

THE PROLIFERATION OF INTERNATIONAL JUDICIAL BODIES: THE PIECES OF THE PUZZLE

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*"Entia non sunt multiplicanda praeter necessitatem"*¹
(Entities should not be multiplied unnecessarily)

William of Ockham (1258-1347)

I. INTRODUCTION

When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age.² Since

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1. Ockham's razor, or the principle of parsimony, is a methodological principle dictating a bias towards simplicity in theory construction. On Ockham's razor, see MARILYN McCORD ADAMS, WILLIAM OCKHAM 143-67 (1987).

2. For a discussion on the recent proliferation of international judicial bodies, see generally *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, Proceedings of American Society of International Law Forum Co-Sponsored with the Graduate Institute of International Studies (L. Boisson de Chazournes ed., 1995); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848 (1995). Gerhard Hafner, *Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?*, in LUCIUS CAFLISCH, THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES: UNIVERSAL AND EUROPEAN PERSPECTIVES 25-41 (1998). For some articulated arguments (mostly by judges of the International Court of

1989, almost a dozen international judicial bodies have become active or have been extensively reformed, compared to only about six or seven previously populating the international scene.³

Furthermore, this quantitative change has been coupled with an equally remarkable expansion and transformation of the nature and competence of international judicial organs. To provide a few examples, international judicial bodies that grant standing to non-state entities far outnumber judicial bodies whose jurisdiction is limited to disputes between sovereign states.⁴ Historically, this was not the rule. Accordingly, the powers and functions of these new judicial organs substantially differ from those of the past. Moreover, the proliferation of international judicial bodies of regional scope introduces a further element of diversity, for regional courts are much more influenced by local legal systems and practices than bodies with a universal scope.⁵ Again, this development is recent. Finally, a whole new genus has been reinvented: international criminal jurisdictions.

The expansion and transformation of international judicial bodies has not taken place in a vacuum. Rather, it is the consequence of an equally tumultuous amplification of the number and ambit of institutions consecrated to ensure compliance with international legal obligations and settlement of disputes arising therefrom. Indeed, if the focus is widened to encompass these quasi-judicial and enforcement institutions, another dozen should be added to the total number of new international bodies crowding the scene.⁶

Justice) against the proliferation of international judicial bodies, see *The Court and Other International Tribunals*, in CONNIE PECK & ROY S. LEE, INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 280-323 (1997); Sir Robert Jennings, *The Role of the International Court of Justice in the Development of International Environment Protection Law*, 1 RECIEL 240-44 (1992); Philip C. Jessup, *Do New Problems Need New Courts?* in 65 PROCEEDINGS OF THE AMERICAN SOCIETY OF INT'L LAW 261-68 (1971); Manfred Lachs, *Some Reflections on the Settlement of International Disputes*, 68 PROCEEDINGS OF THE AMERICAN SOCIETY OF INT'L LAW 323-31 (1974). See also Philip C. Jessup, *Do New Problems Need New Courts?*, in K. RAO & M. NAWAZ, ESSAYS IN HONOR OF KRISHNA RAO 206-213 (1976).

3. See *infra* § II.

4. See *infra* § IV.B.

5. See *infra* § IV.A.3.

6. See *infra* § III.

The purpose of this article is to provide a systemic overview of the present state of the development of the international judiciary.⁷ It is by no means a comprehensive or exhaustive survey. The intent is to show that "international judicial law and organization" can and should be studied as a discipline in its own right, without the need to be subsumed under the general category of "Peaceful Settlement of International Disputes."

First, the notion of "international judicial body" is explored and defined.⁸ Then, with the help of a synoptic chart, the international judiciary is mapped to illustrate the context in which it flourishes and operates.⁹ Subsequently, the forces that have propelled the recent multiplication of international jurisdictions are assessed.¹⁰ The increasing role played by entities other than sovereign states in the international judicial process then is discussed.¹¹ Finally, the conclusion illustrates the dangers inherent in the classification of international judicial bodies together with ad hoc arbitration and diplomatic means as "dispute settlement means," as well as the increasing anachronicity of such a taxonomy.¹²

II. DEFINING "INTERNATIONAL JUDICIAL BODY"

Before proceeding with the analysis of the international judiciary, it is necessary to define clearly what this article means by "international judicial body," for the exact contours of the notion cannot be taken for granted. As a matter of fact, while several authors have attempted to put forward a taxonomy of the myriad institutions established to settle disputes and/or control the implementation of international law, the results have not been consistent. In particular, there exists substantial confusion as to both the terms employed to describe the phenomenon and the notion itself.

7. The term "international judiciary" will be used to indicate those judicial bodies that have been created to administer international justice, without implying the existence of any degree of coordination among them. See *infra* § II.

8. See *infra* § II.

9. See *infra* § III.

10. See *infra* § IV.

11. See *infra* § IV.B.

12. See *infra* § V.

One of the major consequences of the still largely unsettled state of the development of international judicial institutions is the extreme indefiniteness of the terminology employed. Indeed, scholars have used the terms "International Tribunals"¹³ and "International Courts"¹⁴ indiscriminately, often referring to the same object. At first glance, these two terms might seem to be used interchangeably. For example, quite a few scholars have resorted impartially to the expression "International Courts and Tribunals."¹⁵

On closer examination, however, it is evident that, unlike those that speak of "International Courts," scholars who resort to the term "International Tribunals" tend to include in their writings both ad hoc arbitral tribunals as well as permanent jurisdictions. One could infer, therefore, that while the term "International Courts" designates only permanent judicial fora, "International Tribunals" more aptly should be used to indicate ad hoc (or at least transient) institutions. That conclusion seems to be corroborated by states' practices. The great majority of bodies that are discussed in this article are referred to as courts, and perhaps not by chance only the two ad hoc criminal jurisdictions are called tribunals.¹⁶ The ex-

13. See, e.g., BOLESŁAW ADAM BOCZEK, *HISTORICAL DICTIONARY OF INTERNATIONAL TRIBUNALS* (1994); MANLEY O. HUDSON, *INTERNATIONAL TRIBUNALS: PAST AND FUTURE* (1944); LEONID A. KAMAROWSKII, *LE TRIBUNAL INTERNATIONAL* (Seriei Westman trans., 1887); SIR ARNOLD DUNCAN MCNAIR, *THE PLACE OF LAW AND TRIBUNALS IN INTERNATIONAL RELATIONS* (1957); W. EVANS DARBY, *INTERNATIONAL TRIBUNALS: A COLLECTION OF THE VARIOUS SCHEMES WHICH HAVE BEEN PROPOUNDED AND OF INSTANCES SINCE 1815* (1897).

14. See, e.g., RAM PRATASH ANAND, *INTERNATIONAL COURTS AND CONTEMPORARY CONFLICTS* (1974); R. Bierzanek, *Some Remarks on the Function of International Courts in Contemporary World*, 7 *POL. Y. INT'L. L.* 121-50 (1975); MARK JANIS, *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* (1992).

15. See, e.g., BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953); THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968). Moreover, the expression "International Courts and Tribunals" has been employed by the *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* (M. Bernhardt ed., 1981) in all entries dealing with international jurisdictions. Regarding such entries, see Franz Matscher, *Standing Before International Courts and Tribunals* 191-6; Hermann Mosler, *Judgments of International Courts and Tribunals* 111-18; H.W.A. Thirlway, *Procedures of International Courts and Tribunals* 183-87; Christian Tomuschat, *International Courts and Tribunals* 92-9 [hereinafter *International Courts and Tribunals*].

16. See *infra* notes 45-46 and accompanying text.

ception to the rule is the permanent judicial organ established by the 1982 U.N. Convention on the Law of the Sea, which is called the "International Tribunal for the Law of the Sea."¹⁷

Nonetheless, in order not to get entangled in semiotic debate by assessing the merits of one formula over another, this paper will simply resort to the expression "international judicial bodies," which is synonymous with "international judicial institutions" and "international judicial organs." This expression not only has the merit of focusing on the attributes of the organ considered (rather than evoking a misleading affinity with national jurisdictions), it also has sound rooting in the U.N. Charter, which designates the International Court of Justice as the ". . . principal judicial organ . . ." of the organization.¹⁸

Yet, terminological jumble is nothing but the result of the precariousness of the meaning itself, since currently there is no universally accepted definition of what is an "international court, tribunal, or judicial body." Of the few authors who have dealt with the subject of international adjudication holistically, rather than focusing on a particular body, Christian Tomuschat has perhaps come closest to a workable criterion.¹⁹

For this scholar, an international judicial body, to be classified as such, must meet five basic criteria. First, it must be permanent; that is to say its existence must be independent from the vicissitudes of a given case.²⁰ This criterion removes not only ad hoc arbitral tribunals but also those institutions, like the Permanent Court of Arbitration or the Organization for Security & Cooperation in Europe (OSCE) Court on Conciliation and Arbitration, which simply provide a stable institu-

17. See *infra* note 32 and accompanying text. Admittedly, the judicial organ of the Andean Community in Spanish is called "tribunal" (*Tribunal de Justicia de la Comunidad Andina*). Nonetheless, when properly translated into English, the expression "Tribunal de Justicia" inevitably turns into "Court of Justice."

18. U.N. CHARTER art. 92.

19. See Christian Tomuschat, *International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: INTERNATIONAL COURT OF JUSTICE, OTHER COURTS AND TRIBUNALS, ARBITRATION AND CONCILIATION: AN INTERNATIONAL SYMPOSIUM 285-416 (MAX-PLANCK INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, 1987) [hereinafter Tomuschat, *Specialized Jurisdictions*]; see also Tomuschat, *International Courts and Tribunals*, *supra* note 15, at 92-9.

20. See Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 307-311.

tional framework and a roster of experts for ad hoc arbitration or conciliation. Second, it must have been established by an international legal instrument.²¹ Several of the bodies that will be dealt with in this article have been established directly by a treaty, while some others have been established by other international legal acts deriving their force from treaties.²² Third, in deciding the cases submitted to them, they must resort to international law.²³ Fourth, they must decide those cases on the basis of rules of procedure, which preexist the case and usually cannot be modified by the parties.²⁴ Finally, the outcome of the process must be legally binding.²⁵

This last element rules out a large number of compliance monitoring mechanisms and bodies that have proliferated during previous decades, particularly in the areas of human rights and international environmental law, and whose outcome is typically a mere recommendation which is subsequently scrutinized by a larger political organ. Conversely, the fact that some judicial bodies are vested with the power to render advisory opinions, which in most cases are not binding, by itself does not bar those bodies from being regarded as judi-

21. *See id.* at 293.

22. For example, the Court of First Instance of the European Communities has been created by a decision of the Council of Ministers. *See infra* note 36. The two ad hoc criminal tribunals have been established by resolutions of the U.N. Security Council. *See infra* notes 48-49.

23. *See* Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 290-94. According to Hudson ". . . [a]ny international tribunal meriting characterization as such must function within established judicial limitations and must apply international law." HUDSON, *supra* note 13, at 99.

24. *See* Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 311-12.

25. *Id.* at 299-307. The issue of the binding nature of international judicial bodies' judgments, however, should not be confused with that of the enforcement of such decisions. The function of enforcing the decisions of a judicial body is an executive function, and as such it is usually confined to bodies invested with executive powers. It is, in other words, a political rather than a judicial matter. Therefore, the enforcement of decisions of the ICJ is entrusted to the U.N. Security Council, at the request of one of the parties. *See* U.N. CHARTER art. 94. Again, the supervision of the execution of decisions of the European Court of Human Rights is entrusted to the Committee of Ministers. *See* Protocol 11, *infra* note 33, art. 46.2. In the case of the Central American Court of Justice (CACJ), non-compliance with judgments is to be referred by the Court to member states, which ". . . by resorting to pertinent means, will ensure its execution." [Translation of the author] *See* CACJ Statute, *infra* note 107, art. 39.

cial, insofar as the capacity to render advisory opinions is combined with that of binding decisions.²⁶

For the sake of completeness and accuracy, one could add to this list two more tests. For an international judicial body to be classified as such it must be composed (at least in its majority)²⁷ of judges who have not been appointed ad hoc by the parties, but rather who have been chosen before a case is submitted through an impartial mechanism.²⁸ Second, an international judicial body must decide disputes between two or more entities, of which at least one is a sovereign state or an international organization.²⁹ Nevertheless, these two supplementary criteria can be subsumed by and large under one or more of the five fundamental criteria mentioned above.

