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The United States and International Courts: Getting the Cost-Benefit Analysis Right

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Our general approach to international courts and tribunals is pragmatic. In our view, such courts and tribunals should not be seen as an end in themselves but rather as potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes. Consistent with this approach, we evaluate the contributions that proposed international courts and tribunals may make on a case-by-case basis, just as we consider the advantages and disadvantages of addressing particular matters through international judicial mechanisms rather than diplomatic or other means.[1]

Thus, John Bellinger, the legal adviser of the U.S. Secretary of State at the time he penned the opening chapter of this book, summarized the United States' approach to international courts. He could have said the same about any other nation in the world. It is difficult to disagree with such a commonsensical maxim. I am not aware of any government, democratic or dictatorial, that would create international courts and subject itself to them for the sake of it.[2]

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[1] John Bellinger, Chapter 1 of this volume, "International Courts and Tribunals and the Rule of Law."

[2] If, in general and on average, European nations seem to favor international courts more than the United States, any serious analysis of European practice and, in particular, of the major European nations would probably suggest a rather more nuanced picture once one looks beyond the federalist phenomenon of the European Communities/European Union, and its central judicial engine, the European Court of Justice (ECJ), and the system of human rights guarantees hinged on the European Court of Human Rights (ECHR). A book on European attitudes and behaviors toward international courts would need to ask whether it is correct to equate strong support for the judicialization of intra-European relations with support of international courts tout-court and whether motives for support or neglect, and patterns of use, by the United States are substantially different from those of Europe (as a whole or member by member). Since the Nicaragua case (1986), the United States has withdrawn its declaration of acceptance of the jurisdiction of the International Court of Justice (ICJ). Yet the only major European state having one standing (and full of reservations) is the United

Who would favor establishing an effective independent international authority, the sole purpose of which would be to constrain sovereignty, without significant benefits in return?[3] Pragmatic governments will base decisions to create or accept the jurisdiction of international courts on the basis of a cool-headed cost-benefit analysis.[4] Many factors are taken into account in that calculation,

Kingdom. Since then, the United States alone has appeared before the ICJ about as often as the United Kingdom, France, Germany, and Italy combined. It is well documented that it was the United States that pushed for the judicialization of the dispute settlement system under the GATT/WTO regime, to the European objection. John Croome, *Reshaping the World Trading System* (World Trade Organization, 1995) 224–29, 277–81, 332; Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minn. J. Global Trade 1, 13–14 (1999). It is less well documented that, since the birth of the WTO, the European Community has made an instrumental use of the WTO dispute settlement system, often against the United States, to further its own goals. In sum, the danger is to exaggerate European idealism and American realism, as Robert Kagan did in his book *Of Paradise and Power: American and Europe in the New World Order* (Knopf, 2003), forgetting that Machiavelli and Hobbes are Europeans and that Americans have been idealists since the landing of the pilgrims from the Mayflower in Plymouth. As Margaret Thatcher once famously remarked, "European nations are not and never will be like [America]. They are the product of their history. While America is a product of philosophy." Cited in David Brinkley, *Everyone is Entitled to My Opinion* (Knopf, 1996), at 119.

3 Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217, 219 (2000).

4 The George W. Bush administration, and especially the first five years (2000–5), is probably not representative of long-term and general U.S. attitudes, nor could it be dubbed pragmatic. It is likely that those years will go down in history as the nadir of the relationship of the United States with international institutions, and in particular international courts. During that time, neoconservatives, deeply distrustful of any international institution, preferring nationalist and unilateralist options regardless of the cost to the United States, took the helm of American foreign policy. For a while, ideology displaced pragmatism and national interest. For instance, in March 2005, the National Defense Strategy of the United States of America, the document issued every few years by the secretary of defense to detail the official U.S. strategy and policy, bizarrely proclaimed that "our strength as a nation will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism." U.S. Department of Defense, *The National Defense Strategy of the United States of America* (March 2005) 5, at http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm. However, during the second Bush administration, the most reactionary voices (e.g., John Bolton, Donald Rumsfeld, Douglas Feith, Paul Wolfowitz, and others) were removed from office because it had become clear that their positions had clearly ill served the U.S. national interest, and U.S. policy toward international institutions started the long return march toward its pragmatic tradition. Of course, populist politicians, who have found in international courts a new target to pander to the lowest instincts of certain parts of the national constituency, will keep on blaring against the existential threat posed by renegade international judges, but again, these are hardly representative of U.S. attitudes as a whole. For several examples of international courts bashing during the 2008 presidential campaign, *see* José E. Alvarez, *Judicialization and Its Discontents*, Am. Society of Int'l L. (Jan. 31, 2008) at http://www.asil.org/ilpost/president/pres080131.html. "Today, nary a thought is given when international organizations, like the UN, attempt to enforce their myopic vision of a one-world government upon America, while trumping our Constitution in the process. Moreover, many in our own government wilfully or ignorantly cede constitutionally guaranteed rights and

some of which can be empirically explained and pinpointed, whereas others are related to deep-seated cultural and historical forces. States create, utilize, and support international courts because international courts are instruments that render useful services to them.[5] However, if the "instrumental approach" is the necessary starting point of any analysis of how governments relate to international courts, then for the cost-benefit analysis to provide results that truly serve the national interest *all* factors need to be taken into account.[6]

I contend that the present U.S. attitude is exceedingly shortsighted and contextual, vitiated by a lack of sophisticated understanding of crucial differences between courts, or at least genera of courts, and of what international courts are for and about, what they can and cannot do for this country.

This chapter is more overtly normative than those that have preceded it. I put forward several arguments to explain how the United States frequently misses important benefits and exaggerates costs of participating in international courts. An attitude that focuses on praxis and rejects the ethos of international courts – that is to say, the ideals and principles they embody – unduly stresses the short-term benefits and grossly discounts medium and long-term ones. This in turn leads to a policy that is myopic and to decisions that ultimately ill serve U.S. interest. A sound policy is one that at the same time is based on both pragmatic and idealistic considerations because the former privilege the short-term benefits and the latter the long term. I surmise that the United States has more to gain, and less to lose, from more constructive engagement with international courts than superficial analysis might suggest.

I am fully aware that my considerations might not be something that other contributors to this volume would necessarily endorse and sound jarringly

freedoms to the international community." Rep. Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 Harv. J. Leg. 299, 323 (2002). Former U.S. Secretary of State Henry Kissinger warns that international adjudication "is being pushed to extremes which risk substituting the tyranny of judges for that of governments; historically the dictatorship of the virtuous has often led to inquisitions and even witch hunts." Henry Kissinger, "Does America Need a Foreign Policy?" in *Toward a Diplomacy for the 21st Century* (Simon & Schuster, 2001), 273.

5 *See*, in general, Andrew Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. Pa. L. Rev. 171 (2008). *Cf.* Eric Posner and John Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1 (2005). For a rebuttal of Posner and Yoo's analysis, from a liberal theory perspective, *see* Laurence Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899 (2005).

6 I prefer to use the expression "instrumental approach" rather than the less awkward "instrumentalism" because the latter has a specific meaning that is only partly fitting. "Instrumentalism" is used in philosophy of science to indicate the view that concepts and theories are merely useful instruments whose worth is measured not by whether the concepts and theories are true or false (or correctly depict reality) but by how effective they are in explaining and predicting phenomena. The American philosopher John Dewey (1859–1952) is considered to be the father of instrumentalism. Morton White, *The Origin of Dewey's Instrumentalism* (Columbia, 1943).

out of tune with contemporary national and international political reality. However, from time to time throughout history, there are transitional moments when old assumptions seem to be open for questioning and change seems to be looming on the horizon. As America experiences a change of leadership at the helm, after eight rocky years of administration by President George W. Bush, and much soul searching is done within both parties about what policies need to be changed given the alarming and increasing challenges the country faces, it seems the time is ripe to expand the horizon of U.S. foreign policy.

