

Michigan Journal of International Law

Volume 25 | Issue 4

2004

Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?

Pemmaraju Sreenivasa Rao
International Law Commission

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Law Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Pemmaraju S. Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT'L L. 929 (2004).

Available at: <https://repository.law.umich.edu/mjil/vol25/iss4/9>

This Symposium is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

MULTIPLE INTERNATIONAL JUDICIAL FORUMS: A REFLECTION OF THE GROWING STRENGTH OF INTERNATIONAL LAW OR ITS FRAGMENTATION?

*Pemmaraju Sreenivasa Rao**

I. THE PROBLEM OF FRAGMENTATION OF INTERNATIONAL LAW	929
II. THE EXPANDING CHARACTER OF INTERNATIONAL LAW: EMERGENCE OF AN INTERNATIONAL LEGAL COMMUNITY	939
III. FUNCTIONAL NEED FOR THE ESTABLISHMENT OF NEW INTERNATIONAL TRIBUNALS FOR A NEW AGE.....	944
IV. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA...	946
V. THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WORLD TRADE ORGANIZATION	950
VI. INTERNATIONAL CRIMINAL TRIBUNALS.....	955
VII. MULTIPLICITY OF INTERNATIONAL TRIBUNALS: A SIGN OF MATURITY OF THE INTERNATIONAL LEGAL SYSTEM.....	958
VIII. DIVERSITY OF INTERNATIONAL TRIBUNALS: A REFLECTION OF THE GROWING STRENGTH OF THE UNITY AND INTEGRITY OF INTERNATIONAL LAW	960

I. THE PROBLEM OF FRAGMENTATION OF INTERNATIONAL LAW

Fragmentation of international law, in the sense of competing normative orders, has recently received considerable attention.¹ Neither States nor other participants active in the process of the development of international law appear to notice its fragmentation and even if they notice, they do not appear to be overly concerned. To a great extent it is these participants and States who knowingly or unknowingly promoted or engaged in promoting the possibilities for such “fragmentation.” The fragmentation of international law became a matter of concern for different reasons. While I will briefly touch upon these reasons, the primary

* Member, International Law Commission, Additional Secretary and the Legal Adviser, Ministry of External Affairs, India (Retired) and Adjunct Professor, University of Michigan Law School (Fall 2003). The author is thankful to Srikanth Katragadda and Jason C. Nelson, second year law students at the University of Michigan Law School, for their help in finalizing this paper. The author is solely responsible for the views expressed therein.

1. For a review of some of the literature and concerns, see Martti Koskeniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553–79 (2002). See also Symposium, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT’L L. & POL. 679 (1999).

focus of this presentation will be to examine whether the creation of multiple international judicial forums, whose function is the interpretation and application of international law, are a source, or are likely to be sources, of fragmentation of international law. The main thrust of this presentation is to suggest that the creation of multiple international judicial tribunals is a function of the ever-expanding nature of international law and that the creation of such tribunals is a sign of the growing maturity of international law. While it is admitted that these tribunals have to be sensitive to the needs of promoting the unity and integrity of international law, a brief look at the available evidence of their functioning so far has revealed no cause for concern of fragmentation. I will look specifically at the working of the International Tribunal for the Law of the Sea, primarily because its creation had elicited some stringent criticism and concern in this respect. I will also refer to the dispute settlement understanding that governs the World Trade Organization Treaty system and the ad hoc tribunals that are invested with the jurisdiction to try the serious crimes committed during the conflict affecting the former territories of Yugoslavia.

Before I proceed one preliminary point needs to be made. Fragmentation of international law presupposes some basic unity and integrity to the structure of international law that governs international or transnational relations. This unity and integrity attributes universality to the core content of international law. Since the establishment of the (UN), all members of the UN have been participating in the process of formation, development, and application of international law. Thus we witness a truly universal participation of all States in the decision-making of the international conferences that conclude treaties on a variety of international law subjects. But behind the facade of universal participation there is much that does not meet the eye.² The participation of developing countries is not as effective as it ought to be for a variety of reasons. Their interests are not as well-articulated or as united in the process of negotiation as their counterparts from the more developed world. Developing nations also appear to lack a certain focus on immediate priorities and the ability to adopt appropriate strategies for achieving them. Whether in international trade, the environment, or human rights, there is a divergence of approaches both in the formation of law and in its interpretation and

2. See for example the problem described by Ambassador Christopher W. Pinto faced by the developing countries when they attend big multilateral conferences. He noted that they are overwhelmed by the large contingent of specialists from the developed world who come well prepared to these conferences with the most modern means of communications to contact and up-to-date briefs from their capitals. C.W. Pinto, *Modern Conference Technique: Insights from Social Psychology and Anthropology*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW*, 305, 315 (R. St. J. McDonald & D. M. Johnston eds., 1983).

application among different States of the international community. Issues concerning international peace and security and the fight against terrorism have opened up new gaps in the understanding and appreciation of the existing law and on the ways and means of adjusting or reforming the same to suit contemporary requirements. There are no credible options in the present world order to fight and progressively but effectively eliminate growing global poverty and inequalities among nations and peoples. The elimination of weapons of mass destruction and nuclear weapons is not in sight in spite of the priorities attached to it since the end of World War II. As a result, there is bound to be fragmentation in the sense of divergent approaches in the manner in which international law is sought to be interpreted and applied among different States and regions of the world. This fragmentation is aggravated by competing values and priorities not only among States but also among States on the one hand and non-State entities on the other. But this matter is beyond the compass of the present investigation and a new theme to be pursued on its own.

As noted above, assuming a certain basic unity and integrity of international law, several reasons may be cited for the fragmentation of international law. It should be noted that the increased reliance on soft law, that is, for example, on declarations of international conferences or resolutions of the UN General Assembly, which are essentially of a recommendatory value as a basis for the articulation of rights and obligations of States, could cause confusion about the normative value of prescriptions in general. Soft law, which by definition is not related to formal sources as prescribed under Article 38(1) of the Statute of the International Court of Justice (ICJ)—conventions, custom, and general principles—could be interpreted and applied differently by different States; soft obligations do not entail common standards. Instead, soft obligations are recommendatory in nature, and leave in some cases both the level and the schedule of implementation to the discretion of States. Often soft law may not provide for any international enforcement mechanism. The result of such diversification of sources and the dilution of the form and content of international law could be its fragmentation. Associated with it is also the consequence that an obligation could be imposed upon a State, despite its opposition or lack of consent.

Early warnings about fragmentation were given by Prosper Weil in his much-debated essay on the relative normativity of international law. Weil noted that a principle of international law becomes *jus cogens*, or gets the status of peremptory norm, or becomes a principle whose violation is an international crime, not so much by virtue of the content of the principle, but by the recognition accorded to it by the international

community. Further, he pointed out that once recognized and accepted by the "essential components of the international community," the super norms would *ipso jure* be imposed on all States, including those who were against that recognition. In comparison, according to international law a State is not obliged to honor a treaty obligation it has not accepted or customary law obligation it has persistently opposed.³ This dichotomy in the invocation of international law obligations is for Weil a matter of fragmentation of international law. He is also concerned about the legal value often given to principles and declarations, as these *become* normative, even if they do not possess that legal value at the time of their formation. He referred to these as "subnormative" acts. Weil registers his concern thus:

One scarcely overemphasizes the uncertainties inflicted on the international normative system by the fragmentation of normativity that the theories of *jus cogens* and international crimes have brought in their wake. A normativity subject to unlimited gradation is one doomed to flabbiness, one that in the end will be reduced to a convenient term of art, covering a great variety of realities difficult to grasp. Like the "variable legal authority" of subnormative acts, the graduated normativity of normative acts is a notion so elusive as to escape comprehension.⁴

Ian Brownlie was also concerned about fragmentation resulting from excessive compartmentalization of international law. He explained:

A related problem is the tendency to fragmentation of law, which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as "international human rights law" or "international law on development." As a consequence the quality and coherence of international law as a whole is threatened. Thus, for example, points are made as though they are novel propositions of human rights law when in fact the point concerned had long been recognized in general international law.⁵

3. On the role of persistent objection in preventing the application of the customary obligation against the persistent objector State, see T. Stein, *The Approach of the Different Drummer: the Principle of Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457-482 (1985). See also, Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1956 BRIT. Y.B. INT'L L. 1-24 (1985).

4. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 429 (1983).

5. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in THE RIGHTS OF PEOPLES 1, 15 (James Crawford ed., 1988).

Bruno Simma touched on another aspect of fragmentation of international law, relating to the tendency to excessively compartmentalize international law branches into so-called "self-contained regimes." According to Simma, such regimes may have limited significance for promoting a more harmonious development and implementation of international obligations regulated thereunder by tailor-made procedures for implementation and specification of consequences. These regimes are welcomed to the extent that they are likely to insulate the rights and obligations involved from the "the principles of autodetermination and self-enforcement of rights and duties"⁶ that "infect the international legal process with elements of disorder and arbitrariness."⁷ However, he cautioned that:

[W]hen one turns from an abstract discussion of the pros and cons of "self-contained" regimes to the analysis of concrete cases one has to recognize sooner or later that, beyond a certain point, insistence upon further "self-containment" of specific legal consequences can only have a negative effect on the effectiveness of the primary rules concerned.⁸

Associated with the concept of self-contained regimes is the operation of *lex specialis*. These are legal regimes more specific in content and thus seen as differing from the more general category of law on the subject.⁹ *Lex specialis* may provide their own set of rights and obligations, and even the consequences for failure to perform them. In that sense these regimes could exclude the application of the general international law and State responsibility for wrongful acts as provided thereunder. Diplomatic law, international human rights law, international humanitarian law, environmental law, and international trade law regulated by the WTO are

6. See, e.g., Bruno Simma, *Self-contained Regimes*, 16 NETH. Y.B. INT'L L. 111, 135 (1985).

7. *Id.*

8. *Id.* at 136.

