

## Fragmentation of International Law: The Judicial Perspective\*

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## I. Fragmentation as a concern

1. The term «fragmentation» designates the breaking up, the reduction to fragments, of something that was a whole. It implies the factual premise, that indeed, before it was fragmented, something unitary existed and the value judgment that fragmentation is bad while unity is good. Debates about fragmentation of international law started without discussing the factual correctness of the unity of international law and saw fragmentation with concern, as a risk to be avoided. It is significant that when, in 2000, the International Law Commission decided to consider this subject, it chose as a title 'Risks ensuing from fragmentation of international law'. This shows that it was assumed that fragmentation was something that raised concerns. Such concerns are implied in the vivid description made by Hafner in an article on the pros and cons of fragmentation of international law, «International law consists of erratic blocks and elements; different partial systems; and universal, regional or even bilateral subsystems of different levels of legal integration»<sup>1</sup>.

The debate on fragmentation<sup>2</sup> started from concerns arising from two phenomena which were seen, at first separately, later jointly<sup>3</sup>, as dangerous from the viewpoint of the unity of international law: the emergence of «self-contained regimes» and the «proliferation» of international courts and tribunals.

2. The International Court of Justice in the *Hostages* judgment of 1980 made an early reference to «self contained regimes»<sup>4</sup> to designate the very technical concept that certain treaties provide for special (secondary) rules concerning breach of their

<sup>1</sup> G. HAFNER, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 *Michigan J. Int. L.*, 2004, 849-863 at 850.

<sup>2</sup> Two recent collective works may be quoted, A. ZIMMERMANN, R. HOFFMANN (eds.), *Unity and Diversity in International Law*, Berlin, 2006; R. HUESA VINAIXA, K. WELLENS (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international*, Bruxelles, 2006. Together with the literature to be mentioned in following notes, see the following articles: M. KOSKIENIEMI, P. LEINO, *Fragmentation of International Law? Postmodern Anxieties*, *Leiden J. Int. L.*, 2002, 553-570; M. CRAVEN, *Unity, Diversity and the Fragmentation of International Law*, *Finnish Yearbook Int. L.*, 2005, 3-34; P.M. DUPUY, *Un débat doctrinal à l'ère de la globalisation: sur la fragmentation du droit international*, *Eur. J. Legal Studies*, issue 1, 2007; M. KOSKIENIEMI, *International law: Constitutionalism, Managerialism and the Ethos of Legal Education*, *ibid.*, issue 1, 2007; B. CONFORTI, *Unité et fragmentation du droit international: «Glissez, mortels, n'appuyez pas»*, *Rev. gén. dr. int. pub.*, 2007, 5-19.

<sup>3</sup> These two aspects are indicated jointly in the early article by M. KOSKIENIEMI, P. LEINO, *Fragmentation of International Law?* quoted at the preceding note, 556-562.

<sup>4</sup> The discussion in legal literature was started by the well-known article by B. SIMMA, *Self-contained Regimes*, *Netherlands Yearbook Int. L.*, 1985, 111-136. The *Netherlands Yearbook Int. L.* published in 1994 a symposium on the subject, edited in book form as L.A.N.M. BARNHOORN, K.C. WELLENS (eds.), *Diversity of Secondary Rules and the Unity of International Law*, The Hague, Boston, London, 1995. B. SIMMA (with D. PULKOWSKI) revisited the subject in 2006: *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 *Eur. J. Int. L.*, 2006, 483-529.

(primary) rules and reaction to such breach, which derogate general rules on state responsibility:

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse<sup>5</sup>.

This dictum is the basis of the «*lex specialis*» exception set out in article 55 of the ILC Articles on State Responsibility<sup>6</sup> according to which the general rules on State responsibility set out in the ILC Articles «do not apply where and to the extent that the conditions for the existence of an international wrongful act or the content or implementation of international responsibility of a State are governed by special rules of international law»<sup>7</sup>. The dictum in the *Hostages* judgment may be seen as the basis for a theoretical definition of self-contained regimes as sets of substantive (primary) rules accompanied by corresponding secondary rules concerning breaches and reaction to breaches whose effect is to exclude the application of general international law rules on responsibility. Such exclusion may be more or less complete, as confirmed by the distinction, in the Commentary to the ILC's article 55 quoted above, between «strong» and «weak» forms of *lex specialis*, the former being labeled self-contained regimes<sup>8</sup>.

There is also another notion of self-contained regimes supported by scholars holding the view that among the characteristics of self-contained regimes one should count specific secondary rules beyond those on responsibility, in particular those on rule making<sup>9</sup>. This view (which might correspond to the «weaker» notion of *lex specialis*

<sup>5</sup> Case concerning the United States Diplomatic and Consular staff in Tehran (United States v. Iran), Judgment of ICJ of 24 May 1980, *I.C.J. Reports*, 1980, 40, para. 80. The expression had been used before, in the *Wimbledon* case judgment of 17 August 1923 (France, Japan, United Kingdom, Italy v. Poland), *P.C.I.J. Publications*, 2, 1923, Ser. A No. 1, 23-24.

