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# Reflections on International Judicialization

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## Abstract

*This lecture was delivered at the European Society of International Law's annual conference, which was held in Oslo in September 2015. Addressing the move to judicialization, the lecture touches on the function of international courts and tribunals in resolving disputes and contributing to the gradual development of international law and their role as social agents in the evolution of human consciousness and actions. Adopting a historical and personal perspective, the lecture identifies a number of areas for reflection at various international courts and tribunals and seeks to encourage the community of international lawyers to engage more actively with sensitive realities, in the spirit of constructive critique.*

In the summer of 2014, I spent three weeks in The Hague in the company of a man who was a hundred years old. Professor Vladimir Ibler, born on 25 June 1913 in Zagreb, when it was still a part of the Austro-Hungarian Empire, was one of my co-counsel during the arbitration proceedings between Croatia and Slovenia, heard in the Peace Palace. Ibler, diminutive in height but not in presence or character, was curious about the Peace Palace, built when he was a schoolboy, a place he had not previously had occasion to spend much time in. Each day, we would slowly make our way up the central staircase in the morning, then down it later in the afternoon, past the statue of Lady Justice, to and from the Japanese room, where the hearing took place.

Professor Ibler enjoyed musing about the world, the state of international law, and the state of international courts. 'When I was born there were none', he said one morning of the courts, 'and now there are so many that I cannot keep up with them all.' He paused, then asked: 'What are they all for? What do they all mean?' The

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In the interests of editorial transparency, readers are referred to the Editorial on 'Conflicts of Interest in the Editorial Process', 27 *EJIL* (2016), at 562.

questions were left hanging, but from his cheery disposition I felt he retained a sense of hope. A centenarian whose life passed through the reigns of Emperor Franz Josef, Adolf Hitler, Josef Stalin and Josip Tito was somehow still able to seize on the possibility of courts as an alternative to war, which might be said to be the principal end of judicialization. He was hopeful too that Croatia and Slovenia might finally resolve their long-standing boundary dispute by arbitration proceedings under the auspices of the Permanent Court of Arbitration (PCA), conducted before a panel of five distinguished, experienced international arbitrators.

Yet Professor Ibler also sounded a note of caution in the course of a more formal interview that I conducted for a profile to appear in the *Financial Times Magazine*. ‘I learnt in my life not to come to fast conclusions’, he told me. He continued:

I was very happy in a lawyer’s office in Zagreb from 1937 to 1939 working with Mr Korsky, and then the Nazis just shot him. I think that being in a lawyer’s office you can make certain conclusions about people and about human relationships, and you can learn certain things. And what I learnt is not to be very quick to make conclusions, but to reflect all the time.

‘Was it a good idea to refer the dispute between Croatia and Slovenia to an international arbitral tribunal?’, I enquired. ‘Yes’, he responded, ‘of course I think positively of the idea, it was a good idea to establish the court.’ And then he paused before adding by way of a translator: ‘What I am sceptical of is some of the judges that were appointed to the court, I am not entirely convinced that the tribunal has been totally independent.’ He paused again, and said: ‘It seems there are some invisible forces ... there are justices and injustices.’

That was June 2014. Subsequent events, to which I shall return, caused me to revisit the conversation with Professor Ibler. Fortunately I had recorded it. ‘What I’ve learnt is not to be very quick to make conclusions’ – wise advice from a man who is a hundred years old.

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Against this background, what are we to make of our current institutional judicial arrangements and the manner in which they function? We have heard much during these past days at the European Society of International Law’s annual conference in Oslo about the connections between law and politics, and we know these courts are the product of political processes with very long roots. We have also heard much about the relationship between courts and the idea of the rule of law. In one exchange, between sessions, I asked a doctoral student whether she thought you could have a rule of law without courts.<sup>1</sup> ‘No’, she quickly replied, ‘you cannot.’ And must there be independence and impartiality for them to be truly considered to be courts and tribunals? ‘Yes.’ This response is an assumption that all of the participants at this conference seem to share.

There are today far more international courts than Professor Ibler could ever have imagined, as a child, as a law student, as a middle-aged man, or, even – remarkably –

<sup>1</sup> Ms Denise Wohlwend, PhD candidate at Fribourg University, offered a number of interesting insights on the international rule of law, its functions and projections in international courts and tribunals, which is the general subject of her doctoral research and an ever-present theme in my academic work and legal practice.

when he hit the age of retirement (in 1978). Back then there was no World Trade Organization Dispute Settlement Body, no International Tribunal for the Law of the Sea (ITLOS), no International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda and no internationalized criminal courts. The PCA was moribund, if not dead. I recall my first teacher in international law, Robbie Jennings, in our 1980 lecture course, passing over the PCA as a historical footnote. Yet, today, it has well over a hundred cases, including a significant number of inter-state cases.<sup>2</sup> It might be said that the PCA offers hope for all institutions that have occasion to hope for more.