Before I move on to illustrate the limits of the narrow instrumental approach, there are two important problematic features that need to be highlighted. First, the thinking goes, international courts are just one of the many tools that the United States has at its disposal, along with classic diplomacy backed, to varying degrees, by its considerable economic and military muscle.[7] On any given issue, the United States should maintain the flexibility to be able to choose which option to resort to, including force (military, economic, or otherwise). Instrumentalists concede that there is a difference between a settlement reached by diplomatic means and one reached within legal parameters and according to legal procedure, "under the shadow of the law,"[8] so to speak. However, many are less ready to concede that there is a meaningful difference between legal settlement by way of a *permanent* international court and that by way of a *transient* arbitral tribunal, or between prosecution and trial by an ad hoc tribunal or a *permanent* international criminal court.

The whole point of international adjudication is to "settle disputes" by helping parties find a mutually acceptable settlement.[9] If they cannot do so by themselves, it is because either the facts or the law – or both – are not clear.[10] International courts are instruments that render useful services to states by "disseminating information"[11] between the parties, or, in other words, by providing "relatively neutral information about the facts and law relevant to a particular dispute."[12]

7 "[I]nternational courts and tribunals are one tool among many to achieve these important ends." *See* Bellinger, *op. cit.*, *supra* n. 1.

8 José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 Tex. Int'l L.J. 405 (2003); José E. Alvarez, *International Organizations as Law-Makers* (Oxford, 2005).

9 Posner and Yoo, *supra* n. 5, at 34–40.

10 "... states do not need a tribunal if the law and the facts are clear. When the treaty or convention clearly governs the dispute and the states have the same information about the relevant facts, there is nothing a tribunal can contribute to the resolution of the dispute." Posner & Yoo, *supra* n. 5, at 22.

11 Andrew Guzman, *International Tribunals: A Rational Choice Analysis*, U. Pa. L. Rev. 7–9 (2008).

12 Posner and Yoo, *supra* n. 5, at 10.

Thus, a dispute can be settled by the International Court of Justice (ICJ), but it can be equally settled by an ad hoc arbitral tribunal. All that matters is that the settlement is implemented and complied with by the parties. Prosecution of those most responsible for serious international crimes can be done in various ways ranging from domestic courts to ad hoc international criminal tribunals, to full-fledged permanent courts, like the International Criminal Court (ICC). Ad hoc solutions, however, cost less (financially and politically) and probably have equal benefits.

Second, not only are international courts just one tool among many but they are also second best to most. They are unwieldy instruments, difficult to steer and control. If they rule in favor of the United States, their main problem is that they lack their own enforcement powers. If they do have bite, then they are dangerous because they might be used by another state against U.S. interests.[13] Hence, international courts should be created or resorted to only in very controlled circumstances. At all times, the United States should try to minimize its legal exposure, and when it cannot, it should strive to be the plaintiff or the judge, as opposed to the defendant or the indictee.

A. TOWARD A BALANCED INSTRUMENTAL APPROACH

There is a myopic instrumental approach, which privileges the "here" and "now," which is the currently prevailing approach. There is the hyperopic approach, which privileges the "there" and "then," which is the view of the starry-eyed internationalists. And then there is a balanced approach that takes into consideration all factors and reaches an optimal equilibrium between the need for short-term returns and long-term investments. I would like to suggest a few considerations that are usually overlooked when debating what the United States has to gain or lose from greater engagement with international courts.

1. *International Courts Are More than "Dispute Settlers" and "Problem Solvers," and, Surprise!, They Do What They Are Supposed to Do*

What are international courts for? If international courts are classified by *function*, that is to say by what they are supposed to do and how they do it, then it becomes immediately apparent that the first error is to posit that international courts are just dispute settlers, problem-solving devices that states can have

[13] According to Robert Bork, a former U.S. federal judge, states will cooperate with courts only when it suits their interests, so judges are reduced either to puppets (when the states approve) or to impotents (when the states choose not to cooperate). Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI, 2003).

recourse to at will or simply ignore.[14] Although historically that might have been correct, nowadays it is true only for certain kinds of courts and, for that matter, only a minority of them.[15] Indeed, it seems that, at this age in history, it is possible to identify four basic genera of international courts, each of which having four distinct functions. Let us consider them in the order in which they emerged.

The first genus is what we could call the *classical international courts*. The main purpose of these courts is to settle disputes between sovereign states, and *only* sovereign states, on matters of public international law (general or a special branch).[16] The quintessential specimen of this genus is the ICJ. The more recent International Tribunal for the Law of the Sea and the World Trade Organization (WTO) dispute settlement system, the judicial arm of which is the WTO Appellate Body, also belongs to this genus.

This "classical international courts" or the "state-only courts" genus was the first one to emerge in history (early twentieth century), and it is a direct offspring of the practice of international arbitration.[17] In these courts, diplomacy

[14] For some examples of limited appreciation of the scope and breadth of the functions carried out by contemporary international courts, *see* Robert H. Bork, *Coercing Virtue, op. cit.*; Jeremy A. Rabkin, *Law without Nations?: Why Constitutional Government Requires Sovereign States* (Princeton, 2005); Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford, 2005); Posner and Yoo, *supra* n. 5.

[15] Several scholars recognize the complexity of the contemporary international judicial landscape. *See*, for instance, David Caron, *Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial*, 100 Am. Soc. Int'l L. Proc. 55 (2006). José E. Alvarez, "The New Dispute Settlers," *supra* n. 8; José E. Alvarez, *International Organizations, supra* n. 8; Karen Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 Law and Contemporary Problems 36 (2008).

[16] The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea is open, in some circumstances, to state enterprises and natural or juridical persons. United Nations Convention on the Law of the Sea, arts. 187, 189, Dec. 10, 1982, 1833 U.N.T.S. 397.

[17] Arbitration is the immediate previous historical precedent from which this genus of courts emerged and is still present in the structure of these courts. For instance, in the case of the ICJ, parties can decide to submit a case to a chamber of the court, instead of the full court, and influence its composition (ICJ Statute, art. 26). They can ask the court to decide the case *ex aequo et bono* instead of on the basis of international law (art. 38.2), a feature it shares with arbitral tribunals (e.g., Article 33 of the United Nations Commission on International Trade Law's Arbitration Rules (1976) provides that the arbitrators shall consider only the applicable law, unless the arbitral agreement allows the arbitrators to consider the case *ex aequo et bono*). The ICJ has been used in the past as a sort of appeal chamber of arbitral tribunals (e.g., *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*; *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*. *See generally* Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke, 1992). The WTO dispute settlement system consists of two levels: a first tier, in which disputes are decided by arbitral panels, and a second judicial tier, in which cases can be appealed before the Appellate Body. Finally, the International Tribunal for the Law of the Sea (ITLOS) is but one of the various dispute settlement procedures available under the Law of the Sea Convention,

and sovereignty play important roles, and dispute settlement is arguably the most important function they fulfill. Here, litigation is part of a longer diplomatic process of negotiation that usually both precedes litigation and follows it so as to make it possible for any eventual ruling to produce its effects.[18]

Because there are fewer than two hundred sovereign states in the world, these bodies serve a numerically small community, and accordingly, litigation is relatively sporadic. Their caseload tends to range from a few to several dozen per year. However, this kind of litigation tends to be high profile, involve high-level decision makers nationally, and attract considerable (albeit brief) public attention. This handful of courts also attracts a disproportionate level of attention by scholars, way beyond their actual significance in the day-to-day life of international relations. The real action, so to speak, is elsewhere. Indeed, international courts have evolved beyond the international, state-only, and "dispute-settler" model, giving way to a remarkable quantitative growth and qualitative differentiation.[19]

Thus, the second genus is that of *human rights courts*, such as the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), and the nascent African Court of Human and Peoples' Rights. It emerged during the third quarter of the twentieth century. The purpose of human rights courts is to provide legal remedies (compensation, declaration, or specific performance) to individuals whose human rights have been violated. Individuals can submit to these courts – directly (in Europe) or indirectly through specific organs of international organizations called commissions (in the Americas and Africa)[20] – cases concerning the violation of their rights as provided for in the respective basic regional human rights agreements. Although states may raise violations of human rights by other states before

the others being various kinds of arbitral tribunals. *See generally* A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Nijhoff, 1987); *see also* R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3d ed., Juris, 1999). ITLOS can also issue provisional measures pending the constitution of an arbitral tribunal. United Nations Convention on the Law of the Sea, Annex VI, art. 25, *supra* n. 16.

