

**Litigating global crises. Setting the scene:
Legal and political hurdles for State-to-State disputes**

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1. *Introduction*

In the observations that follow I will endeavour to set the scene for the three essays published in the present issue of QIL dealing with the role international courts and tribunals may have as regards three sets of global crises, namely climate change, pandemics and migration. After briefly reviewing the current situation of international dispute settlement, I will examine the most important hurdles that have to be overcome for engaging international courts and tribunals in matters involving global crises.

2. *Setting the scene*

After the second World War, and especially since the last decade of the Twentieth Century, dispute-settlement by international courts and tribunals has expanded.¹ The number of international courts and tribunals has increased. So has the number of treaty obligations to submit to the settlement of disputes through international courts and tribunals. The number of possible parties to disputes and the very number of actual disputes has also increased. I will briefly examine these three factors.

2.1. *The expansion of the number of international courts and tribunals*

The International Court of Justice (ICJ) and more or less isolated State to State arbitration tribunals are not any more the only existing

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¹ T Treves, 'The Expansion of International Law' (2018) 398 *Recueil des Cours de l'Académie de Droit International* 304-338.



international tribunals. Other tribunals set up on the basis of multilateral agreements have been established. The International Tribunal for the Law of the Sea (ITLOS) and the Appellate Body of the World Trade Organization (WTO) are the main examples. State to State arbitration tribunals have been established in growing numbers due in part to the important role the UN Convention for the Law of the Sea (UNCLOS) recognizes to arbitration² and to the increasing reliance of States on the services of the Permanent Court of Arbitration.

Moreover, many courts and tribunals dealing with disputes between individuals and States and concerning human rights, as well as dealing with the criminal responsibility of individuals have been established by multilateral treaties or by resolutions of the UN Security Council under Chapter VII of the UN Charter. The main examples are the European and American Courts of Human rights and the Former Yugoslavia and Rwanda criminal Tribunals, as well as the International Criminal Court. The hundreds of arbitration tribunals established on the basis of some of the thousands of bilateral investment treaties (BITs) to deal with disputes between investors and States host to the investment are also an important element of the expansion of international courts and tribunals.

Admittedly, human rights courts, international criminal courts and tribunals and investment arbitration tribunals are different from the ICJ or the ITLOS and as well as from the WTO Appellate Body in that they deal with disputes in which individuals are parties, together with States in cases before human rights courts and investment arbitrations, or with prosecutors selected through mechanisms agreed by States in cases before the international criminal Court and tribunals. Yet, we may consider them international courts or tribunals because they are established by international treaties or Security Council binding resolutions and the law they apply is international law.

2.2. The expansion of compulsory jurisdiction of international courts and tribunals

Consent of the parties remains the basis of the jurisdiction of an international court or tribunal in State to State disputes as well as of arbitral

² UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1834 UNTS 397 art 287.



tribunals in investment disputes. Mechanisms for the acceptance of compulsory jurisdiction of courts and tribunals exist and are expanding. However, the mechanism of the broadest scope, that based on the acceptance of the compulsory jurisdiction of the ICJ under Article 36, para 2, of the Court's Statute, binds only 74 States,³ less than half of the Members of the United Nations. This figure is only slightly augmented by participation of some Latin-American States in the American Treaty for Pacific Settlement of Disputes (the Pact of Bogotá of 1948) and of some European States in the European Convention for the Settlement of Disputes of 1957. As between States parties to either of these treaties such participation is equivalent to acceptance of the optional clause.

The most important development as regards acceptance of compulsory jurisdiction of international courts and tribunals is in two very broadly ratified treaties entered into force in the last decade of the twentieth century and dealing with important chapters of international law: the United Nations Convention on the Law of the Sea (UNCLOS) and the WTO Understanding on the Settlement of disputes. Under these two treaties disputes concerning their interpretation and application between two or more of their very numerous contracting parties are submitted (although with limitations) to compulsory jurisdiction of judicial or arbitral bodies. Moreover, the dispute settlement mechanism of UNCLOS, including compulsory jurisdiction, has been adopted by some multilateral agreements concluded after UNCLOS concerning fisheries,⁴ underwater cultural heritage⁵ and wrecks.⁶ Another important development concerning compulsory jurisdiction are the treaties (thousands of

³ Data in <www.icj-cij/en/declarations>.

⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) (1995) 34 ILM 1547 arts 30-32; Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (adopted 5 September 2000, entered into force 19 June 2004) (2001) 40 ILM 278 art 31; Convention for the Conservation and Management of Fisheries Resources in the South-East Atlantic Ocean (adopted 20 April 2001, entered into force 13 April 2003) (2002) 41 ILM 257 art 24(4).

⁵ Convention for the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) (2002) 41 ILM 40 art 25.

