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Mythic Courts

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Abstract: This essay critiques common rationales offered for establishing new global courts or tribunals to address terrorism, acts by ISIS, corruption, human trafficking, human rights abuses committed by states, businesses, and international organizations, and the rights of foreign investors. It argues that the three general rationales for these courts, including the International Investment Court that is most likely to be established -- that they are needed to fill gaps in international law, to provide remedies or permit enforcement, and to harmonize or 'de-fragment' the law -- are more Eurocentric myth than reality.

KEYWORDS: New global court,terrorism, corruption, human rights, Internatiopnal Investment Court

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I. Introduction

Even before lawyers self-identified as specialists in ‘international law’ many were strongly invested in the ideal of supranational or international permanent courts. In the modern era, many sought to establish global adjudicative institutions, along with regional courts. Hopes for the former famously dominated the 1899 and 1907 Peace Conferences in The Hague. Those conferences failed to produce the two such entities anticipated – a Permanent Court of International Justice or an International Prize Court. Instead, they yielded only the misnamed Permanent Court of International Arbitration which was neither ‘permanent’ nor a ‘court.’¹ These failures have not discouraged later generations of international lawyers from proposing new global international courts (henceforth “ICs”). This essay looks critically at contemporary rationales on offer for new global courts. It revisits the gap between the ‘mythic courts’ that international lawyers devise in their heads and the actual ones established on the ground. It questions claims that these proposed courts are truly universal in appeal as well as whether they will, as envisioned, complete, enforce, and harmonize international law.

At the outset, some clarifications are in order. My intent is not to bury ICs beneath the hubris of their makers. The title of this essay should not be misunderstood. I am not arguing that global permanent courts, however mythic in conception, are detrimental or useless.² The authority

¹ See generally, David D. Caron, “War and International Adjudication: Reflections on the 1899 Peace Conference,” 94 *AJIL* 4, at 14 (2000). Those conferences’ other major aspiration, disarmament, was no more successful.

² I should also explain my use of the term “myth.” While some modern definitions of ‘myth’ identify the word with total fictions having no connection to reality, older meanings of the term are more subtle and accept some slippage between truth and fiction. As I use the term, “mythic” rationales for ICs take a plausible judicial function or outcome and stretch it to fictive dimensions. As I discuss below, the International Criminal Court (ICC) may have some deterrent (if minimal) effects on perpetrators who commit the crimes within that Court’s jurisdiction. That Court may also enable the preservation of documents that historians might be able to use to construct an accurate account of atrocity. It may provide some relief for few victims of mass atrocity who are called as witnesses before the Court. But

exercised by such courts differs and depends on many variables. An IC's 'effectiveness' may have little to do with whether it lives up to the original goals of its creators.³ The substantial number of international adjudicative forums in existence today, including some 20 permanent courts, have produced tens of thousands of judicial and arbitral rulings, along with a welter of influential, even if non-binding, views or comments, that have transformed modern international law. International legal specialties such as trade, investment, labor, and human rights would be unrecognizable but for the underlying regime's turn to supranational adjudication. As Sir Daniel Bethlehem has recently pointed out, this "common law endeavor on a global scale" has made judicial decisions far more important than is anticipated by Art. 38(1)(d) of the ICJ's statute which accords them only "subsidiary" status.⁴

International lawyers can be proud of the many permanent courts and tribunals established over the course of the 20th century, as well as the many more quasi-judicial bodies.⁵ These forums, as conciliation and mediation efforts, help resolve inter-state disputes that could undermine peace or security. The rising number of international adjudicative forums now open to non-state participation also help thousands of private parties, from individuals to MNEs, to settle their

it would nonetheless be a myth to argue (as many proponents for the ICC did at its creation) that that Court would deter future perpetrators of mass atrocity, enable collective memory, provide relief for victims of such atrocities, and be the fulcrum for 'transitional justice' in societies devastated by such atrocities. Of course, a 'mythic' court may also be one that never comes into existence. Many of the IC proposals addressed in this essay may prove to be mythic in that sense. If so, it may have something to do with the mythic rationales made to justify them.

³ See, e.g., Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, International Court Authority, at 12 (2018).

⁴ Sir Daniel Bethlehem, "The Greening of International Dispute Settlement? Stepping Back a Little," Brower Lecture, ASIL Annual Meeting, June 26, 2020.

⁵ See, e.g., Jacomijn J. van Haersolte-van Hof, "The Revitalization of the Permanent Court of Arbitration," *LIV Netherlands Int'l L. Rev.* 395 (2007)(a survey of the development, over time, of the PCA).

disputes with governments.⁶ It is good thing that a nascent international judiciary is part of international lawyers' toolbox. As Karen Alter has pointed out, the existence of regional and global international courts, have changed how politics is conducted.⁷ Even realists within political science now need to pay attention to cases brought to these forums and those that are merely threatened since even the *prospect* of international adjudication has an impact on how states behave.

At the same time, proposals to establish global courts or tribunals require careful scrutiny. No one should assume, as some have, that the more ICs we have the better – or that when international adjudication is desirable this needs to occur in forums designed for universal participation. Some international disputes, especially those dealing with international law's many 'legal black holes,'⁸ would be better suited to non-binding mediation or conciliation. Some matters should be left to regional international courts, particularly when regional treaties or rules are most on point. And even if a new global adjudicative forum is a good idea, its relationship with existing institutions, including other ICs, needs to be carefully considered. Caution is warranted because the prospect of ICs with a universal reach often inspires grandiose and appealing aspirations that when dashed, undermine those same institutions and possibly multilateralism more generally.

History tells us that the legitimacy of ICs suffers when the expectations they generate are not met. And yet, from the immediate post-Cold War period through today, proponents of global courts continue to espouse mythic goals. The leading exemplar is, of course, the International Criminal Court (ICC). The goals of the ICC's original proponents are the stuff of legend. Those

⁶ See, e.g., Karen J. Alter, *The New Terrain of International Law*, at Figure 3.2, 84 (2014)(indicating that 16 of the existing permanent international courts permit certain non-state parties to initiate cases).

⁷ See generally, *id.* (*The New Terrain of International Law*).

⁸ See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L682 (13 Apr. 2006), at p. 253 (describing the state of principles for addressing inter-regime conflicts as a "legal black hole").

who fought for the ICC argued that it would convict the guilty, absolve the innocent (and thereby avoid collective guilt), enable specific and general deterrence, permit perpetrators to atone for their acts and be rehabilitated, honor the dead, alleviate the suffering of survivors of atrocity by providing recompense, preempt the thirst for revenge, affirm and restore the national and international rule of law, preserve collective memory, and otherwise facilitate ‘transitional justice.’⁹

Both opponents of that Court as well as a few of its friends questioned some or all of these justifications. Many have suggested that it was foolhardy to expect such a global court – which can only realistically convict an exceedingly small and selective slice of those who commit the international crimes within its jurisdiction – to effectively deter, even if it were to achieve universal participation. They argued that no one should expect such a Court, even if it prove able to prosecute most of the most serious offenders in a country, to absolve those not in the dock from ‘collective guilt.’¹⁰ They pointed out that the specific or general deterrence or rehabilitation rationales underlying domestic prosecutions for ordinary crime are hard to export to the global level for crimes of state and hate. Many of us warned particularly against according the ICC primary jurisdiction as was done with respect to the ICTR.¹¹

The realities of the ICC and of the ad hoc war crimes tribunals that preceded it underlie these cautions. Those supranational courts may have accomplished many things but they have not produced clear deterrence effects (at least not yet).¹² The experience of the ICTR and ICTY (which

⁹ See, e.g., José E. Alvarez, “Rush to Closure: Lessons of the Tadić Judgment,” 96 Mich. L. Rev. 2031, at 2031 (1998).

¹⁰ See, e.g., id. (Rush to Closure)(arguing that given Nuremburg’s lack of success on this score, one could hardly expect better results with the ICC). See generally, Daniel Goldhagen, Hitler’s Willing Executioners (1996).

¹¹ See, e.g., José E. Alvarez, “Crimes of States/Crimes of Hate: Lessons from Rwanda,” 24 Yale J. Int’l L. 365 (1999).

¹² See, e.g., Marko Milanovic, “The Impact of the ICTY on the “Former Yugoslavia: An Anticipatory Postmortem,” 111 AJIL 233, at 234 (2016); Shai Dothan, “The ICC is Not as Slice of Cheese,” iCourts Working paper Series, No. 184, 2019.

were surprisingly successful in prosecuting nearly all of those they indicted) does not give us much hope that international criminal trials really provide victims with the benefits anticipated. Indeed, students of transitional justice suggest that other efforts – building monuments, preserving more comprehensive records of complicity through truth commissions, lustrations that disqualify perpetrators from public office, or providing targeted recompense to victims – may be more effective tools to honor or provide solace to victims, satisfy the thirst for revenge, or preserve the memory of atrocity. And the current backlash against the ICC, including from many African states that once were prominent supporters, makes it doubtful whether that Court, now nearing its 20th year, has done much to advance the national or international rule of law (even assuming that we are any closer today to agreeing on what those terms mean).

The ICC's current legitimacy challenges surely have something to do with the gap between the myths on which it was founded and that Court's less lofty actual contributions given its few (and messy) attempts at prosecution to date. Proponents of the ICC assumed that the Court would achieve its mythic goals by bringing perpetrators to trial in The Hague. They assumed that the more ICC trials were conducted, the more effective the Court would be in achieving all of the enumerated goals. Few considered that, on the contrary, the greatest achievement of the Rome Statute would be the consensus it achieved with respect to defining the underlying crimes and convincing states (including some that have never ratified the Rome Statute) that these should be addressed in some fashion, including through national prosecutions or civil 'human rights' actions. Few gave much thought to the benefits of "direct" and "indirect" "positive complementarity."¹³ Had the drafters of

¹³ See, e.g., Geoff Dancy and Florencia Montal, "Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions," 111 AJIL 689 (2017); Human Rights Watch, "The ICC's Impact on National Justice (2018), available at https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf. Ironically, many of those present at the

the Rome Statute focused on these possible achievements far from The Hague, they might have enhanced the ICC's impact by, for example, anticipating the need for technical and financial assistance to states that were 'willing and able' to take appropriate action at the national level. Greater sensitivity to the interplay between supranational court and forums for transitional justice (and not just criminal prosecutions) at the local level might have moderated the backlash that the ICC is now facing.

The well-trodden myths of the ICC require no further revisiting in this article. They should inspire, however, closer examination of the rationales now on offer for a new slate of global courts or tribunals. It is these rationales – and the presumptions behind them -- that are the focus here.

This essay argues that in some important respects, those who set in train the modern wave of ICs in the early 20th century – at the 1899 and 1907 Hague conferences -- while often portrayed as among the most utopian of international lawyers, were more realistic than today's proponents of new global courts. That generation of international lawyers understood, first, that an international court worth building requires achieving, first and foremost, considerable consensus on the law that court would apply. They would have been the first to predict that the most important achievement of the ICC's Rome Statute was to secure consensus on defining international crimes worthy of global enforcement.¹⁴ That generation of IC aspirants understood, second, that binding international adjudication by permanent judges is only one possible option for interpreting and enforcing international rules -- one whose merits need to be considered alongside other options, including national and regional forums and other methods for peaceful dispute settlement. Third, that first

creation of the ICC viewed its complementarity provisions as a concession to real politick and a step backward from the primacy accorded to the ICTY and ICTR.

¹⁴ Of course this was all the more necessary given the ancient *nullem crimen sine lege* principle recognized in the Rome Statute itself at Art. 22.

generation, most of whom came from Europe, learned through their own experience that global courts worth building need to assuage the suspicions engendered by the colonialist legacies of international law.

This essay argues that today's most prominent proposals for ICs generally fail to heed these three lessons. Contemporary proponents of new global courts seem to forget that even judges who do not have to worry about the principle of legality because they are not adjudicating international crimes should not be expected to make the law up as they go along. They imagine instead that gaps in the law, remedial deficits, and the risks of fragmentation can be most easily remedied by elite judges on permanent courts. Advocates for new ICs seem to presume that permanent global courts are superior to alternatives. This bias in favor of judicialization is grounded on a premise that what works for Europe works for the world.

II. The New Slate of IC Proposals

At present, a number of governments, scholars and influential NGOs are proposing new global courts or tribunals. These include proposals for an International Arbitration Tribunal on Business and Human Rights, a World Court of Human Rights, an International Court to Combat Human Trafficking, an International Court Against Terrorism, a Multilateral or International Investment Court, an International Anti-Corruption Court, and an ISIS-only War Crimes Tribunal. These are briefly addressed in turn.

A number of scholars and policy makers, including Lawyers for Better Business, want to establish an **International Arbitration Tribunal for Business and Human Rights** to provide

those victimized by MNEs and their supply chains a remedy.¹⁵ Proponents of this tribunal argue there is a “governance gap” since remedies are “patchy, unpredictable, and ineffective;” national courts, if not overloaded and dilatory, may fail to have judges with the relevant expertise or fail to act because of corruption or political influence.¹⁶ They see a need for a body of reasoned opinions that would develop the human rights duties of private business from the current patchwork of MNE self-regulation and soft law. They argue that the new Arbitral Tribunal would develop the law from the ‘ground up,’ just like merchants’ courts once developed from arbitral practice *lex mercatoria*.¹⁷ A further advantage of the arbitration tribunal, over ‘frail’ national courts, is that it would issue awards that would be widely enforceable under treaties like the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards.¹⁸

The leading proposal for a **World Court for Human Rights**, stemming from a 2011 initiative by the Swiss government that was subsequently endorsed by Norway and Austria and by many of the leading lights of human rights (such as Mary Robinson and independent experts from the UN Human Rights Council), imagines a permanent treaty-based court of 21 full-time judges capable of hearing claims submitted by any person or persons or NGOs. This Court would be able to issue binding judgments as well as advisory opinions requested by any state, the UN Secretary-General, or the UN High Commissioner for Human Rights. Under its proposed draft statute, “entities” (defined to be any inter-governmental organization or non-state actor, including any

¹⁵ See generally Human Rights Resource Centre, “An International Arbitration Tribunal on Business and Human Rights – Version Five,” <https://www.business-humanrights.org/en/proposals-for-intl-tribunal-on-corporate-liability-for-human-rights-abuses-0/?page=1#c121852>.

¹⁶ Claes Cronstedt and Robert C. Thompson, “A Proposal for an International Arbitration Tribunal on Business and Human Rights,” 57 Harv. Int’l L. J. 66 (2016).