[18] In other words, they are yet another forum for political maneuvering, or to paraphrase von Clausewitz, international adjudication is just the continuation of diplomacy by other means. Carl von Clausewitz, *On War* (Michael Howard and Peter Paret eds., Princeton, 1989). The original quote is "war is a continuation of politics by other means." *See* Cesare Romano, "Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts," *in Progress in International Law* (Russell Miller & Rebecca Bratspeis eds., Nijhoff, 2008) 433, 444–48.

[19] Helfer and Slaughter call the new genera of courts "supranational courts." Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273 (1997).

[20] In the case of the ECHR, the filter of the Commission was removed with the entry into force, on November 1, 1998, of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 155.

these courts, thus engaging in classical state-to-state litigation, it is an extremely rare event. Invariably, the defendant is a sovereign state and the plaintiff is a person, typically a citizen of the defendant. These courts tend to have large dockets – from dozens of cases per year, in the case of the IACHR, to tens of thousands in the case of the ECHR – as potential plaintiffs number in the hundreds of millions, and the range of issues they address is considerable and, in many regards, similar to those addressed by national supreme courts.

Although they do settle disputes between individuals and their own governments over whether a violation of human rights has occurred,[21] construing these courts as "problem solvers" or "dispute settlers" is reductive and beside the point. There are two public crucial functions that the "dispute settler" label misses. Over the years, human rights courts have justified their existence mostly by acting both as *custodians of the law*, sanctioning violations by abusive governments, and as *developers of the law*, fleshing out the bare-bones international human rights convention they have been asked to apply.[22] These are important *public* functions that transcend the narrow limits of the given case and the parties.

The third genus comprises *courts of regional economic and/or political integration agreements*. The European Court of Justice (ECJ), the Court of the European Free Trade Agreement, and the Caribbean Court of Justice (CCJ) are but just three examples among a dozen (all established from as early as the 1950s to the present day).[23] Indeed, numerically, this is the largest genus. The functions of these courts are many and diversified. One unique feature of courts of this genus is that they handle requests of interpretation of community law

[21] Besides the fact that the ruling is final and cannot be appealed at other courts or domestically, and thus is dispositive of the matter, human rights courts try to facilitate the settlement of the case *litis pendente*. Once an application has been declared admissible, the ECHR "place[s] itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 38.1, Sept. 9, 1953, C.E.T.S. No. 005. The same happens in the Inter-American system. Organization of American States, American Convention on Human Rights arts. 48.1.f, 49, 50, 51, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[22] *See A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Helen Keller and Alec Stone-Sweet eds., Oxford, 2008); Michael Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers, 2007).

[23] The Caribbean Court of Justice is unique because it has both original and appellate jurisdiction. In its original jurisdiction, like the ECJ, the CCJ is responsible for interpreting the *Revised Treaty of Chaguaramas*, which establishes the CARICOM Single Market and Economy. *See* Caribbean Court of Justice, "About the Court," http://www.caribbeancourtofjustice.org/about.htm (visited Nov. 26, 2008). Yet it also has appellate jurisdiction, as it acts as the common final court of appeal for those states that have accepted its jurisdiction (at the moment, Guyana and Barbados). This hybrid structure is unique among international courts.

from national courts (so-called preliminary rulings).[24] Acting as such, they are a continuum of the national legal systems, rather than a separate level of jurisdiction, as are most international courts. They also decide disputes between organs of the community and member states, and disputes between individuals or corporations and community organs or member states, on the content and implementation of community laws. Very rarely they decide disputes between member states, as classical, state-only courts do. In other words, courts of this genus are more akin to supreme courts of federal states, or supreme administrative courts, than classical international courts settling disputes between sovereign states.[25]

Finally, the last genus of international courts to emerge in history – all since 1993 – is that of *international criminal courts*, such as the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). A specific subgenus is that of the so-called hybrid or internationalized criminal courts, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Panels for Serious Crimes in East Timor, or the Special Tribunal for Lebanon.[26]

These courts do not really "resolve problems" by disclosing information on facts and law to the parties, or "settle disputes." Granted, one might say that the aim of a trial is to determine whether a crime has been committed and by whom, a problem between the indictee and the prosecutor that needs to be resolved by the judges, or a dispute of law and fact that needs to be settled, but, again, that misses the point. The function of international criminal courts is rather to rule on international crimes (war crimes, crimes against humanity, crime of genocide) through trials and, eventually and where appropriate, to

[24] In the case of the ECJ, most decisions of the court are, indeed, preliminary rulings. European Court of Justice, Annual Report (2007) 80. Available at http://curia.europa.eu/en/instit/presentationfr/index.htm.

[25] The ECJ has provided the archetypical model for several regional courts. It is also the most studied phenomenon. *See* Alec Stone-Sweet, *The Judicial Construction of Europe* (Oxford, 2004); Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford, 2001).

[26] The difference between hybrid courts and fully international criminal courts is that they are composed of a mix of international and local judges, and they decide cases by applying a mix of local and international procedural and substantive law. Some are more domestic courts with some international elements grafted on, like the internationalized panels in Kosovo; others approximate international courts but-for the presence of domestic elements, like the Special Court of Sierra Leone. On hybrid criminal tribunals, *see generally Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Cesare Romano, André Nollkaemper, and Jann Kleffner eds., Oxford, 2004); Cesare Romano, "Mixed Criminal Tribunals," *in Max Planck Encyclopedia of Public International Law* (3rd rev. ed., Oxford, forthcoming).

mete out criminal punishment, like loss of liberty or fines. Considering the ad hoc nature of most international criminal courts, bar the ICC, one could venture even to say that determining what happened, and if that amounts to a crime, is beyond the point because the very creation of the tribunal itself presupposes a sort of political "prejudgment" that some crime happened and that those highest in the chain of command are responsible for it.

From the foregoing, it should be apparent that the "problem-solving," "dispute-settlement" function is only one aspect of the work of modern international courts. When states create and subject themselves to the jurisdiction of international courts they seek more than just a clarification about the law or facts in dispute so that they can resolve disagreements. They ask international courts to review administrative decision making, to ensure international institutions do not exceed their powers, to enforce international agreements of all kinds so that states can capture the benefits they bargained for so hard to have included in them, and even to develop international law, just to name a few functions. The great news is that, in the vast majority of cases, international courts do exactly what states asked them to do.[27]

2. *International Courts Are Like Halloween Haunted Houses: They Spook Only the Naïve or Those Who Want to Be Spooked*

Judging from the fact that more, and not less, states are moving toward international courts – Russia and China the two latest most notable developments, countries that traditionally have shunned international adjudication – concerns about loss of sovereignty to unaccountable international adjudicators are grossly overstated.[28] The United States takes international courts and international adjudication very seriously, but perhaps, it can be said it takes them too seriously.