9. The Latin maxim *lex specialis derogat legi generali* expresses the principle. It may not be always easy to separate and identify the special from the general. For the principle to operate and the *lex specialis* to prevail over the general, it is not enough to show that there is a more particular obligation of a later date to override the more general obligation of an earlier date applicable as between the parties to the dispute. It should also be shown that the two have conflicting scope and content. The intention of the parties is material. If it is clearly expressed as to which one should prevail in case of conflict that would take precedence over any other rule of interpretation. See *The Continental Shelf (Tunisia v. Libya)*, 1982 I. C. J. 38, para 24 (Feb. 24). For an analysis of the principle, see JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY* 306-308 (2002). The matter came up for consideration before the International Tribunal on Law of the Sea in the Southern Bluefin Tuna Cases between New Zealand and Japan; Australia and Japan, Order of 27 August 1999, available at <http://www.un.org/Depts/los>.

some of the examples of *lex specialis* or self-contained regimes (there could be some fine nuances between *lex specialis* and self-contained regimes, but the latter is perhaps to be seen as a more developed and complete form of *lex specialis*). “Objective regimes” similarly designate a particularized set of rules for an area but not necessarily fully disconnecting that regime from the general or other such regimes. For example, proposals for nuclear free zones or peace zones fall into this category.¹⁰

Fragmentation of international law is also feared if rights and obligations under any regime of international law are not uniform and are varied for different groups of States. For instance, this scenario could occur if different time frames and different standards of compliance are prescribed under the rubric of the same obligation. In the environmental and economic fields, as well as in disarmament and human rights areas, different, varying, or multiple standards are quite prominent. In other words, common but differentiated responsibilities could well be misrepresented or misunderstood as a threat to the unity and development of universal international law.¹¹

Yet on another level, it is possible to argue that fragmentation could result if obligations were to conflict with each other, given their relative status or hierarchy in international law. For example, apart from problems posed by soft law, and problems of interpretation of international agreements¹², treaty obligations could conflict with the obligations of the parties under the UN Charter. However, in as much as States have expressly contracted away their right not to give effect to treaties that would come into conflict with their obligations under the Charter per Article 103, one may take the view that the implementation of that obligation may not strictly be treated as an example of fragmentation. Similarly, it is not easy to envisage a conflict between a *jus cogens* obli-

10. SURYA SUBEDI, *LAND AND MARITIME ZONES OF PEACE IN INTERNATIONAL LAW* (1996).

11. The problem of double standards one for nuclear power States and the other for non-nuclear States is the one that rendered the non-proliferation of nuclear weapons Treaty almost ineffective in preventing further development and elimination of nuclear weapons. But this is different from varying and modulating treaty obligations according to the stages of economic development and capacity to implement treaty obligations with a view to achieve effective implementation of treaty obligations in a realistic fashion. This objective is at the root of the principle of common but differentiated obligations. See for an analysis of this principle, PHILIPPE SANDS, *PRINCIPLES INTERNATIONAL ENVIRONMENTAL LAW* 55–56 (2003) (accepted in Principle 7 of the Rio Declaration and for US views rejecting the principle of diminution of obligations for the developing countries). See also PATRICIA BERNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 100–101 (2002).

12. For a discussion of problems posed by certain hierarchy of obligations in international law involving “soft law” as well as treaty interpretation, see Dinah Shelton, *International Law and Relative Normativity*, in *INTERNATIONAL LAW*, 145, 146 (Malcolm D. Evans ed., 2003).

gation and an obligation *erga omnes*. The former is a principle that sets out the peremptory character of the obligation usually cited for non-derogability of obligations, while the latter denotes a wider standing even for States not directly affected by a wrongful act involving an *erga omnes* obligation to invoke State responsibility and seek appropriate remedies.¹³ One is a substantive principle of law and the other is an important principle of procedure. The two may be interconnected, but may not necessarily come into conflict. Threats to the unity and integrity of international law could also arise if different tribunals now in existence at the international level were to decide differently on a particular subject matter. This point is said to be the case in at least two different cases, referred to below.

Each of these reasons noted raises several important issues of their own. Given the breadth and complexity of these issues, the International Law Commission (Commission) requested Gerhard Hafner to present an initial feasibility study.¹⁴ Following its consideration of the feasibility study presented by Hafner, the Commission decided in 2000 to include the topic of fragmentation of international law in its long-term program of work. In his study, Hafner listed several causes and effects of such fragmentation. Of the causes, Hafner identified the lack of centralized organs that would ensure homogeneity and conformity of legal regulations, specialization leading to topic autonomy, political division on particular issues, differing legal structures, parallel regulations, competitive regulations, enlargement of the material scope of international law, multiplication of actors, and establishment of monitoring bodies and different regimes of secondary rules. The outcome was claimed to be a threat to the reliability and credibility of international law.

Hafner's paper elicited considerable excitement and Commission members were eager to pursue the subject, even though many of them did not have the opportunity to give the matter the considerable reflection the topic merited. It was also not clear whether the Commission, whose mandate is to codify and progressively develop international law, would be within its mandate to take up this subject, which may not strictly lend itself to such a task. However, given the importance of the fragmentation topic to the unity and integrity of international law, the relationship of the topic to the broad mandate of the Commission, and the flexibility with which the Commission could discharge its mandate, it was generally felt that the Commission would not only be within its

13. See CRAWFORD, *supra* note 9, at 37.

14. Gerhard Hafner, *Risks Ensuing From Fragmentation of International Law*, Report of the International Law Commission, U.N. GAOR, 52nd Sess., Suppl. No.10, at 321, U.N. Doc. A/55/10 (2000).

mandate to study the topic, but by doing so, the Commission could make a distinct contribution to clarify and put into perspective the consequences and implications of the diversification and expansion of international law. This feeling was also shared by the UN General Assembly (the Sixth Committee) when it considered the Report of the Commission of 2001.

Accordingly, a study group under the Chairmanship of then Professor Bruno Simma considered the matter in 2002. It reached several useful conclusions to delimit the nature and scope of the topic.¹⁵ First, the group determined that the Commission's study should not focus on the risks of fragmentation and the "too negative a light"¹⁶ it puts on the subject, but the study should focus on the difficulties posed by the diversification and expansion of international law. It should not deal with problems posed by the creation of multiple international judicial forums and the need for coordination, but could consider the problems that may arise from such divergences. The group also concluded that domestic analogies were not helpful as "there was no well-developed and authoritative hierarchy of values in international law"¹⁷ as well as "no hierarchy of systems represented by a final body to resolve conflicts."¹⁸ The Commission determined that it could do well by not appointing itself as referee "in the relationships between institutions, and in areas of conflicting rules."¹⁹ Further, it was considered useful to approach the study of the fragmentation topic as an extension of its earlier work on the law of State responsibility and the law of treaties. In this regard, several concrete issues were recommended for initial examination, such as the function and scope of *lex specialis* and the question of self-contained regimes. Additional issues that may be addressed in the future are the application and modification of treaties and the hierarchy of norms in international law. The Commission's study group made further progress in 2003 under the Chairmanship of Professor Koskenneimi, by analyzing the concept of *lex specialis* and the question of the self-contained regime.²⁰

Given the limited focus of my presentation, I will neither go into the details of the consideration of the fragmentation topic by the Commission nor examine the different causes or factors considered responsible

15. *Report of the International Law Commission*, U.N. GAOR, 57th Sess., Suppl. No. 10, at 237, 242, U.N. Doc. A/ 57/10 (2002).

16. *Id.* at 239.

17. *Id.* at 240.

18. *Id.*

19. *Id.*

20. *Report of the International Commission*, U.N. GAOR, 58th Sess., Suppl. No. 10, U.N. Doc. A/58/10, 269-275 (2003).

for fragmentation. Instead, I will concentrate on one aspect of the problem: Is the creation of multiple international judicial tribunals detrimental to the unity and integrity of international law?

