
No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary

Yuval Shany*

Abstract

The article assesses some of the theoretical and practical implications arising out of some recent changes in the field of international dispute settlement: the rise in the number of international courts, the expansion of their jurisdictional powers, their increased invocation by state and non-state parties, and the growing inclination of national courts to apply international law. Arguably, these developments point to the emergence of a new judiciary the operation of which is governed by a new ethos (international norm-advancement and the maintenance of co-operative international arrangements), which is different from the traditional ethos of international courts (conflict resolution). The article then moves on to discuss some of the 'blind spots' of the present judicial institutional landscape, which includes a consideration of the remaining difficulties associated with addressing politically-charged conflicts before international courts (especially those relating to war and terror), and problems relating to the enforcement of judicial orders and judgments. While national courts can, in theory, fill some of these remaining gaps, their actual ability to do so remains unclear. In addition, the article addresses in brief some concerns that the emergence of the new institutional judiciary may actually exacerbate: co-ordination problems, and concerns relating to the effectiveness and legitimacy of international adjudication.

1 Introduction

When applied to the international legal system, Alexander Hamilton's description of the judiciary as being 'beyond comparison the weakest of the three departments

* Hersch Lauterpacht Chair in International Law, Faculty of Law, Hebrew University of Jerusalem. The author thanks Prof. Cesare Romano, Dr. Iris Canor, and Dr. Tomer Broude for their most helpful comments and Ms. Erin Gray for her excellent research assistance. The research for this article was undertaken with the support of a European Research Council Starting Grant for Frontier Research.

of power¹ could have been regarded, until very recently, as somewhat of an understatement. Not only did international courts have little influence over the sword and the purse, their jurisdictional powers tended to be limited in scope and marginalized in substance. Hence, the expectation that international courts such as the International Court of Justice (ICJ) would serve as '[beacons] of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force'² was never fully realized. Whilst the ICJ and other courts may serve a useful purpose by offering a non-violent outlet for the resolution of simmering low-level and mid-level international conflicts,³ their contribution to the resolution of the most dramatic conflicts of the post-World War Two era (such as the cold war, decolonization, the Middle East conflict, and the war on terror) has been modest.⁴

The institutional vacuum existing at the international level had, in theory, left considerable space for national courts to assume a more robust international law-applying role and to fulfil, in line with Georges Scelle's famous *dédoulement fonctionnel* theory,⁵ an international judicial function. Yet, most national courts did not rise to the challenge. Instead, they tended to adopt a range of legal doctrines designed either to limit the penetration of international law into their domestic legal systems (for example, by embracing legal dualism or regarding international treaties as non-self-executing),⁶ or to minimize the impact of international law in situations which involved politically sensitive state interests (strategies of the latter kind have been dubbed by Eyal Benvenisti 'avoidance techniques').⁷

The upshot of all of this is that the international legal system has operated for the better part of the twentieth century without a strong international judiciary capable of fulfilling on a regular basis the traditional roles of the national judiciary – dispute

¹ Hamilton, 'The Federalist Papers No. 78: The Judiciary Department', *Independent Journal* (1788), 2.

² 13 UN GAOR Conference on International Organization, UN Doc 913/IV/1/74(1)(1945), at 393.

³ S. Rosenne, *The Law and Practice of the International Court 1920–2005* (2006), i, at 30.

⁴ See, e.g., Kooijmans, 'The ICJ: Where does it Stand?', in A.S. Muller *et al.* (eds), *The International Court of Justice: Its Future Role After 50 Years* (1996), at 411, 418 ('[i]n a Westphalian system which requires State consent to the Courts' jurisdiction or State acquiescence to compulsory jurisdiction, an adjudicative body can only play a limited role. The more sensitive the case is from a political perspective, the more the respondent will be inclined to resist the relevant clause on which the applicant relies as a ground for compulsory jurisdiction'); H. Lauterpacht, *The Development of International Law by the International Court* (1958) (reprinted in 1982), at 4 ('[i]t would be an exaggeration to assert that the Court has proven to be a significant instrument for maintaining international peace'); M.O. Hudson, *International Tribunals Past and Future* (1944), at 238–239 ('[i]t would be difficult to say... that any of the cases threatened to become *casus belli*').

⁵ See, e.g., G. Scelle, II *Précis de droit des gens: principes et systématique* (1934), at 10–12; Scelle, 'La phénomène juridique de déboulement fonctionnel', in W. Schätzel and H.-J. Schlochauer (eds), *Rechtsfragen der Internationalen Organisation* (1956), at 324.

⁶ For a discussion see Y. Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007), at 2–7.

⁷ Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: an Analysis of the Attitudes of National Courts', 4 *EJIL* (1993) 159.

settlement, law interpretation, and law application.⁸ As a result, many international disputes remained unresolved, numerous international law norms and doctrines remained underdeveloped, and international law, generally speaking, remained under-enforced. In short, the international rule of law has suffered from the absence of robust judicial institutions.⁹

But it appears that this unsatisfactory state of affairs has undergone a significant transformation over the last 20 years, mainly as the result of four parallel developments. First, the number of international courts and other international law-applying institutions (such as arbitration institutions and quasi-judicial committees) has grown exponentially. Significantly, almost all of the new judicial and quasi-judicial institutions created in recent decades were invested with compulsory powers of jurisdiction (in the sense that the jurisdiction of the new courts could be invoked unilaterally against parties to their constitutive instruments or, in the case of international criminal courts, against individuals subject to their jurisdiction).¹⁰ Secondly, the jurisdictional powers of important veteran international courts (such as the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR)) have expanded as a result of an increase in their membership, and reforms in their constitutive instruments.¹¹ Thirdly, the rate of usage of international courts has risen markedly, as has the role of individuals and international organizations in international court proceedings.¹² Finally, a number of national courts have adopted a more international law-friendly attitude and have started applying international law with greater frequency,

⁸ See, e.g., J. Coleman *et al*, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2004), at 34 ('[t]he primary responsibility of the judiciary is to apply the law ... in accordance with the rules of evidence and proof'); A. Barak, *The Judge in a Democracy* (2006), at 37 ('the primary function of the judicial branch is to judge (in other words, to resolve disputes by determining the facts, interpreting the law, filling in gaps and/or developing the common law)').