International dispute settlement and international criminal law are probably the activities of international courts with the greatest potential for touching raw nerves, but again, most international courts nowadays are not engaged in this kind of activity. Mostly, they hum in the background processing hundreds, if

[27] *See generally* Karen Alter, "Delegating to International Courts," *supra* n. 15.

[28] Russia joined the Council of Europe in 1996. The first ruling against Russia by the ECHR was in 2002 (*Case of Burodov v. Russia*). Russia has also appeared before the ITLOS in three "prompt release" proceedings – once as applicant in the *Volga* case (*Russian Federation v. Australia*) (2002); twice as respondent in the *Hoshinmaru* case and the *Tomimaru* case (*Japan v. Russian Federation*); and before the International Court of Justice in 2008, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*). China has been a member of WTO since December 11, 2001. Since then it has been the complainant in three cases, respondent in eleven, and third party in sixty-two. To date, it has not yet appeared before the ICJ or the ITLOS.

not thousands, of cases involving the kinds of issues that, in the United States, are dealt with at the level of specialized courts, or low-level federal courts. Very rarely international court activity involves compromising national sovereignty in ways states did not intend and would not want.[29] Of course, critical issues might be at stake in those few instances, but a closer look, particularly at the aftermath of the decision, might indicate otherwise.

Currently, the only courts that are engaged in settlement of disputes between sovereign states in the light of international law – the classical and most ancient type of courts – are the ICJ, the International Tribunal for the Law of the Sea (ITLOS) arbitral tribunals, and the General Agreement on Tariffs and Trade (GATT)/WTO dispute settlement system.[30] The cases decided through these means are often, but not always, high profile, require attention directly from the highest national authority, and might affect or restrict sovereignty and national policy-making decisions. However, they are very few and far apart. The ICJ decides a few cases per year, the WTO Appellate Body a dozen, and there is, perhaps, one major international arbitration a year. ITLOS has decided only one case on the merits in more than ten years.

For all the hype and excitement that U.S. appearances before the ICJ cause, particularly in the United States, once the dust has settled, rulings have little or no practical effect on its foreign policy. The *Nicaragua* case did not jeopardize U.S. anticommunist activities in Central America. In June 1986, when the ICJ ruled on the case, finding that the United States had violated Nicaragua's sovereignty by carrying and aiding military and paramilitary activities on its territory, the Cold War in Latin American had already turned a corner.[31] Mikhail Gorbachev was announcing the perestroika, and Oscar Arias was bringing to a conclusion the negotiations of the Esquipulas Peace Agreements, which brought an end to the conflicts that had plagued Central America for many years. Libya's case against the United States for the sanctions imposed after the Lockerbie bombing did not go through.[32] Sanctions remained in place until those suspected for the bombing had been tried. It is Libya that changed its policy, not the United States. Again, Yugoslavia did not stop NATO bombs through the ICJ, and the case did not prevent the United States and its

[29] *See* Karen Alter, "Delegating to International Courts," *supra* n. 15.

[30] Although states can bring cases against other states in fora such as the IACHR, ECHR, and ECJ, it rarely, if ever, happens in practice.

[31] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment (Merits), I.C.J. Reports 14 (1986).

[32] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*). The case, together with the parallel one brought against the United Kingdom, was discontinued at the joint request of the Parties in 2003, after it had crept slowly forward for more than a decade.

allies from achieving their goals during the Kosovo campaign.[33] Likewise, Iran and the United States have wrestled before the ICJ three times in twenty-five years. There is no sign whatsoever that this has altered the diplomatic situation or the balance of power, or given Iran any edge over the United States.[34] Albeit the United States lost the case on the merits with Mexico and Germany over the question of the right of foreigners to consular notification, it is not yet clear whether and how this has prejudiced U.S. strategic interests or policy.[35] The United States had agreed, a long time before, to notify the consular authorities of those who were arrested, and it routinely did and still does so whenever those effectuating the arrest have a reason to believe they have arrested a foreigner. Probably, law enforcement agents are now more aware and, as a consequence, more willing to verify arrested people's nationality, but this is hardly an attack against U.S. security, sovereignty, interests, culture, lifestyle, or otherwise.[36]

Arguably, international criminal courts might have greater impact. Although politicians might not lose sleep over decisions of international courts that have no independent enforcement powers but that rely for that on organs of the state they themselves govern, the parade of heads of state being prosecuted and incarcerated might send a chill down their spine. For example, Slobodan Milosevic, the powerful, former president of Yugoslavia who kept in check Western diplomacy for a decade, died in a prison in The Hague while on trial before the ICTY. The once-mighty Charles Taylor was forced to give up power in Liberia and is now awaiting trial before the Special Court for Sierra Leone. As a final example, take Sudan's President Umar Hassan Ahmad al-Bashir, the first ever head of state to be indicted for international crimes while still in power.

One might conclude that there is no longer a limit to the chutzpah of international prosecutors. In a world increasingly hostile to the United States, maybe one day, should the nation ever be so crazy as to accept the jurisdiction

[33] Legality of Use of Force (*Yugoslavia v. Belgium; Canada; France; Germany; Italy; Netherlands; Portugal; United Kingdom; Spain; United States*), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 124 (1999).

[34] United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), Judgment (Merits), I.C.J. Reports 3 (1980); Aerial Incident of 3 July 1988 (*Islamic Republic of Iran v. United States of America*), Order of 22 February 1996 (discontinuance), I.C.J. Reports 9 (1996); Oil Platforms (*Islamic Republic of Iran v. United States of America*), Judgment (Merits), I. C. J. Reports 161 (2003).

[35] *LaGrand (F.R.G. v. United States)*, 1999 I.C.J. 9 (Mar. 3); *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31).

[36] Carsten Hoppe, *Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 Eur. J. Int'l L. 317 (2007).

of the ICC, a politically motivated prosecutor might investigate decisions of the U.S. political and military leadership. Although the United States could easily thwart prosecution by relying on the many guarantees included in the Rome Statute that would allow democracies and major powers to stop the ICC from proceeding, it could not prevent the prosecutor launching an investigation with the ensuing political fallout that such a step could have on the worldwide stage. As the movie industry – a field dominated by the United States – teaches, any scenario can be conjured.[37]

Yet reality suggests that international prosecutors are wiser – or timider – than that. Carla Del Ponte, the ICTY prosecutor, refused to investigate the U.S.–led NATO bombing campaign over Yugoslavia in 1999, although she had the power to do so.[38] Luis Moreno Ocampo, the ICC prosecutor, has not given any sign of inclination to investigate former Prime Minister Tony Blair, or anyone in the British military and civilian leadership, for the invasion of Iraq, Afghanistan, or anything that happened therein.[39] Prosecutorial action, at the international level, is discretionary but hardly harum-scarum.

In sum, anathemas of extreme opponents notwithstanding, it is hard to find a single ruling of an international court that has caused tangible and significant damage to any *major* power. International courts are not too powerful; if anything, they are not powerful enough.[40]

3. *You Cannot Have International Courts That Are Always on Your Side*

That the United States cannot have international courts that are always on its side should be a platitude. Alas, it is not. As suggested by Sean Murphy, when it comes to foreign affairs, the United States operates on the basis of a fundamental antinomy.[41] On one hand, it is animated by a desire for cooperation with

[37] "The Trial of Tony Blair" was being screened in the United Kingdom on January 15, 2007, by Channel Four. The same channel previously presented a drama on U.S. President George W. Bush being assassinated. *See* http://www2.irna.ir/en/news/view/menu-234/0701082293185740.htm.

[38] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (June 13, 2000), at http://www.un.org/icty/.

