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# THE PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS: INTERNATIONAL ADJUDICATION IN ASCENDANCE

by Roger P. Alford\*

The past two decades have seen an explosion of new international courts and tribunals. Depending on one's count, more than fifty international courts and tribunals are now in existence, with more than thirty of these established in the past twenty years. The rate of growth has been so furious that government leaders now express concern over "tribunal fatigue." Among the more noteworthy developments in this field in the past two decades are the establishment of two new UN criminal tribunals, one new tribunal relating to the law of the sea, four new or reinvigorated trade and investment tribunals, five new mass claim reparation tribunals, several new regional economic integration tribunals, numerous new human rights tribunals, and one soon-to-be-established international criminal court.<sup>1</sup>

Moreover, international courts and tribunals are being utilized with greater and greater frequency. Judge Stephen Schwebel describes the International Court of Justice (ICJ) as "busier than ever before," and the numbers bear him out: In its first forty years of existence, the ICJ handled 72 cases and rendered forty-five judgments. In the past three years, the ICJ has rendered more than twenty contentious and advisory opinions and currently has twenty-four pending cases on its docket. Likewise, in its first five years of existence, the World Trade Organisation's (WTO) Dispute Settlement Body has been notified of 190 complaints and has rendered thirty-two decisions. Even more astounding, the mass claims tribunals have been rendering decisions that number in the thousands. The Iran-U.S. Claims Tribunal has resolved more than 3,000 claims, the Claims Resolution Tribunal for Dormant Accounts in Switzerland has rendered more than 7,500 decisions, the Commission for Real Property Claims in Bosnia and Herzegovina has rendered more than 25,000 decisions, and the United Nations Compensation Commission (UNCC) has resolved in excess of 125,000 claims.

While there has been a significant focus on a few international tribunals, there have been insufficient efforts to compare and contrast the various courts and tribunals. Even a cursory comparison of these tribunals reveals that there are many unanswered questions regarding the interrelationship of these courts and tribunals and, more disturbing, a profound lack of attention to the collective impact these international tribunals are having on the field of international law. That is changing, as is evidenced by the new Project on International Courts and Tribunals at New York University School of Law, but we as an international legal community are still in the earliest stages of analyzing the importance of these new tribunals. This lecture will sample a few of the representative issues that merit further attention. I will offer concrete examples as often as possible because I think such anecdotes best illustrate the impact of these tribunals.

## INTERNATIONAL TRIBUNALS AS A SOURCE OF INTERNATIONAL LAW

One of the more important issues for practitioners regarding the growth of international courts and tribunals is the impact these courts have as a source of international law. International courts and tribunals regularly render judicial decisions that are creating basic source material for international law. While, in the past, international lawyers may have relied principally on legal opinions emanating from the Peace Palace, they now regularly look to other tribunals for additional guidance. Whether addressing overarching issues such as treaty

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<sup>1</sup> See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 723-28 (1999).

interpretation pursuant to the Vienna Convention of the Law of Treaties or obscure questions such as mitigation of damages under international law, these tribunals are now filling the void.

For instance, while in private practice in Washington representing corporate claimants before the UNCC, I searched in vain for modern judicial pronouncements on the doctrine of *ex delicto non oritur actio*: the principle that an unlawful act cannot serve as the basis of an action in law. In the absence of modern judicial authority, we fell back on Bin Cheng's 1953 classic, *General Principles of Law*, which referred to obscure nineteenth-century mixed-claim commission decisions involving pirates seeking compensation for government seizure of their ships. Fortunately, in 1998 a UNCC panel of commissioners, which included Professor David Caron, filled the void and rendered a modern-day version of the doctrine. In addressing the question of whether Gulf War claimants could pursue claims for losses relating to business activities that violated the UN trade embargo against Iraq, the panel concluded as follows: "Work that . . . involve[s] the transfer of goods or capital to or from Iraq after 6 August 1990 violates the terms of the trade embargo and is not compensable."<sup>2</sup>

The doctrine also finds support at the tribunal I currently serve, the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT). Can a Nazi heir pursue a claim for an account holding assets that were looted from a Holocaust victim? The CRT's rules clearly say no, stating that a claim shall be rejected if it is established by the preponderance of the evidence that the assets in the account were looted from victims of Nazi persecution. *Ex delicto non oritur actio*.

