

---

# Plurality as a Form of (Mis)management of International Dispute Settlement: Afterword to Laurence Boisson de Chazournes' Foreword

Yuval Shany\*

## Abstract

In 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', Laurence Boisson de Chazournes maps out the variety of legal doctrines and communicative devices that allow international courts to navigate the course of international dispute settlement in ways that avert serious jurisdictional or jurisprudential clashes between different international courts. This reply is largely supportive of Boisson de Chazournes' account of an evolving judicial 'managerial approach'. It questions, however, whether international courts are truly committed to a 'managerial approach' and whether such an approach is likely to succeed in the long run without a structural redesign of the 'fabric of international dispute settlement'. Section 2 of the Afterword discusses jurisdictional plurality as a deliberate choice by states, which is likely to restrict the coherence of international law. Section 3 discusses the dilemmas facing international courts: the choice of a pro-coherence 'management approach' may conflict with other mandated functions, including providing the litigating parties with cost-effective dispute settlement services and supporting the particular needs of the legal regimes in which they are embedded. Section 4 concludes.

## 1 Introduction

In her *EJIL* Foreword article, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', Laurence Boisson de Chazournes

\* Hersch Lauterpacht Chair in Public International Law, Faculty of Law, Hebrew University, Jerusalem, Israel. Email: [yshany@mscc.huji.ac.il](mailto:yshany@mscc.huji.ac.il).

maps out in a masterly manner the variety of legal doctrines and communicative devices that allow international courts to navigate the course of international dispute settlement in ways that avert serious jurisdictional or jurisprudential clashes between different international courts.<sup>1</sup> These include cross-references in judicial decisions to decisions by other courts, the employment of jurisdictional coordinating doctrines such as *lis pendens*, *connexité*, fork in the road (*electa una via*), *res judicata* and choice of forum and the application of general standard of conduct applicable to international litigation, such as good faith and judicial comity. Her conclusion is that such a ‘managerial approach’ allows international judges and state actors (who provide judges with many managerial tools) to shape the international legal system in a way that preserves its internal coherence.<sup>2</sup> International judges strive to maintain the coherence of the ‘fabric of international dispute settlement’ because they are committed to promoting the rule of international law and regard coherence as an important element in the external legitimacy of the international legal system and its compliance pull.<sup>3</sup>

This reply is largely supportive of Boisson de Chazournes’ account of an evolving judicial ‘managerial approach’. I agree with her that the plurality of international courts is a ‘consistent choice’ of states,<sup>4</sup> that the adverse consequences of plurality invite a ‘managerial approach’ in response and that international courts can help in this way to maintain the coherence, legitimacy and effectiveness of the international legal order. I am less than certain, however, that international courts are truly committed to a ‘managerial approach’ or that such an approach is likely to succeed in the long run without a structural redesign of the ‘fabric of international dispute settlement’.

The reply will thus proceed as follows. Section 2, which follows these introductory remarks, discusses plurality as a deliberate choice by states, which is likely to restrict the coherence of international law. Section 3 discusses the dilemmas facing international courts: the choice of a pro-coherence ‘management approach’ may conflict with other mandated functions, including providing the litigating parties with cost-effective dispute settlement services and supporting the particular needs of the legal regimes in which they are embedded. Section 4 concludes.

## 2 The More the Merrier? The Dark Side of Plurality of International Courts

Boisson de Chazournes correctly maintains that judicial plurality has always been present in the ‘fabric of international dispute settlement’;<sup>5</sup> that states have favoured plurality in order to maximize their choice of forum<sup>6</sup> and that, in general, the response of judicial and state actors has been to organize, not restrict plurality.<sup>7</sup> She predicts

<sup>1</sup> Boisson de Chazournes, ‘Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach’, 28(1) *European Journal of International Law (EJIL)* (2017) 13.

<sup>2</sup> *Ibid.*, at 71.

<sup>3</sup> *Ibid.*, at 71–72.

<sup>4</sup> *Ibid.*, at 13.

<sup>5</sup> *Ibid.*, at 29.

<sup>6</sup> *Ibid.*, at 30.

<sup>7</sup> *Ibid.*

that plurality will continue to be a feature of international dispute settlement since international courts and tribunals will continue to grow in number and type.<sup>8</sup> This, she believes, should not be regarded as a cause for alarm since the risk of fragmentation is more perceived than real.<sup>9</sup>

But is plurality so innocuous – a mere fact of international life, which requires some managerial tweaking? A number of critical observations, suggesting that plurality may actually undermine the ‘fabric of international dispute settlement’, can be offered in this regard. First, plurality has always been a part of international adjudication because of two impulses shared by many international lawmakers (primarily, states) that have negative implications for the overall effectiveness of the international dispute settlement system: a tendency to limit the jurisdiction of international courts and a related tendency to anchor international courts to specific legal regimes.