¹⁷ Cronstedt and Thompson, *supra* note , at 67.

¹⁸ *Id.*, at 68.

business) could also recognize the competence of the Court to receive complaints against them arising under any human rights treaty that they identify. Like the proposed Tribunal for Business and Human Rights, the World Court for Human Rights responds to a perceived need to ‘harmonize’ the law of human rights given the proliferation of other human rights interpreters, including nine committees under UN human rights treaties, regional human rights courts, and over 30 human rights special rapporteurs. Proponents argue that the new World Court of Human Rights would not make any new human rights law since it would ‘only’ apply any or all 21 human rights treaties to the extent state parties have ratified the particular treaty and they (or any “entities” that do the same) agree to allow the Court to hear claims under one or more of them.

Proposals for an **International Court to Combat Trafficking in Human Beings** stem from dissatisfaction with frail or inconsistent domestic attempts at enforcement and the absence of any regional courts targeting this evil. Like advocates for the other two tribunals mentioned above it is also hoped that the new Court will harmonize the law, which now differs considerably from country to country given diverse views on, among other things, the legality of prostitution and whether, even among countries that criminalize the sex trade, the law should emphasize the transnational movement of persons as the key issue.¹⁹ Proponents hope that the Court’s judges will also settle debates about whether the relevant international law reference point should be the prohibition on slavery (particularly relevant to the extent the focus is on the exploitation of labor and not just sex trafficking), the unequal status of women (particularly important for those focused on ending sex trafficking), or crimes against humanity (particularly important for those seeking criminalization and not just ‘civil’ penalties for traffickers). Some express the hope that the judges will embrace

¹⁹ See, e.g., John Cooper Green, “A Proposal Leading to an International Court to Combat Trafficking in Human Beings,” University of Nevada (2011), available <https://digitalcommons.unl.edu/humtraffconf3/13/>.

the definition of the crime of trafficking in persons contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children that supplements the UN Convention of Transnational Organized Crime.²⁰

The proposed **Court Against Terrorism** – an idea that inspired the original negotiations for an ICC but was left on the cutting room floor – emerges from comparable frustration with the inability or reluctance of national courts to prosecute terrorist acts, notwithstanding 18 specialized anti-terrorist conventions targeting, for example, terrorist bombings, terrorist financing, and acts against air and maritime security. The hope is that such a Court could be established, perhaps by Security Council resolution, to enable international prosecutions against a general crime of terrorism. As the Romanian minister of foreign affairs put it, the hope is that its judges would adopt a “common-denominator approach” that go beyond the crimes now covered by existing anti-terrorism treaties.²¹ Some proponents expect the proposed global court to embrace the customary crime of terrorism as defined by the Special Tribunal for Lebanon.²²

²⁰ Id. Green does not, however, suggest that establishment of the proposed Court should be contingent on the ratification of the Protocol. Indeed, his proposal appears to envision the possibility of simultaneous prosecutions of human trafficking by regional courts for this purpose in Eastern Europe and Southeast Asia as well as prosecutions under by the ICC.

²¹ See, e.g., Bogdan Aurescu, “Does the world need an International Court Against Terrorism?,” World Economic Forum, Nov. 17, 2015, available at <https://www.weforum.org/agenda/2015/11/does-the-world-need-an-international-court-against-terrorism/>.

²² The Appeals Chamber of the Special Tribunal for Lebanon found that there exists a customary international law offense of “terrorism” consisting of the perpetration of a criminal act or threatening such act intended to spread fear among the population or directly or indirectly coercing a national or international authority. Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, paras. 83, 85. For criticism see, e.g., Ben Saul, “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism,” 24 *Leiden J. Int’l L.* 677 (2011).

The proposed **Anti-Corruption Court** would enable the successful prosecution of governmental acts of corruption that national courts are reluctant to undertake.²³ It would also play a significant law-defining role. While there are considerable regional and global efforts to combat corruption, including the World Bank’s Integrity Vice Presidency’s efforts to reject financing projects involving companies that have engaged in bribing government officials, the Court would be expected to ‘harmonize’ the relevant rules. Like most of the other proposed global ICs, the hope is that the Anti-Corruption Court would solve an important enforcement gap while ensuring more uniform agreement on what constitutes an illegal ‘corrupt’ act by both private parties and governments.

When ISIS fighters took over large parts of western Iraq and eastern Syria in mid-2014 establishing a ‘caliphate,’ they submitted the people under their control to horrific human rights violations, including acts that would be characterized as war crimes, crimes against humanity, and genocide.²⁴ The military defeat of ISIS in Iraq and Syria and the arrest of thousands of former fighters, including not only Iraqis and Syrians but foreign nationals from some 70 states, left a problem: what to do with such persons, particularly those whose countries are reluctant to take them back. Among a number of initiatives for holding such persons accountable is a proposal initiated by Sweden and supported by a number of other European states to establish an international or hybrid tribunal modeled on others created by the UN Security Council.

The idea for an **ISIS-only Tribunal**, perhaps based in Iraq assuming that it would accept former ISIS fighters now imprisoned in Syria, stems from the absence of likely alternatives. While

²³ Mark L. Wolf, “The World Needs an International Anti-Corruption Court,” *Daedalus* 144 (July 2018).

²⁴ See, e.g., Impunity Watch, Policy Brief, “ISIS-only tribunal: selective, politicized justice will do more harm than good,” Oct. 31, 2019, available at <https://www.impunitywatch.org/post/isis-only-tribunal-selective-politicised-justice-will-do-more-harm-than-good>.

Iraq has condemned thousands of alleged ISIS members to death or lengthy prison terms, its trials have charged individuals for being members of ISIS rather than specific violent acts, have not accorded victims or their family members much access or information, and have been criticized for lack of fairness.²⁵ While Syrian courts have not imposed the death penalty for Syrians accused of being ISIS fighters, these also have been challenged on fairness and other grounds. European states, whose courts could, of course, try their own nationals accused of ISIS crimes, have been reluctant to open their borders to the return of such dangerous individuals, particularly since they could ‘radicalize’ others. The ICC has not been seen as a viable alternative given doubts about whether the Islamic State as an organization could even constitute a “situation” capable of being referred to the Court by the UN Security Council, lack of support for such a referral in any case, and the fact that the ICC’s jurisdiction over only certain defined crimes would leave out financial crimes critical to the Islamic State’s global operations and aiders and abettors of such crimes.²⁶ While much about the proposed court, including whether it would apply Iraqi or international law, remains uncertain and its establishment appears highly unlikely, the proposal for an ISIS-only Tribunal shares comparable goals with the other ICs addressed here. Its establishment would respond to perceived gaps in existing international criminal law as well as its enforcement.

The EU’s proposal for a “Standing Mechanism for Dispute Settlement” to resolve investor-state claims that are now generally subject to arbitration under nearly 3000 international investment agreements (IIAs) (either BITs or FTAs with investment chapters) is the closest to reality. Accordingly, it merits special attention. As articulated by the EU’s submissions before

²⁵ Id.

²⁶ See, e.g., Stephen E. Schemenauer, “Using the Rule of Law to Combat the Islamic State,” Civilian Research Project, available at https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/schemenauer_s.pdf?ver=2017-12-29-142155-737.

UNCITRAL's Working Group III, the leading forum for reforming the international investment regime, the proposal for a **Multilateral or International Investment Court** would emulate the WTO's Dispute Settlement Understanding (DSU) by establishing a permanent first instance tribunal capable of issuing binding rulings that would be subject to correction for errors of law by an appellate body.²⁷ Like the European Court of Justice or regional human rights courts, the Investment Court's first and second tier tribunals would consist of judges selected by state parties for renewable terms of years. The EU proposal would fold the EU's international investment courts that now exist (at least on paper) in its latest free trade agreements (FTAs) into a single judicial body for the world.²⁸

Within the UNCITRAL Working group, it is widely accepted that the most plausible route to such a court would be for states to enter into an overarching plurilateral treaty – comparable to the Mauritius Convention on Transparency or the OECD's Multilateral Tax Instrument (each of which enables multilateral changes to an existing network of bilateral treaties).²⁹ Establishing the new Court for investment in this fashion would avoid arduous, time-consuming piecemeal renegotiations of existing IIAs. Parties to the envisioned plurilateral treaty would designate which of their existing IIAs would now enable access to the International Investment Court. This would also avoid establishing multiple international investment courts under each one of the EU's FTAs. While FTA-specific investment courts would address a number of the complaints made against investor-state arbitrations, they would be ill suited to deliver on the all-important promise of

²⁷ Submission from the European Union and its Member States, Possible reform of investor-State dispute settlement (ISDS), A/CN.9/WG.III/WP.159/Add.1, Jan. 24, 2019.

²⁸ *Id.*, at paras. 35-37.

²⁹ *Id.*; see also Note by the Secretariat, "Possible reform of investor-State dispute settlement (ISDS) Multilateral instrument on ISDS reform," A/CN.9/WG.III/WP.194 (Jan. 16, 2020).

harmonizing international investment law.³⁰ Only a single International Investment Court is seen as effectively delivering defragmented international investment law.

To further enhance the appeal of its proposed Investment Court, the EU has endorsed the idea that it would be one in a menu of dispute settlement options comparable to those found in the Law of the Sea Convention.³¹ Depending on how the plurilateral instrument is drafted, states could decide, with respect to all or only some of their IIAs, to permit investors, either prior to or after they have exhausted local remedies, to (1) continue to choose investor-state arbitration without recourse to the new Court (with or without a new appeals mechanism not connected to the Court but established, for example, under ICSID); (2) permit investor-state arbitration as a first tier procedure subject to appeal to the Court's appellate tier; or (3) submit to the Court's first and second tier mechanisms. The proposed plurilateral instrument could also enable states to choose with respect to all or some of their IIAs, to permit only state-to-state arbitration or non-binding forms of dispute settlement, from mediation to conciliation, thereby foregoing investor-state dispute settlement or the Investment Court altogether. While there is as yet no indication Working Group III has coalesced around this à la carte proposal, the EU's proposed Investment Court as one option in a pluralilateral

³⁰ See, e.g, Jaemin Lee, "Mending the Wound or Pulling it Apart? New Proposals for International Investment Court and Fragmentation of International Investment Law," 39 NW J. Int'l L & Bus. 1 (2018).

³¹ EU Submission, supra note , para. 39 ("A certain level of flexibility would, nevertheless, need to be built into a standing mechanism. This would be necessary, for example, for countries that might want to use the standing mechanism for state-to-state dispute settlement, but which do not use investor-state dispute settlement in their agreements. It may also be the case these some countries may like the retain the flexibility to utilize only an appeal mechanism even if, in the view of the EU and its Member States, such an approach would not effectively resolve a number of the concerns which have been identified."). But the Law of the Sea Convention's dispute settlement options apply to the single set of rules contained in that Convention – not thousands of IIAs as under the international investment regime.

treaty is the elephant in the room in these negotiations.³² The EU's on-going efforts to substitute courts for investor-state dispute settlement (ISDS) in all of future IIAs is one way the Union leverages its economic power towards this end.

The EU contends that its proposed International Investment Court “is the only available option that effectively responds” to all “structural concerns” expressed about the international investment regime and is “the only option that captures the intertwined nature of those concerns.”³³ Court proponents argue that at present there is no guarantee that similar or identical terms in different IIAs – such as ‘fair and equitable treatment’ – will be interpreted the same way by different arbitral tribunals; international investment law is thus subject to ‘internal’ fragmentation. Moreover, the absence of a unitary adjudicative voice means that ad hoc arbitrators also disagree on whether or how to interpret the substantive rules of IIAs in light of rival international legal regimes, encouraging ‘external’ fragmentation. The single International Investment Court, and particularly its appellate body charged with final determinations on the meaning of the law, would be expected to address the problems of internal and external fragmentation, while unlike ISDS, correcting errors of law.³⁴

³² See, e.g., Anthea Roberts, “UNCITRAL and ISDS Reform: In Sickness and In Health,” *EJIL: Talk!*, Oct. 23, 2019 (suggesting that an emerging consensus in favor of ‘pragmatic pluralism’ might emerge within UNCITRAL around a multilateral instrument containing both procedural and structural reforms which would include both an Investment Court and continuing ISDS).

³³ EU Submission, *supra* note , paras. 10, 39, and 57.

³⁴ EU Submission, *supra* note , paras. 40-56 (also arguing that the Court would also help deflect the problem of duplicious or overlapping procedures (whereby essentially the same claim is brought against respondent states under different treaties or by different individual claimants), ensure greater arbitral independence than party-appointed arbitrators, enable greater transparency and more diverse adjudicators, and reduce the costs and duration of proceedings). Many scholars have also supported the EU proposal for comparable reasons, see, e.g., Gus Van Harten, “A Case for an International Investment Court,” July 16, 2008.

III. Evaluating the New Rationales for ICs

Although many of the proposed ICs enumerated in section II are backed by governments, prominent scholars and powerful NGOs, they have not drawn uniform praise. With the exception of the well-intended but ill-thought through World Court of Human Rights (which has drawn more critical scrutiny),³⁵ the other proposals have been criticized on essentially practical grounds. Some have suggested that one or more of these courts, because of their global scope, are unlikely to draw sufficient state support, prove too costly, or, like the proposal for an ISIS-only War Crimes Tribunal which directs the world's attention to only one set of violent actors, will be perceived as overly selective.³⁶ Such pragmatic concerns are clearly important at a time when most existing global courts or tribunals like the WTO's Dispute Settlement Understanding (DSU), ISDS, and the ICC, and even some regional courts, including the ECtHR, are under strain or face sovereign backlash. Critics are probably right that, with the exception of the International Investment Court, the other IC proposals seem politically unlikely at the present time.

But these are not the kind of myths that are the principal concern of this essay. Nor is the most serious problem that these court proposals depart from current practice, might radically disrupt the status quo, or are likely to take a long time to become real or attract cases. Visionary, paradigm-shifting proposals that advance the rule of law will always draw opposition from the small minded. Patience is always required to make worthwhile change. It took the international community 50 years to travel from Nuremberg to The Hague for the ICC and nearly as long to establish a UN High Commissioner for Human Rights.

³⁵ See, e.g., Philip Alston, "Against a World Court for Human Rights," Public Law & Legal Theory Research Paper Series Working Paper No. 13-71 (Oct. 2013).