[39] "Lawyers Sue Blair over War," *BBC News*, July 28, 2003, at http://news.bbc.co.uk/2/hi/europe/3101697.stm; "Blair 'War Crimes' Case Launched," *BBC News*, Mar. 2, 2004, at http://news.bbc.co.uk/2/hi/uk_news/politics/3524133.stm.

[40] On the limits of international courts, *see generally* Yuval Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary," 20 Eur. J. of Int. L. (2009).

[41] *See supra* Murphy, Chapter 4 of this volume.

other states as equal sovereigns; indeed, the United States distinguishes itself by its strong predisposition for international law and its institutions and a certain legalistic approach to international relations. Yet at the same time, it has innate historical and cultural characteristics that push it toward "exceptionalism," claiming itself entitled, formally and informally, to be treated differently from other nations.[42]

It supports international criminal courts because they provide means that are relatively politically low cost to satisfy calls for accountability – from within the national electorate and the international community – for major international crimes. Yet it does so only when the U.S. government has, or is perceived by its officials to have, a significant degree of control over the court or where the possibility of prosecution of nationals is either expressly precluded or otherwise remote. International criminal courts are good only for everyone else, for the United States is hostile to the idea of having violations of the laws of war by its own military forces subject to third-party adjudication by any international or foreign court (arguably, during the G. W. Bush administration, by its own courts, as well).[43]

The United States believes itself to have one of the best, if not the best, constitutional systems for guaranteeing of human rights and fundamental freedoms; therefore, it sees little need for any external backup or second-guessing system, especially one that is not subject to the check of the American voters.[44] At the same time, it is acutely aware that democracy and human rights have not yet been firmly entrenched in most states of the world and believes it has a mission to spread them. Accordingly, it fosters and welcomes human rights courts and a large array of quasi-adjudicatory expert committees exercising supervisory jurisdiction, but it approaches them mostly as a one-way road, as tools to influence the conduct of other nations rather than instruments to affect internal change.

Finally, there seems to be also a sense – probably also shared by a vocal part of the population[45] – that any international court composed mostly of foreign judges, where the United States has no right of veto, could not possibly correctly apply the law and decide a case involving the United States fairly.[46] At the same time, the United States prides itself for providing the world with first-class judges who will invariably apply the law correctly and decide a case involving other nations fairly.

[42] *See supra* Preface to this volume, n. 7.
[43] *See supra* Cerone, Chapter 6 of this volume.
[44] *See supra* Abi-Mershed, Chapter 7 of this volume, and Melish, Chapter 8 of this volume.
[45] Yet Kull and Ramsey (*see* Chapter 2 in this book) suggest this might not be the attitude of the majority of the U.S. population.
[46] *See, e.g.*, José E. Alvarez, "Judicialization and Its Discontents," *supra* n. 4.

Justice Robert H. Jackson of the U.S Supreme Court, in his first address to the American Society of International Law, in 1945, provided the best reply to this nonsensical attitude:

> It is futile to think, as extreme nationalists do, that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage. In our internal affairs we have come to rely upon the judicial process to settle individual controversies and grievances and even those between states of the Union, not because courts always render right judgments, but because the consequences of wrong or unwise decisions are not nearly so evil as the anarchy which results from having no way to obtain any decision of such questions; in which case each will take the law into his own hands. And in a somewhat similar sporting spirit we must look upon any international tribunal, not as one whose decision always will be welcome or always right or wise. But the worst settlement of international disputes by adjudication or arbitration is likely to be less disastrous to the loser and certainly less destructive to the world than no way of settlement except war.[47]

Granted, Jackson was a unique Supreme Court Justice, the only one ever to have acquired an insider's knowledge of an international court, having served as chief U.S. prosecutor at the Nuremberg trials.[48] Considering the diffidence a majority of judges of the U.S. Supreme Court seems to have toward international courts nowadays, it is hard to believe any could utter something like this.[49]

4. *International Courts, and the Services They Render, Are Global Public Goods*

Justice Jackson reminds us that the wise policy is the one that reconciles the short-term need to avoid tactical legal defeat in court on any given case, with the

[47] *"A Decent Respect to the Opinions of Mankind . . . ": Selected Speeches by Justices of the U.S. Supreme Court on Foreign International Law* (Christopher Borgen ed., ASIL, 2007), 40.

[48] See Robert H. Jackson, The Nürnberg Case as presented by Robert H. Jackson, chief of counsel for the United States, together with other documents. (Cooper Square, 1947).

[49] More troubling still, José Alvarez recently dismally concluded that "any U.S. judge today who would dare to suggest that she (much less her fellow U.S. citizens) should be bound by 'supra-national' law as found by an international court, especially when these decisions are not in accord with the immediate 'national interest,' would likely find herself target of an impeachment campaign – or at least the subject of a Congressional inquiry and a media circus." *See* Alvarez, *Judicialization and Its Discontents*, *supra* n. 4.

long-term benefits of having a respected and effective system of international adjudication in place. In a way, Jackson reminds us that the services that international courts produce – that is, the settlement of a dispute, but also the judgment itself, which adds to the body of international law – are public goods.[50] In particular they are "global public goods," goods whose benefits reach across borders, generations, and population groups, like the ozone layer, the earth climate, or global financial stability.[51]

Narrow instrumental approaches to international courts pay way too little attention to the important positive externalities of international courts and their activity. For instance, in 1995, Venezuela (later joined by Brazil) complained to the WTO Dispute Settlement Body that the United States applied stricter rules on the chemical characteristics of imported gasoline than it did for domestically refined gasoline. By 1997, the dispute had been resolved.[52] A purely instrumental approach would carefully measure how many millions of dollars it cost the United States to implement the report of the dispute settlement body and how much, if anything, because it lost the case, it gained. However, one could also consider that by settling the dispute, the WTO dispute settlement machinery might have defused escalation, averting a larger and more expensive retaliatory spiral that would have, directly or indirectly, harmed the United States and several other nations. Or one could also consider the precedential value of the report issued by the WTO Appellate Body in that case, which set new standards for interpretation of WTO law, thereby affecting all present and future WTO members.[53]

[50] "Public goods" are those for which the use by one person does not reduce availability for others (nonrivalrous), and, once created, it is impossible (or too costly) to exclude third parties from their benefits (nonexcludable). A textbook example of a public good is a street sign. It will not wear out, even if large numbers of people are looking at it; and it would be extremely difficult, costly, and highly inefficient to limit its use to only one or a few persons and try to prevent others from looking at it, too. Conversely, *private* goods are both excludable and rivalrous. I can buy a cake and have exclusive property rights over it (excludable). Once I have eaten it, no one else can enjoy that same cake (rivalrous). Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 R. of Econ. Statistics 387 (Nov. 1954); Paul A. Samuelson, *A Diagrammatic Exposition of a Theory of Public Expenditure*, 37 R. Econ. Statistics 350 (Nov. 1955). International courts and their jurisprudence are highly nonrivalrous goods because their use does not decrease – and perhaps even increases – their availability. They are also highly nonexcludable.

[51] *See* Inge Kaul, Isabelle Grunberg, and Marc A. Stern, "Defining Global Public Goods," in *Global Public Goods: International Cooperation in the 21st Century* (Oxford, 1999), 2–19; William Nordhaus, *Managing the Global Commons: The Economics of Change* (MIT, 1994). An excellent early study surveying the area is Todd Sandler, *Global Challenges: An Approach to Environmental, Political, and Economic Problems* (Cambridge, 1997). *See also Global Public Goods: International Cooperation in the 21st Century* (Inge Kaul, Isabelle Grunberg, and Marc A. Stern eds., Oxford, 1999).