Two decades after Professor Ibler had reached retirement age, in 1997, Cesare Romano, Ruth Mackenzie and I established the Project on International Courts and Tribunals (PICT), by which time the international judicial architecture had been transformed. Our first conference meeting apparently offered the first ever gathering of registrars and secretariats of the international courts, and it seemed we were awash with these bodies and their cases. Today, it is virtually impossible for anyone to keep up with the totality of the developments, and this has had consequences, not least the emergence of new initiatives to keep us informed and help us understand, including this fine pluricourts project in Oslo<sup>3</sup> and the iCourts project nearby.<sup>4</sup>

If not exactly an end of judicialization, one of the consequences has been the emergence of fertile academic communities that have sprung up, and this too has produced consequences. John Louth of Oxford University Press told me last night that 55 books were published on the ICC last year, a number that surely gives rise to the question: what is the purpose and utility of such a rush of publications?<sup>5</sup> For all of our work and effort, it must be said that it becomes ever more difficult to step back and identify trends and themes for the whole. Each court and tribunal is unique, and, I am bound to add, I do believe they *are* courts and tribunals, not just the International Court of Justice (ICJ) as I was told Professor Martti Koskenniemi might have suggested during the opening plenary. Each court and tribunal has its own rules, composition, working methods, cases and, of course, its distinct legal community of bar and scholars. Invited to address 'the end(s) of judicialisation', in such a context I hesitate to draw broad conclusions. We inhabit a galaxy of a thousand points of light, or more.

One thing is clear, however, and it has been a common theme that has coursed its way through this conference: our international courts are delicate and fragile creatures. We may take national courts as a point of comparison, but often they have had centuries to mature. A former colleague, the distinguished English legal historian Professor Sir John Baker, would occasionally tell me that my world of international courts of today equated somewhat to the situation that the English courts found themselves in during the late 15th and early 16th century. I have never quite forgotten that

<sup>2</sup> A complete list of pending cases at the Permanent Court of Arbitration (PCA) is available at [www.pca-cases.com/web/allcases/](http://www.pca-cases.com/web/allcases/) (last visited 30 November 2016).

<sup>3</sup> PluriCourts, available at [www.jus.uio.no/pluricourts/english/](http://www.jus.uio.no/pluricourts/english/) (last visited 30 November 2016).

<sup>4</sup> iCourts, available at <http://jura.ku.dk/icourts/> (last visited 30 November 2016).

<sup>5</sup> John Louth's own publishing activities, now over many years and with so extensive a reach, will no doubt one day be the subject of a doctoral thesis, exploring the role of academic publishers in contributing to the articulation of our community and its output, including in the jurisprudence of the courts.

point of comparison, as it allows us to reflect in a more contextualized way on some of the things we tend to get excited about. The reality is surely that we are engaged in a project that will extend over centuries, and it is but at an early stage of development. We should therefore permit ourselves to have low expectations, even if this does not mean we should not have expectations at all. It does not mean that matters might not be improved, including by our own endeavours as observers and commentators and, occasionally, as actors.

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As Professor Andreas Follesdal noted in his introduction, over the past years I have been spending a significant amount of time researching a book that focuses largely on the Nuremberg trial and the lives of three men in that trial: Hersch Lauterpacht, Raphael Lemkin and Hans Frank.<sup>6</sup> As a result of this project, 1945 and 1946 have been very much on my mind. The idea that courts and law might supplant politics and power came to the fore in 1945, a point at which the notion that disputes could be settled by recourse to arbitration or judicial settlement began to gain traction. In the broader scheme of historical developments, that is a remarkably short period of time – just seventy years have passed. The idea and its moment were encapsulated by a memorable speech given by United States Supreme Court Justice Robert Jackson, who was the chief prosecutor at Nuremberg on 21 November 1945, when he stood before the eight judges in Courtroom 600 in Nuremberg’s Palace of Justice, which is still a working courtroom today: ‘That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason’, he told the judges.<sup>7</sup> And, in a sense, that has been our guiding light – reason and the judgment of the law trumping brute force and power politics.

His friend and colleague Hersch Lauterpacht – the man who suggested that he put the concept of ‘crimes against humanity’ into the Nuremberg Statute (when they met in the garden of Lauterpacht’s home on Cranmer Road in Cambridge on 29 July 1945)<sup>8</sup> – was rather keen on courts. For enforcement within the State ‘there must exist a judicial machinery’, he wrote in 1944, ‘accessible to every individual, for testing the conformity of legislative, judicial, and executive action with the provisions of [his proposed] Bill of Rights’.<sup>9</sup>

Lauterpacht was less keen about the idea of an international human rights court, and it is well worth going back to what he wrote in that remarkable book. He thought such an idea was not practicable, in part because of the absence in the international sphere of what he referred to as ‘restraints upon the unavoidable power of judges’.<sup>10</sup> What was missing at the international level was an equivalent to the ‘community of

<sup>6</sup> P. Sands, *East West Street: On the Origins of Crimes against Humanity and Genocide* (2016).

<sup>7</sup> *Trials of the Major War Criminals before the International Military Tribunal*, reprinted in 2 *Nuremberg Trial Proceedings* (21 November 1945) 98.

<sup>8</sup> Sands, *supra* note 6, at 113.

<sup>9</sup> H. Lauterpacht, *An International Bill of the Rights of Man* (2013), at 185.

<sup>10</sup> *Ibid.*, at 13.

national tradition', one that reflected 'the overwhelming sentiment ... of national solidarity and of the higher national interest, the corrective and deterrent influence of public opinion, and, in case of a clear abuse of judicial discretion, the relatively speedy operation of political checks and remedies'.<sup>11</sup>

The more you go back and the more you read Hersch Lauterpacht, the more remarkable he appears, yet he was shown not to be right in this particular prediction. International courts of human rights were created – even if the issues he alluded to are surely pertinent today across the range of international courts. Still, a number of broad points can be made in regard to the 'end(s) of judicialization' (I will include arbitration, although purists may object): the end and the ends.

