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At the end of the nineteenth century, innovations in technology and design permitted construction of the first skyscrapers in Chicago and led to profound changes in the urban environment. The new possibilities in architecture led to an ongoing debate between functionalists who felt that form must follow function and opponents who believed that design should be constrained only by the laws of physics and the limits of imagination, irrespective of the main purpose or function of the construction.[1]

About the time Chicago architecture was breaking free of past height limitations, the international community began creating its first tribunals with the establishment of the Permanent Court of Arbitration,[2] which emerged from the Hague Peace Conferences of 1899 and 1907, the short-lived Central American Court of Justice (1907–1918), and later the Permanent Court of International Justice ("PCIJ"), predecessor to the current International Court of Justice ("ICJ"). Issues of form and function were also part of discussions about the powers of these new institutions and have remained implicitly or explicitly

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1 For the flavor and impact of Chicago's architecture debate, see Eric Larson, *The Devil in the White City* 23–25, 104–05 (Crown 2003).

2 James Brown Scott's early critique of the Permanent Court of Arbitration noted its misnomer, observing that:

> it is difficult to call a court "permanent," which does not exist, and which only comes into being when it is created for the trial of a particular case, and goes out of existence as soon as the case is tried. It is difficult to consider as a court, a temporary tribunal, which is not composed of judges .... The Conference did not call the creature of their hands a court of justice. It was to be one of arbitration.... [T]he decision is to be on the basis of respect for law, which does not mean necessarily that the decision is to be reached by the impartial and passionless application of principles of law,... but the decision is to be reached "on the basis of respect for law," which may be a very different matter.

James Brown Scott, *The Hague Court Reports* xvii-xviii (Oxford 1916). See also David Bederman, *The Hague Peace Conferences of 1899 and 1907*, in Mark W. Janis, ed, *International Courts for the Twenty-First Century* 3, 4 (Martinus Nijhoff 1992).

part of debates about the international judiciary for more than a century.[3] While previous scholars have critiqued or supported judicial activism and the independence of international courts,[4] and discussed questions of implied or inherent judicial powers,[5] there has been little systematic effort to consider these topics in relation to the various specific functions served by different international courts.[6]

This Article examines the interplay of form, function, and the powers exercised by international courts. It first considers the functions or attributes of any institution that carries the name "court" or "tribunal"[7] and reflects upon

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3 For general discussions of international dispute settlement, see John E. Noyes, *The Third-Party Dispute Settlement Provisions of the 1982 United Nations Convention on the Law of the Sea: Implications for States Parties and for Nonparties*, in Myron H. Nordquist and John Norton Moore, eds, *Entry into Force of the Law of the Sea Convention* 213 (Martinus Nijhoff 1995); Richard B. Bilder, *International Dispute Settlement and the Role of Adjudication* 47–95 (Inst Legal Studies 1986). On the nature of the international judicial function, see C.F. Amerasinghe, *Reflections on the Judicial Function in International Law*, in Tafsir Malick Ndiaye and Rüdiger Wolfrum, eds, *Law of the Sea, Environmental Law and Settlement of Disputes* 121 (Martinus Nijhoff 2007).

4 See generally Eric Posner and John Yoo, *Judicial Independence in International Tribunals*, 93 Cal L Rev 1 (2005); Jenny S. Martinez, *Towards an International Judicial System*, 56 Stanford L Rev 429 (2003); Lawrence R. Helfer and Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 Yale L J 273 (1997–98); Dinah Shelton, *The Independence of International Tribunals*, in Antonio Cancado-Trindade, ed, *The Modern World Of Human Rights: Essays In Honor Of Thomas Buergenthal* (Inter-American Institute of Human Rights 1996).

5 See generally Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 British YB Intl L 195 (2005); Alexander Orakhelashvili, *Judicial Competence and Judicial Remedies in the Avena Case,* 18 Leiden J Intl L 31 (2005); Paola Gaeta, *The Inherent Powers of International Courts and Tribunals*, in Lal Chand Vohrar et al, eds, *Man's Inhumanity to Man: Essays on International Law in Honor of Antonio Cassese* 353 (Kluwer 2003).

6 Chester Brown is one of the few to have linked the inherent powers of international tribunals to their functions, which he divides into "private" (that is, dispute settlement) and "public" functions, the latter including the administration of justice and progressive development of international law. See generally Brown, 76 British YB Intl L at 195 (cited in note 5).

David Caron similarly describes an international court as "a particular form of international institution" with "a wider range of functions" than is usually presented. David Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 Berkeley J Intl L 401, 402 (2006). He contrasts institutions that are community-originated and prospective from those that are party-originated and retrospective. Id at 403. A party-oriented tribunal is ad hoc and retrospective, an outgrowth of a particular dispute and the choice of parties after negotiations on how to address it, an example being the Iran–US Claims Tribunal. A court is an institution that is community-oriented and prospective, shifting control away from the parties. This Article takes a slightly different approach, seeing some of the functions and powers described by Brown and Caron as inherent to all courts and others as specific to particular kinds of tribunals. It is thus closer to the analysis of Martin Shapiro, who sees three functions served by courts generally: conflict resolution, regime enforcement and lawmaking. See Martin Shapiro, *Courts: A Comparative and Political Analysis* 63 (Chicago 1981).

7 The terms "court" and "tribunal" are used interchangeably to refer to judicial institutions, notwithstanding the fact that states sometimes attach these names to arbitral bodies as well as to

whether there are powers that must be deemed inherent in such an institution to allow it to fulfill the judicial function, irrespective of limitations placed on the court's jurisdiction or the type of proceedings it conducts.[8] This analysis can serve not only to understand international judicial powers, but also to aid in distinguishing international courts from nonjudicial treaty bodies and other international institutions concerned with compliance and dispute settlement.

The Article then identifies four specific functions that states have expressly delegated to international courts. These functions are dispute settlement,[9] compliance assessment,[10] enforcement,[11] and legal advice (advisory opinions).[12] There is undoubtedly overlap between these functions and courts may undertake more than one of them, but each court has a dominant function at a given time[13]

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judicial ones. The decision to deny an institution the appellation "court" or "tribunal" may indicate its nonjudicial nature, but attaching the name is not always dispositive as to its character. The attributes of courts are discussed in Section I of the Article.

8 Inherent power is "[a] power that necessarily derives from an office, position or status." *Black's Law Dictionary* 1208 (West 8th ed 2004). "Inherent" means that which "[exists] in something as a permanent attribute or quality; forming an element, esp[ecially] a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of." 7 *Oxford English Dictionary* 969 (Clarendon 2d ed 1989).

9 The function of the International Court of Justice ("ICJ"), as the principal judicial organ of the UN, "is to decide in accordance with international law such disputes as are submitted to it." Statute of the International Court of Justice (1945), art 38(1) 59 Stat 1031 ("ICJ Statute"). The panels and Appellate Body of the World Trade Organization ("WTO") are also dispute-settlement bodies, although the states parties declined to establish a court to decide trade disputes. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, annex 2, reprinted in 33 ILM 1226, 1227 (1994) ("DSU"). The functions of the International Tribunal for the Law of the Sea ("ITLOS") include dispute settlement, but also include compliance monitoring. United Nations Convention on the Law of the Sea (1982), 1833 UN Treaty Ser 3, annex VI (1994) ("ITLOS Statute").

10 While international human rights courts have jurisdiction to redress violations of human rights, they are created "to ensure the observance of the engagements undertaken by the High Contracting Parties." European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 17, 213 UN Treaty Ser 221 (1953) ("European Convention on Human Rights"). Or, similarly, these courts "have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties" to the human rights treaty. American Convention on Human Rights (1969), art 33, 1114 UN Treaty Ser 123 (1978).

11 The Rome Statute of the International Criminal Court ("ICC") grants the court "the power to exercise its jurisdiction over persons for the most serious crimes of international concern" in order to ensure that they do not go unpunished and that their effective prosecution may put an end to impunity. Rome Statute of the International Criminal Court (1998), art 1 and preamble, ¶¶ 4–5, UN Doc No A/CONF.183/9, reprinted in 37 ILM 999 (1998) ("Rome Statute").

12 See, for example, ICJ Statute, art 65, which allows the court to give advice on "any legal question" requested by an authorized body.

13 The primary function of an international tribunal may change over time. The Inter-American Court of Human Rights ("IACtHR"), for example, was exclusively engaged in issuing advisory opinions during its first decade, thereafter gradually shifting toward hearing contentious cases as

that shapes the scope and exercise of its powers. A court whose primary purpose is dispute settlement, for example, may exercise powers not appropriate to a court whose function is to enforce international law by determining the guilt or innocence of an individual charged with an international crime, and vice versa. Controversy over a court's utilization of implied and inherent powers may clearly still arise because complex and varied reasons lead states to create international courts.[14] The different reasons may in turn lead the states to have different views about a court's primary purpose or function. The conclusion suggests that courts, litigants, and scholars still may usefully examine any exercise of international judicial powers by considering the function of the court and asking whether the power is one inherent to all courts, expressly conferred on the particular court, or reasonably implied from an express or inherent power.

I. THE NATURE, FUNCTION, AND INHERENT POWERS OF A COURT

A court is both an independent body that answers legal questions according to principles and rules of law, and the physical place where judicial proceedings occur. The common design of courtrooms and rituals associated with proceedings reflects the specific nature and importance of the administration of justice, with the normally high ceilings and formal décor reflecting and reinforcing the idea of the majesty of the law. Judges wearing robes sit above and apart from those participating in and observing the proceedings, while the disputing parties are placed in a position of physical equality before the panel. All rise when the judges enter and leave the courtroom. At the Peace Palace in The Hague, seat of the ICJ, the solemnity of the room is further enhanced with a tier of stained glass windows that rises behind the judges.[15]

The physical space and proceedings of nonjudicial bodies are considerably different from those of courts. For example, UN human rights treaty bodies, established to monitor implementation and compliance with a specific agreement, primarily do so by considering the periodic reports of states parties. Each committee sits around a table where it meets with representatives of the

states increasingly accepted the optional jurisdiction of the court to hear human rights complaints. See generally Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge 2003); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 Am J Intl L 1 (1985).

14 On the multiple motivations behind the establishment of international criminal courts, see Caron, 24 Berkeley J Intl L at 410 (cited in note 6).

15 The atmosphere at the ICJ is reflected in a story told to the author by several lawyers and judges of the young daughter of counsel appearing before the court. She is said to have looked around as she entered the courtroom, then genuflected and crossed herself.

state party whose report is under review, and conducts a "constructive dialogue" about issues of compliance. Afterwards the committee may make observations and recommendations based on the information it has received. There are no adversary parties, witnesses, or judges. Similarly, there is no judicial setting or process for consideration of individual communications by human rights committees that have the power to receive them; the proceedings take place in a closed session on a written record without representatives of the applicant or state being present or witnesses being heard.[16] The states that designed the procedures deliberately chose not to create a court.