<sup>6</sup> The Articles and Commentary are published in UN doc. A/56/10 (report of the ILC for 2001) 29-365; and in J. CRAWFORD, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge, 2002, 61 ff.

<sup>7</sup> A/56/10, 356, J. CRAWFORD, *The International Law Commission's Articles*, 306.

<sup>8</sup> Commentary to art. 55, para. 5, in A/56/10, 38 f., and J. CRAWFORD, *The International Law Commission's Articles* quoted above, 308.

<sup>9</sup> See K. WELLENS, *Diversity in Secondary Rules and the Unity of International Law*, *Netherlands Yearbook Int. L.*, 1994, 3-37; O. CASANOVAS y LA ROSA, *Unidad y pluralismo en derecho internacional público*, CEBDI, vol. 2, 1998, 35-267, at 100-102; J. CARDONA LLORENS, *Le rôle des traités*, in R. HUESA VINAIXA, K. WELLENS (eds.), *L'influence des sources* quoted at note 1, 25-48, at 33. O. CASANOVAS y LA ROSA clarifies that from the analysis of secondary rules conclusions ensue «as to the degree of autonomy of each particular complex of rules» («sobre el grado de autonomía de cada conjunto normativo particular», quoted above, 102, emphasis added).

mentioned by the ILC Commentary<sup>10</sup>), in my opinion coincides or largely overlaps with the less technically defined notion of self-contained regimes that consists in observing that the expansion of international law to specific fields of specialized interest has given rise to specialized sets of treaty and sometimes customary rules dealing with such fields<sup>11</sup>. It is thus current to refer, for instance, to international human rights law, humanitarian law, environmental law, trade law etc. The complexity of these fields and often the economic or scientific knowledge necessary to understand and apply the relevant rules, as well as the particular values—such as the protection of human rights or of the environment—that are the basis of their development, has stimulated the growth of groups of international lawyers, whose competence in their field of specialization sometimes is, unfortunately, not matched by an equivalent familiarity with the general concepts of international law. Pierre-Marie Dupuy has spoken of these lawyers as scholars that «get lost in the contemplation of regimes that they consider as closed in themselves as they too often are closed within their speciality»<sup>12</sup>.

These specialized fields have their own rules, their own organizations, their own courts and tribunals and their own specialist lawyers. They have developed their own general principles different from those of general international law. Such difference, when not due to the narrowness of the views of the proponents, depends on the needs of the specific relevant field and may bring about divergent solutions on questions dealt with in general terms by general international law. So, for instance, in the field of human rights, rules concerning the effect of reservations and of objections to reservations have emerged that are different from the general ones set out in the Vienna Convention on the Law of Treaties<sup>13</sup>. In the field of international environmental law some «general principles», such as the «precautionary principle» and the

<sup>10</sup> This seems to be the view of the the ILC Study Group on fragmentation of International law: this less technically defined notion would be a third notion of self-contained regimes (UN doc. A/CN.4/L. 682, 12 April 2006, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by M. Koskienniemi, para. 151). The ILC Commentary, however, mentions «weak» forms of *lex specialis* as those excluding general international law «on a single point».

<sup>11</sup> In the view of the ILC Study Group on fragmentation of International law this less technically defined notion would be a third notion of self-contained regimes (UN doc. A/CN.4/L. 682, para. 152 (1)).

<sup>12</sup> P. M. DUPUY, *L'unité de l'ordre juridique international*, *Cours général de droit international public*, *Recueil des Cours*, t. 297, 2002, 9-489, at 436 (translation of the present author).

<sup>13</sup> See the UN Human Rights Committee's General Comment No. 24 (52) relating to reservations of 2 November 1994 (GAOR 50th Sess. Suppl. No. 40, vol. I, 119) In the huge literature, T. GIEGERICH *Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien*, in 55 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1995, 713 - 782; R. BARATTA, *Problemi attuali posti dalle riserve ai trattati sui diritti dell'uomo*, in M. FRIGESSI DI RATTALMA (ed.), *Primo incontro di studio in memoria del Prof. Luigi Migliorino*, Brescia, 2001, 11; O. DE FROUVILLE, *L'intangibilité des droits de l'homme en droit international*, Paris, 2004, 274-412.

