

Developments in Geopolitics – The End(s) of Judicialization?

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Review

Keynote Speech – ESIL 2015

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Developments in Geopolitics – The End(s) of Judicialization?,

In the summer of 2014 I spent three weeks in The Hague, in the company of a man who was a hundred years old. Professor Vladimir Ibler, born on the June 25th, 1913 in Zagreb, when it was still a part of the Austro-Hungarian Empire, was one of my co-counsel during the arbitration proceedings between Croatia and Slovenia, heard in the Peace Palace.

Professor Ibler, diminutive in height but not in presence or character, was curious about the Peace Palace, built when he was a schoolboy, a place he had not previously had occasion to spend much time in. Each day we would slowly make our way up the central staircase in the morning, then down it later in the afternoon, past the statue of Lady Justice, to and from the Japanese room, where the hearing took place.

Professor Ibler enjoyed musing about the world, the state of international law, and the state of international courts. “When I was born there were none”, he said one morning of the courts, “and now there are so many that I cannot keep up with them all”. He paused, then asked: “What are they all for? What do they all mean?” The questions were left hanging, but from his cheery disposition I felt he retained a sense of hope. A centenarian whose life passed through the reigns of Emperor Franz Josef, Adolf Hitler, Josef Stalin and Josip Tito, was somehow still able to seize on the possibility of courts as an alternative to war, which might be said to be the principal end of judicialisation. He was hopeful too that Croatia and Slovenia might finally resolve their longstanding boundary dispute by arbitration proceedings under the auspices of the Permanent Court of Arbitration, conducted before a panel of five distinguished, experienced international arbitrators.

Yet Professor Ibler also sounded a note of caution, in the course of a more formal interview that I conducted for a profile to appear in the Financial Times Magazine. “I learnt in my life not to come to fast conclusions”, he told me. He continued: “I was very happy in a lawyer’s office in Zagreb from 1937 to 1939 working with Mr Korsky, and then the Nazis just shot him. I think that being in a lawyer’s office you can make certain

¹ In preparing this lecture I have been greatly assisted by Luis Viveros, PhD candidate at UCL, and Dr. Trpimir Socic, Faculty of law, University of Zagreb.

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3 conclusions about people and about human relationships, and you can learn certain things.
4 And what I learnt is not to be very quick to make conclusions, but to reflect all the time
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9 “Was it a good idea to refer the dispute between Croatia and Slovenia to an international
10 arbitral tribunal?”, I enquired. “Yes”, he responded, “of course I think positively of the
11 idea, it was a good idea to establish the court.” And then he paused, before adding by way
12 of a translator: “What I am sceptical of is some of the judges that were appointed to the
13 court, I am not entirely convinced that the tribunal has been totally independent.” He
14 paused again, and said: “It seems there are some invisible forces ... there are justices and
15 injustices”.
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21 That was June 2014. Subsequent events, to which I shall return, caused me to revisit the
22 conversation with Professor Ibler. Fortunately I had recorded it.
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26 “What I’ve learnt is not to be very quick to make conclusions”. Wise advice from a man
27 who is a hundred years old.
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32 Against that background, what are we to make of our current institutional judicial
33 arrangements, and the manner in which they function? We have heard much during these
34 past days at the European Society’s annual conference in Oslo about the connections
35 between law and politics, and we know these courts are the product of political processes
36 with very long roots. We have also heard much about the relationship between courts and
37 the idea of the rule of law. In one exchange, between sessions, I asked a doctoral student
38 whether she thought you could have a rule of law without courts.² “No”, she quickly
39 replied, “you cannot”. And must there be independence and impartiality for them to be
40 truly considered to be courts and tribunals? “Yes”. That is an assumption that we all seem
41 to share, participants at this conference.
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50 There are today far more international courts than Professor Ibler could ever have
51 imagined, as a child, as a law student, as a middle-aged man, or even – remarkably - when
52 he hit the age of retirement (in 1978). Back then there was no WTO Dispute Settlement
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56 ² Ms Denise Wohlwend, PhD candidate at Fribourg University, offered a number of interesting insights on
57 the international rule of law, its functions and projections in international courts and tribunals, which is the
58 general subject of her doctoral research and an ever-present theme in my academic work and legal practice.
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3 Body, no ITLOS, no ICC, ICTY, or ICTR, and no internationalised criminal courts. The
4 PCA was moribund, if not dead. I recall my first teacher in international law, Robbie
5 Jennings, in our 1980 lecture course, passing over the PCA as a historical footnote. Yet
6 today it has well over a hundred cases, including a significant number of inter-State cases.³
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8 It might be said that the PCA offers hope for all institutions who have occasion to hope
9 for more.
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13 Two decades after Professor Ibler had reached retirement age, in 1997, Cesare Romano,
14 Ruth Mackenzie and I established the Project on International Courts and Tribunals
15 (PICT), by which time the international judicial architecture had been transformed. Our
16 first conference meeting apparently offered the first ever gathering of registrars and
17 secretariats of the international courts, and it seemed we were awash with these bodies and
18 their cases. Today it is virtually impossible for anyone to keep up with the totality of
19 developments, and that has consequences, not least the emergence of new initiatives to
20 keep us informed and help us understand, including this fine Pluricourts Project in Oslo,⁴
21 and the iCourts project nearby.⁵
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29 If not exactly an end of judicialisation, one of the consequences has been the emergence of
30 fertile academic communities that have sprung up, and that too has produced
31 consequences. John Louth of Oxford University Press told me last night that fifty-five
32 books were published on the ICC last year, a number that surely gives rise to the question:
33 what is the purpose and utility of such a rush of publications?⁶
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38 For all our work and effort, it must be said that it becomes ever more difficult to step back
39 and identify trends and themes for the whole. Each court and tribunal is unique and, I am
40 bound to add, I do believe they are courts and tribunals, not just the ICJ as I was told
41 Professor Koskenniemi might have suggested during the opening plenary. Each court and
42 tribunal has its own rules, composition, working methods, cases, and of course its distinct
43 legal community of bar and scholars. Invited to address “the end(s) of judicialisation”, in
44 such a context I hesitate to draw broad conclusions. We inhabit a galaxy of a thousand
45 points of light, or more.
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53 ³ For a complete list of pending cases at the PCA visit its website at
54 <<http://www.pcacases.com/web/allcases/>> accessed 20 January 2016.