The inherent attributes of courts, like the design of courtrooms, may derive from the judicial function or the very definition of a court as an independent body giving binding decisions according to law on the questions presented to it. Philip Allott identifies what he says are the striking characteristics shared by social institutions that are identified by the word "court" and its equivalent in other languages.[17] First, the court is a self-contained social phenomenon, physically isolated[18] and systematically distinct from other institutions. In addition, there are fixed roles played by judge, litigant and witness, resulting in a proceeding that produces a decision on the rights and duties of the parties. Independent courts also monitor the principle of the rule of law that all conduct, including that of governments and their agents, is subject to the law.[19]

Global and regional judicial bodies have been given the name, formal characteristics, and symbolic attributes of a court. While they are all alike in having guarantees of their independence[20] and control over their procedures,

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16 See, for example, Optional Protocol of the International Covenant on Civil and Political Rights (1976), arts 2–5, 999 UN Treaty Ser 171, 302.

17 Philip Allott, *The International Court and the Voice of Justice*, in Vaughan Lowe and Malgosia Fitzmaurice, eds, *Fifty Years of the International Court of Justice* 17, 23 (Cambridge 1996).

18 Among international courts, only the European Court of Human Rights ("ECtHR") is headquartered in the same city as the political bodies of its parent organization, the Council of Europe. The ICJ and the International Criminal Court are located in The Hague. The IACtHR is in San Jose, Costa Rica, while most other institutions of the Organization of American States are located in Washington, DC. The European Court of Justice in Luxembourg is similarly separated from the political and administrative centers of Brussels and Strasbourg.

19 Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 Va J Intl L 411, 416 (2008).

20 Most of the texts creating international tribunals mention judicial independence. Article 2 of the ICJ Statute provides: "The Court shall be composed of a body of independent judges . . . ." The American Convention on Human Rights contains two specific references to independence of the IACtHR. First, Article 59 provides that the secretariat of the court functions under the administrative standards of the Organization "in all matters not incompatible with the independence of the Court." Second, Article 71 prohibits judges from engaging in any activity that might affect the judge's independence or impartiality. In addition, Article 52 provides that the judges are elected in an individual capacity. The European Convention on Human Rights, as

they differ in their specific functions. Some of the courts, like the ICJ and the International Tribunal for the Law of the Sea ("ITLOS"), are primarily intended to settle disputes between states.[21] Other courts, especially the regional human rights courts, serve as compliance bodies and award reparations for human rights violations. A third group of international tribunals is designed to enforce certain international norms, having jurisdiction to sit in judgment of individuals accused of international crimes and impose penalties on those found guilty. Finally, many international courts have been given competence to answer hypothetical or abstract questions of international law through rendering advisory opinions, a function close to lawmaking.

The ICJ has commented on the nature of judicial bodies and inherent judicial functions in respect to the work of the UN Administrative Tribunal and its independence from control of the UN General Assembly. During the 1950s the US government exerted pressure on the UN Secretary-General to dismiss US nationals suspected of communist sympathies. After the UN Administrative Tribunal overturned the dismissals, the US government argued that the General Assembly, having created the Tribunal, had the authority to review and rescind its judgments. The General Assembly requested an ICJ advisory opinion on the issue and the court replied that "the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favor of a staff member."[22] The Court determined that the Tribunal was established, "not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions."[23] The ICJ then enumerated some of the characteristics of judicial bodies as distinguished from political organs:

> [T]he General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them—all the more so as one party to the dispute is the United Nations Organization itself.[24]

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amended by Protocol 8 to add Article 40(7), requires judges to sit "in their individual capacity," adding that "during their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Court or the demands of this office." European Convention on Human Rights, art 40(7). Judges of the European Court of Justice are required to be persons "whose independence is beyond doubt." Treaty on European Union, arts 167 and 168(a).

21 The WTO Dispute Settlement Understanding has some characteristics of arbitration and some of judicial dispute settlement. See generally DSU.

22 Advisory Opinion No 21, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 ICJ 47, 62 (July 13, 1954) (Hacksworth dissenting).

23 Id at 51 (majority).

Given its judicial nature, the Tribunal's decisions could be reviewed only through amendment of the ICJ statute to provide a regular appellate procedure.[25]

One distinction between courts and arbitration or other dispute-settlement institutions is the autonomy courts have vis-à-vis the parties. Arbitrators serve as agents of the states before them, while parties are less able to influence and direct judicial proceedings. The adversaries cannot determine the composition of the bench (except where the court allows appointment of judges ad hoc) or the procedures. Although the judge has to rule on the subject matter of the dispute as defined by the claims of the parties, the judge is not bound by the grounds of the claims and arguments advanced in support the claims, or even obliged to address all of them. Courts have a published corpus of judgments and orders that can guide the resolution of future disputes and aid in developing the law. A standing court also can be more predictable as it may develop expertise and a consistent jurisprudence.[26]

States may freely choose whether to create a court. They may expressly limit the court's jurisdiction, decide the body of substantive law the court may apply,[27] and restrict or deny implied powers. Nevertheless, the control that states exercise cannot exceed certain limits if they intend to maintain the judicial nature of the institution. It may be objected that there are no attributes inherent to any institution created by a legal instrument, including international courts created by treaty, but instead, that the resulting institution is a mere agent of the states who

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24 Id at 56. See also Joanna Gomula, *The International Court of Justice and Administrative Tribunals of International Organizations*, 13 Mich J Intl L 83, 86–87 (1991).

25 Subsequently, the General Assembly added Article 11 to the Statute of the Administrative Tribunal, creating a Committee on Applications for Review. The Committee is not entirely independent of the General Assembly, although the ICJ has upheld its authority. Advisory Opinion No 57, *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal*, 1973 ICJ 166 (July 12, 1973).

26 On stare decisis, see text accompanying notes 85–92.

27 States submitting disputes to the ICJ generally indicate the source of the court's jurisdiction by reference to a specific treaty or treaties in force between the parties out of which the dispute has arisen and which should govern resolution of the matter. The issue is complicated, however, by the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties, art 31, especially paragraph 3(c), which calls for taking into account "any relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties (1969) art 31, 1155 UN Treaty Ser 331. Courts are increasingly utilizing this provision to place specific treaties in a broader legal context or to reconcile conflicting international obligations. See, for example, *Yassin Abdullah Kadi v Council and Commission*, Case T-315/01, 2005 ECR II-3649 (Sept 21, 2005), revd Joined Cases C-402/05 P and C-415/05 P (Sept 3, 2008), available online at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-402/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> (visited Dec 5, 2008) ("*Kadi*"); *Oil Platforms Case (Iran v US)*, 2003 ICJ 161, 182 (Nov 6, 2003); *Al-Adsani v United Kingdom*, 34 Eur Ct HR 11 (2002).

create it and who have plenary control over its functions and powers.[28] However, other legal persons and institutions often have attributes defined in part by the legal system in which they and their creators operate and which limit creative control. Investors may found a corporation, for example, and define its powers in the corporate charter, but the attributes of a corporation are also partly determined by public law. In fact, the ICJ has recognized that at least one attribute of a corporation—its legal personality separate from its shareholders—is a general principle of law.[29] Judicial independence and other inherent attributes of courts may similarly qualify as general principles of law.[30]

States certainly have the power to mandate that only one side to a dispute be heard and to require that a court decide on the basis of the evidence and arguments of that party alone, but most observers would not consider such an institution a court of justice operating under the rule of law.[31] Other issues are less clear: could states, for example, mandate that all deliberations of judges be public, in the name of transparency and accountability? Observers may debate

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28 Advocate General Warner expressed this view in a case before the European Court of Justice, although he was referring to the powers of the European Commission, not the Court itself: "A body that is created by a legal instrument does not have 'inherent' powers. It has only the powers that are conferred on it by that instrument, either expressly or by necessary implication." *Camera Care Ltd v Commission*, Case 792/79R, 1980 ECR 119, 135 (separate opinion of A-G Warner).

29 *The Barcelona Traction, Light and Power Company, Limited (Belg v Spain)*, Second Phase, 1970 ICJ 3, ¶ 38 (noting that "international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction"). The Court observed that "[t]he concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights." Id, ¶ 41.

30 The International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appellate Chamber has expressly rejected the notion that the intent of its creator determines the full scope of its judicial powers:

> To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council . . . , a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power at its mercy.

Prosecutor v Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, ¶ 15 (ICTY Oct 2, 1995). Thus, the Appeals Chamber determined that it had the power of interlocutory review in order to avoid "lengthy, emotional and expensive trials" because the Security Council "surely expect[ed] that [the Statute] would be supplemented where advisable, by the rules which the Judges were mandated to adopt." Id, ¶¶ 4–6.

31 Thirlway has noted that

> [i]f states setting up an international body classify it as a court or tribunal, then there is no need for them to spell out in its constitutive document that it is under an obligation to hear both sides before deciding; by calling it a court they are already implicitly giving it that instruction.

Hugh Thirlway, *Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication*, 78 Am J Intl L 622, 626 (1984).

whether the widespread rule of confidentiality of judicial deliberations is essential to the ability of a court to perform its judicial function.

In general, courts must have the powers necessary for independent decision making. "The essence of the judicial power or function requires independence of every judicial organ in every sense."[32] Judicial independence is critical because it is in principle a guarantee of justice, or at least a safeguard against injustice, reflecting a basic principle of the rule of law derived in part from the maxim *nemo iudex in causa sua* ("no one should be a judge in his or her own cause"). Judges in turn have a duty to conduct a fair hearing and decide impartially the matters before them. Judicial independence and impartial decision making not only are just, but also further the interest of society in seeing disputes settled by peaceful means. Parties are more likely to submit their differences to judicial resolution if they expect and are afforded procedural fairness and a judgment based on the facts presented and the applicable law.

More specifically, observers have identified four inherent powers flowing from the judicial function: the powers to (1) interpret the submissions of the parties to isolate the issue(s) in the case and identify the object(s) of the claim; (2) determine whether the court is competent to hear a particular matter; (3) determine whether the court should refrain from exercising jurisdiction that it has; and (4) decide all issues concerning the exercise of its jurisdiction, including ruling on questions about evidence, burden of proof, due process, and questions of law relevant to the merits of the dispute.[33] The ICJ supports this bundle of inherent powers and its basis in the judicial function:

> it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" .... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.[34]

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32 Amerasinghe, *Reflections on the Judicial Function in International Law* at 123 (cited in note 3).

33 See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 447–48 (Cambridge 2003); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am J Intl L 535, 555 (2001).

34 *Nuclear Tests (Austl v Fra)*, 1974 ICJ 253, 259–60 (Dec 20, 1974).

International courts sometimes refer to their inherent powers as deriving from the needs of the proper administration of justice,[35] which thereby predominantly concerns procedural rules. The constituent instruments of international courts generally omit detailed instructions regarding the procedural powers of the courts they establish. As early as the PCIJ Statute, the drafters decided that most questions of procedure should be decided by the PCIJ itself.[36] The statutes of most international courts follow suit[37] and add an express power for courts to make procedural orders for the conduct of proceedings.[38] Judge Fitzmaurice has commented that such procedural or incidental jurisdiction, while provided for in the courts' statutes or rules of court is "really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or any court of law—being able to function at all."[39] Thus the express powers set forth are merely declarative of pre-existing and inherent judicial powers.