«polluter pays principle», and notions such as that of «sustainable development» are constantly referred to, although in many cases without seeking to determine whether and to what extent they correspond to familiar notions of international law such as customary law, general principles of law, soft law<sup>14</sup>. A very high-level arbitration tribunal in addressing the question whether one of these principles, the polluter pays principle, was a customary law principle, rejected the idea without elaboration<sup>15</sup>. The alleged customary character of the precautionary principle has raised considerable discussion before international courts and tribunals, which have, however, preferred to leave the question open<sup>16</sup>.

The notion of self-contained regimes, especially in the last-mentioned, less technically defined version, has assumed also an ideological content as used by proponents of opposite values in the debate on fragmentation of international law. From the viewpoint of the proponents of the separateness of these regimes, the indication of their «self-contained» character is used to strengthen the claim to exclude general international law, whatever the degree of separateness that results from the analysis of the relevant rules. Conversely, and again independently of the degree of separateness emerging from the relevant rules, from to viewpoint of those keen on the unity of international law «self-contained regime» is used as a label to designate groups of rules that do not correspond to those of general international law and that contribute to fragmentation of international law.

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<sup>14</sup> So the the very well-known handbook by A.C. KISS, J.P. BEURIER, *Droit international de l'environnement*, 3ème éd., Paris 2004, 123 ff. The legal nature of these principles is envisaged, although in a nuanced manner, in the views set out in two other well-known general treatises on international environmental law: J. JUSTE RUIZ, *Derecho Internacional del Medio Ambiente*, Madrid, 1999, 69: «Ni siquiera está suficientemente claro cuál es la naturaleza jurídica de esos principios fundamentales, ya que los textos se refieren con el término «principios» tanto a postulados filosóficos o científicos como a orientaciones de carácter más bien político, sin excluir en muchos casos su empleo en un sentido más propiamente jurídico o normativo»; Ph. SANDS, *Principles of International Environmental Law*, 2<sup>nd</sup> ed., Cambridge, 2003, 231 f.: «it is frequently difficult to establish the parameters or the precise international legal status of each general principle or rule... Some general principles reflect customary law, others may reflect emerging legal obligations, and yet others may have a less developed status. In each case, however, the principle or rule has broad support and is reflected in extensive state practice through repetitive use or reference in an international legal context».

<sup>15</sup> Composed of Judges Skubiszewski, Guillaume and Kooijmanns, award of 12 March 2004, case concerning the *application of the Convention of December 3, 1976 on the Protection of the Rhine against Pollution by Chlorides and the Additional Protocol of September 25, 1991*, France/Netherlands, www.pca-cpa.org, para. 103: «Le Tribunal observe que ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d'effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général».

<sup>16</sup> References to the attitudes of the ICJ, of the ITLOS and of the WTO Appellate Body are in T. TREVES, *Judicial Lawmaking in an Era of «Proliferation» of International Courts and Tribunals: Development of Fragmentation of International Law?* in R. WOLFRUM, V. ROEBEN (eds.), *Developments of International Law in Treaty-Making*, Berlin, 2005, 587-620, at 615-618.

3. «Proliferation»—already a word containing an implicit negative value judgment—of international courts and tribunals, namely the fact that a number of international courts and tribunals with specialized jurisdiction have been recently instituted, has been linked with the risk of fragmentation of international law<sup>17</sup>. In light of a few decisions in which some of these courts or tribunals have interpreted rules of international law differently from the Court, various presidents of the International Court of Justice have eloquently voiced this concern.

So, President Jennings in commenting in 1995 the *Loizidou* (preliminary objections) judgment of the European Court of Human Rights<sup>18</sup>, in which the Court had interpreted differently from the Hague Court a provision on jurisdiction of the European Convention on Human Rights whose text was practically identical to article 36 of the ICJ Statute, stated that the judgment indicated «the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented» and mentions the *Loizidou* case as «the ideal case» to illustrate the danger of fragmentation of international law due to proliferation of international tribunals<sup>19</sup>.

Addressing the General Assembly in 1999, President Schwebel considered that the possibility of «significant conflicting interpretations of international law» was sufficient to justify the proposal of allowing the International Court of Justice to deliver