It goes without saying that this "test of judiciality" must not be adopted in an uncompromising manner and that other gauges might be as valid.³⁰ Nonetheless, these tests have the unquestionable merit of restricting the list of international judicial bodies to a rather sizable and homogeneous corpus. The existing institutions that currently fit all the requirements identified by Tomuschat are:

- International Court of Justice (ICJ);³¹
- International Tribunal for the Law of the Sea (ITLOS);³²

26. See *infra* notes 133-135.

27. As a matter of fact, certain international judicial bodies allow the parties to the dispute to appoint an ad hoc judge in case none of those composing the bench is its own national. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE [hereinafter ICJ Statute] art. 31; see also STATUTE OF THE INTERNATIONAL TRIBUNAL OF THE LAW OF THE SEA [hereinafter ITLOS], art. 17.

28. See Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 294.

29. This criterion eliminates bodies like the International Chamber of Commerce which provide facilities for commercial arbitration between private parties.

30. See Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 289-90.

31. See U.N. CHARTER, arts. 7.1, 36.3, 92-96. For the basic documents concerning all existing international judicial bodies, as well as several other quasi-judicial, implementation, control and dispute settlement mechanisms, see generally PHILIPPE SANDS ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* (1999).

32. Established by the U.N. Convention on the Law of the Sea [hereinafter UNCLOS] concluded on December 10, 1982, entered into force November 16, 1994. See UNCLOS art. 287, U.N.Doc.A/CONF.62/121 (1982), 21 I.L.M. 1261 (1982). Part XV section 2 of UNCLOS is dedicated to the peace-

- European Court of Human Rights (ECHR);³³
- Inter-American Court of Human Rights (IACHR);³⁴
- Court of Justice of the European Communities (ECJ)³⁵ together with its Court of First Instance (CFI);³⁶
- Central American Court of Justice (CACJ);³⁷
- Court of Justice of the Andean Community (TJAC);³⁸

ful settlement of disputes. The ITLOS Statute is contained in Annex VI of the UNCLOS.

33. Established by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, on November 4, 1950, and entered into force on September 3, 1953 [hereinafter *The European Convention*]. See 213 U.N.T.S. 221, amended by Protocol 11 to the European Convention on Human Rights, 33 I.L.M. 943 [hereinafter *Protocol 11*].

34. Established by the American Convention on Human Rights, signed in San José, Costa Rica, on November 22, 1969 [hereinafter *American Convention*]. See 1144 U.N.T.S. 123.

35. Established by the Treaty Establishing the European Coal and Steel Community, signed at Paris, on April 18, 1951, and entered into force July 25, 1952. See 26 U.N.T.S. 140. In 1957, the European Economic Community and the Euratom were established, and the competence of the Court was accordingly enlarged to include them. Treaty Establishing the European Economic Community, signed at Rome on March 25, 1957, and entered into force January 1, 1958 [hereinafter *EC Treaty*]. See 298 U.N.T.S., 11. Treaty Establishing the European Atomic Agency, signed at Rome, on March 25, 1957, and entered into force January 1, 1958. See *id.* at 167.

Note that the Treaty of Amsterdam, amending the Treaty on the European Union, the Treaties establishing the European Communities, and certain related acts established a new numbering system for the Treaty on the European Union and the Treaties of the European Communities. (See 1997 O.J. (C340)1) Although the Treaty of Amsterdam has not yet entered into force, this paper will resort to the new numbering as codified in the consolidated version of the EU Treaties. See EUROPEAN UNION CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY (Office for the Official Publications of the European Communities 1997).

36. Established by Decision of the Council of Ministers of October 24, 1988. See 1988 O.J. (L319) 1.

37. Established by the Protocol of Tegucigalpa, concluded on December 13, 1991. See 34 I.L.M. 923. The Protocol of Tegucigalpa amended the Charter of the Organization of Central-American States, concluded at Panama, on December 12, 1962. See 2 I.L.M. 235. [hereinafter *Protocol of Tegucigalpa*].

38. Established by the Treaty Creating the Court of Justice of the Cartagena Agreement [hereinafter *TJAC Treaty*], concluded at Cartagena, on

- Court of Justice of the European Free Trade Association (EFTA CJ);³⁹
- Court of Justice of the Benelux Economic Union (Benelux CJ);⁴⁰
- Court of Justice of the Common Market for Eastern and Southern Africa (COMESA CJ);⁴¹
- Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (OHCLA CJ);⁴²
- Court of Justice of the Arab Maghreb Union (AMU CJ);⁴³
- Judicial Board of the Organization of Arab Petroleum Exporting Countries (OAPEC JB).⁴⁴

May 28, 1979, and modified by the Cochabamba and Sucre Protocols. *See* 18 I.L.M. 1203. *See also*, Sucre Protocol Establishing the Andean Parliament, concluded at Quito, June 25, 1997, (visited Feb. 2, 1999) <<http://www.comunidadandina.org/SUCRE.HTM>>. The Sucre Protocol has not yet been ratified by any of the Andean Community members. *See also* Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement, concluded at Cochabamba, on May 28, 1996, (visited Feb. 2, 1999) <<http://www.comunidadandina.org/MODITRIB.HTM>>. The Cochabamba Protocol has yet not been ratified by any of the Andean Community members.

39. The EFTA Court was provided for by the Agreement on the European Economic Area [hereinafter EEA Agreement] concluded at Porto, on May 2, 1992. *See* 1795 U.N.T.S. 3. The EFTA Court was actually established by the Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice [hereinafter ESA Court Agreement], concluded at Porto, May 2, 1992. *See* 1995 O.J. (L344) 1.

40. Established by the Treaty Instituting the Benelux Economic Union, signed at the Hague, on February 3, 1958 [hereinafter Benelux EU Treaty]. *See* 381 U.N.T.S. 165.

41. Established by the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), concluded at Kampala, on November 5, 1993 [hereinafter COMESA Treaty]. *See* 33 I.L.M. 1067. The COMESA Treaty entered into force on December 8, 1994.

42. Established by the Treaty Establishing the Organization for the Harmonization of Corporate Law in Africa [hereinafter OHADA Treaty], signed at Port-Louis, on October 17, 1993. *See* 4 JOURNAL OFFICIEL DE L'OHADA (OFFICIAL JOURNAL OF THE OHADA), November 1, 1997, (visited Feb. 2, 1999) <http://www.refer.org/camer_ct/eco/ecohada/ohada0.htm>.

43. Established by the Treaty Instituting the Arab Maghreb Union, signed in Marrakech, on February 17, 1989, and entered into force on July 1, 1989 [hereinafter AMU Treaty]. *See* 94 R.G.D.I.P. 552-56 (1990).

44. Established by the Agreement for the Establishment of an Arab Organization for the Petroleum Exporting Countries, signed at Beirut, on Janu-

If the above-mentioned five tests are applied with a minimum degree of flexibility, then the list could include the International Criminal Tribunal for Former Yugoslavia (ICTY);⁴⁵ the International Criminal Tribunal for Rwanda (ICTR);⁴⁶ and the World Trade Organization's (WTO) dispute settlement mechanism.⁴⁷ The difficulty of grouping these latter three bodies with the former lies in the fact that they precisely cannot meet the permanency standard.

The two criminal tribunals, the ICTY and ICTR, have been established by the U.N. Security Council acting under its Chapter VII powers.⁴⁸ Since the ICTY and the ICTR are regarded as measures to ". . . restore international peace and security . . .,"⁴⁹ the eventual determination by the Security Council that international peace and security have been restored in the affected regions will terminate their existence. Admittedly, not even the above-listed international judicial bodies are eternal. The day the treaty that established them, or that established the organization of which they are organs, is terminated, they will be dissolved. Yet, their life, unlike in the case of the two criminal courts, is not made dependent upon any particular event in the future.

ary 9, 1968, and entered into force on September 1, 1968 [hereinafter OAPEC Agreement]. 68 U.N.T.S. 235.

45. The Statute of the ICTY was contained in the Report of the U.N. Secretary-General to the U.N. Security Council [hereinafter ICTY Statute]. *See Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, 32 I.L.M. 1159 (1993). The Statute was adopted by U.N. Security Council Resolution 827 (1993). *See Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, 32 I.L.M. 1203 (1993). It was revised by Resolution 1166 of May 13, 1998. *See S.C. Res. 11616*, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/11616 (1998).

46. Established by U.N. Sec. Res. 955, Establishing the International Tribunal for Rwanda, 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

47. Established by the General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1125 (1994) (Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes), at 1226-47 [hereinafter DSU].

48. *See supra* notes 45-46 and accompanying text.

49. U.N. CHARTER art. 39.

The case of the WTO's dispute settlement mechanism, for that matter, is even trickier. First of all, the DSU did not create a single international institution, but rather two distinct bodies: the Dispute Settlement Body (DSB)⁵⁰ and the Appellate Body.⁵¹ Secondly, to varying degrees, these two organs do not match exactly all the above-mentioned requirements. In particular, the DSB is an organ composed of representatives from all WTO members.⁵² It can, therefore, be regarded more as the alter ego of the General Council of the WTO rather than as a true judicial organ. Moreover, the DSB is not the organ that actually scrutinizes the cases. Rather, disputes between WTO members are to be submitted, at the request of either party, and after several other diplomatic options have been exhausted,⁵³ to an ad hoc panel, composed of three experts chosen by the parties. These elements closely recall arbitral tribunals.⁵⁴

The Appellate Body, conversely, has more pronounced judicial features. It is a standing organ that decides appeals against findings of ad hoc panels⁵⁵ and is composed of seven persons, three of whom sit on any one case in rotation⁵⁶ and can hear only appeals relating to points of law covered in the report and legal interpretations developed by the panel.⁵⁷ Nonetheless, the outcome of the proceedings before the DSB and the Appellate Body is not binding in itself, but becomes binding only when adopted by the DSB.⁵⁸ This would be sufficient to make the WTO's dispute settlement procedure fail the test of the binding nature of the decision, if it were not for the fact that the DSB can reject panel and Appellate Body findings only by consensus, making such an event a mere theoretical possibility.⁵⁹

50. See DSU, *supra* note 47, art. 2.

51. See *id.* at 1236.

52. See Agreement Establishing the World Trade Organization art. IV.3, 33 I.L.M. 1263 (1994).

53. See DSU, *supra* note 47, at 1228.

54. See *id.* at 1230.

55. See *id.* at 1235.

56. See *id.*

57. See *id.* at 1235.

58. See DSU, *supra* note 47, at 1237.

59. See *id.* at 1235.

Finally, it is not possible to conclude this survey of the existing international judicial bodies without mentioning two nascent organisms: the International Criminal Court (ICC) and the African Court on Human and People's Rights (ACHR).

The Statute of the ICC was adopted in Rome on July 12, 1998, and to date it has been signed by seventy-five states.⁶⁰ Yet, its entry into force is far from guaranteed,⁶¹ and the possibility that it might sink before its launching, as happened almost one century ago in the case of the International Prize Court,⁶² is something only its most ardent devotees can dismiss lightly. However, if the ICC is established, it will probably become a crowning moment of this era of international law and organization, much as the Permanent Court of Arbitration was one century ago.