⁹ See, e.g., W. Friedman, *The Changing Structure of International Law* (1964), at 141 ('the role of international courts and tribunals in the evolution of international law is still a modest one'). See also O. Schachter, *International Law in Theory and Practice* (1991), at 5–9, 227; M. Shaw *International Law* (6th edn, 2003), at 12. For a discussion of the definition of the international rule of law see Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model', 44 *Virginia J Int'l L* (2003) 19, at 22.

¹⁰ For a discussion see Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), at 4–7; Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent', 39 *NYU J Int'l L & Politics* (2007) 791.

¹¹ See Protocol No. 11 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, ETS 155; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 Oct. 1997, OJ (1997) C340/173. Another example is the expansion and deepening of the jurisdiction of the GATT dispute settlement machinery after 1994 as a result of the establishment of the World Trade Organization (with its host of covered agreements) and the gradual increase in membership thereof.

¹² The most dramatic illustration of this may be seen in the flood of cases which came to the ECtHR after the entry into force of the 11th Protocol to the Convention: While the ECtHR has received some 1000 cases in the first 40 years of its existence, more than 40,000 applications were referred to the Court in 2007: Registry of the European Court of Human Rights, *Annual Report 2007* (2008), at 146, available at: www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf.

in what appears to be a professional and credible manner (even in politically-charged cases involving their own governments).¹³

Arguably, the cumulative effect of these developments has been the emergence of a stronger (though still fragmented) international judiciary, and a qualitative change in the configuration of the field of international dispute settlement. Whereas international law had been applied on relatively few occasions in the past, the operation of the new international judiciary has been much more ‘routinized’ – that is, international law has been applied more frequently, and with less fanfare, than was previously the case. In other words, international adjudication (which was once the exception to the rule – diplomatic settlement) is becoming the default dispute settlement mechanism in some areas of international relations. As a result, the operation of international courts nowadays increasingly resembles that of national courts, and the application of international law by national and international courts increasingly resembles the application of national law.

This article will try to assess some of the theoretical and practical implications arising out of the emergence of the new international judiciary. In Part 2, I argue that the rise in the number of international courts and the expansion of their powers should be primarily understood as a change in the ethos underlying the operation of international courts. International courts are moving away from a principal commitment to dispute settlement to the pursuit of other goals, such as international norm-advancement and the maintenance of co-operative international arrangements (a change which coincides with a more general shift in international law from the law of co-existence to the law of co-operation).¹⁴ So, although the new judiciary seems to represent new levels of institutional effectiveness, its emergence is in part attributable to a recalibration of the ambitions and reach of international judicial bodies.

In Part 3, I consider some of the ‘blind spots’ of the present judicial institutional landscape, and include a discussion of the remaining difficulties associated with addressing politically-charged conflicts before international courts (especially those relating to war and terror), and problems relating to the enforcement of judicial orders and judgments. In the context of the deficiencies associated with international adjudication, the increased role of national courts as international law-appliers may prove to be particularly important – although there appear to be limits to the degree to which national courts are able to fill the institutional vacuum that still remains at the inter-state level. In Part 4, I offer some words of caution against adopting an over-optimistic view of the actual capabilities of the new international judiciary. Specifically, I address some concerns relating to coordination problems, and the relative effectiveness and legitimacy of international adjudication.

It must be emphasized that this article does not purport to offer an exhaustive or comprehensive analysis of the development of international courts, their promise, and limits. Instead, I use in the article a broad brush to describe briefly some of the trends in international adjudication and a few of the salient problems associated with the emergence

¹³ For a discussion see Shany, ‘National Courts as International Actors: Jurisdictional Implications’, Hebrew University International Law Research Paper No. 22-08, available at: SSRN: <http://ssrn.com/abstract=1292056>.

¹⁴ Friedman, *supra* note 9, at 61–62.

of the new judiciary, in a way that does not do full justice to some of the more complex issues I mention. In short, this article strives to offer some points to think about when discussing the past, present, and future of international courts – no more and no less.

2 The New Ethoi of the New International Judiciary

A *The World Court as a War-prevention Tool*

The ideological roots of the World Court – the Permanent Court of International Justice (PCIJ) and its successor, the ICJ – can be found in the ‘peace by law’ movement, which enjoyed considerable intellectual and political support in the late 19th century and early 20th century.¹⁵ Resolution of disputes before judicial bodies was regarded by adherents of the movement as an alternative to the ‘vicissitudes of war’,¹⁶ and permanent courts were viewed as a particularly effective adjudicative mechanism which could respond quickly to international crises, generate accumulated jurisprudence that would somewhat reduce the uncertainties attendant on adjudication, and attract, by virtue of their accumulated prestige, a good level of compliance.¹⁷ As a secondary goal, the PCIJ and ICJ were expected to contribute to the development of international law and to provide International Governmental Organizations (IGOs) with occasional legal guidance in the form of advisory opinions.¹⁸

A detailed evaluation of the success of the PCIJ and ICJ far exceeds the scope of ambitions of this article. At this stage, it suffices to observe that there seems to be broad agreement on the proposition that the record of achievements of the two courts has been mixed: Some disputes have been handled in a rather satisfactory manner, whereas the performance of the two courts has been less impressive in other instances.¹⁹ What is more, the profile of cases brought before the two courts has been heavily tilted in favour of low to mid-level international disputes. The most serious international disputes (which involved the actual use of force or imminent threats of war) have only rarely been brought before the PCIJ or ICJ. Even when explosive cases like *Nicaragua*,²⁰ *Bosnian Genocide*,²¹ or the *Wall*²² were referred to the World Court, its contribution to reducing the actual levels of violence appears to have been very limited.

¹⁵ See, e.g., I.L. Claude Jr., *Swords into Plowshares: The Problems and Progress of International Organization* (4th edn, 1971), at 215–227; H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), at 2–4.

¹⁶ See *supra* note 2. See also Lauterpacht, *supra* note 4, at 3 (‘the primary purpose of the International Court... lies in its function as one of the instruments for securing peace’).

¹⁷ A. Zimmerman *et al.*, *The Statute of the International Court of Justice* (2006), at 42–43; Rosenne, *supra* note 3, at i, 10–11; Lauterpacht, *supra* note 15, at 2–4.

¹⁸ See, e.g., T. Gill *et al.*, *Rosenne’s The World Court: What it is and How it Works* (6th edn, 2004), at 15–19.

¹⁹ See, e.g., Koskeniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden J Int’l L* (2002) 553, at 576.

²⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* [1986] ICJ Rep 14.

²¹ *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia-Herzegovina v. Serbia)*, Judgment of 26 Feb. 2007, 46 ILM (2007) 188, available at: www.icj-cij.org/docket/files/91/13685.pdf.