## 1 First, What Are the Ends of Judicialization?

There seem to be at least three, although only two are usually referred to. First, as Lauterpacht put it, the 'original and primary purpose was to decide disputes between States'.<sup>12</sup> This is a limited end and one that has evolved as other international actors have emerged, including individuals, corporate investors and international organizations. Our legal world is no longer just about states, even if they do remain rather significant. Second, as Lauterpacht also recognized – indeed, he was a proponent of the idea – there is a broader role for international adjudication as a means to develop the law – and the idea of the international rule of law – as a way of gradually beefing up the content of the rules and their effects.<sup>13</sup>

However, there is, I think, a third end for all of these courts: they have themselves become new social actors, ones that contribute to evolutions in the state of human consciousness and actions. Their very existence, and the fact that they function, tends to support the notion that there is an alternative to the unlimited exercise of power or even the possibility of an end to crime and other wrongs (although we know this to be somewhat illusory, as the experience with the ICC makes clear). It could also be said that the mere existence of these institutions offers the illusion of hope – an alternative that is often shown to have been dashed. As discussed during this morning's additional session on the challenges of migration to Europe, the current problem of individuals trying to reach countries of the European Union shows rather clearly the limits of the law and the idea of the rule of law. But it is also evident that changes of public consciousness may be affected by the activities of international courts.

I am sometimes asked which cases really made a difference, and it seems there are actually quite a few that you could settle on. The choice may be subjective, but I would certainly include, by way of illustration, the judgment in the case of *Smith and Grady v. United Kingdom* of the European Court of Human Rights (ECtHR) issued in 1999, a decision that unanimously found that the investigation into, and subsequent discharge

<sup>11</sup> *Ibid.*

<sup>12</sup> Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', 8(2) *European Journal of International Law* (1997) 264, at 270 (citing Lauterpacht's Provisional Report on the Revision of the Statute of the Court, 1 September 1955).

<sup>13</sup> *Ibid.*

of, personnel from the Royal Navy on the basis that they were homosexual was a breach of their right to a private life under Article 8 of the European Convention on Human Rights.<sup>14</sup> This seems to have been a catalytic jurisprudential moment, one that has contributed to, if not caused, a transformation of public views in the European context on gay marriage and related matters. Courts can make a difference; that too is a reality.

## 2 Second, Can We Envisage the End of Judicialization?

It seems hard to envisage. Warts and all, international courts are now a settled part of international and domestic political processes, and they are here to stay. There will be ebbs and flows, and the directions might change, but they are not going away. To be sure, there will be backlashes and whingeing and even departures and disappearances; we have heard much about that over the past two days. There will be questions about arbitration or courts, ad hoc or permanent, concerns about fragmentation and competition and whether these features are a good or bad thing.

A prospective international litigant now has a range of choices, and that is a good thing. Competition has offered choice in decision making – which of several judicial or arbitral possibilities might a claimant opt for – is a question informed, in large part, by speculation as to the possible outcomes. We have seen competition influence the development of the law and public consciousness. One suspects that the fact that ITLOS became the first international court to delimit a maritime boundary 200 miles beyond a coast had at least something to do with the desire to give itself an advantage against its Hague competitor, which has, until now at least, refrained from making such a delimitation.<sup>15</sup> Competition allows ideas to flourish, and the battle of ideas is a hallmark of our emerging international judicial system.

There is nothing novel about this. I could mention the start of *Slade's case* in 1596 before the English courts – it arose because under medieval common law a claim for the repayment of a debt had to be pursued through a writ of debt in the Court of Common Pleas, a difficult, archaic, slow and very expensive process. By 1560, lawyers had found another method, which was enforced by a different court, called the Court of King's Bench, through the action of *assumpsit*, a form of action for deceit. Then along came another body, the Court of Exchequer Chamber, the appellate court to the Court of Common Pleas, which overruled decisions of the King's Bench on *assumpsit*, causing great friction between the courts. Courts going in different directions is not a new thing; it has happened for centuries.<sup>16</sup>

<sup>14</sup> ECtHR, *Smith and Grady v. United Kingdom*, Appls nos 33985/96 and 33986/96, Judgment of 27 September 1999.

<sup>15</sup> Judgment, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS Reports 2012, 14 March 2012, s. IX, para. 506(2); Cf. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, 19 November 2012, ICJ Reports (2012) 624, s. IV; see also *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, 17 March 2016 (pending), available at [www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nicolb&case=154&k=02](http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nicolb&case=154&k=02) (last visited 30 November 2016).

<sup>16</sup> Sir J. Baker, *The Oxford History of the Laws of England: Volume IV* (2003), Part III, s. 5, 6, 7.



In *Slade's case*, the Exchequer Chamber gave judgment after five years – it seems there is nothing novel either about delay – ruling that *assumpsit* claims were valid and enforceable. They became the main course of action in English contract cases, and the episode is sometimes cited as an example of judicial legislation where Parliament failed to act. It could also be cited as an example of the reality of competition, and it applies equally in the international domain.