The adoption by the Assembly of Heads of State and Government of the Organization of African Unity (OAU) on June 8, 1998 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and People's Rights is potentially another important tessera in the international judicial mosaic.⁶³ The Protocol es-

60. *Rome Statute of the International Criminal Court*, U.N.Doc A/Conf.183/9, July 17, 1998, preamble [hereinafter *Rome Statute*]. For a current list of states which have ratified the Rome Statute, see Rome Statute of the ICC: Ratification Status (visited March 1, 1999) <<http://www.un.org/law/icc/statute/status.htm>>.

61. The Rome Statute of the International Criminal Court will enter into force on the first day of the month after the sixtieth day following the date of the deposit of the sixtieth instrument of ratification, acceptance, approval or accession. As of September 1, 1999, the Rome Statute was ratified only by Italy, San Marino, Senegal, and Trinidad and Tobago. *See id.* On the Rome Statute generally, see ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* (1999).

62. Convention Relative à l'Établissement d'une Cour Internationale des Prises, Deuxième Conférence Internationale de la Paix, 1 Actes et Documents 668 (1907) [Convention on the Establishment of an International Prize Court, Second International Peace Conference, 7 Acts and Documents 668 (1907)].

63. African Charter on Human and Peoples' Rights, adopted on June 27, 1981, entered into force on October 21, 1986, 21 I.L.M. 58 (1982), [hereinafter African Charter]; Protocol to the African Charter of Human and Peoples' Rights, opened for signature on June 8, 1998 during the 34th Summit of the OAU, in Ouagadougou, Burkina Faso, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 727 (1998) [hereinafter ACHR

tablishing the ACHR has not yet entered into force.⁶⁴ Unlike the European and Inter-American systems for the protection of human rights, where the ECHR and the IACHR are integral part of the cardinal instrument of the system *ab initio*, in the case of Africa, the establishment of a regional judicial body to ensure the implementation of the fundamental agreement is rather an afterthought. Indeed, the ACHR was established twelve years after the entry into force of the African Charter.

Before the adoption of the ACHR Protocol, the protection of rights listed in the African Charter rested solely with the African Commission on Human and Peoples' Rights, a quasi-judicial body with no binding powers, modeled on the UN Human Rights Committee. In particular, under the African Charter, the Commission's functions are limited to: examining state reports; considering communications alleging violations; and interpreting the Charter at the request of a state party, the OAU, or any organization recognized by the OAU.⁶⁵ The scantiness of the enforcement and compliance control mechanism contained in the African Charter, however, is hardly surprising. When the OAU adopted the African Charter, very few African States, like Gambia, Senegal, and Botswana, could vaunt of a democratic regime respectful at least of the fundamental human rights.⁶⁶ In the second half of the 1990s, however, advancements of democracy in several African states (e.g., Namibia, Malawi, Benin, South Africa, Tanzania, Mali, and Nigeria) and the weak record of the African Commission have heightened the need for stronger domestic and regional guarantees for the protection of human rights, making the establishment of the ACHR possible.

Such a renewed impetus toward more effective protection of human rights accounts also for certain features of the ACHR which set it apart, not only from its American and European congeners, but also from all other judicial bodies, and

Protocol]. On the ACHR Protocol see Makau Mutua, *The African Human Rights Court: A Two Legged Stool?*, 21 HUM. RTS. Q. 342-363 (1999) [hereinafter Mutua].

64. To date 32 States have signed the ACHR Protocol, two have ratified (Senegal and Burkina Faso). "The Protocol shall come into effect one month after eleven instruments of ratification or adherence have been deposited." ACHR Protocol, art. 31.3.

65. African Charter, art. 45.

66. Mutua, *supra* note 63, at 345.

should be briefly mentioned. In particular, the Protocol provides that actions may be brought before the Court on the basis of any instrument, including international human rights treaties, which has been ratified by the state party in question.⁶⁷ Furthermore, the Court can apply as sources of law any relevant human rights instrument ratified by the state in question, in addition to the African Charter.⁶⁸ In other words, the ACHR potentially could become the judicial arm of the panoply of human rights agreements concluded under the aegis of the United Nations (e.g., the International Covenant on Civil and Political Rights,⁶⁹ the Convention on the Elimination of All Forms of Discrimination Against Women,⁷⁰ or the Convention on the Rights of the Child)⁷¹ or of any other relevant legal instrument codifying human rights (e.g., the various conventions of humanitarian law, those adopted by the International Labour Organization, and even several environmental treaties). Very few of those agreements contain judicial mechanisms of ensuring their implementation, and therefore, at least potentially, several African states could end up with a dispute settlement and implementation control system stronger and with more bite than the one ordinarily provided for by those treaties for the rest of the world.

Another peculiarity of the ACHR concerns the standing of individuals and NGOs.⁷² Unlike any other judicial body, African NGOs may request advisory opinions, provided they have been recognized by the OAU, along with member states and OAU organs.⁷³ Again, this is another provision that—if the Protocol establishing the ACHR enters into force and if the OAU recognizes NGOs liberally—might eventually strengthen the ACHR's promotional function. Conversely, concerning contentious jurisdiction, individuals can bring cases but only

67. ACHR Protocol, *supra* note 63, art. 3.1.

68. *Id.*, art. 7.

69. International Covenant on Civil and Political Rights, adopted December 16, 1966, entered into force March 23, 1976, 6 I.L.M. 368 (1967).

70. Convention on the Elimination of All Forms of Discrimination against Women, adopted on December 18, 1979, entered into force on September 3, 1981, 19 I.L.M. 33 (1980).

71. Convention on the Rights of the Child, adopted on November 20, 1989, entered into force on September 2, 1990, 28 I.L.M. 1448 (1989).

72. *Cf. infra* § IV.B.2.

73. ACHR Protocol, *supra* note 63, art. 4.1.

if, at the time of the ratification of the Draft Protocol or thereafter, the State at issue has made a declaration accepting the jurisdiction of the Court to hear such cases.⁷⁴ This is a step forward with respect to the Inter-American Court of Human Rights, where individuals have no standing at all, but still far from the progressive attitude of the new European Court of Human Rights.

III. THE INTERNATIONAL JUDICIARY IN CONTEXT: A SYNOPTIC CHART

In order to understand fully the reasons for the rapid quantitative increase of international judicial bodies, the extensive transformation of their competencies, and the success of certain subject-matter jurisdictions over others, it is also necessary to examine the myriad of bodies and mechanisms that, while not meeting several or all of the above-mentioned standards, still play a role in the enforcement, interpretation, and implementation of international law. Nevertheless, because of their considerable number, a narrative description of each of them, or even of their groupings, is beyond the scope of this paper. To synthesize the subject, the synoptic chart reproduces, as much as possible, the dynamism that characterizes this domain.

Two caveats, however, are required. First, the main challenge in the preparation of this chart has been to portray what can be called "an anarchic system" (perhaps an oxymoron) without giving the illusion of order. Grouping all of these bodies and mechanisms together and sub-grouping them according to a debatable taxonomy, it does not follow that an "international judicial system" exists. If by "system" it is ordinarily meant ". . . a regularly interacting or interdependent group of items forming a unified whole . . .,"⁷⁵ or ". . . a functionally related group of elements . . .,"⁷⁶ then by all standards the bodies listed in this chart do not amount to a system. Whether they ought to is open to debate. Secondly, this chart is likely incomplete. It is the result of an ongoing research effort carried on through the Project on International Courts

74. *Id.* arts. 5.3, 34.6.

75. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1197 (10th ed. 1996).

76. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1823 (3rd ed. 1992).

and Tribunals and should be considered, at best, a partial representation of what exists, or has existed.⁷⁷ Certain groupings, like the "International Claims and Compensation Bodies," have a mere exemplary function, for the enormous number of such bodies that have been created in the past could not properly fit in the scheme.

In order to replicate the great dynamism that currently characterizes the international judicial domain, the chart is inter-temporal. Indeed, alongside extant institutions, such as the International Court of Justice, the chart depicts bodies that have been terminated, such as the Permanent Court of International Justice (PCIJ). There are also bodies that have been provided for in treaties that never entered into force (i.e., the International Prize Court),⁷⁸ idle ones like the OSCE European Nuclear Energy Tribunal,⁷⁹ and nascent bodies, like the International Criminal Court.⁸⁰ Moreover, the synoptic chart also includes bodies that have been debated out and remain confined to the realm of ideas, such as a possible International Court for the Environment.⁸¹ In sum, it depicts both

77. See generally Project on International Courts and Tribunals (visited March 1, 1999) <<http://www.pict-pcti.org>>.

78. See *supra* note 62.

79. The European Nuclear Energy Tribunal is the judicial body of the OECD Nuclear Energy Agency. The OECD Nuclear Energy Agency was established in 1957 by the Council of the OECD (at that time still named Organization for European Economic Cooperation—OEEC). The European Nuclear Energy Tribunal was created pursuant to the 1957 Convention on the Establishment of a Security Control in the Field of Nuclear Energy (concluded at Paris, on December 20, 1957) [U.K.T.S. 8 (1960)] to adjudicate disputes of states party and private enterprises with the Nuclear Energy Agency. The Tribunal does not seem to have been called upon to deal with any cases. On the European Nuclear Energy Tribunal, see Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 386-88; see also Boczek, *HISTORICAL DICTIONARY OF INTERNATIONAL TRIBUNALS*, *supra* note 13, at 90 (entry for the "European Nuclear Energy Tribunal").

80. See *supra* note 60-61.

81. The idea of establishing a permanent international tribunal to address environmental disputes and ensure the implementation of international environmental law dates back to the end of the 1980s. Its main thrust was granting non-state entities, and in particular individuals and NGOs, the possibility to access international courts and tribunals to redress their rights, in particular their right to a clean environment. Indeed, very rarely do the general interests of states coincide with those of their individual nationals. States can and, for foreign policy considerations, often do refuse to support their injured nationals by espousing their claims.

an actual and a potential make-up of the international judiciary.

The main focus of the chart is on international courts and tribunals. In the top portion there are forty different institutions (of which only seventeen are currently existing) grouped by subject-matter jurisdiction in seven clusters. All the entities listed in this group meet the fundamental set of five tests discussed above. Altogether those judicial bodies form what can be called "the international judiciary." Yet, when these bodies are put in a much larger historical and analytical context extending also to past, present, and future quasi-judicial and implementation control mechanisms and institutions, about ninety different entities need to be accounted for.

Again, what sets apart all these additional mechanisms and institutions from international judicial bodies is the fact that each of them fails one or more of the tests of judiciality. For instance, the various committees and commissions established to monitor and ensure the implementation of human rights treaties typically cannot make binding decisions. This is also the case for inspection panels, non-compliance bodies, and conciliation commissions. By definition, all international mechanisms and institutions established to settle claims arising out of international conflicts (e.g., the United Nations Com-

The most fervent supporters of the establishment of an International Court of the Environment are undoubtedly Alfred Rest and Amedeo Postiglione. See Alfred Rest and Amedeo Postiglione, *Need for an International Court for the Environment? Underdeveloped Legal Protection of the Individual in Transnational Litigation*, 24 ENVIRONMENTAL POLICY AND LAW 173-187 (1994); Alfred Rest, *A New International Court of Justice for the Environment to Implement Environmental Responsibility/Liability Law?*, in AMEDEO POSTIGLIONE, PER UN TRIBUNALE INTERNAZIONALE DELL'AMBIENTE (1990); Alfred Rest, *New Legal Instruments for Environmental Prevention, Control and Restoration in Public International Law*, 23 ENVIRONMENTAL POLICY AND LAW 260-272 (1990). See also AMEDEO POSTIGLIONE, THE GLOBAL VILLAGE WITHOUT REGULATIONS: ETHICAL, ECONOMIC, SOCIAL AND LEGAL MOTIVATIONS FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT (2nd ed. 1994); Amedeo Postiglione, *An International Court for the Environment?*, 23 ENVIRONMENTAL POLICY AND LAW 73-78 (1993); AMEDEO POSTIGLIONE, THE GLOBAL ENVIRONMENTAL CRISIS: THE NEED FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT (1996). More information about the proposed International Court of the Environment Foundation can be found at the Green Channel web site (visited April 14, 1998) <<http://www.greenchannel.com/icef/>> and <<http://www.xcom.it/icef/about.html>>.

pensation Commission)⁸² or major domestic unrest (e.g., the Iran-USA Claims Tribunal⁸³ or the 1868 American-Mexican Claims Commissions)⁸⁴ are ad hoc.