²² *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* [2004] ICJ Rep 136.

Of course, the inability of the PCIJ and ICJ fully to realize the expectations they generated is closely linked to their weak jurisdictional structures, which emphasized the exceptional nature of international adjudication and the perceived limits of the international rule of law.²³ Since the two courts could exercise their dispute-settling powers only if both parties agreed thereto, states grew accustomed to their *de facto* veto power over the judicial dispute settlement apparatus. Indeed, under the jurisdictional system created by the PCIJ and ICJ Statutes, the higher the stakes were the lower was the incentive of the parties to surrender control over the subject matter of the dispute to an international court. In those few cases where states have not been careful enough to shield their important interests from the jurisdictional purview of the World Court (by miscalculating the implications of compromissory clauses found in treaties or optional clause declarations) and have subsequently been dragged to court against their will, they have tended to withhold their full co-operation from the process and have sometimes refused to fully comply with the Court's judgments.²⁴

So, the PCIJ and ICJ have typically been utilized in cases of low-level and mid-level importance, where both parties have believed that the prolongation of their disputes entailed more costs than the risks that might be associated with losing the subject-matter of the dispute. Viewed in this context, the performance of the PCIJ and ICJ appears to be rather positive. Some disputes which, if left unchecked, could have ultimately deteriorated into violence were effectively resolved.²⁵ The jurisprudence of the World Court has also contributed to the development of international law. Moreover, it looks as if the greater predictability of permanent court judgments and the lower transaction costs associated with the invocation of their jurisdiction (compared with *ad hoc* arbitration bodies which tend to be less predictable and the establishment of which may involve considerable costs) did increase the overall 'pie' of international litigation.²⁶

²³ See *Abi-Saab*, 'Fragmentation or Unification: Some Concluding Remarks', 31 *NYU J Int'l L & Policy* (1999) 919, at 922; Lauterpacht, *supra* note 15, at 166–172.

²⁴ See, e.g., Oda, 'The Compulsory Jurisdiction of the International Court of Justice: A Myth?', 49 *ICLQ* (2000) 251, at 264; R. Falk, *Reviving the World Court* (1986), at 34.

²⁵ In particular, one may note the important contribution of the PCIJ in facilitating the implementation of some sensitive provisions of the Versailles Peace Treaties relating to Polish–German relations, through a continuous process of judicial interpretation and performance monitoring. See, e.g., *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ (Ser. A), No. 6 (1925); *Factory at Chorzów (Germany v. Poland)*, PCIJ (Ser. A), No. 9 (1927); *Rights of Minorities in Upper Silesia (Germany v. Poland)*, PCIJ (Ser. A), No. 15 (1928); *German Settlers in Poland (Advisory Opinion)*, PCIJ (Ser. B), No. 6 (1923); *Acquisition of Polish Nationality (Advisory Opinion)*, PCIJ (Ser. B), No. 7 (1923); *Access to German Minority Schools in Upper Silesia (Advisory Opinion)*, PCIJ (Ser. A/B), No. 40 (1931); *Access to, or Anchorage in, the port of Danzig, of Polish War Vessels (Advisory Opinion)*, PCIJ (Ser. A/B), No. 43 (1931); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion)*, PCIJ (Ser. A/B), No. 44 (1932).

In a similar vein, the ICJ distinguished itself in handling border delimitation cases. See, e.g., *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 Oct. 2007; *Frontier Dispute (Benin/Niger)* [2005] ICJ Rep 90; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625.

²⁶ See Lauterpacht, *supra* note 16, at 3.

B The Jurisdictional Structure of the New Judiciary

The emergence of new international courts in the second half of the twentieth century started with the establishment of the ECtHR and the ECJ in the 1950s, and accelerated in the 1990s with the establishment and/or operationalization of more than a dozen new regional and global courts. Among those newly established courts one may find the International Criminal Court (ICC), the International Tribunal for the Law of the Sea (ITLOS), the World Trade Organization Appellate Body (WTO AB), and a large number of arbitration institutions and quasi-judicial bodies which have, in combination, dramatically transformed the field of international dispute settlement.²⁷

Notably, the jurisdictional structure of almost all of the new courts diverged from the traditional jurisdictional modality presented by the PCIJ or ICJ in three principal ways. First, almost all of the new courts were invested with compulsory jurisdiction over certain disputes, a development representing a radical departure from the consensually-based 'opt-in' jurisdictional structure of the PCIJ and ICJ.²⁸ The significance of this factor is apparent. Whereas litigation before the PCIJ and ICJ has been exceptional in nature, litigation before newer courts such as the WTO AB or ECtHR can be (and has, in fact, been) initiated in a much more regular manner. Moreover, while the normative impact of the World Court has been curtailed by its inability to address the vast majority of international conflicts, the compulsory jurisdiction of the new international courts has generated a significant 'shadow effect' – extending their normative impact far beyond the scope of the cases which they actually adjudicate.²⁹

Secondly, many of the new international courts, especially those operating in the fields of human rights, investment protection, and economic integration, have been opened up to non-state parties, thus removing international adjudication from the exclusive domain of states. Of course, the mere increase in the number of potential litigants has direct quantitative implications for the frequency of international litigation; yet the involvement of non-state parties has also facilitated a qualitative change in the tendency to litigate disputes. While states often view their litigation options from a broad political perspective (which often favours the advancement of diplomatic interests over upholding specific legal rights), non-state actors, and individuals in particular, operate more like 'private attorneys-general', and may be more inclined than states to resort to litigation in order to uphold international law norms before national and international courts.³⁰ The upshot of both of these developments has been the

²⁷ For an excellent survey of the increase in the number of international courts in the 1990s see Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *NYU J Int'l L & Policy* (1999) 709.

²⁸ For a survey of this development see Romano, *supra* note 10, at 808–816.

²⁹ See Chinkin, 'Alternative Dispute Resolution under International Law', in M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (1998), at 123, 126–127. For a general discussion on the 'shadow of litigation' phenomenon see Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *Yale LJ* (1979) 950.

³⁰ See, e.g., Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law', 6 *Indiana J Global Legal Studies* (1999) 579, at 633; Romano, *supra* note 27, at 742–745; Brilmayer, 'International Law in American Courts: A Modest Proposal', 100 *Yale LJ* (1991) 2277, at 2303.

creation of a more prominent role for international law in those areas of international relations governed by the new international judiciary.

