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The International Judge in an Age of Multiple International Courts and Tribunals

Suzannah Linton* and Dr. Firew Kebede Tiba**

I. INTRODUCTION

International law, although still unsophisticated in comparison to domestic law, is increasingly showing signs of becoming a developed legal system. While there remains no central legislator or enforcer, substantive international law has come to be identified and codified in many areas, thanks in part to the work of the International Law Commission (“ILC”) and the Sixth Committee of the UN General Assembly. Among the most striking expansions of the material scope of international law are those that have taken place through the 1994 World Trade Organization Agreement (“WTO Agreement”), which replaced the General Agreement on Tariffs and Trade (“GATT”);¹ the entry into force of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”);² the numerous regional free trade agreements around the world;³ and the expansion of international criminal law and international human rights law. Some argue that there are specialized regimes developing in international law, but all agree

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¹ Marrakesh Agreement Establishing the World Trade Organization (1994), 1867 UN Treaty Ser 3 (“WTO Agreement”).

² United Nations Convention on the Law of the Sea (1982), 21 ILM 1261 (“UNCLOS”).

³ See, for example, Economic Community of West Africa States: Revised Treaty (1996), 35 ILM 660; North American Free Trade Agreement (1993), 32 ILM 289 (“NAFTA”); Treaty Establishing a Common Market (1991); 30 ILM 1041 (Argentina, Brazil, Paraguay and Uruguay); Treaty Establishing the Caribbean Community (1973) (Barbados, Guyana, Jamaica, and Trinidad and Tobago), 12 ILM 1033.

that previously separate areas are infiltrating others.⁴ The most striking example is international human rights law, which finds its way into every aspect of human life today, including other areas of international law.

As international law has developed, the number of participants in the international legal system has grown. Gone are the days when states were the only subjects of international law. The international landscape today is also populated by participants having some kind of legal personality: international organizations, individuals, and an enormous range of everything else, generally lumped together under the category of nonstate actors. The latter includes terrorist groups, international and domestic nongovernmental organizations and transnational corporations. The significance of nonstate actors in almost all areas of the international system is such that the International Law Association has recently created a new committee to study the phenomenon.⁵

Within this evolving international system, legal disputes are increasingly brought for resolution before judicial or quasi-judicial institutions. Emerging disputes have sometimes required the establishment of new institutions for settlement and resolution, as in the case of the Ethiopia-Eritrea Claims Commission.⁶ Compulsory dispute-settlement clauses in treaties, such as in the WTO Agreement,⁷ are a relatively new, but growing, phenomenon. The majority of international judicial bodies are seized of cases through ex post facto consent, such as that given through compromissary clauses or by way of separate agreement; some examples will be studied in this Article.

The 1990s saw a marked quantitative and qualitative expansion of international courts and tribunals.⁸ In 2004, the Project on International Courts and Tribunals (“PICT”) identified more than 125 “international judicial bodies” and “quasi-judicial, implementation control and other dispute settlement bodies” that have been created since 1868 (when the first American-Mexican Claims

⁴ Id. See also Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 Eur J Int L 483, 484 (2006).

⁵ International Law Association, *Proposal to Establish a ILA Committee for the Study of the Rights and Obligations of Non-State Actors under International Law*, available online at <<http://www.ila-hq.org/download.cfm/docid/AE325494-DFAA-4FCB-BA79F973CC5F54F6>> (visited Dec 5, 2008).

⁶ See Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (2001), art 5, 40 ILM 260 (2001) (“Agreement of Algiers”) (creating the Eritrea-Ethiopia Claims Commission).

⁷ WTO Agreement, annex 2.

⁸ The words “international courts and tribunals,” “international judicial bodies,” and “international judicial forums” are used interchangeably throughout this Article.

Commission was created).⁹ Obviously, not all of these are currently active; the list includes institutions that are temporary and permanent, as well as those of the “first generation,” and there is an obvious bias towards institutionalized mechanisms of dispute resolution. Until the 1990s, there were only six permanent international judicial bodies: the International Court of Justice (“ICJ”),¹⁰ the Court of Justice of the European Communities (“ECJ”),¹¹ the Court of Justice of the Andean Community,¹² the Court of Justice of the Benelux Economic Union,¹³ the European Court of Human Rights (“ECtHR”),¹⁴ and the Inter-American Court of Human Rights (“IACtHR”).¹⁵ One could expand this list to include the semi-permanent claims commissions or arbitral tribunals such as the Iran–US Claims Tribunal,¹⁶ which has been operating since 1980, the International Center for the Settlement of Investment Disputes (“ICSID”),¹⁷ which was established in 1966, and the Permanent Court of Arbitration, which was created in 1899 under the first Hague Convention for the Pacific Settlement of International Disputes.¹⁸ The numbers can be expanded further when we consider the many institutions of a more temporary nature, involving single arbitrators or panel arbitration. This latter type of international adjudication that does not occur under the auspices of an international judicial body of relatively permanent nature is outside the scope of this Article. International courts and tribunals operate at the universal, regional, or sub-regional level, and are either general, as in the case of the ICJ, or specialized, as in the case of courts such as ICSID and the Iran–US Claims Tribunal. They cover all areas of international law. There is much reason to argue that there is now “an evolving, complex and self-organizing” international

⁹ See Project on International Courts and Tribunals, *The International Judiciary in Context*, available online at <http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf> (visited Dec 5, 2008).

¹⁰ See Statute of the International Court of Justice (June 26, 1945), 59 Stat 1031 (“ICJ Statute”).

¹¹ The European Court of Justice (“ECJ”) was established in 1958 as the joint court for the three organs of the European Communities that later became the European Union in 1967.

¹² Treaty Creating the Court of Justice of the Cartagena Agreement (1979), 18 ILM 1203.

¹³ Treaty Instituting the Benelux Economic Union (1971), 381 UN Treaty Ser 165.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (1953), 213 UN Treaty Ser 221.

¹⁵ American Convention on Human Rights (1978), 1144 UN Treaty Ser 143.

¹⁶ See Iran–United States: Settlement of the Hostage Crisis (1981), US–Iran, 20 ILM 223 (“Algiers Accords”) (establishing the Iran–US Claims Tribunal).

¹⁷ Convention for the Settlement of Investment Disputes between States and Nationals of Other States (1966), 575 UN Treaty Ser 159.

¹⁸ Convention for the Pacific Settlement of International Disputes (1899), 32 Stat 1799 (1901–1903). See also Convention for the Pacific Settlement of International Disputes (1907), 36 Stat 2199 (1909–1911).

judicial system, even if it is one that appears to be “dancing on the edge of chaos.”¹⁹

At one level, the mere existence of such courts and tribunals is an incentive to resort to litigation, rather than to the use of force, to resolve disputes. The literature today often speaks of a “proliferation” of international courts and tribunals, suggesting that this is a negative development.²⁰ Like the current president of the ICJ, we do not feel that this “proliferation” is necessarily negative or detrimental to the international order, and prefer the term “multiplication”²¹ to proliferation. Since 2000, the ILC has been examining the issue of multiplication in *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*.²² One of the ILC’s objectives was to produce a “toolbox designed to assist in solving practical problems arising from incongruities and conflicts between existing legal norms and regimes.”²³ It completed its work on this project in 2006, producing an academic work that explored wide-ranging issues.²⁴ The ILC, however, did not take up the

¹⁹ Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan L Rev 429, 444 (2003).

²⁰ The rather negative connotation is apparent in such titles as Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze*, 3 Melb J Intl L 453 (2004); Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2 J Intl Crim Justice 300 (2004); Gerhard Hafner, *Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?*, in Lucius Caflisch, ed, *The Peaceful Settlement of Disputes between States: Universal and European Perspectives* 25–41 (Martinus Nijhoff Law Specials, 36: Kluwer 1998); Robert Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, 9 Am Soc Intl Law Bull 441 (1995); Fausto Pocar, *The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community*, 2 J Intl Crim Justice 304 (2004); Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 Colum J Transnatl L 143 (2001).

²¹ See generally Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 Intl & Comp L Q 791 (2006). For another similarly strong sentiment from the bench, see generally Bruno Simma, *Fragmentation in a Positive Light*, 25 Mich J Intl L 845 (2004).

²² United Nations, *Report of the International Law Commission*, UN Doc A/57/10 at 237, ¶ 494 (2002). The International Law Commission (“ILC”), in its fifty-second session in 2000, decided to include the topic “Risks Ensuing from Fragmentation of International Law” in its long-term program of work. The topic was later changed to its current form in order to tone down the perceived negative connotations created by the word “risks.” A study group led by Bruno Simma (later appointed a judge of the ICJ) was established in 2002 to further study the subject. Upon Bruno Simma’s resignation, Martti Koskenniemi took over the chairmanship of the study group in 2003. Consider id at 238, ¶ 495 (2002).

²³ Id at 241, ¶ 512.

²⁴ For the final report see United Nations, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682 (2006) (“ILC Report on Fragmentation”). For brief conclusions of this very lengthy report, see United Nations, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the International Law Commission*, UN Doc No A/61/10 at 407, ¶ 251 (2006).

institutional dimensions of fragmentation of international law, having excluded that topic from the beginning.²⁵

This Article focuses on two fruits of the increasing fecundity of the system. First, what is the international judge to do when there are several fora that could deal with a dispute, apart from his or her own? Second, what is an international judge to do when the jurisprudence on an issue is inconsistent between international courts and tribunals? These emerging issues are actually evidence of a maturing system. Mature legal systems, such as the domestic systems of developed countries, provide the adjudicator with rules, techniques, and principles that he or she could use to mitigate the adverse impacts that might arise from the growth and diversification of the law. This maturity is not yet the case with international law, which functions in a different system and is controlled by different principles and concepts, not all of which are uncontroversial. Decades ago, Hersch Lauterpacht identified the central role of the international judge, arguing that “the existence of a sufficient body of clear rules is not at all essential to the existence of law”; for him, what was decisive was “whether there exists an international judge competent to decide upon disputed rights and to command peace.”²⁶ Today things are much more complex. In these days of a crowded international system, there is no consolidated guidance to help the international judge find Theseus’s golden thread to lead the way out, let alone rise to meet Lauterpacht’s expectations.

We acknowledge the wealth of literature that already exists about the growth of international courts and tribunals, and the increasing scrutiny of its impact.²⁷ PICT and the Brandeis Institute for International Judges have pioneered work in this area, most recently leading to the publication of a major study on

²⁵ The Study Group agreed that “the Commission should not deal with questions of the creation or relationships among international judicial institutions,” and should not “act as a referee in the relationships between institutions, and in areas of conflicting rules.” United Nations, *Report of the International Law Commission*, Doc No A/57/10 at 240, ¶¶ 505, 507 (2002).

²⁶ Hersch Lauterpacht, *The Function of Law in the International Community* 424 (Clarendon 1933).

²⁷ See generally Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford 2003); Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 *Leiden J Intl L* 267 (2001); Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 *NYU J L & Pol* 919 (1999); Chester Brown, 3 *Melb J Intl L* (cited in note 20); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 217 *Recueil des Cours* 101 (1998); Gilbert Guillaume, 2 *J Intl Crim Just* (cited in note 20); Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 *Mich J Intl L* 849 (2004); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 *NYU J L & Pol* 679 (1999); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *NYU J L & Pol* 709 (1999); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 *NYU J L & Pol* 790 (1999); Eyal Benvenisti and George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 *Stan L Rev* 595 (2007).

international judges.²⁸ The contribution the Article seeks to make is to provide, in line with the precedent set by the Burgh House Principles on the Independence of the International Judiciary,²⁹ a blueprint to aid the international judge in dealing with two of the more common ramifications of an ever-expanding family of international law.

Before proceeding further, one must be clear about our use of the term “international judge.” It is more expansive than that of Terris, Romano and Swigart, who define an “international judge” as someone who “serves on a body whose jurisdiction includes more than one sovereign nation, or on a body established by an international organization to deliver justice in a country where the legal structure is deemed insufficient to address a severe situation, such as the aftermath of ethnic cleansing or genocide.”³⁰ The judicial entity (and we focus on the judicial decision-making function in contrast to administrative or legislative function) needs to be at least semi-permanent and responsible for adjudicating disputes between two or more entities, at least one of which is a state or international organization. We include the WTO dispute settlement panels and the Appellate Body, even though it is actually the Dispute Settlement Body (“DSB”), by making a decision to adopt the “recommendations,” that accepts them and thus binds the parties to the finding set out therein.³¹ We include international arbitrators, whether sitting alone or in panels. Terris, Romano and Swigart view arbitrators as a different species of decision maker, describing them as “judges for hire,” although they acknowledge that some international judges are much sought after as arbitrators.³² This Article does not isolate the international judge from other decisionmakers in the wider scheme of international dispute resolution; the issues discussed concern arbitrators as much as they do judges. Thus, the term “international judge” in this Article refers to the persons that Terris, Romano and Swigart identify, but also includes arbitrators engaged in resolving international disputes between states, and between states and nonstate actors such as corporations or individuals pursuant to a treaty.

²⁸ See Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, *The International Judge: The Men and Women Who Decide the World's Cases* (Brandeis 2007).

²⁹ See Philippe Sands, Ruth Mackenzie, and Yuval Shany, *Manual on International Courts and Tribunals* 247–60 (Butterworths 1999). The principles were prepared by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals.

³⁰ Terris, Romano, and Swigart, *The International Judge* at xi (cited in note 28).

³¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Annex 2, arts 16 and 17(4), 1869 UN Treaty Ser 401 (Marrakesh Agreement establishing the World Trade Organization) (“DSU”).

³² Terris, Romano, and Swigart, *The International Judge* at xi (cited in note 28).

This Article focuses on two phenomena that have emerged, and are likely to continue to emerge, from the growth of international courts and tribunals. These phenomena are the engagement of multiple institutions in resolving a particular dispute, and the risk of inconsistency, even conflict, in the jurisprudence of such institutions. We concentrate on several examples, but do not pretend that these are the only examples that international practice can furnish. Nevertheless, they are particularly useful for helping us chart a way forward. To be acceptable and workable, any such exercise must be grounded in the reality of the international legal order and consistent with the fundamental principles and doctrines of international law. Section II presents a conceptual examination of the situation and studies the implications of the expanding world of international courts and tribunals. Section III deals with multiple institution engagement and competing jurisdictions, while Section IV deals with conflicting jurisprudence. Both Sections III and IV are rooted in case studies. Section V concludes the discussion, with Section VI synthesizing the earlier analysis and drawing from relevant practices in both international and domestic systems to develop guidelines to assist the international judge.

II. THE IMPLICATIONS OF THE EXPANDING WORLD OF INTERNATIONAL COURTS AND TRIBUNALS

Is the expansion of international courts and tribunals a problem at all? Is choice not a good thing? Is there anything wrong with strengthening the rule of law in the notoriously unruly international order? The world of international lawyers and academics is divided. This split has to do, in part, with conceptual orientations and practical considerations. Former presidents of the ICJ, Judge Schwebel and Judge Guillaume, speak of “proliferation” as a threat to the integrity and coherence of international law.³³ In his 2000 address to the UN General Assembly and its Sixth Committee, Judge Guillaume spoke of some “unfortunate” consequences of proliferation.³⁴ These “unfortunate” consequences consisted of risks of overlapping jurisdiction leading to forum

³³ See Judge Stephen M. Schwebel, Address to the Plenary Session of the General Assembly of the United Nations (Nov 6, 1999), available online at <<http://www.icj-cij.org/court/index.php?pr=87&pr=3&p1=1&p2=3&p3=1>> (visited Nov 17, 2008). In his address, although he had not extensively covered the dangers of “proliferation” like Judge Guillaume, his successor, he nonetheless suggested that these other tribunals should refer issues of general international law through the Security Council for the ICJ’s advisory opinion (similar to the European Community court’s reference system).

³⁴ Judge Gilbert Guillaume, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, Speech to the Sixth Committee of the General Assembly of the United Nations (Nov 29, 2000), available online at <<http://www.icj-cij.org/court/index.php?pr=85&pr=3&p1=1&p2=3&p3=1>> (visited Nov 13, 2008).

shopping and conflicting decisions.³⁵ He concluded his address by pointing out that the “proliferation of courts presents us with risks, the seriousness of which it would be unwise to underestimate.”³⁶

The current president, Judge Higgins, does not share this view.³⁷ She says that “we should not exaggerate the phenomenon of fragmentation.”³⁸ In fact, according to her, courts make tremendous efforts to both be “consistent *inter se* and follow the International Court of Justice.”³⁹ For her, differences in approach can be explained by context: context is controlling.⁴⁰ Observers may see the New Haven approach in this.⁴¹ Scholars coming from the Critical Legal Studies movement have ideology in mind: centralism versus decentralism, hegemony versus empowerment, etc. For these scholars, the expansion of international law presents an opportunity to contest the status quo. Among critical scholars, Koskenniemi and Leino stand out for finding the concerns of the former presidents of the ICJ to be mere postmodern anxiety.⁴² They see the phenomenon as an outcome of the hegemonic and counter-hegemonic moves made by participants in the system.⁴³ Among these drives for hegemony, they observe that the ICJ too is seeking to position itself.⁴⁴ The problem, according to these scholars, has “no overall solution.”⁴⁵ Koskenniemi and Leino point out that “the ICJ, a human rights body, a trade regime or a regional exception may each be used for good and for ignoble purposes and it should be a matter of debate and evidence, and not of abstract consistency, as to which institution should be preferred in a particular situation.”⁴⁶ For these authors, the situation reveals the importance of context in every case. Ultimately, rules can be manipulated by their interpreters to suit particular predispositions or ideologies.

35 Id.

36 Id.

37 See Rosalyn Higgins, 55 *Intl & Comp L Q* at 791 (cited in note 21).

38 Id at 796.

39 Id at 797.

40 Id at 794.

41 See President Higgins’ earlier works, notably, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 274 (Clarendon 1993); Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 *Intl & Comp L Q* 57 (1968).

42 See Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *Leiden J Intl L* 553 (2002).

43 Id at 562.

44 Id.

45 Id at 578.

46 Id.

The international legal system is populated by many participants, and features intersecting subsystems as well as different sources of law. But it is not alone in being a busy place. In the domestic arena, some legal systems, particularly federal ones and others that formally recognize legal pluralism (the existence of religious and customary law systems alongside state laws), face similar problems on a day-to-day basis. Private international law is exclusively concerned with the issue of conflicts. However, these systems are sufficiently developed as to be able to anticipate predictable challenges and prepare for them through constitutional provisions and subsidiary legislation.⁴⁷ Domestic courts have also developed doctrines that address these challenges, including *lis alibi pendens*, *res judicata*, and *forum non conveniens*. Private international law is assisted by a number of conventions, model rules and principles that have been adopted on the key issues of conflict of laws, such as choice of venue, choice of law, and recognition and enforcement of foreign judgments.⁴⁸ Cannot the international judge just do the same as is done in the domestic system when dealing with such conflicts in the international system? In answering this question, we have to begin with the unique characteristics of the international legal system, which differ from national systems in three essential ways, and which render wholesale import of domestic practices and principles unsuitable.