Admittedly, if the judiciary test is strictly applied, International Administrative Tribunals meet all of the requirements, inasmuch as they are endowed with the task of settling disputes between the respective organizations and their staff members.⁸⁵ Indeed, the legal regime under which the staff of an international organization is employed derives from the international agreement which established that particular organization. Hence, it pertains to the domain of international law. Nonetheless, disputes concerning the rights and duties of international civil servants closely resemble similar disputes between national agencies and their employees.⁸⁶ Furthermore, administrative tribunals have been shaped according to the model of judicial protection at the national level. These two factors make them a genus of their own, hardly reconcilable with the basic features of international judicial bodies.⁸⁷

All bodies listed in the chart are gathered in largely autonomous clusters. As a matter of fact, each of these clusters has very few links of a legal or functional nature both within itself

82. The United Nations Compensation Commission was created pursuant to paragraph 18 of U.N. SCOR Res. 687 (1991), *reprinted in* 30 I.L.M. 846 (1991).

83. The Iran-USA Claims Tribunal was established by the so-called Algiers Accords of January 19, 1981. *See* Algiers Accord arts. 16-17, 20 I.L.M. 223 (1981).

84. Established by the Convention of July 4, 1868, between the United States and Mexico, U.S.-Mex., 15 Stat. 679, *reprinted in* J.B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATION TO WHICH THE UNITED STATES HAS BEEN A PARTY 1287-1359 (1898).

85. For a discussion of International Administrative Tribunals, see generally DOCUMENTS ON INTERNATIONAL ADMINISTRATIVE TRIBUNALS (Chittharanjan F. Amerasinghe ed., 1989); CHITTHARANJAN AMERASINGHE, THE LAW OF INTERNATIONAL CIVIL SERVICE AS APPLIED BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS (1988); CHITTHARANJAN F. AMERASINGHE & DIMITRA BELLINGER, INDEX OF DECISIONS OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS (1985); Suzanne Bastid, *Les Tribunaux Administratifs Internationaux et Leur Jurisprudence*, 92 RCADI 343-517 (1957); Jean Touscoz, *Les Tribunaux Administratifs Internationaux*, in JURIS CLASSEUR DE DROIT INTERNATIONAL 230-311 (1969); G. Vandersanden, *Administrative Tribunals, Boards and Commissions in International Organizations*, in ENCYCLOPEDIA 1-4 (Bernhardt ed., 1981).

86. *See* Tomuschat, *International Courts*, *supra* note 19, at 94.

87. *See id.*

and with each other. Until 1995, the ICJ could act as an appeal court of the U.N. Administrative Tribunal, but the link was severed by the UN General Assembly.⁸⁸ Certain institutions listed in the group "human rights bodies" (i.e., the Inter-American Commission of Human Rights) act as a mandatory filter for certain international judicial bodies (i.e., the Inter-American Court of Human Rights). Again, there are several cases of potentially competing "jurisdictions," both among bodies within the same group (i.e., the ICJ and ITLOS)⁸⁹ and bodies of different groups (i.e., the non-compliance procedures on the one hand, and the ICJ or the WTO's DSB, on the other).⁹⁰ However, beyond such tenuous connections, each institution is self-contained. This is perhaps the main impediment to their conceptualization as a "system."

Nonetheless, in all their staggering diversity the international mechanisms and institutions listed in the chart have certain commonalities that justify their coexistence in the same scheme. First, all these entities make legal determinations, whether binding or not. This sets them apart from other bodies, such as the U.N. General Assembly or the Parliamentary Assembly of the Council of Europe, which, while sharing the same aspiration towards a "just world," are still of a quintessentially political nature. To be precise, while the former decide whether certain acts are congruous with certain norms, the latter merely appraise the political implications of given situations. This leads to a second commonality: all these institutions make their determinations on the basis of the same body of law, a well-articulated and heterogeneous corpus juris—"International Law."⁹¹

88. See G.A. Res. 54, 50th Sess., U.N. Doc. A/Res/50/54 (1995).

89. See Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37-54 (1997); Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environmental Disputes*, 7 MINN. J. GLOBAL TRADE 287-328 (1998).

90. See Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123-162 (1992); Günther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 TUL. J. INT'L & COMP. L. 29, 46-48 (1997).

91. Admittedly, some of the bodies listed in the bottom part of the synoptic chart, like the OUA Commission of Mediation, Conciliation and Arbitration, do not necessarily resort to international legal principles to carry out their mission. Moreover, even international judicial bodies might be empowered by the parties to render decisions *ex aequo et bono*. Yet, leaving aside the

Third, all these international bodies have been established directly or indirectly (i.e., by a decision taken by a body established by treaty) by international agreements. It follows that they are subject to a legal order that is independent of national systems. Yet, at the same time, they are subject to, and materially dependent upon, states' support. Fourth, and perhaps most importantly, collectively they are the incarnation of a widely shared aspiration to abandon a world where only sovereign states matter, in favor of an order where fundamental common values are shared, protected, and enforceable by all members of a wider society, composed not only of states but also of international organizations and individuals in all of their legal incarnations (i.e., NGOs, peoples, corporations, natural persons, etc.).

IV. THE FLOURISHING OF INTERNATIONAL JUDICIAL BODIES

Thus far, the state of the development of the international judicial sector, both at its center and periphery, has been delineated and a taxonomy of the institutions and mechanisms has been put forward. Now a sampling of the wealth of questions arising out of this rapid expansion will be provided. To this end, two different areas will be broached. First, some considerations on the etiology of the phenomenon of the multiplication of international jurisdictions will be presented. Secondly, the increasing role attributed to non-state entities in the international judicial process as a paradigm of its changing nature will be discussed.

A. *What Propelled the Multiplication of International Jurisdictions?*

The rapid quantitative increase in the number of international judicial fora experienced during last decade can be ascribed, with varying degrees of relevance, to several factors. The proliferation of international jurisdictions can be attributed largely to the expansion of international law into domains that once were either solely within states' domestic jurisdiction (e.g., criminal justice) or were not the object of multi-

issue of whether such judgments are ultimately rooted in law, resort to meta-legal consideration by these bodies constitutes an exception which must be expressly admitted by the parties.

lateral discipline (e.g., international trade of services), or were simply *vacua legis* (e.g., natural resources of the high seas or common heritage of mankind). When conceived in this manner, the multiplication of international judicial fora becomes the precipitate of the accrued normative density of the international legal system. As states increasingly vest specialized international organizations with the power to create international legal standards, the transfer of the power to interpret and uphold those standards naturally follows.

Yet, such a general construction fails to explain why the 1990s have given birth to more international judicial bodies than any other decade. A more specific and plausible answer might be found in the systemic transformation of international relations following the demise of the Soviet Union. In particular, the sudden surge in the number of international judicial bodies might be ascribed to three interrelated factors. First, the end of bi-polarism and the advent of multi-lateralism. Second, the abandonment of Marxist-Leninist interpretations of international relations. Thirdly, and probably most importantly, the fact that capitalist, market-based economies and free-trade doctrines have remained the only plausible way to viable economic development.

1. *End of Bi-polarism*

The impact of the end of the Cold War on the international judicial sector hardly can be overemphasized. The transition from a strictly bi-polar world into a different, more fluid arrangement (or, as some might argue, no arrangement at all) has triggered the need to rejuvenate several international organizations (and with them their judicial bodies) and opened the way to the establishment of new ones.

No less than ten international judicial bodies can be considered, to varying degrees, to have precipitated the end of the Cold War. Indeed, the establishment in 1993 of an international jurisdiction to prosecute international crimes committed in the territory of the former Yugoslavia could take place only because of the existence of a consensus within the U.N. Security Council,⁹² admittedly a rare circumstance in the Cold War era. Had Russia enjoyed the same political leverage that it

92. All members of the U.N. Security Council voted in favor with no abstentions. See INDEX TO PROCEEDINGS OF THE SECURITY COUNCIL 322 (1993);

had during the apogee of the Soviet Union, it most likely would not have allowed any interference in a Slavic country. Moreover, it can be argued that the successful establishment of the ICTY spurred the immediate replication of this exercise with respect to the Rwandan civil war⁹³ and even gave impetus to the subsequent institutionalization of international criminal justice into a permanent court.

The fall of the "iron curtain" opened the way for the expansion of the Council of Europe to the East and the rejuvenation of the European Court of Human Rights. Since 1950, the European Convention on Human Rights and Fundamental Freedoms had been the linchpin of the organization, and for over forty years its member states developed what is rightly regarded as the most accomplished and successful international system for the protection of human rights. Yet, such a refined system hardly could withstand a wave of new members, almost all with dubious human rights records. Thus, partly because of the expansion of the Council of Europe's membership and partly because of the Convention system's perceived effectiveness,⁹⁴ in 1994 the European Court of Human Rights was radically restructured.⁹⁵ Under the new system, the European Commission of Human Rights was eliminated, allowing submissions to directly reach the Court.⁹⁶ The competence of the Committee of Ministers is now limited to the mere supervision and execution of judgments.⁹⁷ In order to allow the Court to cope with an unfettered and constantly growing case load, as well as with an enormously increased number of potential plaintiffs, the bench has been expanded to forty judges and

see also S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

93. Yet, unlike the case of the ICTY, the ICTR was not established by consensus, but rather by 13 votes in favor, China abstaining and Rwanda against. *See* INDEX TO PROCEEDINGS OF THE SECURITY COUNCIL 336 (1994); *see also* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg.

94. *See* HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS AND MORALS 590 (1996).

95. *See* Protocol 11, *supra* note 33.

96. The European Commission of Human Rights was provided for by Articles 19.1 and 20-37 of the 1950 European Convention. *See* The European Convention, *supra* note 33.

97. *See* Protocol 11, *supra* note 33, art. 46-47.

has introduced a system of judge-rapporteurs, chambers, and a Grand Chamber.⁹⁸

Again, it could be argued that the end of the Cold War was one of the factors that roused UNCLOS from its twelve years of dormancy, and hence to the launch of ITLOS.⁹⁹ Indeed, prior to January 1, 1990, only forty-one states, out of sixty required for its entry into force, had ratified the Convention.¹⁰⁰ Yet, more significantly, they were all developing, non-aligned countries.¹⁰¹ None of the countries (with the exception of Iceland)¹⁰² was a member of either NATO or the Soviet

98. See *id.* at arts. 20, 27-31; see also ECHR Rules, at Rules 48-50.

99. See *supra* note 32 and accompanying text.

100. See UNCLOS, *supra* note 32, art. 308.1.

101. Antigua and Barbuda (February 2, 1989), Bahamas (July 29, 1983), Bahrain (May 30, 1985), Belize (August 13, 1983), Brazil (December 22, 1988), Cameroon (November 19, 1985), Cape Verde (August 10, 1987), Ivory Coast (March 26, 1984), Cuba (August 15, 1984), Cyprus (December 12, 1988), Democratic Republic of Congo (February 17, 1989), Egypt (August 26, 1983), Fiji (December 10, 1982), Gambia (May 22, 1984), Ghana (June 7, 1983), Guinea (September 6, 1985), Guinea-Bissau (August 25, 1986), Iceland (June 21, 1985), Indonesia (February 3, 1986), Iraq (July 30, 1985), Jamaica (March 21, 1983), Kenya (March 2, 1989), Mali (July 16, 1985), Mexico (March 18, 1983), Namibia (April 18, 1983), Nigeria (August 14, 1986), Oman (August 17, 1989), Paraguay (September 26, 1986), Philippines (May 8, 1984), Saint Lucia (March 27, 1985), Sao Tome and Principe (November 3, 1987), Senegal (October 25, 1984), Somalia (July 24, 1989), Sudan (January 23, 1985), Togo (April 16, 1985), Trinidad and Tobago (April 25, 1986), Tunisia (April 24, 1985), United Republic of Tanzania (September 30, 1985), Yemen (July 21, 1987), Yugoslavia (May 5, 1986), Zambia (March 7, 1983). These are the dates of ratification/formal confirmation/accession/succession to the UNCLOS. See United Nations web site (visited Feb. 17, 1998) <<http://www.un.org/Depts/los/los94st.htm>>.