[52] *U.S. – Gasoline* (WT/DS2/AB/R).

[53] "The general rule of interpretation [as set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international

There are even greater imponderable, but momentous, benefits. International courts "socialize" states to the idea of international adjudication.[54] The multiplication of international tribunals with specialized and regional competence experienced since the end of the Cold War has gradually enabled governments – many of which are of developing countries, some of which are not quite democratic – to experiment with and observe the effects of international adjudication. Processes of persuasion and acculturation, and learning by doing, might explain why there are certain countries that resort to some judicial bodies more often than others, but it is clear that the more states – at all latitudes and of all kinds – resort to international adjudication, the less reluctant they seem to become to the idea – the United States being an egregious exception.[55]

The United States stands to benefit from the judicialization of international relations even when it opts out of it or when it takes place elsewhere. For example, the Court of Arbitration of the Organization for the Harmonization of Business Law in Africa (OHADA), an African regional court, helps ensure that domestic courts of several African countries will enforce multilaterally negotiated rules regarding foreign direct investment, including those of American companies.[56] Again, U.S. corporations are understandably concerned about reaping the benefits of their research and development and want international intellectual property rules respected. That is what they get from some regional courts. The overwhelming majority of cases decided by the Andean Court of Justice are about ensuring that Andean countries (Ecuador, Bolivia,

law. As such, it forms part of the 'customary rules of interpretation of public international law,' which the Appellate Body has been directed, by Article 3(2) of the [Dispute Settlement Understanding], to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law." *U.S. – Gasoline*, p. 17, DSR 1996:I, p. 3 at 16. (WT/DS2/AB/R). *See generally* Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, 2003).

54 On the "socializing effects" of international litigation, *see generally* Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?* 14 Leiden J. Int'l L. 267 (2001).

55 On the role of persuasion and acculturation (as opposed to coercion) in socializing states, *see generally* Rayan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford, 2009). On trends in international dispute settlement and patterns of utilization, particular by developing countries, *see* Cesare Romano, *International Justice and Developing Countries: A Quantitative Analysis*, 1 Law and Practice of International Courts and Tribunals 367 (2002). On the effect of "learning-by-doing," *see* Cesare Romano, *International Justice and Developing Countries (cont.): A Qualitative Analysis*, 1 Law and Practice of International Courts and Tribunals (2002), 575–576, at 539.

56 Boris Martor, *Business Law in Africa: OHADA and the Harmonization Process* (2nd ed., GMB, 2007).

Colombia, and Peru) respect international intellectual property rules.[57] Likewise, U.S. corporations do not want to be discriminated against by foreign regulatory decisions (e.g., antidumping, countervailing duties, antitrust). The ECJ provides checks that American individuals or companies can activate to challenge the legality of decisions both of the European Community organs and its several member States that could, and sometimes, do jeopardize American interests. When human rights of American citizens are violated by foreign governments, international courts might be able to provide a form of redress that would be otherwise unavailable or that would require the U.S. government to spend considerable political capital to exercise diplomatic protection. Indeed, the United States' refusal to accept the jurisdiction of the IACHR notwithstanding, Americans brought cases before that court to challenge actions by Latin American governments that have jeopardized their human rights.[58] Less known and publicized is the fact that Americans could, and actually have, brought cases before the ECHR.[59]

5. *Easy-Riding Will Cost You*

Yet one might object that, if the United States stands to benefit from the judicialization of international relations even when it opts out of it or it takes place elsewhere, then why should it have greater and deeper engagement with international courts?[60]

[57] *See* Laurence Helfer, Karen Alter, and Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 109 Am. J. Int'l L. (2009).

[58] E.g., *Case of Lori Berenson Mejía vs. Perú*, Judgment of November 25, 2004, I/A Court H. R. (Ser. C), No. 119 (2004).

[59] E.g., *Case of Quinn v. France*, Judgment (Merits and Just Satisfaction) 22/03/1995; *Case of Custers Deveaux and Turk v. Denmark*, Judgment (Merits) 03/05/2007; *Case of Medenica v. Switzerland*, Judgment (Merits) 14/06/2001; *Case of Hartman v. Czech Republic*, Judgment (Merits and Just Satisfaction) 10/07/2003.

[60] The free-rider problem (or easy-rider problem, if the consumer's contribution is small but nonzero) is the crux of the public good theory. Public goods cannot be created by market forces alone. Because public goods are nonexcludable, they provide benefits equally to those who bear the costs of producing the good and those who do not. The most rational strategy for a utility-maximizing individual (the free-rider or the easy-rider) is to let others go first and seek to enjoy the good without contributing to its production. Utility-maximizing individuals would not serve in a jury. The cost in terms of time can be high and the duty can be taxing. The direct benefits of participating and making juries possible are low because they would be distributed among all of the millions of other people in the country. Knowing that an individual cannot be excluded from the benefits of trial by jury, regardless of whether he or she ever sat or will ever sit in a jury, the free rider would not serve. However, if everyone free rides, public goods are never produced or are not produced in the necessary quantity. The free-rider problem can be resolved only through some sort of collective-action mechanisms (e.g., the government

There is a price to be paid for easy-riding on these international public goods. The more that international courts shape and make international law, the less the United States is going to be able to influence it and steer the direction of development of this new "international common law."[61] By being indifferent, if not hostile, to the rise of international courts on the international scene, the United States is giving up the driving role it has played since World War II in international institutions that shape international law. To put it simply, easy riders sit in the backseat; they do not steer.

During the past decade, the ECHR has become the driving engine of human rights law on a global scale. Relying on a massive jurisprudence of several hundreds of cases per year, many of which tackle unprecedented issues, the Strasburg court is de facto writing much of international human rights law of the twenty-first century. Its precedents are cited not only by all other international courts and human rights bodies but also by national courts outside Europe. As a matter of fact, it can be argued that the ECHR's influence is on the way to replace the U.S. Supreme Court as the democratic world's legal beacon on civil rights issues.[62] Had the United States a long-term strategy on international courts, it would try to foster the growth of the IACHR into an equally authoritative voice to balance the European choir across the Atlantic.

It is not far-fetched to imagine that, should the ICC establish itself as an effective and authoritative court, its jurisprudence might become the central voice on international criminal law – an area of international law where the United States has strategic stakes. Strengthened by its permanent nature and by acceptance by a majority of the countries of the world, including a majority of countries in each continent but Asia, it will stand in the field taller than any other international criminal body. It does not have any credible rival. It will stand taller than any hybrid court, the impact of which on international law is diminished by the fact that each speaks a vernacular made of a mix

adopting and enforcing laws that make jury duty compulsory), forcing free-riders to bear their fair share of the cost of producing the good.

The crucial difference between public goods at the national level and at the international level is that nationally there are governments that can authoritatively intervene to ensure the production of the good. They control all factors that determine availability and quality of the public goods. However, at the international level, largely lacking an authoritative supranational authority, public goods can only be produced (or protected from destruction, if they are naturally occurring) by way of international cooperation and, crucially, only if all major actors are better off as a result.

[61] Andrew Guzman and Timothy Meyer, "International Common Law: The Soft-Law of International Tribunals," U.C. Berkeley Public Law Research Paper No. 1267446 (2008). Brown used this same expression, but more narrowly, referring to common procedures between various international courts and tribunals. Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007).

[62] Adam Liptak, "U.S. Court Is Now Guiding Fewer Nations," *New York Times*, Sept. 18, 2008.

of international and local laws; taller than the ICTR and ICTY, which are in the process of being discontinued; taller than any other ad hoc court the United Nations might establish, should the UN ever find again the concord necessary to do so; and definitively taller than the U.S. Supreme Court, the influence of which on courts around the world is steadily declining. It is exactly the realization that this might happen that led George W. Bush's administration to oppose aggressively the creation of the ICC, but it is also the realization that the Court is here to stay and the United States cannot single-handedly stop it that led, eventually, to milder tactics. Still, it is not yet enough. The United States needs to get on the bus, preferably in a front seat.