Thirdly, unlike that of the PCIJ and the ICJ (which have been invested with general personal and subject-matter jurisdiction), the new international courts' jurisdiction is more limited in its reach. Their jurisdiction has been typically restricted to the interpretation and application of a specific treaty, set of treaties, or specific branch of international law (such as human rights law, in the case of the African Court of Human and Peoples' Rights,³¹ or investment law in the case of the International Centre for the Settlement of Investment Disputes (ICSID)). In addition, most new courts were established on a regional basis, and are thus available to a limited number of states parties and non-state actors. Hence, one may identify a 'trade-off' between the depth and the reach of international jurisdiction. Whereas the classic courts had 'shallow' jurisdictional powers (i.e., optional jurisdiction) over all potential international disputes, the new courts have a much 'deeper' jurisdictional basis (i.e., compulsory jurisdiction), but only over a limited number of issues pertaining to a limited number of parties.

C From War-prevention to Norm-advancement

This 'trade-off' between depth and reach, however, has more important implications than simply signifying a different formulation for judicial authorization. Indeed, the new courts seem to be committed to a different ethos from that which had underlain the PCIJ and ICJ. As already noted, the World Court was established as a dispute-settlement body primarily designed to offer states an attractive alternative to international violence. Alas, this *raison d'être* became less compelling after war was outlawed by Article 2(4) of the UN Charter (and the concomitant authorization of the Security Council to monitor and secure the application of the ban on interstate violence). In addition, the less-than-impressive success rates of both the PCIJ and ICJ in handling violent or imminently violent situations have cast doubts on whether it is even realistic to expect courts to prevent wars. Indeed, as noted above, it appears as if the PCIJ and ICJ themselves have, over time, effectively redefined their role and assumed the more mundane tasks of defusing low-level and mid-level tensions before they escalate further, improving international relations, and supporting certain treaty regimes.³² If an analogy were to be made with the world of medicine, the PCIJ and ICJ seem to have transformed themselves from providers of heroic and life-saving emergency treatment into providers of preventive health care and quality-of-life related treatment.

The new international courts have taken the project of recalibrating the ambitions of the international judiciary one step further. In fact, one may argue that, despite their frequent engagement in dispute settlement activities, the new courts are no longer

³¹ This court was merged in 2008 with the African Court of Justice, leading to the establishment of the African Court of Justice and Human Rights: Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available at: www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf.

³² See Rosenne, *supra* note 3, at i, 29–32.

primarily dispute-settling bodies (constituting a permanent law-based alternative to arbitration and diplomatic dispute settlement procedures). They appear to have assumed two other primary functions instead: norm-advancement and regime maintenance.

When fulfilling their judicial roles, all of the new and specialized courts seem to put a special emphasis on the advancement of specific normative and institutional goals. These goals may involve the strengthening of the co-operative regime in which the courts operate (e.g., the EC or the WTO)³³ or, in the case of human rights or criminal law courts, promoting a set of values such as human rights, or an end to impunity for international criminals.³⁴ So, an accessible judicial process is one of the tools used by treaty-makers (and judges) to advance substantive outcomes by way of improved norm-enforcement and more systematic norm-elaboration, and it looks as if the resolution of the underlying conflict between the parties to litigation takes a 'back seat' to the courts' norm-advancing mission.³⁵

This normative *Missionsbewusstsein* or 'in-built bias'³⁶ accounts for many of the differences between the judgments of the specialized courts and the PCIJ/ICJ. It also explains the differences between decisions issued by the alternative specialized courts which pull in different normative directions.³⁷ In addition, variations in the norm-advancement agendas of different courts may account for the distinct ways in which such courts view the desirability of the involvement of national courts in matters falling under their parallel jurisdiction.³⁸

³³ For a discussion of the role of the ECJ in reconstructing the EC legal order see Weiler and Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in A.-M. Slaughter *et al.* (eds), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (1998), at 331, 339–340. See also Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', 68 *Law & Contemporary Problems* (2005) 63, at 96 ('[t]he WTO Dispute Settlement Body (DSB) – and especially the Appellate Body – has increasingly defined its role as promoting the sound and consistent regulation of the international trade regime').

³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, preamble, ETS 5 ('[b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'); Rome Statute of the International Criminal Court, 17 July 1998, preamble, 2187 UNTS 90 ('[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation').

³⁵ See, e.g., ECHR, *supra* note 34, at Art. 38(1)(b) ('[the Court shall] place 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') (emphasis added).

³⁶ See Koskeniemi and Leino, *supra* note 19, at 567, 573.

³⁷ For a study of the differences in the legal international legal doctrines developed by international courts see Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 *Recueil des cours* (1998) 101.

³⁸ Courts which serve legal regimes that put a high premium on preserving their internal coherence and stability tend to resist attempts by national courts to interpret and apply the norms that comprise part of the regime (out of fear that extensive involvement by national court may disrupt the regime's delicate equilibrium). See Shany, *supra* note 6, at 33–34, 150. But other norm-advancing courts tend to engage national courts, which they view as important partners which can complement their task, and encourage them to contribute to the norm-advancement project. See *ibid.*, at 28–29, 34–36.

D Co-operation-maintenance

While all specialized courts promote normative agendas, one may identify a sub-category of international courts whose mission is unique in the sense that it is closely linked to a specific legal regime, which is based, in turn, on intense co-operative relations between the regime's member states. Hence, economic integration/trade liberalization courts such as the ECJ or WTO AB appear to have been created primarily in order to help sustain a very delicate equilibrium between the states parties and other stakeholders participating in a specific legal regime, and between the states and other stakeholders and the regime's institutions.³⁹ Given the complexity of economic integration and trade liberalization treaty regimes and the far-reaching concessions they require from participating states, it is only logical that upon entering the regime states expect to receive some procedural safeguards which would ensure that they obtain the benefits associated with membership of the regime.⁴⁰ By providing a variety of services – continuous interpretation of the applicable legal norms, monitoring compliance by other states parties, authorizing the application of sanctions against non-compliers and placing checks on the power of the regime's institutions⁴¹ – international courts operating within the aforementioned regimes seem to be meeting these expectations. By offering their law-interpretation, law-application, and dispute-settlement services, international courts can promote legal certainty, maintain the credibility of the legal undertaking of states, raise the costs of non-compliance, and defuse intra-regime tensions. In other words, international courts, such as the ECJ and WTO AB, promote the goals of their overarching regimes, but at the same time help to maintain, under changing circumstances, the political, economic, and legal equilibrium that states reasonably expected to hold among them when joining a specific co-operative regime.⁴²

In sum, when compared with the PCIJ and the ICJ, the new international courts should be understood not as simply being more of the same, but rather as courts operating under new *ethoi*. These courts are not designed to prevent violence and wars, although this may be in some cases an indirect side-effect of their existence.⁴³

³⁹ See Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', 44 *Duke LJ* (1995) 829.