Judge Oda, who was a prominent scholar on and a negotiator of the law of the sea, questioned the creation of the International Tribunal for Law of the Sea (ITLOS) and the problem of multiple judicial forums at the international level before his election to the bench of the ICJ. In his words:

The creation of a court of judicature in parallel with the International Court of Justice, which has been in existence for many years as the principal judicial organ of the United Nations, will prove to have been a great mistake. One should not lose sight of the fact that the law of the sea always has been, and always will be, an integral part of international law as a whole. The law of the sea must be interpreted in the light of the uniform development of jurisprudence within the international community and must not be dealt with in a fragmentary manner. . . . If the development of the law of the sea were to be separated from the general rules of international law and placed under the jurisdiction of a separate judicial authority, this could lead to the destruction of the very foundation of international law.²¹

However, Judge Oda pointed out the need for—and the value of—an International Seabed Disputes Chamber (Chamber) to deal with certain specific legal issues arising from the exploration and exploitation of the international seabed area.²² The Chamber would have jurisdiction to decide disputes involving States, the International Seabed Authority (ISA), the Enterprise (a mining arm of the ISA), private contractors, individuals, and non-State entities. Judge Oda also favored special arbitral tribunals to decide disputes concerning scientific research, marine pollution, and fisheries. These disputes might involve conflicts about the exercise of the rights and the discretionary power given to the coastal States in the exclusive economic zone in relation to the rights of other States. These disputes would require a high level of expertise in their respective fields. Moreover, the issues involved may be in the nature of equity and not of law. Similarly, Judge Oda favored arbitration for the settlement of maritime delimitation. In his view the problem of drawing a maritime boundary on the basis of various “factors to be taken into

21. Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT'L & COMP. L.Q. 863, 864 (1995).

22. *Id.* at 867–71.

consideration,” the “special circumstances,” or “relevant circumstances,” that States plead “does not belong to the function of law.”²³

Judge Gilbert Guillaume of the ICJ has also stressed the dangers of fragmentation of international law as a result of multiple judicial forums. He reviewed the role of ITLOS, international criminal courts, both ad hoc and permanent tribunals, and arbitration as methods of dispute settlement. While commending the contribution to creating peace and good order that they all made within their limited sphere, he stressed the “dangers for international law, resulting from the increasing number of judicial institutions in the modern world.” According to Judge Guillaume, the risk of these different tribunals delivering divergent opinions on the same point of international law was real and damaging to the unity of international law.²⁴ In his address to the Sixth Committee of the UN General Assembly in 2000, in his capacity as the President of the ICJ, Judge Guillaume emphasized this point²⁵ and gave two examples where different tribunals expressed divergent positions: the *Loizidou* case²⁶ and the *Tadic* case.²⁷ In the *Loizidou* case (1995) the European Court of Human Rights declared the invalidity of territorial reservations attached to Turkey’s acceptance of the jurisdiction of that court.²⁸ It is not clear whether the decision of the European Court in invalidating Turkey’s territorial reservation to its jurisdiction can be treated as a real case of conflict between the jurisprudence of that court and that of the ICJ. The Statue of the ICJ would allow the type of territorial jurisdiction which was invalidated by the European Court of Justice. But the position of the European Court can be distinguished from that of the position of the ICJ to similar reservations. The main difference is as the European Court noted it was entrusted with “direct supervisory functions in respect of a law-making treaty such as the [European] Convention.”²⁹ I will analyze

23. *Id.* at 869.

24. Gilbert Guillaume, *The Future of International judicial Tribunals*, 44 INT’L & COMP. L.Q. 848, 861–862 (1995).

25. For a mention of the concern of President Guillaume before the UN General Assembly, see Koskenniemi & Leino, *supra* note 1, at 555.

26. *Loizidou v Turkey*, 20 EUR. CT. H.R. (ser. A) No. 310 at 99 (1995).

27. Prosecutor v. Tadic, ICTY Case No. IT-94-1-A, Judgment of the Appeals Chamber, (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm> [hereinafter *Tadic Appeal*].

28. Koskenniemi & Leino, *supra* note 1, at 568. In addition this case also dealt with the issue of attribution of responsibility to Turkey for acts committed by contingents of Turkish army placed on the territory of northern Cyprus in defense of the self-proclaimed State of Turkish Republic of Northern Cyprus, which is not recognised by the international community. For a discussion of this aspect of the case, see Andre J. J. DE Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic case and Attribution of Acts of Bosnian Serb Authorities to the Federal republic of Yugoslavia*, 2001 BRIT. Y.B. INT’L L., 255, 271–272.

29. *Loizidou*, *supra* note 26.

the holding in the *Tadic* case (1999) decided by the International Criminal Tribunal for the former Yugoslavia (ICTY) below, in the context of our examination of the functioning of the international criminal tribunals in the diverse system of international tribunals.

Judge Guillaume argued that a divergence of opinion between two international tribunals showed that proliferation of tribunals was accompanied by “a serious risk: namely ‘loss of control.’”³⁰ He repeated his concern in his address to the UN General Assembly in 2001 by stating that the proliferation of international courts could jeopardize the unity of international law and, as a consequence, its role in inter-State relations.³¹

Other Presidents of the ICJ—Judge Schwebel and Judge Jennings—also voiced similar concerns, though not as directly or as pointedly.³² Judge Schwebel proposed that other international tribunals might seek an advisory opinion from the ICJ “on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law,” as a possible solution.³³ This suggestion was also made by Judge Guillaume.³⁴

One of the points that emerges from the concerns expressed by the distinguished former presidents of the ICJ is that to the extent possible, disputes under general international law, particularly those involving only States, should continue to be addressed to the ICJ in the interest of the unity and integrity of international law. This point raises an issue about the nature of contemporary international law and policy governing the creation of new tribunals, which are meant to decide disputes on the basis of a legal regime set up by an international treaty. Thus, it is important to consider the expanding nature of international law, a significant phenomenon since the establishment of the UN in 1945.

II. THE EXPANDING CHARACTER OF INTERNATIONAL LAW: EMERGENCE OF AN INTERNATIONAL LEGAL COMMUNITY

International law is regarded as a body of principles expressly agreed to by States. Under this definition, States enjoy freedom of action in areas not so expressly regulated or prohibited. However, the scope and structure of international law today is different, as it has been vastly

30. Koskeniemi & Leino, *supra* note 1, at 555.

31. *Id.*

32. *Id.*

33. *Id.* at 554.

34. Guillaume, *supra* note 24, at 862.

expanded to accommodate obligations arising for States without or against their will. Professor Tomuschat observed that:

[S]overeignty could be taken to mean, in the sense outlined by the *Lotus* judgment of the PCIJ, that in the absence of any specific prohibitive rule each State is simply free to do whatever it pleases to do. Such an understanding of sovereignty would be the very denial of the existence of a legal community.³⁵

The “legal community” is a short hand expression for the existence of rights and obligations that a State is required to recognize and discharge in its capacity as a member of the international community irrespective of its consent or will to be bound by the same.

To illustrate, the decisions of the UN Security Council are binding on all States, both members and non-members, by virtue of Article 25 when read in conjunction with article 2(6) of the UN Charter, in all matters concerning the maintenance of international peace and security. Further, under Article 103 of the UN Charter, obligations undertaken by member States override any other conflicting obligations existing or contracted under other treaties. Given the constitutional character of the UN Charter, the obligations Member States have accepted under the Charter are relatively indeterminate in nature and could continuously evolve. Hence, it may not be open any longer to States to claim that they are bound only by those obligations that they have voluntarily accepted.

The General Assembly of the United Nations—a body of more than 189 States—is the most universally representative forum for the expression of the will of the international community. In that capacity, any resolution that it passes with near unanimity, on any subject with a clear intent, content, and concrete focus on rights and obligations of States, or by way of clarification or elaboration of the various provisions of the Charter, could be a source of lawful and binding obligation for States. The fact that resolutions of the UN General Assembly are only recommendatory in nature does not negate this proposition because such resolutions can influence the crystallization of customary law. They can also be the basis for negotiating more elaborate treaty regimes. In addition, as Pellet explained: “[A] recommendation for example: must be “examined” *bona fide* by all the Member States or the Organization that adopted it; narrows the exclusive jurisdiction of the Member States; and may be implemented by them.”³⁶

35. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will* 241 (IV) RES. DES COURS, 198, 237 (1993).

36. Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTL. Y.B. INT'L L. 22, 31–32 (1992). In this Article, Professor Pellet presents a

Further, he noted that: “[W]hen a State implements a recommendation, its international responsibility is not involved and, in turn, this implies that recommendations are not binding, they are permissive. They do not compel—they permit.”³⁷

Moreover, several resolutions of the UN General Assembly have been regarded as inherently prescriptive. For example, UN Resolution 1514 (XV) of 14 December 1960 on the Declaration on the Granting of Independence to Colonial Countries and Peoples is the first resolution to affirm the principle of self-determination, particularly in the context of decolonization. In addition, UN Resolution 1803 of 14 December 1962 on the Permanent Sovereignty over Natural Resources can be seen to have normative value in several respects.³⁸ Professor Crawford referred to them as incontrovertible cases of “peoples’ rights.”³⁹ Further, according to Brownlie “there is strong evidence in support of the conclusion that the adoption of resolution 1803 indicated that the principle of compensation was no longer based upon the ‘adequate, effective and prompt’ formula of Cordell Hull, but upon the principle of ‘appropriate compensation.’”⁴⁰

Another example of a prescriptive resolution is UN Resolution 2625(XXV) of 24 October 1970 on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN. This resolution is one of the most well acclaimed UN Declarations as an authoritative statement of some very fundamental principles of international law. Seven principles were affirmed and clarified: the non-use of force; peaceful settlement of disputes; self-determination; sovereign equality of States; the principle of non-intervention in the domestic jurisdiction of States; the duty of States to cooperate; and the principle of good faith. According to Jennings and Watts, the “fact that the Declaration was prepared within the framework of the United Nations after extensive inter-governmental discussion, and was adopted by acclamation, and

perspective on international law-making which is contrary to the one presented by Professor Prosper Weil, *supra* note 4.

