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Foreword

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Foreword

CESARE P.R. ROMANO*

This issue of the *Loyola of Los Angeles International and Comparative Law Review* has its origins in a conference convened at the Academy Hall of the Peace Palace, at The Hague, in December 2007, to consider the future of international courts and tribunals in the twenty-first century. The conference was organized by the Project on International Courts and Tribunals (PICT) in cooperation with the Permanent Court of Arbitration and the Grotius Centre for International Legal Studies, Leiden University/Campus The Hague, and the sponsorship of Loyola Law School Los Angeles, the Center on International Cooperation, at New York University, and the Centre for International Courts and Tribunals, at University College London.

The event marked not only the centenary of the signing of the 1907 Hague Convention for the Pacific Settlement of Disputes,¹ but also the tenth anniversary of PICT. As a matter of fact, PICT was launched in 1997 to map the rapidly expanding array of international judicial bodies, and to explore the legal and institutional implications of their coexistence.² PICT held its first meeting in February 1997, in London, to discuss the timeliness, feasibility, and interest amongst key-players in its research agenda. Remarkably, it was the first time in history that senior staffers of the registry of several international courts and tribunals and other quasi-judicial bodies met at the same event and had a chance to discuss issues affecting them all.³ In 1998, PICT held its first

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1. Convention I for the Pacific Settlement of International Disputes (Hague I), Oct. 18, 1907, 32 Stat. 1779, U.S.T.S. 392, entered into force Jan. 26, 1910.

2. For more information on PICT, see <http://www.pict-pcti.org>.

3. I.e., International Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights, International Tribunal for the Law of the Sea, World Trade Organization Dispute Settlement Body, Permanent Court of Arbitration,

academic conference at New York University Law School, entitled "The Proliferation of International Tribunals: Piecing Together The Puzzle," which led to the publication of a seminal special symposium issue of the NYU Journal of International Law and Politics.⁴

This time, almost sixty international legal scholars, practitioners and judges met at The Hague to revisit some of the questions raised at the outset of the project, including those canvassed at the 1998 NYU Law School symposium.⁵ Indeed, the Hague conference started by revisiting, in the light of a decade of developments and scholarship, the central question raised at that NYU symposium: is there or should there be an international judicial system?⁶ A set of related questions was asked of the participants. First, to what extent have concerns about possible fragmentation of international law as a result of the multiplication of international tribunals been realized in the last decade? How have tribunals sought to deal with any such concerns, and how might they do so in future? Is there any need for consideration of further general or specific rules to regulate potential overlaps of jurisdiction among international courts and tribunals? To what extent have such overlaps been a problem in practice in the last decade? To what extent has there been an emergence of common procedural rules or approaches? What mechanisms exist for communication and exchange of information among judges from different international courts and tribunals? Finally, are any additional mechanisms required, and, if so, what form might they take? In sum, the symposium asked how far has the array of international courts progressed towards becoming an "international judiciary"?

Albeit international courts and tribunals have very much monopolized the attention of international legal scholars during the past decade, arbitration continues to play a crucial role in the

International Center for the Settlement of Investment Disputes, and United Nations Compensation Commission.

4. See special symposium issue. Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

5. Amongst the international courts and other adjudicative bodies represented there were the African Court of Human and Peoples' Rights, Caribbean Court of Justice, Court of Justice of the Andean Community, ECHR, ECJ, the EFTA Court, ICJ, ICSID, ICTY, ITLOS, PCA, the Special Court for Sierra Leone, and the WTO Appellate Body.

6. Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 680 (1999).

settlement of international and transnational disputes. As a matter of fact, the multiplication and increased use of international courts has been accompanied by an equally vigorous growth of international arbitration, evidenced, *inter alia*, by the reawakening, after a long slumber, of the Permanent Court of Arbitration and the mushrooming caseload of the International Center for the Settlement of Investment Dispute. Thus, the second session asked a question that is always on the mind of international law practitioners: to court or to arbitration? The panel explored the factors that influence this fundamental choice, asking whether arbitration is particularly suitable for certain types of international disputes; what, if any, are the long-term implications of the increased resort to arbitration for the ICJ and ITLOS; and finally, whether changes to procedural rules for these two courts are inevitable.