³⁶ See, e.g., Impunity Watch, Policy Brief, *supra* note .

The ‘myths’ that this essay addresses are not aspirations that can be overcome with pragmatic concessions to real politics and patient negotiations, but those that reveal *fissures of principle*. I worry about myths that reveal serious disconnects between the goals espoused for these courts and the problems that inspire them.

A principal flaw with the rationales offered for these new courts becomes evident once we consider the experiences of the architects of international adjudication, namely those who attempted at the 1899 and 1907 Hague Peace Conferences to establish the first global courts of the modern era. As the late David Caron has pointed out, those present at the turn of the last century peace conferences were inspired by William Ladd’s influential 1840 essay, “A Congress of Nations.”³⁷ That essay proposed establishing a Congress for the world along with a Court of Nations to rule on inter-state disputes. For Ladd, if there was any hope for international order, peace among nations needed to be based on the Christian beliefs of ‘civilized nations’ who might be persuaded to establish a “Congress” of politicians among them.³⁸ That Congress, modeled on the U.S. version, would “fix the fluctuating and various points of international law by the consent of all the parties represented, making the law of nations so plain that a court composed of the most eminent jurists of the countries represented at the Congress could easily apply those principles to any particular case brought before them.”³⁹ Ladd’s proposed Court, because it was charged with merely applying the rules established by the Congress and would be composed of jurists from the same Christian nations, would only address cases that states would voluntarily agree to bring to them and its judges

³⁷ Caron, *supra* note , at 10-11.

³⁸ James Brown Scott, “William Ladd’s Project of a Congress and Court of Nations,” 70 *The Advocate of Peace* 196, at 197 (quoting Ladd) (1908).

³⁹ *Id.*

“would have no more power to enforce its decisions than an ecclesiastical court”⁴⁰ Ladd’s World Court relied on the shared values and rules of the nations that would agree to it. It would achieve compliance with its rulings for the same reasons states would submit their disputes to it – because of the Court’s perceived legitimacy and states’ interest in their reputations for adhering to rules to which they had previously agreed.

“A Congress of Nations” was clearly a product of a time when international law was “owned” by European and American writers and policy-makers and the rest of the world just needed to be brought up to speed by their ‘betters.’ Those Eurocentric assumptions or myths were still prevalent over 50 years later when the 1899 peace conference was convened: when the Queen of the Netherlands invited only European powers, the US, China, Mexico, Persia and Turkey to discuss proposals made by the Russian emperor. Notwithstanding the global aspirations for that conference, its agenda and committees were managed by Russia, France, England, Germany, and the United States.⁴¹ The voices of Mexico, Siam and China – never mind the rest of the world who were not even invited -- were only heard at the time of formal voting, as for the 1899 Convention for the Pacific Settlement of International Disputes. The 1907 Conference was only a little better in terms of diversity of representation and viewpoint with 44 states invited, including 18 from Latin America and three from Asia.⁴²

Despite the relatively few numbers of non-European states present at these conferences, those states were instrumental in demolishing the myth that European powers could impose peace on the planet through the simple expedient of establishing either a global Congress or a Court or

⁴⁰ Id., at 198.

⁴¹ José Manuel Alvarez Zárata, “Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?,” 59 Boston College L. Rev. 2765, at 2776 (2018).

⁴² Id., at 2777.

both. The vision of a Permanent Court of Justice composed of judges with extended tenure armed with “obligatory jurisdiction” over a pre-agreed list of types of interstate disputes perished because of, among other things, the opposition of non-European states to a court dominated by European states that would presumptively uphold Eurocentric views of international law. Encouraged by those who valued the contributions of earlier arbitration efforts (e.g., concerning the Alabama in 1871-72), hopes for a permanent global court gave way to a mechanism for using ad hoc arbitrators, drawn from a pre-established lists of individuals proposed by national groups to hear only those disputes that two parties had, by prior agreement, voluntarily submitted to this process. To be sure not all were content with this alternative. As T.M.C. Asser put it, those hoping for a grand international court were disappointed to discover that the Convention of 1899 yielded “only the phantom of a court, an impalpable specter or, to speak more precisely, it gave a secretariat and a list.”⁴³

A second Court proposal at those conferences yielded an even more disappointing result. The proposed International Prize Court of Appeal, which at one point was endorsed by a vote of 37 to one (Brazil), originally emerged from a German plan for an ad hoc Tribunal to be instituted in time of war with members to be nominated by the two belligerent powers.⁴⁴ The British proposal anticipated permanent judges consisting of juris-consults of the highest reputation with recognized competence on questions of international maritime law designated by each signatory power of the Hague convention whose mercantile marine at time of signature exceeded 800,000 tons.⁴⁵ Negotiations on that court ultimately floundered because of differences in the underlying rules on

⁴³ Caron, *supra* note , at 18 (quoting Asser).

⁴⁴ Charles Noble Gregory, “The Proposed International Prize Court,” 2 AJIL 458, at 459 (1908).

⁴⁵ *Id.*, 458.

prize as applied in different countries. Despite agreement that the court would rule based on applicable conventions between the parties and failing these would default to “the rules of international law” and, ultimately, “principles of justice and equity,” the prize court never emerged due to differences among states over, for example, the meaning of “contraband” or what constitutes a “breach of blockade” that would expose cargo to seizure and condemnation.⁴⁶

For England and the United States, it was only desirable to have a global Prize Court if that body adhered to the international law of prize as applied by their respective domestic prize courts. The proposed prize court’s fate was sealed once it became clear to such maritime powers that others sought a body that would do away with the inconstant and divergent local rules of national prize courts to make the international law of prize congruous and uniform.⁴⁷ For these reasons, Westlake argued that one way out of the diverging views of the function of the Prize Court was to postpone its establishment pending codification of the underlying law of prize.⁴⁸ He recognized that the proposed court, which was supposed to rule on appeals from national prize courts, would be unacceptable to England if it would overturned English court rulings that had simply applied existing English prize law.

Westlake’s contentions were consistent with those of Ladd decades before. Ladd’s assumptions that Christianity was the test for ‘civilization’ strikes the modern mind as worse than naïve but he was not naïve about the need to agree on the applicable rules that global courts would apply. Ladd’s proposed Congress of parliamentarians was intended to “fix” the law that his proposed international court could then “easily apply.”⁴⁹ The debates in the 1899 and 1907

⁴⁶ Id., 460-61.

⁴⁷ Id., 470 (quoting Westlake)

⁴⁸ Id., 470.

⁴⁹ Scott, *supra* note , at (quoting Ladd).

conferences and their outcomes demonstrate that early advocates of a Permanent Court of Justice and an International Prize Court came to understand, as did Ladd, that it would be a mistake to establish global courts if the law they were supposed to apply was non-existent, inconsistent, or subject to fundamental contestation about their universality. Proposals for both permanent courts were abandoned once those underlying substantive legal disputes became clear and were shown to be intractable. Opposition to the Eurocentric composition of the judges on the Permanent Court of Justice by Latin American states in particular at the 1907 conference was not a mere matter of representation. It reflected worries by those same nations that the substantive law the proposed Court would apply, like much of the rules European scholars had defended for centuries, would not favor their interests.⁵⁰ The establishment of the International Prize Court came to naught when states realized that they needed first to resolve serious disagreements over the laws of prize, many of which reflected distinct preferences about how easy it should be for states to resort to maritime embargoes.

Elihu Root, the eminent U.S. international lawyer, articulated the relevant lesson from the Hague Conferences not long after their conclusion. “Where there is no law, a submission to arbitration or to judicial decision is an appeal, not to the rule of law, but to the unknown opinions or predilections of the men who happen to be selected to decide,” he stated during his 1912 Nobel Lecture. “The development of the peaceful settlement of international disputes by the decision of impartial tribunals waits therefore upon the further development of international law. . . .”⁵¹ When Root was awarded the Nobel Prize it was because he was a leading advocate of both international

⁵⁰ See, e.g., Zárate, *supra* note , at 2776-2783.

⁵¹ Elihu Root, “Towards Making Peace Permanent,” Nobel Lecture (1912), available at <https://www.nobelprize.org/prizes/peace/1912/root/lecture/>.

law's codification *and* supranational adjudication. In his Nobel speech, Root refused to entertain the myth that establishing a global court could substitute for arduous negotiations over the international rules it would apply.

Although often portrayed as naïve idealists, those seeking to create international courts at the beginning of the 20th century did not see these as vehicles for instant peace among nations.⁵² The idealism of that first generation of international lawyers was tempered by drawing at least one lesson from the role of national courts in rule of law societies. Root, an astute observer of U.S. law, did not believe that the success as a rule of law nation was premised on constructing at the outset a Supreme Court with hierarchical power to establish the law through binding judicial review over legislative enactments. He was aware that that development, not anticipated by the text of the U.S. constitution, did not emerge until the Supreme Court proclaimed its power of judicial review in 1803, some years after the Constitution was adopted. Further, he must have known that it took that Court another 54 years before it deployed that power again to strike down an act of congress as unconstitutional and was, as of 1912, rarely deployed.⁵³ The scope of that judicially created power (invoked for the great part of U.S. history) – and for some even its propriety -- remains contested to this day.⁵⁴ Root knew that it is not enough to achieve consensus on the procedures to establish national or international courts, on defining their scope of jurisdiction, the qualifications of its judges, the methods of their selection or their tenure. He recognized that a successful world court,

⁵² See, e.g., Henry R. Brown, "Proposed International Prize Court, 2 AJIL 476, at 482 (1908)("That any system of international courts will ever be devised which will bring about an era of universal peace is probably, to use a phrase current in politics many years ago, an "iridescent dream."")

⁵³ See, e.g., *Dred Scott v. Sanford*, 60 U.S. 393 (1857)(infamously striking down the Missouri Compromise). Moreover the Supreme Court's power of judicial review was used sparingly for the next several decades and was invoked more often only beginning with the early 20th century.

⁵⁴ See, e.g., Jeremy Waldron, "The Core of the Case Against Judicial Review," 115 Yale L. J. 1346 (2006).

like a successful national court, needs to be grounded in the hard political work of reaching agreement on the laws such courts would apply.

Although Root did not overcome the prevailing racism of U.S. diplomats of his day and probably did not appreciate how much of the positivist rules of international law on which he relied inspired disdain outside the West,⁵⁵ his intuitive concern about premature judicialization was widely shared among international lawyers throughout much of the 20th century. For decades, at least while the ICJ retained its place as the only global permanent court in existence, its domain (and proper role) was defined as “international dispute settlement.” This was consistent among both common law and civil law scholars. While common law lawyers were more willing to accept the proposition that adjudicators inevitably make some law whenever they apply a particular set of facts to a rule of law, they recognized limits, however imprecise, between acceptable interstitial gap-filling and illegitimate judicial law-making. They recognized that the degree of acceptable interstitial law-making varies with the degree of precision of the rule that adjudicators apply. A judge asked to determine whether an investor has suffered unfair or inequitable treatment (where neither term is defined or defined in terms of existing customary law such as the minimum standard of treatment) has considerably more discretion – more law-making power – than one charged with determining whether an investor has been denied its capacity to transfer profits out of the country under a ‘free transfers’ guarantee in a BIT. But they, like lawyers from civil law jurisdictions, recognized that someone asked to determine whether an investor has a successful claim against a government in the absence of any applicable treaty or other relevant rule of international law is put in the posture of one tasked with making a determination *ex aequo et bono*. Lawyers recognize that such individuals, including conciliators, perform a valuable task. We applaud their efforts as well

⁵⁵ See, e.g., Antony Anghie, Imperialism, Sovereignty and the Making of International Law 281-85 (2004).

as those who submit themselves to any process of peaceful dispute settlement. The error comes when we charge amiable compositeurs with issuing reasoned judgments that further the rule of law.

An adjudicator put in the posture of going beyond interstitial law-making is being tasked, as Root argues, with producing outcomes based on their own predilections or moral intuitions. In rule of law states that kind of decision making belongs to legislators. At the international level, it belongs to policymakers engaged in making international law. As Jeremy Waldron points out in arguing against forms of judicial review in some contexts, this allocation of authority – between law-maker and judge – makes sense given the open forms of deliberation characteristic of the law-maker as compared to the delimited, blinkered deliberation that characterizes adjudicative bodies.⁵⁶ Legislators are expected to engage in policy debates; they give voice to political and moral rights and wrongs and decide them. They are charged with deciding, what, for example, the rules for prize are and whether they should favor maritime powers or whether it makes economic good sense to provide foreign investors with rights denied to domestic entrepreneurs. A judicial or arbitral opinion which bases its ruling principally on such considerations would not be legally reasoned and would likely be overturned on appeal (and, if made by an international arbitrator would be subject to challenge at least under the under the ICSID Convention).⁵⁷

In Waldron's terminology, judges expose themselves to a 'democratic' critique to the extent they resolve rights disagreements that are expected to be given first to legislators to decide.⁵⁸ That Waldron develops his critique in the course of criticizing a now well-established form of constitutional review familiar to students of U.S. constitutional law has made his arguments

⁵⁶ Waldron, *supra* note , at 1382-86.

⁵⁷ See ICSID Convention, art. 52 (indicating that a basis for annulment is failure to state reasons).

⁵⁸ Waldron, *supra* note .

controversial within the United States but it does not make them less relevant to international lawyers. Even if one thinks (pace Waldron) that historic practice (and precedent) now makes it appropriate for U.S. Supreme Court judges to express their views on constitutional values and refuse to defer to U.S. legislators when the judges think those values are violated, we should think twice about exporting that practice to the international level – where the prospect of ‘shared values’ are considerably more suspect among nations, where there is no accepted notion of *stare decisis*, and where the positivist tradition holds that international law is the product of the consent of states.⁵⁹

As today’s debates over the alleged ‘activism’ of the WTO’s Appellate Body demonstrates,⁶⁰ global courts enjoy far more fragile legitimacy and have greater need to respect the delineation of powers between law-makers and law interpreters. With respect to the on-going crisis in the WTO, that fragility is suggested by proposals to stem judicial ‘law-making’ by barring adjudicators from reaching for issues that are not raised by the parties before them, to clarify the scope of adjudicatory discretion or the ‘proper scope’ of the traditional rules of treaty interpretation, to establish mechanisms for states to countermand the Appellate Body’s rulings, or to mandate that adjudicators apply the ‘passive virtue’ of judicial minimalism.⁶¹ The unique legitimacy demands imposed on international courts is, more generally, evident in requirements that their ‘independent’ judges must nonetheless be geographically representative.