By shunning international courts, the United States is renouncing its authority to shape the international courts of the twenty-first century, and American legal discourse and structures are giving way to European archetypes. In particular, the success of European economic and political integration has provided a model for most regional integration schemes around the world. Additionally, as the ECJ is celebrated for having been able to keep European integration on track, sometimes in the teeth of political opposition, it should be no wonder that nowadays most regional economic and political integration endeavors feature at their core a judicial institution that, to varying degrees, mimics the ECJ. The list is remarkable, including the periphery of Europe (e.g., Economic Court of the Commonwealth of Independent States and the European Free Trade Area Court of Justice); Latin America and the Caribbean (Court of Justice of the Andean Community, and, to a certain extent, the Caribbean Court of Justice); and Africa (Court of Justice of the Common Market for Eastern and Southern Africa, Court of Justice of the Economic Community of West African States, Court of Justice of the Economic and Monetary Community of Central Africa, Arab Maghreb Union Judicial Authority, and, last but not the least considering it is probably the closest to the ECJ template, the African Court of Justice). Only in South America, in the Mercosur, is the dispute settlement template favored by the United States that stresses arbitration in favor of permanent judicial institutions resisting. Yet the creation of the Permanent Review Tribunal of the Mercosur in 2002 signals that states of the southern cone are veering toward the permanent and fully judicialized model preferred by the Europeans and away from the à la carte model preferred by the United States.[63]

Missing out on the opportunity to mold international courts on familiar American templates is not the only price that United States pays for riding in the

[63] The Olivos Protocol for the Settlement of Disputes in Mercosur, art. 33, Feb. 18, 2002, 42 ILM 2 (2003). *See generally* Raúl Emilio Vinuesa, *The MERCOSUR Settlement of Disputes System*, 5 Law and Practice of International Courts and Tribunals 77 (2006).

backseat. There are more tangible costs. For instance, by its foreswearing of the ICC, the United States opened the way for the court to be eventually located at The Hague, reinforcing the quasi-monopoly that that European town has on major international judicial institutions. Nowadays, The Hague boasts that it is the "Legal Capital of the World."[64] Hosting major international institutions on one's own territory provides considerable diplomatic and economic advantages and a few minor drawbacks. As a matter of fact, toward the end of World War II, the United States insisted on, and obtained, headquartering the new, major international organizations emerging from the conflict, including the United Nations, the World Bank, the International Monetary Fund, and the Organization of American States.[65] Think what New York or Washington, D.C., would be without those institutions and the business they bring with them.

However, that is not the only thing that the United States lost when it turned its back on the ICC and the new court was pushed out of the United Nations, to be created as a self-standing international organization. The ICC became the first international organization operating on a global scale to have a budget in euros and not in U.S. dollars, a harbinger of the beginning of the end of predominance of the U.S. dollar as the only truly world currency.[66]

6. *If You Do Not Understand Your Instruments, You Risk Blunting Them Unnecessarily*

If international courts are instruments to serve its national interest, then U.S. decision makers need to conceptualize them correctly to avoid blunting them unnecessarily. International courts are peculiar instruments. Trying to explain why any government would favor establishing an effective independent international court, social scientists have argued that Principals (i.e., "States") delegate decision making to Agents (i.e., "international courts") because they know that their recontracting powers will keep the agent within their comfort zone of acceptable jurisprudential outcomes.[67] Yet, as Karen

[64] *See*, e.g., *The Hague: Legal Capital of the World* (Peter J. van Krieken ed., T.M.C. Asser, 2005); David Vriesendorp, *The Hague Legal Capital?: Liber In Honorem W.J. Deetman* (Hauge, 2008). *See also* "The Hague Justice Portal" http://www.haguejusticeportal.net/.

[65] *See generally* Robert Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (University of North Carolina, 1990).

[66] International Criminal Court, *Financial Regulations and Rules*, adopted by the Assembly of States Parties, First session, New York, September 3–10, 2002 (ICC-ASP/1/3), Regulation 3.2.

[67] Under the Principal-Agent theory, one party (the Principal) delegates to another (the Agent) performance of a task that the Principal cannot do by itself, or can do only at too high a cost. The fundamental problem any Principal faces is how to ensure that the Agent, whose desires or wishes might differ, remains faithful to the mandate and does not deviate. Principals will

Alter convincingly argued, courts of law, including international courts, are better understood as "Trustees" rather than "Agents."[68] Agents are chosen because they are expected to be faithful to the Principal; they have *delegated authority* based on the Principal having authorized the Agent to act within a certain domain. Trustees are instead chosen because either they personally or their profession in general brings their own source of legitimacy and authority.[69] Indeed, in addition to delegated authority, trustees have *moral authority* that comes from embodying or serving some shared higher ideals; their moral status as a defender of these ideals provides the basis for their authority. Trustees have *rational-legal authority* to the extent they apply preexisting rules impartially in a like fashion across a body of cases, thereby imparting a perception of procedural justice and neutral fairness in their decisions.[70] Trustees are chosen by Principals exactly because either their persona or their profession in general provides a source of legitimacy and authority. Yet, arguably, the legitimacy and authority of international courts are not a given and a constant. They can increase over time, usually at a slow pace. The more a court is resorted to, and the higher the degree of compliance with its rulings, the greater the perceived legitimacy and its authority. However, legitimacy and authority can be equally reduced when states neglect courts by refusing to submit to, or withdrawing from, their jurisdiction or when they attack, on political and legal grounds, the decision once it has been rendered.

One would expect the Principal to have an interest in seeing the legitimacy and authority of Trustees increase. If courts are instruments of the Principal, then the Principal might want to keep them sharp for when they are needed. This should hold true even if the Principal contracts Trustees only occasionally or even just wants to keep the option open. Only those who rule out ever resorting to an international court would deliberately try to undermine their legitimacy and authority. Yet when in the United States the decisions of the ICJ are rejected by prominent public voices as politically motivated, illegitimate, morally dubious, or plainly, legally wrong, the authority of the court is reduced. When Congress considers legislation to create an ad hoc body to track rulings of the WTO Appellate Body and, should the United States lose too many

nonetheless contract Agents, because they have the power to sanction the Agent by changing the terms of the contract (e.g., firing or not reappointing the Agent, rewriting contractual terms to undercut the Agent's realm of authority, or cutting the Agent's budget). For a primer on the Principal-Agent theory, *see* Norman E. Bowie and R. Edward Freeman, *Ethics and Agency Theory: An Introduction* (Oxford, 1992); Joseph E. Stiglitz, "Principal and Agent," in 3 *The New Palgrave: A Dictionary of Economics* (Palgrave Macmillan, 1987), 966.

[68] Karen Alter, *Agents or Trustees? International Courts in their Political Context*, 14 Euro. J. Int'l Rel. 33 (2008).

[69] *Ibid.*, at 39–40.

[70] *Ibid.*

cases, be able to withdraw the United States from the WTO, legitimacy of the dispute settlement system is reduced. When the United States argues that it will not accept the jurisdiction of the ICC because, despite the fact that it can effectively block any prosecution against its own citizens, it is concerned by politically motivated investigations that an anti-American prosecutor might initiate, it puts in doubt both the moral and the rational-legal authority of the court.