The first distinction is that while national legal systems usually have a judicial hierarchy of sorts,⁴⁹ the international system has no such hierarchy. Courts within the same structure (for example, appellate and trial chambers in an international criminal tribunal) may have a hierarchy, but no international court has the power to overrule another international court. Even the ICJ, the principal judicial organ of the UN and the most senior of all the international courts, lacks the power to overrule other international courts and tribunals.⁵⁰ Neither is there a doctrine of *stare decisis* in international law, as exists in common-law legal systems, where earlier decisions of a superior court are used as authority in deciding future cases.⁵¹ An ICJ decision is not in itself a source of law, but rather it is a subsidiary means of determining the content of

⁴⁷ See Arthur Taylor Von Mehren, *Conflict of Laws in a Federal System: Some Perspectives*, 18 *Intl & Comp L Q* 681 (1969). Consider John Griffiths, *What Is Legal Pluralism?*, 24 *J Legal Pluralism & Unofficial L* 1 (1986).

⁴⁸ Consider Eckart Gottschalk et al, eds, *Conflict of Laws in a Globalized World* (Cambridge 2007); Abba J. Mayss, *Principles of Conflict of Laws* (Cavendish 3d ed 1999).

⁴⁹ Even among the loosely affiliated judicial systems of the former British colonies, there has been a practice of referring a case on appeal, as a matter of last resort, to the Privy Council.

⁵⁰ While many domestic courts cite cases decided by the ICJ for their persuasive value, the reverse seldom happens.

⁵¹ Article 59 of the Statute of the ICJ sets out the formal position: "the decision of the Court has not binding force except between the parties and in respect of the particular case."

international law.⁵² Hence, the greater the number of international judicial bodies, the larger the risk of divergence between the legal approaches and jurisprudence of these courts.

Secondly, in national legal systems, the lawmaking process is more or less centralized.⁵³ On the international plane, however, there is no central lawmaker. International law is made in different ways, and there is no unified legislative entity behind it.⁵⁴ Thus, there is the possibility of conflict and inconsistency. For example, international criminal law has evolved to include a range of different concepts of “crimes against humanity,” as a result of different notions employed in the primary sources of law of international criminal courts and tribunals, and the differences in their statutes. It is not just a question of law evolving over time, for there exist three different notions of the crime against humanity in the near contemporaneous Statutes of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the International Criminal Court.⁵⁵ Two of the statutes emanated from the Security Council and one resulted from a negotiated process between states, although it was based on a draft prepared by the ILC. The sources of international law generally lack the detail that exists in the domestic context. In the case of treaties, this arises from the nature of the treaty-making process, where the drafters strive for consensus and compromise to achieve agreement. Thus, treaties are often vague—take for example the Outer Space Treaty, which refers to “peaceful use” of outer space without a definition of what that means.⁵⁶ And then there is the notoriously difficult issue of identifying not just the existence but the precise content of customary rules. Here, the creators of the law are states, by way of their practice and *opinio juris*. The general principles of international law are also notoriously vague: it is easy to say, for example, that proportionality is a general principle of international law, but exactly what does that mean? It usually falls to the international judge to make a determination, and that person will decide questions of law taking into consideration a range of factors, which can include his or her legal tradition, philosophical approach, openness to the work of other courts and tribunals, as well as willingness to see

⁵² *Id.*, art 38.

⁵³ Even in decentralized federal systems, lawmaking is centralized within their respective fields of autonomy.

⁵⁴ Simma and Pulkowski, 17 *Eur J Intl L* at 489 (cited in note 4).

⁵⁵ See Security Council Res No 827 UN Doc S/RES/827 (1993); Security Council Res No 955 UN Doc S/RES/955 (1994); Rome Statute of the International Criminal Court (2002), 2187 UN Treaty Ser 90.

⁵⁶ Treaty on Principles Governing The Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, (1967), art IV, 610 UN Treaty Ser 205.

his or her work as part of a larger whole, rather than simply confined to his or her institution. Hence, international judicial outcomes can be unpredictable.

Thirdly, unlike national legal systems, and with one exception, there is no hierarchy of laws in the international legal order. The one exception is laid down in Article 103 of the United Nations Charter: charter-based obligations trump all others (although those in turn would, in theory at least, be trumped by a norm of *jus cogens*).⁵⁷ The writ of Article 38(1) of the Statute of the ICJ specifies no hierarchy of the sources of law that it lists, but international lawyers regard a treaty, where there is one, as the primary source of applicable law.

These distinctions are rooted in the structure of the international system and the nature of international law. Thus, for the international judge, conflicts of jurisdiction and jurisprudence raise issues that are different from those that are raised in domestic legal systems. They are problems that are systemic in nature, arising from the structure of international law and the system in which it operates. Given this, we would therefore argue that “systemic problems require systemic solutions.”⁵⁸ These systemic solutions include reaching a consensus on the proper role of international adjudication in the evolving international order, as well as practical, shorter-term measures of institutional, substantive, and procedural character. The theme of the proper role of the international judge in the development of international law can be found already in Hersch Lauterpacht’s work.⁵⁹ We cannot deal with the long-running dispute over the proper function of international adjudication, but we acknowledge that this debate is critical for dealing with the systemic evolutions underway. For example, there is the ideological approach of Martinez, who argues that

the overriding purpose of the emerging international judicial system should be to promote the federalism of free nations—a decentralized system of cooperative relations among nations that, where possible, advances goals of democracy and respect for individual rights and the courts participating in the system should act in ways that further those goals.⁶⁰

Others would be more realistic. For example, Charney takes the view that “the most important objective of international law [and international judicial systems] should be the peaceful settlement of international disputes.”⁶¹ Even without delving into the philosophical issues, it is clear that the international

⁵⁷ See United Nations Charter, art 103. There are very few peremptory norms of international law (*jus cogens*) on which there is consensus. These are some of the most serious international crimes like genocide and slavery.

⁵⁸ John P. van Gigch, *System Design Modelling and Metamodeling* 30 (Springer 1991).

⁵⁹ Hersch Lauterpacht, *The Development of International Law by the International Court* 408 (Stevens 1958).

⁶⁰ Martinez, 56 *Stan L Rev* at 461 (cited in note 19).

⁶¹ Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 *Am J Intl L* 69, 74 (1996).

judge can no longer live in splendid isolation from the evolving international system around him or her, and needs to take a wider perspective of his or her role within that system. Judge Shahabuddeen of the ICTR Appeals Chamber hits the nail on the head when he writes that international judges cannot behave as if the general state of the law in the international community were not of concern: “to act on that blinkered view is to wield power divorced from responsibility.”⁶² In the meantime, and the ILC’s efforts on fragmentation show that it will be a long meantime, practical solutions are needed to prevent conflicts from arising, as well as for managing conflicts when they do occur.

If institutional solutions are to be considered, one must ask whether the ICJ, once clearly *the* World Court, and now one of many international courts and tribunals dotting the horizon? In the same way that Article 38(1) of the ICJ Statute does not set out a formal hierarchy, there is no formal hierarchy of international courts and tribunals. The ICJ does, however, occupy a revered place as the most significant of the international courts and tribunals. The ICJ and its predecessor, the Permanent Court of International Justice (“PCIJ”), are the only two international judicial bodies that have been popularly referred to as the “World Court.”⁶³ The reality is that just as one relies first on a treaty, when such exists, one also seeks out an ICJ decision when it exists, and one looks further afield only if the legal issue remains unresolved. The ICJ has not, however, stepped up to take a leadership role in this new world. Even when faced with an assault, in notably undiplomatic tones, by the ICTY Appeals Chamber in *Prosecutor v Tadic*, the ICJ did not respond until directly pushed by the parties in *Bosnia and Herzegovina v Serbia and Montenegro* (the Bosnia Genocide Case).⁶⁴ And even then, it made no statement on its own role in a world of more and more international courts and tribunals. Pierre Marie Dupuy stated the obvious, which nevertheless needed to be stated, when he pointed out that “the best way for improving the role of the ICJ as a world court rests in the hands of the judges themselves, and in the way they view the true function of the court within the international legal system.”⁶⁵

It is obvious that international judges need to communicate with their counterparts in other international judicial institutions; they cannot live in

⁶² *Semanza v Prosecutor*, Case No ICTR 97-20-A, Appeals Judgment, ¶ 25 (May 20, 2005) (Shahabuddeen concurring).

⁶³ Antonio Sánchez De Bustamante Y Sirvén, *The World Court* 379 (Macmillan 1925); Shabtai Rosenne, *The World Court: What It Is and How It Works* 230 (A.W. Sythoff 1962).

⁶⁴ See *Prosecutor v Tadic*, Case No IT-94-1-A, Judgment, ¶ 120 (July 15, 1999); *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 46 ILM 188, ¶ 403 (Feb 26, 2007) (“Bosnia Genocide Case”).

⁶⁵ Dupuy, 31 NYU J L & Pol at 802 (cited in note 27).

splendid isolation. There are indeed regular exchanges of information and periodic meetings of judges and officials of the different courts and tribunals.⁶⁶ Charney, in his 1999 Hague lectures, examined areas where there has been “judicial dialogue,” or communication through the cases, between the ICJ and other tribunals.⁶⁷ The areas covered in his study included the law of treaties, sources of international law, state responsibility, compensation for injury to aliens, exhaustion of domestic remedies, nationality, and international maritime boundary law. The “dialogue,” as seen by Charney, consists of the citation of the jurisprudence of the ICJ by other tribunals.⁶⁸ That “dialogue” is evident elsewhere, in ICTY cases such as *Prosecutor v Furundzija* and in IACtHR cases such as *Loayza-Tamayo v Peru*, both of which cite international jurisprudence.⁶⁹ One weakness in Charney’s study is the fact that the “dialogue” was a one-sided affair; it is hard to sustain any pretence of a “dialogue” when only one side is doing the talking. Other commentators warn not to make too much out of this, for the examples of “dialogue” are actually very limited.⁷⁰ The reality is that not all judges keep abreast of relevant happenings at other courts and tribunals in an age of growing specialization, and they cannot reasonably be expected to keep abreast of everything being produced. Regardless, there is no doubt that increased judicial interaction between international courts and tribunals contributes to the coherence of international law and should be encouraged.

This Article submits that there are procedural techniques and legal doctrines within international law itself that can be called upon for assistance, in particular, treaty interpretation and the doctrines of *jus cogens*, *res judicata*, and *electa una via*.

A way of bridging the gap is to resort to the accepted rules of interpretation in international law, as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”).⁷¹ This approach helps standardize interpretation of a single treaty that is applied by different courts and

⁶⁶ See, for example, the report about the official visit the judges of the ECJ made to the European Court of Human Rights (“ECtHR”) to discuss the recent case law of the two courts. Court of Justice of the European Communities, *Press Release No 83/07* (Nov 9, 2007), available online at <<http://curia.europa.eu/en/actu/communiqués/cp07/visoff/cp070083en.pdf>> (visited Dec 5, 2008).

⁶⁷ See generally Charney, 217 *Recueil des Cours* (cited in note 27).

⁶⁸ *Id.* at 130.

⁶⁹ *Prosecutor v Furundzija*, Case No IT-95-17/1-A, Judgment, (July 21, 2000); *Loayza-Tamayo v Peru* Case 33, (Inter-Am CHR 1997). For another example of judicial “dialogue,” see *Bosphorus Hava Yollari Turizm v Ireland*, No 45036/98 (Eur Ct HR 2005) (clearly showing a flow of ideas and a familiarity between the ECJ and the ECtHR).

⁷⁰ Consider Nathan Miller, *An International Jurisprudence? The Operation of “Precedent” Across International Tribunals*, 15 *Leiden J Int L* 483 (2002).

⁷¹ Vienna Convention on the Law of Treaties (1980), arts 31, 32, 1155 UN Treaty Ser 331.

tribunals. But this method, in itself, will not help when equally binding legal texts have opposing or incompatible provisions. It is also an inescapable fact that the formulations laid down in Articles 31 and 32 of the Vienna Convention, while accepted as reflecting customary law, are in themselves susceptible to individualized interpretation and application due to the flexibility and malleability of the concepts employed, such as “good faith,” “ordinary meaning,” “context,” and “object and purpose.” Treaty interpretation is not a mathematical equation or a mechanical process that yields the same outcome in all similar cases. Much will depend on who is doing the interpretation—in other words, the international judge.

There are rules for preventing and managing the problem of multiple institutions being engaged on the same dispute. The principle of *electa una via*, which is a shortened version of *una via electa non datur recursus ad alteram* (“one way having been selected, recourse to another is not permissible”), prohibits multiple submissions of essentially the same claim to different tribunals.⁷² The principle of *lis alibi pendens* (also called *litispendance*) requires tribunals to declare as inadmissible applications being examined under different procedures.⁷³ *Electa una via* is about a choice of forum: once a forum is chosen, resort to another is impossible. However, *lis alibi pendens* refers to the very fact that a dispute is pending before another tribunal. While *electa una via* prohibits all forms of multiple proceedings, *lis alibi pendens* prohibits parallel proceedings only.⁷⁴ This means *electa una via* could also cover cases that may later fall under the *res judicata* principle. As the PCIJ held, the object of *lis alibi pendens* “is the prevention of the possibility of conflicting judgment,”⁷⁵ and the same could be said of *electa una via*. In the case of *lis alibi pendens*, this means that it is possible for a party to take the same dispute to another tribunal once the first proceeding is

⁷² Consider Shany, *Competing Jurisdictions* at 218 (cited in note 27). See also European Convention on Human Rights (1950), Eur Treaty Ser No 5, art 35(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), General Assembly Res No 39/46, art 22(5), available online at <http://www.unhchr.ch/html/menu3/b/h_cat39.htm> (visited Dec 5, 2008); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (1981), A/RES/54/4, art 4(2)(f), available online at <<http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>> (visited Dec 5, 2008); NAFTA, art 2005 .

⁷³ Optional Protocol to the International Covenant on Civil and Political Rights (1966), art 5(2), 6 ILM 383, 384 (1967).

⁷⁴ Shany, *Competing Jurisdictions* at 218 (cited in note 27).

⁷⁵ *Case Concerning Certain German Interests in Polish Upper Silesia*, 1925 PCIJ (ser A) no 6 at 20 (Aug 25, 1925).

finalized, but then it will be subject to the principle of *res judicata*, which is widely accepted as a general principle of international law.⁷⁶

Res judicata, also known as the principle of finality, has the same purpose as *lis alibi pendens*: to maintain judicial economy, promote legal security, and avoid conflicting judgments.⁷⁷ According to Bin Cheng, *res judicata* means that “once a case has been decided by a valid and final judgment, the same issue may not be disputed again between the same parties, so long as the same judgment stands.”⁷⁸ It simply precludes parties from litigating a second lawsuit on the same claim.⁷⁹ The principle has been applied by several international courts and tribunals, and most recently was a major issue in the ICJ judgment in the Bosnia Genocide Case.⁸⁰

The use of the concept of *jus cogens* as a means of resolving conflicts is more controversial, with France refusing to accept that there is such a thing, or any obligations that are owed *erga omnes*.⁸¹ However, the majority of states, and the learned authorities, are inclined to accept that there is such a notion. For

⁷⁶ See, for example, Interpretation of Judgments Nos 7 and 8 (Factory at Chorzów) (Anzilotti dissenting), 1927 PCIJ (ser A) no 13 at 25 (Dec 16, 1927) (citing the proceedings of the Commission of Jurists who drafted the Statute of the Permanent Court of International Justice in 1920, describing *res judicata* as a clear example of “a general principle of law recognized by civilized nations”), available online at <http://www.icj-cij.org/pcij/serie_A/A_13/44_Interpretation_des_Arrets_No_7_et_8_Usine_de_Chorzow_Opinion_Anzilotti.pdf> (visited Dec 5, 2008). See also *Waste Management Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, (Award of June 26, 2002), 41 ILM 1315 (affirming that “[t]here is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice”).

⁷⁷ Some constitutive instruments that contain the principle of *res judicata* include: American Convention on Human Rights (1978), 1144 UN Treaty Ser 123, art 47(d); Convention on Conciliation and Arbitration within the Conference and Co-operation in Europe (1994), art 19(1)(a), available online at <http://untreaty.un.org/unts/120001_144071/10/4/00007971.pdf> (visited Nov 21, 2008). For a general discussion, see August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 L & Prac of Intl Cts and Tribunals 37, 44 (2004). See also Iain Scobbie, *Res Judicata, Precedent, and the International Court: A Preliminary Sketch*, 20 Austl YB Intl L 299 (1999).

⁷⁸ Bin Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* 337 (Stevens 1953).

⁷⁹ *Black's Law Dictionary* 1337 (West 8th ed 2004).

⁸⁰ See Advisory Opinion of July 13, 1954, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 ICJ 47, 53 (July 13, 1954) (“A judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute.”); *Arbitral Award Made by the King of Spain on December 23, 1906 (Hond v Nicar)*, 1960 ICJ 192, 213 (1960) (rejecting a challenge to the arbitral award rendered by the King of Spain in a boundary dispute between Honduras and Nicaragua, citing the *res judicata* nature of the earlier award); *Judicial Decisions Involving Questions of International Law: The United States of America v The United Mexican States*, 2 Am J Intl L 893, 901 (1908). See also Bosnia Genocide Case, ¶ 116.

⁸¹ Allain Pellet, *Can States Commit a Crime? Definitely, Yes!*, 10 Eur J Intl L 425, 428 (1999).

example, the notion of *erga omnes* was codified in the Vienna Convention on the Law of Treaties.⁸² The ICJ has used the notions of *jus cogens* and *erga omnes* in a way that clearly suggests a hierarchy of norms.⁸³ Other international courts and tribunals have also referred to notions of *jus cogens* and/or *erga omnes*.⁸⁴ Therefore, we do believe that when a court or tribunal faces a conflict between normative provisions, one of which is of *jus cogens* character, the *jus cogens* norm must prevail.