<sup>17</sup> I have put forward views on this discussion especially in: *Le controversie internazionali, nuove tendenze, nuovi tribunali*, Milan, 1999, 48-67; *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 *New York University J. Int. L. and Politics*, 1999, 809-821; *New Trends in the Settlement of Disputes and the Law of the Sea Convention*, in H. N. SCHEIBER (ed.), *Law of the Sea, The Common Heritage and Emerging Challenges*, The Hague, 2000, 61-86, at 81-86; *Le Tribunal international du droit de la mer et la multiplication des juridictions internationales*, *Riv. dir. int.*, 2000, 726-746; *Le Tribunal international du droit de la mer dans la pléiade des juridictions internationales*, in O. DELAS, R. CÔTÉ, F. CRÉPEAU, P. LEUPRECHT (eds.), *Les juridictions internationales: complémentarité ou concurrence?*, Bruxelles, 2005, 9-39; *Judicial Lawmaking in an Era of «Proliferation» of International Courts and Tribunals: Development of Fragmentation of International Law?*, in R. WOLFRUM, V. ROEBEN (eds.), *Developments of International Law in Treaty-Making*, quoted above, 587-620. See also, in the huge literature: J. CHARNEY, *Is international law threatened by multiple international tribunals?*, *Recueil des Cours*, t. 271, 1998, 106-382; K. OELLER-FRAHM, *Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions*, 5 *Max Planck Yearbook of United Nations Law*, 2001, 67-104; M. COUSTON, *La multiplication des juridictions internationales, Sens et dynamiques*, *J. dr. int.*, 2002, 5-53; Société française de droit international, *Colloque de Lille, La juridictionnalisation du droit international*, Paris, 2003 (especially S. KARGIANNIS, *La multiplication des juridictions internationales: un système anarchique?*, 9-161); Y. SHANY, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2003; A. DEL VECCHIO, *Giurisdizione internazionale e globalizzazione*, Milan, 2003, especially 210-240.

<sup>18</sup> *Loizidou v. Turkey*, judgment of 23 February 1995, 103 *Int. L. Rep.*, 622.

<sup>19</sup> R.Y. JENNINGS, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in *ASIL Bulletin*, No. 9, November 1995, *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (ed. L. BOISSON DE CHAZOURNES et al.), 2-7, at 5. This paper is not included in the *Collected Writings of sir Robert Jennings*, The Hague, 1998.

advisory opinions on questions of international law arising before other international courts and tribunals<sup>20</sup>.

In his speech to the General Assembly in 2000, President Guillaume developed in a systematic way his concerns for the consequences of the proliferation of international courts and tribunals. He stated *inter alia* that:

[...] the proliferation of international courts gives rise to serious risks of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases. This is a particularly acute risk, as we are dealing with specialized courts that are inclined to favour their own discipline<sup>21</sup>.

4. It is evident from the discussion on self-contained regimes and on the proliferation of international courts and tribunals that the concerns expressed address difficulties that in theoretical terms must be taken seriously. Who can deny that really self-contained regimes, totally separate from general international law, may create uncertainty and perhaps undermine the general rules? Who can deny that contradictory determinations by different courts as to the existence or contents of a customary rule or as to the meaning of a treaty rule can have similar effects?

Still, the reality of the difficulties depends on the dimension of the phenomenon, on how separate are the regimes that are labeled as self-contained, on how divergent are in fact the decisions of different courts and tribunals.

To see matters in the right perspective it must be kept in mind, moreover, that the concerns raised have a subjective aspect. This emerges clearly from the fact that Presidents of the International Court of Justice, an institution with a vested interest in the discussion, have played an important role in voicing these concerns and from the fact that such concerns also come from «generalist» international law scholars and practitioners in the name of the «unity» of international law. It must also be conceded that opposing views are voiced by judges of Courts and Tribunals different from the ICJ<sup>22</sup>. Although striving for objectivity, the present writer, as a judge of one such Tribunal, must declare his institutional interest. Underneath the discussion lies a clash for power between institutions and the persons which partake in the decisions of

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<sup>20</sup> Published in *International Court of Justice Press Communiqué 99/46*, available on the Court's website <http://www.icj-cij.org>. See T. TREVES, *Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals*, 4 *Max Planck Yearbook of United Nations Law*, 2000, 215-231.

<sup>21</sup> Address of 26 October 2000, <http://www.icj-cij.org>. See also, of the same author, *La Cour internationale de justice: situation présente et perspectives d'avenir*, in G. GUILLAUME, *La Cour internationale de justice à l'aube du XXIème siècle. Le regard d'un juge*, Paris, 2003, 33 ff, at 43-45.

<sup>22</sup> See for, instance, the statements of the then President of the International Tribunal for the Law of the Sea P. Chandrasekhara Rao on 3 July 2000, in *International Tribunal for the Law of the Sea, Yearbook*, 2000, 162; and the statement of the then President Nelson on 9 December 2002, *ibid.*, 2002, 140.

these institutions. This emerges<sup>23</sup> from the abovementioned proposal coming from Presidents of the International Court of Justice of entrusting the Court with the task of settling through consultative opinions questions of general international law arising in other courts and tribunals<sup>24</sup>. Similar vested interests could be seen as transpiring from the idea, mentioned by a member of the ILC, that, before negotiations on a convention are concluded, States and international organizations submit the draft to the ILC in order to identify divergences with existing international law<sup>25</sup>. It is a debate on whether the last word on international law questions must belong to the International Court of Justice, on whether specialized or generalist international lawyers are best suited to deal with questions belonging to specialized fields.