⁶ Nairobi Convention for the Removal of Wrecks (adopted 18 May 2007, entered into force 14 April 2015) IMO doc LEG/Conf.16/19 art 15.



bilateral, and some multilateral) for the protection of investment in which contracting States accept compulsory jurisdiction of arbitral tribunals in cases brought against them by private investors.

2.3. The increased number of disputes actually submitted to international Courts and Tribunals

A perusal of the websites of the ICJ, of the ITLOS, of the WTO and of the PCA shows that State to State disputes submitted to international courts and tribunals have substantially increased during the recent decades. In particular, the once feared competition by the ITLOS and arbitration tribunals has not diminished the role of the ICJ that remains more active than ever. Former colonial dependencies having become independent States play an important part in expanding the number of State to State, as well as investment, disputes submitted to international courts and tribunals. So do newly independent States previously included in the USSR and Yugoslavia.

3. Limitations and reactions to the expansion of the role of international courts and tribunals

To assess the prospects for a role of international courts and tribunals as regards global crises it is necessary, however, to nuance the rosy picture just broached. The following developments may be mentioned.

No new international courts or tribunals have been established since the beginning of the twenty-first century. The Court of Conciliation and Arbitration of the Organization for Security and Co-operation in Europe has been established but never used.

Compulsory jurisdiction of the ICJ is limited not only because, as already remarked, less than a half of the UN members have accepted the optional clause, but also because many States accepting the optional clause do so with numerous and often broad reservations.

Moreover, some States, especially when unhappy with the outcome of cases in which they were involved, have withdrawn their acceptance of the optional clause, or withdrawn from the treaties, such as the Pact of Bogotá, containing compulsory jurisdiction clauses.



The practice of non-appearance has been resorted to by States called to appear as defendants before the ICJ, the ITLOS and State to State arbitral Tribunals on the basis of compulsory settlement provisions. While this does not stop the exercise of jurisdiction by the seized court or tribunal, it is a symptom of lack of trust and a signal of dissatisfaction with the functioning of compulsory jurisdiction.

The Law of the Sea Convention contains substantial limitations to applicability of the compulsory disputes mechanism, as well as optional exceptions that a number of States parties, and especially the most powerful among them, have resorted to.

The WTO Appellate Body is at present in a state of paralysis due to the opposition of the United States to the renewal of its membership.

Some developing States are dissatisfied with being submitted to compulsory investment arbitration and have withdrawn from Bilateral Investment Treaties or from the ICSID Convention.

Compulsory arbitration under BITs is widely criticized and reforms are studied and discussed in international fora.

Human Rights Courts remain a regional phenomenon totally excluding the biggest continent, Asia, and the International Criminal Court does not count among the parties to its Statute the most powerful and populated States.

4. Recent developments in judicial practice

Two recent developments may have an impact on possible resort to international courts or tribunals in order to deal with global crises. The first concerns the practice of seizing the ICJ invoking multilateral treaties containing a compulsory dispute-settlement clause, as the Convention for the Elimination of Racial Discrimination (CERD), in order to expose to the Court and to public opinion egregious cases of human rights violations. The second includes cases in which a State resorts to all or many compulsory dispute settlement clauses available with the purpose to score points in a political controversy.

The case submitted by Gambia against Myanmar to the ICJ under the Convention on the Prevention and Punishment of the Crime of



Genocide⁷ as well as the cases submitted to the Court in September 2021 under the CERD by Armenia against Azerbaijan and by Azerbaijan against Armenia⁸ seem fitting recent examples of the first category. Examples of the second category are the initiatives taken before multiple international fora⁹ by Qatar against Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, as well those taken, again before multiple fora,¹⁰ by Ukraine against the Russian Federation. Both these legal campaigns, for which the denomination of ‘lawfare’ seems appropriate, derive from broader disputes with substantial political implications that cannot be submitted as such to the judge, because of lack of jurisdiction. The opposition of attitudes in the Middle East conflicts and spheres of influence, including links to Iran or the United States, are the background of the Qatar legal campaign. The annexation of Crimea by the Russian Federation is the background controversy of Ukraine’s campaign.

5. *Questions in assessing the possibility of submitting global crises cases to State to State courts and tribunals*

Having in mind the picture just broached, what are the lessons to be drawn as regards resort to international courts and tribunals in matters connected to global crises? My observations will focus, principally on resort to the ICJ and to State to State arbitration tribunals.

5.1. *Legal hurdles*

Four hurdles present themselves to the prospective plaintiff. The first consists in determining the treaty or customary law obligation whose

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) Order of 23 January 2020 [2020] ICJ Rep 3.

⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* ICJ Press Release 2021/20 and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* ICJ Press Release 2021/21.

⁹ These fora include the International Court of Justice, the ICAO Council, arbitration tribunals established under art 32 of the Constitution of the Universal Postal Union.

