of the clients of the ICJ are developing countries and in particular there is an increasing resort to the court by African countries.⁶⁶ One also must mention the increase in the number of States that made the optional declaration recognizing the compulsory jurisdiction of the ICJ after 1990 according to Article 36 Paragraph 2 of its statute.⁶⁷ This is a

62. Romano, *supra* note 33, at 588-89 n.182.

63. Rao, *supra* note 12, 945-46.

64. Rosalyin Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 123 (2001).

65. J. Shi Jiuyong, former President of the ICJ., Lunch Time Talk at the University of Hong Kong, The Contribution of the International Court of Justice to the Peaceful Settlement of International Disputes (Dec. 2004), <http://law.hku.hk/download/SpeechbyJudgeShiJiuyong.PDF>.

66. For an empirical study on the use of international courts and tribunals by developing countries in general, see Cesare P.R. Romano, *International Justice and Developing Countries: A Quantitative Analysis*, 1 LAW & PRAC. INT'L CTS. & TRIBUNALS 367 (2002); on the qualitative aspect, see also Romano, *supra* note 33.

67. International Court of Justice, *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicdocuments/ibasicdeclarations.htm>; see also I.C.J. STATUTE, *supra* note 32, at art. 36, ¶ 2 (As of December 2004, of the declarations made by 66 countries, the following 25 were made after 1990: Australia (22 March 2002), Bulgaria (24 June 1992), Cameroon (3 February 1994), Canada (10 May 1994), Cote D'Ivoire (29 August 2001), Cyprus (3 September 2002), Djibouti (2 September 2005), Estonia (21 October 1991), Georgia (20 June 1995), Greece (10 January 1994), Guinea (4 December 1998), Hungary (22 October 1992), Lesotho (6 September 2000), Madagascar (2 July 1992), Nauru (9 September 1992), Nigeria (30 April 1998), Norway (25 June 1996), Paraguay (25 September 1996), Peru (7 July 2003), Poland (25 March 1996), Portugal (25 February 2005), Slovakia (28 May 2004), Spain (29 October

significant change. For instance, the acceptance by Yugoslavia of the ICJ's compulsory jurisdiction yielded a number of cases filed against the members of the NATO States for their roles in the armed conflicts in the Balkans.

III. STRUCTURAL CHANGES IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

A. Erosion of the Concept of State Sovereignty

It is has become trite to say that the concept of state sovereignty is being eroded in favor of more inclusive international law. Classical international law had states only as its subjects or main actors. Many of the international courts and tribunals that determine claims, such as the ICJ, are not accessible to non-state actors even though the case involves these actors in different capacities.

Yet, the erosion of the Westphalia model of international law has made it possible for non-state actors to creep in to the stage.⁶⁸ Particularly some treaties adopted in the realm of human rights⁶⁹ and international economic law⁷⁰ make it possible for individuals or generally non-state entities to bring their claims before pre-constituted tribunals. To this effect, the ICTY in a Tadic case declares that a state-sovereignty approach [of international law] has been gradually supplanted by a human being oriented approach.⁷¹ Although this approach may be regarded as signifying the unique nature of international human rights, humanitarian and criminal laws, it also implies the move from state responsibility to that of the more realistic individual responsibility and recognition of the fact that individuals are bearers of rights in concrete terms.

Traditionally, since groups of people do not have standing before an international tribunal under international law, the only available means for non-state actors to bring a claim before an international court has been when the individual, group, or organization is able to persuade a state to bring a

1990), United Kingdom of Great Britain and Northern Ireland (5 July 2004), Yugoslavia (26 April 1999)).

68. Gerhard Hafner, *Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?*, in *RÈGLEMENT PACIFIQUE DES DIFFÉRENDS ENTRE ÉTATS: PERSPECTIVES UNIVERSELLE ET EUROPÉENNE* [THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES: UNIVERSAL AND EUROPEAN PERSPECTIVES] 36 (Lucius Caflisch ed. 1998).

69. *E.g.*, The European Court of Human Rights, the Human Rights Committee (a quasi judicial body).

70. *E.g.*, The Iran-US Claims Tribunal, the UN Compensation Commission and the European Court of Justice, the International Centre for the Settlement of Investment Disputes.

71. Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

claim on their behalf. In other cases, however, a mandate state, like in the case of Portugal in East Timor, may bring an action on their behalf.⁷² Or, the General Assembly may seek advisory opinions on behalf of peoples who could not be represented, as in the case of the advisory opinion on Western Sahara and more recently on the legal consequences of the construction by Israel of the fence/wall inside the Occupied Territories. When a State espouses its citizens' claims, it is not the individual right that is being asserted; rather, it is the right of the state itself.⁷³ Unlike the standing of individuals before international tribunals which has improved over the years, the standing of groups of peoples before international tribunals still has a way to go.

The ICJ statute reflects the Westphalia model which limits its access to these states and some international organizations. As it is, the Statute reflects the international law conception that prevailed in the 1920s when the Statute of the Permanent Court of International Justice (PCIJ) was adopted. Thus, a relative change in the structure of international law over the years in terms of its actors has necessitated the establishment of other international courts and tribunals that could respond to the changed situation. In that regard, in addition to the various human rights courts that allow individual standing,⁷⁴ there are instances in which a non-state actor could be a party to a dispute before the International Tribunal for the Law of the Sea⁷⁵ or the International Centre for Investment Disputes.⁷⁶

B. End of the Cold War

Many of the changes in the international sphere owe their source to a global change that ensued in the late 1980's and early 1990's. Before I go to what concerns us, by way of reminiscence, Michael Reisman succinctly summarizes the state of affairs before the Cold War in the following words: "At the height of the Cold War, there were two worlds on the planet, between which trade and other human contact were drastically reduced. In many ways, there were two systems of international law and two systems of

72. Case Concerning East Timor (Port. v Austl.), 1995 I.C.J. 90 (June 30).

73. Mavromatis Palestine Concessions Case (Greece v U.K.), 1924 P.C.I.J. (Ser. A) No. 2, at 12 (Aug 30); *see also* Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania Case), 1939 P.C.I.J. (Ser. A/B) No. 76.

74. For an example on Individual applications, *see* Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Apr. 11, 1950, Europ. T.S. No. 5.

75. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 291(2), 1833 U.N.T.S. 397 (provides that the dispute settlement procedures under the convention is open to entities other than States under certain circumstances).

76. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 1(2), Mar. 18, 1965, 17.1 U.S.T. 1270, 575 U.N.T.S. 159 (providing, "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention").

world public order.”⁷⁷ It is obvious that dispute settlement mechanisms too have suffered from the consequences of this bipolarity.

It is often said that the end of the Cold War heralded “greater commitment to the rule of law in international relations, at the expense of power-oriented diplomacy.”⁷⁸ It is also credited for “the easing of international tensions, which had hampered in the past the growth of adjudicative [processes].”⁷⁹ The end of cold war created a platform for negotiation and stepping up of efforts towards better international cooperation. There are certain steps that were taken in that direction. For instance, one of the main goals of the United Nations Decade of International Law (1990-99), proclaimed by the General Assembly, is the promotion of methods for the peaceful settlement of disputes including resort to the International Court of Justice.⁸⁰ Likewise, the non-aligned countries supported by Russia also called for the Third Hague Peace Conference at the end of the decade (one hundred years after the First Hague Peace Conference, which was initiated by the Tsar of Russia at that time).⁸¹ Even if this Conference did not take place, it was hoped that it would consider a new universal convention for the peaceful settlement for disputes.⁸² In 1992, the UN Secretary General’s ‘Agenda for Peace’ also pushed for reliance by States on the world court for settlement of disputes in addition to a preventive diplomacy.⁸³

In terms of the number of judicial institutions created, not less than ten of them have come to being as a direct or indirect consequence of the end of the bipolarity.⁸⁴ The following developments are cited as examples:⁸⁵ the establishment of the ICTY, which was made possible as a result of the consensus within the Security Council; the creation of a similar tribunal,

77. W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT’L L. 859, 859 (1990).

78. SHANY, *supra* note 9, at 3-4. However, according to Judge Rosalyn Higgins, “The upturn in recourse to the Court [The International Court of Justice] began in the first half of the 1980s, several years before the arrival of glasnost and perestroika. Many former colonial States who had achieved their independence in the early 1960s had by the 1980s begun to see that international law served their own ends as much as those of the developed countries.” Rosalyn Higgins, *International Law in a Changing International System*, 58(1) CAMBRIDGE L.J. 79, 80 (1999).