## II. Fragmentation as diversity in a diverse world

5. The discussion started with the concerns mentioned above has developed through counter-arguments stating that these concerns are exaggerated or premature, that the very situations causing the concerns have also a positive side, and that fragmentation is an unavoidable fact of life in the current situation of the world. The debate developed in the ILC and around the ILC work on fragmentation has very much contributed to changing the atmosphere. It seems symptomatic that when in 2002 the ILC set up a Study Group to consider this subject, it decided to change the title referring, as mentioned, to the «risks» of fragmentation under which the topic was introduced in Commission's plan of work, into «Fragmentation of international law: difficulties arising from the diversification and expansion of international law»<sup>26</sup>. «Diversification» and «expansion» do not have built-in negative value judgments.

As regards self-contained regimes, it has been remarked that the completely self-contained regime, totally isolated from general international law, does not exist. This is the view reached by the former ILC Rapporteur on International Responsibility Gaetano Arangio-Ruiz<sup>27</sup> as well as by the final report of the ILC Study Group on Fragmentation of international law<sup>28</sup>. As illustrated in these writings and in other

<sup>23</sup> See the observations of M. KOSKIENNIEMI, P. LEINO, *Fragmentation of International Law? Postmodern Anxieties*, quoted above, 574.

<sup>24</sup> For a detailed overview of these proposals, put forward especially by Judges Schwebel and Guillaume, and for the difficulties, legal and political, they raise, T. TREVES, *Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals*, 4 *Max Planck Yearbook of United Nations Law*, 2000, 215-231.

<sup>25</sup> Hafner in A/50/10/2002, 326.

<sup>26</sup> A/CN.4/L.628 1 August 2002, paras. 9 and 20.

<sup>27</sup> G. ARANGIO-RUIZ, *Fourth Report on State Responsibility*, *Yearbook Int. L. Commission*, 1992, II, part 1, 1 ff. at 35-43, espec. paras. 112, 124.

<sup>28</sup> UN doc. A/CN.4/L. 682, espec. para. 192: («no regime is self-contained») and 193 («the term «self-con-



scholarly studies, there are degrees of isolation and in most cases; the self-contained regime is to be applied as special law dominated by a specific purpose, without excluding recourse to general international law for aspects not covered by the special law<sup>29</sup>.

6. In the discussion about possible conflicts arising because of different interpretations given to the same rules by different courts and tribunals it can be observed that the number of such conflicting interpretations is relatively limited. Of the few cases that are normally referred to, some—as the already quoted *Loizidou* judgment of the European Court of Human Rights<sup>30</sup> and the *Racke* judgment of the European Court of Justice<sup>31</sup>—may be explained in light of the *lex specialis* character of the rules applied or as a divergent application of rules whose content and acceptance is, nonetheless, confirmed<sup>32</sup>. Only the *Tadic* judgment of the Tribunal for crimes committed in former Yugoslavia<sup>33</sup> is unquestionably a case in which an international tribunal deliberately chooses to reject the view of a general international law rule that the ICJ had accepted in a previous judgment, the *Nicaragua* judgment<sup>34</sup>, a judgment that the Tribunal for former Yugoslavia subjected to detailed criticism. Even in this

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tained regime» is a misnomer. No legal regime is isolated from general international law»).

<sup>29</sup> See the recent study of B. SIMMA and D. PULKOWSKI, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 *Eur. J. Int. L.*, 2006, 483-529. The analysis set out in this study of four subsystems that have been associated with the notion of self-contained regimes – namely, diplomatic law, the WTO, human rights and the European Community law – reaches the conclusion that, while none of these can be considered as entirely «self-contained», European Community law and WTO law are those that come closest. Similar conclusions, with different arguments, are reached by P.M. DUPUY, *L'unité de l'ordre juridique international*, quoted at note 9, 432-460. See below, para. 3, as regards the situations in which, in the opinion of the ILC, even very separate regimes leave a role to general international law. L. CAFLISCH, A. A. CANÇADO TRINIDADE, *Les conventions américaine et européenne des droits de l'homme et le droit international général*, *Rev. gén. dr. int. pub.*, 2004, 5-61, at the conclusion of an analysis of the attitude of the European and of the Inter-American Court of Human Rights as regards general international law, state that the two judicial mechanisms justify the thesis that the two systems «font partie intégrante du droit international général et conventionnel». They add : «Cela signifie que *l'idée du fractionnement* du droit international chère à certains spécialistes *n'a guère de pertinence pour les systèmes internationaux de protection des droits de l'homme*», 60 f., (italics in the original).

<sup>30</sup> Quoted at note 18.

<sup>31</sup> *Racke v. Hauptzollamt Mainz*, ECR, 1988-I, 3655.

