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International Courts and Tribunals

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One of the most visible changes brought about by the end of the Cold War to the structure, institutions, and discourse of international law and relations is the remarkable multiplication of international courts and tribunals and their increasing specialization and diversification.[1] This chapter aims to verify the extent to which the evolution of the array of international courts since the end of the Cold War has followed the two major lines of development suggested in this volume's introduction (the adaptation of existing institutions and the creation of new ones), and how far it has matched the three phases identified by the editors as characterizing international relations (the end of the Cold War to 9/11, the phase between 9/11 and the invasion of Iraq, and the period from the fall of Saddam Hussein to the present day, at the time of this writing).

It is necessary to make some initial general observations and then delimit the scope of the analysis. The first general remark is that it is apparent that the development of international courts and tribunals has been largely haphazard and unplanned – perhaps inevitably so. Every court was born out of highly contingent situations, sometimes trying to replicate the success of previous experiments, and at other times, in reaction to past failures or the need to provide alternatives. Key players also have different attitudes and behaviors, changing from court to court and over time. It is all highly contextual. It is also apparent that the only significant catalytic event in the

[1] For some explanations of why international courts have proliferated, see, in general: the issue of *International Organizations* devoted to "Legalization and World Politics" (Vol. 54, No. 3, summer, 2000); José E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences," *Texas International Law Journal* 38 (2003); and Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle." For a comprehensive listing of international adjudicative bodies, see Cesare P. R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle," *NYU Journal of International Law and Politics* 31 (1999), pp. 709, 715–9. An updated version, 3d edition, is reprinted in Jose Alvarez, *International Organizations as Law-makers* (2005), pp. 404–7. Available at http://www.pict-pcti.org/publications/synoptic_chart/Synoptic%20Espanol.pdf.

modern history of international adjudication is the end of the Cold War, and there is little sign – perhaps besides the case of the criminal courts – that the 9/11 events and the war on Iraq have had any impact. Only some very broad general trends can be discerned. There is really no single factor driving development or reform common to all international courts.

Second, between international adjudication, on the one hand, and peace and security, on the other, there is not a straightforward causal relationship, not even in the case of international criminal courts. Although advocates of international courts and tribunals rightly claim that no lasting peace can exist unless justice has been done, at least for the most egregious war crimes and crimes against humanity, it is equally a well-known fact that justice cannot be properly administered while guns are roaring. International courts can help defuse a diplomatic crisis, stabilize countries, or prevent further deterioration of a situation, but they need a high degree of security, stability, and peace to operate credibly, particularly because they lack enforcement powers of their own and are highly dependent on the cooperation of all involved states.

To illustrate the complexity of the relationship between peace and justice, one can note that although the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 and started operating in earnest in 1994, it did not prevent, by its mere existence, the massacres in Srebrenica, Goradze, and other Bosnian towns in 1995. It was only after the Dayton agreement and the ensuing peace in Bosnia-Herzegovina that the ICTY had access to the crime scenes, could carry out investigations, and obtain arrest of some (but not all) of those most responsible. On the other hand, had the ICTY not indicted Slobodan Milosevic he would probably still be in power in Belgrade, making any long-term stabilization of the region doubtful. Again, some argue that the issuing of arrest warrants for crimes against humanity and war crimes by the ICC Prosecutor against five senior commanders of the Lord's Resistance Army rebel movement in Uganda undermined attempts to reach a negotiated settlement of the civil war.[2] At the same time, there is little doubt that the ICC's indictments were a significant factor in creating pressure on the Lord's Resistance Army to cease its campaign of mayhem and terror in northern Uganda.[3]

Subject to this qualification, the scope of this analysis is limited to those courts that might have an impact on peace and security issues. International criminal courts are obviously central to this analysis, but there is more. The International Court of

[2] See, in this book, Malone, at Chapter 4. See also, William W. Burke-White, "Double-Edged Tribunals: Domestic Politics and the Relationships among National and International Courts," in *International Institutional Reform: Proceedings of the Seventh Hague Joint Conference Held in The Hague, the Netherlands, June 30–July 2, 2005*, (The Hague: T.M.C. Asser Press, 2006), pp. 203–12.

[3] See Nick Grono, "What Comes First, Peace or Justice? Uganda's Dilemma," *International Herald Tribune* (27 October 2006).

Justice (ICJ), although a court of general jurisdiction, has time and again decided disputes arising out of situations threatening international peace and security, and the legality of the use of force.[4] Being the principal judicial organ of the United Nations (UN), the universal organization devoted to maintenance of international peace and security, it cannot be ignored.

Human rights courts, too, can play an important role. True, the relationship between these courts and issues of peace and security is only indirect. Human rights courts rarely face situations of widespread chaos and violence, and when they do, they are largely toothless. But international human rights courts facilitate maintenance of peace and security because governments that grossly abuse human rights often either become belligerent toward their neighbors or face domestic insurrections and civil wars. They might help prevent governments from following this path to chaos and strife. In other words, if international criminal courts are the fire brigade, human rights courts are the fire alarm and sprinkler system.

Other courts, like the European Court of Justice, or the dispute settlement system of the World Trade Organization, will not be treated, as their connection with peace and security issues is very indirect – unless, of course, one takes a very broad approach to the concept, arguing that without an "international rule of law" administered by an impartial third-party adjudicator, international peace and security cannot be guaranteed.

Finally, this chapter considers also the influence that key players, such as the UN, the United States, and Europe, as well as other major powers, have in the development of international courts and how they relate to them. However, when we speak of "European" attitudes, policies, and behaviors, the adjective is used as shorthand for the European Community/European Union (EC/EU). At other times, it is used in the large geographical sense to indicate countries that are not or were not yet, at the time we refer to, members of the EC/EU but are on the European continent. (Russia is, however, treated separately.) The reader should also remember that the composition of the EC/EU has changed over time, and as with the UN, there can be a difference between attitudes and behaviors of EC/EU institutions and those of its member states. Indeed, the UN plays a role of its own in – and has its own attitudes toward – international courts and tribunals that is somehow different from the mere sum of the positions of its most influential members.