A. COMPÉTENCE DE LA COMPÉTENCE

If a court has jurisdiction over legal disputes, it must have the power to decide whether there is a dispute and, if so, whether the dispute is a legal one. This *compétence de la compétence* or power to decide on the limits of jurisdiction is an inherent power,[40] although most treaties now expressly provide for it[41]

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35 See, for example, *Legality of Use of Force (Serb and Mont v Belg)*, 44 ILM 299 (ICJ Feb 18, 2005), especially the separate opinions of Judge Higgins, id at 341–42, and Judge Kooijmans, id at 345, 349.

36 PCIJ Advisory Committee of Jurists, Proces-Verbaux of the Proceedings of the Advisory Committee of Jurists, July 16–24, 1920 (1920), 247–48. In Article 30, the Committee conferred the power on the PCIJ to draft its rules of procedure; the power is retained in Article 30 of the ICJ Statute.

37 See, for example, ITLOS Statute, art 16; European Convention on Human Rights, art 26(d); American Convention of Human Rights, art 60; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art 15, 32 ILM 1159 (1993) (May 25, 1993)("ICTY Statute").

38 ICJ Statute, art 48; ITLOS Statute, art 27.

39 *Northern Cameroons (Cameroon v UK)*, 1963 ICJ 15, 103 (Dec 20, 1963) (separate opinion of Judge Fitzmaurice).

40 Both the PCIJ and the ICJ consider the *compétence de la compétence* to be inherent in any judicial body. See *Nottebohm Case (Liech v Guat)*, 1953 ICJ 111, 119–20 (Nov 18, 1953) ("[A]n international tribunal has the right to decide as to its own jurisdiction . . . [and t]he judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the court is competent to adjudicate on its own jurisdiction in the present case."); Advisory Opinion No 16, *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, 1928 PCIJ (ser B) no 16 at 15 (Aug 28, 1928) ("[A]ny body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction.").

because if there is a dispute over jurisdiction, that dispute needs to be decided before the court can address the merits. A court lacking the power to resolve this issue would either have to accept all applications filed, rejecting any challenges to its jurisdiction, or uphold all challenges and dismiss each case in which jurisdiction is questioned. Rather than place complete control in the hands of one disputing party or the other, the court itself decides on the scope of its jurisdiction.[42] Only in the ICJ case of *Nicaragua v United States*[43] was the unsuccessful party unwilling to recognize the court's decision on its competence.

Courts can exercise jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties[44] and the parties have consented to the jurisdiction of the tribunal. In the *Tunisia-Libya Continental Shelf Case*,[45] the ICJ observed that no specific acts are required to manifest the existence of a dispute and the question whether one exists is a factual matter to be decided by the Court. Contentious jurisdiction also derives exclusively from the consent of the parties, which means that even if the court determines that there is a genuine dispute, it should decline to hear the matter if it would determine the rights or duties of a third state not before the court.[46] The competence of the court thus extends to deciding whether there are indispensable parties.

As the judicial power in general does not extend to matters of policy or political questions, not only must there be a dispute, but it must be a legal

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41 See, for example, ICJ Statute, art 36(6), which the ICJ says "reflected" rather than "conferred" its competence to decide matters concerning its jurisdiction. *Legality of the Use of Force*, 44 ILM at 313, ¶ 34 (2005). See also European Convention on Human Rights, art 32(2). Art 294 of the UN Convention on the Law of the Sea introduces a "preliminary proceeding" in which a court or tribunal shall determine at the request of a party or *proprio motu* whether the claim being submitted constitutes an abuse of legal process or whether prima facie it is well founded. United Nations Convention on the Law of the Sea (1992), 1833 UN Treaty Ser 3 ("UNCLOS").

42 The WTO's Appellate Body has recognized that it has inherent powers flowing from its function, one of which is to resolve jurisdictional questions even if no party raises them. World Trade Organization, Report of the Appellate Body, *United States–Anti-Dumping Act of 1916*, WTO Doc No WT/DS136/AB/R, WT/DS162/AB/R, ¶ 54 (Sept 26, 2000). The power must be necessary to the exercise of functions and must involve a procedural matter, not new substantive rights or obligations.

43 *Military and Paramilitary Activities in and against Nicaragua* (*Nicar v US*), 1986 ICJ 14 (June 27, 1986) ("*Nicaragua Case*"). The US subsequently withdrew its acceptance of the optional compulsory jurisdiction of the ICJ, claiming that judicial bias led to the exercise of jurisdiction in the *Nicaragua Case* when there was no basis for it.

44 *Nuclear Tests* (*NZ v Fra*), 1974 ICJ 457, 466, ¶ 29 (Dec 20, 1974).

45 *Application for Revision and Interpretation of the Judgment of 4 Feb 1982 in the Case Concerning the Continental Shelf* (*Tunisia v Libyan Arab Jamahiriya*), 1985 ICJ 192 (Dec 10, 1985) ("*Tunisia-Libya Continental Shelf Case*").

46 *Monetary Gold Removed from Rome in 1943* (*Italy v Fra, UK and US*), 1954 ICJ 19, 32 (June 15, 1954). See generally D.W. Greig, *Third Party Rights and Intervention Before the International Court*, 32 Va J Intl L 285 (1992).

dispute. Although all cases before international courts have a political dimension, a court has jurisdiction if the case can be resolved by applying legal criteria. In the *Aegean Sea Continental Shelf Case*, the ICJ explained that a "dispute involving two States in respect of the delimitation of their continental shelf can hardly fail to have some political element" but if both states claim sovereign rights in the dispute, it constitutes a legal dispute.[47] The ICJ does not concern itself with the political motivation of a state in seeking adjudication.[48] In the *Iranian Hostage Case* the ICJ stated:

> Legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one part of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them . . . .[49]

One consequence of the separation of legal and political issues, as in the *Iranian Hostage Case*, is that a decision on the legal dispute may not resolve the remaining and underlying political conflicts. However, the court cannot address the latter, because "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."[50]

B. INTERIM MEASURES

Do courts have inherent power to issue interim measures absent express or implied authority to do so? In many cases, there is a danger that one of the parties may deem it necessary to resort to self-help to preserve its rights or interests during litigation, thus exacerbating the conflict and undermining the functions of international adjudication in contentious cases, to settle disputes peacefully or assess compliance with international law. Therefore, it is not surprising to see that all international courts have the express power to issue interim orders to maintain the status quo ante in matters related to the subject of the dispute.[51] It also could be considered inherent to the administration of justice and within judicial powers, even without express authority, as a means of ensuring the effectiveness of the ultimate decision. In the *Fisheries Jurisdiction*

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47 *Aegean Sea Continental Shelf Case* (*Gree v Turk*), 1978 ICJ 3, 13 (Dec 19, 1978).

48 *Border and Transborder Armed Actions* (*Nicar v Hond*), 1988 ICJ 69, 91 (Dec 20, 1988).

49 *United States Diplomatic and Consular Staff in Tehran* (*US v Iran*), 1980 ICJ 3, 19 (May 24, 1980) ("*Iranian Hostage Case*").

50 *Northern Cameroons*, 1963 ICJ 15, 29. See also *Haye de la Torre Case* (*Colum v Peru*), 1951 ICJ 71, 79 (June 13, 1951); *Nuclear Tests* (*Austl v Fra*), 1974 ICJ at 270–71.

51 Given the stated rationale, it is understandable that interim measures have not been part of the very different function of rendering advisory opinions on hypothetical or general questions of international law.

Case, for example, the ICJ indicated a provisional measure to prevent Iceland from immediately implementing its proposed regulations, because application of the regulations would "prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favor."[52]

Courts have moved beyond exercising their express power to issue interim measures and have found it implied or inherent that such measures are legally binding. The ICJ derived this conclusion from the object and purpose of the ICJ Statute:

> The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and in particular, the basic functions of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[53]

The ICJ might have come to the same conclusion by referring to inherent judicial powers,[54] but basing the decision on customary norms of treaty interpretation was a less controversial source for a controversial conclusion.

Like the ICJ, regional human rights courts have concluded that provisional measures are legally binding. The Inter-American Court of Human Rights ("IACtHR") has stated on several occasions that compliance with provisional measures is necessary to ensure the effectiveness of its decisions on the merits.[55]

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52 *Fisheries Jurisdiction Case (UK v Ice)*, 1972 ICJ 12, ¶ 22 (Aug 17, 1972). Compare *Fisheries Jurisdiction Case* with *Aegean Sea Continental Shelf Case*, 1976 ICJ 3, ¶¶ 17, 33 (Sept 11, 1976) (refusing to exercise its "extraordinary power" to indicate provisional measures because reparation by "appropriate means" could be made following any judgment in favor of the applicant).

53 *LaGrand Case (Ger v US)*, 2001 ICJ 466, 502–03 (June 27, 2001).

54 In fact, in the paragraph following the one quoted above, the ICJ invoked a "related reason" for finding interim measures binding, referring to a "principle universally accepted by international tribunals" to the effect that the parties to a case must abstain from any measures capable of exercising a prejudicial effect in regard to the execution of the decision to be given or to act in any way to aggravate or extend the dispute. Id, ¶ 103, citing *Electricity Company of Sofia and Bulgaria*, Order on Interim Measures of Protection, 1939 PCIJ (ser A/B) No 79 (Dec 5, 1939).

55 See, for example interim orders in *James et al v Trinidad and Tobago* (Aug 16, 2000) (Nov 24, 2000) (Sept 3, 2002); *Caso Loayza Tamayo v Perú*, (July 2, 1996) (Sept 13, 1996) (Nov 11, 1997) (Dec 13, 2000) (Feb 3, 2001) (Aug 28, 2001); *Álvarez et al v Colombia* (Aug 10, 2000) (Nov 12, 2000) (May

The European Court of Human Rights ("ECtHR") initially decided that it could not imply from the convention or from other sources the power to order interim measures that were binding,[56] but later reversed itself and concluded that "in the light of the general principles of international law, the law of treaties and international case-law" such measures are binding on states parties.[57] The ECtHR noted the importance of interim measures in preserving the rights of the parties in the face of the risk of irreparable damage and concluded that it should be considered "an inherent Convention requirement in international proceedings before the Court."[58]

C. ADMISSIBILITY AND APPRECIATION OF THE EVIDENCE

The free assessment of evidence is meant to enable the adjudicative body to decide a legal dispute or deliver an advisory opinion in accordance with all relevant facts. It is thus an essential and inherent element of the judicial function.[59] The question of whether an issue is a matter of fact or law is for the court to decide as part of the judicial function, as is the question whether a fact is so evident that the court may take judicial notice of it. Good fact-finding is important to the credibility and legitimacy of the court. As Helfer and Slaughter point out, "[a] guaranteed capacity to generate facts that have been independently evaluated, either through a third-party fact-finding process or through the public contestation inherent in the adversary system, helps counter the perception of self-serving or 'political' judgments."[60]

In order to evaluate freely evidence, a court must first determine what evidence is admissible and probative. Fairness in proceedings also dictates that

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30, 2001); *Haitians and Dominican Nations of Haitian Origin in the Dominican Republic v Dominican Republic*, (Aug 7, 2000) (Aug 18, 2000) (May 26, 2001); *Chunimá v Guatemala* (Aug 1, 1991). These interim orders are all available online at <http://www.corteidh.or.cr/medidas.cfm?&CFID=28556&CFTOKEN=85077453> (visited Dec 5, 2008). See also *Hilaire, Constantine, Benjamin et al v Trinidad & Tobago*, Judgment of (June 21, 2002), Inter-Am Ct HR (ser C) no 92.