Bearing in mind reservations about wholesale import of the domestic into the international, there are a number of procedural techniques used in private international law that may be helpful if exported into the international system, such as the doctrines of substantial connection, *lis alibi pendens*, forum non conveniens, and choice of law.

In conflict-of-laws cases in which the parties do not agree on jurisdiction, the issue is usually determined based on the principle of “substantial connection.”⁸⁵ The principle considers the connection between a forum, the party, and the transaction or the place where the dispute occurred.⁸⁶ Hence, if one forum has a substantial connection based on these considerations, it will have jurisdiction to the exclusion of other fora. This principle cannot be directly applied to the public international law context because of its nonterritorial, supranational nature. However, if the interpretation of two or more treaties is at stake in a context where these treaties also contain respective dispute-settlement mechanisms, it is reasonable to give priority to a tribunal that is vested with the interpretation of a treaty substantially implicated. In this regard, in the *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* discussed later in this Article, where both the UNCLOS and the Commission for the Conservation of Southern Bluefin Tuna (“CCSBT”) were implicated, the UNCLOS tribunal held that even if the dispute also had the potential to arise under the UNCLOS, the

⁸² For brief but excellent background information, see generally Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 Am J Int L 55 (1966). For a more recent work, see Dinah Shelton, *Normative Hierarchy in International Law*, 100 Am J Int L 291 (2006).

⁸³ See *Bosnia Genocide Case*, 46 ILM at 230, ¶ 161; *Case Concerning Armed Activities on the Territory of the Congo (Congo v Rwanda)*, 45 ILM 562, ¶ 64 (Feb 3, 2006); Advisory Opinion, *Legal Consequences of the Construction of the Wall*, 2004 ICJ 199, ¶ 155 (July 9, 2004); Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 257, ¶ 79 (July 8, 1996); *East Timor (Port v Austl)*, 1995 ICJ 102 (June 30 1995); *Barcelona Traction, Light and Power Company Ltd (Belg v Spain)*, 1970 ICJ 3, ¶ 34 (Feb 5, 1970).

⁸⁴ See, for example, *Prosecutor v Furundzija*, Case No IT-95-17/1-T, ¶ 155 (Dec 10, 1998).

⁸⁵ See, for example, *ALI/UNIDROIT Principles of Transnational Civil Procedure*, 2(1), available online at <<http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>> (visited Dec 5, 2008).

⁸⁶ This is a reflection of the principle that the applicable law should be that of the state that has the closest and most real connection with the dispute.

dispute was really under the province of the CCSBT.⁸⁷ It decided that the case should be resolved within the dispute-settlement mechanisms of the CCSBT, and not the UNCLOS.⁸⁸ The case is discussed in Section III.D below.

Common law jurisdictions seized of conflict-of-laws situations may refuse to exercise jurisdiction over a case where there is concurrent jurisdiction with another court on the grounds of *forum non conveniens*, or, alternatively, claim jurisdiction on the grounds of being the *forum conveniens*.⁸⁹ Although the rule is said to have its origins in the Scottish legal system, which is an essentially civil-law (mixed) jurisdiction, it is not often invoked in the civil-law systems of continental Europe, which instead seem to rely on the closely related principle of *lis alibi pendens*, discussed above.⁹⁰ *Forum non conveniens* is defined as an “inappropriate (inconvenient) court,” referring to the principle whereby a court that has jurisdiction over a claim nevertheless stays the suit conditionally, or dismisses it unconditionally, in order to send the claim to be tried in another jurisdiction to which the defendant is amenable and which the court believes is more appropriate or convenient for the litigation, in the interests of justice.⁹¹ The gist of the rule on *forum non conveniens* is that one of the courts relinquishes jurisdiction (dismisses or conditionally stays the proceeding) on the ground that there is another, more convenient forum where the matter may be adjudicated. A court may arrive at this conclusion based on several considerations, which include hardship to the defendant in terms of costs, location of witnesses and evidence in general, availability of an adequate alternative forum for the plaintiff, issues of public policy, and several other related factors.

At first glance, it seems that *forum non conveniens* may not be relevant for international litigation. This is because inter-state litigation usually takes place, at the choice of the parties, in neutral locations outside the territory of both parties to the dispute, mainly at The Hague, Geneva; Washington, D.C.; London; Paris; or Stockholm. There is, therefore, not likely to be much difference between any of them on *forum non conveniens* grounds. The location of evidence and

⁸⁷ *Southern Bluefin Tuna Case (Austl and NZ v Jap)*, 39 ILM 1359, ¶ 53 (Aug 4, 2000).

⁸⁸ *Id.*, ¶ 54.

⁸⁹ See William Tetley, *Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea*, in Martin Davies, ed, *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* 183 (Kluwer 2005) (for a general comparative discussion).

⁹⁰ Some of the exceptional uses of the *lis alibi pendens* principle are in the state of Louisiana in the US and the province of Quebec in Canada. This may be because there have been common-law influences from neighbouring jurisdictions. See La Civ Code Ann § 123 (West 1960); S Q ch 64 § 3135 (West 1991) (Civil Code of Québec).

⁹¹ See William Tetley, *Glossary of Conflict of Laws*, available online at <<http://www.mcgill.ca/maritimelaw/glossaries/conflictlaws/>> (visited Dec 5, 2008).

witnesses does not pose much of a problem, since international litigation is primarily composed of documentary evidence and oral pleadings from counsel. However, we see that forum non conveniens may be useful in certain contexts, for instance, in a situation where the dispute between both parties could more appropriately be settled by regional dispute-settlement bodies. We can see that a dispute, let us say between two Caribbean or Central American countries, could more cheaply and effectively be dealt with by their respective regional courts rather than the ICJ. If, therefore, a respondent in such a dispute pleads that the ICJ is not a convenient forum, even if it technically has jurisdiction over the matter, the court should defer on the grounds that it is not the forum conveniens.

Choice of law is about the substantive law that courts apply to a dispute before them. In principle, if there is no agreement between the parties, the court may choose to apply the law of the forum (*lex fori*). This can also, in some cases, resolve the issue of conflicting jurisprudence. In a conflict-of-laws context, through the operation of conflict rules, or based on the agreement of the parties, a court may apply a foreign law instead. Similar solutions could also be suggested for international litigation. But we may find that judges of a given tribunal lack the willingness or ability to venture outside of their area of expertise. One does not have to be a human rights lawyer to feel great apprehension and concern at the prospect of a WTO panel interpreting international human rights law. A number of scholars and even the presidents of the ICJ have suggested that issues of general international law be referred to the ICJ for interpretation, as doing so would ensure consistency of legal interpretation on fundamental issues.⁹² However, those suggestions are often dismissed as impractical because of the difficulty or near impossibility of amending the ICJ Statute.⁹³ It may be more practical for courts and tribunals to allow expert submissions during the litigation in order to gain a better understanding of treaties that the judges are called upon to interpret.

The foregoing discussion makes clear, even before examining concrete examples, that managing duplication of claims, competing jurisdictions, and conflicting jurisprudence is a formidable yet feasible task. In addition to careful consideration and deployment of the arsenal of options, flexibility and open-mindedness are required. Judges need to view the international judicial enterprise as part of a collective effort that takes place within a connected international

⁹² See Schwebel, Address to the Plenary Session of the General Assembly (cited in note 33); Guillaume, Speech to the Sixth Committee of the General Assembly (cited in note 34). See also Louis B. Sohn, *Broadening the Advisory Jurisdiction of the ICJ*, 77 Am J Intl L 124 (1983).

⁹³ See Sohn, 77 Am J Intl L at 125 (cited in note 92).

legal system. This system depends on coherence and consistency in order to regulate international society effectively.

III. CHALLENGES FOR THE INTERNATIONAL JUDGE: MULTIPLE INSTITUTION ENGAGEMENT AND COMPETING JURISDICTIONS

The existence of so many courts and tribunals gives their consumers choices. Some see that choice as encouraging forum shopping,⁹⁴ which they see as a bad thing. They reason that so long as tribunals with competing jurisdiction continue to exist, the parties may find themselves spending unnecessary time and resources arguing in different courts and tribunals about which forum is more appropriate for the resolution of the dispute. Judge Gilbert Guillaume, a former President of the ICJ, has argued that justice should not be based on the law of the marketplace, that there are distorting effects of forum shopping.⁹⁵ Judge Guillaume underlined the risk of international judges being drawn into the marketplace:

Every judicial body tends—whether or not consciously—to assess its importance by reference to the frequency with which it is seised. Certain courts could, as a result, be led to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. Such a development would be profoundly damaging to international justice. The law of the marketplace, under the pressure of the media, cannot be the law of justice.⁹⁶

We see such concerns about forum shopping as exaggerated. If there are a range of options from the start, the parties will have to choose. Parties may consider different factors in choosing the most appropriate forum, ranging from the favorability of the applicable law of the forum to tactical considerations that might give them an upper hand over the other side. Practical issues are also relevant to the parties, including access to the court or tribunal, the procedural rules, the court's composition, its case law, or even its power to offer emergency interlocutory or provisional measures. These are, of course, considerations that are also relevant to potential litigants in the domestic sphere. They are all rational

⁹⁴ Consider Andrew S. Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford 2003).

⁹⁵ Gilbert Guillaume, Address to the United Nations General Assembly (Oct 26, 2000), available online at <<http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1>> (visited Dec 5, 2008); Gilbert Guillaume, *The Proliferation of International Bodies: The Outlook for the International Legal Order*, Address to the Sixth Committee of the UNGA (Oct 27, 2007) available online at <<http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>> (visited Dec 5, 2008).

⁹⁶ Gilbert Guillaume, Speech at the University of Cambridge, Lauterpacht Research Centre for International Law 13 (Nov 9, 2001), available online at <<http://www.lcil.cam.ac.uk/Media/lectures/doc/Guillaume.doc>> (visited Dec 5, 2008).

and logical considerations, and there is nothing improper about them. They are, like it or not, considerations of the marketplace. Sometimes, lodging complaints before multiple jurisdictions is not an attempt to seek a peaceful resolution of the dispute. Aggressive litigation of this kind may be a strategic effort to open new front lines of battle and intimidate one's adversary. It can also be about deliberately seeking to play to a local or wider audience, by creating the impression of being the wronged party.

Sometimes, treaties themselves set up potential conflicts of jurisdiction. We see this in Article 287 of UNCLOS, which requires the parties to choose from four international dispute-resolution bodies: the International Tribunal for the Law of the Sea ("ITLOS"), the ICJ, an arbitral tribunal constituted in accordance with Annex VII of the treaty, and a special arbitral tribunal constituted in accordance with Annex VII for one or more of the categories of disputes specified therein.⁹⁷ The only guidance for resolving overlapping and conflicting jurisdictions appears to be in Article 282, which envisages that states in dispute can agree, through a general, regional or bilateral agreement or otherwise, that their dispute be submitted to a procedure that entails a binding decision, and that such procedure shall apply in lieu of the procedures provided for in Article 287.⁹⁸ This, however, is easier said than done. The arbitral panel in one of the cases examined later in this study, the *Southern Bluefin Tuna Case*,⁹⁹ held that the UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions.¹⁰⁰ This is because there are provisions within the UNCLOS itself that permit states to refuse to submit to otherwise compulsory dispute-resolution mechanisms in certain situations.¹⁰¹

There is some confusion in the literature and we believe it is necessary to distinguish three situations: first, a court or tribunal being simply "seized" of a matter; second, a court or tribunal taking interim jurisdiction where there is a request for emergency measures pending resolution of the dispute itself; and, third, a court or tribunal determining that it has jurisdiction to hear the merits of the case. The mere fact that there are complaints lodged at different institutions by the parties does not equate with a conflict of jurisdiction. Several institutions can be seized, but at this early stage, conflict is merely *potential*. Until the courts or tribunals accept that they really do have jurisdiction over the same dispute, there is no conflict as such. When they do find that they have jurisdiction the potential conflict becomes an *actual* conflict of jurisdiction.

⁹⁷ UNCLOS, art 287.

⁹⁸ Id, art 282.

⁹⁹ See Section III.D below for further discussion of this case.

¹⁰⁰ *Southern Bluefin Tuna Case*, 39 ILM at 1359, ¶ 62.

¹⁰¹ For instance, disputes relating to coastal water. See UNCLOS, art 297(3).

Furthermore, the fact that different courts and tribunals are seized of different issues arising out of a single situation, or a connected series of events, does not mean there is a conflict of jurisdiction. The cases that are usually cited as examples of conflicts of jurisdiction actually involve different courts looking at different aspects of a single situation, with the claims founded in different normative bases. This is not to say that the exact same complaint is not sometimes lodged with different bodies. This happens quite frequently in the human rights arena, which is heavily populated with courts, tribunals, and quasi-judicial bodies. They have all developed rules on admissibility for controlling such situations.¹⁰² The latest example of multiple institutions being engaged has arisen from the ongoing Georgia-Russia conflict over Southern Ossetia and Abkhazia. Both the ICJ and the ECtHR have now become seized of inter-state complaints. One alleges violation of the European Convention on Human Rights (right to life, prohibition of inhuman and degrading treatment, and right to property in Protocol 1),¹⁰³ and the other alleges violation of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, with the right to lodge a complaint of genocide being reserved.¹⁰⁴ Both arise out of the same situation, but they go to different issues arising out of those same unfortunate circumstances. The seizing of the ECtHR and the ICJ does not create a conflict of jurisdiction as such. What exists here can instead be termed a multiple institution engagement (“MIE”) over the situation. This could actually lead to complementary jurisdictions, for together they could ensure that there is full and fair coverage of the dispute. Hence, we prefer to use the term MIE when referring to situations where we deal with different courts and tribunals faced with different disputes arising out of the same situation, and “conflicting jurisdiction” when we refer to situations where the courts and tribunals really have a “conflict” over which of them should exercise jurisdiction over exactly the same dispute arising from the same situation. The merit of this approach lies in the reality that there really are not many “conflicts,” but there are plenty of MIEs, and it is important to distinguish these situations. An MIE is not necessarily a problem, but a conflict between judicial bodies over jurisdiction is.

¹⁰² See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U Pa L Rev 285, 308 (1999) (analyzing the consequences of this diversity).

¹⁰³ See European Court of Human Rights, Press Release, *European Court of Human Rights Grants Request for Interim Measures* (Aug 12, 2008), available online at <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=839100&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> (visited Dec 5, 2008).

¹⁰⁴ See International Court of Justice, Press Release, *Georgia Institutes Proceedings against Russia for Violation of the Convention on the Elimination of All Forms of Racial Discrimination*, available online at <<http://www.icj-cij.org/docket/files/140/14659.pdf>> (visited Dec 5, 2008).

A. THE ICJ AND THE AFRICAN COMMISSION ON HUMAN PEOPLES' RIGHTS

The ICJ and the African Commission on Human Peoples' Rights ("African Commission") were jointly seized through several inter-state complaints arising from the international armed conflict in the Democratic Republic of Congo ("DRC").¹⁰⁵ All the cases were brought by the DRC against Burundi, Rwanda and Uganda. Was this a mere MIE or a genuine conflict of jurisdiction?

Unlike the other regional human rights treaties, the African Charter on Human and Peoples' Rights ("African Charter") allows for consideration of breaches of human rights treaties other than the African Charter.¹⁰⁶ The DRC complaint to the African Commission alleged grave and massive violations of human and peoples' rights committed by the armed forces of Burundi, Rwanda and Uganda since August 2, 1998.¹⁰⁷ It alleged that the respondents committed armed aggression in violation of "fundamental principles that govern friendly relations between States, as stipulated in the Charter of the United Nations and the Organisation of African Unity."¹⁰⁸ In addition to the violation of these provisions, the DRC claimed that the respondents violated certain provisions of the International Covenant on Civil and Political Rights, the Geneva Conventions of August 12, 1949 and of the Additional Protocol on the Protection of Victims of International Armed Conflicts of June 8, 1977.

In The Hague, the DRC's complaints to the ICJ involved overlapping, but not always identical, allegations in separate actions against Burundi, Rwanda, and Uganda. The complaints alleged, among other things, acts of armed aggression committed in flagrant breach of the UN Charter and of the Charter of the

¹⁰⁵ See African Union, *Twentieth Activity Report of the African Commission on Human and Peoples' Rights* (2006) at 112, ¶ 1, available online at <http://www.achpr.org/english/activity_reports/20th%20Activity%20Report.pdf> (visited Dec 5, 2008) ("Communication 227/99–DR Congo/Burundi, Rwanda and Uganda") (for the complaint to the African Commission). For the three complaints filed at the ICJ against Rwanda, Uganda and Burundi, see also International Court of Justice, Application Instituting Proceedings, *Armed Activities on the Territory of the Congo (Congo v Uganda)* (June 23, 1999), available online at <<http://www.icj-cij.org/docket/files/116/7151.pdf>> (visited Dec 5, 2008); International Court of Justice, Application Instituting Proceedings, *Armed Activities on the Territory of the Congo (Congo v Rwanda)* (June 23, 1999), available online at <<http://www.icj-cij.org/docket/files/117/7071.pdf>> (visited Dec 5, 2008); International Court of Justice, Application Instituting Proceedings, *Armed Activities on the Territory of the Congo (Congo v Burundi)* (June 23, 1999), available online at <<http://www.icj-cij.org/docket/files/115/7127.pdf>> (visited Dec 5, 2008).

¹⁰⁶ African Charter on Human and Peoples' Rights (1981), 21 ILM 58, arts 60, 61.

¹⁰⁷ Communication 227/99–DR Congo/Burundi, Rwanda and Uganda at 112, ¶ 2 (cited in note 105).

¹⁰⁸ Id at 114, ¶ 8.

Organization of African Unity (“OAU”).¹⁰⁹ They were also rooted in customary international humanitarian and human rights law, as well as the Geneva Conventions of 1949 and their Additional Protocols of 1977¹¹⁰, the Convention on International Civil Aviation (Chicago Convention) of 1944¹¹¹, the 1970 Hague Convention on the Suppression of Unlawful Seizure of Aircraft¹¹², and the 1971 Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation.¹¹³

The African Commission was the first to issue a decision. Burundi did not appear before the Commission throughout the proceedings; Rwanda refused to appear once the Commission declared the DRC complaint to the Commission admissible.¹¹⁴ The Commission, in its Thirty-third Ordinary Session in May 2003, found all three respondent states had violated numerous provisions of the African Charter and the UN and OAU Charters, as well as the humanitarian law conventions, and ordered the respondents to pay “adequate reparations” to the applicant.¹¹⁵

At the ICJ, the DRC withdrew its case against Burundi and Rwanda on February 1, 2001, but reinstated its claims against Rwanda on May 28, 2002 for “massive, serious and flagrant violations of human rights and of international humanitarian law.”¹¹⁶ However, on February 3, 2006, the court found that it had no jurisdiction to entertain the application filed by the DRC against Rwanda.¹¹⁷ The fact that the matter was pending before the African Commission was not

¹⁰⁹ See *Armed Activities on the Territory of the Congo (Congo v Uganda)*; *Armed Activities on the Territory of the Congo (Congo v Rwanda)*; *Armed Activities on the Territory of the Congo (Congo v Burundi)*.