102. The reason Iceland rushed ahead of all other NATO members to sign and ratify the UNCLOS is that it considered it much more important to grant itself an undisputed 200-mile wide exclusive fishing zone rather than maintain strict allegiance to the alliance, even more so when the major challengers of its maritime claims were NATO members the United Kingdom and West Germany. On the Icelandic fisheries dispute see generally, J.A. HART, *THE ANGLO-ICELANDIC COD WAR OF 1972-1973: A CASE STUDY OF A FISHERY DISPUTE*, (Institute of International Studies, University of California, 1976); E. Langavant & Olivier Pirotte, *L'affaire des Pêcheries Islandaises*, 80 R.G.D.I.P. 55-103 (1976); Donald A. Young, *Contributions to International Law and World Order by the World Court's Adjudication of the Icelandic Fisheries Controversy*, 1 B.C. INT'L & COMP. L. J. 175 (1977). The most comprehensive, even if rather biased, account of the Icelandic Fisheries dispute has been given by an Icelander. See HANNES JÓNSSON, *FRIENDS IN CONFLICT* (1982). The dispute was submitted by the United Kingdom and Germany. See Fisher-

bloc. With the end of the Cold War, the loosening of allegiances rapidly brought UNCLOS to a critical threshold for entry into force.

Finally, the end of the East-West rivalry likely has played a fundamental role in the successful effort of Central American States to revive long-forgotten aspirations towards political integration.¹⁰³ After having been engulfed by decade-long civil wars and after often having been used as the pawns of the "superpowers," on December 13, 1991, Costa Rica, El Salvador, Guatemala, Honduras, Panama, and Nicaragua launched the *Sistema de la Integración Centroamericana* (SICA) in an effort to bring peace and stability to the region.¹⁰⁴ The Central American Court of Justice (*Corte Centroamericana de Justicia*)¹⁰⁵ is one

ies Jurisdiction (U.K. v. Ice.) 1974 I.C.J. 3 (July 25); see Fisheries Jurisdiction Cases, (F.R.G. v. Ice.), 1974 I.C.J. 175 (July 25).

103. Since independence from Spain in 1821, the Central American States repeatedly have attempted to join together in a political union. The first such attempt took place in 1824 with the signature of the Constitution of the Federal Republic of Central America by Costa Rica, Nicaragua, Honduras, El Salvador, and Guatemala. See 13 BRITISH AND FOREIGN AFFAIRS STATE PAPERS 725 (1824). In 1898, Honduras, Nicaragua, and El Salvador tried again to unite by signing in Managua, on August 27, 1898, the Constitution of the Union of Central America, endowed with a Federal Supreme Court of Justice. Articles 132-140 of the Constitution provided for the establishment of a common Supreme Court of Justice. See 92 BRITISH AND FOREIGN AFFAIRS STATE PAPERS 234 (1898). Thirdly, for the centenary of independence from Spain, in 1921, Guatemala, El Salvador, and Honduras concluded the Constitution of the Central American Republic, again providing for the establishment of a Federal Supreme Court. See 114 BRITISH AND FOREIGN AFFAIRS STATE PAPERS 831 (1921).

104. See Protocol of Tegucigalpa, *supra* note 37.

105. This judicial body should not be confused with the Central American Court of Justice (*Corte de Justicia Centroamericana*) established on December 20, 1907, by the Convention of Washington, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. 206 CTS 79 (1907-8). The Central American Court of Justice was the first permanent international judicial institution. Its seat was in Costa Rica, and it was made up of five judges, one from each member. Its jurisdiction was very broad, including not only disputes between states but also disputes between nationals of a member state on the one hand, and any other state party on the other hand. The Central American Court of Justice ceased to exist in 1918; in its eleven years of existence it rendered ten judgments. On the 1907-18 Central American Court of Justice, see Manley O. Hudson, *The Central American Court of Justice*, 26 AM. J. INT'L L. 759 (1932); G. GUTIÉRREZ, *LA CORTE DE JUSTICIA CENTRO-AMERICANA* (San José, Ediciones Juricentro 1978); Humphrey Hill, *Central American Court of Justice*, in 1 Encyclopedia of Public International Law 41 (1981); EMILIO

of the pivotal institutions of the new regional regime, and its jurisdiction extends over the entire spectrum of possible judicial powers.¹⁰⁶ It includes contentious, advisory, preliminary, arbitral, appellate, constitutional, and administrative jurisdictions. It can be accessed for different purposes by: member states of SICA; states which are not members of SICA, when they have a dispute with member states and agree to the Court's jurisdiction; the organs of SICA; the Supreme Courts of the members of SICA; national courts; and natural and legal persons.¹⁰⁷

2. *Repudiation of Marxist-Leninist Interpretations of International Law and Relations*

The repudiation of Marxist-Leninist interpretations of international law and relations in large parts of the world has eliminated a strong political and philosophical hindrance to the resort to international judicial bodies. In the traditional Marxist view, law, including international law, together with states, is part of the social superstructure determined by the economic structure. Class relations, therefore, determine as much of states' structure as international relations.¹⁰⁸ Hence, states and international law are instruments of class struggles.

This view, coupled with the doctrine of "limited sovereignty" articulated in the 1970s by Brezhnev, made friendly relations among socialist countries dogma. In the socialist world, third-party adjudication was not an option because judicial bodies upheld class divisions. Accordingly, international

MAZA Y RODRIGUEZ, LA CORTE DE JUSTICIA CENTROAMERICANA (San Salvador, Organización de Estados Americanos 1966).

106. See Protocol of Tegucigalpa, *supra* note 37, art. 12.

107. See Statute of the Central American Court of Justice art. 22-34, 34 I.L.M. 928 (1995) [hereinafter CACJ Statute].

108. On Marxist and Soviet views on international law and relations in different historical ages, see generally, T.A. TARACOUZIO, *THE SOVIET UNION AND INTERNATIONAL LAW: A STUDY BASED ON THE LEGISLATION, TREATIES AND FOREIGN RELATIONS OF THE UNION OF SOCIALIST SOVIET REPUBLICS (1935)*. See also GREGORY I. TUNKIN, *Coexistence and International Law*, in *RECUEIL DES COURS* 5-79; VENDULKA KUBÁLKOVÁ & ALBERT A. CRUICKSHANK, *MARXISM AND INTERNATIONAL RELATIONS* 158-192 (1989); LIGHT, *THE SOVIET THEORY OF INTERNATIONAL RELATIONS* (1988). See generally *PERESTROIKA AND INTERNATIONAL LAW: CURRENT ANGLO-SOVIET APPROACHES TO INTERNATIONAL LAW* (Anthony Carty & Gennady Danilenko eds., 1990); SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 187-194 (1997).

disputes could happen only between socialist states and capitalist states, or among capitalist states themselves, in which case socialist states were better off letting the contradictions of capitalism break free so as to destroy them with endless squabbles. Because of such reasoning, the Soviet Union and the other socialist countries historically have opted for diplomatic consultations rather than judicial settlement.¹⁰⁹

Since the fall of the iron curtain, numerous former socialist states have increasingly accepted the jurisdiction of or have recourse to international judicial bodies.¹¹⁰ Hence, not only have former socialist states actively contributed to the establishment of several of the new jurisdictions, but they also have gradually transformed theoretical acceptance into practice. Almost the whole of Central and Eastern Europe is now under the jurisdiction of the European Court of Human Rights.¹¹¹ Bulgaria, Estonia, Georgia, Hungary, and Poland have filed declarations of acceptance of the jurisdiction of the ICJ with its registry.¹¹² In 1992, for the first time, a case between two former socialist states, Hungary and Slovakia, was submitted to the Court.¹¹³ In a sense, even the dispute between Bosnia and Herzegovina and Yugoslavia over the application of the Con-

109. See generally Lucius Caflisch, *Le Règlement Pacifique des Différends Internationaux à la Lumière des bouleversements intervenus en Europe Centrale et en Europe de l'Est*, ANUARIO DE DERECHO INTERNACIONAL 17-39 (1993).

110. See *id.* at 35. On the changing attitude of socialist countries towards international adjudication, see Wojciech Góralczyk, *Changing Attitudes of Central and Eastern European States towards the Judicial Settlement of International Disputes*, in *LE RÈGLEMENT PACIFIQUE DES DIFFÉRENDS INTERNATIONAUX EN EUROPE: PERSPECTIVES D'AVENIR* 477-96 (1991).

111. The ECHR currently has jurisdiction over Albania, Bulgaria, Croatia, the Czech Republic, Estonia, the Former Yugoslav Republic of Macedonia, Hungary, Latvia, Moldavia, Poland, Romania, Russia, Slovak Republic, Slovenia, and Ukraine.

112. Bulgaria: Declaration Recognizing Jurisdiction of June 24, 1992, 1994-95 ICJ Y.B. at 83 (1995); Estonia: Declaration Recognizing Jurisdiction of October 21, 1991, 1994-95 ICJ Y.B. at 89 (1995); Georgia: Declaration Recognizing Jurisdiction of June 20, 1991, 1994-95 ICJ Y.B. at 90 (1995); Hungary: Declaration Recognizing Jurisdiction of October 22, 1992, 1994-95 ICJ Y.B. at 93 (1995); Poland: Declaration Recognizing Jurisdiction of September 25, 1990, 1994-95 ICJ Y.B. at 109 (1995).

113. *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment*, I.C.J. REPORTS 1-72 (1997). On September 3, 1998, Slovakia filed with the Court's Registry a request for an additional judgment in the case because of the alleged unwillingness of Hungary to implement the judgment delivered by the Court on September 25, 1997.

vention on the Prevention and Punishment of the Crime of Genocide, which is still pending before the Court, can be regarded as a side effect of the demise of Marxist interpretations of international law and international relations.¹¹⁴

3. *Multiplication of Regional Economic Integration Agreements*

By far the major consequence of the setback suffered by Marxist ideas has been the multiplication of regional economic integration agreements (REIAs). The triumph of the market-economy paradigm and free-trade doctrines has spurred all over the world the need to lower business and trade barriers among states in order to foster economic efficiency and growth. Yet, the building of regional free trade areas, more often than not, also has brought along the creation of judicial bodies to settle disputes between members arising out of the implementation of the agreements, to uphold the regime's law, to ensure its consistent interpretation, and to guarantee continuous access to legal remedies.¹¹⁵

The rationale for the establishment of judicial bodies within REIAs is manifold. For instance, it could be argued that the more states move towards economic integration, the more the need for the guarantee of legal protection grows.¹¹⁶ Moreover, the tighter the integration (but also the smaller a state is), the higher this need will be. Indeed, whereas only very few

114. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Preliminary Objections, I.C.J. REPORTS 595-795 (1996). The case is still pending before the Court.