55 ⁴ ‘PluriCourts’ <<http://www.jus.uio.no/pluricourts/english/>> accessed 4 February 2016.

56 ⁵ ‘iCourts’ <<http://jura.ku.dk/icourts/>> accessed 4 February 2016.

57 ⁶ John Louth’s own publishing activities, now over many years and with so extensive a reach, will no doubt
58 one day be the subject of a doctoral thesis, exploring the role of academic publishers in contributing to the
59 articulation of our community and its output, including in the jurisprudence of the courts.
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3 One thing is clear, however, and it's been a common theme that's has coursed its way
4 through this conference: our international courts are delicate and fragile creatures. We may
5 take national courts as points of comparison, but often they have had centuries to mature.
6 A former colleague, the distinguished English legal historian Professor Sir John Baker,
7 would occasionally tell me that my world of international courts of today equated
8 somewhat to the situation English courts found themselves in during the late 15th and early
9 16th century. I've never quite forgotten that point of comparison, as it allows us to reflect in
10 a more contextualised way on some of the things we tend to get excited about. The reality
11 is surely that we are engaged in a project that will extend over centuries, and it but at an
12 early stage of development. We should therefore permit ourselves to have low
13 expectations, even if that does not mean we should not have expectations at all. It does not
14 mean that matters might not be improved, including by our own endeavours as observers
15 and commentators, and occasionally as actors.

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27 As Professor Follesdal noted in his introduction, over the past years I have been spending
28 a significant amount of time researching a book that focuses largely on the Nuremberg
29 Trial, and the lives of three men in that trial: Hersch Lauterpacht, Raphael Lemkin and
30 Hans Frank.⁷ Because of this 1945 and 1946 have been very much on my mind. The idea
31 that courts and law might supplant politics and power came to the fore in 1945, a point at
32 which the notion that disputes could be settled by recourse to arbitration or judicial
33 settlement began to gain traction. In the broader scheme of historical developments, that's
34 a remarkably short period of time: just seventy years have passed. The idea and its moment
35 was encapsulated by a memorable speech given by United States Supreme Court Justice
36 Robert Jackson, Chief Prosecutor at Nuremberg on November 21st, 1945, when he stood
37 before the eight judges in Courtroom 600 in Nuremberg's Palace of Justice, still a working
38 courtroom today:

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48 "That four great nations, flushed with victory and stung with injury stay the hand of
49 vengeance and voluntarily submit their captive enemies to the judgment of the law
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58 ⁷ Philippe Sands, *East West Street: On the Origins of Crimes against Humanity and Genocide* (Alfred
59 Knopf/Weidenfeld & Nicolson 2016)
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3 is one of the most significant tributes that Power has ever paid to reason”;⁸ he told
4 the judges.
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7 And in a sense that has been our guiding light – reason and the judgment of the law
8 trumping brute force and power politics.
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11 His friend and colleague Hersch Lauterpacht – the man who suggested that he put the
12 concept of “crimes against humanity” into the Nuremberg Statute (when they met in the
13 garden of Lauterpacht’s home on Cranmer Road in Cambridge, on 29 July 1945)⁹ - was
14 rather keen on courts: for enforcement within the State “there must exist a judicial
15 machinery”, he wrote in 1944, “accessible to every individual, for testing the conformity of
16 legislative, judicial, and executive action with the provisions of [his proposed] Bill of
17 Rights”.¹⁰
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24 Lauterpacht was less keen about the idea of an international human rights court, and it is
25 well worth going back to what he wrote in that remarkable book. He thought such an idea
26 was not practicable, in part because of the absence in the international sphere of what he
27 referred to as “restraints upon the unavoidable power of judges”.¹¹ What was missing at the
28 international level was an equivalent to the “community of national tradition”, one that
29 reflected “the overwhelming sentiment [...] of national solidarity and of the higher national
30 interest, the corrective and deterrent influence of public opinion, and, in case of a clear
31 abuse of judicial discretion, the relatively speedy operation of political checks and
32 remedies.”¹²
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39 The more you go back, and the more you read Hersch Lauterpacht, the more remarkable
40 he appears, yet he was shown not to be right in this particular prediction. International
41 courts of human rights were created, even if the issues he alluded to are surely pertinent
42 today, across the range of international courts.
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46 Still, a number of broad points can be made, as regards the “end(s) of judicialisation” (I will
47 include arbitration, although purists may object.)
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51 The end and the ends.
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55 ⁸ Nuremberg Military Tribunal, 2 IMT 98 (21 November 1945).

56 ⁹ *East West Street* (n 7) 113.