<sup>32</sup> See T. TREVES, *Judicial Lawmaking* quoted at note 17, at 598, 600-602.

<sup>33</sup> *Prosecutor v. Tadic*, 38 *ILM*, 1999, 1518; *Riv. dir. int.*, 1999, 1072.

<sup>34</sup> *Case concerning military and paramilitary activities in and against Nicaragua*, *Nicaragua v. United States*, Judgment of 27 June 1986, *I.C.J. Reports*, 1986, 14. In the *Armed Activities* judgment of 19 December 2005, 45 *ILM*, 2006, 271, at para. 160, considering the relationship between Uganda and the paramilitary *Mouvement de libération du Congo*, the ICJ found no evidence that the latter was «on the instructions of, or under the direction or control of» the former and stated that: «Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficient control of paramilitaries» referring to the *Nicaragua* judgment. It is not clear, in my view, whether this means that the Court has thus «affirmed its control test as articulated in *Nicaragua v. USA*» and that it «concluded that the requisite tests for sufficiency of control of paramilitaries had not been met», as is authoritatively held by President R. HIGGINS, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 *Int. Comp. L. Quart.*, 2006, 791-804, at 795.

case—«the one ‘real example’», according to Judge Higgins<sup>35</sup>—it can be argued that the context and purpose of the reference to the rule concerning the degree of control on local militia by a foreign State were in the two judgments totally different. In the ICJ *Nicaragua* judgment, the rule was relevant for determining State responsibility, while in the *Tadic* case it served to determine whether the conflict under examination was internal or international in order to establish which rules of international humanitarian law were applicable<sup>36</sup>. The opposition between the two courts has been confirmed in the ICJ’s judgment of 26 February 2007 in the *case concerning the application of the Convention on the prevention and punishment of the crime of genocide* (Bosnia and Herzegovina v. Serbia and Montenegro)<sup>37</sup>. While not excluding that the test of «overall control» on the paramilitary units adopted in the *Tadic* judgment to determine whether a conflict is international could be «applicable and suitable» for that purpose, the Court states that, contrary to the view of the ICTY and to the Bosnian request in the *genocide* case, «the argument in favour of that test is unpersuasive» in the context of the law of State responsibility<sup>38</sup>.

Another divergence that has been mentioned<sup>39</sup> is that between the European Court of Human Rights *Bankovic* judgment and General Comment No. 31 [80] of the UN Human Rights Committee as to whether the territorial scope of the relevant instruments includes acts committed outside the territory of the contracting States<sup>40</sup>. In

<sup>35</sup> R. HIGGINS, *The ICJ, the ECJ, and integrity of international law*, 52 *Int. Comp. L. Quart.*, 2003, 1 ff., at 18. More recently, in her article *A Babel of Judicial Voices? Ruminations from the Bench*, quoted at the preceding note, 794, President Higgins developed the view that «we should not exaggerate problems allegedly presented by *Tadic*», stressing cautionary language contained in the ICTY judgment and underlining that context may be decisive as to the choice of the test of control to be applied.

<sup>36</sup> In his separate opinion, while agreeing with the general direction of the judgment, Judge Shahabuddeen (who chaired the Appeals Chamber) states: «I am unclear about the necessity to challenge Nicaragua... I am not certain whether it is being said that much debated case does not show that there was an international conflict in that case. I think it does, and that on this point it was both right and adequate». Later, after observing that «it may be that there is room for reviewing» the Nicaragua judgment as regards «its holding on the subject of the responsibility of a state for the delictual acts of a foreign military force», he states: «I am not persuaded that it is necessary to set out on that inquiry for the purposes of this case, no issue being involved of state responsibility for another’s breaches of international humanitarian law» (38 *ILM*, 1999, 1611). Similarly, see the Trial Chamber’s judgment 13 September 1996, *Rajic*, IT-95-12, espec. para. 25

<sup>37</sup> In [www.icj-cij.org](http://www.icj-cij.org); and in 46 *ILM*, 2007, 195.

<sup>38</sup> Paragraph 404.

<sup>39</sup> By R. HIGGINS, *A Babel* quoted above, 295.

<sup>40</sup> In *Bankovic v. Belgium and other 16 contracting States*, Judgment of the Grand Chamber of 12 December 2001, 41 *ILM*, 2002, 517, espec. paras. 74-82. the ECHR interpreted the expression «everyone within their jurisdiction» in art. 1 of the European Convention on Human Rights as not including acts outside the territory of the contracting States; the Human Rights Committee in interpreting the expression «within its territory and subject to its jurisdiction» of article 2 of the Covenant on Civil and Political Rights explained that this means «any one within the power or effective control of a State Party, even if not situated on the territory of that State Party». (General Comment No. 31 adopted 29 March 2004, in doc. HRI/GEN/1/Rev. 7, 192 ff, para. 10).

light of the various nuances contained in the *Bankovic* judgment<sup>41</sup> and in the General Comment<sup>42</sup>, it would seem, however, that the distance between the two positions is not as great, and that a real divergence could only emerge if a comparable case was to be submitted to the Human Rights Committee.