56 *Cruz Varas v Sweden*, 201 Eur Ct HR (ser A) (1991); *Conka v Belgium*, App No 51564/99, 34 Eur HR Rep 54 (Feb 5, 2002).

57 *Mamatkulov and Askarov v Turkey*, App Nos 46827/99, 46951/99, 41 Eur HR Rep 25, ¶¶ 123–29 (Feb 4, 2005).

58 Id, ¶ 124. See Jo Pasqualucci, *Interim Measures in International Human Rights: Evolution and Harmonization*, 38 Vand J Transnatl L 1, 13–14 (2005). Pasqualucci argues that judicial organs have the inherent authority to order interim measures. See also Thomas Buergenthal, *Interim Measures in the Inter-American Court of Human Rights*, in Rudolph Bernhardt, ed, *Interim Measures Indicated by International Courts* 69 (Springer-Verlag 1994).

59 In the *Nicaragua Case*, 1986 ICJ 14, ¶ 60, the Court indicated that this freedom must nonetheless be exercised within the limits of the ICJ Statute and Rules.

60 Helfer and Slaughter, 107 Yale L J at 303 (cited in note 4). See generally Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford 1990).

parties know in advance the rules of evidence that will govern the proceedings. Adopting rules of evidence is not an inherent judicial power, in the sense that it cannot be removed by the states parties. Indeed, the states drafting the statute of the International Criminal Court ("ICC") decided that they would retain the power to write the rules of evidence while allowing the court to determine its rules of procedure. In contrast, the UN Security Council explicitly gave power to the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to decide its rules of evidence and procedure;[61] possibly it was the ICTY's exercise of this power that revealed how extensive a power it is, because matters like burden of proof, admissibility of hearsay, and discovery of exculpatory evidence are potentially outcome-determinative. When the freedom or incarceration of those accused of international crimes is at issue, states prefer to decide such important matters of evidence themselves rather than confer the authority on judges.

In most instances, states have expressly conferred on international courts the power to write their own rules of procedure, though they have normally remained silent on the rules of evidence, allowing courts to imply this power as a necessary element to deciding a dispute. In general, courts engaged in dispute settlement and compliance have not adopted written rules of evidence, but have instead chosen to admit and evaluate submissions liberally from the parties, utilizing inferences and presumptions as they deem appropriate.[62] Courts have also begun to articulate a standard of proof, which varies according to the function of the court.[63]

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61 Article 15 of the ICTY Statute provides: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."

62 The WTO's Appellate Body, for example, has looked to general principles of law under its inherent jurisdiction to supply rules on burden of proof, citing to the ICJ and other international tribunals. See generally World Trade Organization, Report of the Appellate Body, *US–Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/5 and WT/DS33/AB/R/Corr.1 (May 23, 1997). In its fact-finding, it has drawn negative inferences from the refusal to provide information. World Trade Organization, Report of the Appellate Body, *Canada–Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug 20, 1999).

63 See, for example, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn and Herz v Serb and Mont)*, 46 ILM 188, ¶¶ 202 et seq (ICJ Feb 26, 2007); *Velasquez Rodriguez v Honduras*, Judgment of (July 29, 1988), Inter-Am Ct HR (ser C) no 4, Part VII, ¶¶ 127–29, available online at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf> (visited Dec 5, 2008); *Ireland v United Kingdom*, 25 Eur Ct HR (ser A) (1978). International criminal courts require a showing of proof beyond a reasonable doubt, as does the ECtHR, although the latter court claims that proof beyond a reasonable doubt does not mean the same in human rights proceedings as it does in criminal law. The IACtHR has referred to "convincing" evidence being required to prove more serious human rights violations, such as disappearances.

In taking evidence and hearing relevant arguments, some international courts have asserted a power to accept submissions from amici curiae. It seems, however, that this is not an inherent power, as it varies according to the functions of the specific courts. Those courts engaged in interstate dispute settlement have been less receptive to amicus participation, especially to submissions from non-state actors, than have been the compliance bodies.[64]

D. DECIDING THE MERITS

The judicial function means that even if parties do not raise relevant questions of law, the court has the duty to examine them *proprio motu*, or of their own accord. In addition, the parties' agreement on the applicable law is not binding on an international court unless the statute of the court so provides.[65]

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64 The IACtHR has accepted amicus participation in nearly all of its contentious and advisory proceedings. The ECtHR also has developed a procedure and standards for accepting briefs of amicus curiae. In contrast, at the ICJ, states may intervene in contentious proceedings either as of right under Article 62 of the Statute or with the Court's permission under Article 63. States also may participate as amici curiae in advisory proceedings. They have rarely done so. See John T. Miller, Jr., *Intervention in Proceedings before the International Court of Justice*, in Leo Gross, ed, *The Future of the International Court of Justice* 542, 550 (Oceana 1976).

When the ICJ receives a request for an advisory opinion, all states entitled to appear, and "any international organization" considered likely to be able to furnish information on the question, shall be notified by the Registrar "that the Court will be prepared to receive ... written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question." ICJ Statute, art 66(2). The parallel provision of the Statute governing contentious proceedings provides that the Court is "subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative." ICJ Statute, art 34(2). The Rules of Court define "public international organization" as "an international organization of States." ICJ Rules of Court, art 69(4) (adopted 1978; amended 2005) ("ICJ Rules"). See also Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 Am J Intl L 611, 642 (1994).

While the DSU to the WTO provides that only states parties to the DSU can appear before it, in the *Shrimp-Turtle* dispute the Appellate Body distinguished the legal right to make submissions in a panel proceeding from the discretion of Panel to accept solicited or unsolicited submissions from others. World Trade Organization, Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct 12, 1998). In the subsequent *Asbestos Case*, the Appellate Body provided working procedures for submitting amicus briefs for that case. World Trade Organization, Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar 12, 2001). During the collapsed *Doha* round of negotiations, the EU and US proposed explicit recognition of the right of panels and the Appellate Body to accepted unsolicited amicus briefs, but most developing countries were opposed to the idea. It remains a contentious issue.

65 *Nicaragua Case*, 1986 ICJ 14, 24; *Fisheries Jurisdiction* (*UK v Ice*), 1974 ICJ 3, 9 (July 25, 1974); *Fisheries Jurisdiction* (*Ger v Ice*), 1974 ICJ 175, 181 (July 25, 1974); *Asylum Case* (*Colom v Peru*), 1950 ICJ 266, 278 (Nov 20, 1950); *Free Zones of Upper Savoy and the District of Gex* (*Fra v Switz*), 1932 PCIJ (ser A/B) no 46 (June 7, 1932).

More generally, the judicial function is to apply existing, recognized rules or principles of law to the questions before it, but these rules and principles have to be developed, adapted, modified, and interpreted in the context of specific cases because all systems of law are incomplete. In the drafting of international agreements, states sometimes decide to reduce the negotiation costs and risk of defection by allowing deliberate ambiguities to remain in the text. States also may leave gaps because they believe that issues can be better clarified in the context of actual cases. On other occasions, they may leave obligations vague to avoid domestic ratification problems or because they may be unsure which side of an issue will be advantageous in the future. In other instances, there may be no written agreement at all, but the matter may be governed by broad norms of customary international law. The incompleteness of international law means it is unrealistic to expect a precise pre-existing rule to exist for every dispute that arises.[66]

International courts also are increasingly faced with balancing or reconciling conflicting norms. In the *Gabcikovo-Nagymaros Case*,[67] the two sides characterized the case quite differently, with Hungary viewing the dispute as one calling for application of emerging norms of customary international environmental law, while Slovakia asserted that the dispute was purely a matter of treaty interpretation. The ECtHR has had to consider whether the European Convention on Human Rights and Fundamental Freedoms ("European Convention on Human Rights") trumps customary norms of sovereign immunity, or whether sovereign immunity retains its force even when a state is accused of *jus cogens* violations.[68] The European Court of Justice has addressed conflicts between binding Security Council resolutions and the fundamental rights guaranteed by the European Union.[69]

Ambiguities, gaps, and conflicts in the law present problems for courts, especially courts whose primary function is dispute settlement. Recourse to adjudication may be considered a failure if the case cannot be resolved on the basis of law and, to avoid this, the court may consider it necessary to fill in gaps in an applicable treaty or decide that a given practice is or is not customary

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66 J.G. Merrills, *International Dispute Settlement* 153 (Cambridge 3d ed 1998). Tom Ginsburg similarly argues that judicial lawmaking is inevitable and serves the interests of the international community by providing predictable expectations of behavior that can lead to coordination. Lawmaking is the product of the interaction of various political institutions. States can overrule and discipline international tribunals and exercise constraints on all international courts, although this may produce tension with judicial independence. Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 Va J Intl L 631, 635–41, 661 (2005).

67 *Gabcikovo-Nagymaros Project (Hung v Slovk)*, 1997 ICJ 7, ¶ 112 (Sept 25, 1997).

68 *Al-Adsani v United Kingdom*, Grand Chamber, 34 Eur Ct HR 11, ¶¶ 50–67 (2002).

69 See, for example, *Kadi*, 2005 ECR II-3649, ¶¶ 181–208.

international law. Interpreting treaties and announcing custom thus help to shape the law in contentious cases. However, general lawmaking arguably occurs most often and most appropriately in advisory opinions, when an international court is asked to determine legal norms in answer to an abstract or hypothetical question.

In order to address normative conflicts, international courts appear increasingly willing to pronounce on the existence of *jus cogens* norms,[70] a topic that the Vienna Convention on the Law of Treaties allocates for decision by the international community of states as a whole.[71] The ICJ long withheld reference to the doctrine of *jus cogens*,[72] but other international courts, including the ICTY,[73] the ECtHR,[74] the IACtHR,[75] and the European Court of First Instance,[76] announced that certain norms are *jus cogens*. The ICJ ultimately joined them in 2006.[77] Some observers may conclude that the courts are engaged in judicial lawmaking, but a norm can only be *jus cogens* if it is already legally binding through treaty or custom. Thus, judicial recognition of *jus cogens* may be seen more as a choice-of-law principle applied when courts are faced with competing or conflicting norms. The observable mutual influence of international courts on this issue, as on others, may be the more significant point to note.