79. SHANY, *supra* note 9, at 4.

80. United Nations Decade of International Law, G.A. Res. 44/23, ¶ 2(b), U.N. Doc. A/RES/44/23 (Nov. 17, 1989).

81. MALANCZUK, *supra* note 34, at 301.

82. *Id.*, at 301.

83. The Secretary-General, *Report of the Secretary-General on an Agenda for Peace-Preventative Diplomacy, Peacemaking and Peace-Keeping*, ¶ 38-39, delivered to the Members of the United Nations, U.N. Doc. A/47/277 (June 17, 1992).

84. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 729 (1999).

85. *Id.* at 729-732.

i.e., the ICTR, in response to the Genocide in Rwanda; the 1994 restructuring of the European Court of Human Rights as a consequence of the expansion of the Council of Europe after the Cold War; the establishment of the ITLOS after twelve years of dormancy; and the establishment of the Central American Court of Justice.⁸⁶ Of course, the establishment of the International Criminal Court is attributable to a large extent to none other than the end of the Cold War.

The end of the Cold War also contributed to the proliferation of regional integration agreements as a result of the triumph of market economy over its rival. Every region of the globe now claims its fair share in the number of regional integration agreements along with dispute settlement mechanisms, albeit with various degrees of efficiency and activity. The most successful dispute settlement mechanism established within the framework of the regional integration agreements is the European Court of Justice followed by the NAFTA dispute settlement body to which Canada, USA and Mexico are current members. The less active or dormant mechanisms include: Benelux Economic Union Court (1974); European Nuclear Energy Tribunal OECD (1957); Western European Union Tribunal (1957); Economic Court of the Commonwealth of Independent States (1993); Common Court for Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997); Court of Justice of the Common Market for Eastern and Southern Africa (1998); Economic Community of West African States Tribunal (1975); Judicial Board of the Organization of Arab Petroleum Exporting Countries (1980); Court of Justice of the Economic Community of Central African States (1983); Court of Justice of the Arab Mahgreb Union (1989); Court of Justice of the African Economic Community (1991); Southern Africa Development Community Tribunal (1992); Court of Justice of the Andean Community (1984); Central American Court of Justice (1994); and Caribbean Court of Justice (2005). In addition, more courts are being proposed along similar lines.⁸⁷

In summary, as predicted by Michael Reisman in 1990, “[t]he need for international law after the Cold War will be more urgent than it was during the conflict. In many ways, what is expected of international law will be

86. These countries are Costa Rica, El Salvador; Guatemala, Honduras, Panama and Nicaragua. It culminated in the establishment of the *Sistema de la Integración Centroamericana* (SICA). The integration agreement among others establishes the Central American Court of Justice.

87. For instance, the International Islamic Court of Justice, the Arab court of Justice, the MERCOSUR Court of Justice, and the Inter-American Court of International Justice.

greater.”⁸⁸ That process will continue as there appears to be an appetite for additional international courts and tribunals.⁸⁹

IV. SUCCESS OF SOME REGIONAL COURTS AS AN INSPIRATION

Shany argues that “the positive experience with some international courts . . . (e.g., The Court of Justice of the European Communities (ECJ) and the European Court of Human Rights (ECHR)) . . . has inspired the creation of similar bodies.”⁹⁰ One of the regions where such inspiration has had some impact is the South American countries where the European Court was perceived by its South American admirers as “providing for a community legal order, and guaranteeing uniform interpretation of treaties and other community acts.”⁹¹ In the area of economic integration, sub-regional efforts have been taken towards that goal. The establishment of MERCOSUR (Mercado Comun del Sur), i.e., the Common Market for the South; and SICA (Secretaría de Integración Centroamericana), i.e. the Secretariat for the Integration of Central America, exemplify some of these efforts. The strongest influence of the European system is felt in the human rights field where the Inter-American Court of Human Rights and Commission are inspired by their European counterparts, despite the fact that the Inter-American Court does not allow for direct access by an individual.⁹²