115. The two major REIAs which are not endowed with a judicial organ are the Common Market of the Southern Cone (MERCOSUR), 30 I.L.M. 1041 (1991), and the North American Free Trade Agreement (NAFTA), 32 I.L.M. 289 (1993). See Annex III of the Treaty of Asunción, which established the MERCOSUR and provided for a temporary dispute settlement (first negotiation, then mediation by the Common Market Group, and finally arbitration), to be replaced after December 31, 1994, by a definitive one. However, to date such a final mechanism has not yet been adopted. Conversely, NAFTA has two different dispute settlement procedures. The first one is provided for under Chapter 20 of the NAFTA agreement and, much like in the case of MERCOSUR, provides first for consultations, then good offices by the Free Trade Commission, and finally arbitration. The second procedure is contained in Chapter 19 and resorts to ad hoc bi-national panels of five independent experts to settle disputes concerning antidumping and countervailing duties.

116. See Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 403.

regional heavyweights may be able to place confidence in political negotiations within the agreement's regime as a means to settle disputes and protect their interests, or to resort successfully to unilateral acts (i.e., countermeasures, reprisal, or withdrawal from the legal regime *tout-court*), the smaller, weaker states have no choice at all. Thus, the establishment of judicial guarantees preventing a substantial transformation of the legal regime often becomes the quid pro quo for their participation. This may be one of the reasons behind the establishment of several international jurisdictions, which include (citing only those currently active during the post-Cold War era): the EFTA Court of Justice,¹¹⁷ the COMESA Court of Justice,¹¹⁸ the Common Court of Justice and Arbitration of the OHCLA,¹¹⁹ the European Court of Justice and its Court of First Instance,¹²⁰ the Court of Justice of the Andean Community,¹²¹ the Court of Justice of the Benelux Economic Union,¹²² the AMU Court of Justice,¹²³ and the OAPEC Judicial Board.¹²⁴

Other possible explanations for the marked tendency of REIAs to develop judicial bodies might be the striking homogeneity of interests among their members and the particular character of such regional legal regimes. The first factor is self-explanatory. Empirical evidence teaches that consistency of political, social, economic, and cultural values favors entrusting the protection of such shared values to a common and permanent judicial institution. Less obvious, however, are the reasons why permanent regional judicial fora enjoy a comparative advantage over both ad hoc mechanisms, like arbitration, conciliation and the like, and universal jurisdictions.

First, recourse to ad hoc dispute settlement means (or, for that matter, even extemporaneous recourse for a specific narrow issue to a permanent judicial institution) is essentially a bilateral issue. The scope of the dispute, its unfolding before the body, the legal consequences of the body's findings, and

117. See *supra* note 39.

118. See *supra* note 41.

119. See *supra* note 42.

120. See *supra* note 35-36.

121. See *supra* note 38.

122. See *supra* note 40.

123. See *supra* note 43.

124. See *supra* note 44.

the eventual settlement all rarely impact, or even have the potential to do so, beyond the two parties. In the case of ad hoc arbitration, the tribunal's award is law for the parties and merely for that particular case. This is also true in the case of certain jurisdictions with a scope transcending a particular region, such as the ICJ¹²⁵ or the ITLOS.¹²⁶ Similar bodies do not purport to modify the legal regime, nor to create binding precedents.

However, when a dispute settlement organ has been empowered to interpret authoritatively a legal regime and when its judgments become an integral part of that regime, as in the case of some REIAs, then its judgments necessarily have an effect *erga omnes partes contractantes*. Even when REIAs allow the parties to a dispute a choice between the agreement's judicial body and ad hoc arbitration, as in the case of the Benelux Economic Union¹²⁷ or OHADA,¹²⁸ the latter still contains certain unorthodox multilateral aspects.

125. See I.C.J. Statute art. 59.

126. See ITLOS Statute art. 33.2.

127. This is the case, for instance, of the Arbitral College provided for by the Treaty of the Benelux Economic Union. See *supra* note 40. Article 42.1 of the BENELUX Treaty provides that the College, depending on the type of dispute, is composed of sections, the number of which is set at four (economic, financial, social, and agricultural). See BENELUX CJ Statute art. 2.1. Each of the three parties to the Treaty appoints an arbitrator and a substitute to each of the four sections. See BENELUX Treaty art. 42.2; BENELUX CJ Statute art. 2.1. In the event of a dispute, the arbitrators of both litigants, as well as the President, compose the College, but the President is not necessarily a citizen of any of the parties to the dispute, but is rather chosen in accordance with a rotation plan based on a list of six arbitrators selected by the Benelux Committee of Ministers. See BENELUX Treaty art. 2.3; BENELUX CJ Statute art. 3.1. Hence, the College might be composed by two out of three arbitrators being of the same nationality and nationals of a state which is a party to the proceeding. On this point see Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 377-378.

128. Another example is the Common Court of Justice and Arbitration of OHADA. See *supra* note 42. Article 21.1 of the OHADA Treaty provides that disputes between parties to a contract, of which one is either resident of one of the states party to the OHADA Treaty or the contract is to be or has been executed in the territory of one of the state parties, can be submitted to arbitration, either by way of a compromissory clause inserted in the contract or by special agreement. The arbitration takes place before a one or three-member arbitral tribunal, designated jointly by the parties. See OHADA Treaty art. 21.2. However, unlike traditional arbitration where the parties retain absolute control in each stage of the procedure, in the case of

Second, legal regimes created by REIAs can favor recourse to permanent endogenous judicial institutions. Indeed, regional courts and tribunals might resort less often to customary international law or general legal principles than their counterparts that have universal scope. Judicial bodies established within REIAs usually are primarily concerned with upholding the law of the treaty on which they are founded, as well as with the secondary law derived from that treaty, thereby relegating general international law to a subsidiary role. Again, the substantive scope of the applicable law of regional judicial bodies is typically narrower and more easily identifiable than in the case of their counterparts with a universal scope, thus reducing the risks taken by litigants to reasonable proportions. Finally, regional legal regimes usually are created by the active participation of all members of that particular community. They are peculiar to that, and only that, community. Because of their collective, voluntary, and endogenous origin, they are less likely to be rejected as the expression of past political situations than are customary international law or bilateral agreements. All these reasons unite to indicate why regional judicial bodies recently have grown at a faster pace than universal jurisdictions.

B. *Role of Non-State Entities in the International Judicial Process*

In addition to the rapid quantitative increase of international judicial bodies, after two centuries of unfolding the international judicial process also has been deeply transformed since the 1794 Jay Treaty.¹²⁹ In addition to its institutionaliza-

OHADA, the Common Court of Justice and Arbitration oversees the proceedings. For example, the Court confirms the parties' choice as to the arbitrators. *See id.* art. 21.2-4. It also appoints arbitrators when the parties cannot agree on a candidate and rules on parties' objections to arbitrators. *See id.* art. 21.6. It can replace arbitrators. *See id.* art. 21.7. Finally, it scrutinizes arbitral awards before they are signed by the arbitrators, yet without having the power to impose changes on the substance. *See id.* art. 24.

129. *See* Treaty of Amity, Commerce and Navigation (Nov. 19, 1794) U.S.-Gr. Brit., 8 Stat. 116, 119-22, T.S. No. 105. The Treaty, named after the former U.S. Chief Justice and former Secretary of Foreign Affairs John Jay, was concluded to resolve the outstanding issues between the two states after the American revolution. The Jay Treaty provided for the establishment of three mixed claims commissions, one relating to U.S.-British border disputes and two to examine the war claims of British subjects and U.S. citizens, respectively. The Jay Treaty gave impetus to a revival of the judicial process of

tion, the single most consequential development probably has been its gradual opening to all international actors, whether sovereign states or not. In other words, the international judicial process has changed from a device concocted by states to serve their own interests into a tool available to all entities, whether sovereign states or not, to obtain justice and further the international rule of law.

In fact, provided that the dispute settlement system created by the WTO DSU is considered to be an international judicial body, then at the eve of the twenty-first century there exists only one state-only international judicial forum.¹³⁰ Even in the case of the ICJ, the international judicial organ par excellence, states share with U.N. organs and specialized agencies access to the same courtroom, albeit for different purposes.¹³¹ In all other international judicial bodies, to different degrees and ends, and in different capacities, non-state entities are granted standing. Because of the extreme heterogeneity of the domain, for the sake of clarity we have grouped non-state entities into three clusters: international organizations, individuals, and national courts.

1. *International Organizations*

International organizations have locus standi through their organs in almost every jurisdiction. In some instances, access is limited to obtaining the legal expertise of the organization's judicial body. This is the case, as was just noted, with the U.N. General Assembly, or any other organ or specialized agency so authorized by the General Assembly, and the Secur-

arbitration that had fallen into disuse during the eighteenth century. See Hudson, *supra* note 13, at 3-4.

130. Actually, even the WTO dispute settlement system is not, strictly speaking, a states-only forum. The EC is indeed a member of the WTO in its own right, and as such it is a member of the DSB and participates in a large share of the WTO dispute settlement system's caseload. The exclusion of all legal entities except sovereign states from the WTO and, a fortiori, its dispute settlement mechanism is justified by the fact that the fixing and exacting of customs duties, as well as the regulation of external trade, are still an exclusive prerogative of states.

131. Only states can be parties in cases before the ICJ. See I.C.J. Statute art. 34(1), 59 Stat. 1055, 1059, T.S. No. 993, 3 Bevens 1179, 1186. The U.N. General Assembly, or any other organ or specialized agency so authorized by the General Assembly, and the U.N. Security Council can ask the International Court of Justice to render advisory opinions.

ity Council, which can ask the ICJ to render advisory opinions.¹³² Advisory opinions also can be requested of ITLOS by the General Assembly or the Council of the International Sea-Bed Authority;¹³³ of the ECJ by the Council and the Commission of the European Communities;¹³⁴ of the European Court on Human Rights by the Committee of Ministers;¹³⁵ of the Inter-American Court on Human Rights by several organs of the Organization of American States;¹³⁶ of the Central American Court of Justice by the organs of the Central American Integration System;¹³⁷ and of the COMESA Court of Justice by the

132. See U.N. CHARTER art. 96; I.C.J. Statute arts. 65-68.

133. See UNCLOS, *supra* note 32, arts. 159.10, 191. Under the rules of the Tribunal, ITLOS may also render advisory opinions on legal questions pursuant to an international agreement, related to the purposes of UNCLOS, which confers such jurisdiction to ITLOS. See ITLOS Rules art. 138.1.

134. The Court, which can render advisory opinions at the request of the Council, Commission, or a member state, may review the compatibility of international treaties concluded between the Community and third parties. See EC Treaty, *supra* note 35, art. 300. If the opinion of the ECJ is adverse, the Treaty may only enter into force in accordance with Article 48, which establishes the procedural requirements for amending the Treaty.

135. See Protocol 11, *supra* note 33, art. 47. Although the Grand Chamber may give advisory opinions at the request of the Committee of Ministers:

... [s]uch opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

Id. See also Second Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (May 6, 1963). In principle, the Court's advisory opinions are consultative in character and are, therefore, not binding as such on the requesting bodies. Certain instruments or regulations, however, can provide in advance that an advisory opinion shall be binding.

136. See Statute of the Inter-American Court of Human Rights art. 64, 19 I.L.M. 643 [hereinafter IACHR Statute]. The OAS organs listed in Chapter X, Article 51, of the OAS Charter as amended by Article 12 of the 1967 Protocol of Buenos Aires (signed at Buenos Aires Feb. 27, 1967, entered into force on February 27, 1970. [21 UST 607]) are the General Assembly, the Meeting of Consultation of Ministries of Foreign Affairs, the Councils, the Inter-American Judicial Committee, the Inter-American Commission on Human Rights, the General Secretariat, Specialized Conferences, and Specialized Organizations.

