Proliferation of International Courts and Tribunals: Is It Good or Bad?

Thomas Buergenthal*

Keywords: arbitration; dispute settlement; International Court of Justice; Proliferation of International Tribunals.

Abstract. In his opening lecture of the LL.M. Program in Public International Law at Leiden University, Judge Buergenthal examines whether the recent phenomenon of the proliferation of international tribunals is to be welcomed or regretted by those who are interested in seeing international law become a vibrant and politically relevant legal system. He addresses questions relating to their interaction and the delimitation of their respective roles.

I am delighted to be here today at your distinguished University. I have had the pleasure of knowing and collaborating in one way or another with a number of your Faculty members – particularly, Professors Schermers, Kalshoven, Dugard, and Alkema. Our friendship goes back many years, which makes this visit such a great pleasure for me.

Let me also take this opportunity to congratulate those of you in the audience who are beginning your LL.M. program of studies in public international law at the University of Leiden. You have made the right decision on at least two counts. First, you have chosen a very fine university with eminent international legal scholars; and, second, you could not have picked a better time to study international law. International law plays a much more important role in international relations today than at any other time in the past, and there is good reason to believe that this trend will continue.

The topic of my talk today is: ‘Proliferation of International Courts and Tribunals: Is It Good or Bad?’ Much has been written on the subject, so I am unlikely to say anything new or profound about it. I selected this topic because we are in fact witnessing such a proliferation. It has practical implications for students of international law and raises the question whether this proliferation is to be welcomed or to be regretted by those of us who are interested in seeing international law become a vibrant and politically relevant legal system in international relations. Moreover, even if one were to believe that there is nothing really wrong with the creation
of an ever increasing number of international judicial institutions, one will still have to address questions relating to their interaction and how to delimit their respective roles. I shall attempt to deal with some of these questions.

For the moment, I will keep you in suspense and not tell you whether I believe that the proliferation of international courts is good or bad. Instead, I would first like to provide you with an inventory of existing international courts and tribunals. I will not attempt to be exhaustive, since the complete list is long and would put you all to sleep. I am offering this inventory to provide the context for my talk. It occurs to me, however, that it might also benefit the many law students in this audience who are no doubt thinking of their future careers in international law and wondering what jobs are available in the field. To you I can say, things certainly look much more promising career-wise than in my day – you are the real beneficiaries of the inflationary tendency as far as the creation of international tribunals is concerned.

As you know, besides the International Court of Justice (‘ICJ’), we now have the following major international regional judicial and specialized tribunals: the International Tribunal for the Law of the Sea, the European Court of Human Rights, the Court of Justice of the European Union and its first-instance tribunal, and the Inter-American Court of Human Rights and its Commission, which is a quasi-judicial institution. The African Court of Human and Peoples’ Rights is also in the process of coming into being. There also exists the Andean Court of Justice, designed to serve the Andean common market. It is modeled on its European counterpart but it is not very active. Equally inactive is the new Central American Court of Justice. Not to be forgotten are the ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda – they are really two separate courts with one appellate tribunal – and the Iran-United States Claims Tribunal. This ad hoc body has now been in existence for about 20 years, and will no doubt continue for some years to come. The two existing ad hoc international criminal courts will soon be followed by a permanent International Criminal Court. It will most likely come into existence in two to three years. In the meantime, an ad hoc criminal tribunal for Sierra Leone is in the making and there is talk of one for East Timor. Mention should also be made of the World Trade Organization’s (‘WTO’) dispute settlement mechanism, which provides for the resolution of trade law disputes between member states of the WTO. A similar mechanism for the North American Free Trade Agreement (‘NAFTA’) also exists.

Not to be forgotten in making our inventory are the many international administrative tribunals in existence today. International administrative tribunals are established to enable employees of inter-governmental international organizations to sue their employers, which they could not do in national courts because these organizations are immune as a general rule from suit in domestic courts. These administrative tribunals have a very interesting jurisprudence that deserves more scholarly attention than it has
received. Among these institutions one finds the United Nations Administrative Tribunal and the International Labor Organization (‘ILO’) Administrative Tribunal. These two bodies adjudicate disputes not only between their own staff members and the UN or ILO; they also serve as the administrative tribunals for most of the other specialized agencies of the UN, such as the World Health Organization (WHO) or UNESCO, among others. Some specialized agencies, the World Bank and the International Monetary Fund (‘IMF’) for example, have their own administrative tribunals. Many distinguished international lawyers serve or have served as judges on these tribunals. At one point, the World Bank Administrative Tribunal included among its judges such eminent internationalists as Jiménez de Aréchaga, who had been a president of the ICJ, as well as Professors Elihu Lauterpacht and Prosper Weil, to mention just three. Another such body is the Administrative Tribunal of the Inter-American Development Bank. I had the pleasure of serving on this body with Judge Luzius Wildhaber, the current President of the European Court of Human Rights, while I was still a judge of the Inter-American Court of Human Rights, and he is a member of the old European Human Rights Court. Judge Stephen Schwebel, my American predecessor on the ICJ, served for many years as judge on the IMF Administrative Tribunal; he is now its President. The Asian Development Bank also has an administrative tribunal, as does the Organization of American States (‘OAS’), as do many other such institutions.