With the exception of the International Court of Justice (ICJ), all permanent international courts are severely limited in their dispute-settling capacity due to their restricted subject matter jurisdiction (typically, their jurisdiction is confined to disputes over the interpretation and application of specific treaties<sup>10</sup> or to disputes arising under a specific branch of international law).<sup>11</sup> Even the ICJ, whose subject matter jurisdiction is potentially unlimited, is severely restricted as far as its personal jurisdiction is concerned (only states can appear in contentious cases before the Court and, even then, only if they have accepted its jurisdiction over any specific dispute).<sup>12</sup> These serious jurisdictional constraints result in the relative marginalization of international adjudication. Despite the multiplication of international courts, adjudication remains the exception, not the rule, in many areas of international life. Furthermore, the practice of embedding international courts in specific legal regimes, such as the World Trade Organization (WTO), often implies an institutional configuration that is more responsive to the lawmaker’s interest in supporting the operation of the specific legal regime than in promoting international dispute settlement *per se*.<sup>13</sup> Hence, judicial plurality, as it is actually practised, may also entail the dilution of the dispute-settling function of international courts and the prioritization of other judicial functions, such as norm implementation or legitimization, which have little to do with the general ‘fabric of international dispute settlement’.

<sup>8</sup> *Ibid.*, at 32.

<sup>9</sup> *Ibid.*, at 34.

<sup>10</sup> See, e.g., Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, Art. 5; United Nations Convention on the Law of the Sea 1982, 833 UNTS 3, Annex VI, Art. 21; Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon, OJ 2010 C 83/49, Arts 256–275.

<sup>11</sup> See, e.g., Convention for the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159, Art. 25; Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights 1998, art. 3, available at [www.achpr.org/instruments/court-establishment/](http://www.achpr.org/instruments/court-establishment/).

<sup>12</sup> Statute of the International Court of Justice 1946, 33 UNTS 993, Arts 34–37.

<sup>13</sup> See, e.g., Shlomo-Agon and Shany, ‘The WTO Dispute Settlement System’, in Y. Shany (ed.), *Assessing the Effectiveness of International Courts* (2014) 191.

Second, the narrow configuration of the jurisdictional reach of existing international courts suggests that states do not place open-ended trust in international adjudication; rather, they accept the authority of international courts only in exceptional and circumscribed circumstances. Even the creation of new international courts to deal with matters not subject heretofore to the jurisdiction of international courts does not necessarily signify trust by states in international adjudication. To the contrary, it may be indicative of a degree of mistrust; had they considered existing international courts as suitable fora, they could have empowered them to deal with such matters in the first place or expanded their jurisdiction subsequently. Moreover, states have sometimes gone out of their way to create new courts just for the purpose of ‘bypassing’ the jurisdiction of existing international courts, which fell out of favour with them. For example, the establishment of the International Tribunal on the Law of the Sea (ITLOS) during the 1982 United Nations (UN) Conference on the Law of the Sea was viewed by some observers as casting a ‘vote of no confidence’ in the ICJ, to which ITLOS constitutes a judicial alternative.<sup>14</sup>

Finally, one cannot exclude the possibility that the multiplication of international courts since the 1990s – a development that has included the creation of new ad hoc criminal tribunals for specific crime scenes<sup>15</sup> and new human rights bodies with quasi-judicial jurisdiction overlapping existing ones<sup>16</sup> – was partly driven by an aversion by states to the creation of new permanent judicial institutions, or to empowering existing judicial or quasi-judicial bodies, in ways that could augment their public standing and render them harder to ignore from a legal and political point of view.<sup>17</sup> Such a putative ‘divide-and-rule’ policy can perhaps explain, *inter alia*, the reluctance by some UN Security Council members to refer new cases to the International Criminal Court<sup>18</sup> and the broad political opposition to the creation of a World Court for Human Rights.<sup>19</sup>

As a result, Boisson de Chazournes’ claim that ‘managerial approach’ constitutes part of a broader move towards an international rule of law may be somewhat overstated.

<sup>14</sup> See, e.g., Sinde Warioba, ‘Monitoring Compliance with the Enforcement of Binding Decisions of International Court’, 5 *Max Planck Yearbook of United Nations Law* (2001) 41, at 43; J.G. Merrills, *International Dispute Settlement* (6th edn, 2017), at 192.