States have available a fairly large range of tools to regulate ("recontract," in principal/agent theory parlance) overreaching in international courts.[71] Some operate *ex ante*, before any given case is decided, such as precisely defining interpretive methodologies or standards of review in the court's constitutive treaties. Others can be deployed *ex post*, such as renegotiation of a court's jurisdiction or procedural rules, or forum shopping to tribunals with competing jurisdictions. Some are formal and structural; others are political. The matrix is complex, but the trustee/principal theory seems to suggest that modes of contestation that are rhetorical, persuasive, and jurisprudentially based, as opposed to delegitimizing, material, or threatening (the modes of choice of the United States during much of the past decade) are less likely to produce long-term deleterious effects on the targeted international court and the international judicial system as a whole, making it possible for the United States to rely on strong and legitimate international courts if and when needed.

There are also some powerful internal constraints that limit the possibility of international judges going rogue. Indeed, international judges are typically more concerned about their reputation and maintaining their authority – personal and of their profession – than they are about displeasing governments, however powerful and influential they might be. Granted, international courts and their judges are not apolitical or immune from pressure. They are susceptible to all sorts of legitimacy and rhetorical prods. Logically, relying on sovereign states and their organs to execute their decisions, they necessarily worry about maintaining their support.[72] However, international judges understand that Principals (states) contracted them as Trustees exactly because they have moral authority that comes from embodying or serving some shared higher ideals, and rational-legal authority that comes from their impartiality and loyalty to the law. If they neglect those ideals and start applying law in a way that might be perceived as biased, or as a cave-in to states' pressure, they undermine their own rationale. Some judges might be inclined to use the

[71] *See* Laurence R. Helfer, "Why States Create International Tribunals: A Theory of Constrained Independence," 23 *Conferences on New Political Economy* (Mohr Siebeck, 2006), 265–72.

[72] *See generally* Daniel Terris, Cesare Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford, 2007), 147–79.

bench to do politics and not serve the law, but systemic bias of a whole court, or group of courts, as some critics of international courts in the United States seem to suggest, smacks of paranoia and is hardly believable.

7. *The United States Needs International Courts, and International Courts Need the United States*

What is more likely to happen is that the generally antipathetic U.S. attitude toward international courts might induce international judges to have less reason to tread with care when it comes to American interests. When given the chance, international judges might be tempted to use the bench to lecture the United States. Truth be told, international courts have their own level of responsibility for the current troubled relationship with the United States. Not all criticism leveled against them by the United States is unfounded. The process of selection/election/nomination of international judges is opaque – perhaps too much to stomach for the United States, a country that is accustomed to electing some of its judges, and to having those who are appointed undergo fierce public scrutiny. International judges often act as if their independence and impartiality are a dogma rather than something that can, and should be, legitimately questioned. The United States has been seeking greater transparency of international judicial proceedings and public participation (at the WTO, in the North American Free Trade Agreement, at the ICJ) and has often been baffled by finding resistance both from other states and the courts themselves.

It is also difficult to deny that certain countries have tactically used international courts to harass, embarrass, and influence the United States. The use of courts by adversaries of the United States is understandable; use by allies, however, is more questionable. In recent years, Mexico has used the ICJ and the IACHR to chastise the United States' treatment of Mexican nationals – with little practical effect but with the result of further alienating the United States from international courts.[73] The EC has similarly used international tribunals on occasion to score easy political points against the United States. For example, in response to the United States' successful challenges at the WTO of the EC's bananas regime, the EC started a case at the WTO against the United States that it was virtually certain to win (and where it would be

[73] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *supra* n. 38; Request for Interpretation of the Judgment of March 31, 2004 in the Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States*); The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, Inter-Am Ct. H.R. (Ser. A) No. 16 (Oct. 1, 1999); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, Inter-Am Ct. H.R. (Ser. A) No. 18 (Sept. 17, 2003).

politically difficult for the United States to comply with an adverse ruling), largely in an effort to bolster domestic support for the WTO dispute system and to gain easy bargaining chips to be used in other WTO disputes where its hand was not that strong.[74]

It is a vicious circle. Negative U.S. attitudes lower the incentives that international courts have to tread carefully when U.S. interests are at stake. This, in turn, gives more voice to opponents and further alienates the United States from the process, leading to harsher criticism down the line. Its military and economic preponderance and unilateralist stance force other nations to try to find alternative ways to challenge it, but the United States, having little confidence in these mechanisms and in its own capacity to control them, resents it.

The circle must be broken. It is in everyone's interest. The United States needs international courts; and even if this notion is rejected, the truth is that, for all the unilateralist rhetoric, it cannot completely disengage from the system, remaining exposed to litigation it cannot effectively control. In turn, international courts suffer from U.S. lack of interest or even hostility because they cannot rely on the legitimization and borrowed clout they could have with the largest and most powerful democracy of the world accepting their jurisdiction. Nor can they count on the material and diplomatic assets that the United States can make available to them to carry out their respective missions.

International courts need more support and engagement than the United States is currently willing to provide.[75] To illustrate, the hostility of the United States toward the ICC affects its capacity in multiple ways. It denies it the possibility to count on American financial support, which limits its resources.

74 In 1999, the European Union challenged the Foreign Sales Corporation provisions of U.S. tax law as a violation of the Uruguay Round Code on Subsidies & Countervailing Measures (*United States – Tax Treatment for "Foreign Sales Corporations,"* DS108). This was a surprise to the United States because the tax treatment for foreign sales corporations had not been challenged during the course of the Uruguay Round negotiations.

75 In March 2009, an Independent Task Force convened by the American Society of International Law to assess attitudes and behaviors of the United States toward the ICC recommended that "the President take prompt steps to announce a policy of continued positive engagement with the Court, including: a stated policy of the U.S. Government's intention, notwithstanding its letter of May 6, 2002 to the U.N. Secretary General [i.e., the un-signing of the Rome Statute], to support the object and purpose of the Rome Statute of the Court; examination of methods by which the United States can support important criminal investigations of the Court, including cooperation on the arrest of fugitive defendants, the provision of diplomatic support, and the sharing of information, as well as ways in which it can cooperate with the Court in the prevention and deterrence of genocide, war crimes, and crimes against humanity." Independent Task Force, *U.S. Policy toward the International Criminal Court: Furthering Positive Engagement* (ASIL, 2009), available at http://www.asil.org.

That, in turn, makes the ICC overwhelmingly dependent on financial support from EU member states, thwarting its universal aspirations. It undermines efforts to expand ICC jurisdiction to countries that the United States might arguably have an interest in having subject to a permanent mechanism of accountability for war crimes and crimes against humanity (e.g., Indonesia, Syria, Iran, Sudan, Eritrea, Zimbabwe, but also geostrategic rivals such as Russia and China). It denies the ICC and its investigators the diplomatic power that they need to investigate crimes in countries whose governments are unwilling to cooperate. It denies the transport, intelligence gathering, and protection capacities of its military and governmental agencies. It is simple. One just needs to look at what difference active U.S. support of the ICTY, ICTR, and Special Court for Sierra Leone has made to start appreciating how much difference U.S. endorsement of the ICC could make.

Between the historical lows that the U.S. attitude toward international courts has reached since the end of the Cold War, and in particular since September 11, and the attitude the United States could have, given its power, role, history, culture, and constitutional structure, there is much room for maneuver. America needs change the world can believe in, to paraphrase President Obama's campaign slogan, on many issues, including international courts. It is becoming increasingly apparent that what Americans call a realist attitude is perceived around the world as a cynical one; what Americans call pragmatism is perceived as callousness and egotism; that à la carte commitment betrays insecurity; and that American exceptionalism and sense of mission come across as odious arrogance. Benignant support of international courts – and the ideals of peace, justice, and equality they stand for – is a practical, effective, low-cost, and low-risk way to reassure the world that the United States still stands by those ideals and is ready to lead the way as it did for the second half of the twentieth century.