The fact that leading international law practitioners and judges serve on these administrative tribunals contributes to the cross-fertilization of international jurisprudence and thus to the enrichment of international law in general. Let me emphasize, in this connection, that it is a mistake to assume that these tribunals deal only with narrow questions relating to the interpretation of employment contracts and pension rights. They do that too, but, in addition, they deal more and more with human rights issues, particularly due process of law questions and various forms of discrimination, whether it be racial, religious, or sexual, as well as with sexual harassment claims. I regard them therefore as specialized human rights tribunals whose jurisprudence deserves more attention from those interested in international human rights law.

There is yet another ever-expanding group of tribunals that belong on our inventory list of international judicial and quasi-judicial institutions. These are the various types of international arbitral tribunals. First, there are those that deal only with disputes involving private parties of different nationalities and frequently concern transnational commercial disputes. They are not inter-governmental or inter-state in character, and the law they apply is generally not public international law, but national law, private international law, and international commercial law.

At the other extreme are the types of ad hoc arbitration tribunals that are set up when two states have a dispute and decide to settle it by arbitration instead of going to an existing international court. Such ad hoc
tribunals have a long history and for centuries were the only institutions that provided the world with international law jurisprudence. They continue to be established. Of course, as a theoretical matter, the Iran-United States Claims Tribunal probably falls into this category, as do the various mixed arbitral commissions that existed before and between the two World Wars. The United States and Mexico had such a body, and, if I remember correctly, it was in business even longer than the Iran-United States Claims Tribunal. There is of course also the Permanent Court of Arbitration (‘PCA’), the grandparent of modern inter-state arbitration, which has its seat in The Hague. It is not a court as such and is permanent only in the sense that it has a permanent secretariat and a list of panels of arbitrators to which the parties to a dispute may resort when they agree to establish their arbitral tribunal. While initially set up to deal only with inter-state disputes, the PCA is today available as an arbitration facility that private parties and states may also utilize.

The third category of arbitral mechanisms consist of international arbitral institutions that provide dispute settlement facilities to states and private persons to resolve disputes between them. The modern prototype of such institutions, in addition to the PCA, is the International Centre for Settlement of Investment Disputes (‘ICSID’), which is a World Bank institution. It was established by the 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States and has more than a hundred member states. As its name indicates, ICSID is the forum for the resolution of disputes between private investors and governments. The proliferation of so-called Bilateral Investment Treaties (‘BITS’), which frequently confer dispute resolution jurisdiction on ICSID, has in recent years dramatically increased the ICSID caseload.

Here you should keep in mind that the law which applies to most of ICSID arbitrations and similar types of arbitrations is a mixture of public international law, private international law, and national law, with all three types of law relevant to the resolution of a particular dispute. Public international law tends to play an important role in these arbitrations because at least one party to the dispute is a state and because the outcome of some disputes turn on the interpretation of treaties. What you have here is confirmation to a certain extent of the thesis, which is gaining support among international lawyers, that the traditional dividing line between public and private international law, including international commercial and economic law, is gradually becoming less pronounced and relevant. This is the result, of course, of the fact that bilateral and multilateral treaties and conventions deal increasingly with subjects that regulate and facilitate private cross-boundary conduct and transnational commercial relations of all kinds. The entire process is driven by the globalization and privatization revolution. Globalization and privatization can function effectively only within a legal infrastructure consisting of an amalgam of different national and international laws and institutions in which the
academic distinctions between international public and private law gradually lose significance. Whether one likes it or not, privatization and globalization are transforming the role and character of international law and, with it, the function of international dispute settlement mechanisms.