The third session addressed the often uneasy relationship between domestic courts and international courts. During the decade since the NYU conference, a series of cases suggested that the relationship between national and international courts continues to waver between deference and disdain.⁷ Thus, in what consideration should international courts hold factual findings of national courts or interpretations by national courts of international law? Conversely, looking at the relationship from the perspective of national courts, are there limits to the deference due to international courts? Are the doctrines of *lis alibi pendens* or *res judicata* applicable in the relationship between national and international proceedings?

The fourth session focused on international criminal courts, the area where the greatest and most spectacular progress has been made since the end of the Cold War. The resurgence of international criminal law has been fueled by the creation first of the two ad hoc tribunals—the ICTY in 1993 and the ICTR in 1995—then the International Criminal Court in 1998 and several hybrid courts since 2000—in Sierra Leone, Kosovo, East Timor,

7. For example, the U.S. Supreme Court 2006 decision in *Sanchez Llamas and Medellin*, and the German *Solange* cases (I and II). See *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 29, 1974, 37 (F.R.G.) [hereinafter Solange I]*; *Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 22, 1986, 73 (F.R.G.) [hereinafter Solange II]*; *Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, 89 (F.R.G.) [hereinafter Solange III]*.

Cambodia and Lebanon. Yet, the existential question that is still unanswered is: have international criminal tribunals fulfilled their ultimate mandate, namely restoring peace and bringing justice for victims? Also, an often unnoticed phenomenon is that during the same period the International Court of Justice has considered several cases touching on, directly or indirectly, issues of international criminal law.⁸ Some of those cases stem from the same situations that have been considered by international criminal courts, raising the question of whether these parallel judicial functions should be conceptualized as positive complementary jurisdictions or rather as instances of fragmentation of international law. The ICJ and international criminal courts will likely continue crossing paths in the years ahead, especially if States parties to the International Criminal Court reach an agreement on the definition of aggression at the ICC review conference in 2010.

The fifth section put the men and (still too few) women who wear the international judicial robe under the spotlight. Both in the United States and Europe, some claim that international judges have become too powerful. At stake, they say, are the concepts of sovereignty, national identity, and freedom. Critics have portrayed international judges as cosmopolitan radicals riding roughshod over unwilling nations and peoples in their rush to impose an ill-defined set of "common values." At the same time, others claim international judges are not powerful enough. For all of their reach, the effectiveness of international judges

8. These are the cases arising out of the civil war in Congo. *See, e.g.*, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), 2006 I.C.J. 126 (Feb. 3); Certain Criminal Proceedings in France (Republic of the Congo v. France), 2003 I.C.J. 102 (June 17); Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2000 I.C.J. 3 (Feb. 14). *See also*, those out of the disintegration of Yugoslavia. *E.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 1996 I.C.J. 595 (July 11); Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 2007 I.C.J. 91 (Feb. 26); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=73&case=118&code=cry&p3=4> (last visited Feb. 18, 2009). Arguably, the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory also falls under this category. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Req. for Advisory Op.) (Order of Dec. 19, 2003), available at <http://www.icj-cij.org/docket> (follow hyperlink under "Advisory Opinions"; then follow "2003").

depends ultimately on the faith and trust of powerful nations, leaving courts vulnerable to the vagaries of international politics. Are means of selection of international judges appropriate given the growing significance of international courts and tribunals? What has been, is and will be the contribution of international judges to the making of international law? Should international judges contribute to the making of international law at all considering how they are selected and the unresolved ethical and independence issues? And, finally, what does it mean to be an international judge? How is it different from being a national judge? What is the scope of the international judicial function?

The final session wrapped up the discussion, asking participants to consider whether we reached the end of the multiplication and specialization of international courts; whether there is a need for more, and if so, in which sectors, for what and for whom; and whether there are limits to the specialization of international adjudicative bodies.

In sum, The Hague conference afforded an occasion to assess the work on international legal courts and tribunals produced by a multitude of international legal scholars since the end of the 1990s, to take stock of a decade of developments in the field, and to look to future issues and challenges. The conference proved very rich and challenging. Its format was discussion rather than set panels and papers, but a few participants produced contributions in writing relating to each session of the conference that the student editors of the *Loyola of Los Angeles International and Comparative Law Review* decided would be valuable to publish for the benefit of others working on these important themes. Despite the heterodox nature of the materials available, they have worked tirelessly to bring this issue to fruition, encompassing as it does a range from very substantial papers to summaries of succinct spoken presentations.