¹⁰ Including the ICJ and arbitration tribunals established under UNCLOS Annex VII.



alleged violation is the origin of the dispute. The second consists in determining the existence of the dispute. The third consists in determining whether there is a court or tribunal with jurisdiction over the dispute. The fourth consists in determining whether the prospective plaintiff has *locus standi* before the competent court or tribunal. I will try to assess them separately but in practice there may be overlaps between two or more, as the objective is to find whether there exists a court or tribunal with jurisdiction to adjudicate a claim that the prospective plaintiff may bring against a given State.

The obligation whose violations is invoked must be set out in an international law rule binding for the prospective plaintiff as well as for the prospective defendant. While a customary rule is by definition binding on all States, when a treaty obligation is considered it must be contained in a treaty applicable between the parties. Moreover the facts constituting the alleged violations must be encompassed by scope of the rule invoked.

As regards the *existence of the dispute*, the International Court of Justice relies on the almost century old *Mavrommatis* definition¹¹. It has, however, introduced refinements to the requirement that there exist ‘a disagreement on a point of law or fact, a conflict of legal views or of interests’¹² between parties, such as that ‘[i]t must be shown that the claim of one party is positively opposed by the other’.¹³ Yet up to the 2016 Judgments on the *Nuclear arms race* submitted to the ICJ by the Marshall Islands against several States, the Court has never rejected a case on the ground that there was no dispute at the time the Application was lodged. This was done in these 2016 Judgments.¹⁴ The Court added to the requirements for the existence of a dispute specifying that ‘a dispute exists when it is demonstrated, on the basis of the evidence, *that the respondent was aware, or could not have been unaware*, that its views were “positively

¹¹ *Mavrommatis Palestine Concessions* (Judgment) [1924] PCIJ Series A No 2.

¹² *ibid* 11.

¹³ *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) Judgment of 21 December 1962 [1962] ICJ Rep 328.

¹⁴ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)* (Preliminary Objections) Judgment 5 October 2016 [2016] ICJ Rep 255 (emphasis added). The judgments in the parallel cases submitted by the Marshall Islands against the United Kingdom and Pakistan come to the same conclusion using the same language: *Marshall Islands v Pakistan* [2016] ICJ Rep 552 and *Marshall Islands v United Kingdom* [2016] ICJ Rep 833.



opposed” by the applicant’.¹⁵ This ‘objective awareness’ (to use judge Crawford’s terminology)¹⁶ requirement was deemed sufficient for justifying the Court’s finding that there was no dispute concerning compliance of the defendant States with an obligation under the Nuclear Proliferation Treaty. Doubts may be raised as to whether the addition of this requirement is correct or opportune. Dissenting opinions, especially the terse and well reasoned one by Judge Crawford, show that such doubts may be justified.

Be it as it may, the 2016 judgments show that the ICJ may not hesitate to revisit the notion of dispute by conditioning its existence to further requirements when it does not feel ready to confront a highly delicate political controversy. That the dispute submitted to it was one involving such controversy is witnessed by the fact that the Judges in the majority included all nationals of nuclear States present on the bench, and that the decision was taken in the cases against India and Pakistan by the narrow majority of 9 to 7 and in the case against the United Kingdom by 8 to 8 votes with the casting vote of the President.¹⁷ The 2016 *Nuclear arms race* judgments may be, in my view, very instructive, as regards the requirement of the existence of a dispute, for States wishing to start a case against important States on matters concerning global crises.

Finding a court or tribunal having jurisdiction to deal with the case is a key initial task of the legal advisers of the State wishing to submit a case to an international court or tribunal. It conditions the already mentioned search for the obligation non-compliance with which may be invoked and the determination of the existence of the dispute. This task consists in finding an applicable compulsory dispute-settlement clause applicable between the prospective parties permitting to start a case without obtaining the consent of the other party. The ideal but not too frequent scenario

¹⁵ *Marshall Islands v India* (n 14) para 38; *Marshall Islands v Pakistan* (n 14) para 38; *Marshall Islands v United Kingdom* (n 14) para 41.

¹⁶ In his dissenting opinions in the three cases [2016] ICJ Rep (n 14) 513, 794, 1093.

¹⁷ Vice-president Yusuf voted with the majority in the cases against India and Pakistan, and with the minority in the case against the United Kingdom. In his dissenting opinion in this case he explains the factual circumstances that in his view justified his conclusion that a dispute between the Marshall Islands and the United Kingdom existed ([2016] ICJ Rep (n 14) 861). He nonetheless disagreed with the requirement of ‘awareness’ in his declarations in the cases against India (ibid 282) and Pakistan (ibid 578).



is that both parties have accepted the optional clause of Article 36, para 2, of the ICJ Statute and that there are no relevant reservations to such acceptance. If this is not the case, the search will be for a treaty that contains a compulsory dispute-settlement clause and that contains provisions that can be claimed to apply to the State's conduct as regards a global crisis. This may cause the starting of a case whose connection with such conduct is tenuous or debatable encouraging preliminary objections of the other party.