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Against this background, summing up the current state and perspectives of international courts and tribunals is no easy feat. An assessment of the relative successes or failures of international justice enterprises requires an understanding of what we expect of them, both individually and collectively. It would need several hours to engage fully in the matter. All I can do, having surveyed the general landscape, is to settle on a few developments that might raise an eyebrow or indicate the road that might yet be followed. I will briefly touch on a few examples, not wishing to suggest any particular sense of hierarchy or exclusivity, to suggest some themes we might wish to think about.

In so doing, I depart from the lecture I had prepared before I arrived. It has been striking, as I sit in on various sessions, to note that there seem to be quite a few things that were not talked about in this conference – matters that are delicate and best skirted around in the polite company that is our community; matters one prefers not to talk about. So I shall plough on, encouraged to talk about them, reminded of the words of psychoanalyst Nicolas Abraham, who observed: 'What haunts are not the dead, but the gaps left within us by the secrets of others.'<sup>17</sup> In this sense, that which has not been said over the course of this conference may be as interesting as what was said. In entering this forbidden domain, I shall draw from my own experiences.

## A ICC

In recent months, the question has entered my mind: 'Did we create the ICC too early?' It is plainly now something of a problem institution in the eyes of many, and the causes of this situation seem to be manifold. Particularly in the African context, one has to confront a very real and – let us say it – legitimate concern: if you switch on a computer and go to the ICC webpage, you will see that every single person that has been indicted by the Prosecutor's Office at the ICC is African and black.<sup>18</sup> Yet Africans and

<sup>17</sup> Abraham, 'Notes on the Phantom: A Complement to Freud's Metapsychology', translated by Nicholas Rand 13(2) *Trial(s) of Psychoanalysis* (1987) 287.

<sup>18</sup> *Situation in Democratic Republic of Congo's* indictees: Thomas Lubanga Dyilo, Germain Katanga, Bosco Ntaganda, Callixte Mbarushimana, Sylvestre Mudacumura and Mathieu Ngudjolo Chui; *Situation in the Central African Republic's* indictees: Jean-Pierre Bamba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido; *Situation in Uganda's* indictees: Ahmad Muhammad Harun ('Ahmad Harun'), Ali Muhamad Ali Abd-Al-Rahman ('Ali Kushayb'), Omar Hassan Al Bashir, Bahar Idriss Abu Garda, Abdallah Banda Abakaer Norain and Abdel Raheem Muhammad Hussein; *Situation in the Republic of Kenya's* indictees: William Samoei Ruto, Joshua Arap Sang, Uhuru Muigai Kenyatta and Walter Osapiri Barasa; *Situation in Libya's* indictees: Saif Al-Islam Gaddafi; *Situation in the Republic of Côte d'Ivoire's* indictees: Simone Gbagbo, Laurent Gbagbo, Charles Blé Goudé and Ahmad Al Faqi Al Mahdi. International Criminal Court, 'All Cases', available at [www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx) (last visited 30 November 2016).

black people do not have a monopoly on international crime. This record, 15 years after the creation of the ICC, sends a troubling signal that we are bound to reflect on and address, not least since it is having political ramifications.

We have seen the consequences of that in the Kenya case<sup>19</sup> and, more recently, in the situation of Sudan's President Al Bashir arriving in, and then leaving, South Africa, which is a party to the ICC Statute, under an obligation to arrest him.<sup>20</sup> We must recognize the cogency of an argument that suggests the focus on certain individuals amounts to a form of legal neo-colonialism. Why there has been no indictment for the practice of torture or rendition adopted after the events of 11 September seems remarkable.<sup>21</sup> We have to confront this issue; we cannot just run away from it.

## B *ECtHR*

Let us alight on the situation in my own country, where the dominant political party of the day has a large number of parliamentarians – and even ministers – who seem to want to leave the ECtHR. This is because the Court is coming down with judgments they do not like, given by judges from faraway places. One of the judgments they like to focus on – the prisoner's voting case – strikes me as one that actually was correctly decided.<sup>22</sup>

Here too, we have to deal with a reality, and one that tends to be skirted around at conferences such as this, namely that in the Council of Europe of 48 states, you have some that have properly functioning, independent judicial systems and others that do not. When you create an international court that straddles so varied a group of countries, it is understandable that there may be an institutional desire to ensure that there are expressions of judicial action across the range of those countries. And this desire raises the question of whether it was mistake to get rid of the European Commission of Human Rights, which functioned as a screening mechanism, allowing the ECtHR to deal with a more limited number of cases – those that raise serious, grave human rights issues that plainly touch on the well-being of Europe as a whole. Again, we have to deal with the realities of the situations into which we have put ourselves, and if we have fallen into error we must be honest about it.

And, of course, the positions adopted by Prime Minister David Cameron in the United Kingdom<sup>23</sup> get seized on by friends in Russia: 'If the UK is going to withdraw,

<sup>19</sup> O. Bowcott, 'ICC Drops Murder and Rape Charges against Kenyan President', *Guardian* (London, 5 December 2014), available at [www.theguardian.com/world/2014/dec/05/charges-humanity-charges-kenya-president-dropped-uhuru-kenyatta](http://www.theguardian.com/world/2014/dec/05/charges-humanity-charges-kenya-president-dropped-uhuru-kenyatta) (last visited 30 November 2016).