[4] For example, Corfu Channel (United Kingdom v. Albania); Temple of Preah Vihear (Cambodia v. Thailand); United States Diplomatic and Consular Staff in Teheran (United States v. Iran); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States); Border and Transborder Armed Actions (Nicaragua v. Costa Rica and Nicaragua v. Honduras); Aerial Incident of July 3, 1988 (Islamic Republic of Iran v. United States); Territorial Dispute (Libyan Arab Jamahiriya/Chad); Oil Platforms (Islamic Republic of Iran v. United States); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria); Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda, Rwanda and Burundi).

EVOLUTION, ADAPTATION, ATTITUDES, AND BEHAVIORS

The International Court of Justice

The end of the Cold War and subsequent world events have had only marginal impact on courts that settle legal disputes among sovereign states, the oldest genus of all international courts, whose roots can be traced back to the practice of international arbitration. International courts to hear disputes among sovereign states were born (or at least conceived) during, or even before, the Cold War. The ICJ was created in 1945, and it was largely the continuation of the Permanent Court of International Justice, (PCIJ) established in 1921. No new court to decide classical disputes among sovereign states at the global level was established at the end of the Cold War, and there are no signs that any has been considered since.[5] If institutional innovation has taken place in this particular genus of international relations, it has only been marginal. After all, a two-century-long practice has crystallized structures and categories in this field.

What has changed with the end of the Cold War, however, is the frequency of the resort to the ICJ or international arbitration. The number of cases litigated in these fora during the forty-one years of the Cold War is a fraction of those litigated in the eighteen years since its end. Fifty of the 109 cases submitted to the ICJ in its entire history have been started since 1990. Also, the Permanent Court of Arbitration, the oldest of existing international dispute settlement bodies, having been founded in 1899, underwent a true renaissance since the end of the Cold War.[6] It was largely abandoned after World War II, its facilities and services unused for decades, but has gotten back in business since the early 1990s, with several cases now on its docket, and its services in demand.[7]

[5] The only exception being, at the regional level, the OSCE Court for Conciliation and Arbitration, which was created in 1995. Yet, it was hatched toward the end of the Cold War and in its history and structure reflects quintessential Cold War concerns. It has never been used. For a detailed analysis of the history of the creation of the OSCE Court, see Patricia Schneider and Tim J. Aristide Müller-Wolf, "The Court of Conciliation and Arbitration within the OSCE: Working Methods, Procedures and Composition," Center for OSCE Research, University of Hamburg, Working Paper 16 (2007), pp. 5–18, available at: http://www.core-hamburg.de/documents/CORE_Working_Paper_16.pdf.

[6] It was established by the 1899 Hague Convention on the Pacific Settlement of International Disputes, subsequently revised in 1907. For the text of the Convention of July 29, 1899, see C. I. Bevans, ed., *Treaties and Other International Agreements of the United States of America 1776–1949* (1968), Vol. I, pp. 230–46. For the text of the Convention of October 18, 1907, see id. at pp. 577–606.

[7] The point has been well made that the name "Permanent Court of Arbitration" is not a wholly accurate description of the machinery set up by the Hague conventions. Indeed the PCA is neither a "court" nor "permanent." It is rather an institutional framework open to parties to a dispute to avail themselves of at their choice. It provides them with all legal, administrative, and secretarial services necessary to have an effective settlement of the dispute, including providing an updated list of leading scholars and practitioners to be appointed as arbitrators or conciliators; acting as a channel of communication between the parties, holding and disbursing deposits for costs; ensuring safe custody of documents;

Moreover a larger and more diversified group of states use these courts than in the past. During the Cold War they were mostly used to litigate disputes either among Western countries or between the West and developing countries; since the end of the Cold War developing countries have also increasingly resorted to them to litigate disputes among themselves.[8]

The UN is, of course, central to the fortunes of the ICJ, because the "World Court," as it is dubbed, is the principal judicial organ of the UN.[9] Although the UN itself cannot bring disputes before the World Court, time and again it has used the advisory jurisdiction of the court to "litigate disputes" with certain UN members or attempted to use it to change the dynamics of issues that had reached a dead end within political organs of the organization (like occupation of South-West Africa,[10] or Palestine,[11] or nuclear weapons[12]). However, the UN is arguably the reason why the ICJ has been highly resistant to change, to the point of having its relevance to international relations questioned. The Statute of the ICJ is part of the UN Charter, and the UN Charter has proven to be all but nonreformable.[13]

Since World War II, the attitude and practice of the United States toward the ICJ have been far from consistent. Specifically, one can identify four distinct phases.[14] The first one, from its inception to 1959, was characterized by high hopes. The United States championed carrying the prewar PCIJ over to the new UN, in the form of the ICJ. This period was marked by several efforts by the United States to invoke the jurisdiction of the Court, without success, against countries of the Communist bloc while, at the same time, it managed to avoid the Court's jurisdiction. As a result, the second phase, between 1960 and 1979, was a lengthy period where the United States viewed the Court as a failure or, at least, as inconsequential. The third phase, between 1980 and 1987, was the period of the return to the Court. During those years, the United States accepted the Court's jurisdiction to handle

arranging for efficient secretarial, language, and communications services; and providing a courtroom and office space.

8 See, in general, C, Romano, "International Justice and Developing Countries (cont.): A Qualitative Analysis," *Law and Practice of International Courts and Tribunals* 1 (2002), pp. 539–611; idem, "International Justice and Developing Countries: A Quantitative Analysis," *Law and Practice of International Courts and Tribunals* 1, (2002), pp. 367–99.

9 UN Charter, art. 92.

10 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 *I.C.J.* 16.

11 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 *I.C.J.* 136.

12 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 *I.C.J.* 226 (July 8).