Additionally, in Africa, there has been conscious effort to draw inspiration from the European and the Inter-American experience. In the human rights field, the African Commission on Human and Peoples’ Rights and the newly established African Court of Human Peoples’ Rights⁹³ also derive their inspiration from the European and the Inter-American Model.⁹⁴ The African Union is yet another bold attempt at emulating the European

88. Reisman, *supra* note 77, at 866.

89. The need for the establishment of an International Human Rights Court has always been discussed and it is waiting for the right time to come. The regional integration agreements also have more promise for additional dispute settlement bodies.

90. SHANY, *supra* note 9, at 4.

91. Rosalyn Higgins, *The ICJ, the ECJ and the Integrity of International Law*, 52 INT’L & COMP. L.Q., 1, 13 (2003).

92. Organization of American States, American Convention on Human Rights art. 61(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

93. See Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court of Human Rights, Ouagadougou, Burkina Faso, June 10, 1998, OAU/LRG/AFCHPR/PROT(III) (*entered into force* Jan. 25, 2004), available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf>.

94. However, the earlier Treaty Establishing the African Economic Community which did provide for an African Court of Justice lapsed before the court was put into place, see Treaty Establishing the African Economic Community, June 3, 1991, art. 18, available at http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf.

Union with similar institutions including the African Court of Justice.⁹⁵ It is, however, important to mention the recent decision taken by the African Union Assembly of Heads of State held in July 2004 to merge the African Court of Human and Peoples' Right and the African Court of Justice.⁹⁶ It appears that the decision to merge these two courts was prompted by financial and logistical reasons, as well as the apparent competence of both courts to adjudicate human rights issues, rather than the desire to coherently apply international law.⁹⁷ This decision raises several issues of implementation given the unique nature of these two courts.⁹⁸ The modalities of merging these two courts is still under review, and the African Commission on Human and Peoples' Right has already expressed its deep concern given the fact that many states have yet to ratify the instrument establishing the African Court of Justice while the one for the African Court of Human and Peoples' Right has already entered in to force.⁹⁹ In the meantime, the Executive Council of the African Union, which is composed of the foreign ministers of the member states, have decided to allow the human rights court to become operational notwithstanding the continuing discussion on the merger.¹⁰⁰ This is the first global attempt to lessen the inflationary tendency in the creation of international courts and tribunals but

95. Protocol to the African Charter, *supra* note 92 at ¶4; Protocol of the Court of Justice of the African Union Maputo, Mozambique (11 July 2003) available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf>.

96. Assembly of the African Union, 3d Ordinary Sess., Addis Ababa, Ethiopia, July 6-8, 2004, Assembly/ AU/Dec./45 (III), ¶ 4.

97. Submission to the African Union by The Coalition for an Effective African Court on Human & Peoples' Rights, *Legal and Institutional Issues Arising from the Decision by the Assembly of Heads of State & Government of the African Union to Integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union* (October 2004), available at <http://www.african courtcoalition.org>.

98. *Id.* The substantive integration unlike administrative integration raises issues that could only be addressed by amending the constitutive instruments of both courts. For instance, the African Court of Human Rights is a treaty body while the African Court of Justice is an organ of the African Union; therefore, the merger should take that into account and introduce an amendment to the respective instruments. Further, both courts interpret different instruments with a possible overlap which also needs to be addressed given the fact that while the Court of Justice is not accessible to individuals, a human rights court is. The merger also raises questions with respect to the number of judges as well as the manner of appointment and removal from office in a newly merged court. The difference in approach to the enforcement of the decisions of both courts also warrants the overhauling of the direction to be taken by the merged courts. This by itself is a new and time consuming project that could lead to a protracted negotiation in the amendment process.

99. African Commission on Human and People's Rights [ACHPR], Resolution for the Establishment of an Effective African Court on Human and Peoples' Rights, ACHPR/Res. 76 (XXXVII)05 (May 11, 2005), available at http://www.achpr.org/english/resolutions/resolution81_en.html.