<sup>20</sup> N. Onishi, 'Omar al-Bashir, Leaving South Africa, Eludes Arrest Again', *New York Times* (New York, 15 June 2015). Rome Statute on the International Criminal Court 1998, 2187 UNTS 90.

<sup>21</sup> P. Sands, *Torture Team: Uncovering War Crimes in the Land of the Free* (2008).

<sup>22</sup> ECtHR, *Hirst v. United Kingdom (No. 2)*, Appl. no 74025/01, Judgment of 6 October 2005; M. Holehouse, 'David Cameron: I Will Ignore Europe's Top Court on Prisoner Voting', *Telegraph* (London, 4 October 2015).

<sup>23</sup> N. Watt, 'Cameron Refuses to Rule out Leaving European Convention on Human Rights', *Guardian* (London, 2 June 2015).



then we might as well do so.<sup>24</sup> The parallel approaches of the present leadership in Russia and that of the United Kingdom is striking and worrisome. It seems that the idea of sovereign equality means treating all countries equally, yet the reality, as we know, is that not all countries are equal in the context of international judicial systems. That is a reality we cannot run away from.

### C *Court of Justice of the European Union (CJEU)*

Much has been talked about it in this conference about the recent advisory opinion on European Union (EU) ratification of the ECHR.<sup>25</sup> This decision seems difficult to justify in purely legal terms in circumstances in which EU member states have agreed that they wish the Union to become a party. It is hard to escape the conclusion that the CJEU has basically acted to protect its own turf, to safeguard its own autonomy and put its own interests first. This suggests that one of the ends of judicialization – yet not one that our community has really focused on – is the instinct of institutional self-interest, of self-protection and ‘bigging up’ your own institution against the encroachment of others. Again, let us have strength to rise to the challenge of calling a spade a spade and engage with what is actually going on in the functioning of the courts.

### D *Investor State Dispute Settlement (ISDS)*

One could speak for hours on this subject. There are a growing number of observers who believe that the system has been ‘captured’ by one particular stakeholder: the arbitrators (of which I am one) and the lawyers and law firms who benefit from the growth of the system.<sup>26</sup> It is hard to avoid the charge. Sitting in on Alina Miron’s striking presentation on the costs of international justice – the legal fees – I reflected on the information that comes before ISDS arbitrators, the kind of fees that are charged for discrete, small and sometimes relatively insignificant cases – fees that run to the tens of millions of dollars for cases – and the legal opinions of a few pages, for which a fee note of a hundred thousand dollars or more might be charged. This is what one sees sometimes when presented with a breakdown of costs. We need to look at those issues and address them realistically, and we need to join the clamour for greater transparency in the system.

<sup>24</sup> ‘The participation of the Russian Federation in any international treaty does not mean giving up national sovereignty. Neither the ECHR, nor the legal positions of the ECtHR based on it, can cancel the priority of the Constitution. Their practical implementation in the Russian legal system is only possible through recognition of the supremacy of the Constitution’s legal force.’ M. Smirnova, ‘Russian Constitutional Court Affirms Russian Constitution’s Supremacy over ECtHR Decisions’, *Ejil:Talk!* (15 July 2015), available at [www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/](http://www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/) (last visited 30 November 2016).

<sup>25</sup> Case 2/13, *Opinion Pursuant to Article 218(11) TFEU*, judgment of 18 December 2014, not yet published (ECLI:EU:C:2014:2454).

<sup>26</sup> C. Olivet and P. Eberhardt, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom*, 27 November 2012, available at [www.tni.org/en/briefing/profitting-injustice](http://www.tni.org/en/briefing/profitting-injustice) (last visited 30 November 2016).

There is also the most unfortunate practice of those who act as counsel and arbitrator in ISDS cases, a sort of revolving door in which the same person can spend a morning drafting a pleading on the meaning of ‘fair and equitable treatment’ (in one case) and then an afternoon drafting an award on the meaning of ‘fair and equitable treatment’ (in another case). This is sometimes referred to as ‘issue conflict’,<sup>27</sup> and some institutions have put an end to it (the ICJ took a leadership role in eradicating this kind of practice nearly 20 years ago in its practice directions, which precluded individuals who acted as counsel from simultaneously sitting as ad hoc judges;<sup>28</sup> the Court of Arbitration for Sport has now also prohibited the practice).

Speaking from experience, it can be an unfortunate situation to find yourself deliberating with fellow arbitrators knowing that one or more of them is actually litigating the very point on which you are striving to write an award. There is growing attention now being given to this and rightly so. In the ISDS field, the European Commission has now stepped in to call for an international investment court,<sup>29</sup> and the European Parliament has also made clear that it no longer wishes to tolerate this kind of practice.<sup>30</sup>

What is the alternative? The alternative is to move away from arbitration to the establishment of a standing body or court. Whether this resolves all of these issues – who knows; whether it gives rise to other issues – who knows. One can have one’s views, but these matters are now very much on the agenda. On this matter, the ends of judicialization operate to prioritize the interests of certain stakeholders, including lawyers and law firms and perhaps also individual arbitrators. That is not a popular thing to say publicly, but we have to address the reality of what is actually going on.