13 For some of the literature on UN and ICJ reform, see ABILA Committee on Intergovernmental Settlement, "Reforming the United Nations: What about the International Court of Justice?", in ABILA Committee on Intergovernmental Settlement of Disputes, Report, *Chinese Journal of International Law* 5 (2006), pp. 39–65, note 4.

14 Murphy, S., "The U.S. and the International Court of Justice: Coping with Antinomies," in C. Romano, ed., *The Sword and the Scales: The US and International Courts and Tribunals* (Cambridge University Press, 2009).

both a territorial dispute[15] and a major political crisis,[16] only to be followed by bitter rejection of the Court after losing a politically charged Cold War case (the so-called *Nicaragua* case).[17] Finally, since the dawn of the post–Cold War era (about 1988) to present, the attitude has consistently been merely defensive. The United States has declined bringing any cases, while aggressively defending against cases brought by others. During this phase, it has resisted the Court without breaking from it and has turned to other fora, particularly for what concerns issues of trade and economics.

The attitude of the Europeans toward the ICJ has probably been equally ambiguous. This might sound surprising given that Europeans have the reputation of being enthusiastic supporters of the idea of an international rule of law administered through international courts. However, this reputation seems to be due more to the success of regional courts, like the European Court of Justice and the European Court of Human Rights, in replacing power politics with a rule-based system, rather than any commitment to the ICJ. There is definitely a need for a better understanding of European policies (or lack thereof) in this field.

Subject to the caveat at the beginning of this chapter about the use of the adjective "European," it can be safely said that European states in general have not been particularly supportive of the ICJ, surely no more than other states or regions. If support is measured not by number of judges on the bench and funding (which, in any event, are not elective but both depend on the UN structure), and not by words and rhetoric, but by actual behaviors, the European record is mixed. Like the United States, Western European states have long kept the ICJ at arm's length, trying to avoid appearing before it, both as plaintiffs and as defendants, if possible. The number of cases initiated, or submitted with the agreement of the other party, by West Europeans is relatively small,[18] and in some of these they did so as part of "the West" and not individually.[19] The United States has been involved in twenty-one cases before the ICJ (nine as applicant, eleven as respondent, and one consensually), more than the UK (seven, five, and one),[20] France (six, six, and two),[21] Germany

[15] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), 1984 *I.C.J.* 246 (Oct. 12).

[16] United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 *I.C.J.* 3 (May 24); 1979 *I.C.J.* 7 (Dec. 15) (provisional measures).

[17] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1991 *I.C.J.* 47 (Sept. 26) (removal); 1986 *I.C.J.* 14 (June 27); 1984 *I.C.J.* 392 (Nov. 26) (jurisdiction).

[18] Out of 109 cases submitted to date to the ICJ, the number of cases started by, or litigated by agreement including, a European State (i.e., the fifteen Western EC members, before the last two recent enlargements), is 24.

[19] For instance, in the case of the dispute arising out of the bombing of Pan Am flight 103 over Lockerbie, Libya filed cases both against the UK and the United States. In the case of the NATO bombing campaign over Kosovo in 1991, Yugoslavia filed cases against the United States, the UK, Spain, Portugal, Netherlands, Italy, Germany, France, Canada, and Belgium.

[20] The last time the UK submitted a case to the ICJ was in 1972, against Iceland.

[21] The last time France submitted a case to the ICJ was in 1959, against Norway.

(four, two, and zero),[22] and Italy (one, two, and zero).[23] These figures do not suggest a particular European predilection for the ICJ. Moreover, although everyone seems to remember how the United States refused to participate in the proceedings in the *Nicaragua* case, and withdrew its acceptance of jurisdiction, few seem to remember that France and Iceland had essentially done the same a few years before.[24] Currently, of the twenty-seven members of the EC/EU only eighteen have declared acceptance of the jurisdiction of the ICJ,[25] and often with extensive reservations.[26] Even more remarkably, three out of the "big four" members of the Union – Germany, Italy, and France – have no "optional declaration" standing.

It is a fact that since the *Nicaragua* case at least,[27] and surely since the end of the Cold War, the ICJ has increasingly become a favorite for developing countries. In particular, it is becoming a forum of choice for medium and small developing countries, whereas large powers (e.g., China, India, Brazil, Nigeria, Mexico, and also Russia) have either been absent or have had mixed records. This phenomenon can be explained both by the indifference of developed countries, which, as we just explained, appear seldom and grudgingly, and by a certain tendency (conscious or unconscious) of the ICJ to pander to the majority of the UN General Assembly (made up of developing countries) when interpreting international law.

In recent years, the ICJ has decided a few cases that touch on post–9/11 anxieties and sensitivities. One is the question of the legality of the wall in Palestine, which is the cause célèbre in Islamic countries[28]; another is the question of the use of force to respond to low-intensity, hit-and-run attacks or asymmetric warfare[29]; and yet another is the question of sovereign immunity from jurisdiction for international crimes.[30] In all of these, the ICJ's answers have been criticized in the United States, but surely also perplexed many in Europe.

Human Rights Courts

The second genus of international courts to emerge historically is the one of human rights courts. As in the case of courts that can only hear disputes between sovereign

[22] The last time Germany submitted a case to the ICJ was in 1999, against the United States.

[23] The last time Italy submitted a case to the ICJ was in 1953, against France, the UK, and the United States.

[24] Fisheries Jurisdiction (United Kingdom v. Iceland), 1973 *I.C.J.* 3 (jurisdiction); Fisheries Jurisdiction (United Kingdom v. Iceland), 1974 *I.C.J.* 3 (Merits); Nuclear Tests (Australia v. France), 1974 *I.C.J.* 253; Nuclear Tests (New Zealand v. France), 1974 *I.C.J.* 457.

[25] Austria (declaration filed in 1971); Belgium (1958), Bulgaria (1992), Cyprus (2002), Denmark (1956), Estonia (1991), Finland (1958), Greece (1994), Hungary (1992), Luxemburg (1930), Malta (1966 and 1983), Netherlands (1956), Poland (1996), Portugal (1955), Slovakia (2004), Spain (1990), Sweden (1957), and the UK (1969).