57 ¹⁰ Hersch Lauterpacht, *An International Bill of the Rights of Man* (updated edn, OUP 2013) 185.

58 ¹¹ *Ibid* 13.

59 ¹² *Ibid*.

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3 **First, what are the ends of judicialisation?**
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5 There seem to be at least three, although only two are usually referred to.
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8 *First*, as Lauterpacht put it, the “original and primary purpose was to decide disputes
9 between States”.¹³ That is a limited end, and one that has evolved, as other international
10 actors have emerged, including individuals, corporate investors, and international
11 organisations. Our legal world is no longer just about states, even if they do remain rather
12 significant.
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17 *Second*, as Lauterpacht also recognised – indeed he was a proponent of the idea - there was
18 a broader role for international adjudication, as a means to develop the law – and the idea
19 of the international rule of law - a way of gradually beefing up the content of the rules, and
20 their effects.¹⁴
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25 There is, I think, a *third* end for all these courts: they have themselves become new social
26 actors, ones that contribute to evolutions in the state of human consciousness and actions.
27 Their very existence, and the fact that they function, tends to support the notion that there
28 is an alternative to the unlimited exercise of power, or even the possibility of an end to
29 crime and other wrongs (although we know that to be somewhat illusory, as the experience
30 with the ICC makes clear). It could also be said that the mere existence of these institutions
31 offers the illusion of hope, an alternative that is often shown to have been dashed: as
32 discussed during this morning’s additional session on the challenges of migration to
33 Europe, the current problem of individuals trying to reach countries of the European
34 Union shows rather clearly the limits of the law, and the idea of the rule of law. But it is
35 also evident that changes of public consciousness may be effected by the activities of
36 international courts.
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45 I am sometimes asked which cases really made a difference, and it seems there are actually
46 quite a few that you could settle on; the choice may be subjective, but I would certainly
47 include, by way of illustration, the judgment in the case of *Smith and Grady v. UK*¹⁵ of the
48 European Court of Human Rights issued in 1999, a decision that unanimously found that
49 the investigation into and subsequent discharge of personnel from the Royal Navy on the
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55 ¹³ Ian G. M. Scobbie, ‘The Theorist as Judge: Hersch Lauterpacht’s Concept of the International Judicial
56 Function’ (1997) 8(2) *European JIL* 264, 270 (citing Lauterpacht’s Provisional Report on the Revision of the
57 Statute of the Court of 1 September 1955).

58 ¹⁴ *Ibid.*

59 ¹⁵ *Smith and Grady v. UK* Apps nos 33985/96 & 33986/96 (ECtHR 27 Sept 1999).
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3 basis that they were homosexual was a breach of their right to a private life under Article 8
4 of the European Convention on Human Rights. That seems to have been a catalytic
5 jurisprudential moment, one that has contributed to, if not caused, a transformation of
6 public views in the European context on gay marriage and related matters. Courts can
7 make a difference, that too is a reality.
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10 11 **Second, can we envisage the end of judicialisation?** 12

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14 It seems hard to envisage. Warts and all, international courts are now a settled part of
15 international and domestic political processes, and they are here to stay. There will be ebbs
16 and flows and the directions might change, but they are not going away. To be sure, there
17 will be backlashes and whingeing and even departures and disappearances, we have heard
18 much about that over the past two days. There will be questions about arbitration or
19 courts, *ad hoc* or permanent, concerns about fragmentation and competition, and whether
20 these features are a good or bad thing.
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24 A prospective international litigant now has a range of choices, and that is a good thing.
25 Competition has offered choice in decision-making - which of several judicial or arbitral
26 possibilities might a claimant opt for? - is a question informed, in large part, by speculation
27 as to possible outcomes. We have seen competition influence the development of the law
28 and public consciousness: one suspects that the fact that ITLOS became the first
29 international court to delimit a maritime boundary 200 miles beyond a coast had at least
30 something to do with the desire to give itself an advantage against its Hague competitor
31 which has, until now at least, refrained from so making such delimitation.¹⁶ Competition
32 allows ideas to flourish, and the battle of ideas is a hallmark of our emerging international
33 judicial system.
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37 There is nothing novel about this. I could mention the start of Slade's case in 1596 before
38 the English courts – it arose because under medieval common law a claim for the
39 repayment of a debt had to be pursued through a writ of debt in the Court of Common
40 Pleas, a difficult, archaic, slow and very expensive process. By 1560 lawyers had found
41 another method, enforced by a different court, called the Court of King's Bench, through
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¹⁶ *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (Judgment, 14 March 2012) ITLOS Rep. 2012, s. IX & para 506(2); *Cfr. Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Merits) 2012 ICJ Rep. 624, s. IV; also see *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Pending) <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nicolb&case=154&k=02>> accessed 5 February 2016.