But ICSID and the PCA not alone in providing arbitral facilities for the settlement of disputes between private parties and states. There are various private institutions, such as the London Court of International Arbitration (‘LCIA’) and the International Court of Arbitration of the International Chamber of Commerce (‘ICC’) in Paris, which also provide arbitral facilities for the adjudication of disputes between states and private parties, although most of their caseload consists of disputes between private parties only. The jurisdiction of these institutions to deal with disputes involving governments and private parties is based on arbitration clauses found in numerous international commercial agreements concluded by states and private commercial enterprises. The number of these agreements and the arbitrations giving rise to them are also increasing dramatically. What is particularly interesting, in this connection, is that a treaty drawn up under the auspices of the United Nations, the so-called New York Convention,1 which has now been ratified by more than a hundred countries, has proved to be an effective mechanism for the enforcement of international arbitral awards by the national courts of the states party to the New York Convention. This enforcement mechanism can be invoked by and against states and private parties.

What this by no means complete inventory of international judicial, quasi-judicial, and arbitral institutions and mechanisms suggests is that an increasing number of disputes involving states are dealt with by third-party adjudication of one form or another, traditional and non-traditional. As a consequence, international law plays an ever-increasing role in the resolution of such disputes, whether or not they are adjudicated or settled by negotiations. That is to say, the availability of these dispute-resolution mechanisms and institutions, even if they are not resorted to in a particular case, increases the role law plays in bilateral and multilateral negotiations. The more such institutions exist in the background, the more the law they apply provides the normative context for negotiated settlements. This law, of course, also influences the contents of international conventions, domestic legislation, and national jurisprudence applicable to international transactions and international relations.

Much more important is the very special effect that the existence and proliferation of these judicial, quasi-judicial, and arbitral institutions have on states. They socialize states, in my opinion, to the idea of international adjudication, that is, they tend to make states less reluctant of and more agreeable to the idea of settling their disputes by adjudication or arbitra-

---

tion. Put another way, the proliferation of international tribunals is both the consequence of and a major factor contributing to the acceptance by states of international adjudication, as a viable and effective option for the resolution of disputes between them. This phenomenon contributes, in turn, to the development and application of international law and its increased relevance in international relations. The proliferation of international tribunals with specialized and regional competence has in recent decades enabled governments to experiment with and observe the effects of international adjudication involving states and their acceptance of the jurisdiction of international tribunals. That is why I believe that in general the proliferation of international tribunals has been beneficial. It has contributed to the development of international law and increased its relevance to the conduct of contemporary international relations to a much greater extent than in the past, and that is certainly a welcome development.

It is clear, at the same time, that the proliferation of international tribunals can also have adverse consequences for the development of international law. A major risk, and one that is frequently noted by commentators, is that the jurisprudence of the different international tribunals can erode the unity of international law, lead to the development of conflicting or mutually exclusive legal doctrines, and thus eventually threaten the universality of international law.

Let me give you one example of the type of problems that are already beginning to emerge. Recently, the Inter-American Court of Human Rights rendered an Advisory Opinion in which it interpreted the scope of Article 36 of the Vienna Convention on Consular Relations, which deals with the right of consular officials of one state to communicate with and render assistance to their nationals detained or arrested in another State.\(^2\) The Court was asked to decline to comply with the request or delay acting on it because some of the same issues were raised in a contentious case pending before the International Court of Justice. That is the LaGrand case, brought by Germany against the United States, which will be heard by the ICJ in November.\(^3\) The Inter-American Court did not see the pending ICJ case as an obstacle to proceeding, and rendered a very extensive Advisory Opinion. It is, of course, impossible to say at this time whether the ICJ will in fact reach a conclusion different from that of the Inter-American Court, but such a conflict is theoretically possible. Similar conflicts can also arise, for example, between decisions of the ICJ and those of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) or the Law of the Sea Tribunal. In fact, one such conflict


\(^3\) Case LaGrand (Germany v. United States) (case under deliberation at the time of publication).
involving the holding of the ICTY in the Tadić case and the Judgment of the ICJ in the Nicaragua case has already arisen.

I must say, I do not see the likelihood of these conflicts as major risks, at this time, to the unity of the international legal system, provided the various tribunals stay within their respective spheres of competence, apply traditional international legal reasoning, show judicial restraint by seeking to avoid unnecessary conflicts, and remain open to reconsider their prior legal pronouncements in order to take account of the case-law of other international courts. Such attitudes, if they become the modus operandi of international courts, would go a long way in recognizing that they are all part of the same legal system.