37. Pellet, *supra* note 36, at 32.

38. It is important in the context of the efforts of the United Nations to strengthen the economic base of the newly independent countries and to affirm their right to choose freely any political or economic system. This also provided a substantial basis for the nationalization of several foreign corporations, which until then and during the colonial period owned and exploited the national resources of the dependent countries for their profit.

39. James Crawford, *The Rights of Peoples: Some Conclusions*, in *THE RIGHTS OF PEOPLES* 161, 163 (James Crawford ed., 1988).

40. Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations*, 255 *RES. DES COURS.* 150 (1995). The Resolution was adopted by 87 votes in favor, 2 against and 12 abstentions.

without [a] dissenting vote by the General Assembly, gives the seven principles contained in it a preeminent value in contemporary international law."⁴¹

Other UN resolutions with significant prescriptive value include the definition of aggression adopted by the UN General Assembly,⁴² the declaration of the international seabed area as the common heritage of mankind,⁴³ and the preservation of outer space for the common interests of the international community.⁴⁴ The ICJ—in its advisory opinion on the Certain Expenses of the United Nations⁴⁵—declared that the resolutions of the UN are not merely “hortatory.” In the *Nicaragua* case the ICJ recognized that *opinio juris* could be deduced from the circumstances surrounding the adoption and application of the resolutions of the UN General Assembly.⁴⁶ And in its advisory opinion on the Legality of the Threat or use of Nuclear Weapons it examined a series of UN General Assembly resolutions on the legality of nuclear weapons for assessing whether any *opinio juris* emerged from these resolutions. Although it could not find such an *opinio juris* in favor of prohibition of nuclear weapons, it made a noteworthy observation on the legal value of UN General Assembly resolutions. The ICJ said that:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.⁴⁷

41. ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 334 (9th ed., 1992).

42. G.A. Res. 3314, U.N. GAOR, 6th Comm., 29th Sess., No. 86, at 1 U.N. Doc. A/9890 (1975).

43. *Declaration of the Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof Beyond the Limits of National Jurisdiction*, G.A. Res. 2749, U.N. GAOR, 1st Comm., 25th Sess., No. 25, at 1, U.N. Doc. A/8097 (1971).

44. *The Agreement Governing The Activities of States on the Moon and other Celestial Bodies* (also known as the Moon Treaty), G.A. Res. 68, U.N. GAOR, 34th Sess., No. 48 & 49, at 1, U.N. Doc. A/34/664 (1979).

45. Certain Expenses of the United Nations, 1962 ICJ 13 (July 20).

46. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), 1986 ICJ 14, 99–100 (June 27).

47. Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 32–33, para. 70 (July 8).

More importantly, in recent years enormous strides have been made in international law to establish the criminal responsibility of individuals, particularly the heads of States, governments, and other senior functionaries. Further, international criminal tribunals have been given jurisdiction to try these individuals, irrespective of their official status for crimes committed against humanity and other war crimes. These trends are also influencing the national courts to review their own jurisdiction and competence to allow prosecution of both national and foreign individuals for such crimes irrespective of the location in which they are committed or the nationality of the victims.⁴⁸ Some domestic tribunals are now prosecuting criminal acts committed by functionaries of a foreign State after they cease to hold their high offices.⁴⁹ These developments are powerful testimony to the growing presence of the international legal community.

Simultaneously, the right of victims whose human rights were violated by their own government to appeal to international tribunals significantly strengthens the concept of international legal community. The work of UN human rights bodies established with a mandate to monitor the records of States in the performance of human rights obligations is also noteworthy for its contribution to consolidate the concept of the international legal community.⁵⁰

Aside from the prescriptive value of UN resolutions and increasing international criminal responsibility, the law of State responsibility and the law of treaties are evolving and mutually reinforcing *erga omnes* and *jus cogens* obligations. The formation and execution or enforcement of these obligations is directly the product and function of the international community in its capacity as "an overarching system which embodies a common interest of all States and, indirectly, of mankind."⁵¹ In this sense, the collective consent of States on the basis of some form of a majoritarian principle is the basis for the creation and implementation of international obligations. In such cases, the will of the international community supersedes the normal requirement of the formal concurrence of wills of States as expressed through reciprocal or bilateral inter-State relations.⁵² The concept of international community operates at a

48. M.N. SHAW, *INTERNATIONAL LAW* 655–659 (5th ed., 2003).

49. *Id.* at 659.

50. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RES. DES COURS 243 (1994).

51. Tomuschat, *supra* note 35, at 227.

52. Simma, *supra* note 50, at 293.

different level within the system of international law and overrides in the area of its operation the requirement of State consent.⁵³

One should also not underestimate the role of non-traditional sources of international law that the ICJ and other international tribunals play in the development of the law. Judicial legislation at the international level is a well recognized occurrence, albeit within limits of judicial caution and restraint.⁵⁴ In this regard, international tribunals act as "authoritative decision-makers expressing community values."⁵⁵

The expansion of international law in the age of globalization through formal and informal sources, and the access being granted non-State actors to international legal procedures and tribunals, as we will see below, created a functional need to establish more than one international tribunal to administer the various legal regimes that it encompasses. The emergence of international community interest need not be viewed as the end of the State's pivotal role in building and maintaining the world public order.⁵⁶ These changes only mean that the non-State actors can no longer be denied their due and direct role in shaping goals and values of the world public order. Even as we recognize this fact, it is important to remind ourselves that the main edifice for the structure of the international legal system is and continues to be treaties that States conclude and ratify. They, together with the customary process by which law continues to evolve, play a dominant role in the codification and progressive development of international law.

III. FUNCTIONAL NEED FOR THE ESTABLISHMENT OF NEW INTERNATIONAL TRIBUNALS FOR A NEW AGE

Treaties concluded in the last twenty years have consolidated and expanded diverse fields including the law of the sea, international trade

53. For development of this theme, see Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L., 529-551 (1993).

54. H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 5 (1982) observed that "Institutions set for the achievement of definite purposes grow and to fulfill tasks not wholly identical with those which were in the minds of their authors at the time of their creation." On judicial legislation and judicial restraint and caution see various chapters of the book.

55. Brownlie, *supra* note 40, at 29, 45-49 on judicial reasoning and judicial legislation.

56. Simma, *supra* note 50, at 247 observed that 'bilateralist statal paradigm' has not been overcome by the actual developments in favor of growing manifestation of the international community interest. According to him to assert to the contrary would 'inevitably lead to an unrealistic view of the contemporary international relations.' On a different note, emphasizing the value of treaties along with the recognition that the U.N. Charter is a 'kind of constitution of the international community for the progressive development and codification of international law. See Grigory Tunkin, *Is International Law Customary Law Only?*, 4 EUR. J. INT'L L. 534, 541 (1994).

law, human rights, environmental law, and international criminal law. With the exception of environmental law, these areas of international law are served by their own special monitoring bodies or tribunals. Each time a new international tribunal is proposed under any new regime, the need for its establishment is carefully considered. The creation of a tribunal is often justified by the special features of the regime it is meant to serve by way of implementation and development. The State representatives who lobby for these tribunals are conscious of the need to avoid duplicating the efforts of or supplanting the stature of the ICJ. The ICJ is by all reasoning not only the premier international law tribunal, but also the principal judicial organ of the UN.⁵⁷ Even though scholars and policy-makers are cognizant of the ICJ and its preeminent role in the development of international law, within the strict bounds of its judicial role, we cannot ignore the fact that the ICJ—like its predecessor the Permanent Court of International Justice (PCIJ)—is a product of its time.

Further, it is obvious to those familiar with the Statute of the ICJ that its jurisdiction is open only to States and that it construes its jurisdiction in strict terms because it is based on the consent of States.⁵⁸ The ICJ's composition is confined to fifteen judges, with persons from the five permanent members of the UN Security Council routinely being elected; only a few positions are available to nationals of most of the member States of the UN. This factor may have had some influence over the decision to establish new tribunals. New tribunals would no doubt open up opportunities for more nationals to be elected as judges of such international tribunals. However, it must be emphasized that this factor is of limited significance and plays only a secondary role to the functional need for the establishment of such tribunals. Another stated reason for the formation of new tribunals is disenchantment with the decisions of the ICJ,⁵⁹ but this explanation too is not a significant factor. After all,

57. Mohamed Shahabuddeen, *Consistency in Holdings by International Tribunals*, in LIBER AMICORUM JUDGE SHIGERU ODA 633, 648 (N. Ando, E. McWhinney & R. Wolfrum eds., 2002). For a fuller analysis of the status of the ICJ as principal organ and as principal judicial organ of the United Nations, see SHABTAI ROSENNE, I THE LAW AND THE PRACTICE OF THE INTERNATIONAL COURT, 1920–1996, vol.1, 110–44 (1997). On the relations between the Court and other tribunals, at p.142, the author observed that ‘This indicates that the Charter implies no formal hierarchical relationship between the different judicial organs established by or under the auspices of the United Nations, and no limitations upon the power of the Organization to establish other judicial organs, which shall not, however, be principal organs in the conception of the Charter.’

58. In *Phosphates in Morocco*, 1938 P.C.I.J. (ser. A/B), No. 74, at 23, the court noted that the jurisdiction (of the court) exists only in the limits within which it has been given and accepted (by the parties to the dispute).