137. See CACJ Statute, *supra* note 107, art. 22.e. The organs of the Central American Integration System are the Meeting of the Presidents, Council of

COMESA Authority and Council.¹³⁸ Conversely, in the case of OHADA only the plenary organ made of member states' representatives (Council of Finance Ministers) can refer matters to the regime's judicial body.¹³⁹

In other cases, access to legal regimes' organs is limited to a mere filtering and intermediary function. Hence, the Inter-American Court of Human Rights has jurisdiction over individuals' claims as to the violation of the 1969 American Convention on Human Rights only insofar as these claims have been submitted by the Inter-American Commission on Human Rights.¹⁴⁰

In several instances, however, organs of international organizations have full standing in contentious matters. With respect to jurisdictions with a universal scope, the Sea-Bed Disputes Chamber of the ITLOS can hear cases between states and the International Sea-Bed Authority.¹⁴¹ Even in the case of the two ad hoc international criminal tribunals, it is the Prosecutor (an "organ" of the tribunal),¹⁴² who prepares and submits the indictments.¹⁴³ Again, the ICC will exercise its jurisdiction if a situation is referred to the Prosecutor either by a state party to the Court's Statute or the U.N. Security Council acting under Chapter VII, or when the Prosecutor has initiated an investigation *proprio motu*.¹⁴⁴

Finally, organs of regional international organizations can appear, both as plaintiffs and defendants, before the organization's judicial body in the case of the European Communities;¹⁴⁵ the European Free Trade Agreement;¹⁴⁶ the Andean

Ministers, Executive Committee, and the General Secretariat. See Protocol of Tegucigalpa, *supra* note 37, art. 12.

138. The COMESA Authority and the COMESA Council can ask the COMESA Court of Justice for an opinion under Article 32 of the Treaty. See COMESA Rules, at Rules 95-97.

139. See OHADA Treaty, *supra* note 42, art. 7.2.

140. See American Convention, *supra* note 34, art. 61.1.

141. See UNCLOS, *supra* note 32, art. 187; see also ITLOS Statute, *supra* note 32, art. 37.

142. See ICTY Statute, *supra* note 45, art. 11.b; see also ICTR Statute, *supra* note 46, art. 10.b.

143. See ICTY Statute, *supra* note 45, art. 18; see also ICTR Statute, *supra* note 46, at 17.

144. See Rome Statute, *supra* note 61, arts. 13, 34.c.

145. The main forms of action that can be brought by the Parliament, the Council of Ministers, and the Commission under the EC Treaty are action

Community;¹⁴⁷ the Central-American Integration System;¹⁴⁸ and the Common Market for Eastern and Southern Africa.¹⁴⁹

The rationale for opening the doors of international courtrooms to international organizations' organs is straightforward. Today, there is almost no international regime in which the upholding and vindication of its normative structure is vested solely in the individual member states (who will eventually exercise this right through the traditional legal remedies provided for by international law, such as countermeasures, retaliation, and termination of agreements). To be sure, there are different degrees associated with a regime's organs carrying out their custodian function, ranging from actual cause of action to mere supervisory powers, as in the case of universal human rights regimes. Yet when even occasional non-compliance with the regime's norms is likely to threaten the whole regime's structure, as in the case of REIAs, or even

for annulment (*see* EC Treaty, *supra* note 35, art. 230.); action for failure to act (*see id.* art. 232.); action for default by member state (*see id.* art. 226); disputes concerning members of the Commission and the Court of Auditors and the Ombudsman (*see id.* arts. 195, 213, 216, and 247.); and actions based on the arbitration clause (*see id.* art. 238.). Certain community institutions also have the possibility to bring special procedures before the Court, such as disputes concerning the European Investment Bank and national central banks. *See* EC Treaty, *supra* note 35, art. 237.

146. EFTA states can bring an action against the EFTA Surveillance Authority (*See* ESA Court Agreement, *supra* note 39, art. 37.); failure to act (*see id.* art. 37.). Conversely, the EFTA Surveillance authority can bring an action against an EFTA state if it considers that the EFTA state has failed to fulfill an obligation under the EEA Agreement or the ESA Court Agreement. *See* ESA Court Agreement, *supra* note 39, art. 31.

147. The Board ("Junta") of the Andean Community can bring an action against member states for non-compliance. *See* TJAC Treaty, *supra* note 38, art. 23.

148. The organs of the SICA can bring cases before the for non-compliance. *See* CACJ Statute, *supra* note 107, art. 22.b. They can be sued by any entity which has suffered prejudice by the SICA Organs (*See* CACJ Statute, *supra* note 107, art. 22.g.) or for administrative matters (*See id.* art. 22.j.).

149. COMESA member states can refer to the COMESA Court any act, regulation, directive, or decision of the COMESA Council, any failure of the Council to fulfill obligations under the Treaty, and/or infringement by the Council of its provisions. *See* COMESA Treaty, *supra* note 41, art. 24. Conversely, the COMESA Secretary-General may refer to the COMESA Court any member state's failure to comply with the Treaty. *See id.*

in that of the "international criminal law regime,"¹⁵⁰ its defense is usually not left at the mercy of individual member's political calculations.

2. *Individuals*

With respect to access by individuals, as both legal and/or natural persons, to international jurisdictions, the picture is much less uniform. Indeed, while it is undeniable that individuals have gained increasing access to international judicial fora in their own right, rather than under the veil of diplomatic protection, there exists a sharp dichotomy between judicial bodies with a universal scope and REIA judicial bodies.

In the case of REIAs, legal and natural persons can seize the regime's judicial body in the case of the European Communities;¹⁵¹ the EFTA,¹⁵² the Andean Community,¹⁵³ the Cen-

150. "International legal regime" usually indicates a set of rules (either customary or codified in "hard" and "soft" legal instruments) governing a given area of international relations. This is, at least, the meaning of the phrase according to the ICJ in the United States Diplomatic and Consular Staff in Teheran Case. Paragraph 83 of the Court's judgment states that "diplomatic law itself provides the necessary means of defense against, and sanction for, illicit activities." Paragraph 86 adds "The rules of diplomatic law, in short, constitute a self-contained regime . . ." International Court of Justice: Judgment in the case concerning United States Diplomatic and Consular Staff in Teheran, paras. 83-86, 19 I.L.M. 553. In this sense, international legal scholars speak about the "regime of the high seas," referring to that set of rules, both customary and treaty-based, which govern the rights and duties of states on the high seas. Hence, the term "international criminal law regime" indicates the legal regime created by international treaties like the Geneva conventions and protocols, the Convention on the Repression of the Crime of Genocide, the statutes of the ICTY and ICTR, and the Rome Statute of the ICC (when it will enter into force).

151. The main forms of action that can be brought by individuals under the EC Treaty are action for annulment (*See* EC Treaty, *supra* note 35, art. 230.); actions for failure to act (*see id.* art. 232.); actions for damages (*see id.* art. 235.); staff cases (*see id.* art. 236.); actions against fines and penalties provided for in EC regulations (*see id.* art. 229.); actions based on arbitration clause (*see* EC Treaty, *supra* note 35, art. 238.); and actions against the applicability of EC regulation (*see id.* art. 241.).

152. Individuals can bring an action before the EFTA Court against a decision of the EFTA Surveillance Authority (ESA) on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of the ESA Court Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers. *See* ESA Court Agreement, *supra* note 39, art. 36. Individuals also can bring an action against the

tral-American Integration System;¹⁵⁴ the COMESA;¹⁵⁵ OHADA;¹⁵⁶ and partially in that of the Organization of Arab Petrol Exporting Countries.¹⁵⁷ In the case of the Benelux Court of Justice and the Arab Maghreb Union, individuals can appear only insofar as they are employees of the organization and only for administrative matters.¹⁵⁸ In addition to REIAs, but still remaining at a regional level, it should be stressed that in the case of the ECHR, until recently, individuals could have their claims decided by judicial procedure only after the petition was accepted by the regime's commissions. However, at least in the case of Europe, since the entry into force of Protocol 11, the ECHR's filter has been removed and now individuals can submit cases directly to the court.¹⁵⁹ Conversely, in the case of the IACHR, individuals do not yet have direct access to the court.¹⁶⁰

International judicial bodies with a universal scope remain much more impervious to individuals. Besides being completely excluded from the World Court and the WTO dispute settlement system, in the case of criminal courts, individuals obviously are confined to the role of defendants, and in the case of ITLOS their access is restricted only to disputes before one of the Tribunal's chambers for litigation arising out of the interpretation or implementation of contractual obligations or acts or omissions of a party to a contract relating to activities in

EFTA Surveillance Authority for failure to act. *See id.* art. 37. Finally, individuals can bring an action for non-contractual liability of the EFTA Surveillance Authority. *See id.* art. 39.

153. *See* TJAC Treaty, *supra* note 38, art. 19 (for nullification).

154. *See* CACJ Statute, *supra* note 107, art. 22.

155. *See* COMESA Treaty, *supra* note 41, art. 26.

156. *See* OHADA Treaty, *supra* note 42, arts. 13-20.

157. *See* OAPEC Agreement, *supra* note 44, art. 24.

158. Additional Protocol to the BENELUX CJ Treaty relating to the Jurisdictional Protection of Persons in Service of the Benelux Economic Union, signed in The Hague on April 29, 1969, *see* 94 U.N.T.S. 17 art. 3. The individuals employed by the Arab Maghreb Union can bring an administrative action before the AMU Court. Yet, such jurisdiction is provided for only by the internal regulation of the Court and not by the AMU Treaty nor the Statute of the AMU Court. *See* Lazaheir Bouony, *La Cour Maghrebine De Justice*, in 26 REVUE BELGE DE DROIT INTERNATIONAL 351, 365 (1993).

159. *See supra* note 33.

160. *See supra* note 34.

a defined "Area."¹⁶¹ Yet, even this narrow, albeit potentially consequential, allowance is not completely out of states' touch. As a matter of fact, in order to be able to apply to the International Sea-Bed Authority for approval of plans to work for activities in the Area, natural and legal persons must be sponsored by the state party of which they are a national.¹⁶² If the applicant has more than one nationality, as might happen in the case of international joint-ventures or consortiums, then all states involved must sponsor the application, a requirement that might turn out to be particularly cumbersome in the case of large North-South joint undertakings.¹⁶³ In other words, with no state sponsorship, there is no contract, and hence no justiciable issues.

International judicial fora with universal jurisdiction are impermeable to individuals, as compared to the relative openness of REIA judicial bodies. At the moment at which international organizations receive power to affect individuals' interests directly, it becomes essential to guarantee the substance of the legal protection normally found under national law in new international fora.¹⁶⁴ If such guarantee is not provided, either individuals risk being stripped of judicial protection or, if they have retained the right to have recourse against the REIA's legislation in the courts of member states, the consistent interpretation of the regime's normative structure cannot be ensured. Because there are few, if any, international organizations that can legislate at a universal level on issues that might affect individuals directly, the need to guarantee individual legal protection in universal jurisdictions is minimal. In those few instances in which individuals' rights can be vindicated at a universal level, as in the case of international criminal law, such derogation is warranted because legal protection at the domestic level either has vanished (usually as a consequence of civil war) or cannot be left in the hands of the few states willing to exercise criminal jurisdiction.

161. See UNCLOS, *supra* note 32, art. 187.c. Article 1.1 of UNCLOS defines the Area as ". . . the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."

162. See *id.* Annex III, art. 4.

163. See *id.* art. 4.3.

164. See Tomuschat, *Specialized Jurisdictions*, *supra* note 19, at 405-6.

As a final observation, it should be noted that one of the foremost results of granting individuals direct access to international jurisdictions is the erosion of diplomatic protection.¹⁶⁵ This inevitably makes formal inter-state litigation even rarer than in the past, for no small portion of the international judicial bodies' work originated from individuals' claims that had been espoused by the state of which they were nationals. Ergo, those international jurisdictions that can hear only disputes between sovereign states, such as the ICJ, are deprived of a relevant share of their caseload.¹⁶⁶

3. *National Courts*

Finally, a third entity, distinct from individuals and international organizations, is a source of a significant share of the docket of certain judicial bodies. In several REIAs, and particularly in those where supranational traits are particularly strong, national courts can access the agreement's judicial body *litis pendente* to ask for an interpretation of the regime's law. "Preliminary Rulings," to employ the term used in EC Law,¹⁶⁷ can be asked for by national courts of member states of

165. The Permanent Court of International Justice (PCIJ) provided the classic definition of espousal in the *Panevezys-Saldutiskis Railway* case by stating that diplomatic protection is a situation in international law whereby "in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law." See *Panevezys-Saldutiskis Railway*, P.C.I.J., ser. A/B, No. 76 (1939).