⁴⁰ See Abi-Saab, *supra* note 23, at 925 ('[t]o each level of normative density, there corresponds a level of institutional density necessary to sustain the norms').

⁴¹ The effectiveness of the power of review exercised by international courts over the institutions of the regime in which they operate has been put into question, however. See, e.g., Kingsbury *et al.*, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15, at 45.

⁴² See Case 39/72, *Commission v. Italy* [1973] ECR 101, at 115 ('[f]or a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discrimination at the expense of their nationals').

⁴³ For a recent discussion of the link between international criminal courts and reconciliation see Damaska, 'What is the Point of International Criminal Justice?', 83 *Chicago-Kent L Rev* (2008) 329. See also R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2007), at 28 ('[s]ome of the most serious doubts that have been expressed about international criminal law relate to the claim that it promotes peace and reconciliation'); Broude, 'Between Pax Mercatoria and Pax Europea: How Trade Dispute Procedures Serve the EC's Regional Hegemony', in P.B. Stephen (ed.), *Economics of European Union Law* (2007), at 319.

Moreover, their main function is not to resolve disputes or to decrease international tensions (in fact, the operation of courts such as the ICC and ECtHR may on occasion give rise to international tensions, and complicate diplomatic relations). What these new courts appear to aim for is strengthening the rule of law in some areas of international relations which have undergone, or are undergoing, a process of legalization – that is gradually being removed from the vicissitudes of international politics.

3 Minding the Gaps

A Jurisdictional Gaps

While the new international judiciary is no doubt impressive in its scope and reach, it is perhaps too early to celebrate its emergence as the triumph of international order over anarchy. As a matter of fact, the new courts have been concentrated in a relatively limited number of areas of international relations, mostly appertaining to the protection of basic human rights, some economic relations, and maritime interests. Many other areas of international life remain outside the compulsory jurisdiction of any international court. What is more, the personal jurisdiction of the new international judiciary is less than universal, and sometimes those very states that are most likely to become involved in conflicts falling under the jurisdiction of the new courts tend to withhold their consent to jurisdiction.

So, for example, matters relating to the use of force (*jus ad bellum* and *jus in bello*) and international terrorism remain outside the scope of the compulsory jurisdiction of most international courts. Even if some legal aspects relating to the use of force or terror can, under certain circumstances, fall under the subject matter jurisdiction of international human rights courts or international criminal courts (the first group of courts having jurisdiction over certain acts of violence taking place within the territory of the states parties and other areas subject to their effective control;⁴⁴ the latter having jurisdiction over some international crimes committed in times of conflict),⁴⁵ states likely to become involved in hostilities may succeed in evading the jurisdiction of all such courts. Moreover, even when international courts are formally competent to address use of force-related matters, they seem, at times, reluctant to confront the ‘big powers’,⁴⁶ and on a number of occasions they have applied dubious legal

⁴⁴ See, e.g., App. No. 57950/00, *Isayeva v Russia*, ECtHR, Judgment of 24 Feb. 2005; App. No. 31821/96, *Issa v. Turkey*, ECtHR, judgment of 16 Nov. 2004. See also *Las Palmeras v. Colombia*, Judgment of 6 Dec. 2001, I/A CHR (Ser. C), No. 90.

⁴⁵ See ICC Statute, Art. 6.

⁴⁶ See Slaughter and Helfer, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’, 93 *California L Rev* (2005) 899, at 946–951 (judges are operating within a set of legal, political, and discursive constraints).

doctrines and factual assertions which have resulted in the dismissal of sensitive cases involving the use of force.⁴⁷

True, there are a few counter-examples in which courts such as the ICJ and the ECtHR have reviewed violent or otherwise sensitive conflicts against the wishes of the great powers (or their close allies),⁴⁸ but their success rates in actually resolving such disputes appear to be rather limited.⁴⁹ Not only were some of the proceedings (and the subsequent enforcement procedures) hampered by the resistance presented by some of the parties,⁵⁰ the scope of involvement of international courts in these cases has at times been narrowly constrained by far-reaching jurisdictional limitations.⁵¹ This has led to a less-than-comprehensive judicial approach, and to an inability to address the root cause of the conflict. In any event, the involvement of international courts in violent conflicts is too haphazard in nature, and thus does not have the capacity for establishing a meaningful ‘rule of international law’ in this sphere of international relations. So, the reach of international courts is still restricted. No compulsory or effective jurisdiction exists over some of the most contentious issues in international relations, or over many of the states involved in such conflicts.

B Enforcement Gaps

Another notable gap, which needs to be acknowledged, still exists in relation to the enforcement powers of the international judiciary. The increase in the jurisdictional

⁴⁷ See, e.g., App. No. 71412/01, *Behrami v. France*, ECtHR, Judgment of 2 May 2007 (holding that states involved in multinational operations in Kosovo are not responsible for human rights violations committed by the troops); *Banković v. Belgium*, ECtHR, Judgment of 19 Dec. 2001 (holding that bombing operations conducted in the territory of a non-Convention country are not covered by the European Convention); *Legality of the Use of Force (Serbia and Montenegro v. Belgium)* [2004] ICJ Rep. 279 (holding that Yugoslavia was not a party to the ICJ Statute in 1999 and could not consequently bring a claim against NATO member states); Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, 39 ILM (2000) 1257 (holding that there was no *prima facie* evidence implicating NATO service members in war crimes committed during the Kosovo campaign).

⁴⁸ See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Order of 15 Oct. 2008; *Armed Activity on the Territory of Congo (DRC v. Uganda)* [2005] ICJ Rep 166; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), *supra* note 22; *Oil Platforms (Iran v. US)* [2003] ICJ Rep 161; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, *supra* note 20; *Isayeva, supra* note 44; *Issa, supra* note 44.

⁴⁹ See, e.g., Ginsburg and McAdams, ‘Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution’, 45 *William & Mary L Rev* (2004) 1229, at 1327–1329.