Courts dedicated to compliance or enforcement may be less inclined to develop the law than dispute-settlement courts, in part because there is less likelihood of conflict if the court finds no norm governs the issue before it. The ECtHR, for example, has explicitly declined to infer human rights that states

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70 See generally Dinah Shelton, *Hierarchy of Sources of International Law*, 100 Am J Intl L 290 (1996).

71 Vienna Convention on the Law of Treaties, art 53.

72 *Gabcikovo-Nagymaros*, 1997 ICJ 7, 67–68, ¶ 112 (noting that neither side had contended that new peremptory norms of environmental law had emerged); *North Sea Continental Shelf* (*Ger v Den and Neth*), 1969 ICJ 3, ¶ 72 (Feb 20, 1969) (declining to enter into or pronounce upon any issue concerning *jus cogens*).

73 *Prosecutor v Anto Furundzija*, Case No IT-95-17/1-T, ¶¶ 137–46, 153–57 (ICTY Dec 19, 1998) (torture violates *jus cogens*); *Prosecutor v Tadic*, Case No IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 15 (ICTY 1995).

74 *Al-Adsani v United Kingdom*, 34 Eur Ct HR 11, ¶ 30 (recognizing the prohibition of torture as a *jus cogens* norm).

75 *La Cantuta v Peru*, Judgment of (Nov 29, 2006), Inter-Am Ct HR (ser C) no 162, ¶ 160 (holding access to justice constitutes *jus cogens*); *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am Ct HR (ser A) no 18, ¶ 101 (Sept 17, 2003) (holding the principle of equality and right to be free from discrimination are *jus cogens*).

76 *Kadi*, 2005 ECR II-3649.

77 *Armed Activities on the Territory of the Congo* (New Application: 2002) (*DRC v Rwan*), Jurisdiction and Admissibility, ICJ ¶ 64 (Feb 3, 2006) <available online at http://www.icj-cij.org/docket/files/126/10437.pdf> (visited Dec 5, 2008).

parties chose not to include in the European Convention.[78] Lawmaking by "finding" new rights could risk a backlash from states and with it the risk of noncompliance. While the ICTY and International Criminal Tribunal for Rwanda ("ICTR") have created considerable amounts of international criminal procedural law as they have decided cases, they have done so in part because of a paucity of precedents and applicable texts[79] and in part because the adoption of procedural rules is generally viewed as within the powers of international courts.

Once a decision on the merits is reached, the courts generally must turn to reparations. The ICJ has held that the power to afford reparations is implicit in its jurisdiction as a necessary concomitant to its function to decide disputes:[80]

> If the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided. An important part of it would remain unsettled . . . . It would not give full effect to the Resolutions but would leave open the possibility of a further dispute.[81]

In the *Gabcikovo Case*, the ICJ sought to resolve the matter by reworking a bilateral-treaty regime, constructing a workable resolution based on the reality created by the breaches; neither side was fully victorious in its claims. Other courts engaged in dispute settlement and compliance have also assumed that they may award reparations and make related orders,[82] but enforcement tribunals are not seeking directly to repair harm to victims of the defendant's criminal acts and thus only have such power when the states parties confer it; instead they impose sentences on convicted persons within the limits set forth in their statutes.

E. FINALITY AND THE BINDING NATURE OF JUDGMENTS

The final inherent powers that courts might claim arise after a judgment has been rendered include deciding that the matter is res judicata and agreeing to be

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78 See, for example, *Pretty v United Kingdom*, 35 Eur Ct HR 1 (2002) (declining to find a right to die); *Johnston v Ireland*, 9 Eur Ct HR 203 (ser A), ¶ 105 (1985) (declining to find a right to divorce).

79 The ICTY had to decide, for example, on matters of privilege invoked by witnesses. See *Prosecutor v Brdjanin*, Case No IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 2 (ICTY Dec 11, 2003).

80 In *Nicaragua*, the ICJ was clear: "In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation." 1986 ICJ 14, ¶ 283.

81 *Corfu Channel Case (Alb v UK)*, 1949 ICJ 4, 26 (Apr 9, 1949).

82 The IACtHR, for example, has ordered a state party to create a tax-free trust fund on behalf of victims of human rights violations, under the supervision of the court. See *Aloeboetoe v Suriname*, Inter-Am Ct HR (ser C) no 11 (1991). The remedial powers of human rights courts do vary according to the express provisions of the relevant treaties. See generally Dinah Shelton, *Remedies in International Human Rights Law* (Oxford 2d ed 2006).

bound by the judgment in future rulings (the principle of stare decisis). Declining to hear a dispute because the case has been decided previously, that is, applying the doctrine of res judicata, follows from the express provision contained in most courts' statutes that decisions are binding on the parties,[83] but also seems inherent to the judicial function of deciding cases. Related to this is the power to correct mistakes if it appears that a judgment was procured by fraud or error.[84]

The question of stare decisis is less easily answered.[85] Predictability in the law is valued, so it is expected that the resolution of one dispute will lead courts to decide similar disputes the same way. International courts do cite their previous judgments and reason from them. They also cite each other in an effort to provide some consistency in international law across courts and legal regimes. Judge Shahabuddeen, however, considers that a legal obligation for an international tribunal to follow its previous decisions would be "extraordinary" and has no foundation as an inherent power.[86] If the power exists, it must be expressly conferred or implied from the creating instrument.

The specific functions of different international courts appear to influence the degree of reliance on precedent, with this influence being strongest in international criminal procedures. Notably, Article 21(2) of the ICC Statute states that the court "may apply principles and rules as interpreted in its previous decisions."[87] The prohibition on ex post facto criminalization of conduct implies that there should be broad consistency in the judgments of criminal courts about the interpretation and application of the law. Indeed, the ICTY has said that, while there "is no provision in the Statute of the Tribunal that deals expressly with the question of the binding force of decisions of the Appeals Chamber,"[88] "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent

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83 ICJ Statute, art 60, for example, provides that the Court's judgment in a contentious case is "final and without appeal."

84 The IACtHR has held that it has inherent power to revise its judgments based on the general principles of domestic and international procedural law. *Genie-Lacayo v Nicaragua*, Judgment of (Sept 13, 1997), Inter-Am Ct HR (ser C) no 45, ¶ 9, available online at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_100_ing.pdf> (visited Dec 5, 2008).

85 See generally Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J Legal Studies 125 (1972).

86 Mohamed Shahabuddeen, *Consistency in Holdings by International Tribunals* in Nisuke Ando, Edward McWhinney, and Rüdiger Wolfram, eds, 1 *Liber Amicorum Judge Shigeru Oda* 633, 638 (Kluwer 2002).

87 Rome Statute of the International Criminal Court, art 21(2), UN Doc A/CONF.183/9 (1998), reprinted in 37 ILM 999 (1998).

88 *Prosecutor v Aleksovski*, Case No IT-95-14/1-A ¶ 99 (ICTY Mar 24, 2000).

reasons in the interests of justice."[89] It appears that the Chamber viewed this deference to precedent as required by "a proper construction of [its] Statute, taking due account of its text and purpose."[90]

Compliance courts also express concern for consistency, since they are announcing general rules for all states parties. The European Convention on Human Rights establishes inconsistency with a prior judgment as one ground for relinquishment of a case from a Chamber to a Grand Chamber of the Court.[91] The ECtHR for its part has said that "[w]hile the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability, and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases."[92]

II. THE SPECIFIC FUNCTIONS AND CONSEQUENT POWERS OF INTERNATIONAL COURTS

International courts are created for a variety of purposes. As Judge Fitzmaurice noted, "courts of law . . . are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford concrete reparation if a wrong has been committed."[93] He added that courts are not there to make legal pronouncements *in abstracto*, yet some international courts have performed precisely this function in responding to requests for advisory opinions on general questions of international law. As noted earlier, the main functions of international courts are dispute settlement, compliance assessment, enforcement, and providing legal advice. The express and implied powers of each court vary with the type of function conferred upon it.

A. DISPUTE SETTLEMENT

The first function assigned international courts is akin to the resolution of private disputes by civil litigation within domestic legal systems.[94] The purpose of such jurisdiction is to resolve the issues between the parties and end the

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89 Id, ¶ 107. The ICTR adopted this view in *Laurent Semanza v Le Procureur*, Case No ICTR 97-20-A, ¶ 92, Decision (May 31, 2000).

90 *Aleksovski*, IT-95-14/1-A ¶ 107. Oddly, the defense argued that the doctrine of stare decisis or binding precedent is inconsistent with the principle of legality. Id, ¶ 123.

91 European Convention on Human Rights, art 30.

92 *Goodwin v United Kingdom*, 35 Eur Ct HR 18 (2002).

93 *Northern Cameroons Case*, 1963 ICJ 15, 98–99 (separate opinion of Judge Fitzmaurice).

94 On adjudication as a conflict resolution mechanism, see P. Terrence Hopmann, *The Negotiation Process and the Resolution of International Conflicts* 221 (South Carolina 1996).

dispute. Conflict resolution is a way to avoid self-help and escalation of conflicts by channeling the dispute to a third-party decision maker, a function even more important in international relations than in domestic relations because, first, we are lacking international peacekeepers to discourage recourse to violence, and, second, the consequences of an interstate conflict are likely to go well beyond those conflicts that may arise between two individuals or two companies.

Courts are not the only forums to which disputes may be submitted; ad hoc arbitral tribunals, mixed commissions, and fact-finding commissions of inquiry exist or may be created. States have chosen to add adjudication by courts to this range of options for peaceful settlement of disputes. The adjudicative function means that the court has a duty "not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not indicated in those submissions."[95] This has not precluded judges from making pronouncements of law and principle that may "enrich and develop the law"[96] despite concerns about overstepping into lawmaking.

The role of the ICJ, the principal judicial organ of the UN, is to "decide disputes" submitted to it in accordance with international law.[97] The prominent place of the ICJ in the peaceful dispute-settlement landscape is reinforced by the UN Charter's suggestion in Article 36(3) that, instead of being taken up by the Security Council, "legal disputes should as a general rule be referred by the parties to the ICJ in accordance with the provisions of the Statute of the Court."[98] As a dispute-settlement body, the ICJ is not primarily reviewing compliance with the UN Charter or other international agreements; indeed, the Charter drafters denied the ICJ the power of judicial review of the UN Charter organs or the ultimate authority to interpret the Charter.[99]

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95 *Request for Interpretation of the Judgement of November 20th, 1950, in the Asylum Case (Colum v Peru)*, 1950 ICJ 395, 402 (Nov 27, 1950).

96 Gerald Fitzmaurice, *Hersch Lauterpacht—The Scholar as Judge*, 37 British YB Intl L 1, 14–15 (1961).

97 See, for example *LaGrand*, 2001 ICJ at 1093; *Nuclear Tests (Austl v Fra)*, 1974 ICJ at 270–71; *Fisheries Jurisdiction (UK v Ice)*, 1974 ICJ at 18–19.