[26] For example, the UK.

[27] See note 17 earlier.

[28] See note 11 earlier.

[29] Oil Platforms (Islamic Republic of Iran v. United States), 2003 *I.C.J.* 161 (Nov. 6), 1996 *I.C.J.* 803 (Dec. 12) (prel. obj.).

[30] For example, Certain Criminal Proceedings in France (Democratic Republic of Congo/France).

states, the courts belonging to this group are only a few. All had been created before the end of the Cold War, and their basic structure has changed a little. There are three of them: the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), and the African Court of Human and Peoples' Rights (ACHPR), belonging, respectively, to the Council of Europe, the Organization of American States, and the Organization of African Unity (now African Union [AU]). The ECHR emerged in the late 1950s; the IACHR, in the 1970s; and the ACHPR, at the start of the current decade.

The main exception to the relative stasis that characterizes this group is the European system, which was substantially transformed in the early 1990s, as a result of the end of the Cold War and the need to accommodate former Soviet Republics and their satellites in the Council of Europe. With the entry into force of Protocol 11 to the European Convention, in 1998, the filter of the Commission has been abolished, and the Court now faces a staggering number of more than 700 million potential plaintiffs in forty-six countries.[31] The practical challenges facing a court with such a wide jurisdiction have prompted, in recent years, discussion about the need for further reform to avoid gridlock, sometimes invoking the need to reestablish some sort of filter between individuals and the court, but so far no radical solution has been implemented.[32]

The ECHR has long been regarded as the archetype of the human rights court, and a success; and Europe has fundamentally contributed, by both example and knowledge sharing, to the establishment of the other two regional systems. Over the years, the ECHR gained legitimacy and acceptance by European governments and domestic courts.[33] It entrenched the transition of countries like Spain, Portugal, and Greece from dictatorships to full-fledged democracies. It helped prevent Turkey from slipping down a dangerous authoritarian slope during the fight against the Kurds and the Islamists and over the question of Cyprus. As its footing became increasingly secure, it waded into contentious territory at the limit of the textual interpretation of the European Convention – like human rights in the private sphere – and away from traditional hard-core human rights issues – like forced disappearances, extrajudicial killings, and torture – which remain a significant part of the docket of the other human rights courts.

Nowadays, its jurisdiction extends to Eastern Europe, including the whole of the Russian Federation, and as far as Turkey's borders with Iran and Iraq. Hard-core

[31] Protocol No. 11 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. 155.

[32] See, generally, Alastair Mowbray, "Proposals for Reform of the European Court of Human Rights," in *Public Law* 2 (2002), pp. 252–64; András B. Baka, "The Problems of the European Court of Human Rights and its Reform," in *L'état actuel des droits de l'homme dans le monde: défis et perspectives* (Paris: Pedone, 2006). Some reforms were implemented in the (yet to enter into force) Protocol 14 to the European Convention of Human Rights. See, generally, Paul Lemmens, Wouter Vandenhole, eds., *Protocol no. 14 and the Reform of the European Court of Human Rights* (Antwerpen: Intersentia, 2005).

[33] See, generally, Michael Goldhaber, *A People's History of The European Court of Human Rights* (New Brunswick, NJ: Rutgers University Press, 2007).

human rights issues are coming back to the ECHR docket. In a world agitated by the moral dilemmas imposed by the U.S.-declared war on terrorism, and the invasion of Afghanistan and Iraq, one can wonder whether the ECHR can, wants, and would play a role in the maintenance of peace and security in a significant part of the globe. If it manages, if not to stop, to at least make Russia think harder before resorting again to ham-fisted tactics like those it used in Chechnya, that would be a significant achievement.[34] It remains to be seen whether and to what extent the ECHR will scrutinize the antiterrorism measures taken by European states (governments and legislatures) and the assistance they have given the United States in the war on terror.

In the Americas, there has been no change comparable to the one that took place in Europe in the aftermath of the Cold War. Looking hard for signs of change, one might notice that in recent years the Inter-American Court has put greater emphasis on following up its judgments and ensuring compliance with them by dedicating a significant part of its scarce resources to this task.[35] This is probably because with the waning of dictatorships in much of the continent (which had been justified by one bloc or the other during the Cold War), it has felt it could tackle with more confidence the issue of compliance with its own decisions. Like the ECHR in the 1980s, it is also slowly moving away from hard-core human rights issues. Until the mid-1990s most of its docket was made of cases arising out of the "dirty wars" (such as Guatemala, Nicaragua, El Salvador, and Colombia), as the conflicts fueled by the Cold War in Latin America were known, and the heritage of dictatorships (such as Argentina, Chile, and Peru). Since then, it has gradually moved into the terrain of economic, social, and cultural rights.

[34] Several cases brought by Chechen civilians against Russia have been decided by the ECHR in the past few years. See, for example, Khashiyev and Akayeva v. Russia, App. Nos. 57942/00 and 57945/00; Gasan v. Russia, App. No. 43402/02; Kolstov v. Russia, App. No. 41304/02; Petrushko v. Russia, App No. 36494/02; Isayeva v. Russia, App. No. 57950/00; Isayeva, Yusupova and Bazayeva v. Russia App Nos. 57947/00; 57948/00, 57949/00 (all Feb. 24, 2005); Timishev v. Russia App Nos. 55762/00 and 55974/00 (Dec. 13, 2005); Bazorkina v. Russia App No. 69481/01 (July 27, 2006); Estamirov and Others v. Russia, App No. 60272/00 (Oct. 12, 2006). Tarik Abdel-Monem, "Chechens Win First Claims in the European Court of Human Rights in Khashiyev & Akayeva v. Russia," *Cornell International Law Journal* 39 (2006) p. 171; Erika Niedowski, "Russians Find Justice Scarce," *The Baltimore Sun*, August 27, 2006, p. 21A. There are hundreds of cases involving human rights abuses in Chechnya currently pending before the ECHR. Joshua Pantesco, "Europe Rights Court Holds Russia liable for Death of Chechen," *Jurist Legal News & Research* (July 27, 2006), http://jurist.law.pitt.edu/paperchase/2006/07/europe-rights-court-holds-russia.php (last visited Oct. 27, 2006); "Russia Censured over Chechen Man," *BBC News* (July 27, 2006), http://news.bbc.co.uk/2/hi/europe/5219254.stm (last visited Oct. 27, 2006); "Russia Condemned for Disappearance of Chechen," *Human Rights Watch* (July 27, 2006), (last visited Oct. 27, 2006).