100. Executive Council of the African Union, Decision EX.CL/Dec.165 (VI), January 2005, available at <http://www.africa-union.org/Summit/jan2005/Executive%20Council/Executive%20Council%20Decisions%20-Dec%20165-191-Abuja.doc>.

not necessarily prompted by the desire to achieve the coherent application of international law. Nevertheless, it is to be seen in the future whether the merged court is able to efficiently handle cases, which in Europe are handled by two different courts based in Strasbourg and Luxembourg. It will certainly serve as a test case for the much called for unification or coordination of international courts and tribunals.

V. PREFERENCE FOR *AD HOC* DISPUTE SETTLEMENT

A. Introduction

At present, *ad hoc* and quasi *ad hoc* dispute settlement mechanisms play a significant role. Among the many are the long running Iran-US Claims Tribunal (since 1981),¹⁰¹ the United Nations Compensation Commission (UNCC),¹⁰² the International Criminal Tribunal for Yugoslavia (ICTY) (since 1993), the International Criminal Tribunal for Rwanda (ICTR) (since 1994), and more recently the Ethio-Eritrean Boundary and Claims Commissions.¹⁰³ It is evident that most of these tribunals took longer than their intended life-time. This aspect prompted Judge Thomas Buergenthal to comment on Iran-US Claims Tribunal, stating that it “has proved that if you want to create a truly permanent international court, all you need to do is to establish an *ad hoc* tribunal and expect it to finish its work in less than two years.”¹⁰⁴

As noted in the preceding sections, some of the reasons why States opt out of permanent standing dispute settlement procedures could well be because of a preference for *ad hoc* dispute settlement mechanisms. For instance, the need for control over the procedures, specialization, cost considerations, etc., could prompt states to choose the more expedient *ad*

101. The Iran-United States Claims Tribunal was established as one of the measures taken to resolve the crisis between the United States of America and Iran which began in November 1979, following the detention of fifty-two US nationals at the US embassy in Tehran and subsequent freeze of the Iranian assets by the US.

102. The United Nations Compensation Commission was established by the United Nations Security Council as its subsidiary organ in 1991. Its mandate is to process claims and pay compensation for losses and damage suffered as a direct result of the Iraqis' unlawful invasion and occupation of Kuwait.

103. The Ethiopian-Eritrean Boundary and Claims Commission were established after both countries signed the Algiers Peace Agreement in 2000 and agreed to resolve the boundary dispute that gave rise to the two year war (1998-2000) and the claims arising from the conflict.

104. Thomas Buergenthal, *Dinner Speech by Judge Thomas Buergenthal*, in FROM GOVERNMENT TO GOVERNANCE: THE GROWING IMPACT OF NON-STATE ACTORS ON THE INTERNATIONAL AND EUROPEAN LEGAL SYSTEM. PROCEEDINGS OF THE SIXTH HAGUE JOINT CONFERENCE HELD IN THE HAGUE, THE NETHERLANDS 3-5 JULY 2003, 258 (Wybo. P. Heere ed., 2004).

hoc dispute settlement bodies.¹⁰⁵ But there are also specific reasons that influence State's choice for such forums. The following two major reasons broadly explain the proliferation of *ad hoc* dispute settlement mechanisms.

B. Ad hoc Tribunals in Response to Emergency Situations

Not many countries have subscribed to the compulsory jurisdiction of the ICJ. In December 2005, the number of countries which have made such declaration stand at sixty-six. The same story applies to other treaty based dispute settlement bodies. Nor are countries that have not yet made the policy determination to appear before the ICJ prepared to make a one time declaration to use its services for a particular case unless they have earlier negotiated a treaty to that effect. Yet conflicts happen without due notice and these conflicts need a settlement, even after a deadly war. A cursory look at the pending and earlier cases before the Permanent Court of Arbitration shows that at least one of the countries if not both have not accepted the compulsory jurisdiction of the ICJ, a fact which, among others, plays an important role for resort to an *ad hoc* dispute settlement mechanism.¹⁰⁶ Hence the resort to claims commissions and *ad hoc* arbitrations is sometimes an emergency measure as the parties in dispute were not prepared for it in advance.