98 United Nations Charter, art 36(3).

99 See Revised Summary Report of Fourteenth Meeting of Committee IV/2, Doc 873, IV/2/37, 13 UNCIO Docs 653, 653 (1945). Article 7 of the UN Charter established six "principle organs of the United Nations: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat." United Nations Charter art 7, ¶ 1. These organs have a "horizontal" relationship in that they are independent bodies not subordinate to one another. Moreover, the ICJ has indicated that it lacks the power of judicial review of decisions of the political bodies. See Advisory Opinion, *Certain Expenses of the United Nations*, 1962 ICJ 151, 168 (July 20, 1962) ("Expenses of the United Nations"); Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971 ICJ 16, 45 (June 21). See David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* 267–85

The ITLOS was also created as a court, primarily for the adjudication and settlement of disputes relating to the UN Convention on the Law of the Sea ("UNCLOS"), the comprehensive treaty establishing a legal order for the seas, oceans, and marine resources.[100] While creating a new court was not uncontroversial, those in favor argued that the compromises necessary to achieve agreement on the law of the sea necessitated a dispute-settlement body. The agreement finally reached included many novel principles and institutions that many negotiators felt would be maintained only if sufficient means were provided to avoid the political, economic, and even military confrontations which might otherwise occur.[101] Further, many of the activities on the oceans were conducted by non-state actors who had no standing at the ICJ. Allowing them access to ITLOS was seen as having potential to reduce the level of maritime conflict by keeping disputes from becoming interstate matters. Thus, ITLOS was drafted so that not only the states parties but also state enterprises and non-state entities involved in resource exploitation could be given access to dispute settlement.[102] Finally, proponents argued that without compulsory

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(Kluwer 2001). See generally Geoffry R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 Harv Intl L J 1 (1993).

In contrast, the ECJ has extensive powers of judicial review of the interpretation and application of the EC Treaty. See, for example, *Les Verts v European Parliament*, Case 294/83, 1986 ECR 1339, ¶ 25 (Apr 23, 1986); *Costa v Enel*, Case 6/64, 1964 ECR 585 (July 15, 1964); *Van Gend en Loos v Nederlandse Administatie der Belastingen*, Case 26/62, 1963 ECR 3 (Feb 5, 1963).

100 The ITLOS, established by Annex VI of UNCLOS Convention, was inaugurated on Oct 18, 1996 in Hamburg, Germany. John Noyes, *The International Tribunal for the Law of the Sea*, 32 Cornell Intl L J 109, 110–11, 127 (1998). For overviews of the dispute settlement mechanisms of UNCLOS, see generally J.G. Merrills, *International Dispute Settlement* 170–96 (Cambridge 3d ed 1998); E.D. Brown, *Dispute Settlement and the Law of the Sea: The UN Convention Regime*, 21 Marine Poly 17 (1997); John King Gamble, Jr., *The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?*, 9 BU Intl L J 39 (1991); Raymond Ranjeva, *Settlement of Disputes*, in René-Jean Dupuy and Daniel Vignes, eds, *A Handbook on the New Law of the Sea* 1333 (Martinus Nijhoff 1991); John E. Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 Conn J Intl L 675 (1989); A.O. Adede, *The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention*, 11 Ocean Dev & Intl L 125 (1982).

101 See Louis B. Sohn, *A Tribunal for the Sea-Bed and the Oceans*, 32 Heidelberg J Intl L 253, 258 (1972). Arguments have also been made that the establishment of the ITLOS was a response to the failings of the ICJ during the 1960s (*South-West Africa Case*) and "an oblique response to the decline in the use of States of the ICJ" during the 1970s. A.R. Carnegie, *The Law of the Sea Tribunal*, 28 Intl & Comp L Q 669, 683 (1979). ICJ Judge Shigeru Oda offered as a less generous motivation for ITLOS: "the personal desires of some delegates to UNCLOS III and the Preparatory Commission and other jurists, who appear to have been personally interested in obtaining posts in international judicial organs." Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 4 Intl & Comp L Q 863, 865 (1995).

102 Article 20 allows non-state entities access to ITLOS in two categories of cases: (1) cases expressly provided for in UNCLOS Part XI dealing with the international seabed area, and (2) other cases

dispute settlement, the complex text drafted by the conference would lack "stability, certainty, and predictability."[103] UNCLOS III President H.S. Amerasinghe, speaking in 1976, saw "the provision of effective dispute-settlement procedures as essential for stabilizing and maintaining the compromise necessary for the attainment of agreement on a convention."[104] In sum, UNCLOS negotiators agreed on the need for a new dispute-settlement tribunal to ensure effective application of the treaty by the states parties.

Part XV of the UNCLOS Convention requires states to settle their disputes by peaceful means and to seek such solutions by the modes indicated in Article 33(1) of the UN Charter.[105] When a dispute arises, Article 33(1) requires states to attempt to settle their differences through negotiation, after which it is obligatory for the parties to exchange views to choose the means of dispute settlement. Article 287(1) allows states to opt for dispute settlement by ITLOS, the ICJ, or one of two arbitral processes. ITLOS was conferred compulsory jurisdiction over the prompt release of vessels and the prescription of provisional measures even when another dispute-settlement mechanism had been chosen.[106] ITLOS also serves in part as a compliance body in that it may prescribe provisional measures not only to preserve the rights of the parties, but also to "prevent serious harm to the marine environment."[107] In the *Southern Bluefin Tuna Cases*, the court determined that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" and issued provisional measures to protect the fish stocks.[108]

The function of international dispute settlement is carried out by other "judicial" bodies in addition to the ICJ and ITLOS. Many commentators would add the WTO Dispute Settlement procedure, or at least the WTO's Appellate Body, to a list of international tribunals created for this purpose. One scholar

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submitted pursuant to any agreement conferring jurisdiction on the Tribunal that is accepted by all the parties to that case. ITLOS Statute, annex VI, art 20.

103 Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 L & Contemp Probs 195, 195 (1983). See also Louis B. Sohn, *Problems of Dispute Settlement*, in Edward Miles and John King Gamble, eds, *Law of the Sea: Conference Outcomes and Problems of Implementation* 223, 223 (Ballinger 1977).

104 Memorandum by the President of the Conference on Document A/CONF.62/WP.9 of 21 July 1975, ¶ 6, UN Doc A/CONF.62/WP.9/Add.1 (1976).

105 The modes of dispute settlement found in Article 33(1) are "negotiation, inquiry, mediation, conciliation, arbitration, or judicial settlement." United Nations Charter, art 33, ¶ 1.

106 ITLOS Statute, arts 292 and 290(5). The majority of disputes that have been submitted to the Tribunal fall under these two headings. There have been seven prompt-release cases and three cases of provisional measures as of mid-2008.

107 ITLOS Statute, art 290, ¶ 1.

108 ITLOS, *Southern Bluefin Tuna Cases*, ¶ 77, Order for Provisional Measures (Aug 27, 1999).

calls the Appellate Body "an institutionally independent organ with permanent members that functions 'like an appellate court.'"[109] Another scholar says that the "Appellate Body is a court in all but name."[110] If so, it is argued, then WTO dispute-settlement bodies have inherent jurisdiction because they are international judicial tribunals.[111] They may act independently "much like international courts" and "fix the boundaries of the dispute before them, marshal the evidence determine the appropriate law, apply that law to the facts, and reach a decision."[112]

Yet the parties drafting the WTO agreements deliberately stopped short of creating a court, and the Dispute Settlement Understanding ("DSU") institutions lack "some fundamental and conspicuous markers of the judiciary," from the title accorded the decision makers (panelists or members, not judges) to the results (reports, not opinions or judgments).[113] Nonetheless it is claimed that "[d]espite this lack of conspicuous signs of judicial institutions, the Appellate Body has understood itself as a judicial institution from the very beginning."[114] The Appellate Body has fairly broad discretion to create its own working procedures and its members have spoken of the need for "independence, impartiality and objectivity."[115]

The DSU addresses trade conflicts and "serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[116] The WTO panel in the *EC–Bananas* dispute summed up the process by saying that "[f]irst and foremost, that system is designed to settle disputes."[117] The process also helps to clarify and articulate rules despite the fact that the DSU explicitly denies the ability of panels to make

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109 Shoaib A. Ghias, *International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body*, 24 Berkeley J Intl L 534, 535 (2006). The WTO member states appoint ad hoc Panels to review disputes. Appeals to the Panels' reports can be taken to the Appellate Body.

110 Jo Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the International and External Legitimacy of WTO Dispute Settlement*, 35 J World Trade 191, 201 (2001). See also Donald McRae, *What is the Future of WTO Dispute Settlement?*, 7 J Intl Econ L 3, 8 (2004).

111 Andrew D. Mitchell, *The Legal Basis for Using Principles in WTO Disputes*, 10 J Intl Econ L 795, 828–29 (2007). See generally Yuji Iwasawa, *WTO Dispute Settlement as Judicial Supervision*, 5 J Intl Econ L 287 (2002).

112 Mitchell, 10 J Intl Econ L at 829 (cited in note 111).

113 Id at 542.

114 Id.

115 Id at 543.

116 DSU, art 3.2.

117 1997 DSR-II 695, 711 (PR).

law through interpretation.[118] There has been a gradual expansion in interpretive rulings and clarifications, perhaps because the bulk of disputes have involved good-faith differences over interpretation of ambiguous terms in the relevant agreements.

Taking the ICJ, ITLOS, and the DSU's panels and Appellate Body as dispute-settlement tribunals, it is possible to consider what form and powers follow from their function. One is an insistence on the equality of the parties. Thus, the ICJ Statute and Rules of Court are designed to "secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contention."[119] The prominent and equal role of states in dispute settlement by adjudication means that it is primarily for the parties to present the evidence and legal arguments to the courts.

The function of the ICJ and other dispute-settlement bodies—to put an end to a dispute in furthering international peace and security—pushes such courts towards ruling on the merits and avoids dismissal on technical procedural grounds. The dispute-settlement function also has an evident influence on the treatment of cases when one party fails to appear. Rather than apply a strict default rule that would allow the side appearing to win on all issues of fact and law, the ICJ, for example, must satisfy itself that it has jurisdiction over the dispute and that the claim is well-founded in fact and law.[120] To do otherwise would risk exacerbating the underlying dispute. Compliance bodies, in contrast, are less accommodating to a state that fails to appear to answer claims that it has breached its obligations, such as preserving the human rights of the applicant. Human rights courts will generally assume the truth of the allegations "provided there is no evidence to the contrary," a less stringent test than is applied in dispute settlement.