[35] The first decision on compliance with judgments of the IACHR was in 2001. I/A Court H.R., Case of Castillo-Páez v. Peru; Loayza-Tamayo, Castillo-Petruzzi, et al., Ivcher-Bronstein and the Constitutional Court. Monitoring Compliance with Judgment. Order of the Court of June 1, 2001. On the issue, see, generally, Morse Tan, "Member State Compliance with the Judgments of the Inter-American Court of Human Rights," *International Journal of Legal Information* 33 (2005) pp. 319–44; Mónica Pinto, "NGOs and the Inter-American Court of Human Rights," in Tullio Treves (ed.), *Civil Society, International Courts and Compliance Bodies* (The Hague: T.M.C. Asser Press, 2005), pp. 47–56.

It should be remarked that, between 2002 and 2006, the Inter-American Commission on Human Rights has questioned repeatedly the treatment of the detainees of the war on terror at Guantanamo Bay by the United States. Although the United States is not a state party to the American Convention on Human Rights, the Commission exercises jurisdiction over the United States on the basis of its mandate under the OAS Charter, to which the United States is a party. In such cases, the Commission applies the standards set forth in the American Declaration of the Rights and Duties of Man.[36] The Commission issued provisional measures urging the United States to close the Guantanamo Bay facility without delay; to remove the detainees in full accordance with international human rights law and international humanitarian law; to investigate, prosecute, and punish any instances of torture or other cruel, inhuman, or degrading treatment or punishment that may have occurred; and to take the necessary measures to ensure detainees a fair and transparent process before a competent, independent, and impartial decision maker.[37] This foray into the legal and moral quagmire of the war on terror did not have, unsurprisingly, much impact on U.S. policies and attitudes. It was probably the high mark of IHCHR criticism, as the United States was already showing signs of reconsidering its general war on terror strategy, but it makes clear that human rights bodies will not be silent witnesses to the war on terror.

Finally, Africa is the third continent to equip itself with a regional human rights agreement guaranteed by a commission and a court. Although the African Commission on Human and Peoples' Rights has now been active for twenty-one years, the Court came into being only in 2004, and it has yet to start operating.[38] The contribution of the African Commission to peace and security in the continent is, admittedly, very small – and, of course, that of the African Court is still only a hypothesis; yet, as we said earlier, peace and stability are often a prerequisite for the rule of law and not the consequence.[39] Considering the number, scale, and intensity of conflicts that have marred the region since at least the 1960s, no international organization, not even the UN itself, can claim a good record in Africa, least of all a Commission that does not have binding powers.

As concerns players in human rights courts, one should note that all human rights courts are regional and are attached to regional international organizations of a general competence (the Council of Europe, Organization of American States, Organization of African Unity/African Union). They have given the opportunity to regional powers to play an important role, both in their establishment and their

[36] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

[37] Inter-American Commission on Human Rights, Resolution No. 1/06 of July 28, 2006.

[38] Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

[39] On compliance with recommendations of the African Commission, see, in general, Frans Viljoen and Lirrete Louw, "State Compliance with the Recommendations of the African Commission on Human and People's Rights – 1994–2004," *American Journal of International Law* 101 (2007), pp. 1–34.

functioning. Thus, the UN has played no role in their creation or functioning. Nor does it assist them. At the universal level, there are no comparable human rights mechanisms, unless one argues that the UN Human Rights Council, which has no binding powers, can be compared to an international tribunal.

The lack of UN participation can be explained by the fact that, for different reasons, neither the United States nor many Asian and Middle Eastern countries favor the idea of being submitted to the jurisdiction of human rights tribunals. The attitude of the United States can be best described as benign disinterest. It has nodded favorably to the Council of Europe for decades and welcomed its expansion eastward. It has supported, financially and politically, both the Inter-American Commission and – albeit less – the Court, while at the same time, it has resisted being subject to their scrutiny. Typically, it has applauded developments, while convinced that it is blessed by the best judiciary in the world, one that does not need second-guessing.

International Criminal Courts

The international criminal courts comprise the last genus to emerge in the kingdom of international adjudicative bodies, but they have broken onto the scene suddenly, massively, and loudly, awing some and rattling others. This is the area marked by the greatest innovation and expansion.

The rise of international criminal courts has been sudden, at least when compared to the glacial pace with which international legal regimes and institutions emerge. Yugoslavia started breaking apart in the summer of 1991. The war in Bosnia started in April 1992, by which time experts were already busy drafting the statute of the International Criminal Tribunal for Yugoslavia (ICTY). UN Security Council Resolution 827 created the ICTY in May 1993, and it started operating (slowly) by the end of the year.[40] When hell broke loose in Rwanda between April and July 1994, a template for a criminal court was already in place, and the Yugoslav model was adopted, *mutatis mutandis*, by Resolution 955, in November 1994, creating the International Criminal Tribunal for Rwanda.[41] As soon as the two ad hoc tribunals had been established, the idea of a permanent international criminal court was resurrected and immediately gained traction among governments and at the UN. The Statute of the ICC was adopted in Rome in July 1998, and by 2002 it had entered into force.[42]