In the field of international criminal law, major decisions such as the establishment of the Nuremberg Tribunal, the ICTY, and the ICTR were likewise made under difficult circumstances when the international community could not afford the luxury of negotiating a permanent international tribunal or modifying the existing ones to fit the purpose. As Abi-Saab rightly notes, international law is not always made in a "cool headed way"; its development is usually precipitated by crises and atrocities, through decisions taken hastily and under great pressure.¹⁰⁷ He further argues that international law and its institutions by implication, has to develop like a parasitic plant by seizing on all opportunities and latching onto anything that gives it the possibility of moving upwards towards the light.¹⁰⁸ Even if these *ad hoc* attempts to establish international criminal tribunals paved the way for a permanent international criminal court, it is

105. Though doubts have been expressed as to whether arbitration is as cost-effective and expedient as it is thought to be, the general perception remains that it is.

106. Examples of disputes include those between Guyana/Suriname (Guyana has not accepted); Barbados/Trinidad and Tobago (Trinidad and Tobago has not accepted); Ireland/UK (Ireland has not accepted); and Ethiopia/Eritrea (both have not accepted). Earlier cases include disputes between Malaysia/Singapore (neither has accepted); Netherlands/France (France has not accepted); Eritrea/Yemen (neither has accepted).

107. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 930 (1999).

108. *Id.* at 931.

not yet the time to rule out *ad hoc* international criminal courts in the future.¹⁰⁹

C. Selectivity Prompted by Domestic Priorities

The other reason why States opt for *ad hoc* dispute settlement mechanisms in preference over permanent courts and tribunals has to do with forces within the domestic politics. Often foreign policies of states and their attitude towards international dispute settlement is determined by the prevailing domestic political attitudes. Among others, a choice for settlement of disputes in an *ad hoc* fashion is partly an outcome of the compromise reached between the proponents and the opponents of a more general and permanent international court. The attitude of a state towards a world court is not only shaped by the struggle between the legislative and the executive branch of governments.¹¹⁰ Thomas Franck discusses this struggle in the context of the United States' attitude towards the world court since the League of Nations.¹¹¹ According to him:

[P]olicy has always been the product of an inconclusive struggle between two contradictory national tendencies: the messianic and the chauvinist. The messianics and chauvinists both start from the assumption that the United States is uniquely successful living experiment in resolving conflict between governments (state and federal) and between political institutions (Congress and the Presidency) by recourse to laws and courts. From this common assumption, however, they derive diametrically opposed prescriptive theories. The messianic believe that what has worked so well for the Republic succeed in a world community. More broadly, America's Messianic are moved by a missionary vision, seeking national security by the conversion of others to their ways. The chauvinists, on the other hand, believe that American Experience is unique, held in place by the social cement of our people's shared values. To extrapolate these uniquely American ideas and institutions is to risk diluting and undermining them.¹¹²

109. The fact that the United States, which is the sole super power, is violently opposed to the International Criminal Court is an indication that other forms of international criminal justice are not decisively off the table yet. The United States, as a champion of *ad hoc* international criminal tribunals, has played a very important role in the establishment of Nuremberg, ICTY and ICTR.

110. See generally Torres v. State, 120 P.3d 1184 (Okla. Crim. App. 2005); Germany v. U.S., 526 U.S. 111 (1999).

111. See also MICHLA POMERANCE, THE UNITED STATES AND THE WORLD COURT AS A 'SUPREME COURT OF THE NATIONS': DREAMS, ILLUSION AND DISILLUSION (1996).

112. THOMAS M. FRANCK, THE U.S. AND THE HISTORIC IDEA OF A WORLD COURT, IN THE ROLE OF COURTS IN SOCIETY 369-370 (1988).

Hence, letting a court composed of outsiders decide on American affairs is undesirable.

Christopher Pinto argues that the analysis by Professor Frank of the impact of the domestic politics on the attitude towards international third party dispute settlement in the United States could likewise be applied to other members of the United Nations.¹¹³ However, the effect of the tension between the chauvinists and the messianics, which he refers to as the reds and the blues, respectively for want of less emotive expressions, is likely to be felt most acutely where democratic forms of governance prevail. This prevalent tendency explains not only why States sometimes reject appearing before international courts, but it also explains why they choose to give their support for the establishment of *ad hoc* forms of judicial forums which involve less onerous obligation. We are here interested in the latter aspect.