59. See Oda, *supra* note 21, at 865; Guillaume, *supra* note 24, at 854. The disenchantment of developing countries with the court on account of its decisions in the South-West Africa

disenchantment with outcomes is not confined to the ICJ or to judicial tribunals in general; it is a feature common to most permanent institutional bodies.⁶⁰

In the ultimate analysis, the functional needs and special features of the legal regime in question provide the main rationale for the establishment of new tribunals, thanks to the expanding role of the international legal system. Judge Higgins of the ICJ underlined this policy rationale as a justification for the creation of the newer and more specialized international tribunals. She takes the view that new tribunals are a necessity because of "certain decentralization of some of the topics with which the ICJ *can* in principle deal to new, highly specialized bodies, whose members are experts in a subject matter which becomes ever more complex, which are more open to non-State actors, and which can respond rapidly."⁶¹ Accordingly, Judge Higgins did not view the creation of new tribunals as a matter of regret and did not support the call of the past Presidents of the ICJ for centralization of international law disputes around the ICJ.⁶²

The functional requirements of new tribunals can be readily understood if we examine three new international legal regimes that are of universal interest and scope: the international law of the sea; the international law of trade; and the international law of crimes.

IV. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The International Tribunal for the Law of the Sea (ITLOS) is comprised of twenty-one judges and is now functioning in Hamburg, Germany. ITLOS has been functioning since October of 1996 and has already rendered some very important decisions. These decisions generally involved the prompt release of detained vessels and crews, fishery management in the exclusive economic zone, flags of convenience, hot pursuit and espousal of claims relating to crew members not of the nationality of the applicant State, and the issuance of provisional

cases (1962,1966) and the Northern Cameroons case (1963) were mentioned for the establishment of the International Tribunal for the Law of the Sea.

60. For example disenchantment with the U.N. on occasion is well known. On the attitudes of States towards the ICJ and other tribunals, see Rosenne, *supra* note 50, at 178-99.

61. Rosalyn Higgins, *Respecting the Sovereign States and the Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 122 (2001).

62. *Id.*

measures.⁶³ The decisions of ITLOS and the legal issues they have opened up appear to put ITLOS in a distinct area of its own control within the family of international tribunals. As Alan Boyle noted, the Law of the Sea Convention (LOSC) deals with “much that had been in dispute, much that is new, and much that remains unresolved, it inevitably represents a complex balance of interests, and contains many inherently uncertain or ambiguous articles.”⁶⁴ For example, before an application for the prompt release of a vessel and the crew can be entertained, according to Article 292(1) of the LOSC, any court or ITLOS to which the parties may agree to submit the matter must first be satisfied that the allegation that the detaining State has not complied with the provisions of the LOSC meet a certain standard of appreciation.⁶⁵ Further, as provided in Article 292(3) of the LOSC, in arriving at its conclusion, and subsequently while acting upon the application for release, the court or ITLOS shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel or its crew. These questions came up for consideration for the first time in the *M/V Saiga* case⁶⁶ (1997), between St. Vincent Grenadines and Guinea.⁶⁷ By a majority vote of twelve to nine, the ITLOS noted that because they are concerned only with the matter of prompt release of the vessel and the crew and not with the merits of the allegation, which may be submitted for consideration of a suitable tribunal or court by the parties separately, the allegation of non-compliance with the provisions of the LOSC need not be proven, but merely shown “arguable” or “sufficiently plausible.”⁶⁸ The dissenting judges, however, disagreed with the majority and wanted a higher threshold of appreciation and held the view that the allegation must be well-founded as required under Rule 113(1) of the Rules of the ITLOS.⁶⁹ In their view, any decision on release of a

63. Shabtai Rosenne, *The Case-Law of the ITLOS (1997–2001): An Overview*, in CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 127, 127–28 (Myron H. Nordquist & John N. Moore, eds., 2001).

64. Alan E. Boyle, *Dispute Settlement and the Law of the Sea: Problems of Fragmentation and Jurisdiction*, 46 INT’L & COMP. L.Q. 37, 38 (1997).

65. For the text of Article 292 (1) of the LOSC, see INTERNATIONAL SEABED AUTHORITY, THE LAW OF THE SEA: COMPENDIUM OF BASIC DOCUMENTS, 127 (2001).

66. *M/V Saiga* (Saint Vincent & Grenadines v. Guinea), 1997 ITLOS (December 4) at http://www.itlos.org/start2_en.html.

67. See E. Lauterpacht, *The First Decision of the International Tribunal For the Law of the Sea: The M/V Saiga*, in LIBER AMICORUM PROFESSOR SEIDL-HOHENVELDERN—IN HONOR OF HIS 80TH BIRTH DAY, 395 (Gerhard Hafner et al. eds., 1998).

68. *M/V Saiga*, *supra* note 66, para. 51.

69. *International Tribunal for the Law of the Sea: Rules of the Tribunal*, U.N. Doc. ITLOS/8 (2001), at <http://www.itlos.org/documents and publications/documents> [hereinafter Rules of the Tribunal]. Rule 113(1) of the Tribunal reads thus: “The Tribunal shall in its Judgment determine in each case in accordance with article 292 of the Convention whether the allegations made by the applicant that the detaining State has not complied with a provision of

vessel and crew is final and binding on the parties to the dispute, and this is similar to any other claim on a substantive issue under the LOSC.⁷⁰ The standard of appreciation adopted by ITLOS in this case was noted to be more suitable to a claim on provisional measures (which is covered by Article 290 of the LOSC) than for the issue of a prompt release of vessel and crew.⁷¹ It is noteworthy that the standard of appreciation of allegations adopted by ITLOS in the *M/V Saiga* case was abandoned in the *Camouco* case (2000), a dispute involving Panama and France.⁷² By a majority vote of 19 to 2, ITLOS required that the allegation be “well-founded” before being entertained, a standard provided for in rule 113(1) of the Tribunal.⁷³

Other issues could also arise under Article 294 of the LOSC by way of preliminary hearing. These issues may involve an early stage of proceedings before the Court or ITLOS to which the dispute under Article 297 of the LOSC could be submitted. This stage occurs even prior to the stage in which procedural issues, including provisional measures under Article 290 of the LOSC, may be considered. Under Article 294, the court or ITLOS would first have to determine whether the complaint brought before it is *prima facie* unfounded or abusive of the process of dispute settlement provided for under the LOSC.⁷⁴ Even though this provision is drafted in a neutral manner to apply to complaints brought by any State—coastal or flag State—this provision is incorporated in the LOSC to provide some reassurance to coastal States. At the time of negotiation of the LOSC, coastal States needed assurance that flag States would not drag them before ITLOS on flimsy grounds whenever they exercised their enforcement powers within the exclusive economic zone. According to Rosenne, the burden that Article 294 imposes upon any court or tribunal is heavy, but when such issues arise before the ICJ as the competent forum under Article 297, “the question whether the burden is compatible with the Court’s powers and functions under the Charter and Statute may well arise.”⁷⁵

the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded.”

70. See *M/V Saiga* (Anderson, J., dissenting) at paras. 2–5; *M/V Saiga* (Wolfrum, V.P. and Yamamoto, J., dissenting) at para 5; *M/V Saiga* (Mensah, P., dissenting) at para 5; *M/V Saiga* (Park, Nelson, Chandrasekhara Rao, Vukas, and Ndiaye, J., dissenting) at para 8.

71. See *M/V Saiga* (Wolfrum, V.P. and Yamamoto, J., dissenting) at paras 7–8.

72. *Camouco* (Panama v. France), 2000 ITLOS (February 7) at http://www.itlos.org/case_documents/2001/document_en_129.doc.

73. *Id.* at para 49. The dissenting judges however did not question the standard adopted.

74. For a discussion of this aspect of the matter see, Tullio Trevis, *Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations*, in Ando, McWhinney & Wolfrum, *supra* note 57, at 749.

75. *Id.* at 757, note 13.

There are other reasons for the creation of ITLOS. ITLOS is open to entertain disputes involving not only States, but individuals, corporations, State enterprises, and international organizations.⁷⁶ As Professor Sohn pointed out, many disputes might arise between private persons and the authority established to regulate the international seabed area, and the ICJ could not be awarded jurisdiction over such disputes according to the existing limitations in its Statute.⁷⁷ On this point, even Judge Oda, who is concerned about the fragmentation of international law due to the proliferation of international tribunals, fully supported the creation of ITLOS to deal with such disputes. In addition, under its Statute, ITLOS can give an advisory opinion to two or more State parties to any treaty or agreement related to the purposes of the LOSC, if such treaties or agreements confer jurisdiction on ITLOS.⁷⁸ This provision is novel, because so far only the ICJ, has jurisdiction to give advisory opinions to state parties to the UN Charter or its specialized agencies.

Moreover, one of the initial principal considerations for creating ITLOS was to use it as the sole forum to settle all disputes concerning interpretation and application of the new concept of the common heritage of mankind and thus help a progressive development of the law governing the international seabed area and its resources. It is certainly desirable, at least in the formative years, to create a tribunal composed of judges who are both well-versed in international law as well as experienced in negotiation of the international seabed regime.⁷⁹ It is essential to remember that during the negotiations of the LOSC, there were conspicuous differences between the representatives of the Third World and the First World about the value, content, and consequences of the concept of the common heritage of mankind, which has been accepted as the foundation for the legal regime governing the international seabed area and its resources.⁸⁰

76. Hugo Caminos, *The Creation of Specialized Courts: The Case for the International Tribunal for Law of the Sea*, in Ando et al., *supra* note 57, at 569–74.