<sup>15</sup> See, e.g., SC Res. 827, 25 May 1993 (establishing the International Criminal Tribunal for the former Yugoslavia); SC Res. 1757, 30 May 2007 (establishing the Special Tribunal for Lebanon).

<sup>16</sup> See, e.g., International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3, Art. 28 (noting the overlap between the Committee on Enforced Disappearances and the Human Rights Council); African Charter in the Rights and Welfare of the Child 1990, OUA Doc. CAB/LEG/24.9/49 (1990).

<sup>17</sup> Cf. C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (2013), at 141–142: ‘[T]here are so many human rights mechanisms coming out of Geneva that any given recommendation holds very little weight for a state and holds only a nominal incentive for compliance.’

<sup>18</sup> See, e.g., D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014), at 13.

<sup>19</sup> See, e.g., P. Alston, ‘A Truly Bad Idea: A World Court of Human Rights’, *Open Democracy* (13 June 2014), available at [www.opendemocracy.net/openglobalrights-blog/philip-alston/truly-bad-idea-world-court-for-human-rights](http://www.opendemocracy.net/openglobalrights-blog/philip-alston/truly-bad-idea-world-court-for-human-rights).

Whereas some ‘islands of effective adjudication’ operate under the jurisdictional shadow of international courts,<sup>20</sup> it is dubious whether the ‘managerial approach’ can effectively reverse the lawlessness that dominates in the many interstitial spaces of international relations in which adjudication remains weak and uncertain. It is also important to note in this regard that the process of multiplication of judicial fora has slowed down considerably since the late 1990s,<sup>21</sup> due to a certain ‘tribunal fatigue’,<sup>22</sup> and that this implies that the process of multiplication depends on specific contextual circumstances and does not necessarily reflect a universally-shared commitment to the systemic welfare of the international dispute settlement or to the rule of law in international relations.<sup>23</sup>

### 3 To Coordinate or Not to Coordinate? International Courts’ Identity Crisis

Boisson de Chazournes observes that international courts have a number of legal and communicative tools that may help them to deal with the adverse consequences of plurality – mainly, with concerns about lack of jurisdictional coordination and jurisprudential coherence – and with their implications for the effectiveness and legitimacy of international dispute settlement. She writes:

[I]t is apparent that judicial actors increasingly view their function as including the need to serve as guardians of the fabric of international dispute settlement by ensuring its coherence through coordination. These efforts at management are important because they have the overall efficacy of the collection of dispute settlement mechanisms as their end goal.<sup>24</sup>

I believe (although comprehensive empirical research might be required for confirmation) that Boisson de Chazournes’ statement is true – that is, that many international judges have a broad role conception of themselves as part of a global judiciary, serving an international legal system, whose overall systemic welfare reflects on the welfare of their own legal institutions. But while this appears to be the truth, it is not the whole truth. This is because judicial actors also have other functions, which may conflict with the systemic needs of international dispute settlement. Coordinating the conduct of proceedings before one international court with proceedings before

<sup>20</sup> Cf. Helfer, Alter and Guertzovich, ‘Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community’, 103 *American Journal of International Law* (2009) 1.

<sup>21</sup> See, e.g., Pellet, ‘Judicial Settlement of International Disputes’, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2013) 54, para. 71.

<sup>22</sup> See, e.g., S.R. Ratner, J.S. Abrams and J.L. Bischoff (eds), *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd edn, 2009), at 351.

<sup>23</sup> The multiplication of international courts in the 1990s could be viewed as tied to the uptick in institutionalized international cooperation following the end of the Cold War. It may also reflect, to some extent, the dominant position in international politics of a particular liberal ideology throughout most of the 1990s (carried forward by the liberal-oriented USA under George H.W. Bush and Bill Clinton, and an expanding European Union [EU]), whose political momentum has been lost in the 2000s (*inter alia*, due to the re-emergence of Russia and China and political changes in the USA and the EU). See, e.g., R. Kagan, ‘The End of the End of History’, *The New Republic* (23 April 2008).

<sup>24</sup> Boisson de Chazournes, *supra* note 1, at 14.

other international courts may extend the overall cost and duration of litigation and frustrate the expectations of the disputing parties for a prompt resolution of their dispute.<sup>25</sup> Furthermore, the alignment of one international court's jurisprudence with that of other courts may require judges to follow what they consider to be 'bad law' or, more probably, may result in infusing the court's own jurisprudence with decisions inspired by different professional experiences, cultural sensibilities, legal vocabulary and judicial reasoning.<sup>26</sup> This may, in turn, complicate the ability of courts to coherently promote the normative needs of their specific legal regime or, in the case of general international courts, complicate their ability to develop the law from a broad perspective (which courts operating under special legal regimes often lack).