⁵⁹ Thus, one of the alleged reasons for charges of ‘judicial overreach’ against the WTO’s Appellate Body is precisely the contention that it has become overly reliant on its own ‘precedents.’ See, e.g., Bruce Hirsch, “Resolving the WTO Appellate Body Crisis Proposals on Overreach,” Dec. 2019, at 18-5.

⁶⁰ See, e.g., Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, “The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures,” Peterson Institute for International Economics, Policy Brief (March 2018)(describing U.S. reactions to “overreach” by Appellate Body members and proposed solutions).

⁶¹ See, e.g., Hirsch, *supra* note .

Most international adjudicators implicitly accept the wisdom of Waldron’s counsel. They do so when they emphasize, for example, that their interpretations of treaties are grounded in a good faith reading of their plain text, consistent with the Vienna Convention on the Law of Treaties’ primary rule for treaty interpretation in its Art. 31(1). The most effective international adjudicators know instinctively that they are on the most solid ground in terms of eliciting voluntary state compliance with their rulings when their reasoning emphasizes fidelity to legal texts to which the parties have consented. Such judges know, and the rest of us accept, that adjudicators should not discover new crimes – whether human trafficking, corruption, or terrorism – or novel international wrongful acts *only* because the judges believe that the underlying actions are ‘evil’ or wrong.

While it is true that states often fail to assume their law-making responsibilities and leave lamentable substantive gaps in substantive international law, this need not mean that international disputes concerning those matters cannot be addressed. As Bethlehem points out, the under-utilized tool of conciliation may be ideal for cases where we want a particular dispute to be addressed, no clear law applies, and we have no clear immediate prospect for filling the legal gap through the international law equivalent of legislation.⁶² In other cases, such as the prosecution of the crime of corruption, even though formally states have agreed to prosecute it (because most are parties to the UN Convention Against Corruption),⁶³ given differences in what that offense covers and concerns over what genuine supranational prosecutions would entail, what states have actually agreed to do is to leave prosecutions in the hands of domestic authorities which would presumably apply corruption as informed by both national laws and the UN Convention.⁶⁴ In other instances, while

⁶² Bethlehem, *supra* note .

⁶³ 140 signatories as of July 2020.

⁶⁴ See, e.g., Karen Alter and Juliet Sorensen, “Let Nations, Not the World, Prosecute Corruption,” *U.S. News and World Report*, Apr. 30, 2014.

there is no global law defining an act as criminal or as an internationally wrongful act, it is far more legitimate to deal with those acts under a regional or national forums that can apply regional or national laws that do so.⁶⁵

Those advocating for new global courts do not appear to have absorbed the lessons of the 1899/1907 Conferences. Those making the proposals surveyed in Part II articulate one or more of the following three rationales.

(1) New ICs are needed to fill gaps in the substantive law. Judges (or in the case of the International Arbitration Tribunal for Business and Human Rights, arbitrators) need to define the crimes of terrorism or human trafficking, give content to the human rights and tortious duties of businesses and other non-state actors, elaborate the interconnections between and priorities among distinct human rights conventions, re-calibrate the rights of foreign investors under IIAs, redefine as needed war crimes to take into account the reality of ISIS, and affirm the primary and secondary duties owed by international organizations.

(2) New adjudicators are needed to redress enforcement or remedial gaps. We need new adjudicative forums to rectify the ‘softness’ of global human rights interpreters like UN treaty bodies, the UN Human Rights Council, or UN special rapporteurs; to provide an international adjudicatory backstop given national courts’ reluctance to convict terrorists, human traffickers, or corrupt government officials and those who bribe them; or to enable claims to be brought against international organizations, MNEs, or NGOs that harm third parties.

(3) New tribunals are needed to address the fragmentation of international law brought about or encouraged by the proliferation of specialized treaty regimes. We need new judges to make the rules governing international investment, human rights, corruption, human trafficking, and

⁶⁵ See *infra* at section V for discussion of African countries’ anti-corruption efforts.

extraterritoriality internally more coherent and consistent. These courts are also needed to make sure that no international legal regime is ‘self-contained,’ that is, to make sure that their respective rules are interpreted harmoniously to prevent conflicting interpretations among regimes and therefore avoid or mitigate ‘external fragmentation.’

These rationales do not motivate only those seeking to establish new global courts. A number of recent proposals for expanding the advisory or contentious jurisdiction of the ICJ or to elevate the status of that Court echo the same ideas. Some proposals to permit the UN Secretary General to ask the Court for an advisory opinion or to permit international organizations to be parties to contentious cases stem from the same urge to use the ICJ to fill gaps in the substantive law, address remedial gaps, or minimize international law’s fragmentation. Proposals to expand the ICJ’s jurisdiction to enable more consideration of matters relating to the responsibility of international organizations, like a number of the other IC proposals surveyed here, are motivated by a perceived need to have that Court simultaneously fill both a substantive gap in the law and an enforcement gap since, as is well known, the prospects for judicial consideration of IO responsibility are severely constrained, particularly in national courts, by the existence of IO immunities. Apart from select international venues for consideration of employee complaints, such as the ILO’s Administrative Tribunal, there are few international adjudicative venues available to consider the responsibility of IOs, despite the ILC’s recent efforts to develop applicable rules of IO responsibility. Those motivated to establish the World Court of Human Rights also want that body to affirm by judicial fiat that all international organizations irrespective of subject matter or structure are subject to both primary rules of human rights and secondary rules of (formerly state) responsibility, thereby hastening the transformation of the ILC’s (2002) Rules on International Organization Responsibility from progressive development into established (presumably

customary) law – even while a great number of those rules remain contested and untested by actual practice.⁶⁶

The third or defragmentation rationale has also motivated some contemporary proposals for ICJ reforms. A number of ICJ Presidents, particularly Judge Gilbert Guillaume, have used their annual speeches before the UN General Assembly to note the risks posed by the ‘proliferation’ of international courts and the need for greater acceptance that, as the international community’s ‘principal legal organ’ the ICJ judgments are owed deference by others. Judge Guillaume went so far as to propose arrangements whereby international courts would seek the opinion of the ICJ on “doubtful or important points of general international law raised in cases before them.”⁶⁷ This adaption of the procedure under Article 234 of the Treaty of Rome (which enables national courts in EU states to refer questions to the European Court of Justice) seeks to make the ICJ a more effective agent of de-fragmentation. Others have sought to achieve the same end by having all international adjudicators use their ‘inherent’ powers or other general principles of interpretation to accord greater deference to the ICJ’s pronouncements for the sake of the unity and coherency of international law.⁶⁸ While these proposals to expand the jurisdiction or inherent authority of the ICJ are not the focus of this essay, they demonstrate the contemporary popularity of the three rationales identified here.

⁶⁶ This is readily acknowledged in the commentaries to those ILC’s rules. ILC, “Draft Articles on the Responsibility of International Organizations, with Commentaries,” (2011), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

⁶⁷ Speech by his Excellency Judge Gilbert Guillaume, President of the ICJ, to the Sixth Committee of the General Assembly, 27 Oct. 2000, at 7.

⁶⁸ Christian Leathley, “An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity,” 40 NYU J. Int’l L. & Pol. 259 (2007).

The first rationale is, of course, a frontal challenge to the Root/Waldron conception of the proper role of judges. It evinces impatience with the uneven and slow growth of international law. It relies on the prohibition against non-liquet to empower the new judicial interpreters to become law-makers. Thus, some of the arguments for new ICs are precisely that these are needed because we need judges or arbitrators to make law where none exists or because the international rules are so contradictory that a new set of global judges needs to make them coherent. The principal argument for the International Arbitration Tribunal on Business and Human Rights, as noted, is that its arbitrators can cobble together a body of new hard law from a not altogether consistent body of vague and soft codes of conduct and other non-binding instruments, such as the UN's Guiding Principles on Business and Human Rights. The World Court for Human Rights's envisioned jurisdiction over non-state entities presumes that its judges can and should fashion applicable human rights duties with respect to actors as different as NGOs, diverse international organizations, and businesses by extrapolating from the obligations imposed on states in 21 human rights treaties. The extension of that Court's jurisdiction to non-state 'entities' assumes that we need its judges to do what most national courts and the special rapporteur on business and human rights have failed to do: impose all or some of the human rights obligations on non-state actors even though those human rights duties were usually defined in terms of abuses of *state* power.

The International Court Against Terrorism's "common-denominator approach" would permit the prosecution of all persons committing terrorist acts, whether or not such crimes are included in the relevant treaties on point and without regard to the principle of *nullem crimen sine lege*. That Court would obviate the need to conclude a much debated general convention on the

subject by defining and enforcing the general crime of terrorism – as did the Special Tribunal for Lebanon.⁶⁹

This first rationale for these courts evinces the clearest impatience with the lessons of the 1899/1907 conferences canvassed above. But global courts premised on the need to correct gaps in ‘enforcement’ or to ‘defragment’ the law –rationales 2 and 3 – also fail to heed the lessons of history. Those arguing for ICs on this bases fail to consider whether, to the extent those perceived flaws also reflect the absence of inter-state agreement or even intentional policy choices, they are in effect bestowing considerable delegated law-making powers on their new judges.

Proponents of new ICs need to ask why the enforcement gaps that they are trying to fix exist and, depending on those reasons, why new permanent global courts are the proper solution. As even stalwart defenders of ICs have noted, the reasons that preclude or discourage prosecutions of corruption at the national level – which include nuanced disagreements about what types of public or private acts qualify as corruption, the sheer numerosity of perpetrators, the difficulty of finding victims willing to report and cooperate, and the need for long-term investigative efforts backed by strong subpoena powers -- may make supranational courts strikingly poor alternative enforcement candidates.⁷⁰ Even in cases like corruption where states formally espouse universal agreement on the offense, enforcement gaps frequently result from states’ failures to agree on remedial measures. These gaps in the law may be no less vast than those that divide states with respect to meaning of ‘human trafficking’ or ‘terrorism.’

⁶⁹ See supra note .

⁷⁰ See Karen Alter and Juliet Sorensen, “Let Nations, Not the World, Prosecute Corruption,” U.S. News and World Report, Apr. 30, 2014.

The argument that we need binding rulings by a World Court of Human Rights because the views issued by UN human rights interpreters (such as human rights treaty bodies) are not legally binding and because existing human rights treaties do not reach the actions of non-state actors ignores why states have thus far failed to remedy these defects. It ignores why states did not draft those treaties with the abuses of non-state parties in mind; why they did not open up these treaties to ratification by non-state entities; and why they have only opted for supranational binding adjudication by select regional courts (that do not exist for the United States, parts of Africa or all of Asia or the Islamic world).

The proposal to establish a single supranational judicial body to correct these ‘enforcement gaps’ by according it the power to issue binding rulings under 21 human rights treaties (so long as states or non-state entities make a declaration to be so bound) ignores, as Philip Alston argues, the substantial and unprecedented delegation of law-making authority to judges entailed by such a move.⁷¹ As Alston points out, the proposal presumes that it is a good idea to accord judges the task of reconciling all those 21 human rights treaties in response to particular claims brought by individual claimants even without agreement on the relationship among these treaties or on principles that indicate how judges are supposed to prioritize or balance the individual and collective rights contained in them.

Securing the consent of states (and possibly non-state actors) to establishing a permanent Human Rights Court to resolve these questions does not fill these substantive gaps in the law. Nor is the problem of undue delegated authority to global judges resolved simply by insisting on exhaustion of local remedies. Even if we assume, along with its proponents, that the World Court of Human Rights would require any claimants before it to first exhaust local remedies, that Court

⁷¹ Alston, *supra* note , at 8.

would give national courts first crack at these novel issues at a price: the World Court would, after exhaustion, second-guess national courts' attempt to balance those rights. That World Court would be in a position, in other words, to overrule a state's Supreme or Constitutional court on a matter that international law (and possibly national law) has not addressed. That affront on sovereignty would only be compounded if that Court were also expected (as proponents also urge) to 'defragment' the law by making sure that whatever result is reached in case X – however the 'balance' is struck among rights and between national and international law -- is struck the same way everywhere. And should that World Court also be empowered, as proponents suggest, to rectify the problem that non-state actors as varied as trade unions, religious associations and for-profit and non-profit entities have not been clearly subjected to as many as 21 human rights treaties, the law-making delegation anticipated by correcting this 'enforcement gap' grows to even more mythical proportions – as Philip Alston has again pointed out.⁷²

As this suggests, the third rationale for these ICs – the premise that they should 'harmonize' international (or national) law to avoid fragmentation – raises comparable difficulties. The defragmentation rationale for ICs is decidedly modern. It emerges from the proliferation of both treaty regimes and the cascade of international adjudicative bodies in their wake. There are, of course, some ironies in proposing new specialized ICs to correct the failures of existing specialized international courts. Advocates for the new ICs do not explain why existing adjudicative forums fail to defragment the law, we are simply told that we need a World Court of Human Rights, an arbitral tribunal for business and human rights, or an International Investment Court precisely to address the overlap of otherwise silo-ed human rights/investment treaties – as well as to harmonize the law despite inconsistencies reached among human rights actors as diverse as the Human Rights

⁷² Alston, *supra* note , at 15-17.

Council and UN special rapporteurs. Advocates for the Anti-Corruption Court point out, with some justice, that international law – including its definition of what constitutes corruption – are not wholly consistent given differences among national laws, domestic judicial rulings, regional and global conventions, as well as the practices and “caselaw” generated by international financial institutions, including the World Bank’s Integrity Vice Presidency.⁷³ For some this alone justifies establishing a global court to address corruption since it would be in a position to ‘harmonize’ international rules with respect to that offense.

The unarticulated (mythical) premise is that defragmentation by judiciary merely requires routinized application of rule to fact – as if the inconsistencies of the relevant rules among different national and international legal regimes or the prospect of differing outcomes among their different interpreters were merely an accident of drafting involving no substantive policy disagreements. But inconsistencies in the law – whether among IIAs, between and among the individual and collective human rights in relevant treaties, or among anti-corruption regimes – often reflect policy disagreements that adjudicators have not been delegated authority to resolve and are, in any case, ill-equipped to do so.