These international tribunals are also relied upon by other international tribunals. The seed of a doctrine on wrongful expropriation was planted by the Permanent Court of International Justice in 1926. This doctrine grew to maturity with dozens of decisions of the Iran-U.S. Claims Tribunal in the 1980s. It then has been cultivated and has borne fruit in decisions by the UNCC and panels of the International Centre for the Settlement of Investment Disputes (ICSID). Likewise, human rights tribunals often cite each other's decisions, fostering a fertile environment that has been aptly described by one scholar as "horizontal dialogue."<sup>3</sup>

Yet despite the vast amount of judicial authority emanating from these international tribunals, much of their jurisprudence remains undiscovered and untapped by international lawyers. Many of the decisions are unavailable, and to the extent that they are in the public domain, they are hidden in plain view, without the benefit of indexes, catalogues, digests or other user-friendly search capabilities.

#### RELATIONSHIP WITH NATIONAL COURTS

A second key issue in a comparative analysis of international courts and tribunals is the relationship of these courts with national courts. Jurisdictional issues arise in connection with the relationship between international tribunals and national courts. In some instances, such as that of the European Court of Justice (ECJ), an international tribunal will work closely with national courts in interpreting and applying substantive treaty provisions. In other instances, the international tribunal divests national courts of jurisdiction, as is the case with the Iran-U.S. Claims Tribunal. This divestiture is so complete that last year the United States was found to be in noncompliance with its Algiers Accords obligation simply by permitting private parties to file lawsuits in U.S. courts in order to toll the applicable statute of limitations.<sup>4</sup> The UNCC, by contrast, is viewed as supplementary to any other dispute resolution mechanism, including litigation before national courts. The UNCC's principal concern regarding its supplementary

<sup>2</sup> *Report and Recommendation of the Panel of Commissioners Concerning the First Instalment of "E2" Claims*, UN Doc. S/AC.26/1998/7 paras. 170-73.

<sup>3</sup> Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 UNIV. PENN. L. REV. 285, 349 (1999).

<sup>4</sup> Award in Case No. A15(IV)/A24 (590-A15(IV)/A24-FT) (Dec. 28, 1999) reprinted in 24 Y.B. COM. ARB. 472 (1999).

jurisdiction is that claimants not receive double payment for the same injury. And under the complementary doctrine, the International Criminal Court will be subordinate to national court prosecution of criminals, likely prosecuting only in cases in which trial procedures may not be available or may be ineffective. The CRT is unusual in that it is separate from any national court and yet has been subsumed within a specific national court proceeding. That is, any decision involving a Holocaust account rendered by the CRT will reduce the amount to be paid as part of the distribution of the global settlement fund.

#### INTERNATIONAL LEGAL PERSONALITY AND THE CAPACITY TO SUE AND BE SUED

Third, there is the issue of international legal personality. International legal personality under international law has historically been viewed as vested only in states. Under this view, individuals and corporate entities are not "legal actors" on the international plane, and a grievance by such an individual or entity must be espoused by a government for the claim to acquire the requisite standing before an international tribunal. The growth of international courts and tribunals has called this historic doctrine into question, such that individuals and corporate entities have the capacity to sue and be sued before many international courts and tribunals.

The authority to sue depends on the treaty or agreement establishing the international tribunal. The ICJ, WTO, International Tribunal on the Law of the Sea, and UNCC continue to require diplomatic espousal of claims by private persons or entities. Many other international tribunals, however, authorize private parties to bring suit directly against a state. These include the ECJ, the European Court of Human Rights (ECHR), and mass claims tribunals such as the Iran-U.S. Claims Tribunal. And a few international tribunals, such as the international criminal tribunals, allow action to be brought directly against private parties.

The difference should not be underestimated, for the competing approaches present different problems. For tribunals that require diplomatic espousal of claims, private parties often have difficulty convincing their government to espouse their claim. Even if the claim is espoused, disagreements arise regarding the conduct of the litigation, such as the disagreement by certain U.S. corporate claimants with the U.S. government position regarding jurisdiction of the UNCC to compensate for Iraqi prewar debt. By contrast, tribunals that do not require diplomatic espousal of claims are often flooded with claims, and these tribunals spend an inordinate amount of time dismissing claims for want of jurisdiction or because the claims otherwise lack merit. Despite the divergent principles regarding the capacity of private parties to sue and be sued before international tribunals, the common thread that unites these tribunals is state consent. By signing the treaty establishing the international court or tribunal, states consent to being sued by individuals. And even in the absence of treaty ratification, a private party may sue or be sued before an international tribunal in appropriate circumstances, provided there is ad hoc consent by the state, in the form of instruments such as the ICSID additional facility mechanisms.