⁵⁰ See Zimmerman, *supra* note 17, at 110 (describing Nicaragua’s inability to enforce an ICJ judgment against the US); Leach, ‘Implementation of the First ECHR Judgments Relating to Chechnya’, *EHRAC Submission* (2007), available at: http://ejp.icj.org/IMG/EHRAC_submission.pdf (noting a number of deficiencies in Russia’s compliance with ECtHR judgments relating to Chechnya).

⁵¹ For example, the recent *Georgia v. Russia* case was brought to the ICJ on the basis of Art. 22 of the CERD Convention (the compromissory clause); hence, the Court can address violations only of that specific convention. For criticism of the decision to base jurisdiction on such narrow grounds see *Application of CERD, supra* note 48, joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna, and Skotnikov, at para. 9. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)*, Judgment of 26 Feb. 2007, at para 147 (‘[the Court] has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*’).

reach of international courts has not been met by a comparable increase in their enforcement capabilities, which would enable courts effectively to carry out their missions.⁵² While this may be less of a problem in the economic sphere (where cooperative regimes typically generate their own incentives to comply),⁵³ it appears to be a serious obstacle to the smooth functioning of international courts in the field of criminal law. Where the apprehension of suspects holding high office (such as President Bashir of Sudan) or fugitives from justice (such as General Mladić from Republica Srpska) is required, lack of effective enforcement procedures may complicate an already long and uncertain process.

Moreover, problems of sub-optimal compliance arise in other contexts too. As the recent *Medellin* saga illustrates,⁵⁴ compliance with ICJ judgments and orders which run counter to state interests of perceived importance still leaves much to be desired. In fact, the procedure in place under Article 94 of the UN Charter for securing compliance with ICJ decisions has never been activated and appears to have fallen into desuetude.⁵⁵ Even in the ECtHR system, where a long political tradition supports voluntary compliance with judgments, financial compensation ordered by the Court is paid within the required deadlines only in less than 60 per cent of cases.⁵⁶ Furthermore, it appears that legal and structural reforms pursuant to ECtHR judgments occur at an even slower pace (one may note that the record of compliance with decisions of other human rights courts and commissions is far less impressive than the record of compliance commanded by the ECtHR).⁵⁷

Against the background of the growing, yet still limited, jurisdictional reach of international courts and their sub-optimal enforcement capabilities, one may look at developments at the national level as a potential complementary source for the work of international courts. Indeed, recent judgments issued by some national courts in countries such as the UK and Israel on the war on terror, the Iraq war, and the Palestinian uprising⁵⁸ do seem to carry with them the promise of a more

⁵² For a comparable observation see Coleman and Doyle, 'Introduction: Expanding Norms, Lagging Compliance', in E.C. Luck and M.W. Doyle (eds), *International Law and Organization* (2004) 1, at 1 ('in many cases the explosion of international norms has not been accompanied by a complementary development of international institutions to monitor states' efforts to implement these norms, and to facilitate or to compel such compliance').

⁵³ But even in the economic sphere, the record of compliance with decisions of the WTO dispute settlement mechanism appears to have been less than impeccable. See, e.g., Gantz, 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties', 14 *American U Int'l L Rev* (1999) 1025, at 1084.

⁵⁴ See, e.g., *Medellin v. Texas*, 171 L Ed 2d 833 (2008); *Ex parte Medellin*, 2008 Tex Crim App LEXIS 851 (2008); *Medellin v. Dretke*, 128 S Ct 1346 (2008); *Medellin v. Dretke*, 544 US 660 (2005).

⁵⁵ See Zimmerman, *supra* note 17, at 1246 (discussing the dismal record of invoking UN Charter, Art. 94).

⁵⁶ Council of Europe – Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights* (2007), at 219.

⁵⁷ See, e.g., J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003), at 8–9; Viljoen and Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994–2004', 101 *AJIL* (2007) 1.

⁵⁸ See, e.g., *Al Skeini v. Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153; *R (Al Jeddah) v. Secretary of State for Defence* [2007] QB 621; *Secretary of State for the Home Dept v. JJ*, [2007] UKHL 45, [2008] AC 385; *HJ* 3239/02, *Marab v. IDF Commander in Judea and Samaria*, 57(2) PD 349; *HJ* 3799/02, *Adalah v. IDF Chief of Central Command*, 45 ILM 491 (2006).

meaningful partnership between national and international courts. These judgments use international law as a dominant legal framework in which to analyse the questions at hand and accord only a limited degree of deference to professed state interests which may justify deviations from the applicable international standards. In fact, in their style, methodology, and outcome, these judgments are sometimes indistinguishable from international judgments.⁵⁹ Arguably, if national judges apply international law in a credible manner, out of an explicitly or implicitly proclaimed sense of legal obligation, then they can be viewed as part of the international judiciary (perhaps regardless of the actual motivations which may explain their new-found internationalist tendencies).⁶⁰ The stronger jurisdictional powers and enforcement capabilities of national courts may thus compensate for some of the shortcomings of international courts.

Here too, however, one should not exaggerate the concrete ramifications of recent developments. While the trend to invoke international law before national courts is noticeable, its ultimate impact on the international rule of law is still unclear. At least one notable scholar has intimated that the increased involvement of national courts with international law may actually strengthen national sovereignty and operate as a counter-weight to international institutions. In other words, increasing the ability of national courts to purport authoritatively to interpret international law may detract, in the long run, from the authority of international bodies.⁶¹ Moreover, while increased in scope, the phenomenon of national courts acting like international courts is still incipient and limited in nature (one might even say ‘anecdotal’), and in the US at least, one may identify a shift in the opposite direction (consider the emergence of a *de facto* presumption in the Supreme Court against the self-executing status of international treaties and judgments).⁶² Hence, the long-term ability of national courts increasingly to embrace international law and to confront their governments or parliaments in cases involving essential state interests is still open to doubt.

What is more, the national courts of those states whose record of conduct is at the greatest variance with international standards are probably the least likely to apply international law against their own governments in a credible manner. Further, and in any event, because all national courts remain subject to rules on immunity of states and high state officials, their ability to hold foreign states and leaders accountable under existing international law remains limited.⁶³ So, at the end of the day, national courts may compensate only to some degree for the shortcomings of international courts.

⁵⁹ For a discussion see Shany, *supra* note 13.

⁶⁰ For a discussion of possible motivations see Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’, 102 *AJIL* (2008) 241.

⁶¹ *Ibid.*, at 244.

⁶² See *Medellin*, 128 S Ct 1346, at 1356–1357.