Consider the wave of COVID-related complaints likely to find their way to national courts, UN human rights treaty bodies, regional human rights courts, and global adjudicators like the WTO, the ICJ, and ICSID arbitrators. These are likely to include claims targeting state actions (from quarantines to travel bans) ostensibly taken to respond to COVID-19 for violations of individual rights to privacy, dignity or life, association, family relations, religious worship, or speech, as well

⁷³ For a description of the World Bank’s corruption regime and its development over time, see, e.g., Anne-Marie Leroy and Franck Fariello, “The World Bank Group Sanctions Process and Its Recent Reforms” (World Bank 2012), available at <https://openknowledge.worldbank.org/handle/10986/2373>. As the example of the Bank indicates, corrupt acts can be sanctioned by non-criminal methods requiring fewer due process constraints.

as the rights of traders and investors.⁷⁴ Over the coming years such COVID-19 claims can be expected to produce diverse and perhaps contradictory rulings. Outcomes may differ depending on the applicable choice of law applied by the forum, which rights are asserted (e.g., individual rights to associate or worship versus the collective rights to health), whether the focus of the action is on limiting state power (as by emphasizing the principles of non-discrimination or limits on emergency powers) or on requiring positive action by states to fulfill the right to health, which litigants are granted the right to sue or to intervene, the fact finding powers employed by the adjudicators, the ‘balancing’ principles applied by the forum and much else.⁷⁵ National and international adjudicators are likely to defer on, for example, the extent of deference given to state efforts to stem the spread of the virus (whether or not these measures are endorsed by the WHO). Even if adjudicators apply only international law, including rules of state (and possibly international organization immunity to the extent actions are directed at entities like the WHO), considerable ambiguities exist on how such rules apply to wrongful acts committed in the course of pandemics.⁷⁶ Even long established principles of international law, such as the defense of necessity, have serious lacunae (such as the consequences of its invocation as a state defense or uncertainties on how to determine when an ‘emergency’ legitimately ends).⁷⁷

⁷⁴ See, e.g., Raphael Minder, “Courts Bracing for Crisis After Lockdown Is Lifted,” NY Times, May 26, 2020, A8 (discussing expected deluge of COVID-19 cases in the Spanish courts). See generally, Karima Bennouna, “‘Less We Should Sleep’: COVID-19 and Human Rights,” (forthcoming AJIL October 2020)(noting how the virus and responses to it “threaten nearly every human right guaranteed by international law nearly everywhere”).

⁷⁵ See generally, Bennouna, *supra* note .

⁷⁶ For a survey of some of these, including ambiguities within the established rules of state responsibility when it comes to assertions of ‘communal’ responsibility, see, e.g., Martins Paprinskis, “The Once and Future Law of State Responsibility,” (forthcoming AJIL October 2020).

⁷⁷ See, e.g., Federica Paddeu and Michael Waibel, “The Final Act: Exploring the End of Pandemics,” (forthcoming in AJIL October 2020).

Given the many gaps in relevant general rules of international law – as well as differences in texts among relevant international instruments -- there is likely to be considerable difference of opinion with respect to the legality of decisions made by government health care professionals or produced by government rules on matters such as travel/export bans and quarantines, never mind difficult triage issues involving access to scarce PPE, life-saving ventilators or intensive care units in hospitals. Starkly different outcomes might emerge to the extent COVID-related claims are raised in trade or investment forums that apply an “exceptions-oriented paradigm” demanding justifications for measures taken in response to pandemics as opposed to forums that presume public health measures are justified.⁷⁸ Even forums that rely on medical experts cannot be expected to generate consistent rulings – not when that advice differs around the world in response to differing cultural, political, and social contexts.⁷⁹ Rulings are likely to differ even among the three existing regional human rights courts and UN human rights treaty bodies given the differing cultural and political contexts in which each of these adjudicative forums operate, textual differences among the underlying human rights instruments, and institutional variations on how each forum relates to the constitutional courts and national laws of the respective states involved.

Legal answers to such complex and cutting edge human rights dilemmas will emerge in piecemeal fashion and will arise from an admittedly chaotic, eclectic series of forums rarely subject to hierarchical resolution. The impending wave of coronavirus claims poses risks of furthering the ‘internal’ fragmentation of human right law, and to the extent such claims are brought in other

⁷⁸ See, e.g., Julian Arato, Kathleen Claussen, and J. Benton Heath, “The Perils of Pandemic Exceptionalism,” (forthcoming AJIL October 2020).

⁷⁹ See, e.g., Bennoune, *supra* note . Bennoune argues that these varying contexts should not only influence the interpretation of human rights but also drive human rights interpreters to bring in expertise from all those other disciplines.

forums, may encourage general fragmentation arising from distinct outcomes within specialized international law regimes such as investment and trade.

But those who propose a World Court of Human Rights as the correct response to these risks need to explain why mitigating internal and external fragmentation is more important than making sure that any adjudicative decisions produced are perceived as just and therefore likely to generate compliance. Producing greater certainty with respect to human rights by judicial fiat is a contestable goal to elevate above all others. It is a particularly contestable goal to seek to achieve when the underlying claims involve fraught issues at the interpretative cutting edge of regimes dealing with human rights, state (and IO) responsibility, trade and investment.

Sober reflection of the coming wave of COVID-related claims suggest why it would be extraordinary to allocate such law-making powers to a single World Court of Human Rights. Court proponents need to tell us why it would be a good idea to short-circuit the forum-specific development of the relevant rules of international law by putting all of these decisions in the hands of a single set of elite judges. Even assuming those judges were up to the task, why is securing uniform interpretation of human rights treaties or making sure that these cohere in a uniform way with other international legal regimes necessarily more important than, for example, securing better domestic respect for the human rights of persons if this is best achieved through the piecemeal experimentalist accumulation of rulings issued by more locally grounded forums? Allocating final decisions over these life and death COVID disputes to a select group of global judges – no matter how carefully selected for their international law expertise -- seems manifestly premature given the

state of human rights law and relevant rules of responsibility. Sovereign backlash to any such attempt would appear inevitable.⁸⁰

There are more fundamental questions about whether international lawyers ought to encourage the further judicialization of prominent contemporary issues such as pandemics. As Francisco-Jose Quintana and Justina Uriburu point out, global health threats raise critical polycentric concerns that require immediate attention from policy-makers as well as lawyers.⁸¹ They require correcting the flaws of the WHO's International Health Regulations, of an atomistic conception of sovereignty and non-intervention (which now pose a threat of obscene 'vaccine nationalism'), and of institutions from the IMF to the ILO to the WTO) that have helped promote policies of austerity, market freedom, and avoidance of protections for the most vulnerable (like migrant workers) that have made possible the spread of the coronavirus as well as its devastating consequences. Quintana and Uriburu argue that we need to "re-politicize" international law to address those issues. Their arguments should resonate with those who have long argued that attention to the underlying substantive laws is worthy of at least as much, if not more attention, than devising adjudicative venues that can apply them.⁸²

⁸⁰ Indeed, there is some irony that the EU, the leading opponent of arbitration in the international investment regime, is now the leader of WTO members resort to arbitration in the wake of backlash to that regime's DSU. See EU and 15 World Trade Organization members establish contingency appeal arrangement for trade disputes, 27 March 2020. The EU has also joined a number of WTO members in proposing changes to the rules governing the WTO's Appellate Body that would restrain that body's law-making capacities. See WTO, Communication from the European Union, China and India to the General Council, WT/GC/W/753, Nov. 26, 2018.

⁸¹ Francisco-José Quintana and Justina Uriburu, "COVID-19, International Legal Responses, and Depoliticization," *AJIL* (Oct. 2020).

⁸² *Id.* Others stress the need to for closer attention to addressing the underlying legal and policy gaps made ever more evident in the age of the coronavirus. See, e.g., Jain, *supra* note ; Paddeu and Waibel, *supra* note ; and Martins Paporinkis, *supra* note ; Arato, Claussen, and Heath, *supra* note ; Bennoune, *supra* note .

As the prospect of COVID-related claims illustrates, the unacknowledged delegation of law-making authority to international judges is potentially no less vast under the ‘defragmentation’ rationale. It is quite a leap to assume that the substantial ambiguities and gaps in the law that such claims will raise can be easily resolved and smoothed over by resorting to general principles of interpretation touted by self-described ‘European constitutionalists’ like Anne van Aaken.⁸³ Van Aaken argues that international judges should issue regime-crossing “integrative” rulings grounded in constitutionalist forms of judicial interpretation exported from the national and EU level. Like a number of others, she argues that public international law concretizes common concepts such as justice, fairness, human rights, peace, and security that can be usefully deployed through the general principle of proportionality.⁸⁴ In the views of such constitutionalists, such general principles can generate, for example, judicial reinterpretations of differently worded FET guarantees in IIAs that permit the incorporation of values and rules from other IL regimes, thereby mitigating the internal and external fragmentation of international investment law.⁸⁵ Van Aaken, like other constitutionalists inspired by European models of adjudication, appears to assume that these ‘constitutionalist’ principles enable the ‘harmonization’ of all human rights – from the right to individual property to the rights of indigenous peoples – despite the considerable differentiation in such rights as between, for example, the European Convention on Human Rights and the African

⁸³ See, e.g., Anne van Aaken, “Defragmentation of Public International Law Through Interpretation: A Methodological Proposal,” 16 *Indiana J. Global Legal Studies* 483 (2009)(proposing constitutionalist principles for achieving interpretative defragmentation). See also A. Stone Sweet, “Investor-State Arbitration: Proportionality’s New Frontier,” 4 *Law & Ethics of Human Rights* 47 (2010).

⁸⁴ Aaken, *supra* note , at 503. Although van Aaken, implies that EU courts like the CJEU and the ECtHR promote the integration of EU and public international law, the situation may be considerably more nuanced. See, e.g., Jed Odermatt, “The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and the Universality of International Law,” *iCourts Working Paper Series*, No. 158 (2019).

⁸⁵ Aaken, *supra* note , at 507-08.

Charter on Human and People’s Rights. To her credit, van Aaken acknowledges (albeit in passing) that having judges engage in interpretative defragmentation is a “second-best solution” and that it would be better to have states address these issues through explicit drafting.⁸⁶ Her caution is not, alas, reflected in the current slate of IC proposals.

With the exception of the proposal to rely on a permanent arbitration tribunal akin to the Permanent Court of Arbitration (PCA) to resolve business and human rights claims, the other proposals for new ICs indulge in another myth: they presume that judges elected for a term of years (and therefore called, somewhat misleadingly “permanent judges”), should be preferred over mediators, conciliators, or arbitrators. Some of those who participated in the 1899/1907 conferences also saw arbitration as but an interim step towards the Holy Grail of a permanent court.⁸⁷ But, as is well known, they ultimately overcame their judicialization bias to establish the PCA which, over time, achieved considerable success.⁸⁸ The PCA’s achievements cast doubt on the proposition that only the judges of a permanent court can effectively resolve international disputes through impartial adjudication paired with credible enforcement.

Advocates for these global courts, particularly those now nearing success with respect to establishing an International Investment Court, draw overly sharp lines between ‘ad hoc’ arbitration and ‘permanent’ bodies. Those lines have been blurred ever since the U.S. and Britain established interstate arbitral bodies in the Jay Treaty, the U.S. and Mexico resolved disputes under the US-Mexico Claims Commission, or the U.S. and Iran established the long-lasting Iran-U.S. Claims

⁸⁶ *Id.*, at 492.

⁸⁷ See, e.g., Root, *supra* note (“Plainly the next advance to be urged along this line is to pass on from an arbitral tribunal, the members of which are specifically selected from the general list of the court for each case, and whose service is but an incident in the career of a diplomatist or a pure publicist, to a permanent court composed of judges who devote their entire time to the performance of judicial duties . . .”).

⁸⁸ Hof, *supra* note .

Tribunal. Once the arbitral tools used to settle disputes between private parties came to be adopted to hybrid complaints between governments and private investors and these rulings were announced publicly -- most prominently in ISDS – the lines (and relative merits) between ‘commercial’ arbitration and forums that more closely resemble national courts became further blurred.

Despite these developments, most present day proposals to establish global courts assume that those with tenures comparable to those who serve on national courts are best able to achieve a trifecta: completing and harmonizing the law while enforcing it. This premise is particularly shared by those proposing a single International Investment Court for the world, the subject of the next section.

IV. A Closer Look at the International Investment Court

As noted, the proposal to establish an International Investment Court is the closest to realization. Accordingly, it merits a closer look. Of the three rationales commonly given for ICs canvassed in section II, the harmonization or defragmentation goal takes pride of place in the EU’s arguments for such a court, as it does with respect to other supporters.⁸⁹ It is argued that this goal is best secured by judicializing investor-state dispute settlement. Judges elected for a term of years rather than arbitrators appointed by litigants case by case are said to be more legitimate simply because they are more like domestic judges.⁹⁰ Their relative permanency will make them better fact-finders as well

⁸⁹ EU Submission, *supra* note , at para. 6; Lee, *supra* note . See generally, Julian Arato, Chester Brown, and Federico Ortino, “Parsing and Managing Inconsistency in Investor-State Dispute Settlement,” 21 *J. World Investment & Trade* 336 (2020).

⁹⁰ As noted in section III, such views have had a long shelf life. Indeed, the bias in favor of ICs that resemble national courts was clear even during the Dumbarton Oaks discussions of the ICJ. A number of lawyers, particularly from the U.S., objected to that Court’s jurisdiction over advisory opinions as well as appointments of ad hoc judges on the basis that such whiffs of arbitration were objectionable features that should be eliminated since they detracted from “judicial impartiality” and savored of permitting adjudicators to be “a party in its own cause.” See Amos J. Peaslee, “The

as reason-givers and, particularly when partnered with appellate colleagues, better jurisprudence-builders.⁹¹ Building an international court comparable to domestic courts is, in short, seen as more consistent with advancing ‘rule of law’ values advanced by, for example, global administrative law scholars (namely, greater participation, transparency, reason-giving, and correction and review).⁹² These views and recipes for reform are consistent with those who see ISDS as the erroneous privatization of ‘public’ law disputes.⁹³

How well does the Investment Court proposal address the legitimacy complaints faced by the international investment regime?

The critiques of the international investment regime, the subject of a large literature, concern both its method of dispute settlement and, more significantly, the underlying IIAs themselves.

While, as noted, the EU’s International Investment Court purports to respond to all these

Dumbarton Oaks Proposals Regarding the Settlement of International Disputes,” *Minn. L. Rev.* 223, at 224 (1945)(Statement at the Joint Session of Members of the American Bar Association and Committee on International Law of the NY State Bar Association).