The Inter-American Court, for example, could substantially reduce the possibility of an irreconcilable conflict between its holding and a possible contrary judgment of the ICJ if it limited its interpretation of Article 36 of the Consular Convention to the context of the inter-American human rights system. It must be kept in mind, however, that if the ICJ were to reach a different conclusion regarding the obligations of states under the Vienna Consular Convention than the Inter-American Court, states parties to inter-American human rights instruments would be deemed to have different obligations among themselves under the Vienna Convention than vis-à-vis states not members of the inter-American system. This problem would not be serious as long as the Inter-American Court recognized that its interpretation of universal treaties would have to be reconsidered if it were to conflict with subsequent judgments of the ICJ. Unless regional and specialized courts adopt such a policy of judicial deference with regard to the interpretation of universal treaties, serious practical problems will arise for states. These, in turn, would detract from the legitimacy and efficacy of international judicial pronouncements in general, besides leading to unseemly forum shopping. The same deference would have to be shown by such tribunals with regard to ICJ pronouncements regarding the contents of specific customary international law principles or with determinations relating to the competence or authority of universal international organizations, where the ICJ may rightly be deemed to have the last word on the subject. Judicial deference must not be a one-way street, however. There will be situations where the ICJ will have to reconsider or modify some of its holdings to avoid conflicts with pronouncements of regional or specialized tribunals within their primary jurisdiction.

It is clear, of course, that conflicts cannot always be avoided and that they will arise as long as there does not exist within the international legal system a court with authority to render final decisions binding on all other courts within the system. No such court is likely to be established in the near future, nor is it realistic at this time to assume that the juris-

---

diction of the ICJ will be expanded to give it the same power that the Court of Justice of the European Union has and give such a court the power to render preliminary decisions interpreting treaties and customary international law.

Short of the existence of such institutional mechanisms, conflicts will arise. Here it is important for all international tribunals, the ICJ as well as the other specialized and regional courts, to recognize that they are all part of the same legal system and that this fact imposes certain obligations. Of these, the most basic one is the obligation to accept the method-ological and doctrinal unity of the international legal system. This means, among other things, that each tribunal has an obligation to respect the general and special competence of the other judicial and quasi-judicial institutions which comprise the system, to recognize that it has an obligation, when rendering judgments, to take account of the case-law of other judicial institutions that have pronounced on the same subject and, most importantly, to promote and be open to jurisprudential interaction or cross-fertilization.

Let me illustrate what I mean by jurisprudential interaction. As you know, the European and Inter-American Human Rights Courts, but particularly the European Court, has very creatively expanded the international law concept of the exhaustion of domestic remedies doctrine. It seems to me that other international courts, including the ICJ cannot simply disregard this body of law, when they have to deal with exhaustion of domestic remedies issues. This does not mean that these courts need necessarily follow the precedents set by the European or Inter-American Courts, since some of the precedents may be appropriate only for human rights cases. But if other courts decide not to follow these precedents, they have an obligation, in my opinion, to distinguish these precedents, that is, to explain why they cannot or need not follow them, and do so by reference to generally accepted methods of international legal analysis and discourse. Not irrelevant, in this connection, is the regrettable tendency of some international tribunals to cite only their own decisions as if other courts did not exist. The ICJ is not the only culprit in this regard. I believe that this tendency is bad and needs to be reversed, if only because it sends the wrong message regarding the conceptual unity of the international legal system. The vitality and creativity of contemporary international law can be greatly enhanced, I believe, if international courts and judges recognize that they are part of the same legal system. This means, among other things, that they should look to the jurisprudence of their sister institutions as sources from which to draw judicial inspiration and not to view the other institutions as competitors to be treated with disdain or to act as if they did not exist.

Finally, it should be asked whether we should continue to support the establishment of more and more regional and specialized international tribunals. To me the answer depends on the needs of the international community. For example, there was a real need for a permanent interna-
tional criminal court, and its establishment met that need. In the future, there may be a need for additional specialized courts. There certainly is a need for additional human rights courts in other regions of the world. In short, I do not see the problem as one of mere numbers, although I believe that there may come a time when the creation of too many specialized courts will gradually diminish the relevance of the ICJ and, with it, its capacity to contribute to the development of universal international law. This problem could of course be avoided if a way were found to relate such courts to the ICJ in a hierarchical relationship that would give the ICJ the final word on the subject, but this is not likely to happen soon. In the meantime, though, I do not believe that we have too many international courts and that they pose a serious threat to the international system.

Moreover, if I am right in believing that the proliferation of international judicial institutions has a socializing effect on states that leads to the ever greater acceptance by them of the jurisdiction and role of international tribunals, then it can be assumed that states will, in the future, be more willing to resort to the ICJ instead of creating more specialized tribunals to settle their disputes. The current increased caseload of the ICJ suggests that this development is beginning to take place. To take full advantage of it, the ICJ may have to reform or restructure its procedure and judicial *modus operandi*, but that is another topic. It is certainly not a topic that I, as the most junior in seniority member of the Court, dare to touch.