## E ICJ

I turn to the ICJ, a court that probably has its strongest bench in years. It is now in a fine position to enhance its role. Yet it too might also want to examine some of its practices, some long established, to see if there is not room for improvement – for example, the standard applied by the court to the issue of independence and the circumstances in which a judge can and cannot sit in a case. This was addressed in the *Construction of a Wall* advisory opinion,<sup>31</sup> giving rise to a standard that was relied upon in an Annex VII

<sup>27</sup> Sands, ‘Conflict of Interest for Arbitrators and/or Counsel’, in M. Kinnear *et al.* (eds), *Building International Investment Law: The First 50 Years of ICSID* (2015) 655.

<sup>28</sup> ‘The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge ad hoc in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court.’ Practice Direction VII: Basic Documents of the International Court of Justice, available at [www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0](http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0) (last visited 30 November 2016).

<sup>29</sup> ‘Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations’, *European Commission News Archive* (Brussels, 16 September 2015), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364> (last visited 30 November 2016).

<sup>30</sup> European Parliament, Resolution on the Future European International Investment Policy, Doc. 2010/2203(INI)(2011), available at [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN) (last visited 30 November 2016).

<sup>31</sup> *Legal Consequences of the Construction of a Wall*, Order, 30 January 2004, ICJ Reports (2004) 3, paras 6–8.

arbitration proceeding between Mauritius and the United Kingdom.<sup>32</sup> The approach raises some fundamental concerns: the principal judicial organ of the United Nations (UN), which should operate to the very highest standards, seems to have the lowest standards of judicial independence in the world in terms of determining the circumstances in which a judge can and cannot sit.

Related to this is another matter that should be put on the table with some trepidation, given who is in the audience today, and that is the extracurricular activities of judges. Why is the ICJ apparently the only permanent court in the world that allows its judges to sit and act as arbitrators? This strikes me as potentially problematic in terms of independence and perceptions as to the functioning of the Court itself. One has to step back from our community and ask ourselves: 'How do others perceive this practice and how do others perceive the idea that a judge might accept appointment by a party, a claimant or a state?' One can understand, perhaps, sitting as president of a tribunal, not as a party-appointed arbitrator, but even in these circumstances, how can it be that a judge who has a permanent and a full-time position and is paid a full-time salary does not pass over any fees that are paid to the UN (as happened, I understand, on one occasion when an ICTY judge was allowed to sit on another case).<sup>33</sup> It is not about actual bias but, rather, about perception and about ramping up our standards.

## F *PCA/Ad Hoc Inter-State Arbitration*

This is a convenient point to come back to the PCA and Professor Ibler. The PCA, as I mentioned, was moribund when I first studied international law and has since had a remarkable transformation. In relation to inter-state disputes, it has been much assisted by the coming into force of Part XV of the UN Convention on the Law of the Sea (UNCLOS).<sup>34</sup> Developments at the PCA had been going seemingly well until rather recently. A couple of its cases have now involved permanent members of the UN Security Council – Russia and China – who have chosen not to participate in UNCLOS Annex VII cases brought against them, an approach that raises concerns that need to be addressed.<sup>35</sup>

That is not the only problem. Of the various aspects of this conference that have struck me over the past three days, the one that has been most striking is the fact that there is one recent development that, in any discussion I have attended, has not been addressed on any platform. So delicate and sensitive, perhaps, or so recent, and it is the case of Croatia and Slovenia.<sup>36</sup> I declare an interest, as I was counsel for Croatia until

<sup>32</sup> PCA, *Chagos Maritime Protected Area (Mauritius v. UK)*, Reasoned Decision on Challenge, 30 November 2011, PCA Case no. 2011-03, at 24–35.

<sup>33</sup> Even pending change in the practise, surely a first step would be to make publicly available on the Court website a list of all such appointments accepted by judges? In regard to future practice, the problem could be addressed by changing the status of judges and treating the appointment as part-time, as at the International Tribunal on the Law of the Sea.

<sup>34</sup> Convention on the Law of the Sea 1982, 1833 UNTS 3.

<sup>35</sup> PCA, *In the Matter of the South China Sea Arbitration (Philippines v. China)*, Case no. 2013–19; PCA, *Artic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case no. 2014-02.

<sup>36</sup> PCA, *Arbitration between the Republic of Croatia and the Republic of Slovenia*, PCA Case no. 2012-04.

it withdrew from the proceedings in August 2015. I am not independent, neutral or objective, and I must limit myself to the facts that are in the public domain. However, it seems clear that what occurred – what was revealed – last summer is like an Exocet missile that goes to the heart of the system that we are all involved and care about, a system that we wish to see succeed and improve but that, remarkably, we seem not to want to talk about at this conference, which has as its theme the functioning of international courts and tribunals.