⁹¹ See, e.g., Jaemin Lee, *NW J Int’l L. & Bus.* (2018)(“[I]t is expected that full-time, or at least exclusively employed, judges of a standing court could help introduce higher standard of professionalism and experience, and therefore ensure appropriate fact-finding and application of the relevant jurisprudence of international investment disputes.”)

⁹² See, e.g., Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law,” in *El nuevo derecho administrativo global en América Latina* (2009).

⁹³ See, e.g., Gus Van Harten, *Investment Treaty Arbitration and Public Law* (2007). The merits of that contention, the subject of a growing literature, lie outside the scope of this essay. See, e.g., José E. Alvarez, “Is Investor-State Dispute Settlement ‘Public’?,” 7 *J. Int’l Dispute Settlement* 534 (2016)(arguing that leading “public” law prescriptions for reforming the investment regime ignore the fact that investor-state disputes are a hybrid between public and private). Interestingly, there are now rules that adapt the tools of ISDS (and commercial arbitration) to enable businesses to incorporate arbitration clauses to resolve business and human rights disputes; thereby ‘privatizing’ another set of ‘public’ disputes. See *The Hague Rules on Business and Human Rights Arbitration*, December 2019, at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

intertwined complaints – to charges that the investment regime does not adhere to the rule of law, challenges or undermines democratic choices made by polities, and exacerbates inequalities among states -- in actuality it is directed at addressing the perceived ‘rule of law’ problems posed by ISDS.⁹⁴ Sadly, the narrowness of the EU’s Court solution, including the pragmatic way most expect it to be implemented, threatens its touted goals, including its *raison d’être*: the unification and coherence of international investment law.

The perceived legitimacy deficits of the international investment regime can hardly be overstated. The rug is being pulled from the regime’s economic premises. Policymakers are now challenging the fundamental premise of IIAs: namely that foreign investors need to be protected from the bargain that they originally struck when deciding to enter a state to invest. States disagree about whether foreign investors really face an ‘obsolescing bargain’ that requires correction via treaty, particularly given the serious market consequences that face states that attempt to renege on their prior commitments.⁹⁵ Many now question how often host states really take advantage of foreign investors once they sink their capital into a host state and whether those investors really cannot expect impartial justice from host state courts should a dispute about treatment arise.⁹⁶ Some question, in short, whether the ‘liability of foreignness’ really exists in local courts or whether in fact the large foreign firms that principally get the benefit of IIAs exert greater levels of political

⁹⁴ Failure to clearly distinguish between stark divides on international investment law and complaints directed at investor-state arbitration (ISDS) is not limited to the EU. See, for one example, G. Kahale, III, “Rethinking ISDS,” *Transnational Dispute Management* (Feb. 2018).

⁹⁵ See, e.g., Jonathan Bonnitcha-Poulsen, Lauge N. Skovgaard, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* 128-35 (2017).

⁹⁶ *Id.*, at 127-80 (OUP 2017)(summarizing the arguments for and against the microeconomic justifications offered for traditional IIAs). For a defense of the traditional economic rationales for IIAs, see Alan O. Sykes, “The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design,” 113 *AJIL* 482 (2019).

influence and benefit from more generous regulatory concessions – and do not need treaties to protect them from ‘discriminatory’ action. Some economists also question the all or nothing content of IIA rights – which may protect foreign ‘investment’ without insisting that it makes a net contribution to economic development or otherwise benefits the local population.⁹⁷

For all these reasons, there is serious doubt about why states ought to enter into IIAs that provide foreign investors better rights (along with a supranational forum for dispute settlement) not available to local entrepreneurs. Insofar as IIAs grant foreigners ‘special’ rights that at least in democracies have not been given to them by the peoples’ elected representatives, the regime is perceived as suffering from a ‘democratic deficit.’ Nor is that all. To the extent negotiating ‘one-sided’ IIAs or forcing poor states onto the ‘uneven playing field’ of ISDS is seen as furthering the interests of capital exporters, the regime appears to undermine sovereign equality. That critique is only encouraged by perceptions of ‘excessive’ monetary awards, threats to impose ‘excessive’ adjudicative costs, and failures to include adequate mechanisms to address the harms committed by foreign investors on host states or their peoples.

Because the EU is aware that states have repeatedly failed to negotiate a single set of multilateral rules that would satisfy address the democratic deficit and sovereign equality complaints, it has been instrumental in limiting the scope of UNCITRAL’s Working Group III. The EU’s proposed investment court proposal fits well within this constrained reform agenda. As the EU’s advocacy emphasizes, its Investment Court answers the perceived rule of law complaints against ISDS. The Court can be expected to lessen the prospects for forum shopping and parallel proceedings; enable greater transparency with respect to awards, proceedings, pleadings, third party funding, and settlements; include a code of conduct to address complaints about the lack of

⁹⁷ Id., at 155-80.

sufficient ethical or conflict of interest rules for regime participants (including arbitrators); enable greater access for third party states and non-state actors as intervenors or amici; and provide a mechanism to correct errors of law. But since contemporary IIAs incorporate their own responses to all of these complaints through reforms to ISDS,⁹⁸ the EU's core rationale for its Court proposal comes down to the claim that the Investment Court is uniquely positioned to systematically integrate international investment law, thereby enabling greater stability and reducing uncertainty.

At the same time, neither the EU nor the general UNCTRAL reform process seeks multilateral changes to the basic substantive rules of the game.⁹⁹ The EU is not seeking, for example, a global consensus on narrowing the content of fair and equitable treatment or the precise terms of exceptions permitting host states to take action to address economic, environmental or even public health crises or agreement on a list of human rights responsibilities that would apply to foreign investors. Neither the EU nor other UNCITRAL reformers is proposing a specific rule (akin to the ECtHR's margin of appreciation) to balance investor rights with their responsibilities or with host states' right/duty to regulate. The EU's court proposal only tinkers at the margins of the democratic deficit and sovereign equality critiques.

While the EU expects that its Investment Court will systematically integrate international investment law, it is not attempting to make that underlying rule more consistent. The EU and other proponents of that Court argue that turning over thousands of disparate IIAs to its astute permanent

⁹⁸ See, e.g., José E. Alvarez, "Is the Trans-Pacific Partnership's Investment Chapter the new 'Gold Standard'?", 47 *Victoria University of Wellington Law Review* 503, at (2016)(enumerating the numerous rule of law reforms incorporated into ISDS, along with changes in its investor rights intended to increase the scope of host state regulatory authority).

⁹⁹ As Steven R. Ratner points out, this reflects a broad gap in the investment reform agenda: namely a lack of sufficient curiosity about both international and national investment laws and particularly how they interact with one another. Steven R. Ratner, "International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows," 21 *J. World Investment & Trade* 7 (2020).

judges, and particularly to its appellate body, will nonetheless produce more coherent and more respondent-state sensitive interpretations of the law. But this anticipates a level of judicial activism comparable to those who want ICs to create a new general crime of terrorism, harmonious anti-corruption or anti-trafficking rules, coherent human rights law across 21 treaties, or a clear set of primary and secondary rules regarding the liability of non-state actors as different as international organizations, MNEs, and NGOs.

It is something of a mystery how the judges on the International Investment Court will come up with a coherent or consistent set of rules that will finally determine how best to ‘balance’ the rights of foreign investors with the rights (or duties) of states to regulate in the public interest. This is quite a challenge considering that the IIAs they will be interpreting contain different and differently worded investor rights, distinct (if any) ‘exceptions’ or defences for states charged with violating those rights, and, importantly, few (if any) provisions on how to prioritize or balance the rights of investors with the rights of their host states. IIAs have as many as seven different textual variations on investors’ rights to fair and equitable treatment, sharply different ‘measures not precluded’ clauses (when they address respondent state defenses at all), amidst preambles expressing distinct objects and purposes. Most existing IIAs do not include provisions anticipating how they are supposed to be interpreted vis-à-vis states’ other international obligations, including labor, environmental, or human rights conventions, much less customary international law or other forms of ‘soft law’ such as MNEs’ codes of conduct. Few mention the possibility that MNEs might be subject to human rights duties, much less obligate MNEs to respect them or make the question subject to justiciable.

Those who expect more unified or coherent or ‘responsible’ international investment law from the mere establishment of a permanent Court are likely to be disappointed. To the extent the Investment Court’s judges adhere to the traditional Vienna Convention rules of treaty interpretation

– which elevate plain meaning, context, and open the door to individual negotiating history – harmonious interpretations of diverse texts should not be readily expected. Should the international judges of that Court act like the experts of public international law that they are expected to be and abide by the traditional rules of treaty interpretation, the premise that the Investment Court will produce more harmonious ‘jurisprudence constante’ than is now generated under ISDS even with ad hoc tribunals remains a matter of speculation. While it is true that the appellate judges of such a court might be expected to adhere to a consistent view of a particular text – and would therefore generate a more consistent interpretation of, for example, the U.S.-Argentina BIT should they have repeated opportunities to opine on specific provisions of that treaty over time – even ad hoc arbitral tribunals have been sensitive to prior rulings issued on similar texts.¹⁰⁰ Revisitations of identical treaty provisions applying comparable facts are, in any case, rare – and would be even rarer for a Court that would be only one option among other possibilities for dispute resolution. And if, on the other hand, that Court’s permanent judges purport to find harmonious interpretations in defiance of the explicit texts of IIAs – perhaps deploying European inspired ‘constitutionalist modes of interpretation’ as recommended by von Aaken – that is likely to generate eventual resistance from those who expect both national and international judges not to disguise judicial activism as fidelity to text.

The prospects for defragmenting international investment law become all the more unlikely given the fact that, as noted, the UNCITRAL reform process is likely to produce, at best, a plurilateral agreement that will enable states to choose from an à la carte menu dispute settlement

¹⁰⁰ See, e.g., José E. Alvarez and Gustavo Topalian, “The Paradoxical Argentina Cases,” 6 *World Arbitration & Mediation Review* 491 (2012)(discussing consistencies and inconsistencies in investor-state rulings involving Argentina).

methods to enforce them. This is portrayed as a great advance from the sharp binary choice – court or no court – that states would otherwise face.¹⁰¹ It is also portrayed as a great ‘rule of law’ advance on mere reliance on ISDS. But under this pragmatic option the investment regime’s ‘spaghetti bowl’ of treaties and options will only thicken over time. If the envisioned pluralilateral investment treaty emerges, there would be more distinct treaty interpreters not less, as states gain more dispute settlement options. There will be more noodles in the investment regime’s ‘spaghetti bowl,’ more complexity. A regime now consisting of some 3000 IIAs mostly enforced through ISDS will evolve to one of at least 3000 IIAs some of which may permit foreign investor claims to be brought to national courts of the host state, along with some 9 other supranational dispute settlement options or combinations.¹⁰²

An investment court that will probably operate alongside continued investor-state arbitrations, an appellate mechanism under ICSID, and national courts -- and that therefore will have only occasional and select opportunities for appellate review is unlikely to be a forceful tool for harmonizing international investment law as a whole. Indeed, any attempt by that IC to wrestle

¹⁰¹ See, e.g., Anthea Roberts, “UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court,” EJIL Talk, Dec. 12, 2017.

¹⁰² The menu of dispute settlement options could include, in addition, leaving all investment claims to be resolved under national courts: investor-state arbitration with or without a prior requirement to exhaust local remedies for some period of time, investor-state arbitration with the possibility of appealing to a new appellate mechanism built into an arbitration forum such as ICSID, investor-state arbitration with the possibility of appealing to the appellate tribunal of the International Investment Court, international investment courts established under distinct IIAs, a single two-tiered International Investment Court, state to state arbitration, non-binding post dispute conciliation or mediation, non-binding pre-dispute (preventive) conciliation or mediation, or any combination of the preceding options. Of course, this does preclude the likelihood that particular foreign investors will continue (or increase) their resort to arbitration under their investment contracts with host states. Advocates for the permanent Court have not addressed how including the Court among the options in IIAs is likely to affect the market for dispute settlement among prominent stakeholders, namely businesses.

for itself supreme judicial authority while being only one in a menu of dispute settlement options will likely undermine the very ‘rule of law’ values used to justify its existence.¹⁰³

Given the myths propounded for its creation, it is not surprising that the EU’s investment court proposal inspires harsh critiques from all sides of the political spectrum. The submission by Corporate Counsel to UNCITRAL argues that the Court proposal ignores on-going reforms to ISDS (and some IIAs) that attempt to address broader legitimacy critiques of the regime.¹⁰⁴ For defenders of ISDS the proposed investment court gives up on the attractions of ISDS – party control, flexibility, credible enforcement – on the basis of unproven hopes. For critics on the political left, the Investment Court proposal ignores the real underlying concerns with international investment law and not merely its method for resolving disputes. Thus, Martti Koskenniemi argues that since IIA negotiations take place in the shadow of binding international dispute settlement that protects only the investor, this shifts the balance of power decisively in their favor.¹⁰⁵ For him, the choice between a permanent court and ISDS pales in significance next to the fact that neither supranational venue is designed to protect domestic political communities from economic globalization itself. To those like Koskenniemi who see IIAs as unnecessary and undemocratic attempts to permit unfettered trade/capital flows and/or strengthen corporate property rights while chilling protective government action, otherwise coercing policy outcomes, and threatening government revenues that could be used to enhance inter-generational equity, the Investment Court only ‘monopolizes

¹⁰³ This is all the more the case since the International Investment Court, unlike, for example, the International Tribunal on the Law of the Sea (ITLOS) as one option in the Law of the Sea Convention, is not applying a single multilateral text.

¹⁰⁴ Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III, Dec. 18, 2019.

¹⁰⁵ Martti Koskenniemi, Review of Sornarajah, Resistance and Change in the International Law on Foreign Investment (2015), in 18 J. World Investment & Trade 343, at 351 (2017).

creative thinking.’¹⁰⁶ The Center for International Environmental Law (CIEL), for similar reasons, sees the EU’s attempt to judicialize ISDS as entrenching injustice through a “World Court for Corporations.”¹⁰⁷ For these critics the proposed Investment Court is in a comparable posture to the proposed International Prize Court early in the 20th century: in neither case should a court emerge given disagreements over the underlying rules.