¹¹⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UN Treaty Ser 31, entered into force Oct 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UN Treaty Ser 85, entered into force Oct 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 UN Treaty Ser 135, entered into force Oct 21, 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UN Treaty Ser 287, entered into force Oct 21, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UN Treaty Ser 3, entered into force Dec 7, 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UN Treaty Ser 609, entered into force Dec 7, 1978.

¹¹¹ 15 UN Treaty Ser 295.

¹¹² 860 UN Treaty Ser 105.

¹¹³ 974 UN Treaty Ser 178.

¹¹⁴ Communication 227/99–DR Congo/Burundi, Rwanda and Uganda, ¶¶ 52, 97 (cited in note 105).

¹¹⁵ *Id.*, ¶ 98.

¹¹⁶ *Case Concerning Armed Activities on the Territory of the Congo (Congo v Rwanda)*, 45 ILM 562, ¶ 1 (2006).

¹¹⁷ *Id.*, ¶ 64.

among the reasons that led to the decision. Thus, only the case against Uganda proceeded to the merits phase at the ICJ. That case against Uganda was decided by the ICJ on its merits on December 19, 2005. The ICJ found that Uganda, through its actions and omissions, had contravened the rules on non-use of force and non-intervention, violated its obligations under international human rights law and international humanitarian law, and was responsible for acts of looting, plundering and exploitation of Congolese natural resources.¹¹⁸ Uganda was obliged to make reparations to the DRC.¹¹⁹

This example of an MIE, which did involve overlapping claims and sources of law, did not lead to an actual conflict of jurisdiction. This was because the two institutions ignored each other. The ICJ decision, coming some two years after the decision of the African Commission, was silent on the involvement of the Commission. However, the ICJ had informed the organs responsible for supervising the implementation of treaties invoked in the dispute (or under whose auspices the conventions were adopted) according to Article 69, paragraph 3, of the rules of the court and Article 34(3) of its Statute.¹²⁰ However, none of these organizations presented written observations.¹²¹ At the African Commission, the MIE situation was raised during the proceedings. Rwanda and Uganda had, in their pleadings, referred to the ongoing litigation at the ICJ and the involvement of other international political bodies as grounds for discontinuation of the claims against them. Rwanda alleged that the African Commission itself had not respected its own Rules of Procedure as “the matters addressed by the communication were pending before competent authorities of the Organization of African Unity and other international bodies like the UN Security Council and ECOSOC.”¹²² Uganda did raise the issue of the complaints lodged by the DRC at several other venues, such as the UN Security Council, the ICJ, the Lusaka Initiative, and the OAU. It described this as presenting a “dilemma to the conduct of international affairs . . . and adjudication” for undermining the the credibility of these institutions and raising the risk of divergent opinions.¹²³ Uganda also wanted the Commission to take note of the

¹¹⁸ Id.

¹¹⁹ Id., ¶ 259.

¹²⁰ See Communication 227/99–DR Congo/Burundi, Rwanda and Uganda, ¶ 13 (cited in note 105). Article 34(3) of the ICJ Statute provides that: “Whenever the construction of the constitutive instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization so concerned and shall communicate to it copies of all the written proceedings.”

¹²¹ *Case Concerning Armed Activities on the Territory of the Congo*, 45 ILM 562.

¹²² Communication 227/99–DR Congo/Burundi, Rwanda and Uganda 116, ¶ 22 (cited in note 105).

¹²³ Id at 118, ¶ 34.

DRC's failure to persuade the ICJ to order it (Uganda) to unconditionally withdraw its troops from the territories it had occupied. Uganda also argued, since the facts complained of by the DRC were pending before the ICJ, that consideration of the Communication by the Commission would prejudice the court hearing. In no part of its decision did the Commission address these complaints or discuss the ICJ proceedings.

This situation of partly competing jurisdiction, therefore, led to two decisions against Uganda. They related to the same facts, and cited some of the same legal norms. The authors do not have any information that the decisions were ever implemented. It is in this area of enforcement that the issue of overlap will become critical. Here, Uganda would, if it complied with both decisions, have had to give double reparation to Rwanda for the same acts.

B. THE MOX PLANT CASE

The *MOX Plant Case (Ireland v United Kingdom)* saw the involvement of four different judicial/quasi-judicial bodies seized of the matter of pollution by the British nuclear waste processing plant at Sellafield in Cumbria, along the Irish Sea.

1. ITLOS, the UNCLOS Arbitral Tribunal, and the ECJ

Ireland lodged its complaint against the UK under the UNCLOS on October 25, 2001.¹²⁴ This dispute first had to go to the ITLOS for determination of a provisional measures application, before eventually being referred to an arbitral tribunal, since neither party chose a forum under Annex VII, Article 287(5) of the UNCLOS.¹²⁵

The ITLOS ascertained that an UNCLOS panel would be able to exercise *prima facie* jurisdiction, which was necessary for the ITLOS to be able to consider the provisional measures requested; it issued an order for provisional measures on December 3, 2001.¹²⁶ This was not a definitive finding of jurisdiction, but was as far as a decisionmaker in the position of ITLOS could go. *Prima facie* jurisdiction was all that was needed at this stage, and ITLOS could not usurp the role of the tribunal seized with the merits of the case to conduct a full and complete examination of jurisdiction.

¹²⁴ *MOX Plant Case (Ireland v UK)*, 42 ILM 1187 (Perm Ct Arb 2003).

¹²⁵ UNCLOS, art 287(5).

¹²⁶ See *MOX Plant Case (Ireland v UK)*, Request for Provisional Measures, ¶ 62 (ITLOS Dec 3, 2001), available online at <http://www.itlos.org/case_documents/2001/document_en_191.pdf> (visited Dec 5, 2008).

The Annex VII arbitral tribunal itself was later duly constituted in February 2002, and hearings were held in 2003.¹²⁷ The tribunal accepted that it had prima facie jurisdiction over the matter, but that was not enough to deal with the merits.¹²⁸ The tribunal had doubts about whether it had that jurisdiction in a “definitive sense.”¹²⁹ Under Article 292 of the European Communities Treaty (“EC Treaty”), all disputes between European Community (“EC”) member states involving community law must be brought exclusively to the ECJ.¹³⁰ Oral and written pleadings, notably from the UK, had left the tribunal concerned about several related issues. Specifically, there arose doubts about the standing of Ireland to institute these proceedings and the standing of the UK to respond, as well as the division of competences between the EC (both Ireland and the UK being member states) and its member states in respect of UNCLOS. The tribunal was also concerned about a statement of the Commission of the European Communities in the European Parliament which indicated that proceedings were being considered against Ireland under Article 292 of the EC Treaty for bringing the case against the UK under UNCLOS. The tribunal’s doubts about its jurisdiction were also exacerbated by concerns about the extent to which provisions and instruments invoked by the parties could properly be relied upon, as well as the matters which, by agreement of the parties, were subject to the exclusive jurisdiction of the ECJ under EC law. It was not that the ECJ clearly had jurisdiction, but the possibility that it had such jurisdiction left the UNCLOS panel in doubt about whether it had sufficient grounds to exercise its own jurisdiction.

Neither state argued that the MOX dispute in its entirety fell within the exclusive competence of the ECJ, but the panel took an extremely cautious view that it could not be said “with certainty that this view would be rejected by the European Court of Justice.”¹³¹ There was also no certainty that the view would be accepted. It appears that the panel had already made up its mind to “wait and see” and was putting together the arguments to reach the desired conclusion. The two states agreed that if the ECJ were to determine that it had exclusive competence, this would preclude the jurisdiction of the panel entirely, by virtue of Article 282 of the UNCLOS.¹³² There was also the possibility that the ECJ

¹²⁷ *MOX Plant Case*, 42 ILM 1187, ¶¶ 1, 8.

¹²⁸ *Id.*, ¶ 14.

¹²⁹ *Id.*, ¶ 25 (emphasis added).

¹³⁰ See Treaty Establishing the European Economic Community (1958), art 292, 298 UN Treaty Ser 11 (“Rome Treaty” as amended).

¹³¹ *MOX Plant Case*, 42 ILM 1187, ¶ 22.

¹³² *Id.*

could find it had exclusive jurisdiction over only part of the dispute. It was not clear to the panel

at this stage that the Parties are able to identify with any certainty what such provisions might be; and the Tribunal is in no better position. For another, there is no certainty that any such provisions would in fact give rise to a self-contained and distinct dispute capable of being resolved by the Tribunal.¹³³

All these issues caused the UNCLOS panel, which already accepted that it had *prima facie* jurisdiction, to stay the case rather than proceed to the merits.¹³⁴ In effect, the panel deferred to the European Court, allowing that court to take the lead in deciding the issue of jurisdiction, but reserving its own position. The reasons for this deference appear to be rooted in what the panel described as “considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States.”¹³⁵ The stay was only until the ECJ decided on the issue of jurisdiction, or until the UNCLOS tribunal decided otherwise.

The European Commission did institute an action against Ireland before the ECJ, which found that it had indeed breached its treaty obligations, both under Article 292 of the EC Treaty and Article 193 of the Euroatom Treaty, which gave exclusive jurisdiction to the ECJ on disputes relating to matters that form part of the community legal order.¹³⁶ The court observed that *certain* provisions of the UNCLOS formed part of the Community’s legal order and that it had jurisdiction to determine disputes on their interpretation and application. In other words, it had exclusive jurisdiction over *most* of the dispute under EC law, which includes certain provisions of the UNCLOS (with the exception of Article 123, most of the Irish claim was based on Part XII of the UNCLOS).¹³⁷ According to the ECJ, “the Convention provisions on the prevention of marine pollution relied on by Ireland, which clearly cover a significant part of the dispute relating to *MOX Plant* come within the scope of Community competence which the Community has elected to exercise by becoming a party to the Convention.”¹³⁸ The UNCLOS was able to be considered part of EC law because the EC itself was a party to the treaty.¹³⁹ Consequently, these were rules

¹³³ *Id.*, ¶ 26.

¹³⁴ *Id.* See also *MOX Plant Case (Ireland v UK)*, Order No 4, Further Suspension of Proceedings on Jurisdiction and Merits, available online at <http://www.pca-cpa.org/showfile.asp?fil_id=73> (visited Dec 5, 2008).

¹³⁵ *MOX Plant Case*, 42 ILM 1187, ¶ 28.

¹³⁶ *Commission of the European Communities v Ireland*, Case 459/03, 2006 ECR I-4635, ¶ 152 (May 30, 2006).

¹³⁷ *Id.*, ¶ 88.

¹³⁸ *Id.*, ¶ 120.

¹³⁹ See UNCLOS, annex IX.

which formed part of the Community legal order, and the court had “jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State’s compliance with them.”¹⁴⁰

2. The OSPAR Tribunal

Ireland initiated parallel proceedings under the Convention for the Protection of the Marine Environment of the North East Atlantic (“OSPAR”).¹⁴¹ Article 32 of that convention provides for dispute resolution by way of arbitration.¹⁴² Ireland sought, citing Article 9(2) of the OSPAR convention, to obtain information on the operation of the MOX Plant (OSPAR makes it possible for a state to demand information “on the state of the maritime area, on activities or measures adversely affecting or likely to affect it”).¹⁴³

The OSPAR tribunal established its jurisdiction and, unlike the UNCLOS tribunal, dealt with the merits of the case. There was no competing jurisdiction with the UNCLOS tribunal, which did not cover the issue of information pursued in this matter, or with EC law, both because the EU was not a party to the treaty, and because this was not a treaty considered part of the Community legal order. Both jurisdictional issues and the merits of the dispute were discussed in the Final Award of July 2, 2003, one month after the UNCLOS tribunal had decided to stay proceedings and three full years before the ECJ issued its decision on jurisdiction.¹⁴⁴ The tribunal observed that the “OSPAR Convention contains a particular and self-contained dispute-resolution mechanism in Article 32, in accordance with which this Tribunal acts.”¹⁴⁵ The issue of jurisdiction was resolved by virtue of the evidence presented, as well as by considering Article 32. There was no issue of prima facie jurisdiction; this ruling was about definitive jurisdiction. The issue of EC legislation was not considered; the UK only raised the argument that its institutional framework was sufficient to prevent the jurisdiction of the panel. The panel rejected that claim and proceeded to the merits. The tribunal then held that the class of information being sought by Ireland did not fall within the scope of Article 9(2). It found

¹⁴⁰ *Commission of the European Communities v Ireland*, 2006 ECR I-4635, ¶ 121.

¹⁴¹ See *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)*, 42 ILM 1118, ¶ 1 (2003).

¹⁴² Convention for the Protection the Marine Environment of the Northern Atlantic (1992), 32 ILM 1069, art 32.

¹⁴³ *Id.*, art 9(2).

¹⁴⁴ *Dispute Concerning Access to Information under Article 9*, 42 ILM 1118.

¹⁴⁵ *Id.*, ¶ 143.

that the UK had not violated its obligation under the OSPAR Convention by not disclosing information about the operation of the MOX Plant to Ireland.

Looking at the proceedings as a whole is instructive. Ireland triggered the UNCLOS dispute-settlement procedure on October 25, 2001.¹⁴⁶ Those proceedings were suspended from June 24, 2003 until June 6, 2008, with the two parties submitting periodic reports in accordance with the panel's earlier decisions.¹⁴⁷ The panel terminated the proceedings some two years after the ECJ decision and only after the withdrawal, by Ireland, of its claim against the UK.¹⁴⁸ It never decided to defer its prima facie jurisdiction to that of the ECJ; it only suspended proceedings, and terminated after the parties withdrew. The OSPAR arbitration commenced on June 18, 2001, but unlike the UNCLOS tribunal, the OSPAR tribunal was able to decide the issue brought to it (on July 2, 2003). Critical observers could understandably see the UNCLOS process as seven unnecessarily wasted years. Those of less-critical disposition could, on the other hand, see that even if unintentional, the staying of proceedings created a space within which the parties could engage in dialogue. This was so successful that to date Ireland has not resorted to using legal mechanisms to reinstate this claim against the UK. Ireland now participates in various collaborative mechanisms with the UK. At the time of writing, it appears that the Sellafield plant is being defuelled and partially decommissioned.¹⁴⁹

The MIE arising from the *MOX Plant Case* falls within the category of jurisdictional disputes that Lowe would categorize as general-specific (involving what he sees as jurisdictional competition between courts of general and specific jurisdiction). Lowe believes that this kind of overlap could be solved within the framework of the Vienna Convention.¹⁵⁰ For him, the first consideration is whether one agreement has modified the application of the other.¹⁵¹ While Lowe doubts there could be two treaties that give exclusive jurisdiction to two different tribunals, he nonetheless concedes the possibility of there being one treaty which gives an exclusive jurisdiction to a particular body, and another

¹⁴⁶ *MOX Plant Case (Ireland v UK)*, Request for Provisional Measures, preamble.

¹⁴⁷ *MOX Plant Case (Ireland v UK)*, Order No 6: Termination of Proceedings, available online at <<http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf>> (visited Dec 5, 2008).

¹⁴⁸ *Id.*

¹⁴⁹ See the website of the Nuclear Decommissioning Authority, available online at <<http://www.nda.gov.uk/sites/sellafield/>> (visited Dec 5, 2008).

¹⁵⁰ Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 *Austl YB Intl L* 191, 193–94 (1999).

¹⁵¹ *Id.* at 193.

treaty being non-specific.¹⁵² Under such circumstances, the operation of the principle of *lex specialis generalibus derogat* modifies the relationship between both treaties.¹⁵³ Based on the operation of this maxim, Lowe argues that “the tribunal of general jurisdiction must decline to accept the case, because the parties are legally bound to refer the case to another tribunal.”¹⁵⁴ As a matter of principle, the parties’ original intentions should be given precedence. However, there is no hard rule that forces judicial bodies to abdicate their jurisdiction in favor of another. In the *MOX Plant Case*, the ECJ did not have exclusive jurisdiction over the entire dispute, and there remained a residual role for the UNCLOS panel.

The UNCLOS arbitrators did not need to suspend the proceedings and adopt a wait-and-see approach that essentially deferred to the ECJ. They could have taken the view that *prima facie* jurisdiction was sufficient to deal with the case on its merits. They could also have taken the view that they could not exercise jurisdiction when jurisdiction had not been “firmly established.” In the *Chorzów Factory* decision, the PCIJ took the position that the court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competence to give way unless confronted with a jurisdictional clause which it considers “sufficiently clear” to prevent the possibility of negative conflict jurisdiction involving the danger of a denial of justice.¹⁵⁵ This same court, in the same case, laid down the general principle for asserting jurisdiction in a positive sense:

When considering whether it has jurisdiction or not, the Court’s aim is to always ascertain whether an *intention* on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when . . . this intention can be demonstrated in a manner convincing to the Court.¹⁵⁶

The court’s dictum here clearly indicates when a court may relinquish its jurisdiction (negative sense) and when it can assert its jurisdiction (positive sense). Nonetheless, when it comes to the negative sense, the standard of “sufficiently clear” is obviously lower than the “firmly established” standard used in the *MOX Plant Case* by the arbitral panel (the *prima facie* standard of the ITLOS itself was predetermined by Article 290(5) of the UNCLOS). The UNCLOS panel, to be satisfied of having jurisdiction in a “definitive sense,” required that its own jurisdiction be “firmly established” or that it be “firmly

¹⁵² Id at 194.

¹⁵³ Id at 195.

¹⁵⁴ Id.

¹⁵⁵ *Case Concerning the Factory at Chorzów (Ger v Pol)*, 1927 PCIJ (ser A) no 9 at 30 (July 26, 1927), available online at <http://www.icj-cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf> (visited Dec 5, 2008).