Yet, as the ICC does not have retroactive jurisdiction,[43] a number of other criminal courts were created to address crises where multiple international crimes had been committed that could not be referred to it: Sierra Leone, East Timor, Kosovo, and Cambodia. The entry into force of the Rome Statute did not exhaust the need for ad hoc prosecution – for procedural and political reasons – leading to

[40] Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/RES/827 (1993).
[41] Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).
[42] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.
[43] Rome Statute, art. 11.

negotiations to establish a tribunal for Lebanon,[44] and one for Burundi.[45] And, finally, the completion strategy that will force the shutting down of the ICTY and ICTR by 2010 at the earliest has also spurred the imposition of international oversight on domestic courts that are, or will be, taking over from where the ICTY and ICTR have left off.[46]

In sum, in the span of about fifteen years a dozen new international institutions, commanding considerable resources and attention, have been created. Given broad powers, and relying on their necessary independence, these institutions have swiftly proceeded to rewrite or add entire chapters to the book of international law. For instance, the doctrine of sovereign immunity, which had barely changed for centuries, has been radically altered – and for good. The notions of war crimes and crimes against humanity have greatly expanded and morphed. Heads of state and prime ministers have been put under pressure by international investigations, then forced to step down and finally arrested and put to trial (including Slobodan Milosevic, president of Yugoslavia; Charles Taylor, president of Liberia; Jean Kambanda, prime minister of Rwanda; and Ramush Haradinaj, prime minister of Kosovo). This is not the first time in history that top-level politicians have been removed, but it is the first time that they have lost power because an international tribunal has indicted them for crimes they committed to seize and hold on to power.

There are few precedents for similarly broad grants of powers to international institutions in such a short period. The idea that justice is necessary to achieve peace is radical and revolutionary, but it is inevitable. The fall of the Berlin Wall has been accompanied – and some might claim caused – by a level of mass access to information having no precedent in human history, in terms of scope and quantity. While for centuries war and peace was a business of a handful of decision makers, and the logic of it was apparent only to them, mass-media society and, even more, the age of the internet have changed forever how states justify going to war and making peace (or, at least, how they sell war and peace to the people). The logic and dictates of justice and accountability have increasingly crept in, and eventually started interfering with, classical balance of power considerations.[47] There is no way back. Cynical dictators used to boast that if one kills a man, one goes to jail, but if one million are killed, one goes to peace talks. Now there is an alternative scenario: having one's trial broadcast all over the planet.

[44] UN Doc S/RES/1644 (December 15, 2005) and UN Doc S/RES/1664 (March 29, 2006) on the situation in the Middle East.

[45] UN Doc S/RES/1606 (June 20, 2005).

[46] In the former Yugoslavia this led to the establishment of the War Crimes Chamber in Bosnia-Herzegovina.

[47] On the role played by civil society in pushing for the establishment of international criminal courts, see Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (New York: Routledge, 2006). See also chapters by M. Colitti, P. De Cesare, F. Trombetta-Panigali, C. Ragni, and M. Politi, in *Civil Society, International Courts and Compliance Bodies*, see note 35 earlier.

The role of the United States in this revolution cannot and should not be understated. It has provided the media that brought about this revolution, from CNN to the internet. It is a country built on the very idea of justice for all and the rule of law, and it regards its own legal system and its judiciary almost as a supernatural gift rather than a perfectible human institution. The attitude of the United States toward international criminal courts has been very well chronicled, and it is far from as clear as its detractors claim it to be.[48] To begin with, there is really no coherent U.S. policy on international criminal courts in general. Although the Clinton administration created the position of the Ambassador at Large for War Crimes Issues within the U.S. State Department, this person is nothing like an "International Criminal Tribunals Czar." There is no single mind, no single master plan, in Washington, D.C., that includes all international criminal courts. This is in part due to the multifaceted nature of international criminal courts, and more generally to the fact that the U.S. perspective is an amalgamation of diverse views reduced in some cases to written form, which might itself be subject to varying interpretations.

At most, a historical survey would reveal certain consistent themes underlying U.S. attitudes toward international criminal courts. First, the United States is traditionally and in principle committed to justice and accountability for all. This dates, at least, back to the Nuremberg and Tokyo Trials, which took place largely at the insistence of the United States and, famously, in spite of the contrary opinion of the UK, not to mention the USSR. Granted, the United States never sought accountability at any cost. Even in cases where the U.S. attitude toward international criminal courts is at its most favorable, these institutions are not viewed as ends in themselves. The U.S. approach is better described as "pragmatic," or "hardheaded" as its critics might say. Each institution is assessed mostly, if not solely, in terms of its ability to advance U.S. interests, which include, but are not limited to, promoting accountability and the rule of law on the international level.[49] Of course, prosecution of American nationals by an international criminal court is not and has never been an option. Those can be taken care of, effectively and impartially – from the U.S. perspective – by the superior U.S. judicial system (military or civilian).

Second, according to the United States, it is best to prosecute crimes – including international crimes – at the national level. Prosecution by any other court (international or even domestic courts of other countries) should be the absolute last resort. To be fair, there is some merit to that. Many wonder whether, and to which degree, the ICTY and ICTR have been successful in making affected populations feel a sense of ownership of the justice that has been done. This objection is one of the favorite arguments of those who oppose the ICC. Considering that the first cases

[48] For a detailed account of U.S. attitude and practice toward international criminal courts, see, in general, J. Cerone, "U.S. Attitudes toward International Criminal Courts and Tribunals," in C. Romano, ed., *The Sword and the Scales*, see note 14 earlier.

[49] For an account of the official U.S. government position, see J. Bellinger, "International Courts and Tribunals and the Rule of Law," in C. Romano, ed., *The Sword and the Scales*, see note 14 earlier.

before the Court (and those likely beyond that) all originated from appalling African conflicts, while the ICC sits thousands of miles away in the The Hague, one has to admit that there is the risk some might see in the whole exercise a repetition of the infamous "white man's burden" approach.