Adjudication of disputes arose in large part in an effort to avoid recourse to armed conflict to settle disagreements between states. Thirlway notes that it is essential to the conflict avoidance and resolution process that the ICJ has "shown itself disinclined to rule on issues not actually essential to the chain of reasoning leading to its decision . . . ."[121] If the parties themselves do not raise issues, or if they seem agreed on points of law, it is not for the court to create

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118 "Recommendations and rulings of the DB cannot add to or diminish the rights and obligations provided in the covered agreements." DSU, annex 2, art 3.2.

119 *Nicaragua Case*, 1986 ICJ 24, ¶ 31.

120 See ICJ Statute, art 49; ICJ Rules, art 62 (cited in note 64); ITLOS, Rules of the Tribunal (2005), art 77, available online at <http://www.itlos.org/documents_publications/documents/Itlos.8.E.27.04.05.pdf> (visited Dec 5, 2008).

121 Hugh Thirlway, *Judicial Activism and the International Court of Justice*, in Ando, McWhinney, and Wolfram, eds, 1 *Liber Amicorum Judge Shigeru Oda* 75, 88 (cited in note 86).

conflict where none exists. A narrow ruling also may facilitate compliance because it will require less action by states. Similarly, if two lines of argument lead to the same result, one or the other is sufficient to decide: it is not necessary to rule on both in order to produce a result satisfactory to the parties.

The dispute-settlement courts have shown some reluctance to rule on the existence of customary international law because the conclusion would impact other states not before the court, even though the judgment would be formally binding only on the litigants.[122] Hence, in the *Anglo-Norwegian Fisheries Case*, the ICJ was able to recharacterize the submissions of the parties to permit it to decide the dispute without ruling on the broad issue of the legality of extension of fishing zones to fifty miles from the baseline. The law at the time was in a state of flux and any pronouncement by the court on the breadth of territorial seas would likely have had considerable, possibly negative, impact on the negotiations for UNCLOS.[123] Were the court's function primarily one of enhancing compliance with international norms, it might have approached the issue differently and offered its views on existing or emerging custom that states should implement in practice.[124]

Courts engaged in compliance monitoring often do give broad statements of the meaning and scope of right and obligations, with which all states in the system are expected to comply. The one topic on which the ICJ seems willing to issue broad statements of customary international law is the use of force, a matter central to the international legal order and the UN Charter; the ICJ may be conscious of this issue of its role as the "principal judicial organ of the United Nations" with functions beyond dispute settlement.[125]

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122 In the *Gabcikovo-Nagymaros Project*, the court declined to pronounce on the customary nature of the rules of state succession contained in the Vienna Convention on Succession of States in Relation to Treaties. 1997 ICJ 7, 71, ¶ 123.

123 The impact of the ICJ's opinions are evident. The *Anglo-Norwegian Fisheries Case*, led to the straight-baselines method being adopted in the 1958 Convention on the Territorial Sea and the 1982 UNCLOS. See generally *Anglo-Norwegian Fisheries Case (UK v Norway)*, 1951 ICJ 116 (Dec 18, 1951). The *Genocide Advisory Opinion* directly influenced the articles on reservations contained in the 1969 Vienna Convention on the Law of Treaties. Advisory Opinion No 12, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ 15 (May 28, 1951).

124 Thirlway, *Judicial Activism and the International Court of Justice* at 80–81 (cited in note 121).

125 See generally, for example, the *Nicaragua Case*, 1986 ICJ 14; *Oil Platforms Case (Iran v US)*, 2003 ICJ 161. Judge Lachs has commented: "In fact, the Court is the guardian of legality for the international community as a whole, both within and without the United Nations." *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v UK)*, 1992 ICJ 3, 26 (Apr 14, 1992) (separate opinion of Judge Lachs).

B. COMPLIANCE

Some courts focus more on the public, even constitutional aim of the regime in which they operate than they do on dispute settlement.[126] The ECtHR has referred to the public order of Europe and expressed its role as being one to provide advice for states on compliance with their human rights obligations under the European Convention on Human Rights. That convention itself has a "special character" as a treaty for the collective enforcement of human rights, as it comprises a network of mutual, bilateral undertakings rather than reciprocal engagements between contracting states. The role of the ECtHR in light of the object and purpose of the convention is to interpret and apply the agreement "so as to make its safeguard practical and effective."[127] A compliance body may look beyond the particular facts or parties before it to guide other states bound by the same substantive obligations. The ECtHR has held that its functions are "not only to decide those cases brought before it, but more generally, to elucidate, safeguard and develop the rules instituted by the Convention."[128]

The public-interest function of compliance bodies means the court may keep a case even if the applicant dies during the proceedings and no heir is found to continue the matter. The ECtHR explained that it is indispensable for an individual to be personally affected by an alleged violation to put the protection mechanism in motion—in contrast to the "general interest attaching to the observance of the Convention" that renders admissible an inter-state application without requiring an interest. Yet the object and purpose of the treaty mean that "human rights cases before the Court generally also have a moral dimension, which must be taken into account when considering whether the examination of an application should continue" after an applicant's death:

> The Court has repeatedly stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties."[129]

While the court claims that its primary purpose is to provide individual relief, it sees its second function as being "to determine issues on public policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence

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126 On courts as compliance bodies, see Philip M. Moremen, *Private Rights of Action to Enforce Rules of International Regimes*, 79 Temple L Rev 1127, 1147–48 (2006).

127 *Mamatkulov*, Eur Ct HR, App No 46827/99, ¶ 101.

128 *Ireland v United Kingdom*, 25 Eur Ct HR (ser A) ¶ 154 (1978).

129 *Karner v Austria*, App No 40016/98, 38 Eur Ct HR 24, ¶¶ 24–26 (Jul 24, 2003), quoting *Ireland v United Kingdom*, 25 Eur Ct HR (ser A) ¶ 154.

throughout the community of Convention States."[130] Given this broader function, it should not be surprising that individuals appearing before the ECtHR cannot represent themselves, as they can as defendants in international criminal courts;[131] rather they must have legal representation from an early stage in the case.[132]

The institutional structure of some organizations reinforces the compliance function. The Inter-American system, following the pre-1998 European human rights system, allows individuals to appear before the court to seek redress for the specific harm caused to them by violations of their rights. However, the Inter-American Commission, like the former European Commission, brings the cases to the court and acts as a *ministerio publico*, or public prosecutor, often seeking forward-looking reparations designed to prevent future violations rather than redress past ones. The IACtHR has been particularly open to the Commission's requests for guarantees by the state that the breach will not be repeated, usually demanded in the form of legislative changes and other reforms of domestic law and practice. In contrast, dispute-settlement bodies like the ICJ have shown reluctance to specify guarantees of non-repetition among the reparations granted the prevailing party.[133]

The distinctive character of adjudication in dispute settlement means that the parties can discontinue the litigation whenever they agree to do so and the court must respect their decision. This is not the case in compliance courts, where upholding the obligations of the parties is deemed a sufficient interest to maintain the case even against the wish of the parties. Thus human rights courts must approve any friendly settlements negotiated between the parties to ensure that they are consistent with respect for the rights guaranteed, which is particularly important given the disparity of power between individual applicants and defendant states. Courts engaged in dispute settlement can also decide that the object of the case has been obtained and dismiss the matter as moot, as the ICJ did with the *Nuclear Test Cases.*[134] In addition to the possibility of declaring a matter moot, the ICJ applies the *ne ultra petita* rule and does not decide claims or

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130 Id, ¶ 26.

131 On the right of defendants to self-representation before international criminal tribunals and the power of courts to ensure that this right is not abused to obstruct a fair trial, see generally Nina H.B. Jorgensen, *The Right of the Accused to Self-Representation before International Criminal Tribunals*, 98 Am J Intl L 711 (2004).

132 ECtHR, Rules of Court, Rule 36 (Dec 2005), requires applicants to have legal representation once the application has been notified to the respondent state.

133 See, for example, the *Avena* and *LaGrand* cases where Mexico and Germany, respectively, unsuccessfully sought such measures. *Avena (Mex v US)*, 2004 ICJ 12 (Mar 31, 2004); *LaGrand (Ger v US)*, 2001 ICJ 466 (June 27, 2001).

134 *Nuclear Tests (Austl v Fra)*, 1974 ICJ 253, ¶ 23; *Nuclear Tests (NZ v Fra)*, 1974 ICJ 457, ¶ 22.

award more compensation or other remedies than those requested. In contrast, the compliance courts assess the nature and scope of the claim and decide on the appropriate norm to be applied, whether or not it is invoked by the parties.

One rationale for international courts to monitor compliance through the mechanism of individual complaints is that interstate disputes are unlikely to arise when treaty obligations run vertically from government to those governed; other states are unlikely to suffer direct and immediate harm from a breach and thus other states rarely take enforcement measures. To be effective, such "unilateral" treaty undertakings must be monitored by allowing those who are affected to seek redress for injury. The function of the courts is broader, however, in providing guidance to all states in the human rights system on the scope of their obligations.

C. ENFORCEMENT

Enforcement courts have other forms and powers that follow from their function to determine the guilt or innocence of individuals accused of international crimes.[135] The principle of legality requires that crimes be drafted in detail (*nullum crimen sine lege*) and requires that judges refrain from making substantive criminal law. The drafting of the ICC Statute and of the elements of crimes illustrates clear intent on the part of the states parties to the Statute "to maintain control over the making of international law and to keep a tight leash on the ability of international judges to go beyond what they have agreed to."[136] Yet, the ICTY claims to have inherent jurisdiction, that is, all the powers essential to fulfilling its mission in a just and efficient manner. Such powers include the power to take such action as might be required to ensure that the exercise of its subject-matter jurisdiction is not frustrated, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the inherent limitations on the exercise of the judicial function of the court, and to maintain the court's judicial character.[137]

Enforcement bodies are those most subject to ex ante control. In creating criminal courts, states might be exercising more control because they must meld

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135 The preamble to the ICC Statute also refers to combating impunity as a function of the court. Madeleine Albright stated during Security Council deliberations on the establishment of the ICTY: "Truth is the cornerstone of the rule of law . . . . [I]t is only truth that can cleanse the ethnic and religious hatreds and begin the healing process." UN SCOR, 48th Sess, 3217th mtg at 13, UN Doc S/PV.3217 (1993). See generally Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 Hum Rts Q 908 (2005).

136 Notably, the drafters explicitly withheld jurisdiction over the crime of aggression until the states parties define the elements of the crime. ICC Statute, art 4.

137 *Prosecutor v Blaskic*, Case No IT-95-14-AR108, ¶ 33, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997 (ICTY Oct 29, 1997).

very different legal systems. The roles of prosecutor, witnesses, and defense attorney, as well as issues of evidence and privileges, vary considerably from one legal system to another, probably more so than in civil litigation. States also may be more concerned to ensure procedures that will afford due process should any of their nationals be prosecuted by an international criminal court. For these or other reasons, states parties to the ICC drafted the ICC Statute, the elements of crimes, and the rules of procedure and evidence. In turn, the ICC Statute drafted by the parties allows the Security Council to call for a one-year delay in prosecution if it deems it necessary to international peace and security.