¹⁵⁶ Id at 32 (emphasis added).

established” that another tribunal had exclusive jurisdiction. Following this line of reasoning, a court or tribunal that is not convinced of its jurisdiction should be free to adopt the wait-and-see approach or decline to exercise jurisdiction. If there is a situation of two courts with nonexclusive jurisdiction (Lowe’s general-general category), then any overlap could be resolved using some of the tools suggested above, such as “substantial connection” and *lex specialis*.¹⁵⁷

This tribunal clearly sensed a major dispute over jurisdiction on the horizon; they also saw the risk of a conflict of jurisprudence.¹⁵⁸ The fact that “considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States” came to be considered as relevant in the decision to suspend reveals that the panel was considering the overall impact of such a conflict on the international system of dispute resolution.¹⁵⁹ This suggests recognition that international law is the cement of the international system, and that international judges, as major actors in that international system, should not be territorial and competitive about the exercise of jurisdiction. They should instead grasp their important role in maintaining a degree of coherence within this system.

The OSPAR panel’s approach was clearly different from that employed by the UNCLOS panel. Here was a panel that held that “the first duty of the Tribunal is to apply OSPAR.”¹⁶⁰ It made no distinction between *prima facie* jurisdiction and “firmly established” jurisdiction; the question was whether the panel had jurisdiction, and this question was answered in the affirmative. The particular circumstances, with no foreseeable MIE, allowed for a straightforward process. The seriousness of the matter being litigated was also very different: both cases concerned the alleged breach of a treaty, but the case before UNCLOS concerned the claim of a serious breach of the treaty arising from alleged pollution, while the OSPAR matter was about alleged failure to provide information pursuant to the treaty (presumably such information was sought with a view to facilitating the UNCLOS proceedings).

C. THE *SWORDFISH CASE*

The ITLOS can have competing jurisdiction with the WTO Dispute Settlement Body (“DSB”). We see this well illustrated in the *Swordfish Case (Chile*

¹⁵⁷ Section III.D below returns to this point of the standard for exercise of jurisdiction when it examines the *Southern Bluefin Tuna* dispute.

¹⁵⁸ *MOX Plant Case*, 42 ILM 1187.

¹⁵⁹ *Id.*, ¶ 28.

¹⁶⁰ *Dispute Concerning Access to Information under Article*, 42 ILM 1118, ¶ 84.

v European Community).¹⁶¹ The case concerned Chile's closing of its ports to certain EU (primarily Spanish) ships because Chile considered the fishing of swordfish to be a violation of relevant provisions of the UNCLOS. Chile's actions prevented swordfish-carrying boats not only from accessing ports, but also from storing and transferring to other boats. After the parties failed to settle the dispute amicably, they both took their cases to different tribunals: Chile took the matter to the ITLOS complaining about violation of the UNCLOS, and the EU went to the WTO citing violation of trading rules laid down in the GATT.¹⁶² The *Swordfish Case* was therefore about each party going to a different court, complaining about a violation of a different treaty. One party argued that the dispute was about environmental issues, while the other argued that it was about international trade rules. The dispute, therefore, was not about conflicting jurisdiction but about MIE.

At the WTO, the EU claimed that the Chilean prohibition on unloading of swordfish in its ports under Article 165 of its Fisheries Law was inconsistent with GATT's Article V.¹⁶³ This provision provides for freedom of transit for goods through the territory of each contracting party on their way to or from other contracting parties. The EU also invoked GATT Article XI, which prohibits quantitative restrictions on imports or exports, subject to some exceptions for imports of agricultural or fisheries products.¹⁶⁴

At the ITLOS, Chile complained about the EU's conduct, citing UNCLOS Articles 64 (calling for cooperation in ensuring conservation of highly migratory species), 116–19 (relating to conservation of the living resources of the high seas), 297 (concerning dispute settlement), and 300 (calling for good faith and no abuse of right).¹⁶⁵ Chile further claimed that the EU failed to enact and enforce substantive conservation measures on its vessels fishing in the area pursuant to Articles 116 and 119 of the UNCLOS.¹⁶⁶ It alleged that the EU did not report its swordfish catch to the relevant organization, and that it failed to cooperate with the coastal state (Chile) in ensuring the conservation of highly migratory

¹⁶¹ See *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v EC)*, 40 ILM 475 (ITLOS 2000).

¹⁶² See World Trade Organization, Request for Establishment of a Panel by the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WTO Doc No WT/DS193/2 (Nov 7, 2000).

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ ITLOS, *Case Concerning the Conservation of and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/EU)*, Constitution of Chamber, Order, ¶ 2(3)d (Dec 20, 2000).

¹⁶⁶ *Id.*, ¶ 2(3)(a).

species.¹⁶⁷ In response to Chile's allegations, the EU asked for a finding that Chile violated UNCLOS Articles 64, 116–19, 300, 87 (on freedom of the high seas including freedom of fishing, subject to conservation obligations), and 89 (prohibiting any state from subjecting any part of the high seas to its sovereignty).¹⁶⁸

Before either panel could deal with the issue of jurisdiction, both parties reached a provisional agreement and suspended proceedings.¹⁶⁹ Both parties undertook to resume bilateral cooperation on the matter, although proceedings may be reactivated if that fails. The ITLOS Special Chamber, in its order of December 29, 2005, upon the written request of the parties, authorized suspension of the proceeding for two more years.¹⁷⁰ A similar decision was also made by the WTO DSB on March 23, 2001, with the EU reserving the right to revive the proceedings at any time.¹⁷¹ This is, therefore, still a live matter.

The *Swordfish Case* reveals the dangers of specialized courts that are constructed as if they operate within hermetically sealed regimes of law. It reveals the fallacy of such an understanding in an increasingly interdependent legal world. The *Swordfish Case* involved genuine disputes over international trade rules and environmental protection arising out of commercial fishing for the swordfish of the southeastern Pacific Ocean. Looking at this matter in a compartmentalized way is artificial and highly problematic. We believe that were it ever to revert back to dispute settlement procedures, the dispute should be considered by a court with general jurisdiction, which would be able to examine the dispute in its entirety. In an ideal world, the disputes should be withdrawn from the tribunals already seized, and referred to the ICJ by Spain and Chile through an agreement (*compromis*). Nevertheless, we see again the problem of specialized courts with narrow subject matter jurisdictions. While the UNCLOS requires compulsory dispute settlement but allows a range of options including referral to the ICJ, the WTO Agreement only permits dispute settlement under its auspices. The WTO's dispute settlement procedure binds disputing parties to a set procedure. A dispute may ultimately end up before the Appellate Body, but at no stage does such a dispute go outside the WTO. Arbitration is encouraged,

¹⁶⁷ Id., ¶ 2(3)(b).

¹⁶⁸ Id., ¶ 2(3)(e)–(g).

¹⁶⁹ See World Trade Organization, Arrangement between European Communities and Chile, Communication from the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WTO Doc No WT/DS193/3 (Apr 6, 2001).

¹⁷⁰ See *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v EC)*, Case No 7, Order 2005/1 (ITLOS Dec 29, 2005).

¹⁷¹ See World Trade Organization, Arrangement between European Communities and Chile, Communication from the European Communities, Addendum 3, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WTO Doc No WT/DS193/3/Add.3 (Dec 22, 2005).

but under Article 25(1) of the Dispute Settlement Understanding (“DSU”), and has to be used in the WTO context. Thus, while a *compromis* referral to the ICJ may work in other disputes, no trade dispute that involves member states of the WTO can go outside that body. The rigidity of the WTO dispute settlement regime may mean that the parties just have to pursue parallel litigation in different courts and tribunals where the disputes impact areas other than international trade.

It seems logical that if jurisdiction of a court or tribunal is made exclusive by its controlling treaty (as with the EC Treaty in the ECJ’s *MOX Plant* judgment), then that body should indeed take jurisdiction over those matters. However, in the *Swordfish Case*, there were issues over which both tribunals seemed to have jurisdiction. For example, both tribunals would seem to have equal jurisdiction to decide on matters relating to access to fishing vessels and on the justifiability of the environmental protection measures taken by Chile. Lowe offers another way of looking at this: if two specialized courts have jurisdiction on matters arising from the same fact, both courts should be allowed to exercise jurisdiction by virtue of the principle of *lex specialis*.¹⁷² He stresses,

In such a case the two jurisdictions would not overlap—and any argument that they might overlap would fall in the face of the *lex specialis* principle, which plainly requires the GATT disputes go to the WTO and the Law of the Sea dispute to go to the ITLOS. The claims would not overlap, even though they spring from the same facts.¹⁷³

On the other hand, however, it is entirely possible that a decision by one of the tribunals might make compliance with the decision of the other tribunal difficult, if not impossible.

Another possibility for resolution of the problem of competing jurisdiction would be for one of the two bodies to be granted jurisdiction to hear disputes raised before the other. For example, the WTO could deal with matters of the UNCLOS or the UNCLOS panel could deal with WTO matters. Theoretically, if the parties agreed, they could refer the entire dispute to that institution. However, things are not that simple. UNCLOS panels cannot deal with disputes concerning anything but UNCLOS.¹⁷⁴ At the WTO, the UNCLOS is not one of the treaties listed in Annex II (Appendix I and II) of the DSU as a multilateral treaty that can be considered under that procedure.¹⁷⁵ The DSB is empowered, in Article 3(2), only to clarify the existing provisions of accepted agreements “in

¹⁷² See Lowe, 20 *Austl YB Intl L* at 203 (cited in note 150).

¹⁷³ *Id.*

¹⁷⁴ UNCLOS, art 288.

¹⁷⁵ DSU, Annex 2.

accordance with customary rules of interpretation of public international law.”¹⁷⁶ This speaks to treaty interpretation and is obviously not *carte blanche* to import in a treaty such as the UNCLOS. However, rules of treaty interpretation do allow for reference to the other international legal obligations of the state.¹⁷⁷ Specifically, these rules provide that the decisionmaker, in interpreting the treaty, is to consider, along with the context, a number of issues that include “any relevant rules of international law applicable in the relations between the parties.”¹⁷⁸ A treaty such as the UNCLOS could arguably fall into the category of rules of international law to be considered. The recently completed ILC project on Fragmentation of International Law explored at length the possible use of this Vienna Convention rule, and examined the practice across various international judicial bodies.¹⁷⁹ It concluded that “when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”¹⁸⁰ It referred to this principle of interpretation as a principle of harmonization.¹⁸¹ For the ILC:

International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.¹⁸²

This soaring rhetoric is unlikely to stand a chance in the face of fierce competition between diverse interests operating in the different regimes of international law. We should not exaggerate, however; sometimes such competition may boil down to turf wars between the high priests of the various subsystems of international law.¹⁸³

¹⁷⁶ Id, art 3(2).

¹⁷⁷ Vienna Convention (1969), art 31(3).

¹⁷⁸ Id, art 31 (3) (c)

¹⁷⁹ ILC Report on Fragmentation at 88, ¶ 167, n 223 (cited in note 24).

¹⁸⁰ Id at 9, ¶ 4.

¹⁸¹ Id.

¹⁸² Id at 1, ¶ 1.

¹⁸³ A representative example is the “Alston-Petersmann controversy,” so called after the heated debate between the two scholars, both apparently rooted in and representing the human rights regime and the trade regime, respectively. Compare Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 Eur J Intl L 815 (2002), with Ernst-Ulrich Petersmann, *Taking Dignity, Rights, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 Eur J Intl L 845 (2002).

D. THE SOUTHERN BLUEFIN TUNA CASE

Another important and familiar situation that resulted in MIE is the *Southern Bluefin Tuna Case* between Australia, New Zealand, and Japan.¹⁸⁴ The case involved exploitation of, and conservation measures to protect, bluefin tuna in the oceans of the southern hemisphere (“SBT”). This species of fish is included in the list of highly migratory species set out in Annex I of the UNCLOS.¹⁸⁵ In 1982, Australia, New Zealand and Japan started informally to manage the catching of the SBT.¹⁸⁶ In 1993, the parties replaced their pre-existing arrangement with the Convention for the Preservation of Southern Bluefin Tuna (“SBT Treaty”), in which they agreed to protect these fish.¹⁸⁷ The SBT Treaty established the Commission for the Conservation of the Southern Bluefin Tuna (“CCSBT”). The CCSBT’s main function is to decide upon measures for the management of the SBT such as total allowable catch, the amount that each state may catch (national allocation) and additional measures.¹⁸⁸

In the late 1990s, however, Japan sought to increase the catch limit because of the improved fish stock situation, and to that end, recommended experimental fishing. Australia and New Zealand suggested an alternative procedure. With no agreement on how to proceed, Japan unilaterally began what it called an Experimental Fishing Program. The pilot project took place between July 10 and August 31, 1998, catching 1,464 tons in addition to that year’s national quota.¹⁸⁹ Australia and New Zealand challenged the legality of the Japanese action under the SBT Treaty. With a view to resolving the dispute, an ad hoc working group investigating the possibility of carrying out a joint experimental fishing program was established. However, the program failed to resolve the dispute and on June 1, 1999, Japan initiated a broader Experimental Fishing Program.

Australia and New Zealand resorted to dispute settlement. They had two choices: the dispute-settlement procedures of the UNCLOS or an ad hoc arbitral tribunal constituted under Article 16 of the SBT Treaty.¹⁹⁰ As already noted, the UNCLOS itself provides for four types of judicial dispute settlement: the ICJ, the ITLOS, an Arbitral Tribunal constituted in accordance with Annex VII of

¹⁸⁴ *Southern Bluefin Tuna Case*, 39 ILM 1359 (Arbitral Tribunal Constituted under Annex VII of UNCLOS 2000).

¹⁸⁵ UNCLOS, Annex 1.

¹⁸⁶ *Southern Bluefin Tuna Case*, 39 ILM 1359.

¹⁸⁷ Convention for the Preservation of Southern Bluefin Tuna (1994), 1819 UN Treaty Ser 360.

¹⁸⁸ Id, art 8(3)(a)–(b).

¹⁸⁹ *Southern Bluefin Tuna Case*, 39 ILM 1359, ¶ 25.

¹⁹⁰ Convention for the Preservation of Southern Bluefin Tuna, art 16.

the Convention, and a special Arbitral Tribunal constituted in accordance with Annex VIII of the Convention.¹⁹¹ Of the available fora, the applicants opted for arbitration under UNCLOS, alleging that Japan had breached its obligations under Articles 64 and 116–19 of that treaty, and sought interim measures.¹⁹² Some of these UNCLOS provisions were not exclusive to that treaty. In other words, they could also be found in the SBT Treaty.

As in the *MOX Plant Case*, the ITLOS was the first to be engaged. Before it could do anything on the interim measures, the ITLOS had to satisfy itself that there was prima facie jurisdiction for an UNCLOS arbitral panel. For Japan, the dispute was about the interpretation and implementation of the 1993 SBT Treaty, not UNCLOS. Thus, Japan argued, jurisdiction had to be constituted according to Article 16 of the SBT Treaty.¹⁹³ Further, Japan argued that treaty was both *lex posterior* (the later law prevails over the former) and *lex specialis* (the special law prevails over the general) to the UNCLOS.¹⁹⁴ Japan also invoked Article 281 of the UNCLOS, which allows parties to confine the applicability of compulsory procedures to cases where all the parties to the dispute had agreed to submit the dispute to those procedures.¹⁹⁵ The ITLOS found that an UNCLOS panel under Annex VII would prima facie have jurisdiction, and thus it could hear the matter; it ordered the interim measures.¹⁹⁶ Ad hoc Judge Ivan Shearer addressed jurisdiction in a separate decision, going so far as to state that jurisdiction in this matter went “beyond the level of being merely prima facie” and should be “regarded as clearly established.”¹⁹⁷ He observed that the Japanese objection to jurisdiction, on the grounds that this dispute had nothing to do with UNCLOS, was really a matter of justiciability, and argued that in this case the issues of justiciability and jurisdiction were inextricably linked.¹⁹⁸ Ad hoc Judge Shearer viewed Article 16 of the CCSBT as establishing a nonbinding, nonexclusive parallel dispute-resolution procedure to that of the UNCLOS.¹⁹⁹ The dispute was, to him, one arising under the UNCLOS, even if the two

¹⁹¹ See UNCLOS, art 287.

¹⁹² *Southern Bluefin Tuna Case*, Provisional Measures, 38 ILM 1624, ¶¶ 31–32 (ITLOS Aug 27, 1999).

¹⁹³ *Southern Bluefin Tuna Case*, 39 ILM 1359, ¶ 28.

¹⁹⁴ Id, ¶ 38(c).

¹⁹⁵ Id, ¶ 56.

¹⁹⁶ *Southern Bluefin Tuna Case*, Provisional Measures, 38 ILM 1624, ¶ 62.

¹⁹⁷ *Southern Bluefin Tuna Case*, 39 ILM at 1647 (Shearer concurring).

¹⁹⁸ Id.

¹⁹⁹ Id at 1648.

instruments were inherently interlinked.²⁰⁰ Thus, he found the Japanese attempt to separate the dispute into two different baskets was highly artificial.²⁰¹

The case went forward to a duly constituted UNCLOS panel. On August 4, 2000, the majority declined to exercise jurisdiction, persuaded by the Japanese argument that Article 16 of the SBT Treaty was an agreement by the parties to seek the settlement of this particular dispute by peaceful means of their own choice, although it stressed that the dispute between the parties arose both under the UNCLOS and the SBT Treaty.²⁰² It also reversed the prima facie jurisdiction finding of the ITLOS and the interim measures that it ordered. The panel took the position that there was a single dispute arising under both conventions, not two separate disputes.²⁰³ It agreed with Japan that Article 16 of the SBT Treaty itself was an agreement by the parties to seek settlement of the instant dispute by peaceful means within the framework of that treaty.²⁰⁴ The parties should have continued that process rather than resorting to external dispute settlement. Also, the ordinary meaning of Article 16 made it clear that the method of settlement must be based on the consent of all the parties, which was absent in this case.²⁰⁵

This MIE raises the kind of potential “conflict” that Lowe has identified as “specific-specific”: this was a case where two specialized tribunals appeared to have prima facie jurisdiction over the same matter.²⁰⁶ Here, Australia and New Zealand had attempted to resolve their dispute with Japan through the SBT Treaty, including Article 16. It was only after those efforts failed to produce a satisfactory resolution of the dispute that Australia and New Zealand resorted to outside dispute settlement, choosing to do so by way of UNCLOS arbitration. The Annex VII panel forced the parties back into a cycle of fruitless negotiations in the CCSBT, and into a situation where one party was proceeding over the objections of the others. Ad hoc Judge Shearer, in his separate opinion, correctly described this as being essentially circular. In the panel’s view, Article 16 of the SBT Treaty was meant to exclude compulsory jurisdiction.²⁰⁷ Also relevant was the finding that despite the applicability of the UNCLOS to the case, the flexibility of its dispute-settlement procedure was such as to incline the

²⁰⁰ Id.