77. *See id.* at 571.

78. *See Rules of the Tribunal*, *supra* note 69, art. 138; P. Chandrasekhara Rao, *The International Tribunal for the Law of the Sea: An Evaluation*, in Ando, McWhinney & Wolfrum *supra* note 57, at 667, 669.

79. According to article 191 of the LOS Convention, it is the Seabed Disputes Chamber “which is competent to give the advisory opinions at the request of the Assembly or the Council of the Seabed Authority on legal questions arising within the scope of their activities.” This is one of the seven reasons mentioned by the former President of the ITLOS and Judge P. Chandrasekhara Rao for highlighting the ‘important role and authority’ and hence the rationale for the creation of the ITLOS. *See Rao*, *supra* note 78, at 668–69.

80. For an analysis of the views and the early development of the concept of common heritage of mankind, see P.S. RAO, *THE PUBLIC ORDER OF THE OCEAN RESOURCES* 76–108 (1975).

V. THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WORLD TRADE ORGANIZATION

In the past, international trade largely drew its strength from the establishment of colonial empires that in turn were supported by maritime military power. Expanding the naval power of the colonial powers involved legal debates about the open and closed seas that eventually culminated in the doctrine of the freedom of the high seas. This situation changed with the beginning of decolonization and the renewed call for sovereign equality and peaceful settlement of all disputes, which the UN Charter proclaimed as the basic policy of the New World order in 1945.⁸¹ International trade was eventually organized under the 1947 General Agreement on Trade and Tariffs (GATT) system.⁸² The 1947 GATT was replaced by the 1994 GATT system, which has since been incorporated into the broader international trade regime of the World Trade Organization (WTO).⁸³ The present GATT system is rule-based and is subject to a compulsory settlement of disputes. The current system not only replaced the earlier system that was essentially sustained by diplomatic and military instruments, but it laid a firm foundation for third party dispute settlement procedures in international relations. The present Dispute Settlement Understanding (DSU) of the WTO, unlike its predecessor contained in the 1947 GATT system, is not a "collection of ad hoc agreements, panel reports and understandings of the parties."⁸⁴ This system is also not encumbered by the "need to satisfy all parties and can concentrate on the merits of the dispute and the unencumbered application of the facts to WTO law."⁸⁵ The current dispute settlement procedures enjoy this advantage because it is a permanent and standing procedure. The decisions of the WTO Appellate Body are final unless disapproved by the Dispute Settlement Body (DSB), an alter ego of the General Council of the WTO, by consensus. Under the 1947 GATT system, decisions were not final unless the GATT Council, consisting of all Contracting Parties, approved them by consensus.⁸⁶

81. See U.N. CHARTER, art. 2.

82. For an analysis of GATT history, see course prepared by Stephanie Carter, UNITED NATIONS CONFERENCES ON TRADE AND DEVELOPMENT DISPUTE SETTLEMENT: WORLD TRADE ORGANIZATION, 3.5 GATT 1994 (2003), at <http://www.unctad.org>.

83. *Id.*

84. James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L & COMP. L.Q. 248, 248 (2001).

85. *Id.* at 249.

86. See the course prepared by Mr. Peter Van den Bossche, United Nations Conference on Trade and Development, Dispute Settlement: World Trade Organization, 3.1, Overview 39, 49 (2003), at <http://www.unctad.org>.

The legal work of the WTO—like the work of the earlier panels under the 1947 GATT system—largely resembles the work of administrative tribunals and other established international tribunals. In some respects, it also has the features of domestic courts.⁸⁷ The pleadings in WTO disputes require inputs from trade specialists and experts on technical, financial, and economic details before they can be couched in the legal language of the WTO law. Moreover, Article 3.7 of the DSU states that the “aim of the dispute settlement mechanism is to secure a positive solution to a dispute” and that “a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”⁸⁸ Given the high profile of trade details and the commercial give-and-take that characterizes the implementation of the various agreements administered by the WTO, it is not surprising that an astute observer such as Judge Guillaume wondered whether the DSU warrants being termed as a “judicial system.”⁸⁹ But such misgivings are misplaced given the steady and valuable contribution already made by the DSU to the principles of compulsory third party dispute settlement in international relations. The WTO Appellate Body is comprised of both well-known international law specialists and specialists trained in international trade law.

No party—including the ardent supporters of the ICJ who view the ICJ as the apex of international judicial system—would consider the creation of the DSU of the WTO as anything less than a valuable and positive addition to the family of international tribunals. This assertion is amply demonstrated by the fact that the work of the panels and the Appellate Body of the WTO have acquired sufficient depth, content, and connectivity to international law. The WTO’s jurisprudence is of value not only to trade specialists, but to public international lawyers as well. For instance, consider the number of decisions of the Appellate Body, which deal with the law of treaties, environmental law, human rights, and State responsibility.⁹⁰ In fact, some of the more important holdings that are significant to international law are worth noting.⁹¹ First, the Vienna Convention on Law of Treaties (VCLT) represents the codification of customary international law and is therefore binding on all States.⁹²

87. Cameron & Gray, *supra* note 84, at 251.

88. See Van den Bossche, *supra* note 86, at 42–43.

89. Guillaume, *supra* note 24, at 860.

90. For a review of the cases of the Appellate Body where rules of general international law are used for the interpretation of WTO provisions, see JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 268–72 (2003).

91. Cameron & Gray, *supra* note 84, at 252–72.

92. Appellate Body Report, Japan—Taxes on Alcoholic Beverages, complaints by the European Communities, WTO Doc. WT/DS.8/AB/R, Canada, WTO Doc. WT/DS10/AB/R,

Second, treaties should be interpreted in good faith and in accordance with the ordinary meaning of terms in pertinent provisions, keeping in view the object, purposes, and the overall text of the treaty.⁹³ In addition, given the various cross-references in each of the agreements to other WTO agreements, the interpretation of any one of the agreements must achieve harmony with the terms of the other agreements.⁹⁴ It is also established that *travaux préparatoires* is to be regarded as only a supplementary tool of interpretation in cases where the ordinary meaning of the provision does not resolve the problem of interpretation or to confirm a textual interpretation.⁹⁵ These principles of treaty interpretation are in full conformity with Articles 31 and 32 of the VCLT and Article 3:2 of the DSU.⁹⁶ Third, the decisions of the panel and Appellate Body of the WTO do not have any precedential effect, but parties can have “reasonable expectations” arising from such decisions and these can be given appropriate consideration.⁹⁷ Similarly, the 1994 GATT is a *lex specialis* agreement but it cannot “be read in clinical isolation from public international law.”⁹⁸ In considering the relationship between WTO Agreements and multilateral environmental agreements (MEAs), one must recognize that decisions of the panels or Appellate Body of the WTO do not make pronouncements in a direct fashion. However, the WTO Appellate Body also enlarged the meaning of “natural resources” in Article XX (g) by equating the term “renewable natural resources” to include both living and non-living resources. To make this modification, the Appellate Body relied on the objective of sustainable development, which the Appellate Body believed added “color, texture, and shading” to the interpretation

the United States, WTO Doc. WT/DS11/AB/R, Section D on treaty interpretation, WTO Doc. AB-1996-2 (adopted Oct. 4, 1996) at 11 [hereinafter Japan—Taxes]. There the Appellate body also noted that the general rules of treaty interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of the Treaty have “attained the status of a rule of customary or general international law.”

93. See Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, complaints by India, Malaysia, Pakistan, and Thailand, WTO Doc. WT/DS58/AB/R, AB-1998-4 (adopted Oct. 12, 1998), at para 114 [hereinafter US—Shrimp].

94. See Appellate Body, Canada—Certain Measures Concerning Periodicals, complaint by the United States, WTO Doc. WT/DS31/AB/R, AB-1997-2 (adopted June 30, 1997) at section IV. See also Cameron & Gray, *supra* note 84, at 257.

95. See Appellate Body, European Communities—Measures Affecting the Importation of Certain Poultry Products, complaint by Brazil, WTO Doc. WT/DS69/AB/R, WTO Doc. AB-199803 (adopted July 13, 1998), at section IV, para 83.

96. Cameron & Gray, *supra* note 84, at 255, 257.

97. Japan—Taxes, *supra* note 92, at § 14.

98. See Appellate Body, United States—Standards for Reformulated and Conventional Gasoline, complaints by Venezuela, WTO Doc. WT/DS2/AB/R, and Brazil, WTO Doc. WT/DS4/AB/R, AB-1996-1 (adopted Apr. 29, 1996) at § III, B, 17. See also Cameron & Gray, *supra* note 84, at 264.

of WTO Agreements.⁹⁹ Any conflict between tribunals must be reconciled keeping in view Article 30 of the VCLT, which addresses the effect of later treaties on former treaties between the same parties. Moreover, for a WTO member to justify trade restrictions on account of legitimate societal values and interests such as human, animal and plant life or health, exhaustible natural resources, national treasures of artistic, historic, archeological value and public morals as exceptions under Article XX of 1994 GATT, the member is required to exhaust all reasonable options available to achieve multilateral solutions, taking into consideration the different conditions that may exist in the exporting countries.¹⁰⁰

Some other points of general legal interest from the work of the DSU of the WTO may be pertinent for our present examination and are noted. First, WTO agreements are non-retroactive in nature. Second, the jurisprudence of WTO dispute settlement is meant to clarify the precise nature and scope of rights and obligations incorporated in the WTO Agreements. It has only persuasive value for the subsequent cases. Within this parameter there has been a continual attempt to prevent fragmentation since the advent of DSU of WTO as a permanent mechanism.¹⁰¹ Third, the DSU neither has the power of judicial legislation that changes the rights and obligations of the parties to the WTO, nor the role of authoritatively interpreting the 1994 GATT. This function is reserved under the WTO system to the Ministerial Conference and the General Council, where decisions are adopted by a two-thirds majority.¹⁰² This structure differs from the position of the ICJ, which has a prominent role in the progressive development of international law without the need for any organs of the United Nations first to adopt its decisions.