Given these realities, the judicialization of the investor-state dispute settlement may not produce the other benefits anticipated. Even if a shift from the use of ad hoc arbitration to a permanent court of judges may *sometimes* elevate the agency or authority of international adjudicators, this depends on the institutional context and the particular stakeholders involved.¹⁰⁸ One should not presume that those selected or elected to a permanent court will exercise greater ‘judicial wisdom’ than arbitrators chosen by the parties to a particular dispute. Much depends on who the individuals are as well as how they are selected. The quality of international judges selected or elected by states varies – as does the question of how much the merit of candidates matters.¹⁰⁹ In any case, “judicial wisdom” can only go so far if the problem is the absence of law on which it will be applied. Of course, it matters as well whether permanent judges will be the only interpreters or only one of many competing voices.

¹⁰⁶ *Id.*, at 352.

¹⁰⁷ CIEL, “A World Court for Corporations How the EU Plans to Entrench and Institutionalize Investor-State Dispute Settlement,”

¹⁰⁸ See, e.g., Mikkel Jarle Christensen and Mikael Rask Madsen, “Agency of International Adjudicatory Bodies,” iCourts Working Paper Series, No. 190 (2019). See generally Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, ed., International Court Authority (OUP 2018).

¹⁰⁹ See, e.g., Ruth Mackenzie, Kate Malleson, and Penny Martin, Selecting International Judges: Principle, Process, and Politics (2010).

The pros and cons of the EU's proposed investment court need not be addressed further here. The larger point is that the institutional context of a permanent court matters. None of the permanent global courts addressed here is necessarily a reliable – or better -- instrument for its touted goals simply because they do not rely on party-appointed arbitrators selected to preside only with respect to the dispute at hand. Neither judges nor arbitrators should be expected to settle serious differences over policy left unaddressed by the law. Neither should be expected to harmonize rules that states have refused to harmonize, sometimes purposely so. To the extent the adjudication of human rights, corruption, trafficking, terrorist or ISIS acts, and IO accountability implicate not only 'rule of law' concerns, but also worries about whether the underlying international rules respect democracy or the principle of sovereign equality – as all these issues surely do -- there is no substitute for addressing those deficits head-on. We should not expect international judges to be able to take on all these challenges merely because they promise 'judicial wisdom.'

V. Global Courts and Systemic Eurocentrism

The IC proposals canvassed here ignore another lesson from the 1899/1907 conferences: beware proposals for global courts coming from and beholden to only part of the globe, namely Europe. The slate of proposed ICs addressed here originate from the usual actors – governments and scholars – located in and reflecting the biases of Geneva, Strasbourg, New York, or Washington, D.C.¹¹⁰ None of the IC proposals originates from or reflects the strong support of countries from the Global South. None speak from a 'subaltern epistemic location,' even though

¹¹⁰ James Thuo Gathii, "The Promise of International Law: A Third World View," Grotius Lecture, ASIL Annual Meeting, June 25, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509, at 2. See also Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (2010).

the proposed courts would address harms – terrorism, trafficking, corruption, human rights abuses, alleged violations of investor rights – that inordinately impact countries of the Global South.

There is room for skepticism about whether a World Court of Human Rights, an Anti-Corruption Tribunal, an International Court to Combat Trafficking, an ISIS-Only Tribunal or an International Investment Court will advance universal values. As TWAIL scholars have pointed out, the history of international law is strewn with ‘progressive’ proposals written by ‘advanced’ countries for the benefit of the ‘backward.’ TWAIL scholarship has demonstrated how often such proposals implement a ‘civilizing mission’ using distinct vocabularies – naturalism, positivism and increasingly pragmatism – even while advancing particularized agendas under the guise of advancing the universal.

IC proponents do not address how their three underlying rationales offered for these bodies – the need for legal gap filling, enforceable remedies, and defragmentation – would be seen from the perspective of, for example, the East African Court of Justice or the African Court on Human and People’s Rights. None of the proponents consider why, now as during the 1899/1907 conferences, proposals by Europeans for global courts legitimately provoke LDC suspicions.¹¹¹ On the contrary, the underlying rationales offered for these courts presume that since “international law is applicable everywhere,” we “should regard it as a view from nowhere.”¹¹² IC proponents assume that since they are only demanding that issues be resolved by ‘impartial’ judges of eminent stature, questions need not be raised about who benefits from establishing each of these courts. That premise warrants close scrutiny.

¹¹¹ See, e.g., Zárate, *supra* note .

¹¹² Gathii, *supra* note , at 2.

Consider the European-backed proposal for an ISIS-Only Tribunal. That tribunal originated amidst fears that ISIS fighters would escape to Northeastern Syria in response to the advance of Turkish troops. As critics of the proposal have argued, such a tribunal, especially if it were tasked with prosecuting foreign ISIS members and not Iraqis who would face questionable justice (if not summary executions) in Iraq, would be fundamentally unjust insofar as it would accord only some ISIS fighters fairer trials without the prospect of the death penalty.¹¹³ Such a tribunal would also be unfair on victims as only those who suffered at the hands of foreign ISIS fighters would have their day in court. The proposed tribunal makes more sense, however, from a political standpoint. Critics charge that its version of select justice is perfectly designed to avoid political complications in European states which would otherwise face the return of their own ISIS-affiliated citizens – and popular opposition to their return given the possibility that they may radicalize others.¹¹⁴ Of course, a European backed tribunal established to prosecute only a certain kind of terrorist who threatens the heart of Europe follows a well-worn script familiar to those who have studied the ways ‘hegemonic’ international law has responded to the 9/11 attacks on the United States.¹¹⁵

Comparable skepticism can be directed at the proposed Counter-Terrorism Court. That proposal seems designed to deflect difficult disputes among nations about what constitutes a criminal ‘terrorist’ act. Many of those issues are illustrated by article 28G of the Malabo Protocol of 2014 which would establish an African Court of Justice and Human Rights with jurisdiction over that crime (as well as the international crimes of aggression, genocide, crimes against humanity, and war crimes; the transnational crimes of piracy, mercenarism, money laundering, trafficking in

¹¹³ See, e.g., PAX, Policy Brief, “ISIS-only tribunal: selective, politicized justice will do more harm than good,” Oct. 31, 2019.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., Anghie, *supra* note , at 298-303.

persons, trafficking in drugs, trafficking in hazardous waste, and illicit exploitation of natural resources; as well as the partly international or transnational crimes of terrorism, unconstitutional change of government, and corruption).¹¹⁶ The Malabo Protocol has not yet been ratified by any of the 55 African Union states.

The terrorism crime within that proposed regional court, closely modeled on the OAU's 1999 on the Prevention and Combating of Terrorism, is in many respects very comprehensive. Apart from acts that may endanger life, physical integrity or freedom of any person, it includes acts that may cause damage to public or private property, natural resources, environmental or cultural heritage and intended to intimidate governments or the general public, disrupt any public service or create a public emergency, or create general insurrection in a state so long as these violate states' criminal laws, the laws of the African Union, or international law.¹¹⁷ Unlike, for example, the ostensible customary crime of terrorism identified by the Special Tribunal for Lebanon, the Malabo Protocol's terrorism crime does not require any transnational element.¹¹⁸ Art. 28(G) B of the Protocol would extend liability to those who promote, sponsor, contribute, command, aid, incite, encourage, attempt, threaten, conspire, organize or procure persons to commit the crime of terrorism. That crime further anticipates that any individual and legal persons can bear criminal responsibility including state officials or agents but provides immunity for certain senior officials and heads of state during their tenure in office.

¹¹⁶ Charles C. Jalloh, "A Classification of the Crimes in the Malabo Protocol," in Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmeielle, *The African Court of Justice and Human and Peoples' Rights in Context* 225, at 239 (2019)(the classifications for the specific crimes included in the Protocol are Jalloh's).

¹¹⁷ Ben Saul, "The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights," in *id.*, 409, at 421.

¹¹⁸ *Id.*, at 422-23.

At the same time, the Protocol's crime of terrorism reflects Africa states' historical experiences and includes an exception that is absent from the 18 anti-terrorism conventions negotiated at UN venues such as ICAO.¹¹⁹ Although it provides that "political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence," the definition of the crime indicates that "the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts."¹²⁰ While this does not exempt violent acts of liberation from criminal prosecution under other laws (including as war crimes or crimes against humanity under the same Protocol), it reflects powerful political beliefs in the region that it would be wrong to stigmatize such acts as 'terrorist.'¹²¹ Of course, the fact that this exception is not just of historic significance but could apply to post-independence instances of foreign occupation (including recent interventions in Libya) or acts by Palestinians makes it extremely controversial. The Malabor Protocol's terrorism crime is not necessarily a model for the world; despite its relative precision, critics suggest that it is problematic, including with respect to African human rights law.¹²² At the same time, even a crime that is, like the regional court it anticipates, not yet in force should merit attention, particularly since it is part of broader regional efforts that have had real world legal impact, including an AU Plan of Action along with an African Model Anti-Terrorism Law.¹²³

¹¹⁹ Id., at 414-15; 439-41.

¹²⁰ Id., at 421-22.

¹²¹ Id., at 439.

¹²² Id., at 416.

¹²³ Id., at 417-19.

The broader point is that there is a serious question of who a global counter-terrorism court is for. If, as proponents suggest, it is intended to serve as something more than an enforcement tool of the 18 existing counter-terrorism conventions for parties to those conventions, what ‘universal’ definition of the crime are its judges expected to endorse? One suspects that the European proponents of that court do not expect its judges to endorse the Malabor Protocol’s crime of terrorism. Nor do proponents say anything about how that proposed global court is supposed to interact with the proposed African Court of Justice and Human Rights. But the Malabor Protocol’s crime of terrorism, the most sustained effort to negotiate the precise scope of such a crime and the product of arduous negotiations and decades of efforts by a continent that has been subject to numerous terrorist acts, should not be defined by its controversial exception. It reflects distinct, highly politically salient choices on how that crime should be defined, how it relates to other international crimes and international humanitarian law, and who can be prosecuted. It is revealing that the proposal for a Counter-Terrorism Court does not address these substantive legal questions. It just assumes that once the Court is established, the law will come – as if the Court’s elite judges will somehow provide an escape from making some very serious political choices.

Questions should also be raised about who ultimately benefits from more uniform view of corruption expected from a global Anti-Corruption Court. Here again, the European proponents of that Court, who focus more on the details for its establishment than on the law that Court ought to apply, fail to consider the views of the continent that has arguably more at stake than any other on this question, namely Africa. As is well known, corruption has been repeatedly identified as one of

the main concerns of people in African states.¹²⁴ The enforcement gap that drives virtually all of the IC proposals discussed in this essay is especially wide when it comes to corruption and that continent. Although 40 of the 55 members of the African Union are parties to its Convention on Preventing and Combating Corruption and most African states have in place national laws criminalizing a wide range of corruption and money laundering offences, billions of dollars have been stolen by African leaders and laundered around the world.¹²⁵

Given the prominence of corruption in Africa, it is not surprising that the Malabo Protocol, addressed above, also includes extremely detailed provisions that would add the crimes of bribery in the public and private sectors to the jurisdiction of the proposed African Court of Justice and Human Rights. The relevant crimes include innovative provisions on corporate criminal liability, along with offences for ‘abuse of functions,’ ‘trading in influence,’ ‘illicit enrichment,’ ‘diversion of state assets,’ and ‘money laundering.’¹²⁶ Apart from authorizing prison sentences and fines for these offences, the Protocol also anticipates reparations for victims, including asset recovery.¹²⁷ Although the prosecution of these corruption crimes is made considerably less likely by requirements that the acts must be of “a serious nature” and by the general immunity given to “senior state officials,”¹²⁸ there is much to learn from the Malabo Protocol about the ways the supranational prosecution of corruption can respond to localized variants on how theft by governmental authorities and private parties occurs. The proposal for a Counter-corruption Court

¹²⁴ See, e.g., John Hatchard, “Combating Corruption Effectively?,” in Jalloh, Clarke, and Nmehielle, *supra* note , 477. See also Cecily Rose, “Money Laundering and the African Court of Justice and Human and Peoples’ Rights,” in *id.*, 505.

¹²⁵ Hatchard, *supra* note , at 477-78.

¹²⁶ *Id.*, at 481-89.

¹²⁷ *Id.*, at 491-92.

¹²⁸ *Id.*, at 492-95.

fails to address why global prosecutions based on a harmonized definition of corruption bereft of sociological insight or cultural context should be preferred over alternatives, including by regional courts.¹²⁹

Much the same can be said of the proposed anti-trafficking court. That proposal again deals with a problem that since it is especially salient in Africa, has a considerable history of legal efforts on that continent. Here again the Malabo Protocol's definition of the crime of human trafficking is worthy of attention – as is the fact that African states' national laws vary considerably as between states that associate human trafficking with prostitution and sexual exploitation only and those that extend the exploitation offense to cover forced marriage, harmful sports, and involvement in armed conflicts.¹³⁰ As with respect to the examples of corruption and terrorism, attention to how African states have treated the issue would reveal how the perception of this crime, like the others, reflects social, cultural, political and legal traditions that require political negotiations to address and, if global enforcement is desired, to overcome. It is a myth that these can be papered over through the application of judicial wisdom.

More generally, proposals for global ICs ignore the potential benefits of diversification of standards and of adjudicative fora. Regional efforts may be ahead of the curve, for example, on crimes that most likely impact on victims in poor countries – like the crimes of mercenarism, trafficking in hazardous wastes, illicit exploitation of natural resources, or unconstitutional change of government in the Malabo Protocol. Those seeking guidance on how international law could deal with these evils should not look for it only in global courts. More significantly, the emphasis on the need for uniformity and harmonization implies that more localized venues – whether ad hoc

¹²⁹ See generally, Kevin E. Davis, *Between Impunity and Imperialism* (2019).

¹³⁰ See, e.g., Tom Obokata, "Human Trafficking in Africa," in Jalloh, Clarke, and Nmehielle, *supra* note , 529, at 538.

arbitrations designed around the needs of the particular litigants or regional human rights courts – are “destabilizing, irrelevant, and different.”¹³¹

Proponents for a World Court of Human Rights – like those proposing global courts to counter trafficking or corruption or to promote the accountability of MNEs or IOs – appear to presume that existing diverse human rights “threaten . . . jurisprudential chaos.”¹³² No consideration is given about whether the desire to harmonize the law ought to prevail over the need to leave the last word on the meaning of human rights to more localized forums – such as African human rights courts – even if these might improve domestic implementation or democratization.¹³³

Advocates for that court fail to ask whether the substance of at least some human rights should vary from place to place. Why should the expected flow of COVID-related claims not be responsive to different contexts? As Bennoune points out, the future trajectory of human rights law could benefit from forums, like the African Commission on Human and Peoples Rights, that go beyond the need for states to limit their COVID responses in order to respect human rights but also address the need to fulfill or ensure the right to health.¹³⁴ Or consider differences on how the property (or “possessions” in the European Convention of Human Rights) has been interpreted among regional human rights courts.¹³⁵ Surely there ought to be room to accord deference to sub-altern as opposed to European caselaw on point, particularly when the respondent state is from the Global South. Such deference should not be foreclosed simply because we ‘need’ harmonized law. For those sensitized to how even existing tribunals, with no claim to universality, tend to privilege

¹³¹ Gathii, *supra* note , at 3.