#### EVIDENTIARY STANDARDS AND THE BURDEN OF PROOF

A fourth major issue that merits further attention is the evidentiary standards of international tribunals. To my knowledge there has been no significant attempt to compare and contrast these institutions' various evidentiary standards. Yet, as practitioners will attest, evidentiary standards and the burden of proof are often among the most important factors for claimants in calculating the likelihood of success. The standard of proof before some international tribunals is remarkably low. For example, a claimant before the CRT must show that it is "plausible" in light of all the circumstances that he or she is entitled to the dormant account. This low threshold is appropriate and justifiable in light of the destruction of World War II and the Holocaust, and the long time that has lapsed since the opening of the accounts.

But in rare cases it also can have some unsettling results. Thus, a clearly documented nephew of the account holder may be denied the assets in the account because another claimant, who asserts he is the long-lost son of the account holder, has pieced together enough anecdotal information to make his story plausible.

By contrast, the burden of proof at other tribunals has quite a high threshold. The Iran-United States Claims Tribunal requires clear and convincing evidence that a document is forged. A corporate claimant before the UNCC is required to establish to a "reasonable degree of certainty" each element of its claim through documentary evidence. This too has led to unsettling results. The UNCC has rejected claims for lack of documentation even when claimants have proven that they surreptitiously returned to Baghdad to search for missing documents, only to find that they have been destroyed by Iraqi authorities. The apparent logic of such a high standard is that sophisticated construction companies should keep a duplicate copy of every important document in the corporate headquarters.

There are numerous evidentiary questions that require scholarly attention. Does the tribunal require documentary evidence, or are affidavits sufficient? What sanction does the tribunal apply for recalcitrant defendants who ignore discovery requests? Does the tribunal simply rely on the information available or does it apply adverse inferences? Does the tribunal conduct its own investigation or is it authorized to appoint experts? What recourse is there for the tribunal when witnesses lack credibility or there is evidence that testimony is given under duress or is fabricated? These type of evidentiary questions are critical to the success or failure of many claims before international tribunals, and more attention should be given to the conduct of the court proceedings.

#### INTERNATIONAL COURTS AND WHY NATIONS OBEY

Fifth, and more theoretical, the proliferation of international courts and tribunals also poses more profound meta-questions regarding the conduct of international relations. For example, a comparative analysis of international courts and tribunals offers clues as to why nations obey international law. That is, one can examine international tribunals as one way of testing the mettle of current theories of why nations obey international legal norms. There are numerous theories as to why nations obey. Using the typology offered by Harold Koh, these include (1) classical coercion models (nations obey international rules because they are compelled to do so), (2) Henkin's rationalist model (nations obey international rules because the benefits generally outweigh the costs), (3) Chayes's managerial model (nations obey international rules not because they are threatened by sanction but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong, e.g., they obey because of fear of loss of reputation), (4) Franck's fairness model (nations obey because they are pulled toward compliance by considerations of legitimacy and distributive justice, e.g., they obey because the rules are fair and legitimate), and (5) Koh's transnational legal process model (nations obey because of the complex process of domestic internalization of international legal norms).<sup>5</sup>

One can certainly find support for most of these models by examining international courts and tribunals. The mandates of the UNCC and the ad hoc international criminal tribunals arguably are obeyed as a result of coercion. The Iran-U.S. Claims Tribunal arguably exists because Iran calculated that the political costs of not cooperating were far outweighed by the benefits of unfreezing Iranian assets and terminating U.S. court litigation. ICSID panels established pursuant to investment protections in bilateral investment treaties represent a similar rationalist calculation. Decisions of the ICJ and human rights tribunals often are adhered to because of the legitimacy and inherent fairness of the norm enunciated and because of fear of loss of reputation for noncompliance. The norms of the ECJ and the ECHR have

<sup>5</sup> See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599 (1997).

become internalized domestically, and these courts now are permanent fixtures on the European legal landscape.

The effectiveness of a particular international court depends in large measure on the theoretical rationale for why nations obey its mandates. One would think that courts that base their authority on the coercive model would be among the most effective, but that has not necessarily been the case. For coercive models to work, often one needs the international equivalent of a national guard enforcing judicial authority in the face of Governor Wallace standing at the schoolhouse door. The ad hoc criminal tribunals have been ineffective in apprehending those persons on its most wanted list because the international forces have been unwilling or unable to enforce its indictments. Just this week, the *Washington Post* reported that an indicted war criminal, General Mladic, attended a soccer match in Belgrade and walked right past the VIP box where the Yugoslav foreign minister and the Chinese ambassador were sitting. Likewise, the coercive model of placing the Iraqi oil industry under UN receivership and skimming off 30 percent of the oil revenues was wholly ineffective for many years because Saddam Hussein simply refused to pump oil.