The case was brought by an arbitration agreement between two countries to resolve a long-standing dispute.<sup>37</sup> The written pleadings closed in the spring of 2014. Hearings were held in May and June 2014. It is a big case involving land and sea boundaries, so it is entirely reasonable that it should take time to resolve that case and to write an award. In February 2015, an incident occurred that gave rise to some concerns and some attention in the media. The Slovenian foreign minister made a public statement in which he suggested that he had been privy to the confidential deliberations of the tribunal. The tribunal was alerted to these statements and, on 5 May 2015, wrote to the parties (the letter, which is strongly worded, is available on the PCA website).<sup>38</sup> The tribunal noted that it was ‘seriously concerned by the suggestion that one Party would have been privy to confidential information related to the Tribunal’s deliberations’,<sup>39</sup> and it noted that it considered that ‘such a meaning could be attributed to statements by the Slovenian Foreign Minister, and ... that such statements are unhelpful for the resolution of the present dispute’.<sup>40</sup> The tribunal then expressed the view, understandably, that ‘safeguarding the confidentiality of the deliberations until the issuance of an award is a matter of highest priority’, premised as it is on the independence of the adjudicators from the parties.<sup>41</sup> In the letter, the tribunal took note of ‘Slovenia’s assurance that it has not received any information whatsoever as to any aspect of the outcome of the arbitration’ and stated that it had ‘examined the arrangements that it has put in place to ensure that no confidential information may be disclosed’.<sup>42</sup> It concluded: ‘The Tribunal is therefore confident that no information about the likely outcome of any aspect of the arbitration has been disclosed.’<sup>43</sup> And that, we expected, was the end of the matter.

I went on holiday on 22 July on a morning flight to New York. By the time I got off the plane, I had some 200 email and phone messages directed to what had emerged in the course of that day: the publication by a Serbian newspaper of the transcripts

<sup>37</sup> Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, available at [www.mzz.gov.si/fileadmin/pageuploads/Novinarsko\\_sredisce/Sporocila\\_za\\_javnost/Sporazum-angl.pdf](http://www.mzz.gov.si/fileadmin/pageuploads/Novinarsko_sredisce/Sporocila_za_javnost/Sporazum-angl.pdf) (last visited 30 November 2016).

<sup>38</sup> Letter from Dirk Pulkowski (Registrar) to the Agents in the Arbitration between Croatia and Slovenia, 5 May 2015, available at <https://www.pcacases.com/web/sendAttach/1307> (last visited 30 November 2016).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

of what was purported to be telephone conversations between the agent of Slovenia and Slovenia's party-appointed arbitrator, revealing extraordinary details about the deliberations. This was not just about the sharing of confidential information about what was going on inside the deliberations, it was also about the use of that arbitrator as a conduit for the presentation of further arguments by the party that appointed him. Assuming they are accurate, the transcripts were very detailed, showing a two-way process in which the arbitrator gave a great deal of information to the agent and also appeared to be acting as a conduit for the views of Slovenia, through its agent. The question of how these recordings were obtained is of course an important one, which remains unresolved (I should mention that I have long proceeded on the assumption that any communication I engage in is recorded by someone, somewhere in the world, so I was surprised that others involved in this story did not proceed on the same basis).

On 23 July, the day after the news reports came out and the Serbian news republished, the agent and the arbitrator both resigned. That was addressed in a press release put out by the PCA. This press release itself – and here I speak in a purely personal capacity – contained an extremely unfortunate line: 'Once reconstituted, the Tribunal intends to resume its deliberations in the present arbitration without delay.'<sup>44</sup> No one who has read those transcripts can sensibly assume that the case can continue in any way before that arbitral tribunal. I say this having lived through the bitter experience of the Pinochet proceedings in 1998 and 1999 where the House of Lords for the first time in a 900-year history found itself having to set aside one of its own judgments in the case that had drawn more international attention than any other in order to be seen to be absolutely squeaky clean.<sup>45</sup>

No doubt for the judges who sat on that case, it must have been a painful and difficult thing to do, all the more so on a case with such a high profile – to set aside the whole thing and start again in order to protect the system as a whole. Yet, it was plainly the right thing to do in order to protect the integrity of the judicial process. I shall not express any view as to what precisely ought now to happen in the *Croatia v. Slovenia* case, but in deciding how to proceed, the interests of the system as a whole – the integrity of the arbitral process – must surely be paramount.

On 24 July, Croatia wrote to the tribunal to say that it considered the entire arbitral process to have been tainted. It asked the tribunal to suspend proceedings with immediate effect and invited the remaining members of the tribunal to reflect on the grave damage that had been done to the integrity of the proceeding.<sup>46</sup> Five days later, on 28 July, Slovenia appointed a new arbitrator, the president of the ICJ. This was odd, since Article 2, paragraph 2, of the Arbitration Agreement identifies the ICJ president as the appointing authority for the independent arbitrators, raising a question as to how it

<sup>44</sup> PCA Press Release, 23 July 2015, available at [www.pcacases.com/web/sendAttach/1310](http://www.pcacases.com/web/sendAttach/1310) (last visited 30 November 2016).

<sup>45</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 2)*, [1999] 2 WLR 272.

<sup>46</sup> PCA Press Release, 5 August 2015, available at [www.pcacases.com/web/sendAttach/1389](http://www.pcacases.com/web/sendAttach/1389) (last visited 30 November 2016).

could be that the appointing authority could have been appointed.<sup>47</sup> Nevertheless, the error was quickly corrected, and the ICJ president resigned from the arbitral tribunal, as did Croatia's party-appointed arbitrator, leaving three arbitrators sitting. Slovenia announced that it would not appoint a new arbitrator, leaving it to the president of the tribunal to do so. In the absence of Croatia appointing its party-appointed arbitrator, one assumes the president of the arbitral tribunal would have to decide what to do.