In international investment arbitration, two recent ICSID awards concerning Argentina (and based on the same Bilateral Investment Treaty) have come to opposite solutions as regards the applicability of the «state of necessity» defense to justify the economic measures taken by Argentina<sup>43</sup>. More than the different conclusions reached, it seems disconcerting that the later award does not discuss the earlier one even though one arbitrator present in the two tribunals belonged to the majority in both<sup>44</sup>. It has also been observed that the high number of existing Bilateral Investment Treaties sets out a high number of exceptions to compliance with environmental obligations under multilateral environmental treaties. In light of the support given to compliance with the BITs by arbitral compulsory jurisdiction, this would amount to fragmentation of the obligations under the multilateral environmental agreements<sup>45</sup>.

Far more numerous than the cases considered above are the judgments which rely on the case-law of other courts, thus visibly contributing to the strengthening of international law as well as to its unity. Studies on the subject<sup>46</sup> show that international

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<sup>41</sup> Paras. 67-73.

<sup>42</sup> «This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peace-keeping or peace-enforcement operation» (para. 10, just after the sentence quoted at note 31). Compare with para. 71 of the *Bankovic* judgment.

<sup>43</sup> CMS Gas Transmission Co. v. Argentina, ICSID case No. ARB/01/8, 12 May 2005, *ILM*, vol. 44, 2005, 1205; LG&E Energy Corp. et al. v. Argentina, ICSID case No. ARB/02/1, decision on liability, 3 October 2006, 46 *ILM*, 2007, 40. The first award, stating that the defence of necessity could not be invoked was submitted for annulment to an *Ad Hoc* Committee which, on 25 September 2007, found that there were manifest errors of law in the reasoning, including on the question of necessity, but that they did not meet the requirement of manifest excess of power necessary for annulling the award under article 52(2) of the ICSID Convention (ICSID Case No. ARB/01/8, Annulment Proceeding). The importance of the consideration of decisions of other investment arbitration awards by arbitral tribunals is underlined by T. Waelde's separate opinion in the NAFTA Chapter XI Award of 26 January 2006 in the *Thunderbird v. Mexico* case. See also the observations of G. BASTID-BURDEAU, *Le pouvoir créateur de la jurisprudence internationale à l'épreuve de la dispersion des juridictions*, *Archives de philosophie du droit: la création du droit par le juge*, 2006, 289-304, at 301.

<sup>44</sup> It is remarkable that the *Ad Hoc* Committee decision of 25 September 2005 does not refer to the decision on the LG&E case.

<sup>45</sup> LEUBUSCHER, *The displacement of International Obligations: BITs and the Commodification of the Environment*, *Am Society Int. Law, Proceedings*, vol. 98, 2004, 280-283.

<sup>46</sup> J. CHARNEY, *Is International Law Threatened by Multiple International Tribunals?*, *Recueil des Cours*, t. 271, 1998, 101 ff.; N. MILLER, *An International Jurisprudence? The Operation of «Precedent» Across International Tribunals*, *Leiden J. Int. L.*, 2002, 483 ff. On relationships between specific bodies: A. CASSESE,

courts and tribunals are aware of each other's decisions and rely on them much more often than they distinguish them, and that it is extremely rare that they outright oppose them. A particular case seems to be that of the ICJ which has been reluctant to refer explicitly to the judgments of other courts of a permanent character and still in existence. A promising exception, through non-explicit reference, seemed to be contained in the *Lagrand* judgment of 2001. The ICJ stated that:

it need not examine Germany's further argument which seeks to found a like obligation on the contention that the right of a detained person to be informed without delay pursuant to Article 36, paragraph 1, of the Vienna Convention is not only an individual right but has today assumed the character of a human right<sup>47</sup>.

In commenting on this in 2003 I thought it right to state: «In so doing the ICJ avoided to take a position on the very issue examined in the Inter-American Court's opinion»<sup>48</sup> which had endorsed the view later put forward by Germany at the Hague; and to add: «It might be regretted that this was not done more explicitly, but it is a fact that the Court, while avoiding a situation in which it might have concurred with the opinion of another court, avoided also the possibility of expressing a divergent opinion»<sup>49</sup>. Perhaps these remarks were too hasty in their optimism. In its 2004 judgment on the *Avena* case the same argument was raised by Mexico, and again the Court declined to take a position. It added, however, that «neither the text nor the object and purpose of the Convention [on consular relations of 1963], nor any indications in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard»<sup>50</sup>. It is difficult not to agree with the recent observa-

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*L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux*, in A. CASSESE, M. DELMAS-MARTY, *Crimes internationaux et juridictions internationales*, 2002, 143 ff.; L. CAFLISCH, A. A. CANÇADO TRINIDADE, *Les conventions américaine et européenne des droits de l'homme* quoted above at note 28; A. ROSAS, *With Little Help from my Friends: International Case-Law as a Source of Reference for UE Courts, The Global Community, Yearbook Int. L. and Jur.*, 2005, I, (2006), 203-230 (a review of the references to decisions of the ICJ, of the European Court of Human Rights and of other international dispute-settlement bodies made by the European Court of Justice).