However, under the DSU, the decisions of the panels or the appellate body, like the decisions of the ICJ, lack formal precedential value for later cases. Nevertheless, they are followed or relied upon unless a good cause exists to depart from them. This practice of relying upon the previous decisions without being obliged to adopt them is consistent with the policy of honoring legitimate expectations that such decisions create in the interest of predictability and certainty of law.¹⁰³ The pattern of

99. *US—Shrimp*, *supra* note 93, at § VI, C1, ¶ 155, *see also* Cameron & Gray, *supra* note 84, at 267.

100. Cameron & Gray, *supra* note 84, at 265. For a discussion of the two-tier test (first, the measure meets the elements of a particular exception and second, the same measure meets the requirements of the chapeaux of Article XX) to determine whether a measure otherwise GATT inconsistent could be justified, *see* *Cartier*, *supra* note 82, at 66–69.

101. Cameron & Gray, *supra* note 84, at 283

102. *Id.* at 273.

103. *Id.* at 260–63, 272–76. Judge Shahabuddeen also dealt with this matter in the context of the work of the International criminal tribunal for the former Yugoslavia and came to the same conclusion. *See* Shahabuddeen, *supra* note 57, at 636.

decision-making in the DSU is also similar to the ICJ in promoting judicial economy, without totally rejecting the need to be flexible and active in settling and clarifying the ambiguities in the WTO Agreements.¹⁰⁴ Accordingly, as noted by the Appellate Body, panels are not required to answer all the points raised by the parties, but only to address those questions that are necessary for resolving the claim, and to the extent necessary for reasoned consideration of the claims asserted.¹⁰⁵ Claims not asserted, or exceptions not pleaded, need not be addressed.¹⁰⁶ To avoid conflicts with the policies and objectives of other multilateral economic institutions like the International Bank for Reconstruction and Development or the International Monetary Fund, the WTO Appellate Body also narrowly defines its obligations under WTO agreements.¹⁰⁷

There are also some key differences between the ICJ and DSU of the WTO in the settlement of disputes. In the case of the ICJ, third parties can intervene in the case before the court if they can convince the court that they have an interest of a legal nature that is likely to be affected by the decision. In practice, the ICJ will rarely allow a third party intervention.¹⁰⁸ On the other hand, Article 10 and Appendix 3 of the DSU permit third parties an opportunity to be heard and to make written submissions; they can also make oral submissions. For example, in the *EC—Banana* case there were six parties (including the European Commission (EC)), which represented 15 States and 20 third parties. The Appellate Body in the *EC—Banana* case clarified that a State could seek the establishment of a panel even if did not have a legal interest or could not show an actual trade impact.¹⁰⁹ The interest in ensuring free international trade in goods and services, as well as the interest in clearly determining rights

104. Cameron & Gray, *supra* note 84, at 258, 281–83. The need to engage in the judicial economy without neglecting the proper function of a court to clarify and advance the development of law, thus engage in some cautious form of judicial activism is common in the practice of the International Court of Justice. See Lauterpacht, *supra* note 54; see also Hugh Thirlway, *Judicial Activism and the International Court of Justice*, in Ando, et al., *supra* note 57, at 77–105.

105. See the course prepared by Peter Van den Bossche, United Nations Conference on Trade and Development, Dispute Settlement: World Trade Organization, 3.2, Panels 15 (2003), at <http://www.unctad.org>.

106. See Appellate Body, United States—Measures Affecting Imports of Woven Wool Shirts and Blouses, complaint by India, WTO Doc. WT/DS33/AB/R, AB-1997-1 (adopted Apr. 27, 1997) at § VI, 21; see also Cameron & Gray, *supra* note 87, at 282.

107. *Id.* at 270.

108. See the course prepared by P.S. Rao, United Nations Conference on Trade and Development, Dispute Settlement: World Trade Organization, 1.2, General Topics 19 (2003) at <http://www.unctad.org>.

109. Appellate Body, European Communities—Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States, WTO Doc. WT/DS27/AB/R, AB-1997-3 (adopted Sept. 9, 1997); see also Cameron & Gray, *supra* note 87, at 288; Van den Bossche, *supra* note 105, at 35.

and obligations under the WTO Agreement, provide sufficient grounds to pursue WTO dispute settlement.¹¹⁰ However, the difference between the ICJ and the DSU in allowing third party intervention is a difference of a procedural nature and is otherwise justified by the specialized character of the legal regime to which the DSU is organically linked.

This analysis of the jurisprudence of the WTO dispute settlement system reveals that even though the WTO agreements have been constituted as a self-contained regime, general principles of international law, particularly those pertaining to international treaty interpretation provide a necessary basis for the application and implementation of that regime. The evolving process thus adds strength to the international legal system without affecting the unity and integrity of international law.

VI. INTERNATIONAL CRIMINAL TRIBUNALS

The initial creation of ad hoc criminal courts, and more recently, permanent international criminal courts, has opened up possibilities for the interpretation and application of international law through specialized forums. These tribunals were created because the UN Security Council saw the need to prosecute and punish persons committing war crimes and crimes against humanity, not only as a necessary measure of justice, but also as an important means for the maintenance of international peace and security. These tribunals are open for the trial of *individuals*, as opposed to States, for committing crimes as defined under the respective tribunal's statute. Following the principle of individual criminal responsibility, the Rome Statute established a permanent international criminal court. The added justification for the permanent international criminal court is that it would better meet the goal of justice than the system of ad hoc international criminal courts, which smack of victor's justice.¹¹¹

These international tribunals are essentially trial courts. Their main work revolves around the weighing of evidence, claims concerning the burden of proof, the admissibility of evidence given by witnesses and experts, and the typical procedures of interrogation and cross-examination. This work is special and should not be equated with the procedures and proceedings before any other international tribunals, particularly the ICJ. This, however, does not relieve these tribunals, as

110. Cameron & Gray, *supra* note 87, at 289.

111. See M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992); see also P.S. Rao, *Trends in International Criminal Jurisdiction*, in M. S. RAJAN, UNITED NATIONS AT 50 AND BEYOND 67 n.1 (1996).

Judge Shahabuddeen emphasized, from the duty to correctly apply customary international law and any relevant treaty law, including the Statute establishing the tribunal and the crimes defined therein.¹¹² In fact, Judge Shahabuddeen makes two important points. First, he notes the need for the international criminal tribunals established by or under the auspices of the UN to correctly apply international law whenever the subject matter under their consideration demands it.¹¹³ Second, when pronouncing what the international law "is" in a particular case, these tribunals should be conscious of the desirability of achieving consistency within the same system. Further, in pursuance of the duty to maintain consistency, the tribunals should show deference to the holdings of the ICJ, even if they are not by law bound by the ICJ's decisions. Judge Shahabuddeen noted that the ICJ is not only a premier legal body within the family of the United Nations, but is also a principal (judicial) organ of the UN.¹¹⁴

A question arose concerning the decision of the *Tadic* case¹¹⁵ (1999), decided by the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY), regarding whether it correctly appreciated the applicable principle of international law. This question was on the issue of attribution of responsibility to the Federal Republic of Yugoslavia (FRY) for acts committed by the Bosnian Serb Army in the territory of Bosnia and Herzegovina. The Trial Chamber of the ICTY, earlier relying upon the holding of the ICJ in the *Nicaragua* case, concluded that they could not be so attributed to the FRY. This decision was made on the ground that no "dependency and control" could be shown to exist between the Bosnian Serb Army (BSA) and the FRY such that the former could be considered an organ of the latter.¹¹⁶ In addition, it noted that in the absence of proof that the BSA acted as an agent of the FRY, "effective control" by the latter must be shown for specific unlawful acts of the former to be attributable to the FRY.¹¹⁷

In the *Nicaragua* case, it may be recalled, the ICJ declined to attribute to the United States the acts of the Contras, a rebel group fighting to overthrow the Sandinista Government in Nicaragua. The ICJ held that the test of "dependency and control" could not be shown between the contras and the United States to equate the Contras, for legal purposes, with an organ of the United States, or to establish that they were acting

112. On this duty of the International Criminal Tribunal for former Yugoslavia, see Shahabuddeen, *supra* note 57, at 643.

113. *Id.* at 648.

114. *Id.*

115. *Prosecutor v. Tadic*, *supra* note 27.

116. *See de Hoogh*, *supra* note 28, at 262.