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3 the action of *assumpsit*, a form of action for deceit. Then along came another body, the
4 Court of Exchequer Chamber, the appellate court to the Court of Common Pleas, which
5 overruled decisions of the King's Bench on *assumpsit*, causing great friction between the
6 courts. Courts going in different directions is not a new thing, it has happened for
7 centuries.¹⁷
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11 In Slade's Case the Exchequer Chamber gave judgment after five years – it seems there is
12 nothing novel either about delay – ruling that *assumpsit* claims were valid and enforceable.
13 They became the main course of action in English contract cases, and the episode is
14 sometimes cited as an example of judicial legislation where Parliament failed to act. It could
15 also be cited as an example of the reality of competition, and it applies equally in the
16 international domain.
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25 Against this background, summing up the current state and perspectives of international
26 courts and tribunals is no easy feat. An assessment of the relative successes or failures of
27 international justice enterprises requires an understanding of what we expect of them, both
28 individually and collectively. It would need several hours to engage fully in the matter. All I
29 can do, having surveyed the general landscape, is to settle on a few developments that
30 might raise an eyebrow, or indicate the road that might yet be followed. I will briefly touch
31 on a few examples, not wishing to suggest any particular sense of hierarchy or exclusivity,
32 to suggest a indicate themes we might wish to think about.
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39 In so doing, I depart from the lecture I had prepared before I arrived. It has been striking,
40 as I sit in on various sessions, to note that there seem to be quite a few things that were not
41 talked about in this conference, matters that are delicate and best skirted around in the
42 polite company that is our community, matters one prefers not to talk about. So I shall
43 plough on, encouraged to talk about them, reminded of the words of psychoanalyst
44 Nicolas Abraham, who observed:
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50 “What haunts are not the dead, but the gaps left within us by the secrets of
51 others”¹⁸ –.
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56 ¹⁷ Sir John Baker, *The Oxford History of the Laws of England: Volume IV* (OUP 2003) Part III, s. 5,6, 7.

57 Cite to Sir John Baker book on English legal history

58 ¹⁸ Nicolas Abraham, 'Notes on the Phantom: A Complement to Freud's Metapsychology' (1987) 13(2)
59 Trial(s) of Psychoanalysis 287 (Nicholas Rand tr).
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3 In his sense, that which has not been said over the course of this conference may be as
4 interesting as what was said. In entering that forbidden domain, I shall draw from my own
5 experiences.
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8 *The International Criminal Court*

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11 In recent months the question has entered my mind: 'did we create the ICC too early?' It is
12 plainly now something of a problem institution, in the eyes of many, and the causes of that
13 situation seem to be manifold. Particularly in the African context, one has to confront a
14 very real and - let us say it - legitimate concern: if you switch on a computer and go to the
15 ICC webpage, you will see that every single person that has been indicted by the
16 Prosecutor's Office at the ICC is African and black.¹⁹ Yet Africans and black people do not
17 have a monopoly on international crime. That record, fifteen years after the creation of the
18 ICC, sends a troubling signal which we are bound to reflect on and address, not least since
19 it is having political ramifications. We have seen the consequences of that in the Kenya
20 case²⁰ and, more recently, in the situation of Sudan's President Al Bashir arriving in, and
21 then leaving, South Africa, a party to the ICC Statute under an obligation to arrest him.²¹
22 We must recognise the cogency of an argument which suggests the focus on certain
23 individuals amounts to a form of legal neo-colonialism. Quite why there has been no
24 indictment for the practise of torture or rendition adopted after the events of September
25 11th seems remarkable.²² We have to confront this; we cannot just run away from it.
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37 *The European Court of Human Rights*

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¹⁹ *Situation in Democratic Republic of Congo's indictees*: Thomas Lubanga Dyilo, Germain Katanga, Bosco Ntaganda, Callixte Mbarushimana, Sylvestre Mudacumura, Mathieu Ngudjolo Chui; *Situation in the Central African Republic*: Jean-Pierre Bamba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, Narcisse Arido; *Situation in Uganda*: Ahmad Muhammad Harun ('Ahmad Harun'), Ali Muhamad Ali Abd-Al-Rahman ('Ali Kushayb'), Omar Hassan Al Bashir, Bahar Idriss Abu Garda, Abdallah Banda Abakaer Norain, Abdel Raheem Muhamad Hussein; *Situation in the Republic of Kenya*: William Samoei Ruto, Joshua Arap Sang, Uhuru Muigai Kenyatta, Walter Osapiri Barasa; *Situation in Libya*: Saif Al-Islam Gaddafi; *Situation in the Republic of Côte d'Ivoire*: Simone Gbagbo, Laurent Gbagbo, Charles Blé Goudé, Ahmad Al Faqi Al Mahdi. International Criminal Court, 'All Cases' <https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx> accessed 19 February 2016.

²⁰ Owen Bowcott, 'ICC drops murder and rape charges against Kenyan president' *Guardian* (London, 5 December 2014) <<http://www.theguardian.com/world/2014/dec/05/charges-humanity-kenya-president-dropped-uhuru-kenyatta>> accessed 13 February 2016.

²¹ Norimitsu Onishi, 'Omar al-Bashir, Leaving South Africa, Eludes Arrest Again' *NYT* (New York, 15 June 2015) <<http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html>> accessed 13 February 2016.

²² Philippe Sands, *Torture Team: Uncovering War Crimes in the Land of the Free* (Kindle edn., Penguin 2008) Ch. 'Responsibility'.

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3 Let us alight on the situation in my own country, where the dominant political party of the
4 day has a large number of its parliamentarians – and even ministers - who seem to want to
5 leave the European Court of Human Rights. This is because the Court is coming down
6 with judgments they don't like, given by judges from faraway places. One of the judgments
7 they like to focus on - the prisoner's voting case – strikes me as one that actually was
8 correctly decided.²³

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

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34 And of course the positions adopted by Prime Minister Cameron in the United Kingdom²⁴
35 get seized of by friends in Russia: 'if the UK is going to withdraw, then we might as well do
36 so'.²⁵ The parallel approaches of the present leadership in Russia and that of the United
37 Kingdom is striking and worrisome.