Thus, there appears to be an inherent conflict between the judge's function in the broad universe of international dispute settlement and his or her fidelity to the broad system's underlying 'common values',<sup>27</sup> on the one hand, and his or her other functions, which may entail duties of loyalty towards a specific legal regime (comprised of specific norms, institutions, states and other participating actors and constituencies) and the disputing parties, on the other hand.<sup>28</sup> While Boisson de Chazournes is no doubt right in noting that many values and interests are shared across institutions, it is not difficult to see fundamental tensions between some of them.<sup>29</sup> For example, the refusal by WTO panels and the Appellate Body to coordinate their proceedings with regional trade tribunals may reflect a position implicitly favouring adjudication of trade issues in a broad multilateral setting rather than before regional dispute settlement bodies.<sup>30</sup> In the same vein, the famous *Tadić-Nicaragua* jurisprudential chasm has been explained in the unique policy considerations underlying attribution of responsibility for the purpose of establishing the applicability of international criminal law, as opposed to other state responsibility contexts.<sup>31</sup> Note that the manner in which the 'managerial approach' is employed may even be subject to conflicting interpretations by different judges serving on the same court, employing different judicial policy considerations.<sup>32</sup>

<sup>25</sup> See, e.g., P. Webb, *International Judicial Integration and Fragmentation* (2013), at 209; J.P. Trachtman, *The Future of International Law: Global Government* (2013), at 229.

<sup>26</sup> Cf. Hersch Lauterpach, *The Development of International Law by the International Court* (1958 [1982]), at 13.

<sup>27</sup> Boisson de Chazournes, *supra* note 1, at 38.

<sup>28</sup> See, e.g., Ulfstein, 'To Guide and Guard International Judges', 46 *New York University Journal of International Law and Politics* (NYUJILP) (2014) 793, at 800–803.

<sup>29</sup> Boisson de Chazournes, *supra* note 1, at 14.

<sup>30</sup> See, e.g., McRae, 'The Place of the WTO in the International System', in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (2009) 54, at 65.

<sup>31</sup> See, e.g., D. Guilfoyle, *International Criminal Law* (2016), at 207. Jurisdiction, *Prosecutor v. Tadić* (IT-94-1) Appeals Chamber, 15 July 1999. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), Judgment, 27 June 1986, ICJ Reports (1986) 14.

<sup>32</sup> Cf. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*), Judgment (Preliminary Objections), 17 March 2016, paras 85–88; Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge Ad Hoc Brower, paras 40ff.

The key question in this regard may be one of dominant tendency – that is, which sets of values, policy preferences, institutions and constituencies actually exert the stronger ‘pull’ on international judges? Boisson de Chazournes’ optimism about the strength of systemic considerations and its ability to sustain the coherence of the ‘fabric of international dispute settlement’ seems to be based to a large extent on the limited number of clashes encountered so far:

The practice of international courts and tribunals reveals that proliferation has not caused many problems, contrary to popular assumptions. Where there has been divergence, there is more often legitimate justifications for such divergence, or this divergence can simply remain unproblematic so long as the instances from which it stems remain isolated and do not develop into trends ... In any event, it is likely that ‘[t]he best judgments, because of their technical qualities and because of their correspondence to the needs of time, will prevail, the others will be overcome or forgotten’. Further still, judicial actors regularly seek coherence with other judicial actors, and we must remember that the number of apparently conflicting decisions are very few indeed.<sup>33</sup>

In my view, it is hard, and probably premature, to conclude from the paucity of major clashes between international courts that international judges systematically prefer broad international values and interests over specific ones. Given that international judges are embedded within special regimes, entrusted with advancing specific policy goals such as ending impunity for crimes, protecting foreign investors or upholding the rights of persons with disabilities, it would be quite surprising to find them inclined to sacrifice the promotion of such policy goals at the altar of supporting the abstract ‘fabric of international dispute settlement’. To the contrary, given their background experience and expertise (for example, as domestic criminal law judges, investment lawyers or human rights activists) and the strong socializing pressures created by the policy-oriented institutional environment in which they operate, we have every reason to anticipate that the ‘pull’ of the judge’s legal regime would far outweigh that of the general system.<sup>34</sup> In fact, it is the very logic of plurality that encourages judicial institutions and their members to apply a ‘tunnel vision’ *vis-à-vis* the world’s problems in accordance with their limited jurisdiction and specific mandate.<sup>35</sup>

Still, Boisson des Chazournes is correct in observing that plurality appears to have created so far only relatively few practical problems. How can this observation be reconciled with my claim about the limited coherence-generating potential of the ‘managerial approach’? This is a topic on which I believe more research is warranted – first, to establish the precise scope of the practical problems deriving from the plurality of international courts (for example, the number and nature of instances of uncoordinated exercise of jurisdiction and jurisprudential conflicts) and, second, to

<sup>33</sup> Boisson de Chazournes, *supra* note 1, at 34. The quoted language is extracted from Treves, ‘Fragmentation of International Law: The Judicial Perspective’, 23 *Comunicazioni E Studi* (2008) 821, at 840.