²⁰¹ Id.

²⁰² Id, ¶ 54.

²⁰³ Id, ¶ 53.

²⁰⁴ Id, ¶ 54.

²⁰⁵ Id, ¶ 57.

²⁰⁶ Lowe, 20 *Austl YB Intl L* at 197 (cited in note 150).

²⁰⁷ *Southern Bluefin Tuna Case*, 39 ILM 1359, ¶ 58.

tribunal to relinquish its jurisdiction in favor of the more rigid dispute settlement mechanisms under the SBT Treaty.²⁰⁸

Sir Keith's divergence from the majority on the issue of jurisdiction provides an example of the use of basic treaty interpretation methodology in addressing an MIE situation. It did not, under his approach, present a conflict of jurisdiction. He spoke of the "parallel and overlapping" treaty obligations, which did not exclude or prejudice each other.²⁰⁹ The key was Article 16 of the SBT Treaty, which he found, using Article 31 of the Vienna Convention, not to exclude any other attempts at dispute resolution, including in relation to the interpretation and application of other treaties.²¹⁰ The "separate set of UNCLOS peaceful settlement obligations exists along with and distinct from the provisions of article 16."²¹¹ He argued that the essential point was that the two treaty regimes (including their settlement procedures) remained distinct; it was not possible to see the two procedures as interchangeable or that one could be read into the other.²¹²

The general principle of *lex specialis* (discussed in Section III.B.2 above) is a possible tool for overcoming such conflicts.²¹³ Here, in support of its no-jurisdiction position, Japan argued that the SBT Treaty was the *lex specialis* over the general provisions of the UNCLOS. The question was, therefore, which treaty was more specific than the other, the potential conflict of jurisdiction being what Lowe describes as specific-specific. In his separate opinion during the ITLOS stage, ad hoc Judge Shearer found it clearly established that the intention of the SBT Treaty was to give effect to the prospective obligations of the parties under the UNCLOS, with respect to the SBT as a highly migratory species.²¹⁴ In the Final Award, the panel acknowledged the support in international law and in the legal systems of states for the application of a *lex specialis* that governs general provisions of an antecedent treaty or statute.²¹⁵ Nevertheless, while the SBT Treaty could be regarded as *lex specialis*, international law and state practice allow for more than one treaty to bear upon

²⁰⁸ Id, ¶ 41(k).

²⁰⁹ Id at 1395 (Keith concurring).

²¹⁰ Id, ¶ 9.

²¹¹ Id at 1395 (Keith concurring).

²¹² Id, ¶ 16.

²¹³ The doctrine has been considered by the ICJ. See Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 240, ¶ 25 (July 8, 1996); Advisory Opinion, *Legal Consequences of the Construction of the Wall*, 2004 ICJ 178, ¶ 106 (July 9, 2004).

²¹⁴ *Southern Bluefin Tuna Case*, 39 ILM at 1647-48 (Shearer concurring).

²¹⁵ Id, ¶ 52.

a particular dispute.²¹⁶ The panel could see no reason why a state may not violate its obligations under more than one treaty; it pointed out that there is often a “parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.”²¹⁷ The panel argued that the conclusion of a more specific implementing convention does not necessarily vacate the obligations imposed by the general framework convention upon the parties to the implementing convention (in this case, UNCLOS would be the framework convention, and the SBT Treaty the implementing convention). The panel cited the example of how the broad provisions concerning the promotion of universal respect for and observance of human rights, and the international obligation to cooperate in the achievement of those purposes found in certain articles of the Charter of the UN, have not been discharged for parties that have ratified international human rights treaties.²¹⁸ To sum up, the *lex specialis* argument did not work in the particular circumstances of this case, but the panel did not exclude the application of the rule altogether. The *lex specialis* rule therefore remains a possible means of resolving conflicts of jurisdiction.

IV. CHALLENGES FOR THE INTERNATIONAL JUDGE: CONFLICTING JURISPRUDENCE

In a system where there is no hierarchy among the burgeoning courts and tribunals and no concept of stare decisis or binding precedent, it is only to be expected that the international judge increasingly faces divergent decisions on the same issue. We feel it is important to draw the distinction between a direct clash of jurisprudence, and divergences that can be attributed to much more pedestrian differences in interpretation and application. Cases of outright conflict are rare. Most cases said to evidence conflicts actually involve divergent interpretations. In its classical sense, as propounded by Wilfred Jenks, conflict exists when joint compliance or simultaneous performance with two different standards is impossible.²¹⁹ According to Jenks, these may “prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them recourse to which would involve a violation of, or failure to comply with, certain requirements of the other.”²²⁰ Jenks was speaking of treaties, but interpretation of treaties or other rules of international law by two or more tribunals could result in a divergent or conflicting conclusion. Divergent

²¹⁶ Id.

²¹⁷ Id.

²¹⁸ Id.

²¹⁹ C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 Brit YB Int L 401, 426 (1953).

²²⁰ Id.

interpretation, although not as provocative as deliberately conflicting interpretation, is something the international judge needs to avoid. But, there may be times when he or she simply cannot avoid the divergence because of error in the earlier decision.

Conflicts of jurisprudence are a much talked-up “result” of the fragmentation of international law in this age of multiple courts and tribunals. Such conflicts are nowhere near as common as the flood of literature warrants. They would not be much of an issue if they were confined to regimes of international law that operate according to their own standards. But confined bodies of law create their own problems. No area of international law can exist in a vacuum; if there were any such area, it could no longer be part of international law. We now have the example of the WTO Appellate Body holding that WTO rules should not be interpreted in clinical isolation from other bodies of international law.²²¹ The ICTY and ICTR illustrate that as the courts develop their own practice and body of jurisprudence, they are less likely to consider the work of other courts, but they continue to base their work on the methodologies and fundamental principles of international law. This approach gives their own work internal consistency, but the outside world may be faced with ICTY and ICTR decisions that conflict with the decisions of other courts and tribunals. When there is a new issue emerging, these tribunals continue to do what they have always done: find the sources of law and identify their content, which can involve consideration of the work of other courts and tribunals. And those works can be inconsistent, requiring the decisionmaker to take a position.

Inconsistencies in international decisions do not arise just because the judges or arbitrators take opposite approaches, but sometimes due to nuances in the treaties that govern the work of courts. For example, decisions under the African Charter can differ from those under the European Convention on Human Rights because of the content of these treaties. The ICTY’s concept of the crime against humanity is different from that of the ICTR.²²² Such nuances in the primary sources of law for the tribunals will lead to differences in interpretation, but the careful international lawyer is usually able to identify the reasons for that divergence, and handle the situation appropriately. It is not always the international judge who is to be blamed. Sometimes, to avoid a *non liquet*, a situation where there is no applicable law, the international judge has to be creative and fill gaps in the law. This remains a controversial position and

²²¹ World Trade Organization, Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc No WT/DS2/AB/R (Apr 29, 1996).

²²² Compare ICTY Statute (1994), art 5, 33 ILM 484 (1994), with ICTR Statute (1994), art 3, 33 ILM 1598 (1994).

process, and can encourage judicial resistance, which can lead to decisions that conflict. As long ago as 1933, Hersch Lauterpacht was writing that judges and arbitrators were actually engaged in a process of evolving the law in the ordinary course of their judicial function, applying it in innovative ways and setting aside rules that were obsolete or unjust.²²³ Some thirty-five years later, then-Assistant Professor Higgins argued that “[t]here is today at least a minimal agreement that judges have a creating function, that adjudication is not a mere, automatic application of existing rules to particular situations. The interpretive function of judges may do much to fill alleged gaps.”²²⁴ That approach was confirmed by the ICJ’s position on Southwest Africa in 1971, which took into account the evolution of international law in regards to non-self-governing territories. Such development made modern law different from that which existed at the time of the creation of South Africa’s mandate.²²⁵ We see contemporary concern about judicial propriety in this area in the post-*Tadic* writings of Judge Shahabuddeen in this matter, including his view that just because judges may separately pronounce on the content of international law does not relieve them “of the need, in doing so, to take account of the desirability of achieving coherence within the same system”; he argues that an international court has a “legal duty to take account of the need for coherence in the whole field.”²²⁶

Be that as it may, conflict or divergence of jurisprudence affects the predictability and certainty required of legal outcomes, and is hardly encouraging for those seeking a clear definition of their legal obligations. In the long term, repeated divergence or conflict erodes the legitimacy of rules and the institutions that apply these rules. International law, not being equipped with an executive to enforce the judgments of its courts, must rely on its soft power to compel. This soft power to compel, among other sources, stems from the legitimacy of its rules and institutions.

A. THE ICC, ICTR, AND ICTY ON WITNESS-PROOFING

Now that the ICC is up and running, it has already started to issue decisions that do not follow practices established at the ICTY and ICTR. This is best illustrated by the dispute over witness-proofing, an issue of international criminal procedure. There is no doubt that ICC decisions do not bind the ICTY and ICTR, and vice versa. The ICC and the two ad hoc tribunals are structured

²²³ Lauterpacht, *The Function of Law* at 344 (cited in note 26).

²²⁴ Rosalyn Higgins, 17 *Intl & Comp L Q* at 68 (cited in note 41)

²²⁵ See Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 ICJ 16 (June 21, 1971).

²²⁶ *Semanza v Prosecutor*, Case No ICTR-97-20-A, Judgment, ¶¶ 27, 29 (May 31, 2000) (Shahabuddeen dissenting).

differently and work to different procedures, with similar yet different subject-matter jurisdictions. What is particularly interesting for present purposes is the way that the courts took different approaches to the issue of proofing witnesses before trial, the judicial dialogue between the tribunals, and the methods that they employed in reaching their decisions.

A practice of witness-proofing has developed at the ICTY and ICTR. These tribunals' respective Statutes and Rules of Procedure are silent on this matter of preparing prosecution witnesses for their testimony in court. There are two aspects to this; the first is uncontroversial, and deals with familiarizing the witness with the proceedings (witness-familiarization). The second is where the controversy arises: reviewing that witness's testimony (witness-proofing), including allowing the witness to read his or her earlier witness statement and pre-testimony interviews. Both practices have been in use for some time, and are accepted by the judges as being necessary for the better administration of justice, but there are not many formal decisions of the Chambers addressing this. One exception arose in the case of *Prosecutor v Limaj*.²²⁷ Here, the Trial Chamber, faced with a defense challenge to the practice of witness-proofing, found that reviewing a witness's evidence prior to testimony was permissible as it could be useful to the entire process. Given the usual length of time between the events charged in the indictment, the original interview of the witness and the oral testimony, the Chamber found that witness-proofing assists the tribunal by providing a detailed review of relevant and irrelevant facts in light of the precise charges against the accused; aids the process of "human recollection"; enables "more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial"; and identifies and puts the defense on notice of differences in the recollection of the witness, thus preventing undue surprise.²²⁸ Such witness-proofing needs to be done in accordance with "clear standards of professional conduct," and cannot amount to coaching the witnesses or manipulation of testimony.²²⁹

Shortly before the first and only witness for the prosecution in the confirmation hearing for the first case before the ICC was due to be heard, the issue of witness-proofing arose at the ICC. Subsequent litigation led to a decision by the Pre-Trial Chamber ("PTC") that, while witness-familiarization was fully in accordance with the ICC's sources of law, witness-proofing, in the

²²⁷ *Prosecutor v Limaj*, Case No IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses (ICTY Dec 10, 2004), available online at <<http://www.un.org/icty/limaj/trialc/decision-e/041210.pdf>> (visited Dec 5, 2008).

²²⁸ Id.

²²⁹ Id.

form identified by the prosecutor, was not.²³⁰ The PTC dismissed the prosecution's assertion that witness-proofing was a "widely accepted practice in international criminal law" as unsupported because most of the cases cited were irrelevant to the issue at hand, and dismissed the one case (*Lima*) that was relevant because it did not "regulate in detail the content of such a practice."²³¹ The PTC also did not find the practice of witness-proofing to be supported in sufficient national jurisdictions to amount to a "general principle of law that can be derived from the national laws of the legal systems of the world" and observed that this practice would in any event directly contravene the ethical and professional standards to which the prosecution had voluntarily committed itself (specifically, Article 705 of the Code of Conduct of the Bar Council of England and Wales).²³²

The PTC's *Prosecutor v Dyilo* decision was directly addressed at both ad hoc tribunals, where two trial chambers delivered decisions within three days of each other (*Prosecutor v Milutinovic*²³³ on December 12, 2006, and *Prosecutor v Karemar*²³⁴ on December 15, 2006). The *Dyilo* decision led to applications by defense counsel for termination of the prosecution's practice of witness-proofing at both the ICTY and ICTR. In *Milutinovic* the ICTY Trial Chamber found that the practice of proofing witnesses was not just widespread and accepted at the tribunals, but also a widespread practice in countries with an adversarial process.²³⁵ There was no doubt that the ICC decision did not bind the ICTY in any way, but the chamber engaged directly with the *Dyilo* decision and was able to distinguish it on three grounds.²³⁶ Firstly, the ICC PTC in *Dyilo* had to consider national laws, some of which admittedly prohibited witness-proofing. This was unlike the situation at the ICTY. Thus, "the process by which the *Dyilo* Chamber came to its decision is not applicable to this Chamber's determination of the issue." Secondly, at the ICTY there were no prosecutorial undertakings of the kind that had been given at the ICC. Thirdly, the circumstances at the ICC, where the *Dyilo* Chamber was dealing with a single witness coming to testify at the pre-trial confirmation hearing of the accused, were "a radically different

²³⁰ *Prosecutor v Dyilo*, Case No ICC-01/04-01/06, Decision on Practices of Witness Familiarisation and Witness Proofing (Nov 8, 2006), available online at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-679_English.pdf> (visited Dec 5, 2008).

²³¹ *Id.*, ¶ 32.

²³² *Id.*, ¶¶ 31–32, 37–41.

²³³ *Prosecutor v Milutinovic*, Case No IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing (ICTY Dec 12, 2006).

²³⁴ *Prosecutor v Karemar*, Case No ICTR-98-44-T, Decision on Defence Motions to Prevent Witness Proofing, ¶ 8 (Dec 15, 2006).

²³⁵ *Prosecutor v Milutinovic*, Case No IT-05-87-T, ¶ 12

²³⁶ *Id.*, ¶¶ 11–17.

situation than that confronted by ICTY on a daily basis for the last thirteen years.” There was also a fourth reason for rejecting the *Dyilo* decision, and this was not on grounds of distinction, but of different interpretation about the value of the practice of witness-proofing. Unlike the ICC PTC, the ICTY found that discussions between a party and a potential witness regarding his or her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided they are a genuine attempt to clarify the evidence.²³⁷ This practice in itself does not amount to rehearsing, practicing or coaching a witness.²³⁸

In *Karemara*, ICTR Trial Chamber III also engaged directly with the *Dyilo* decision. It found that “the process by which the *Dyilo* Chamber came to its decision is not based on a comprehensive knowledge of the established practice of the ad hoc Tribunals, which is justified by the particularities of these proceedings that differentiates them from national criminal proceedings.”²³⁹ The trial chamber was prepared to approve witness-proofing practices that did not amount to manipulation of testimony such as comparing prior witness statements made by the witness, detecting differences and inconsistencies in recollection of the witness, and allowing a witness to refresh his or her memory.²⁴⁰

Almost a year later the matter of witness-proofing was the subject of another decision at the ICC. Trial Chamber I, which would eventually try *Dyilo*, allowed further litigation on this matter.²⁴¹ This time, the prosecution put forward a stronger argument supported by more research. Even so, examples of the practice within national legal systems that were surveyed did not convince the Trial Chamber that there was a general principle of law allowing the substantive preparation of witnesses prior to testimony.²⁴² This time, the ICC acknowledged that witness-proofing, as described by the prosecution, was in fact commonly utilized at the ad hoc tribunals. It underlined, not surprisingly, that this precedent was not binding on the Trial Chamber, and that the procedural rules and jurisprudence of the ad hoc Tribunals could not be automatically applicable to the ICC without detailed analysis.²⁴³ The Trial Chamber did not go into the details of the *Milutinovic* and *Karemara* decisions, but emphasized the structural differences between the ICC and the ad hoc tribunals:

²³⁷ Id, ¶ 16.

²³⁸ Id.

²³⁹ *Prosecutor v Karemara*, Case No ICTR-98-44-T, ¶ 8.

²⁴⁰ Id, ¶ 15.

²⁴¹ *Prosecutor v Dyilo*, Case No ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Nov 30, 2007).

²⁴² Id, ¶ 41.

²⁴³ Id, ¶ 44.

Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, while acknowledging the importance of considering the practice and jurisprudence at the ad hoc tribunals, the Chamber is not persuaded that the application of ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.²⁴⁴

In practical terms, the Trial Chamber approved allowing a witness to read his or her past statements, as this would aid the effective presentation of the evidence and help the Trial Chamber in establishing the truth. But it prohibited the prosecution from discussing the topics that were to be dealt with in court, or discussing any exhibits that may be shown in court.

At one level, there was conflicting jurisprudence. The ICC was saying one thing and the ICTY and the ICTR were saying something else. But when one looks at it more closely, these courts were functioning very much as self-contained regimes, and the issue of witness-proofing was actually a court-specific matter. This does not mean the various tribunals were blind to what was going on elsewhere, for this example also clearly reveals extensive cross-fertilization between the three courts. The ICTY and ICTR have long been in a complex symbiotic relationship, sharing the same judges at the appeals level and similar rules of procedure and evidence. This has encouraged considerable interflow of ideas and jurisprudence, despite the fact that the two bodies actually operate under different substantive frameworks (their subject-matter jurisdiction is different, including the way the crimes are defined). The ICC has now come into that relationship.

The witness-proofing situation outlined above clearly reveals a judicial dialogue in process, with a range of tools being used by the courts to manage the different positions in relation to the prosecution practice under scrutiny. It was clear that none of the three courts—the ICC, the ICTY and the ICTR—was bound by the other's decision. Even if the *Karemara* decision essentially said that the *Dyilo* Chamber did not do its homework on the practice at the ad hoc tribunals (a fair comment), all three took pains to avoid conflict in the jurisprudence and outright rejection of the decision of another. This effort at judicial comity is clear in the way the three judicial institutions relied on the technique of distinction, finding different normative bases for their decisions and arguing that different situations were at issue.

²⁴⁴ Id., ¶ 45.