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47 ²³ *Hirst v. UK No. 2* App no 74025/01 (ECtHR 6 October 2005); Mathew Holehouse, 'David Cameron: I will
48 ignore Europe's top court on prisoner voting' *Telegraph* (London, 4 October 2015)

49 <<http://www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html>> accessed 13 February 2016.

50 ²⁴ Nicholas Watt, 'Cameron refuses to rule out leaving European convention on human rights' *Guardian*
51 (London, 2 June 2015) <<http://www.theguardian.com/law/2015/jun/03/cameron-refuses-to-rule-out-leaving-european-convention-on-human-rights>> accessed 13 February 2016.

52 ²⁵ "The participation of the Russian Federation in any international treaty does not mean giving up national
53 sovereignty. Neither the ECHR, nor the legal positions of the ECtHR based on it, can cancel the priority of
54 the Constitution. Their practical implementation in the Russian legal system is only possible through
55 recognition of the supremacy of the Constitution's legal force." Maria Smirnova, 'Russian Constitutional
56 Court Affirms Russian Constitution's Supremacy over ECtHR Decisions' (*Ejil:Talk!*, 15 July 2015)
57 <<http://www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/>> accessed 13 February 2016.

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3 It seems that the idea of sovereign equality means treating all countries equally, yet the
4 reality as we know is that not all countries are equal in the context of international judicial
5 systems. That is a reality we cannot run away from.
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11 *The European Court of Justice*
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14 Much has been talked about it in this conference about the recent Advisory opinion on EU
15 ratification of the ECHR.²⁶ This decision seems difficult to justify in purely legal terms, in
16 circumstances in which EU member states have agreed that they wish the Union to
17 become a party. It is hard to escape the conclusion that the ECJ has basically acted to
18 protect its own turf, to safeguard its own autonomy and put its own interests first. This
19 suggests that one of the ends of judicialisation – yet not one that our community has really
20 focused on - is the instinct of institutional self-interest, of self protection and bigging up
21 your own institution against the encroachment of others. Again, let us have strength to rise
22 to the challenge of calling a spade a spade, and engage with what is actually going on in the
23 functioning of the courts.
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34 *ISDS – Investor State Dispute Settlement*
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36 One could speak for hours on this subject. There are a growing number of observers who
37 believe that the system has been ‘captured’ by one particular stakeholder: the arbitrators (of
38 which I am one) and the lawyers and law firms who benefit from the growth of the
39 system.²⁷ It is hard to avoid the charge. Sitting in on Alina Miron’s striking presentation on
40 the costs of international justice – the legal fees - I reflected on the information that comes
41 before ISDS arbitrators, the kind of fees that are charged for discrete, small and sometimes
42 relatively insignificant cases: fees that run to the tens of millions of dollars for cases, legal
43 opinions of a few pages for which a fee note of a hundred thousand dollars or more might
44 be charged. This is what one sees sometimes when presented with a breakdown of costs.
45 We need to look at those issues and address them realistically, and we need to join the
46 clamour for greater transparency in the system.
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56 ²⁶ Opinion 2/13 (Full Court) [2014] ECR I-2454.

57 ²⁷ Cecilia Olivet & Pia Eberhardt, ‘Profiting from injustice: How law firms, arbitrators and financiers are
58 fuelling an investment arbitration boom’ (Transnational Institute, 27 November 2012)
59 <<https://www.tni.org/en/briefing/profitting-injustice>> accessed 13 February 2016.
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3 There is too the most unfortunate practise of those who act as counsel and arbitrator in
4 ISDS cases, a sort of revolving door in which the same person can spend a morning
5 drafting a pleading on the meaning of 'fair and equitable treatment' (in one case) and then
6 an afternoon drafting an award on the meaning of 'fair and equitable treatment' (in another
7 case). This is sometimes referred to as 'issue conflict',²⁸ and some institutions have put an
8 end to it (the International Court of Justice took a leadership role in eradicating that kind
9 of practice nearly twenty years ago in its Practice Directions, which precluded individuals
10 who acted as counsel from simultaneously sitting as ad hoc Judges;²⁹ the Court of
11 Arbitration for Sport has now also prohibited the practise).

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14 Speaking from experience, it can be an unfortunate situation to find yourself deliberating
15 with fellow arbitrators knowing that one of more of them is actually litigating the very
16 point that your are striving to write an award on. There is growing attention now being
17 given to this, and rightly so. In the ISDS field the European Commission has now stepped
18 in to call for an international investment court,³⁰ and the European Parliament has also
19 made clear that it no longer wishes to tolerate that kind of practice.³¹

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

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The International Court of Justice

²⁸ Philippe Sands, 'Conflict of Interest for Arbitrators and/or Counsel' in Meg Kinnear et al (eds), *Building International Investment Law The First 50 Years of ICSID* (Kluwer 2015) 655-668.

²⁹ "The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge ad hoc in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court [...]" *Practice Direction VII* (Basic Documents of the International Court of Justice) <<http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>> accessed 13 February 2016.

³⁰ 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' *European Commission News Archive* (Brussels, 16 September 2015) ><http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>> accessed 13 February 2016.

³¹ European Parliament (2011) Resolution on the future European international investment policy (2010/2203(INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>> accessed 13 February 2016.