And that, as far as I know, is where matters remain. Three arbitrators standing, Slovenia says the case can and must go on, Croatia says it is all over.<sup>48</sup> It is hard to describe fully one's reaction to such developments. It felt extraordinarily painful, not only as a former counsel but also as someone involved in the system of international justice, because it went to the very heart of the system in which we are involved – the centrality of the independence of the adjudicator. The concern must be not only that the episode will bring to a premature end a process that has run over several years but also that it will cause tremendous harm to the system of international arbitration both within and outside the PCA system, including in the context of investor–state arbitration. The trickle-down consequences are something to watch out for.

There is also a real concern that this might not be an isolated example. During the conference, I had a conversation with a colleague who expressed the view that this was surely a one-off, isolated case, and we should not make too much about it. In my own experience, that is not likely to be the case. Many involved in international proceedings are aware that things go on that should not go on, even if not to the same extent as the matter I have just described. It is not entirely unusual for an agent in an inter-state case to share a conversation that he or she has had with a person sitting on a court or tribunal, a fact that causes (or should cause) a tremendous ethical difficulty. Under most rules of professional conduct, counsel should not be privy to such information, and they should not want to hear such stuff or know what is going on. Other rules of professional conduct may have a different standard, and this raises a serious question about the ethical standards for the international bar.

<sup>47</sup> Composition of the Arbitral Tribunal, Art. 2(1), states that '[b]oth Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of the European Commission and the Member responsible for the enlargement of the European Commission. In case that they cannot agree within this delay, the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list'. Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, available at [www.assidmer.net/doc/Arbitration\\_Agreement\\_Croatia\\_Slovenia.pdf](http://www.assidmer.net/doc/Arbitration_Agreement_Croatia_Slovenia.pdf) (last visited 30 November 2016).

<sup>48</sup> Following this lecture, the president of the arbitral tribunal appointed Norwegian and Swiss arbitrators, H.E. Rolf Fife and Nicolas Michel and instituted a process to fill the vacant seats left by the resignation of the party-appointed arbitrators. PCA Press Release, 25 September 2015, available at [www.pccases.com/web/sendAttach/1468](http://www.pccases.com/web/sendAttach/1468) (last visited 30 November 2016). On 30 June 2016, following the appointment of two new members and a procedure in which Croatia declined to participate, the Tribunal issued a partial award ruling that the breaches of the Arbitration Agreement by Slovenia did not render the continuation of the proceedings impossible and, therefore, did not defeat the object and purpose of the agreement, thus allowing the proceedings to continue (see Press Release, <https://pccases.com/web/sendAttach/1785> [last visited 30 November 2016]).



I even had a situation in one case – and I may not be alone in this room having had such a situation – of receiving an email from an agent in one case (it was several years ago) sending for my attention, review and comment the deliberations of an international court or tribunal in a case in which I was involved. The reaction of a member of the English bar was to delete the email immediately, to refrain from reading the text and to invite the appropriate person at the court or tribunal to remind its members of the duty of confidentiality.

The hope must be that this terrible episode in the course of last summer will serve as a wake-up call to everyone in the community to re-double their efforts in applying the very highest standards of propriety. Our international system is delicate – each court and tribunal a fragile creature – and those who wish to attack the system as a whole or individual courts will seize on these kinds of practices and will do very great damage indeed. This, I believe, is the positive that one can take out of this particular development.

What is to be done about it? Silence is not an option. Pushing uncomfortable truths under the carpet is not an option. The time has come to have an honest debate and discussion about party-appointed adjudicators and including the issue of nationality and whether it now ought to be excluded altogether to engage in this particular process. And I think it also has trickle-down consequences for the question of who sits on what cases at permanent international courts and tribunals. The moment should be used for an honest and constructive exploration of our own practices – to enhance the system, not to tear it apart.

Which brings me back to ask the question that hovers: How can it be that, despite the fact that these recent matters are now widely reported, even though they happened only a few weeks ago, they have not been talked about at this conference? This raises a question about the nature of our community, one that is a small and closed and inherently conservative, in which it is delicate and embarrassing to raise such matters and talk about them. It is understandable that younger members of the academic community would wish to tread carefully, which is why those of us who are of a more advanced age have a particular responsibility to raise such matters, even if sensitive and delicate, even if it causes difficulties in relation to our own prospects. The concern must be that our community is too cosy and too closed. Scrutiny is good, so is informed discussion and debate. The absence of scrutiny and transparency surely allows these kinds of things to happen and then perpetuates them. Much is under the carpet, and it should be allowed – nay, encouraged – to come out.

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Which brings me back to Professor Ibler. ‘I learnt in my life not to come to fast conclusions’, he said to me. That is surely right, and it covers all of the topics I have briefly touched on and many others. I take heed of his warning and do not come to any fast conclusions. Very regrettably – or perhaps fortunately – Professor Ibler did not live to become aware of what had happened in the case in which he had been involved. He passed away in the summer of 2015 before these matters emerged, leaving him perhaps in a happily optimistic state. He infused us with a sense of optimism – this man of

a hundred years – and that is surely a good thing. So let us leave this conference with a sense of optimism. Let us not run away from the hard, dirty, difficult things that happen in our own narrow, small world. Let us confront them but with courtesy, balance and propriety. I think that is what Vladimir Ibler would have wanted.

Thank you very much indeed for your kind attention.