If a treaty with a compulsory jurisdiction clause is not available a case can be brought in the hope that the other party accepts the jurisdiction of the Court through the *forum prorogatum* mechanism of Article 38, para 5, of the Rules of the ICJ. As the *Nuclear arms race* cases indicate, the chances of obtaining consent in this way are slim.¹⁸ The question of acceptance or non-acceptance of jurisdiction may raise discussions and seize the attention in the public opinion. This can be used to the advantage of the requesting States.

A final hurdle to be overcome is to determine whether the prospective plaintiff State has standing to bring the case to the ICJ or another court or tribunal. The question is whether the prospective plaintiff State needs to be an injured State to be able to submit the case. The issue has undergone significant evolution during the last decades. The International Law Commission's Articles on State responsibility provide that in case of *erga omnes* or *erga omnes partes* obligations non-injured States are entitled to invoke the responsibility of another State.¹⁹ While this statement is set out in a set of articles concerning the substantive law of State responsibility, the ICJ has (on the unarticulated but indispensable tacit premise that there was jurisdiction, as explained by Professor Gaja)²⁰ relied on these Articles of the ILC to affirm the *locus standi* of States parties

¹⁸ As reported in the 'Overview of the Case' in the Court's website pages (<www.icj-cij.org>) concerning each of the cases between the Marshall Islands and the United Kingdom, India and Pakistan, the Marshall Islands had also filed Applications against China, Democratic People's Republic of Korea, France, India, Israel, Pakistan, Russian Federation, and United States of America. Nonetheless, these were not entered in the list of cases because these States did not consent to the jurisdiction of the Court under art 38(5) of the Rules of the Court.

¹⁹ Arts 42 and 48 of the ILC Articles, available inter alia in J Crawford, *The International Law Commission's Articles on State Responsibility* (CUP 2002) 61.

²⁰ G Gaja, 'The Protection of General Interests in the International Community' (2014) 364 *Recueil des Cours de l'Académie de Droit International* 114.



to treaties setting out *erga omnes* obligations even when they are not the injured State. The Court has applied this reasoning to obligations under the Torture Convention in its judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* case,²¹ and more recently, although *prima facie*, in the provisional measures order in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* case.²² Multilateral treaties that may be invoked in connection with global crises are likely to contain *erga omnes* parties obligations so that these developments can be useful additions to the toolkit of the legal adviser considering submitting a case connected with a global crisis to an international court or tribunal.

5.2. Political and policy aspects

No less important than the legal questions arising from the four hurdles just examined, may be the policy or political aspects. We have seen that, under recent trends in the ICJ's jurisprudence, through the notion of *erga omnes* or *erga omnes partes* obligations all States, and all States parties to a multilateral treaty, may invoke the responsibility of a State alleging violation of one such obligation even when they are not an injured State, and that they have *locus standi* to submit these claims to an international court or tribunal. But for what reason should such a claim be submitted to an international court or tribunal? The possibility of compromising the relationship with an allied or otherwise friendly country, or being perceived as being motivated by bad relations with an hostile country may discourage a State from seizing an international court or tribunal. Moreover, why should one State bear the political, legal and financial burden of submitting a case to an international court or tribunal when other States that could do the same are not doing so? Coordinated initiatives with States with the same claim may be in order to make the position of each participating State less uncomfortable. But also such coordination has its political costs.

²¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012 [2012] ICJ Rep 422 paras 69-70.

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (n 7) 3 paras 41-42.



Moreover, the prospective plaintiff must make up its mind as to what is its principal true objective in initiating a case. Is it the desire to have a dispute settled and perhaps to obtain compensation for the alleged wrongdoings of the other State? Or is it the desire to have the Court make a statement that consolidates or develops the law and perhaps, as suggested by Lowe, contributes to the ‘setting of the conditions to negotiate solutions at the political level’?²³ This policy choice may be relevant in the determination or in the characterization of the dispute, and, possibly more importantly, in the domestic discussions concerning whether to resort to an international court or tribunal. It may moreover be relevant as regards the decision to request or not to request provisional measures. Such request seems more consonant with the objective of settling a dispute and to submit it quickly to the attention of international public opinion.²⁴

²³ V Lowe, ‘The Function of Litigation in International Society’ (2012) 61 ICLQ 209, 213.

²⁴ T Treves, ‘The Political Use of Unilateral Applications and Provisional Measures Proceedings’ in JA Frowein, K Scharioth, I Winkelmann, R Wolfrum, (eds), *Verhandeln für Frieden, Negotiating for Peace, Liber Amicorum Tono Eitel* (Springer 2003) 463-481.