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3 I turn to the ICJ, a court which probably has its strongest bench in years. It is now in a fine
4 position to enhance its role. Yet it too might also want to examine some of its practices,
5 some long-established, to see if there is not room for improvement.
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9 For example, the standard applied by the court to the issue of independence and the
10 circumstances in which a judge can and cannot sit in a case. This was addressed in the Wall
11 Advisory Opinion,³² giving rise to a standard that was relied upon in an Annex VII
12 arbitration proceeding between Mauritius and the United Kingdom.³³ The approach raises
13 some fundamental concerns: the principal judicial organ of the United Nations, which
14 should operate to the very highest standards, seems to have the lowest standard of judicial
15 independence in the world in terms of determining the circumstances in which a judge can
16 and cannot sit.
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23 Related to this is another matter that should be put on the table with some trepidation,
24 given who is in the audience today, and that is the extracurricular activities of judges. Why
25 is the International Court of Justice apparently the only permanent court in the world
26 which allows its judges to sit and act as arbitrators? That strikes me as potentially
27 problematic in terms of independence and perceptions as to the functioning of the Court
28 itself. One has to step back from our community and ask ourselves: 'how do others
29 perceive that practice? How do others perceive the idea that a judge might accept
30 appointment by a party, a claimant or a State?' One can understand, perhaps, sitting as
31 president of a tribunal, not as party-appointed arbitrator, but even in those circumstances,
32 how can it be that a judge who has a permanent and a full time position and is paid a full
33 time salary, does not pass over any fees that are paid to the United Nations (as happened, I
34 understand, on one occasion when an ICTY judge was allowed to sit on another case).³⁴
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43 It is not about actual bias but about perception, about ramping up our standards.
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48 *PCA/ad hoc inter-state arbitration*
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54 ³² *Legal Consequences of the Construction of a Wall* (Order of 30 January 2004) 2004 ICJ Rep 3 [6]-[8].

55 ³³ *Chagos Maritime Protected Area (Mauritius v. UK)* (Reasoned Decision on Challenge, 30 November 2011) 24-
56 35.

57 ³⁴ Even pending change in the practise, surely a first step would be to make publicly available on the Court
58 web site a list of all such appointments accepted by judges? As regards the future practise, the problem could
59 be addressed by changing the status of judges and treating the appointment as part-time, as at ITLOS.
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3 This is a convenient point to come back to the PCA and Professor Ibler. The PCA – as I
4 mentioned - was moribund when I first studied international law, and has since had a
5 remarkable transformation. In relation to inter-State disputes, it has been much assisted by
6 the coming into force of Part XV of the UN Convention on the Law of the Sea.
7 Developments at the PCA had been going seemingly well until rather recently. A couple of
8 its cases have now involved permanent members of the Security Council - Russia and
9 China – who have chosen not to participate in UNCLOS Annex VII cases brought against
10 them, an approach that raises concerns which need to be addressed.³⁵
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17 That is not the only problem. Of the various aspects of this conference that that have
18 struck me over the past three days, the one that has been most striking is this: there is one
19 recent development which, in any discussion I have attended, has not been addressed on
20 any platform. So delicate and sensitive, perhaps, or so recent, and that is the case of Croatia
21 and Slovenia.³⁶ I declare an interest, as I was counsel for Croatia until it withdrew from the
22 proceedings in August 2015. I am not independent, or neutral, or objective, and I must
23 limit myself to the facts that are in the public domain. But it seems clear that what occurred
24 – what was revealed – last summer is like an Exocet missile that goes to the heart of the
25 system that we are all involved and care about, a system that we wish to see succeed and
26 improved but which, remarkably, we seem not to want to talk about at this conference,
27 which has as its theme the functioning of international courts and tribunals.
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36 The case was brought by an arbitration agreement between two countries, to resolve a
37 long-standing dispute.³⁷ The written pleadings closed in spring of 2014. Hearings were held
38 in May and June 2014. It's a big case involving land and sea boundaries, so it is entirely
39 reasonable that it should take time to resolve that case and to write an award.
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43 In February 2015 an incident occurred which gave rise to some concerns, and some
44 attention in the media. The Slovenian Foreign Minister made a public statement in which
45 he suggested that he had been privy to the confidential deliberations of the Tribunal. The
46 Tribunal was alerted to these statements, and on 5 May 2015 wrote to the parties (the
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52 ³⁵ *Arbitral Tribunal Constituted Under Annex VII UNCLOS (Philippines v. China)* (PCA Case 2013-19); *Artic*
53 *Sunrise Arbitration (Netherlands v. Russia)* (PCA Case 2014-02).

54 ³⁶ *Arbitration between the Republic of Croatia and the Republic of Slovenia* (PCA Case 2012-04), information available
55 at the PCA website <http://www.pca-cpa.org/showpage9e4c.html?pag_id=1443>, information starting
56 from July 2015 available at <<http://www.pcacases.com/web/view/3>> accessed 22 January 2016.

57 ³⁷ *Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia*
58 <[http://www.mzz.gov.si/fileadmin/pageuploads/Novinarsko_sredisce/Sporocila_za_javnost/Sporazum-
59 angl.pdf](http://www.mzz.gov.si/fileadmin/pageuploads/Novinarsko_sredisce/Sporocila_za_javnost/Sporazum-angl.pdf)> accessed 13 February 2016.
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3 letter, which is strongly worded, is available on the PCA website).³⁸ The Tribunal noted
4 that it was “seriously concerned by the suggestion that one Party would have been privy to
5 confidential information related to the Tribunal’s deliberations”,³⁹ and noted that it
6 considered that “such a meaning could be attributed to statements by the Slovenian
7 Foreign Minister, and [...] that such statements are unhelpful for the resolution of the
8 present dispute.”⁴⁰ The Tribunal then expressed the view, understandably, that
9 “safeguarding the confidentiality of the deliberations until the issuance of an award is a
10 matter of highest priority”,⁴¹ premised as it is on the independence of the adjudicators from
11 the Parties. In the letter the Tribunal took note of “Slovenia’s assurance that it has not
12 received any information whatsoever as to any aspect of the outcome of the arbitration”,⁴²
13 and stated that it had “examined the arrangements that it has put in place to ensure that no
14 confidential information may be disclosed”. It concluded: “The Tribunal is therefore
15 confident that no information about the likely outcome of any aspect of the arbitration has
16 been disclosed.”⁴³

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27 And that, we expected, was the end of the matter.