Third, and probably decisively, the United States is strongly interested in maintaining the primacy of the Security Council in matters of peace and security, including accountability for international crimes. It is obvious that this is due to the status of the United States as a permanent and veto-wielding member of the Council. Indeed, there seems to be a direct correlation between the degree of U.S. support for international criminal prosecution and the degree of control it has over the institution that will do it. The ICC is far too independent from the Security Council for U.S. comfort. The ICTY and ICTR have largely benefited from the benevolence of the United States. Being creatures of the Security Council, they are unlikely to do anything against one of its permanent members, as the decision of the ICTY Prosecutor not to investigate the bombing of Yugoslavia by NATO in 1999 suggests.[50] And, finally, the hybrid courts are so fragile and dependent on international support and powerful patrons, and tread such a narrow ground, that the chances of them straying are close to nothing.

Of course, these are only broad trends. Ideological leanings – between institutionalists and realists, Democrats and Republicans, and all possible cross-combinations – determine, case by case, the ultimate U.S. attitude. In general, it is probably correct to say that the United States has been heavily involved in – in favor or against – the creation of each international criminal court for essentially two reasons. In favor, because it stands for accountability for international crimes, and its people demand so. Against, because, being the ultimate superpower, by definition, it has stakes, diplomatic or military, in any conflict around the globe. It is more exposed than any other state because the more situations it is involved in, the greater the chances that some of its personnel might be indicted for crimes.

All international criminal courts existing today have been created within or with the support of the UN (hence, with the support or acquiescence of the United States). There is no international criminal court that has been created, and works solely, with support of a regional organization. This does not necessarily mean that the UN, per se, is enthusiastic about each. The UN is, of course, more than the algebraic sum of its members; it has an agenda and will of its own. Various organs and offices within the UN have different opinions about the desirability, functioning, and ideal design for the numerous courts that have been hatched over time.

To illustrate, in the early days of the ICTY and ICTR, Western countries showed support of the ad hoc tribunals by generously seconding a large number of gratis

[50] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (June 2000), http://www.un.org/icty/pressreal/nato061300.htm.

personnel from their own bureaucracies (including prosecutors, attorneys, officials, and intelligence operators). One might be cynical and say that they wanted to make sure these courts worked and did not get bogged down in the "geographically correct" policies of the UN. Yet, the UN, being a truly universal organization, and one that goes to great lengths and pains to ensure its own personnel are concomitantly diverse, as of 1998 started phasing out gratis personnel and relying on its own procedures and criteria to staff them.

Also, it is well known that the UN Secretariat – especially former Secretary-General Kofi Annan – and member states have been divided by the issue of how to finance criminal courts, particularly hybrid international/domestic courts.[51] The considerable budgets of the ICTY and ICTR ($276 and $250 million, respectively, for the biennium 2006–2007) have attracted a lot of criticism by member states, which have blamed the UN bureaucracy and its way of doing things, for much of those costs. Because of that, when the creation of hybrid criminal courts for Sierra Leone first, and then for Cambodia, was discussed, member states opted for voluntary funding by donors and not underwriting those costs in the UN budget (either for regular or for peacekeeping operations). But this has shifted the onus of raising those funds on the Secretary-General, forcing him to spend considerable time and political capital, and exponentially increasing the unwillingness of the UN bureaucracy to create any such tribunal (at least so funded) in the future.

Let me give one last example of how the UN might have an attitude of its own toward international criminal courts. The UN has entered into negotiations with Cambodia to create an international (hybrid) mechanism to try the few surviving Khmer Rouge leaders very grudgingly and only after it was literally ordered to do so by the Security Council.[52] The UN and its staff are perfectly aware that there is a substantial risk that the trials will turn out to be just a tool for domestic Cambodian score-settling and political intrigue. Because it is a hybrid court, and because the Cambodians have a say greater than any other "host country" of a hybrid court, the UN has no way to effectively control trials and their outcome except in the bluntest, and most awkward, way: by pulling the plug. But, should that happen, it would be the first to be blamed for having made it possible for the remaining Khmer Rouge leaders to die free and safe in their beds and not be held to account for their actions. And, if trials are held and sentences are passed and people actually go to jail, it will be blamed anyway for the high selectivity of the trials (only a handful of people will be indicted) and the delays. It is the scapegoat of an announced public relations disaster.

[51] On financing of international courts in general and the ICTY and ICTR in particular, see C. Romano, "The Price of International Justice," *The Law and Practice of International Courts and Tribunals* 4 (2005), pp. 281–328.

[52] See, generally, C. Etchenson, "The Politics of Genocide Justice in Cambodia," in C. Romano, A. Nollkaemper, and J. Kleffner, eds., *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: OUP, 2004), pp. 181–206; D. Shraga, "The Second Generation UN-Based Tribunals – A Diversity of Mixed Jurisdictions," ibid., pp. 15–38.

Finally, as to the European role in international criminal courts, are Europeans really such "international criminal courts huggers" as everyone, including themselves, seem to believe? They might be, but probably not by their own merit, when compared not only to the attitudes of other major players, the United States foremost, but also to the dismal attitudes of Russia and China.

The ICC was not a European creation – suggesting that would be revisionism. At the outset, it had a constituency much larger than Europe and the countries that benefit from its generous foreign aid. It became a European darling once the United States pulled out when it did not obtain what it wanted during negotiations of the statute in Rome, when China, Russia, and India failed to get on board, and Japan hesitated on the fence. Then, Europe found itself to be the only wealthy parent of this neglected child, with so much political capital invested in its success.

Besides much rhetoric, there is no sign that European states might be more ready than the United States to see some of their service-members, or even politicians, being indicted by the ICC, not even "their" ICC such as this one. When key national interests of major and minor European nations have been threatened by international adjudication – like in the case of France with nuclear tests, Iceland with fisheries, UK with Libya over Lockerbie, to mention some – those states have not hesitated to assume guarded attitudes or even quickly turn their back on those same institutions they claim to support. Likewise, if one reads in the U.S. support of hybrid courts an attempt to undermine the ICC, what does the support by the Europeans mean? The UK and, to a lesser extent, the Netherlands have been promoters and constant supporters of the Special Court for Sierra Leone. France has been a driving force behind the Cambodian Chambers and now the Hariri Tribunal (in which Italy is also very active). The EU has supported, both politically and financially, all hybrid courts.