On the other hand, those tribunals established under a rationalist theory have been among the most effective. Iran is still participating in the Iran-U.S. Claims Tribunal, in part because it is a claimant in a multibillion dollar military dispute with the United States. Likewise, for most nations, the benefits of ICSID foreign investment protections far outweigh the costs of investment protection provisions in bilateral investment treaties. On the trade front, one of the great innovations of the WTO is that it has a mechanism for increasing the costs of noncompliance with retaliatory countermeasures. Yet rationalist models have their inherent limitations, for cases do present themselves in which the costs of compliance outweigh the benefits. Few can forget the international tremors that were felt when the European Union threatened to bring suit against the United States over the Helms-Burton Act. One U.S. Government official bluntly stated that the matter fell outside the WTO's competence, and that the United States would not comply with any decision by the WTO. United States congressional leaders even went so far as to state that they would rather pull out of the WTO than abide by a decision finding that Helms-Burton violated the WTO obligations.

#### INTERNATIONAL COURTS AND INTERNATIONAL DIPLOMACY

Finally, the proliferation of international courts and tribunals and the increased reliance on international legal norms also has greatly affected the conduct of international relations. Perhaps the best example of this is the recent dispute over bananas. What began as a Central American dispute over banana exports has now escalated into a major diplomatic dispute that is having repercussions in the diplomatic hallways of Washington and Brussels as well as aftershocks felt as far away as duck farms in France. One could say we are experiencing the growing pains of the adolescent international rule of law.

Of course, more often than not international tribunals do not create diplomatic crises, they solve them. Whatever conclusions one may draw regarding the relative success or failure of the Iran-U.S. Claims Tribunal, it established a mechanism for the pacific settlement of disputes that is far preferable to the outcome that has resulted from the Cuban expropriations. One wonders whether the United States would be able to make diplomatic overtures to Iran today if U.S. nationals had never seen a measure of economic justice. One wonders whether the United States would be making diplomatic overtures to Cuba if U.S. nationals had at some point received just compensation for the billions that were unlawfully expropriated, obviating the need or desire for Helms-Burton.

The proliferation of international courts and tribunals has created a situation in which the normal rules of international diplomacy have changed. We now are in a situation in which new choices are presented to governments when faced with international grievances. Whereas in the

past the options could be placed along a continuum between quiet diplomacy and military intervention, there are now new mechanisms for resolving, and creating, international pressure. Government leaders throughout the world are now asking questions such as:

Should we use the threat to sue before the WTO over state sanctions against Burma as a bargaining chip to encourage sanctions reform?

Will the establishment of a new international tribunal curtail or blunt the impact of class action domestic court litigation?

What is the relevance of the indictment of Slobodan Molosevic as a war criminal in brokering peace in Kosovo?

Should we reconsider the conviction of a political prisoner to avoid the loss of reputation if a claim is filed against us before a human rights tribunal?

How much war reparations should be demanded of Iraq to adequately compensate Gulf War claimants without repeating the mistakes of Versailles?

What will be the impact of future foreign investment if we are forced to litigate this oil dispute before an ICSID panel?

These kinds of questions arise because the proliferation of international courts and tribunals is changing the political and diplomatic landscape. Yet the growth has been so furious that there has been little time to reflect on the importance of international tribunals as players, or, more accurately, as pieces in the international chess game.

#### CONCLUSION

The proliferation of international courts and tribunals represents a profound change in international law and international relations. One hundred years ago, the first global mechanism for the settlement of international disputes was established with the creation of the Permanent Court of Arbitration. The purpose of this tribunal was to “seek the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments.”<sup>6</sup>

One hundred years later, international courts and tribunals have proven to be among the most important means for the peaceful settlement of international disputes. Their impact is being felt at the highest levels of government in Washington. Activists actually riot in the streets because of concerns that the WTO lacks democratic legitimacy and disputes are decided behind closed doors. The impact of these courts is also felt by soft-spoken Holocaust survivors in Warsaw. Such claimants have described the filing of a claim as a cleansing, a release and a forgiving of the past and an opportunity to have a new and honorable beginning. From public protests to private petitions, these tribunals are changing the legal landscape.

Of course, international courts are only one mechanism among many to promote adherence to international norms and resolve international disputes. But the ascendancy of international adjudication cannot be denied, and the need for closer analysis of the newer international tribunals is long overdue.

<sup>6</sup> *Obtainable from* <[http://www.un.int/netherlands/pages/c\\_pca.htm](http://www.un.int/netherlands/pages/c_pca.htm)>