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29 I went on holiday on July 22nd, on a morning flight to New York. By the time I got off the
30 plane I had some two-hundred email and phone messages directed to what had emerged in
31 the course of that day: the publication by a Serbian newspaper of the transcripts of what
32 purported to be telephone conversations between the Agent of Slovenia and Slovenia’s
33 Party-appointed arbitrator, revealing extraordinary details about the deliberations. This was
34 not just about the sharing of confidential information about what was going on inside the
35 deliberations, it was also about the use of that arbitrator as a conduit for the presentation
36 of further arguments by the Party that appointed him. Assuming they are accurate, the
37 transcripts were very detailed, showing a two-way process in which the arbitrator gave a
38 great deal of information to the Agent and also appeared to be acting as a conduit for the
39 views of Slovenia, through its Agent. The question of how these recordings were obtained
40 is of course an important one, which remains unresolved (I should mention that I have
41 long proceeded on the assumption that any communication I engage in is recorded by
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52 ³⁸ Letter from Dirk Pulkowski (Registrar) to the Agents in the Arbitration between Croatia & Slovenia (5 May 2015)

53 <[http://www.pca-cpa.org/PCA_Ltr_20150505%20\(disclosed%20by%20Tribunal\)1157.pdf?fil_id=2974](http://www.pca-cpa.org/PCA_Ltr_20150505%20(disclosed%20by%20Tribunal)1157.pdf?fil_id=2974)>
54 accessed 22 January 2016.

55 ³⁹ Ibid.

56 ⁴⁰ Ibid.

57 ⁴¹ Ibid.

58 ⁴² Ibid.

59 ⁴³ Ibid.

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3 someone, somewhere in the world, so I was surprised that others involved in this story did
4 not proceed on the same basis).

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7 On July 23rd, the day after the news reports came out and the Serbian news republished, the
8 Agent and arbitrator both resigned. That was addressed in a press release put out by the
9 PCA. That press release itself – and here I speak in a purely personal capacity - contained
10 an extremely unfortunate line: “Once reconstituted, the Tribunal intends to resume its
11 deliberations in the present arbitration without delay.”⁴⁴ No one who has read those
12 transcripts can sensibly assume that the case can continue in any way before that arbitral
13 tribunal. I say this having lived through the bitter experience of the Pinochet proceedings
14 in 1998 and 1999 where the House of Lords for the first time in a nine-hundred year
15 history found itself having to set aside one of its own judgments in the case that had drawn
16 more international attention than any other in order to be seen as absolutely squeaky
17 clean.⁴⁵ No doubt for the judges who sat on that case that it must have been a painful and
18 difficult thing to do, all the more so on a case with such a high profile: to set aside the
19 whole thing and start again in order to protect the system as a whole. Yet it was plainly the
20 right thing to do, to protect the integrity of the judicial process. I shall not express any view
21 as to what precisely ought now to happen in the *Croatia v. Slovenia case*, but in deciding how
22 to proceed the interests of the system as a whole – the integrity of the arbitral process –
23 must surely be paramount.
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36 On 24th July Croatia wrote to the Tribunal to say that it considered the entire arbitral
37 process to have been tainted. It asked the Tribunal to suspend proceedings with immediate
38 effect, and invited remaining members of the Tribunal to reflect on the grave damage that
39 had been done to the integrity of the proceeding.⁴⁶ Five days later, on July 28th, Slovenia
40 appointed a new arbitrator, the President of the International Court of Justice. This was
41 odd, since article 2 paragraph 2 of the Arbitration Agreement identifies the President of the
42 International Court of Justice as the appointing authority for the independent arbitrators,
43 raising a question as to how it could be that the appointing authority could have been
44 appointed.⁴⁷ Nevertheless, the error was quickly corrected and the President of the ICJ
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52 ⁴⁴ PCA Press Release of 23 July 2015 <<http://www.pcacases.com/web/sendAttach/1310>> accessed 22
53 January 2016.

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

55 ⁴⁶ PCA Press Release of 5 August 2015 <<http://www.pcacases.com/web/sendAttach/1389>> accessed 13
56 February 2016.