166. To escape from this predicament, the Permanent Court of Arbitration also in recent years has put itself at the service of non-state entities. Since 1994, the PCA has facilitated disputes between an Asian company and an Asian state-owned company; an African state and two foreign nationals; a company and the Taraba state and Federal Government of Nigeria; an Asian state-owned enterprise and three European enterprises. See Permanent Court of Arbitration, 97th ANNUAL REPORT (1997). Moreover, in the 1990s, it adopted the "Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State;" "Permanent Court of Arbitration Optional Rules for Arbitration involving International Organizations and States;" and "Permanent Court of Arbitration Optional Rules for Arbitration involving International Organizations and Private Parties." PERMANENT COURT OF ARBITRATION, BASIC DOCUMENTS: CONVENTIONS, RULES, MODEL CLAUSES AND GUIDELINES, The Hague, PCA (1998) at 69-152.

167. Yet, sometimes they might be misleadingly called "preliminary opinions." For instance, the Central American Court of Justice can render "... toda consulta prejudicial requerida por todo Juez o Tribunal Judicial que

the European Communities,¹⁶⁸ the Benelux Economic Union,¹⁶⁹ the Andean Community,¹⁷⁰ the Central American Integration System,¹⁷¹ and the Common Market for Eastern and Southern Africa.¹⁷² Moreover, in certain instances, such resort may eventually become a legal duty when the national court is one of last instance.¹⁷³

The interpretation of the legal regime's norms given by the regime's judicial body, by way of preliminary ruling, is typically binding upon the requesting national court.¹⁷⁴ Admittedly, the fact that an international jurisdiction can interpret authoritatively the law before the national jurisdiction can decide a case, and therefore have a decisive influence on the outcome of the judicial process, gives away the supranational drift of certain REIA judicial bodies. Yet, it still falls short of transforming them into the apex of a strictly integrated judicial system. Only in the case of the OHADA Common Court of Justice and Arbitration does the regime's judicial organ become a sort of "cour de cassation."¹⁷⁵

estuviere conociendo de un caso pendiente de fallo . . ." [. . . any preliminary opinion requested by any judge or tribunal, before whom a case is pending . . .]. Translation of the author. CACJ Statute, *supra* note 107, art. 22.k.

168. Under Article 234 of the EC Treaty, national courts can ask the ECJ for preliminary rulings concerning the EC Treaty, the validity and interpretation of acts of the institutions of the Community and the European Central Bank, and the interpretation of statutes of the bodies established by an act of the Council.

169. BENELUX EU Treaty art. 6.3, *supra* note 40.

170. See TJAC Treaty art. 29, *supra* note 38.

171. See CACJ Statute art. 22.k, *supra* note 107.

172. See COMESA Treaty art. 30, *supra* note 41.

173. See EC Treaty, *supra* note 35, at 234 (former art. 177). See also BENELUX EU Treaty art. 6.3; TJAC Treaty, *supra* note 38, art. 29; COMESA Treaty art. 30.2.

174. The major exception to this principle is the case of the EFTA Court. Indeed, while the EFTA Court can receive questions concerning the interpretation of the EEA Agreement from the domestic courts of the member states, national courts at any level of jurisdiction have no obligation to make such a request, nor are they bound by the interpretation. See ESA Court Agreement, *supra* note 39, art. 34. This likens the EFTA Court's "interpretative jurisdiction" to that of an advisory jurisdiction rather than to that of a full preliminary jurisdiction.

175. See OHADA Treaty, *supra* note 42, arts. 13-20; OHADA Rules, *supra* note 42, arts. 51-52. Nonetheless, referring to the OHADA Court as a "cour de cassation" is not wholly accurate. Admittedly, much like a "cour de cassation," under Article 18 of the OHADA Treaty, the OHADA Court is con-

Preliminary rulings gradually have been transformed from mere instruments that guarantee the uniform interpretation of regimes' laws by national jurisdictions to powerful instruments for the control of the legality of national legislation. Indeed, national courts ordinarily resort to this instrument to request the opinion of the regime's judicial organ regarding whether a certain regime's norms give rise to rights which nationals are entitled to invoke before national agencies and jurisdictions (i.e., whether it is directly applicable), or whether a given national law is in conflict with the regime's normative structure. Hence, preliminary rulings give national courts the possibility to transform themselves into custodians of the international, or rather supranational, regime.

Moreover, by asking the regime's judicial body to rule on the direct applicability of the regime's legislation, national courts de facto bypass national parliaments, which ordinarily are entrusted with the mission of incorporating international law into the domestic legal system. Yet, the ultimate custodians of REIA law are individuals. Preliminary rulings originate from the initiative of individuals who decide to claim the direct applicability of a regime's law or the incompatibility of national legislation with it before national courts. This is a further explanation for why direct inter-state litigation has become an exceptionally rare event, and why fora which grant non-state entities standing are constantly expanding in number and scope.

V. CONCLUSION

This survey of the current state of the development of the international judicial sector is by no means exhaustive. Its intent is to provoke international legal scholars to study this ex-

ferred the power to quash national courts' decisions in cases involving the application of uniform laws and regulations adopted by the organization. See OHADA Treaty, *supra* note 42, art. 18; OHADA Rules, *supra* note 42, art. 52.4. However, the Court can be seized of the matter, at the request of the national judge or of either of the parties, even when the case is simply pending before a national jurisdiction of last instance, well before it can reach a verdict. See OHADA Treaty, *supra* note 42, arts. 14-5. Referral of the case to the OHADA Court has the effect of depriving the national court of its jurisdiction. See *id.* art. 16.2; see also OHADA Rules, *supra* note 42, art. 51.1. The Court's decisions are binding and immediately enforceable within the organization's member states. See OHADA Treaty, *supra* note 42, art. 20.

tremely dynamic and fertile field with an holistic approach by sampling a few out of the many questions which even a cursory glance can reveal. Moreover, it is intended to suggest that "international judicial law and organization" can and should be studied as a discipline in its own merit, and it need not be subsumed under the general category of "Peaceful Settlement of International Disputes."

Classifying the international judiciary with consultation, mediation, conciliation, and ad hoc arbitration is no longer correct and has become potentially misleading. International judicial bodies are no longer one of the many arrows in the quiver of Foreign Affairs Ministries to resolve legal disputes with their peers. Indeed, since its institutionalization at the beginning of the twentieth century, the single most consequential change affecting the international judicial process probably has been its transformation from just another instrument hatched by sovereign states to provide themselves, and only themselves, with a viable alternative to raw force and diplomatic dialectics, into a tool accessible by all international actors, whether sovereign states or not, to achieve justice and build the international rule of law. At the eve of the twenty-first century, non-state actors, to varying degrees and qualifications, now have access to the overwhelming majority of judicial fora. In any forum in which they have standing, they represent the source of almost the totality of the docket.

At the time when international justice was still largely a "states-only" concern, international judicial bodies rightly could be conceived of as instruments to settle disputes, and hence alternatives to the use of force. This was the rationale behind their creation, and this is what they did. Yet, maintaining such a perception in an age in which non-state entities play such a fundamental role in the international judicial process has become largely anachronistic. Of course, international justice cannot be regarded by non-state entities as an alternative to the use of force because, since the inception of the modern age, violence is a state monopoly.

Nevertheless, even if the scope of reasoning is focused only on states and on disputes between them, the term "Peaceful Settlement of International Disputes" is still inadequate. Indeed, its logical counterpart, "Non-Peaceful Settlement of International Disputes," is no more of a legitimate alternative since the threat or the actual use of force in international rela-

tions has been banned.¹⁷⁶ What is left, therefore, after the logical elimination of "Peaceful" is simply "Settlement of International Disputes."

Yet, even such a mutilated designation is somewhat *dépassée*, for it implies that the main role of international judicial bodies is to settle disputes between the parties. Admittedly, in the overwhelming majority of instances, what they actually do is settle legal disputes on a point of law or fact between two or more parties. Even international criminal jurisdictions can be construed as instruments to settle disputes between the prosecutor and the indictee on a series of facts and interpretation of those facts in light of the law. However, international jurisdictions not only settle disputes but also apply international law. They transform abstract norms into cogent and binding reality, and by doing so they are promoting justice. Framed in this manner, international jurisdictions become essential tools for the building of the international legal system and the furtherance of the international rule of law. That is a mission that admittedly escapes the narrow ambit of a dispute.

International dispute settlement is a quintessential bilateral issue,¹⁷⁷ for judgments rendered by international judicial bodies are binding only upon the states that are parties to the

176. Of course, this does not prejudice the right to self-defense, sanctified in Article 51 of the U.N. Charter, which remains a cornerstone of the international legal order.

177. There are very few instances of international litigation between three parties. Among them one could recall the North Sea Continental Shelf Case (North Sea Continental Shelf Case) F.R.G. v. Den.; F.R.G. v. Neth., 1969 I.C.J. 3 (Feb. 20, 1969); Gulf of Fonseca Case (Case Concerning the Land, Island and Maritime Frontier Dispute) El Salvador v. Honduras: Nicaragua intervening, 1992 I.C.J. Reports 351 (Sept. 11, 1992). In the first case, the ICJ decided to join two cases that were filed separately. In the second, a dispute originally between two states (El Salvador and Honduras) escalated to a three-states dispute when Nicaragua was allowed to intervene. Yet, the only instance of international dispute settled by a judicial body among more than three states at the same time is the Wimbledon Case. See Case of the S.S. Wimbledon, U.K., Fr., Italy, Japan v. F.R.G.: Poland, intervening, 1 P.C.I.J. (ser. A) at 11-47. However, closer scrutiny of the case reveals that there were actually but three parties to the dispute, if not simply two: on the one hand, the applicants (UK, France, Italy, and Japan) which strictly maintained the same legal positions and acted as one; the intervenor (Poland), which in practice did not claim before the Court anything different from the applicants, and on the other the respondent (Germany).

dispute.¹⁷⁸ However, when international judicial bodies accessible by non-state entities are brought into the picture, this statement does not hold. In international judicial bodies, precedents do matter, albeit not in the technical sense as understood under the Anglo-American legal system. Even in the case of the International Court of Justice, which is mandated by its own statute to relegate judicial decisions to a subsidiary role,¹⁷⁹ precedents are often referred to, and the Court strives to maintain its own internal coherence.¹⁸⁰ International judges are well aware of the fact that in rendering judgments they are *de facto*, if not *de jure*, contributing to the development of an overarching international legal order. By so doing international judges affect a community that is actually much larger than the parties to the action.

For all of these reasons, given the current state of the development of the international judiciary, one cannot look at the synoptic chart attached to this article and infer that the dozens of international judicial and quasi-judicial bodies constitute an elaborated and institutionalized alternative to direct negotiations between the parties, or even to outright violence. Rather, the chart depicts the beginning of a process towards the construction of a coherent international order based on justice, an order where all participants (sovereign states, individuals, multinational corporations, etc.) can be held accountable for their actions or seek redress through an impartial, independent, objective, and law-based judicial institution.

178. See *supra* note 25.

179. See I.C.J. Statute, *supra* note 31, arts. 38.1.d, 59.

180. On this point see ROSENNE, *supra* note 108, at 1606-15.