B. CONFLICTING JURISPRUDENCE: THE ICTY AND THE ICJ

The case of *Tadic* before the ICTY's Appeals Chamber is the most notorious and cited example of an international tribunal expressly rejecting a controversial legal ruling of the ICJ (specifically, *Nicaragua v United States*).²⁴⁵ *Tadic* was the first, and to date only, direct challenge by another international court to the ICJ. The facts of the two cases are well known, and the two decisions have attracted much commentary. What is relevant here is that in 1999, the ICTY's Appeals Chamber expressly considered and rejected the ICJ's "effective control" test from its judgment on the merits of the case of the paramilitary activities in and around Nicaragua (*Nicaragua v United States*)²⁴⁶ and substituted for it a test of "overall control." This section draws from these well-known decisions and moves the analysis forward by examining both more recent developments and the approaches taken by the two courts.

Even with a different composition of judges, the ICTY's "overall control" test has been confirmed repeatedly by a majority of the Appeals Chamber.²⁴⁷ At the Peace Palace, the "effective control" test of *Nicaragua* has stood the test of time since 1986, and has been applied in cases since *Tadic*.²⁴⁸ The formulation chosen for the Articles of State Responsibility ("ASR") adopted by the ILC in 2001 is much closer to the *Nicaragua* standard, but it is not identical as it does not identify what degree of control is required.²⁴⁹ In its commentary, the ILC took the view that the legal and factual issues in the two cases were different, underlining that the ICTY's mandate was limited to matters of international criminal responsibility, not state responsibility.²⁵⁰ The ILC explained that control must be of the specific operation and the conduct complained of must be an integral part of that operation. Rather than confirming whether that control should be "overall" or "effective", it opted for a flexible case-by-case approach: "it is a matter for appreciation in each case whether particular conduct was or

²⁴⁵ See *Prosecutor v Tadic*, Case No IT-94-1-A; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar v US)*, Merits, Judgment, ICJ Reports, 14, ¶ 115 (1986).

²⁴⁶ *Id.*, ¶ 124.

²⁴⁷ *Prosecutor v Kordic*, Case No IT-95-14/2-A, Judgment, ¶¶ 299, 307, 313 (Dec 17, 2004); *Prosecutor v Delalic*, Case No IT-96-21-A, Judgment, ¶ 26 (Feb 20, 2001); *Prosecutor v Aleksovski*, Case No IT-95-14-1-A, Judgment, ¶¶ 134–35 (Mar 24, 2000).

²⁴⁸ See, for example, *Case Concerning Armed Activities on the Territory of the Congo*, 45 ILM 562.

²⁴⁹ United Nations, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/49, art 8 (2001). Article 8 on conduct directed or controlled by a state reads as follows: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

²⁵⁰ United Nations, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc A/56/10, 48 (2001).

was not carried out under the control of a State, to such an extent that the conduct should be attributed to it.”²⁵¹

In the ICJ’s 2005 *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)*, the court had to consider the issue of responsibility for the actions of the Movement for the Liberation of Congo (“MLC”), an irregular force that fought against the DRC government, to which Uganda provided training and military support.²⁵² But would that support suffice to trigger responsibility for the MLC’s actions? As to whether the MLC was in fact an organ of Uganda, the court found that it was not.²⁵³ It found that the “conduct of the MLC was not that of an organ of Uganda nor that of an entity exercising elements of governmental authority on its behalf.”²⁵⁴ As to whether the MLC was controlled by Uganda, the court considered

whether the MLC’s conduct was “on the instructions of, or under the direction or control of” Uganda (Article 8) and finds that there is no probative evidence by reference to which it has been persuaded that this is the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* . . .).²⁵⁵

Clearly, Article 8 of the ASR is being applied by the ICJ as if it were identical to the *Nicaragua* test.

Congo v Uganda offered an opportunity for the ICJ to tackle the *Tadic* test, to put forth the court’s view on the ICTY’s direct challenge to its earlier decision, to express some views on whether there was in fact a hierarchy of courts and tribunals, and to offer guidance to the plethora of courts engaged in issues concerning the Geneva Conventions of 1949, as well as issues of imputability leading to state responsibility. But the ICJ ignored this opportunity. There was no mention of the “overall control” test in the judgment or in the dissents and separate opinions.²⁵⁶ The ICJ applied its usual “effective control” test, citing the ASR alongside its own previous decision in *Nicaragua*. The silence on the *Tadic*

²⁵¹ Id.

²⁵² See generally *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)*, 45 ILM 271 (ICJ Dec 19, 2005).

²⁵³ Id., ¶ 160.

²⁵⁴ Id.

²⁵⁵ Id.

²⁵⁶ As with the judgment itself, the dissents and separate opinions managed to engage with the *Nicaragua* decision and avoid all mention of the *Tadic* test. That is not to say that *Tadic* was ignored, for it was not. It was, for example, used as authority for the geographical and temporal application of international humanitarian law; for examples of opinions which discuss *Nicaragua* while ignoring *Tadic*, and use other aspects of *Tadic*, see id., ¶¶ 19–25 (Kooijmans); id., ¶¶ 4–8 (Simma); id., ¶ 9 (Koroma); id., ¶ 12 (Tomka); id., ¶¶ 12–34 (Kateka). It is all very surreal, as if the *Tadic* test had never been created.

test was remarkable, leading towards the conclusion that it was of no import to the ICJ. However, that may not be the entire picture, for the ICJ is known for its unwillingness to refer to the decisions of other courts and tribunals, apart from its predecessor, the PCIJ. One could also read from such silence that the World Court does not in fact see itself as the “senior” court, and so was not in a position to correct a less authoritative court. In an article written after the DRC case, Judge Higgins acknowledged that “some differences of perception between the ICJ and ICTY do remain on this control test for purposes of responsibility, but given the different relevant contexts, they hardly constitute a drama.”²⁵⁷ What is proclaimed by many as the great clash of the titans is here reduced to “some difference of perception”.

In the Bosnia Genocide case, the parties litigated the standard of attribution and the *Tadic* case was expressly raised.²⁵⁸ Eight years after the ICTY Appeals Chamber decision, the ICJ, under the presidency of Judge Rosalyn Higgins, finally addressed its challenge.²⁵⁹ This case is also remarkable for being the first (the authors are not aware of any other such example) in which the ICJ actually engaged with the substance of a decision of another international court (other than the PCIJ). The majority cited two carefully reasoned grounds for rejecting the *Tadic* position, both of which had been discussed in the flood of literature inspired by the case.²⁶⁰ But nowhere did it assert its “superiority” or hierarchical “seniority” to the ICTY. The first reason for rejecting *Tadic* was that the ICTY was not called upon in that case, nor was it in general called upon to rule on questions of state responsibility, since its jurisdiction was criminal and extended over persons only. As a result, what the ICTY said in that case was obiter dictum, “an issue which was not indispensable for the exercise of its jurisdiction,” an issue of general international law which does not lie within the specific purview of its jurisdiction, and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it. This, of course, begs

²⁵⁷ Higgins, 55 *Intl & Comp L Q* at 795 (cited in note 21).

²⁵⁸ See the transcript of oral arguments of both parties in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Mar 13, 2006), available online at <<http://www.icj-cij.org/docket/files/91/10535.pdf>> (visited Nov 21, 2008). See also *Case Concerning the Application of the Convention*, 46 *ILM* 188 (2007).

²⁵⁹ See *Case Concerning Armed Activities on the Territory of the Congo*, 45 *ILM* 271, ¶ 160. See also Higgins, 55 *Intl & Comp L Q* at 795 (cited in note 21) (for comments); *Case Concerning the Application of the Convention*, 46 *ILM* at 288, ¶ 406.

²⁶⁰ See, for example, Marco Sassoli and Laura M. Olson, *The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?*, 82 *Intl Rev Red Cross* 733 (2000), available online at <<http://icrc.org/Web/Eng/siteeng0.nsf/html/57JQQC>> (visited Dec 5, 2008)

the question of whether the ICJ would have deferred to the views of the ICTY, if the latter's view went to the reasoning of the case it decided.

The second ground for dismissing the argument that the *Tadic* test should apply concerned the standard itself. The court did not exclude the possibility that the "overall control" test could possibly be relevant in the ICTY context, but declined to take a position. However, it was prepared to state that the ICTY was wrong to present the "overall control" test as if it were equally applicable in international criminal law as under the law of state responsibility. The ICJ found the ICTY Appeals Chamber's argument unpersuasive on a number of grounds. One ground was that logic did not require the same test to be adopted in resolving the two issues, which were very different in nature. Also, the ICJ took the position that the degree and nature of a state's involvement in an armed conflict on another state's territory required to internationalize that conflict can differ from that required to give rise to the state's responsibility for acts committed in the course of the conflict. The ICJ also noted that the ICTY's "overall control" test had the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of international responsibility. The ICJ underlined that a state's responsibility can be incurred for wrongful acts committed by persons or groups of persons who are neither state organs nor equated with such organs only if they are attributable to it under the rule of customary international law reflected in Article 8 of the ILC's ASR. The "overall control" test was unsuitable, "for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a state's organs and its international responsibility."²⁶¹ The Bosnia Genocide judgment provides the only extant example of the ICJ engaging directly with the conflicting decision of another court, and finding that court's reasoning to be flawed.

There is no formal hierarchy between the two courts, and the ICTY was not bound to abide by the controversial *Nicaragua* standard. The Appeals Chamber was breaking no norm or rule of international law, or its own constitutive documents, by rejecting the ICJ's "effective control" test. What is at issue is whether it should have done so; to borrow from Judge Shahabuddeen, was it necessary?²⁶² Should the ICTY judges have considered the impact of what they were doing, the uncertainty that they were creating and the resulting damage to

²⁶¹ *Case Concerning the Application of the Convention*, 46 ILM, ¶ 406.

²⁶² *Prosecutor v Tadic*, Case No IT-94-1-A, ¶ 5 (Shahabuddeen concurring). See also his declaration in the *Blaskic* Trial Judgment, where he argued that the "effective control test to be extracted from the judgement of the International Court of Justice in *Nicaragua* is sound"; *Prosecutor v Blaskic*, Case No IT-95-14-T Judgment, at 272 (Mar 3, 2000) (Shahabuddeen); Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur J Intl L 649 (2007) (defending the *Tadic* "overall control test" in light of the Bosnia Genocide Case).

the legitimacy of the international legal system that would arise from the assault on the ICJ? Judge Shahabuddeen's concerns would eventually coalesce in a sharp rebuke to *Tadic*, expressed in his statement that it is the responsibility of the tribunal to "show deference to the views of the ICJ as to what is customary international law."²⁶³

There were several other options available to the Appeals Chamber. It could have followed *Nicaragua*, stating its grounds for dissatisfaction yet acting in the interests of consistency in international jurisprudence. It could have easily distinguished its decision, based as it was on international criminal law involving an individual on trial for grave breaches of the Geneva Conventions of 1949, from that of the state responsibility at issue in *Nicaragua*. This was a point made by Judge Shahabuddeen in his separate opinion.²⁶⁴ The technique of distinction on a substantive issue has already been discussed in relation to the witness-proofing matter in Section IV.A above. It was also used in the decision on the immunity of former Liberian President Charles Taylor at the Sierra Leone court; in that decision, the court cited the ICJ's *Arrest Warrant* case (*DRC v Belgium*), but distinguished it on the facts.²⁶⁵ One commentator argued that the fact that there was a ten-year difference between *Tadic* and *Nicaragua*, with much development in the law, would have enabled the Tribunal to distinguish its case from that of the ICJ.²⁶⁶ This assumes that the law changed; *Tadic* was in fact based on *Nicaragua* being wrong at the point in time at which it was decided, and continuing to be wrong. The *Tadic* judgment gives the impression that the ICTY Appeals Chamber, or at least certain judges within it, were determined to take on the ICJ in relation to *Nicaragua*, and *Tadic* served as a useful vehicle for doing so. They caused the first real conflict in jurisprudence. Until the ICJ addressed the issue in the Bosnia Genocide Case, there were two conflicting tests; since that judgment, and if one accepts that judgment as being correct, there are two tests for two different situations. That conflict of jurisprudence is no more, at least in the eyes of the ICJ.

C. CONFLICTING JURISPRUDENCE IN INVESTMENT DISPUTES

A comprehensive study by Susan Franck has documented how investment arbitral tribunals and other tribunals have rendered a number of inconsistent

²⁶³ *Semanza v Prosecutor*, Case No ICTR-97-20-A, Judgment, ¶¶ 27, 29 (May 31, 2000) (Shahabuddeen dissenting).

²⁶⁴ *Prosecutor v Tadic*, Case No IT-94-1-A, ¶¶ 16–21 (Shahabuddeen concurring).

²⁶⁵ *Prosecutor v Taylor*, Case No SCSL-2003-01-1, Decision on Immunity from Jurisdiction (May 31, 2004); *Case Concerning Arrest Warrant of 11 April 2000 (DRC v Belgium)*, 2002 ICJ 3 (Feb 14, 2002).

²⁶⁶ Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction—Problems and Possible Solutions*, 5 Max Planck YB UN L 67, 80 (2001).

decisions.²⁶⁷ An example of this arose in the investment dispute between the government of the Czech Republic and a US investor named Ronald Lauder. The Media Council of the Czech Republic cancelled the license of a company (“CME”) and caused economic loss to Mr. Lauder and CME. This matter was put before two different arbitral tribunals based on the bilateral investment treaties between the Czech Republic and the Netherlands, and between the Czech Republic and the US.

In the first case, Mr. Lauder commenced a United Nations Commission on International Trade Law arbitral proceeding in London under the US-Czech Bilateral Investment Treaty (“BIT”) in August 1999. As the majority shareholder of CME, he alleged that the Czech Republic violated the US-Czech BIT through the actions of the Media Agency and caused him economic losses. The US-Czech BIT gives protection to an indirect investor.²⁶⁸ A few months later, a company he controlled, CME Czech Republic BV, started arbitral proceedings at a Stockholm arbitration facility against the Czech Republic under the Netherlands-Czech Republic BIT.²⁶⁹ The same facts thereby generated disputes under two separate legal instruments. The difference is that in one case Mr. Lauder brought the action (as an indirect investor) and in the other case, CMR Czech Republic BV brought the action. The awards were made within ten days of each other. Although the applicants wanted the claims to be consolidated, the Czech Republic refused to agree to the consolidation.²⁷⁰ The award made by the Stockholm-based arbitral body was further challenged before the Svea Appeals Court in Sweden (a domestic court) pursuant to the rules of the BIT. This appeal did not succeed.

The London and Stockholm arbitral tribunals (and the Svea Appeals Court) arrived at conflicting decisions on diverse issues relating to expropriation, fair and equitable treatment, full protection and security, and compliance with minimum obligations under international law, despite the identical or similar

²⁶⁷ Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 *Fordham L Rev* 1521, 1568–82 (2005). See also Charles N. Brower and Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 *Arb Intl* 415 (2003).

²⁶⁸ See Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (1992), art I(1)a, available online at <<http://www.state.gov/documents/organization/43557.pdf>> (visited Dec 5, 2008) (“Bilateral Investment Treaty between the Czech Republic & USA”).

²⁶⁹ This was notwithstanding other pending cases before a domestic court and other related arbitrations.

²⁷⁰ See *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Final Award, ¶¶ 426–28 (UNCITRAL Arbitration Proceedings Mar 14, 2003), available online at <http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf> (visited Dec 5, 2008).

nature of the two BIT provisions involved.²⁷¹ The London-based arbitral tribunal concluded that no action tantamount to expropriation occurred, since there was no direct or indirect interference by the Czech Republic;²⁷² that the replacement of the Media Council in 1994 did not amount an arbitrary and discriminatory measure by the Czech Republic;²⁷³ that the respondent did not violate the prohibition against arbitrary and discriminatory measures;²⁷⁴ that there was no inconsistent conduct on the part of the Media Council which would have amounted to unfair and inequitable treatment;²⁷⁵ that none of the actions or inactions of the Media Council caused direct or indirect damage to the investment of Mr. Lauder;²⁷⁶ and that therefore there was no violation of the obligation to provide full protection and security under the Treaty.²⁷⁷ The London tribunal made only one declaration in favor of the applicant, namely that the respondent breached its obligation to refrain from arbitrary and discriminatory measures when in the winter of 1993, it changed its original position.²⁷⁸ This, however, did not result in an order of compensation for damages; the relief sought by the claimant was denied.²⁷⁹

On the other hand, the Stockholm Arbitral Panel gave a partial award on September 13, 2001, with one member dissenting, declaring that the Czech Republic violated the following provisions of the Netherlands–Czech Republic BIT: the obligation of fair and equitable treatment (Article 3(1)); the obligation not to impair investments by unreasonable and discriminatory measures (Article 3(1)); the obligation of full security and protection (Article 3(2)); the obligation to treat foreign investments in conformity with principles of international law (Articles 3(5) and 8(6)); and the obligation not to deprive the claimant of its investment (Article 5).²⁸⁰ Having found in favor of the claimant in a manner dramatically opposed to the London Arbitral Tribunal's Award, the Stockholm

²⁷¹ For a detailed comparison of conflicting awards, see Franck, 73 *Fordham L Rev* at 1563–68 (cited in note 267).

²⁷² *Lauder v The Czech Republic*, Final Award, ¶ 201 (Sept 3, 2001), available online at <<http://ita.law.uvic.ca/documents/LauderAward.pdf>> (visited Dec 5, 2008).

²⁷³ *Id.*, ¶ 240.

²⁷⁴ *Id.*, ¶ 284.

²⁷⁵ *Id.*, ¶ 295.

²⁷⁶ *Id.*, ¶ 313.

²⁷⁷ *Id.*, ¶ 309.

²⁷⁸ *Id.*, ¶ 319.

²⁷⁹ *Id.*, ¶ 319(3).

²⁸⁰ See *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Partial Award (Sept 3, 2001) 14 *World Trade & Arb Mat* 109. See also *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Final Award, ¶ 52 (reiterating the partial award).