The truth is that the ICC was never intended to indict and try citizens of developed democracies. (Europeans are aware of that, while the United States for other reasons pretends not to know it.) Those countries have viable judicial systems that can take care of the occasional war criminal. They have rarely (at least since 1945) been visited by genocide. It is no secret that the ICC was thought of and created for those developing countries that are under a double-curse: that of having too frail national institutions and being prone to violence and conflict, and not being important enough for someone else to care enough to step in and take the risk (and losses) to restore order and peace, and try criminals. It turns out most of those are in Africa.

At the end of the day, there is really not much difference between attitudes toward international criminal courts of the United States and Europe. It is only the behavior that changes, with the Europeans playing a far shrewder game than the Americans.

CONCLUSIONS

In sum, the single most influential event in the development of contemporary international courts is, undoubtedly, the end of the Cold War. The end of the

bipolar confrontation between the two antagonistic blocks has led to an increase in the number of cases litigated, and to participation by more diverse groups of states. It has opened the way for the expansion of the European Court of Human Rights' jurisdiction to the East, triggering its reform. It has opened the way for the establishment of the African Court of Human and Peoples' Rights. It has lessened the resistance of Latin American governments to having their actions (past and present) questioned by the Inter-American Court of Human Rights. Most significantly, the end of the Cold War has opened the way for accountability for war crimes and crimes against humanity, causing the emergence of a new genus of international courts, and subsequent mutations, branching out in three separate subgenera: ICC, ad hoc international tribunals, and hybrid courts.

There is little sign that 9/11, the war on terror, and the invasion of Iraq have had an impact on the structure, development, and pattern of utilization of international courts at large. Granted, some of the measures taken by certain states, including the United States, and even by the Security Council itself, have been an object of judicial scrutiny, but rulings (mostly adverse to those measures) have not produced much visible effect on either states' policies and behaviors or patterns of utilization or neglect of international adjudicative bodies. If they had any effect, they probably only made the United States shy away even further from international judicial scrutiny of its actions. There is no indication that post–9/11 events have spurred either the creation of new or the modification of existing international judicial structures.

As concerns attitudes and behaviors of key players, much of the judicialization of world politics has happened despite the United States and not because of it. Unlike many other areas of international law and relations, U.S. participation in international adjudication and the building of the international judiciary is not essential. Although the United States has been a force behind the ad hoc tribunals and some hybrid courts, and has broken new ground with other forms of quasi-judicial justice, like compensations commissions,[53] it has otherwise been largely absent. This aloofness is due to several structural factors (e.g., the U.S. Constitution, tradition, ambivalence; the fact that it is a superpower, hence, it has alternatives, and so on), which can only be mitigated or exacerbated, but not altered, by the ideological bent of those in control of the White House and Congress.

Europe has played a much greater role in shaping the development of the array of international courts. It has been instrumental in the creation of and support to criminal tribunals (ad hoc and hybrid), and it has become the champion of the ICC, it has grandfathered the IACHR and ACHPR, and it has provided the basic template for many regional economic courts. Interestingly, it has shown that this

[53] In this category, one can mention the Iran-US Claims Tribunal, the United Nations Compensation Commission, created by the UN Security Council to decide on damages arising out of the 1990–1991 Gulf War, and the Holocaust victims compensation mechanisms. On the history of the U.S. role in the establishment and operation of these bodies, see, generally, John Crook, in C. Romano, ed., *The Sword and the Scales*, see note 14 earlier.

is one of the fields in which it does not need U.S. or UN support to achieve its goals, and indeed, that it can do so even in the teeth of U.S. opposition. Even more interestingly, the opposite is not true. When the United States tried to set up a sort of international tribunal without UN or European support, as in the case of the Iraqi Special Tribunal, the result has been, by any standards, poor.

The UN is irrelevant in the case of international courts with regional scope. It is, however, essential in the case of all international criminal bodies. Only the UN can provide legitimacy to any attempt to try individuals for crimes that offend the whole of humanity. To date, there has not been any significant attempt to administer international criminal justice at the regional level, outside the framework of the UN.

Regional courts of any flavor have provided regional powers an opportunity to raise their profile by spearheading efforts to create judicial bodies and support them. Japan and Australia are driving forces behind the Extraordinary Chambers in the Courts of Cambodia. Argentina and Brazil have championed the judicialization of the Mercosur dispute settlement system. South Africa has played a fundamental role in the entry into force of the protocol establishing the African Court of Human and Peoples' Rights. Norway is the giant in the three-nation EFTA Court (the other two members being Iceland and Liechtenstein). Trinidad and Tobago have been in the forefront of the creation of the Caribbean Court of Justice.

Although there are signs that the breakneck expansion of the array of international courts during the 1990s and early 2000s is leveling off, it is certain that international courts are here to stay. They have become a fundamental feature of several international regimes. It is difficult to see how demand for accountability for international crimes might diminish. As long as states, and the UN, continue engaging in nation-building it is equally hard to see how that could be properly achieved without also building or rebuilding national judicial structures, and at least during the first stages, an international component is indispensable. It is equally difficult to imagine the creation of new regional integration agreements without at least some form of compulsory dispute settlement system and judicial oversight of the actions both of states and of community institutions.

Overall, the most interesting, and also perplexing, aspect of international courts and tribunals is probably the fact that not only the successes but also the failures of experiments in international justice have provided reasons to establish even more of them. In a sense, the development of international courts and tribunals might have acquired a logic and drive on its own not subordinate to, or dependent on, the interests of a specific government, but propelled by deeper public opinion forces, which are incarnated in the many nongovernmental organizations (NGOs) that have campaigned for and supported the creation of many of these judicial bodies.