The forces that are opposed to the idea of international court feel that it is an ideal that lies far in the future and in the meantime the tension is resolved on the basis of selectivity. This selectivity, however, in practice has led to the creation of more judicial forums. Here, the selection is made in favor of some issues on an *ad hoc* basis. In effect, such selectivity is able to “appease moral strivings, while at the same time relieving practical tensions of politics at the domestic level”.¹¹⁴ Even if such is the case, in most countries, the selectivity option has real meaning and value for the powerful and affluent states since it is they who may contemplate a regular substantial allocation of funds to maintain a new institution for settling disputes. This particularly explains the manner in which *ad hoc* international criminal courts are encouraged and established at the insistence of some countries, instead of pushing for a permanent international court. Even after the Rome Statute entered into force there were indications towards keeping the piecemeal approaches to certain crisis situations. The suggestion made by the U.S. regarding the handling of the Sudanese crisis is a case in point. Augmenting the resources of the already existing judicial forums and empowering them to deal with new issues implies “a more generalized commitment that could prove inconvenient, expensive and difficult to justify domestically and as a result a government should pursue a course that is more selective and responsive to the situation.”¹¹⁵ This tendency “has led to . . . mixed arbitral tribunals or recourse to cooperatively maintained (and therefore relatively low cost) specialized arbitration centers.”¹¹⁶

113. M.C.W. Pinto, *Judicial Settlement of International Disputes: One Forum or Many?*, in LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 469 (Antony Anghie & Gary Struggess eds., 1998).

114. *Id.* at 471.

115. *Id.* at 472.

116. *Id.*

In addition to lessening the financial implications and tension in domestic politics, “[t]he newness of the institution would also allow certain flexibility through freedom from traditions and practices of an earlier time, which the initiators might consider inappropriate to the expeditious achievement of their political objectives.”¹¹⁷ Financially, there is an anxiety associated with the continuous funding of *ad hoc* criminal tribunals which take longer to complete their job than originally contemplated. There also appears a ‘tribunal fatigue’ among the UN member States for establishing more *ad hoc* tribunals.¹¹⁸ Again politicians are prepared to face the lesser of the two evils.

VI. CONCLUSIONS

Several reasons are invoked for the creation of multiple international courts and tribunals. An attempt has been made in this essay to examine these reasons from varying perspectives. The first of these perspectives is to look at why States choose not to use the already existing International Court of Justice. While some of the reasons in this category are justified, the others are based on mere perceptions that are not supported empirically. In addition to a historical and functional consideration for choosing alternative international judicial forums, the fundamental structural changes in international law and relations at the end of the Cold War has its role to play in the multiplicity of these forums. The relative success of early regional courts is also believed to have inspired the replication of similar tribunals in the other regions.

It has also been shown that one of the features of modern international dispute settlement mechanisms is the prevalence of *ad hoc* forms of dispute settlement bodies. This in turn finds its justification, among others, in the desire of the international community, notably through the United Nations Security Council, to swiftly respond to emergency situations. This *ad hoc* response is also explained as a consequence of a domestic politics that projects itself in how States make their policy decisions at the international level.

The desire to establish more international courts and tribunals has not abated despite the repeated suggestions from influential figures such as the former ICJ presidents who made successive calls to the members of the United Nations in their annual reports. Yet, in at least one region of the world, Africa, there is a serious attempt to merge the African Court of Justice, modeled after the European Court of Justice, with the African Court

117. *Id.* at 473.

118. Paul J. Magnarella, *The Consequences of the War Crimes Tribunals and an International Criminal Court for Human Rights In Transition Societies*, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION: CAUSES, CONSEQUENCES AND RESPONSES 119, 138 (Shale Horowitz & Albrecht Schnabel eds., 2004).

of Human and Peoples Rights'. Though the move is not primarily prompted by the desire to coherently apply international law, one will have to wait to see whether this endeavor will bear fruit and whether other regions are prepared to follow suit.