Tribunal awarded in damages the sum of US\$269,814,000 plus interest at the rate of 10 percent from February 23, 2003.²⁸¹

As mentioned earlier, the Czech Republic sought to have the Stockholm award set aside. It raised a number of issues, including the claim that an arbitrator had been excluded from the panel's deliberations; alleged failure of the tribunal to take into consideration applicable law; whether the tribunal exceeded its mandate; and whether the judgment of the Court of Appeals may be appealed.²⁸² Most importantly for our discussion, it alleged lack of jurisdiction due to *lis pendens* and *res judicata*. However, as noted, the tribunals decided that *lis pendens* and *res judicata* were not present. These challenges were based on procedural grounds, and in a sense, not an appeal on the merits of the arbitral award. The appeals court rejected these challenges and upheld the award made by the Stockholm Tribunal.²⁸³

The two tribunals were not concerned about the overlapping proceedings and resulting inconsistencies. The tribunal established pursuant to the US–Czech Republic BIT simply stated that since the “arbitration proceedings involve different parties and different causes of action . . . no possibility exists that any other court or tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal.”²⁸⁴ Eventually, according to the other tribunal (established under the Netherlands–Czech Republic BIT), any “overlapping of the *results* of parallel processes must be dealt with on the level of loss and quantum but not on the level of breach of treaty.”²⁸⁵ The Svea Court of Appeals also stated that “since Lauder and CME cannot be deemed to be the same party, one of the prerequisites for *lis pendens* and *res judicata* is lacking.”²⁸⁶

Technically speaking, the parties were different and different treaties were invoked. But the fact remains that the complaint concerned the action of the Czech Republic, which detrimentally affected the rights of an investor in his personal capacity, and the company that he controlled. The conclusion—that whatever inconsistency might arise could be resolved at the quantum stage—seems to be misguided, as both tribunals arrived at conflicting conclusions on issues arising from identical fact situations. Eventually, the Czech Republic had to pay compensation despite the fact that another tribunal declared it not to be

²⁸¹ *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Final Award, § IX(1).

²⁸² See *Czech Republic v CME Czech Republic BV*, Case No T 8735-01 (May 15, 2003), 42 ILM 919 (Svea Court of Appeals).

²⁸³ See *id.*

²⁸⁴ *Lauder v Czech Republic*, Final Award, ¶ 171 (emphasis added).

²⁸⁵ *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Partial Award, 14 World Trade & Arb Mat, ¶ 419.

²⁸⁶ *Czech Republic v CME Czech Republic BV*, 42 ILM at 967.

liable. This is disappointing, although, to an extent, there are some technical grounds that justify the outcome. Consolidation of the two cases, as requested by the two applicants, was not possible as the Czech Republic refused to agree. The end result was two parallel proceedings, with two contradictory findings.

V. CONCLUDING REMARKS

This Article has focused on identifying what the international judge can do to avoid conflicts and manage the situation in the current climate of multiple courts and tribunals. While the authors aim to stimulate a wider discussion about the feasibility and content of their Guidelines for International Judges in managing MIEs, competing jurisdictions, and conflicting jurisprudence, there is only so much that the international judge can single-handedly do. As has been described earlier in this Article, this is a systemic problem, and it requires a systemic approach.

There needs to be a parallel effort with the other actors in the international legal system. As with so many other situations, prevention is always preferable to searching for a cure. It is important to settle the proper role of the international judge in a fast-evolving world of international courts and tribunals, with increasing judicialization of international law. States need, at an early stage, to put more effort into anticipating and avoiding unnecessary situations of competing jurisdictions and into preventing conflicting jurisprudence from arising in the first place. States need to be more aware of the ramifications of the new courts and tribunals that they are creating, as well as the implications of the increasing prevalence of compulsory jurisdiction clauses in treaties.

Taking the WTO dispute-settlement process as an example, the linkage to general practices of treaty interpretation in Article 3.2 of the DSU is certainly a bridge between Articles 31 and 32 of the Vienna Convention, which have attained the status of rules of customary or general international law, as confirmed by the WTO Appellate Body.²⁸⁷ Article 31(3)(c) of the Vienna Convention allows tribunals to take into account other “relevant rules of international law” for contextual interpretation.²⁸⁸ But that provision goes to context and treaty interpretation; it cannot enable the parties or the WTO DSB to use those other treaties as sources of law relevant to the dispute. Thus, a new approach is needed, perhaps a change in the DSU rules or the Agreement itself, allowing the panel, at the request of a party, to consider the dispute in its

²⁸⁷ See World Trade Organization, Report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages*, WTO Doc No WT/DS11/AB/R at 104 (Sept 25, 1996); World Trade Organization, Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc No WT/DS2/AB/R at 17 (Apr 29, 1996).

²⁸⁸ Consider ILC Report on Fragmentation (cited in note 24).

entirety. But that may not work, as it would expand the work of the WTO beyond international trade disputes. The WTO's Appellate Body has pointed out that the WTO Agreement is "not to be read in clinical isolation from public international law," but that is not a license to bring in all the treaties that could possibly apply to a particular situation.²⁸⁹

Likewise, a "constitutionalization" of international adjudication (as part of the so-called "constitutionalization" of international law) both at the conceptual and institutional level could be argued for.²⁹⁰ Constitutionalization in this context refers to an organization of the system of international adjudication along certain normative and institutional values and patterns. This constitutionalization demands that the participants agree on these fundamental values and principles. Some aspects of institutional consolidation at the international level have already been implemented or proposed.²⁹¹ Conceptually, there have also been proposals that seek to constitutionalize international law with a view to reforming radically its norms and structures.²⁹² Clearly, these proposals lie far in the future. In the meantime, the following are some suggestions for what can be done in the here and now.

²⁸⁹ World Trade Organization, Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc No WT/DS2/AB/R 17 (Apr 29, 1996).

²⁹⁰ Consider Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 Max Planck YB UN Law 1 (1997); Theodor Schilling, *On the Constitutionalization of General International Law*, Jean Monnet Working Paper 06/05 (NYU School of Law 2005); Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* 156 (Cambridge 2004); Ernest-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations* 10 Leiden J Intl L 421 (1997).

²⁹¹ See, for example, *Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union Assembly*, Assembly/AU/Dec.83(V) (July 4–5, 2005), available online at <http://www.africa-union.org/root/au/Documents/Decisions/hog/Decisions_Sirte_July_2005.pdf> (visited Dec 5, 2008). There are also proposals to establish an International Human Rights Court that could replace the several human rights treaty bodies, and of course, there is debate about reform of the UN. Consider also recent developments with the accession of the EU to the European Convention on Fundamental Human Rights and Freedoms, such as the enabling of the ECtHR to have the ultimate say in human rights matters within the EU. See European Parliamentary Assembly Resolution 1610, *The Accession of the European Union/European Community to the European Convention on Human Rights*, (Apr 17, 2008), available online at <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1610.htm>> (visited Dec 5, 2008).

²⁹² See Philip Allott, *International Law and International Revolution: Reconceiving the World* in David Freestone, Surya Subedi, and Scott Davidson, eds, *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures* 77 (Kluwer 2002); Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalise the UN Dispute Settlement System*, 31 NYU J Intl L & Pol 753 (1999); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum J Transnatl L 529 (1998).

If states are to avoid situations of the kind we have been concerned with, they need to be more careful to insert appropriate provisions on managing disputes over jurisdiction and jurisprudence into treaties. But that is not straightforward. Using the WTO Agreement as an example again, the DSU's closed list of multilateral treaties that the panels may refer to could be opened up, but the DSU cannot list every treaty in existence, nor can it have jurisdiction over every treaty that a party before it is bound by. At this juncture, a proposal by Joost Pauwelyn to distinguish between "jurisdiction" and the "applicable law" may prove useful.²⁹³ Briefly, the WTO DSB only has jurisdiction under the covered agreements, but its "applicable law" is not limited to those listed in the covered agreements. Perhaps the solution may lie in consent of the parties. They may, on an ad hoc basis, allow the court to decide a trade dispute that has ramifications over other areas. This, however, raises a new and wholly unsatisfactory situation that is guaranteed to damage the international system: international trade lawyers making decisions on matters of international human rights law or international environmental law.

The ICJ is probably the right candidate for giving guidance on matters of general international law as it is a court of general jurisdiction, a principal organ of the UN and the most senior court with eminently qualified judges at its disposal. Notwithstanding the practical obstacles relating to the amendment of its Statute, it is possible to do something with what we already have. For instance, as noted earlier, Article 34(3) of the ICJ Statute allows the court to liaise with and seek the views of public international organizations whose constitutive documents or conventions have been invoked in a proceeding before it.²⁹⁴ This creates a proper forum to engage in a dialogue. The ICJ cannot force these organizations to submit their views, but it may urge them to do so in the interest of promoting uniformity in the interpretation of the provisions of international rules invoked in the proceedings before it. The ICJ may also encourage amicus curiae briefs that help elucidate challenging issues intersecting different subsystems of international law.²⁹⁵

The role of the legal community writ large also deserves special attention in this regard. By this we mean the "invisible college" of professional lawyers, negotiators, advocacy groups, etc. Those who teach need to try to reach as many future legal practitioners as possible, teaching a non-idiosyncratic and coherent

²⁹³ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 456 (Cambridge 2003).

²⁹⁴ See Statute of the ICJ, art 34(3).

²⁹⁵ Major courts and tribunals including the WTO Panels and its Appellate Body, NAFTA, the ICTY and ICTR, and human rights courts allow for amicus curiae submissions on legal issues arising in pending cases from various interest groups, professional bodies and individuals.

understanding of international law that does not paper over the many crevasses, yet highlights the fundamental principles and the increasing unity and stability in our discipline. And, to borrow from Koskenniemi, if international lawyers are to contribute towards a coherent understanding and application of the rules of international law, it is important that they develop an ability to feel “at home in [the various subsystems of international law], yet imprisoned in none of them.”²⁹⁶ This requires international legal professionals to be as versatile as Swiss Army knives in terms of their knowledge of the various subsystems of international law, with an attitude that attaches equal importance to norms belonging to these various subsystems. It is inspiring to observe some of the leading international lawyers appearing as judges, arbitrators, counsel or advisors within different functional areas. For example, Professor Georges Abi-Saab served as ad hoc judge of the ICJ, judge of the Appeals Chamber of the ICTY and ICTR, Commissioner of the UN Compensation Commission, and Chairman of the Appellate Body of the WTO. He is not alone, but there are not many like him. Such shifting roles will undoubtedly promote the values of mutual understanding and system building. The same principle applies to lawyers who have legal practices that cut across the different functional areas of international law.

VI. CHARTING THE WAY FORWARD: GUIDELINES FOR INTERNATIONAL JUDGES

It is imperative to provide the international judge with guidance in a world where MIE is increasingly common, leading to the risk of competing jurisdictions and conflicting jurisprudence. With due consideration for both avoidance and management so as to minimize negative effects, the following guidelines are proposed as a starting point for a wider discussion.

1. GENERAL GUIDELINES

- 1.1 The proper function of the international judge in international adjudication is an issue which has been controversial for a long time. Absent consensus, it is a fact that international judges are engaged in a process of authoritative decision making and that they are part of a wider system of international law that needs, in order to retain its legitimacy as a regulator of international

²⁹⁶ Martti Koskenniemi, *The Fate of Public International Law between Technique and Politics*, 70 Mod L Rev 1, 29 (2007).

society, to function in an orderly manner and provide certainty, predictability and uniformity of application and result.

- 1.2 International judges, being part of this wider international system, are in a symbiotic relationship with each other. They must have the appropriate specialization in the common discipline of public international law, and closely follow international legal developments at other courts and tribunals. International judges have a common responsibility to cooperate and work in a way that is complementary, rather than opposed.
- 1.3 The decisions of the international judge may, because of the nature of the system, sometimes be colored by non-legal considerations such as assessment of the impact of the decision on the wider system. But even if decision making may sometimes be colored by issues that are non-judicial, the international judge must still operate in accordance with the doctrines and methodologies of the discipline of public international law. Treaty interpretation, for example, is to be by way of the Vienna Convention. As the ILC has pointed out, the Vienna Convention provides a toolbox for dealing with fragmentation and serves as a framework for assessing and managing it in a “legal-professional” way.²⁹⁷
- 1.4 In general, judges should keep within their own specialization and within areas that they are mandated to rule on. Where it is necessary for resolution of the dispute before them, they should be able to venture beyond these boundaries, but remain subject to the guidelines.

2. GUIDELINES FOR PREVENTING AND MANAGING MULTIPLE INSTITUTION ENGAGEMENT AND COMPETING JURISDICTIONS

- 2.1 Multiple Institution Engagement (“MIE”) is becoming increasingly common in modern international dispute settlement,

²⁹⁷ *ILC Report on Fragmentation*, ¶¶ 17, 20 (cited in note 24). However, the ILC did not provide international judges with any such tools.

but this is not the same thing as competing jurisdiction between courts.

- 2.2 International judges should not be territorial or competitive over jurisdiction.
- 2.3 The intention of the parties must be a controlling factor.
- 2.4 International judges should also consider the nature of the dispute in context. They should take a system-sensitive approach that does not result in injustice for the parties. They should take care that their decisions do not contribute to the overall delegitimization of the international dispute-settlement process.
- 2.5 International judges sometimes have the discretion to decline to exercise jurisdiction. Simply having jurisdiction does not always mean it is best to exercise it. Judicial economy is a key consideration. Other courts and tribunals may have a stronger claim to jurisdiction. Other courts and tribunals may also have parallel jurisdiction looking at different aspects of the dispute; this is not competing jurisdiction but rather complementary jurisdiction that in the particular circumstances may mean that the matter is dealt with in an orderly and comprehensive manner and no party is denied justice for legitimate grievances.
- 2.6 International judges should consider the standards for their own exercise of jurisdiction in a consistent manner. Several standards are currently being used. “Prima facie” is the standard used for assessing jurisdiction for the purposes of precautionary measures and there are at least three standards—“clearly established,” “sufficiently clear,” and “firmly established”—used when deciding to exercise jurisdiction over the merits. More consistency must be developed in this matter.
- 2.7 Where there is MIE, the courts and tribunals that are seized with the matter have several options:
 - 2.7.1 Insisting on exercising jurisdiction. This would be appropriate, for example, where the court clearly has exclusive jurisdiction over the matter, such as under a treaty.

- 2.7.2 Deferring to the jurisdiction of another court or tribunal. This would be possible, for example, where the other court was seized of the matter first or the other court is a specialized court and the matter is purely within that specialization, or where most of a dispute falls within the exclusive jurisdiction of the other court, with nonexclusive jurisdiction falling to both bodies.
- 2.7.3 “Wait and see.” This technique could be used, for example, where the courts that have been seized both have equally valid grounds for exercising jurisdiction, or where there are two specialized courts seized, and the parties may be persuaded to refer the matter to a court of general jurisdiction that could look at the dispute in its entirety.
- 2.8 In managing a situation of MIE to avoid a conflict of jurisdiction, and in managing a situation where there is in fact such conflict, international judges may consider appropriate use of the following doctrines, techniques and considerations: *res judicata*; *electa una via* and/or *lis alibi pendens*; *lex specialis*; substantial connection; forum non conveniens; choice of law; and judicial economy.
- 2.9 If there is MIE, every effort should be made for inter-institutional engagement and dialogue. This promotes judicial economy. Two tribunals seized of the same matter may, for example, agree to take joint depositions from the same witnesses. The two tribunals may, for example, reach agreement on custody of original documents.
- 2.10 A court of general jurisdiction such as the ICJ could be called upon to play a more active role. There are of course many difficulties in creating a role for the ICJ in deciding genuine conflicts of jurisdiction between courts and tribunals, as this would require amending the court’s Statute. However, it is possible for the parties, in situations where there is no compulsory jurisdiction clause in a treaty, and MIE involving different legal issues occurs, to withdraw all claims and by mutual agreement refer the matter to the ICJ as a court of general

jurisdiction able to hear the dispute in its entirety. Article 34(3) of the ICJ Statute creates a mechanism whereby international organizations, whose constitutive documents or conventions are invoked in an ICJ proceeding, are requested to provide their views. International organizations should be encouraged to make use of that procedure.

3. GUIDELINES FOR PREVENTING AND MANAGING CONFLICTS OF JURISPRUDENCE

- 3.1 International judges need to beware of the dangers of creating unnecessary conflicts of jurisprudence. They also need to be able to deal with conflicting normative and factual findings from different courts and tribunals in a coherent and doctrinally principled manner. The way they deal with both creation and management of conflicts can affect the international legal system and damage its legitimacy.
- 3.2 Where possible, international judges should strive to ensure there is complementarity and consistency, as opposed to confrontation and conflict (although these may sometimes be necessary where a decision is clearly wrong in law and fact, by the estimation of the court considering it). Differences in interpretation do not equal conflicts of jurisdiction. A coherent body of law does not require identical decisions, but sufficient consistency, including in the application of basic principles.
- 3.3 It is essential that international judges be well trained in the basic principles of public international law. International judges who have that soundness of background will be “speaking the same language” as their counterparts, that language being essential for operation in international dispute settlement. This reduces the risks of conflicting jurisprudence on core issues.
- 3.4 There is no doctrine of stare decisis in international law, and there is no formal hierarchy between international courts and tribunals. But the decisions of other courts and tribunals should be treated with respect and given careful consideration. Some courts have superior competence in their area of specialization and their decisions in that area should generally be deferred to. For instance, a decision from a specialized court on that

specialized issue has more weight than a general court on that same matter. A decision from the ICJ on a general principles issue has more weight than what a specialized court says about general principles. The weight to be given to a decision will also depend on whether the body in which the decision originates is judicial or quasi-judicial.

3.5 The following techniques may aid the international judge in managing competing jurisprudence:

3.5.1 Competing jurisprudence calls upon the court to conduct its own investigations. For example, a court that is faced with a situation such as *Tadic v. Nicaragua* should conduct its own investigations to establish the true state of customary international law.

3.5.2 Disagreeing with a decision is not sufficient grounds for rejecting the position taken by another court or tribunal. The international judge should consider self-restraint and judicial comity when considering issuing a decision that directly conflicts with that of another court or tribunal. Two vital issues to be considered are: is it necessary to take this approach, and what are the implications in this case and to the wider system? International judges should consider whether techniques such as distinguishing between cases, and the doctrine of *lex specialis*, can effectively be used to achieve the same result. These are, of course, sometimes not suitable. For example, a mere change in terminology may not suffice to avoid a problem.²⁹⁸

3.5.3 Judicial comity and basic professionalism require an international judge who chooses to reject the position of another court to explain that decision and his or her reasoning for rejecting the earlier decision of another court or tribunal.

²⁹⁸ *Prosecutor v Blaskic*, Case No IT-95-14-T at 235 (citing *Gulf of Maine*, ICJ Reports 1984, ¶ 6 (Judge Gros dissenting)).

- 3.5.4 To the extent necessary, international judges should encourage amicus curiae submissions in disputes on the law or where dealing with areas where they are less proficient.