<sup>34</sup> See, e.g., M. Hirsch, *Invitation to the Sociology of International Law* (2016), at 141ff.

<sup>35</sup> See, e.g., Romano, Alter and Shany, ‘Mapping International Adjudicative Bodies, the Issues and Players’, in C.P.R. Romano, K.J. Alter and Y. Shany (eds), *Oxford Handbook of International Adjudication* (2014) 3, at 21.

understand the exact reasons for the less-than-feared prevalence of jurisdictional and jurisprudential clashes.

I would venture to speculate, at this stage, that part of the explanation for the apparent gap between potential and apparent judicial clashes stems from under-reporting of overlaps and conflicts. Even when international courts encroach on the jurisdiction of other international courts or deviate from their case law, they may try to downplay such moves (for example, distinguish between the parallel proceedings or decisions) out of comity to the other court or because they do not want to draw attention to the controversial nature of their decisions.<sup>36</sup> And when practical problems such as uncertainty about the precise meaning of a treaty provision or conflicting policies by intergovernmental organizations emerge overtime, it might be hard to trace their roots back to a previous ‘hidden clash’ in a judicial decision.

A second explanation for the apparent gap might be the ‘law of small numbers’.<sup>37</sup> Since the total number of instances in which international courts have actually been seized since the outset of ‘judicial proliferation’ in the 1990s in cases involving potentially overlapping jurisdictions has not been very large (due to the aforementioned limits on the scope of jurisdiction), the phenomenon of jurisdictional clashes is still viewed (perhaps, erroneously) as tolerable. Still, as the size of the ‘sample group’ – cases involving potential overlaps – continues to grow, our perceptions about the scope of the coordination and harmonization problems afflicting judicial plurality and their seriousness might change.<sup>38</sup>

Finally, it should be observed that the plurality of norms and institutions is not unique to international dispute settlement but that it characterizes many other aspects of international life. It is perhaps against this backdrop that additional jurisdictional and jurisprudential clashes do not appear to be a remarkable development in the eyes of many observers accustomed to the anarchical conditions of international law. Still, a full understanding of the true scope of the coordination problems caused by plurality requires us to compare the ‘fabric of international dispute settlement’ not against other incoherent areas in international life in which stakeholders somehow muddle through but, rather, against how a more coherent international dispute settlement

<sup>36</sup> See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, para. 404: ‘Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment.’

<sup>37</sup> See, e.g., Tversky and Kahneman, ‘Belief in the Law of Small Numbers’, in D. Kahneman, P. Slovic and A. Tversky (eds), *Judgment under Uncertainty: Heuristics and Biases* (1982) 23.

<sup>38</sup> The calls for reform of the investment arbitration system, including plans for the establishment of permanent appeal structures within the International Centre for the Settlement of Investment Disputes, which are perhaps indicative of the existence of a tipping point (at least in the eyes of some actors and observers), after which uncoordinated plurality is no longer tolerated. See, e.g., Wu, ‘The Scope and Limits of Trade’s Influence in Shaping the Evolving International Investment Regime’, in Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 169, at 178–185.



system could have looked and what benefits could have accrued as a result to the international legal order as a whole.

## 4 Conclusions

The plurality of international courts is, as Boisson des Chazournes rightly assesses, here to stay, and resort to a 'managerial approach' by international judges should be regarded as a positive development, which helps address the problems in the lack of coordination and coherence emanating from plurality. However, unlike Boisson des Chazournes, I do not consider the situation of loosely regulated plurality as fully sustainable in the long run since the structural and sociological 'centrifugal effects' of specialization and embeddedness in distinct institutional frameworks are likely to generate overtime more jurisdictional and jurisprudential clashes,<sup>39</sup> curbing thereby the effectiveness and legitimacy of an already under-effective and less than fully legitimate international dispute settlement system. Although the 'managerial approach' may delay such crises and render clashes less pronounced, it is hard for me to see how the 'fabric of international dispute settlement' could remain effective without a more drastic redesign of its structural coherence features.

<sup>39</sup> See, e.g., Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *NYUJILP* (1999) 919, at 925.