57 ⁴⁷ Article 2(1) on the “Composition of the Arbitral Tribunal” states that “[...] Both Parties shall appoint by
58 common agreement the President of the Arbitral Tribunal and two members recognized for their
59 competence in international law within fifteen days drawn from a list of candidates established by the
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3 resigned from the arbitral Tribunal, as did Croatia's party appointed arbitrator, leaving
4 three arbitrators sitting. Slovenia announced that it would not appoint a new arbitrator,
5 leaving it to the President of the Tribunal to do so. In the absence of Croatia's appointing
6 its party appointed arbitrator, one assumes the President of the arbitral Tribunal would
7 have to decide what to do.
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12 And that, as far as I know, is where matters remain. Three arbitrators standing, Slovenia
13 says the case can and must go on, Croatia says it is all over.⁴⁸
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16 It is hard to describe fully one's reaction to such developments. It felt extraordinarily
17 painful, not only as a former counsel but as someone involved in the system of
18 international justice, because it went to the very heart of the system in which we are
19 involved, the centrality of the independence of the adjudicator. The concern must be not
20 only that the episode will bring to a premature end a process that has run over several
21 years, but also that it will cause tremendous harm to the system of international arbitration
22 both within and outside the PCA system, including in the context of investor-State
23 arbitration. The trickle-down consequences are something to watch out for.
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30 There is also a real concern that this might not be an isolated example. During the
31 conference I had a conversation with a colleague who expressed the view that this was
32 surely a one-off, an isolated case, and we should not make too much about it. In my own
33 experience that is not likely to be the case: many involved in international proceedings are
34 aware that things go on that should not go on, even if not to the same extent as the matter
35 I have just described. It is not entirely unusual for an agent in an inter-State case to share a
36 conversation that he or she has had with a person sitting on a court or tribunal, a fact that
37 causes (or should cause) a tremendous ethical difficulty. Under most rules of professional
38 conduct counsel should not be privy to such information, and they should not want to hear
39 such stuff or know what is going on. Other rules of professional conduct may have a
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49 President of the European Commission and the Member responsible for the enlargement of the European
50 Commission. In case that they cannot agree within this delay, the President and the two members of the
51 Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list."
52 (Emphasis not in original text) Arbitration Agreement between the Government of the Republic of Slovenia
53 and the Government of the Republic of Croatia <
54 http://www.assidmer.net/doc/Arbitration_Agreement_Croatia_Slovenia.pdf> accessed 22 January 2016.

55 ⁴⁸ Following this lecture, the President of the Arbitral Tribunal appointed Norwegian and Swiss arbitrators,
56 H.E. Mr. Rolf Fife and Professor Nicolas Michel and instituted a process to fill the vacant seats left by the
57 resignation of the party-appointed arbitrators. PCA Press Release of 25 September 2015
58 <<http://www.pcacases.com/web/sendAttach/1468>> accessed 13 February 2016. The future direction of
59 the case remains an open question.
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3 different standard, and that raises a serious question about ethical standards for the
4 international bar.
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7 I even had a situation in one case – and I may not be alone in this room having had that
8 situation - of receiving an email from an agent in one case (it was several years ago) sending
9 for my attention, review and comment the deliberations of an international court or
10 tribunal in a case in which I was involved. The reaction of a member of the English bar is
11 to delete the email immediately, to refrain from reading the text, and to invite the
12 appropriate person at the court or tribunal to remind its members of the duty of
13 confidentiality.
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19 The hope must be that this terrible episode in the course of last summer will serve as a
20 wake up call to everyone in the community to re-double their efforts in applying the very
21 highest standards of propriety. Our international system is delicate, each court and tribunal
22 a fragile creature, and those who wish to attack the system as a whole or individual courts
23 will seize on these kinds of practices and will do very great damage indeed.
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28 That – I think - is the positive that one could take out of this particular development.
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31 What is to be done about it? Silence is not an option. Pushing uncomfortable truths under
32 the carpet is not an option. The time has come to have an honest debate and discussion
33 about party-appointed adjudicators and including the issue of nationality, and whether it
34 now ought to be excluded altogether to engage in that particular process. And I think it has
35 trickle-down consequences for who sits on what cases at permanent international courts
36 and tribunals also. The moment should be used for an honest and constructive exploration of
37 our own practices, to enhance the system, not to tear it apart.
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43 Which brings me to back to ask the question that hovers: How can it be that, despite the
44 fact that these recent matters are now widely reported, even though they happened only a
45 few weeks ago, that this was not talked about at this conference? This raises a question about the
46 nature of our community, one that is a small and closed and inherently conservative, in
47 which it is delicate and embarrassing to raise such matters and talk about them. It is
48 understandable that younger members of the academic community would wish to tread
49 carefully, which is why those of us who are of a more advanced age have a particular
50 responsibility to raise such matters, even if sensitive and delicate, even if it causes
51 difficulties in relation to our own prospects. The concern must be that our community is
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3 too cosy and too closed. Scrutiny is good, so is informed discussion and debate. The
4 absence of scrutiny and transparency surely allows these kinds of things happen, and then
5 perpetuates them. Much is under the carpet, and it should be allowed – nay, encouraged –
6 to come out.
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12 Which brings me back to Professor Ibler.

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15 “I learnt in my life not to come to fast conclusions”, he said to me. That is surely right, and
16 covers all the topics I have briefly touched on, and many others. I take heed of his warning
17 and do not come to any fast conclusions.
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21 Very regrettably - or perhaps fortunately - Professor Ibler did not live to become aware of
22 what had happened in the case in which he had been involved: he passed away in the
23 summer of 2015, before these matters emerged, leaving him perhaps in a happily optimistic
24 state. He infused us with a sense of optimism – this man of a hundred years – and that is
25 surely a good thing. So let us leave this conference with a sense of optimism. Let us not run
26 away from the hard, dirty, difficult things that happen in our world, and in our own
27 narrow, small world. Let us confront them, but with courtesy, balance and propriety. I
28 think that is what Vladimir Ibler would have wanted.
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35 Thank you very much indeed, for your kind attention.
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