Yet, before leaving the floor to my distinguished colleagues and their papers, I would like to use this pulpit to give an update of the status of the Project on International Courts and Tribunals after its tenth anniversary. As a matter of fact, PICT's working structure has undergone some significant changes since its inception. The project was founded in 1997 jointly by the Center on International Cooperation, at New York University, and the Foundation for International Environmental Law and Development (FIELD), at the University of London. In March

2002, the London home of PICT moved from FIELD to the newly established Centre for International Courts and Tribunals, at University College London. In June 2006, Cesare Romano, who had been managing the New York end of PICT since inception, joined the faculty of Loyola Law School Los Angeles. Others, who over the years worked at the New York or London end of the project, likewise moved on to academic appointments in universities around the world. These changes cumulatively led to the transformation of PICT from a joint undertaking of two research centers located at two different institutions in New York and London, to an open collaborative endeavor, a shared research agenda, and a set of related activities (e.g., research, training, teaching, dissemination) carried out by a larger network of institutions and individuals. In short, nowadays people work *on* PICT not *at* PICT.

Currently, PICT has four directors, located at four different institutions: Ruth Mackenzie, at the Centre for International Courts and Tribunals, University College London;⁹ Cesare Romano, at Loyola Law School Los Angeles; Thordis Ingadottir, at Reykjavík University Faculty of Law;¹⁰ and Yuval Shany, at the Hebrew University of Jerusalem, Faculty of Law.¹¹ These are the people who, these days, carry out the bulk of PICT activities and manage the project. In practice, however, PICT is a much larger enterprise that has frequently benefitted on specific activities by the support of several other legal scholars and institutions such as the University of Amsterdam (Amsterdam Center for International Law), the University of Geneva (Faculty of Law and the Graduate Institute of International and Development Studies) and the University of Milan (Faculty of Law).

Each PICT institution/director works independently on a part of the overall research agenda. PICT has one Chairman, Philippe Sands,¹² and a Steering Committee, that oversee PICT as a whole.¹³

9. Deputy Director and Principal Research Fellow, Centre for International Courts and Tribunals, University College London.

10. Associate Professor, Faculty of Law, Reykjavik University.

11. Hersch Lauterpacht Chair in International Law, Faculty of Law, Hebrew University of Jerusalem.

12. QC, Professor of Law, University College London.

13. The current members are: Georges Abi-Saab (PICT Steering Committee Chair, Member, WTO Appellate Body, Emeritus Professor, Graduate Institute of International Studies, Geneva); Mahnoush H. Arsanjani (United Nations, Office of Legal Affairs); Laurence Boisson de Chazournes (University of Geneva, Faculty of Law); Christine Chinkin (Professor, London School of Economics); James Crawford SC (Whewell

PICT's work plan is developed by the directors with the support of the Chairman, in consultation with and endorsement by the Steering Committee. PICT's work agenda remains large and ambitious and, hopefully, will continue making a critical contribution to the understanding of the dynamics, problems and opportunities created by the multiplication of international adjudicative bodies.

Professor of International Law, University of Cambridge; Director, Lauterpacht Research Centre for International Law; Member of the International Law Commission); Pierre-Marie Dupuy (University of Paris II (Panthéon-Assas); European University Institute); Florentino Feliciano (former Member, WTO Appellate Body; Philippines Supreme Court Justice); Rita E. Hauser (President, The Hauser Foundation; Chair, International Peace Academy); Francisco Orrego Vicuna (Professor, University of Chile, Member, United Nations Compensation Commission); Monica Pinto (University of Buenos Aires); Allan Rosas (Judge, European Court of Justice); Bruno Simma (University of Munich; Member of the International Law Commission; Judge, International Court of Justice); Tullio Treves (Università degli Studi di Milano; Judge, International Tribunal for the Law of the Sea); Nina Vajic (Judge, European Court of Human Rights); Eduardo Valencia Ospina (former Registrar, International Court of Justice; Member of the International Law Commission); Michael W. Doyle (Columbia University, SIPA and Law); Richard Falk (Princeton University).