117. *Id.* at 280.

on behalf of that government.¹¹⁸ Further, it held that in the absence of that equation, to create responsibility, the United States should have exercised “effective control” with respect to the specific operation “in the course of which the alleged violations were committed.”¹¹⁹

Reversing the decision of the Trial Chamber, the Appeals Chamber of the ICTY was not persuaded by the reasoning of the ICJ in the *Nicaragua* case.¹²⁰ It held that the *Nicaragua* requirement, of acting under specific instructions, could be applied only in relation to a specific act of a single individual or an unorganized group of individuals.¹²¹ However, it stated that:

In order to attribute the acts of a military or paramilitary group to State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. . . . However it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.¹²²

This holding of the Appeals Chamber of ICTY raised a concern from the perspective of maintaining the unity and integrity of international law.¹²³ An examination of the holding of the Appeals Chamber of the ICTY in the *Tadic* case is beyond the scope of this presentation.¹²⁴ But in so far as the Appeals Chamber in the *Tadic* case distinguished itself from the ICJ in the *Nicaragua* case on the basis of material facts, the danger of fragmentation or the chance of lack of consistency may not be as real as feared.¹²⁵

In any case, it is possible that persons of integrity in their own wisdom could honestly differ on the interpretation and application of international law in a given case on a similar, but not necessarily identical, set of facts. These disagreements are evident when judges of the same court disagree and enter dissenting or separate opinions. They are also visible when the same court overturns its own previous position

118. *Id.* at 269.

119. *Id.* at 280 n.130.

120. Koskeniemi & Leino, *supra* note 1, at 565.

121. de Hoogh, *supra* note 28, at 263.

122. *Id.* In adopting the criterion of overall control, the Appeals chamber appeared to follow the test adopted by European Court of Human rights in the *Loizidou* case, even though the test used there is ‘effective overall control.’ *See id.* at 272.

123. For the concern of President Guillaume, see Koskeniemi & Leino, *supra* note 1, at 555, and for the expression of concern of Judge Shahabuddeen, *supra* note 57, at 649.

124. For such an examination, see de Hoogh, *supra* note 28.

125. Prosecutor v. Tadic, *supra* note 27, at paras. 115–45.

with a majority supporting a new proposition. Disagreements are also unavoidable between different international forums given the particular features and the specialized interests of the legal regime that the tribunals are required to implement in specific cases. Inevitable disagreements may be considered healthy, as long as these relate to differences in perception about the applicable principles and exceptions that apply within the same system. The choices preferred under one regime might not be the same for all decision-makers, and the same decision-maker might not prefer the same choice if the circumstances or context changes. There is also the possibility for distinguishing one claim or situation from another and for discarding previous holdings and adopting new decisions by adducing cogent reasons in the interest of justice. Disagreements of this nature need not be viewed as threats to the unity and integrity of international law. As Judge Shahabuddeen himself observed, in this task the decision maker is assisted by viewing the system as whole and appreciating that "these are not separate and independent rules, but single rules subject to qualifications imposed by the same system."¹²⁶

It has been asserted that international law, like any legal system, is full of normative ambiguity. Accordingly,

[T]he great ambiguity of the constituent technical terms in the principal prescriptions and the wide variety of authoritative policy sources accorded to the authorized decision-makers have given, and continue to give, to such decision-makers, a very large discretion to adjust particular controversies in terms of the multiple variables peculiar to each controversy. . . .¹²⁷

VII. MULTIPLICITY OF INTERNATIONAL TRIBUNALS: A SIGN OF MATURITY OF THE INTERNATIONAL LEGAL SYSTEM

Apart from the major dispute settlement systems, there are other international judicial tribunals, which are established—or likely to be established—in a regional context such as Europe, Latin America, and Africa. In addition, national tribunals are also a forum for interpretation and application of international law, including the interpretation of numerous treaties in the new era of the globalization of human rights, international trade, and environmental law. But the work of these tribu-

126. Shahabuddeen, *supra* note 57, at 635.

127. McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Tests for Security*, reprinted in MCDUGAL & REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY* 9, 14 (1981).

nals—both national and regional—poses less of a problem for the unity and integrity of international law for several reasons. First, they are forums, which do not operate at the same universal level as international tribunals like the ICJ, ITLOS, or the DSU of the WTO. Hence, rarely is there any conflict in the working of these national and international tribunals. Second, in most cases these tribunals are quite conscious of the need to align their jurisprudence with the well-established norms of international law, particularly in the field of human rights and environmental law. In fact, it is through the decisions of the national and regional tribunals that we are witnessing a progressive development and application of international standards. These tribunals for the most part act more as agents and instruments for the unity and integrity of international law than as sources of its fragmentation.

Jonathan Charney reviewed the work of different international law tribunals and their impact on select areas of international law as part of his Hague lecture.¹²⁸ One finding of his analysis is that “in several core areas of international law the different international tribunals of the late twentieth century do share a coherent understanding of that law.”¹²⁹ Further, although “differences exist, these tribunals are clearly engaged in the same dialectic.”¹³⁰ Charney was conscious that in the absence of a hierarchical system, complete uniformity of decisions of various tribunals was not possible. Yet, he noted that “it is clear that the continuing specialized tribunals tend to follow the reasoning of their prior decisions.”¹³¹ Furthermore, “the views of the ICJ, when on point, are given considerable weight and those of other international tribunals are often considered.”¹³² In fact, Charney sees a certain advantage in the lack of a strict hierarchical system because it provides opportunity for experimentation and creativity.¹³³ Thus, various tribunals can collectively contribute to the development of international law.¹³⁴

George Abi-Saab makes the same point and is perhaps even more positive about the emergence of the multitude of international tribunals.¹³⁵ Abi-Saab argues that as things become more complex, the scope of international law will continue to increase the number of these tribunals, “reflect[ing] a higher degree of division of labor, or specialization,

128. Jonathan I. Charney, *Is International Law Threatened By Multiple International Law Tribunals?*, 271 RES. DES COURS 101 (1998).

129. *Id.* at 347.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. George Abi-Saab, *Fragmentation Or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919 (1999).

which is a higher stage of evolution."¹³⁶ Like Shahabuddeen, however, Abi-Saab cautioned that it is important to maintain a proper balance among the holdings of different tribunals.¹³⁷ For this balance to be achieved, he suggests that the judges of these diverse tribunals must always be mindful of the functioning of "the overarching principles that sustain its normative edifice and keep it together."¹³⁸ He urges that the tribunals should strive for the emergence and hardening of an international judicial system.¹³⁹ The ICJ, in his opinion, could play a pivotal role in this effort by earning a status of *primus inter pares*, which then would be followed "not out of legal compulsion, but through recognition of and deference to its intrinsic authority and the quality of its legal reasoning and findings."¹⁴⁰

VIII. DIVERSITY OF INTERNATIONAL TRIBUNALS: A REFLECTION OF THE GROWING STRENGTH OF THE UNITY AND INTEGRITY OF INTERNATIONAL LAW

The creation of these tribunals is never an easy matter, but in almost every case States establish them when the need is clear and justified.¹⁴¹ All new tribunals require an additional allocation of financial resource and infrastructure, and they also compete with other parts of the international machinery also established under these new international regimes committed to the common cause of the international community. However, it is a sign of maturity and growing importance of the rule of law in international affairs that international machinery and an appropriate judicial system also accompany the creation of any new and comprehensive international legal regime.¹⁴² The judicial enforcement of international rights and obligations reduces arbitrariness and power plays in international relations.

Simultaneously, tribunals enhance respect for universal legal order. Judicial tribunals composed of international legal experts—but with spe-

136. *Id.* at 925.

137. *Id.* at 926; see also Shahabuddeen, *supra* note 126.

138. Abi-Saab, *supra* note 135.

139. *Id.* at 929.

140. *Id.*

141. On this point, see Charney, *supra* note 128, at 124–25. Judge Rosalyn Higgins also is of the same view. See *supra* note 61, at 122.

142. Professor and now Judge Bruno Simma is particularly concerned and critical that in many instances States set forth new legal regimes without investing them with adequate international infrastructure to be fully effective and non-discriminatory. He says that "there is indeed reason to be concerned about new conceptions being grafted upon universal international law without support though, and serious attempt at, adequate institution building." Simma, *supra* note 50, at 249.

cialists in the particular field of law itself—would not merely settle disputes on a case by case basis, but in doing so would help develop the nascent legal regime into a full blown branch of international law. It is also important to bear in mind that comprehensive and virtually “self-contained regimes” have their own dynamics and special features, and to be successful the dispute settlement mechanism must be cognizant of these features. Hence, there is ample opportunity for the system of international law to branch out and to gain strength with multiple judicial tribunals that are vested with the charge of nurturing specific areas of international legal landscape. The important caveat, however, is that judges of these diverse tribunals, when they apply and interpret rights and obligations under international law, should be conscious of the overarching international judicial system that is emerging, which they should creatively and energetically promote. Furthermore, judges must show good faith and exhibit respect, not only to their own previous holdings on a subject, but should show equal respect to the relevant holdings of other international tribunals in the interest of judicial harmony, certainty, and the predictability of law. In this respect judicial restraint and economy should play just as important a role as judicial activism plays to help bridge gaps in law. The ultimate justification for the existence of a diversity of international tribunals is to achieve unity of the international legal system, which is dedicated to justice and equity in international relations.