Despite state control of many aspects of their procedures, international criminal courts assert inherent and implied powers, but ones that that differ from those claimed by other international courts. For example, the power to address the obstruction of justice is said to be inherent in any criminal judicial body.[138] The ICTY has also asserted ancillary or incidental powers to issue binding orders for legal assistance from states and the inherent power to hold individuals in contempt when they fail to comply with a subpoena.

The ICTY claims that it is entitled to take such actions to ensure that the exercise of its jurisdiction over the merits is not "frustrated" and "to provide for the orderly settlement of all matters in dispute."[139] These are powers "which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rule of procedure of such a body, because they are essential for the

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138 See *Prosecutor v Blagoje Simic et al*, Case No IT-95-9-PT, Trial Chamber III, Judgement on Allegations of Contempt against an Accused and his Counsel (ICTY June 30, 2000); *Prosecutor v Tadic*, Case No IT-94-1-A-R77, ¶¶ 26–28, Appeals Chamber, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin (ICTY Jan 31, 2000); *Prosecutor v Delalic et al*, Case No IT-96-21-A, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalic and Zdravko Mucic (ICTY Nov 11, 1996) (stating, in *obiter dictum*, that contempt of the Tribunal was the prerogative of the Chambers since it derived from the inherent power of the Court to control its own proceedings). See also Göran Sluiter, *The ICTY and Offences against the Administration of Justice*, 2 J Intl Crim Just 631, 633–34 (2004).

139 *Prosecutor v Dragoljub Kunarac, Rdomir Kovac & Zoran Vukovic*, Case No IT-96-23&23/1, ¶ 9 (ICTY Mar 14, 2000) ("*Kunarac*"), quoting *Prosecutor v Tadic*, Case No IT-94-1-A-R77, ¶ 18, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin (ICTY Jan 31, 2000). The quoted language relies on the ICJ's *Nuclear Tests Case (Austl v Fra)*, cited with approval by the ICTY in *Blaskic*, Case No IT-95-14-AR108, n 27. In the *Nuclear Tests Case*, 1974 ICJ at 259–60, ¶ 23, the ICJ stated that it

> possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute. . . . Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

carrying out of judicial functions and ensuring the fair administration of justice."[140] The powers invoked include the power to determine its jurisdiction, summon individuals directly, adopt rules of contempt, relieve a counsel of duties, and order disclosure of defense witnesses' statements. Perhaps to foreclose complaints that the court is overreaching its mandate, the ICTY has relied on its need to act finding the absence of explicit authority in the ICTY statute or rules. Taking a balanced approach, Judge Wald has concluded that the rules cannot confer power on the Chambers greater than provided by the statute, "unless it is a power recognized universally as essential to the functioning of a court of law."[141] An even broader view has been expressed that inherent power exists "to ensure that justice is done."[142] Many states parties might question whether the views of the judges on what implied powers are needed to ensure justice can override the decisions of the states parties.

Although initially the ICTY trial court emphasized that its authority derived solely from the statute and it could not question the "legality of its creation,"[143] the Appeals Chamber disagreed and held that under the principle of *compétence de la compétence*, it had inherent jurisdiction to determine its own jurisdiction. In *Tadic*, the ICTY Appeals Chamber asserted an "incidental" or "inherent" jurisdiction to review the legality of the ICTY's establishment, deeming that this "derives automatically from the exercise of the judicial function."[144] Thus, the court's concern for the fairness of its proceedings when individual liberty is at stake has led it to expand its claim of inherent and incidental powers.

D. ADVICE

Most international courts have the competence to issue advisory opinions; the jurisdiction to do so ranges from very narrow[145] to very broad.[146] The

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140 *Kunarac*, Case No IT-96-23&23/1, ¶ 9.

141 *Prosecutor v Jelisic*, Case No IT-95-0-A, ¶ 7, Judgement (ICTY July 5, 2001) (Wald dissenting in part).

142 *Prosecutor v Simi*, Case No IT-95-9-PT, ¶ 25, Decision on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness (ICTY July 27, 1999) (separate opinion of Judge Hunt). See generally Gregory P. Lombardi, *Legitimacy and the Expanding Power of the ICTY*, 37 New Eng L Rev 887 (2003); Michèle Buteau and Gabriël Oosthuizen, *When the Statute and Rules Are Silent: The Inherent Powers of the Tribunal*, in Richard May et al, eds, *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* 65 (Kluwer 2001).

143 *Prosecutor v Tadic*, Case No IT-94-1-T, ¶ 5, Trial Chambers Decision on the Defence Motion on Jurisdiction (ICTY Aug 10, 1995).

144 *Tadic*, Case No IT-94-1-AR72, ¶ 14, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct 2, 1995); *Blaskic*, Case No IT-95-14-AR108, ¶ 33.

145 Protocol No 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms confers on the European Court advisory jurisdiction, but only the Committee of Ministers may request an opinion and the opinion may deal only with legal

IACtHR has described the purpose of its advisory jurisdiction as "intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field."[147] Like the other international courts, the IACtHR has interpreted its advisory jurisdiction as permissive in nature.

The ICJ's advisory jurisdiction extends to responding to "any legal question" at the request of an authorized body. As with contentious cases, the court's jurisdiction in this respect is often challenged. In the *Nuclear Weapons* advisory opinion, when the ICJ was asked to rule on the compatibility of the threat or use of nuclear weapons with relevant principles of international law, the court explained the legal nature of the question through a reference to its methodology:

> To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law .... The fact that this question also has political aspects ... does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" ... [nor is the] political nature of the motives which may be said to have inspired the request or the political implications that the opinion given might have of relevance in the establishment of the Court's jurisdiction to give such an opinion.[148]

As the quotation indicates, the ICJ views its advisory function as identifying, interpreting, and applying international principles and rules. How broadly this function should lead the court into progressively developing the law is debated. In its first advisory opinion, the ICJ declared that nothing forbade the court to exercise an interpretive function "which falls within the normal exercise of its

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questions concerning the interpretation of the Convention and its Protocols. European Convention on Human Rights. This excludes the interpretation of any question relating to the content or scope of the rights or freedoms defined in the instruments, or any other question that the Court might have to consider in consequence of any contentious case. In its half century of operation, the European Court has issued a single advisory opinion.

146 Article 64 of the American Convention on Human Rights confers jurisdiction on the IACtHR to render advisory opinions at the request of every OAS Member State as well as OAS organs with respect to treaties concerning the protection of human rights in the American States. See Advisory Opinion OC-1/82, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court* (Sept 24, 1982), available online at <http://www.corteidh.or.cr/docs/opiniones/seriea_01_espl.pdf> (visited Dec 5, 2008) ("*Other Treaties*").

147 *Other Treaties*, ¶ 25.

148 Advisory Opinion No 96, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, ¶ 13 (July 8, 1996).

judicial powers,"[149] suggesting that as long as there was a legal question, the court could answer it. Later, in the *Western Sahara* opinion,[150] the court indicated that it should in principle help to develop international law by accepting requests to give advisory opinions: "[b]y lending its assistance in the solution of a problem confronting the General Assembly, the court would discharge its functions as the principal judicial organ of the United Nations."[151] The court is clear that this does not amount to legislation; rather, "its task is to engage in its normal judicial function of ascertaining or otherwise of legal principles and rules applicable .... This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."[152]

The advisory jurisdiction is seen as providing assistance to the political organs in dealing with international legal issues that come within their mandate. ICJ Judge Oda has objected that answering general, even hypothetical questions, about issues of international law risks the court's "main function"—to settle international disputes on the basis of law—and could transform it into a lawmaking body.[153] But arguably this blurring of judicial and legislative functions is precisely what is intended by the states parties in conferring advisory jurisdiction on courts.[154]

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149 Advisory Opinion No 3, *Conditions of a State to Membership in the United Nations*, 1948 ICJ 57, 61 (May 28, 1948). See generally David L. Breau, *The World Court's Advisory Function: Not Legally Well-Founded*, 14 U Miami Intl & Comp L Rev 185 (2006). One common aim of litigation and advisory opinions is "to provide countries with an effective forum to settle their differences so that they would not resort to military measures." Id at 186.

150 Advisory Opinion No 61, *Western Sahara*, 1975 ICJ 12 (Oct 16, 1975).

151 Id at 21, ¶ 23.

152 Advisory Opinion No 95, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 237, ¶ 18 (Jul 8, 1996).

153 Id at 372, ¶ 53 (separate opinion of Judge Oda).

154 Another blurring of functions occurs due to the binding nature of some ICJ "advisory opinions," which are in fact dispute-settlement references pursuant to treaty provisions. For one example, see art VIII, § 30 of the Convention on the Privileges and Immunities of the United Nations (Feb 13, 1946), 1 UN Treaty Ser 15, which provides in relevant part:

> If a difference arises between the United Nations on the one hand and Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

The ICJ nonetheless views the nature of its task as advisory, because its authority derives from the UN Charter and the ICJ Statute; therefore, the normal admissibility requirements for advisory opinions apply. In addition, the "binding" nature of the advisory opinion derives solely from Section 30 and not from any provision in the Statute. See Advisory Opinion No 100, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 ICJ 62, ¶¶ 62 et seq (Apr 29, 1999). This anomaly is necessitated by the UN's lack of standing to bring contentious cases to the court, but it is also anomalous because the UN is not a party to the

Courts issuing advisory opinions should be particularly hesitant to undertake fact-finding, because parties with relevant information may not and perhaps cannot all be before the court. While some responsibility rests with the requesting body to provide all the relevant background information, the court itself should ensure that it is able to do the necessary fact-finding when factual determinations are critical to its advisory function. If required, the court should appoint its own experts rather than rely on potentially biased information. It is an express power that the courts have not utilized as often as they might.

III. CONCLUSION

It is a mistake to evaluate the exercise of powers by all international courts in the same manner because each court is created for a specific purpose or function and that function shapes its powers. While all courts, by virtue of being courts, have inherent powers derived from their judicial functions—including the need for independence and control over the administration of justice—each court's specific functions are coupled with express and implied powers that are particularly important to fulfilling that function. An understanding of the different functions and the implications of them for the type and scope of implied powers is necessary to properly evaluate the work of the international judiciary. This Article suggests that the functions of dispute settlement, compliance assessment, enforcement, and advice are different from each other and require the exercise of different powers. This Article also outlines some of those differences, including the use of interim measures in contentious cases but not in advisory proceedings, the different standards of proof used in different types of courts, and the continuation of cases by compliance courts despite the death of the applicant or, in some instances, the agreement of the parties, but it is important to acknowledge that this has been merely an opening analysis. It should be considered an invitation to others interested in the work of international adjudication to give more attention to the variety of international judicial bodies and the powers they exercise.

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treaty either. See generally Charles N. Brower and Pieter H.F. Bekker, *Understanding "Binding" Advisory Opinions of the International Court of Justice*, in Ando, McWhinney, and Wolfram, eds, 1 *Liber Amicorum Judge Shigeru Oda* 351–68 (cited in note 86).

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