⁶³ See, e.g., *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270; *Arrest Warrant of 11 April 2000 (DRC v. Belgium)* [2002] ICJ Rep 3.

4 Taking the Bitter with the Sweet

A Jurisdictional and Normative Conflicts

While the increase in the number of international courts and the expansion of their jurisdictional powers have contributed to the promotion of the international rule of law (at least in some sectors of international life), these developments have not been free from problems and difficulties. In this section, I briefly survey some of the adverse effects relating to the emergence of the new judiciary.

The uncoordinated manner in which the new international courts were created, and the specialized character of their jurisdictional structures, generates potential jurisdictional conflicts and introduces tensions which threaten the coherence of the international legal system as a whole.⁶⁴ The current scale and level of seriousness of these problems are open to debate: While some writers have focused their gaze on the half-full part of the glass, acknowledging that only a few major clashes have occurred to date,⁶⁵ others have focused on the half-empty part of the same glass, acknowledging the increasing number of actual and potential jurisdictional clashes and normative fragmentation. But, notwithstanding the controversy over the scope of the current problem, there appears to be wide agreement that the existing institutional structures and legal doctrines offer very limited solutions to such problems, should they arise in the future.⁶⁶ So, if jurisdictional and normative relations between international courts (and between national and international courts) remain under-regulated, it cannot be negated that the costs and legal uncertainty associated with adjudication will dramatically increase over time. Moreover, if the situation continues to deteriorate (and the present writer is among those pessimists who believe that the current 'ostrich approach' taken by many courts and commentators is ultimately untenable), the advancement of the rule of law in some specific areas of international law may come at the expense of advancing the rule of law in other specific areas, and at the expense of the systemic welfare of international law in general.

This last 'trade-off' between specific and general systemic wellbeing may be illustrated by the recent judgment of the ECJ in *Kadi*.⁶⁷ While the case clearly asserts an important substantive rule of law principle under EU law (i.e., that the exercise of European governmental power is always subject to judicial review on the basis of

⁶⁴ For a discussion of these issues see Shany, *supra* note 10, at 77–127; Abi-Saab, *supra* note 23, at 925–930.

⁶⁵ See, e.g., Charney, *supra* note 35, at 371; Kingsbury, 'Is the Proliferation of International Courts and Tribunals a Systemic Problem?', 31 *NYU J Int'l L & Policy* (1999) 679.

⁶⁶ See International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 (2006), at 249 ('the emergence of conflicting rules and overlapping legal regimes will undoubtedly create problems of coordination at the international level. But... *no homogenous, hierarchical meta-system is realistically available to do away with such problems. International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions*') (emphasis in original text).

⁶⁷ Joined Cases C–402/05 P and C–415/05 P, *Kadi v. Council*, ECJ Judgment of 3 Sept. 2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>.

fundamental human rights), it sets in motion a jurisdictional competition between the EU, its Member States, and the UN Security Council with regard to the competence to review terror ‘blacklisting’ and delisting decisions. Moreover, the judgment invokes regional norms (general principles of Community law) in order effectively to set aside a universal norm (striking down the EC regulation which implements a Security Council Resolution), and advances a competing vision of normative hierarchy to that offered by Article 103 of the UN Charter. So, although *Kadi* can be said to strengthen the rule of law in Europe, its long-term impact on the authority of the Security Council (perhaps the most important organ of the international community) and the Council’s ability to order and co-ordinate international action in sensitive political matters (such as the international fight against terror) may be problematic. While it looks as if imposing ‘rule of law’ limits on the Security Council in some respects advanced the rule of law in international affairs, the jurisdictional and normative confusion over the powers of the Security Council generated by *Kadi* may be counter-productive in other respects.⁶⁸

B *Is the Judicialization of Dispute Settlement Desirable?*

Another potential group of problems relating to the increased prominence of international courts is more general in nature and derives from the inherent limits of any judiciary (though these limits are arguably more acute at the international than at the national level). The legalization of international relations and the attendant removal of conflicts from the diplomatic to the judicial realm, have some obvious advantages (for instance, procedural efficiency, fairness, and foreseeability); but there are also certain drawbacks associated with this move which need to be acknowledged.

Whereas diplomatic dispute settlement is flexible and may generate imaginative solutions which are closely attuned to the cumulative interests of the parties to the dispute,⁶⁹ judicial dispute settlement (being law-based) tends to be binary in nature and may run counter to important interests of some of the conflicting parties. In other words, as a problem-solving tool law has its limits. In addition, the confrontational nature of the adjudicative process may counter-productively contribute to exacerbation of the relations between the parties. As a result, while the judicial process will no doubt produce a legally binding outcome in a prescribed timeframe, the ability of that outcome to fix bilateral relations, solve the roots of the problem at hand, and generate compliance may be limited. While, similar shortcomings can also be found in domestic legal systems (this is, in fact, the lynchpin of the ADR movement in domestic law),⁷⁰ difficulties associated with formulating and amending international norms and the

⁶⁸ For an analogous observation see Krisch, ‘The Pluralism of Global Administrative Law’, 17 *EJIL* (2006) 247, at 275 (‘with the disappearance of a clearly competent authority and the resulting fluidity of decisions, the clarity and stabilization of expectations that we usually expect from the law would be severely compromised’).

⁶⁹ For a parallel argument taken from the ADR literature see Menkel-Meadow, ‘Whose Dispute is it Anyway?: A Philosophical and Democratic Defence of Settlement (in some cases)’, 83 *Georgia LJ* (1995) 2663, at 2692.

⁷⁰ See Chinkin, *supra* note 29, at 123–124.

weakness of international enforcement structures may render the aforementioned problems more serious at the international level.

So, the judicialization of dispute settlement may not always produce better outcomes, particularly where some of the parties deem the applicable norms to be an inadequate basis for a just and comprehensive settlement without some adjustments. More courts may therefore mean less effective settlements. Indeed, it is interesting to note that in the field of environmental relations, the move in practice has been from law-based dispute settlement mechanism (in accordance with compromissory clauses found in some environmental treaties) to more flexible and less confrontational non-compliance procedures.⁷¹

C *Relative Efficacy*

In addition, one may wonder whether the investment of considerable political and financial resources on the part of the international community in establishing new international courts always represents the most cost-efficient investment of resources.⁷² This concern is most apparent in the international criminal sphere, where some of the goals of international criminal courts (such as ending impunity, facilitating national reconciliation, setting a historical record of events and capacity building) can probably be achieved by resort to other measures, which may be no less cost-effective (for example, strengthening local judicial institutions, establishing compensation schemes, truth and reconciliation committees, and peacekeeping). Even more problematic in this context is the perception that the establishment of new international criminal courts (or the authorization of the ICC to assume jurisdiction over specific situations) might serve as a substitute for more meaningful international action (such as military intervention), which may be less politically palatable to key states.⁷³ If international criminal courts do indeed serve as 'fig leaves', or conscience-clearing outlets that encourage inaction in the face of atrocity, then the clear benefits they generate (international condemnation of atrocious conduct, development of international criminal law, etc.) may be outweighed by their adverse effects.