¹³² *Id.*, at 7.

¹³³ *Id.*, at 8.

¹³⁴ Bennoune, *supra* note .

¹³⁵ See, e.g., José E. Alvarez, “The Human Right of Property,” 72 U. Miami L. Rev. 580 (2018).

the caselaw and standards produced by the European Court of Human Rights over its regional rivals,¹³⁶ it matters whether a new global court will reproduce or even exacerbate those biases. It matters whether the World Court of Human Rights will ‘harmonize’ the law at the expense of, for example, the Inter-American Court of Human Rights’ innovative rulings concerning the communal property rights of indigenous peoples.¹³⁷

Those emphasizing the risks of defragmentation focus on the risks to the general integrity and overall consistency of international law to the exclusion of other concerns – such as reasonable demands that international law-makers (and dispute settlers) not exacerbate the perception or reality of democratic deficits or horizontal (inter-state) inequities. Of course, the bias in favor of global courts does not come out of nowhere. Suggestions that global courts like the ICJ should be given greater deference similarly ignore the checkered history of that Court and resentments that history has engendered among nations of the Global South at various times.¹³⁸ The idea that the ICJ, because it is a global court, is a repository of superior knowledge does not acknowledge the complicated historical legacies of that Court nor the fact that its judges, like those on other global courts, are not always impartial or objective.¹³⁹ It matters who those judges are, how they are

¹³⁶ As this author has documented, although as many as twenty percent of publicly available ISDS rulings refer to human rights, nearly all such references are to the caselaw of the European Court of Human Rights even when the respondent state is not European. See José E. Alvarez, *The Boundaries of Investment Arbitration* (2018).

¹³⁷ See, e.g., Alvarez, *supra* note (Human Right of Property), at 607-15.

¹³⁸ See, e.g., Anghie, *supra* note note, at 112 (discussing the ICJ’s Advisory Opinion in Western Sahara). This complicated legacy has not hindered reliance on the ICJ by prominent actors like the International Law Commission.

¹³⁹ See, e.g., Anghie, *supra* note , at 111 (noting that the ICJ makes little effort to draw upon non-Western traditions or peoples when it considers general principles of law).

selected and appointed, and by whom.¹⁴⁰ And if the diversity of issues addressed by the Court and of the litigants that come before it is a relevant criterion for judging a court's cosmopolitan bona fides, the ICJ is no model.¹⁴¹

The European proponents of the International Investment Court undoubtedly presume that most LDCs will find that prospect far more enticing than ISDS. They may be right. For longstanding critics of the investment regime, ISDS embodies the colonist project in its clearest form.¹⁴² Arbitration, after all, was the North's chosen tool for enforcing the special rights of their nationals in foreign lands, a venerable vehicle for international law's 'civilizing mission.'¹⁴³ Famed arbitral decisions, still cited by current ISDS tribunals, enforced the rules of state responsibility to secure the free movement of capital and denigrated UN General Assembly resolutions, then supported by the majority of LDCs, that would have established a New International Economic Order.¹⁴⁴

But the imperialist legacy of the international investment regime – which extends to IIAs and not only the arbitral means used to enforce them – should not obscure the extent to which the EU's Investment Court proposal might share the same legacy. As noted, the colonial origins and

¹⁴⁰ See, e.g., Zarate, *supra* note , at 2786-87. For the most recent example of North/South tensions with respect to the ICJ, see, e.g., International Justice Resource Center, "After Contested Election, UK Withdraws ICJ Candidate," available at <https://ijrcenter.org/2017/11/21/after-contested-election-uk-withdraws-icj-candidate/>.

¹⁴¹ See, e.g., Gathii, *supra* note , at 3-4 (comparing the nationalities of law firms that appear before the ICJ to those litigating in African international courts).

¹⁴² See, e.g., M.S. Sornarajah, The Settlement of Foreign Investment Disputes (2000).

¹⁴³ See, e.g., Anghie, *supra* note , at 3, 221-226, 229. As Anghie points out, ISDS has been an important strut in neo-liberal economic policies pursued by rich capital exporters including pursuit of the 'Washington Consensus' model of development. *Id.*, 245.

¹⁴⁴ *Id.*, at 221-23.

‘civilizing’ patterns of international law tend to repeat themselves in different forms.¹⁴⁵ The EU’s model for its Investment Court was presented to the UNCITRAL working group in a fully developed state: it was designed to be simply the multilateral version of permanent courts already negotiated in prior EU IIAs. Like many other international legal institutions gifted by the North to the South, its ‘avowed specificity’¹⁴⁶ – complete down to the number of judges on each tier, its choice of law, and the qualifications expected for its judges – has been deemed no obstacle to its touted universality. Indeed, the EU’s Investment Court is justified on the premise that it will become the principal tool for harmonizing (and enforcing) universally applicable investment law – presumably by deploying another gift from Europe, namely ‘constitutional’ interpretative methods and principles originating in and defused globally by European courts like the CJEU.¹⁴⁷ Like other innovations proposed by the Global North for the benefit of the Global South, the Investment Court is being marketed as part of a pragmatic package of (delimited) reforms that will better respect sovereignty and civilize unruly investment law.

Even though it is designed by Europeans and seeks to satisfy demands that investor-state dispute settlement not compete with the CJEU by pronouncing on European law, the proposed International Investment Court may nonetheless advance more ‘progressive’ investment law that comes to have genuine universal appeal. A court can, after all, escape its origins. But its prospects for becoming a genuinely accepted “global” judicial body are lessened to the extent its makers are

¹⁴⁵ See, e.g., *id.*, at 3.

¹⁴⁶ *Id.*, at 4.

¹⁴⁷ See, e.g., Aaken, *supra* note . See generally, A. Stone Sweet, “Investor-State Arbitration: Proportionality’s New Frontier,” 4 *Land & Ethics of Human Rights* 47 (2010); A. Stone Sweet and J. Matthews, “Proportionality Balancing and Constitutionalism,” 47 *Columbia J. Transnat’l L.* 73 (2008).

disinclined to attempt to (re)negotiate at the multilateral level the law and expect the Court's judges to do it for them.

It is also worth considering which approach to dispute settlement – arbitration or permanent court – is more adaptable as circumstances and sovereign needs change over time. Under the current system of ad hoc arbitration, all countries, no matter how poor, are assured that they will get to appoint one of three adjudicators deciding investor-state claims brought against them. At present reputational and other pressures appear to compel even respondent states from the Global South to resort to a fairly non-diverse set of repeat arbitrators dominated by those with European or American backgrounds.¹⁴⁸ But there is little assurance that simply replacing party-appointed arbitrators with judges selected by states will correct this situation. It is not clear how the composition of the International Investment Court will compare to the current system of ad hoc panels of three arbitrators. While the Court proposal is presented as enabling greater ‘diversity’ of investor-state adjudicators, the meaning of diversity varies. The inherent numerical limits of a permanent court of judges with lengthy tenures is likely to constrain the North/South diversity of its judges, even if that Court manages to do better than existing arbitral panels (or most permanent courts for that matter) when it comes to gender composition. There is certainly no assurance being given by its European proponents that judges from non-European states will dominate, even if that Court ends up, as seems likely, with a disproportionate number of respondent states from the Global South.

For all these reasons, it remains to be seen how establishing a permanent Investment Court among one of many dispute settlement options will ameliorate the perception (if not the reality) that

¹⁴⁸ See generally, Andrea K. Bjorklund, et al, “The Diversity Deficit in International Investment Arbitration,” 21 J. World Investment & Trade 410 (2020).

the investment regime unduly privileges rich states and their investors. Further, if the proposed Investment Court's judges cannot, as its EU proponents hope, opine on European Union law, that will be another blow to its legitimacy. For decades, investment disputes – under IIAs or even in specific forums like the Iran-U.S. Claims Tribunal – have been subject to choice of law clauses that permit consideration of both national and international law. There are good reasons for this. It is hard to disentangle one from the other in many cases and a number of the goals of IIAs – from reducing the need to bring investor-state claims to protecting foreign investors -- relies on narrowing the gap between the two.¹⁴⁹

For Europeans suggestions that its investment court proposal furthers a less than universal agenda or embodies Eurocentricism with not a small touch of systemic racism may seem absurd.¹⁵⁰ The EU sees its proposal as a *response* to the claim that ISDS embodies international law's systemic biases against developing countries. But it is precisely that response that should encourage closer scrutiny. ISDS, after all, was supposed to be the more enlightened response to the gun-boat diplomacy of the 19th century. Is the proposed Court the stark departure from international law's past that it purports to be or merely a more subtle manifestation of it? At a time when my country is facing long overdue convulsions about what it means to engage in systemic racism, it behooves all of us, particularly in the Global North, to scrutinize, with unaccustomed humility and less condescension, what we propose to the world 'for its own good.'

VI. Conclusions

¹⁴⁹ See, e.g., Ratner, *supra* note .

¹⁵⁰ Their surprise may reflect traditional international lawyers' own shortcomings. See, e.g., Anne Spain Bradley, "Human Rights Racism," 32 *Harvard Human Rights Journal* (2019)(identifying and critiquing international law's preference for framing protection around racial discrimination and not systemic racism).

Proposals for new global courts – to address the human rights obligations of business, to globally enforce 21 human rights treaties even against non-state actors, to combat human trafficking or corruption, to prosecute terrorists and members of ISIS, to ensure the accountability of international organizations, or to correct the legitimacy flaws of investor-state arbitration – are backed by powerful sentiments. International law is a less credible legal system to the extent it fails to fill significant gaps in the law or in its enforcement.

At the same time, history tells us that we should not demand that international judges short-circuit inter-governmental deliberation of rights and wrongs by appealing to international rules that do not yet exist, at least at the global level. Judges are not well equipped to do the job of treaty-makers. Judges on global courts who deploy the prohibition against non-liquet simply to make up the law as they go along de-legitimize themselves.¹⁵¹ We are long past a time when it is appropriate to expect the world’s laws to be crafted by a select few who, history tells us, are likely to be disproportionately from a few countries in Europe and North America.

To be sure, the proponents of global courts do not always acknowledge that they want international judges to become law-makers. Some would argue that turning soft human rights law into hard, ‘generalizing’ from treaties that define certain terrorist or corrupt acts, establishing ‘priorities’ among human rights treaties, ‘affirming’ that all IOs owe responsibilities, affirming that states need to balance particular investor rights with the ‘sovereign right to regulate’ are all ordinary examples of legitimate “interstitial” law-making. But as is suggested by the many unanswered questions that are likely to be presented for adjudicative consideration in the age of the coronavirus,

¹⁵¹ It is unlikely that the most prominent advocate for judicial gap-filling given the principle of non-liquet, Hersch Lauterpacht, ever intended that it be taken so far. Compare Hersch Lauterpacht, The Function of Law in the International Community (1933).

even ostensibly simple demands to ‘harmonize’ international law across human rights treaties and among other international regimes entail greater delegations of authority to adjudicators than proponents of the new ICs appear to anticipate. Moreover, even if such delegations of authority were deemed acceptable and international judges were willing and able to assume the tasks given to them, unanswered questions remain about the choice to prioritize adjudicative defragmentation over other goals.

None of this means that the proposed new global courts discussed here are bad ideas. The fact that many if not most of the rationales offered for the ICC were mythical has not prevented that Court from serving useful functions, even if these were not the ones anticipated. The same may hold for the proposed Anti-Corruption Court, for example. That Court could operate, like the ICC, within the constraints of complementarity. Like the ICC, it could serve a useful function if all it does is motivate domestic prosecutions that would otherwise not have occurred. Similarly, the International Investment Court could serve far more modest (or at least different) functions than those now touted by major backers, even as part of a pluraliteral menu of options. Its very existence could, for example, inspire reactive rulings by investor-state arbitrators, regional human rights courts, or national courts that might begin to address other legitimacy critiques of the regime.¹⁵² Over the long term, its very existence (if not its rulings) might even engender political support for an eventual multilateral treaty that genuinely addresses the many legitimacy critiques of international investment law. This may occur precisely because it fails to attain the mythic goal of harmonizing international investment law and states face renewed pressure to ‘politicize’ what the EU had hoped to judicialize.

¹⁵² But, as suggested with respect to the ICC, to the extent this is a possible rationale for establishing a global court, it would be more useful to address it from the outset, when the IC is initially designed.

But the mythical rationales offered by contemporary global court builders should serve as flashing alarms. Cautionary lessons from the first generation of international lawyers who sought to establish global courts are not being heeded. A new generation of principally European scholars and policymakers appears infatuated with forms of judicialization that scholars from other parts of the world have questioned for decades.¹⁵³ If we do not question existing rationales for these courts we may end up spending considerable amounts of time building castles in the sand that are likely to last as long – if they are built at all. What is worse, new global court proposals are each built on their own set of largely mythical aspirations, without concerted attention to how each new IC might relate to each other, to existing supranational but not global adjudicators such as regional courts in Africa or Latin America, or to non-judicial forms of both dispute settlement and law creation. It is just assumed that so long as each employs elite judges the new World Court of Human Rights as much as the EU’s ‘World Court for Corporations’ will engage in progressive boundary-crossings superior to those reached by say, the African Court of Human and Peoples’ Rights. Courts built on such Eurocentric myths are likely to generate very real backlash.

ICs grounded in the premise that its adjudicators will serve as law-makers capable of settling underlying policy disputes, enforcers of last or first resort, and/or judicial agents of defragmentation -- are like the *deus ex machina* that lazy screenwriters deploy in their haste to achieve Hollywood-style happy endings. Those who built the PCA were not so naïve about what permanent global courts could realistically achieve and not as dismissive about alternatives, including arbitration.

¹⁵³ See, e.g., Onuma, *supra* note , at 244-252 (questioning ‘judicial centrism’ and the role of the ICJ as agent of legalization).

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