D *Legitimacy*

But even if law-based adjudication is a relatively effective dispute settlement procedure (and/or an effective method for law-interpretation or law-application), questions of legitimacy related to the empowerment of international courts to issue decisions which affect important state interests still remain. This is because the normal 'democratic deficit' associated with decision-making at the international level

⁷¹ See *ibid.*, at 128–130; Romano, 'International Dispute Settlement', in D.M. Bodansky *et al.* (eds), *Oxford Handbook of International Environmental Law* (2007), at 1038.

⁷² For a discussion see Romano, 'International Courts and Tribunals: Price, Financing and Output', in S. Voigt *et al.* (eds), *International Conflict Resolution – 23 Conferences on New Political Economy (Jahrbuch für neue Politische Ökonomie)* (2006) at 189, 229–230.

⁷³ See, e.g., J.A. Rabkin, *Law Without Nations?: Why Constitutional Government Requires Sovereign States* (2005), at 180; A. Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (1998), at 112.

by national representatives⁷⁴ is further compounded when the decision-makers delegate the power to issue decisions to international judges farther removed from the popular will. Together with the less-than-satisfactory ethical standards applicable in some international courts,⁷⁵ this raises difficult problems of accountability and legitimacy.

The expansion of international courts and international jurisdiction without seriously addressing their perceived legitimacy may thus result in a political and legal backlash that would, over time, complicate the mission of international courts. Indeed, the refusal on the part of the US Supreme Court in *Medellin* to give legal effect to the judgments of the ICJ in *Avena*⁷⁶ can be regarded as a reaction to what the majority of the Supreme Court perceived to be an illegitimate intrusion on the part of the ICJ upon the delicate system of checks and balances under the US political and legal system.⁷⁷

Conclusions

The dramatic growth in the number of international courts, the expansion of their jurisdictional powers and dockets, and the renewed interest in the application of international law by some national courts (processes which have considerably accelerated in the last 20 years) have introduced to the world a reinvigorated international judiciary with unprecedented levels of power and influence. Clearly, the emergence of the new international judiciary advances the rule of international law in those areas of law governed by the new courts and tribunals. Yet it also facilitates the transformation of the field of international dispute settlement, altering the default dispute settlement procedures in some areas (seeing international adjudication becoming the rule and not the exception).

It is important to understand, however, that the current situation still very much constitutes a work in progress. The subjugation of politics to law and to courts has largely occurred in the context of co-operative economic regimes (where courts play an important co-operation-sustaining function) and, to a lesser extent, in other specific and/or regional contexts (where courts promote certain normative projects). In other areas of international relations – including, some of the most important areas of international life (use of force, war on terror, and self-determination, for example) – the powers of international and national courts remain limited. Even on

⁷⁴ See, e.g., Risse, 'Transnational Actors and World Politics', in W. Carlsnaes *et al.* (eds), *Handbook of International Relations* (2003), at 255, 269–270; J.H.H. Weiler, *The Constitution of Europe* (1999), at 77–86.

⁷⁵ See, e.g., Mackenzie and Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 *Harvard Int'l LJ* (2003) 271, at 285.

⁷⁶ *Avena (Mexico v. US)* [2004] ICJ Rep 12.

⁷⁷ See also *Sanchez-Llamas v. Oregon*, 548 US 331, at 353–354 (2006) ('[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department", headed by the "one supreme Court" established by the Constitution.... Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts').

those relatively rare occasions when courts are charged with handling cases appertaining to 'high-politics',⁷⁸ their ability to resolve the underlying conflict against the true wishes of all the parties, or to secure enforcement of judgments, is circumscribed.

Still, some room for optimism remains. The recent involvement of the ICJ in the volatile conflicts in Georgia, Kosovo, and South America;⁷⁹ and its increased willingness to assert jurisdiction, to issue provisional measures under controversial circumstances,⁸⁰ and to expedite procedures before it,⁸¹ raises certain hopes that the Court will play a more meaningful role in the coming years than it has previously in the resolution of high-profile international disputes. Perhaps the combined effect of a more robust ICJ and more international law-minded national courts could go some way towards closing the existing gaps in international jurisdictional coverage and enforcement.

In any event, one must acknowledge that even if transformation of the international judiciary from a 'weak department of power' to an important player in many aspects of international relations proceeds at the same pace (or even accelerates), there remain in place some major problems associated with the transformation that could jeopardize the success of the entire project. The unco-ordinated growth of international courts is likely to continue to raise increasingly difficult questions of procedural co-ordination and normative fragmentation. In a similar vein, the lack of a comprehensive approach to dispute settlement at the international level and the weakness of the existing institutional enforcement structures continue to give rise to issues concerning the efficacy and legitimacy of international adjudication. Arguably, one of the key challenges in the 21st century for the international judiciary (and the international community on behalf of which it operates) will be to develop legal doctrines, best-practices, and institutional safeguards to address such concerns.

⁷⁸ For the distinction between 'low politics' and 'high politics' see Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 13 *American Rev Int'l Arbitration* (2002) 177, at 182.

⁷⁹ See *Application of CERD*, *supra* note 48; *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for Advisory Opinion) (letter by UN Secretary General), available at: www.icj-cij.org/docket/files/141/14799.pdf; *Aerial Herbicide Spraying (Ecuador v. Colombia)* (application by Ecuador), available at: www.icj-cij.org/docket/files/138/14474.pdf.

⁸⁰ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 18 Nov. 2008; *Application of CERD*, *supra* note 48; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Order of 16 July 2008, available at: www.icj-cij.org/docket/files/139/14639.pdf; *Application of the Genocide Convention*, *supra* note 21.

⁸¹ See, e.g., ICJPracticeDirection V, available at: www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0 (setting 4 months as the default period for submitting written memorials to the Court).