<sup>47</sup> Judgment of 27 June 2001, *Germany v. United States*, 40 *ILM*, 2001, 1068, at para. 129.

<sup>48</sup> Consultative Opinion OC-16/99, 1 October 1999, upon the request of Mexico. See paras. 61 ff., as regards the relationship of the Inter-American Court with the ICJ, and the observations by T. BUERGEN-THAL, *International Law and the Proliferation of International Courts, Cursos Euromediterráneos Bancaja de derecho internacional*, V, Pamplona, 2001, 29 ff, at 38-41.

<sup>49</sup> The remarks were made at a Symposium held in Heidelberg in October 2003 and reproduced in T. TREVES, *Judicial Law-Making in an Era of «Proliferation» of International Courts and Tribunals: Development or Fragmentation of International Law?*, in R. WOLFRUM, V. ROEBEN (eds.), *Developments of International Law in Treaty-Making*, quoted above, 2005, 387-620, at 605. Similar remarks are made by P.M. DUPUY, *L'unité de l'ordre juridique international* quoted above, note 29, 471 f.

<sup>50</sup> Judgment of 31 March 2004, 43 *ILM*, 2004, 580, at para. 124.

tion of the President of the ICJ that «unity among tribunals might have been better served [by the ICJ] by maintaining its prior silence on the issue»<sup>51</sup>.

A major exception to this attitude of the ICJ (or, perhaps, the beginning of a new attitude) is the judgment of 26 February 2007 on the *genocide* case (Bosnia and Herzegovina v. Serbia and Montenegro). Notwithstanding the above-mentioned confirmation of its opinion on the *Tadic* judgment on the question of the test of control of paramilitary units for the purposes of international responsibility, the judgment contains almost innumerable instances of reliance on judgments of the ICTY. It uses them in many instances as a basis for the ascertainment of facts and often adopts the legal qualifications given by the Tribunal. The Court summarizes its approach as follows:

[...] the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight<sup>52</sup>.

Third, it can be observed that the growth in number of international courts and tribunals has the healthy effect of creating the conditions for developing a constructive dialogue between courts resulting in positive responses by one judicial body to positions taken by another in reaction to perceived drawbacks of its decisions or rules. Some relevant examples of such constructive dialogue concern the impact on the practice of the ICJ of provisions in the International Convention for the Law of the Sea and in the Rules of the International Tribunal for the Law of the Sea. These provisions tried to overcome difficulties raised in the application by the ICJ of the corresponding provisions of its Statute or Rules, and were taken into account by the ICJ in its jurisprudence, such as, for instance, in the *Lagrand* judgment as regards the binding nature of provisional measures indicated by the Court, and in amendments to its Rules, such the one adopted in 2000, concerning article 79 on preliminary objections<sup>53</sup>.

The present President of the International Court of Justice, Dame Rosalyn Higgins, has made similar points in her speech on the occasion of the tenth anniversary of the International Tribunal for the Law of the Sea. Adopting an approach different from that of her predecessors, she remarked, *inter alia*:

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<sup>51</sup> R. HIGGINS, *A Babel* etc., quoted at note 34, 796.

<sup>52</sup> Paragraph 223.

<sup>53</sup> For a detailed analysis, T. TREVES, *Judicial Lawmaking* quoted above, 587-620, at 609-618.

This growth in the number of new courts and tribunals has generated a certain concern about the potential for a lack of consistency in the enunciation of legal norms and the attendant risk of fragmentation. Yet these concerns have not proved significant. The general picture has been one of important courts, like this Tribunal, dealing with specialised legal issues of the first rank of significance, and seeing the necessity of nonetheless locating themselves within the embrace of general international law. Over the past decade, ITLOS has regularly referred to the Judgments of the International Court with respect to questions of international law and procedure. The International Court, for its part, has been following the Tribunal's work closely, and especially its already well-developed jurisprudence on provisional measures. (...)

The potential for fragmentation should not be exaggerated. Parties prefer to submit their disputes for settlement to bodies whose decisions are characterised by consistency, both within that body's own jurisprudence and with the decisions of other international bodies confronted with analogous issues of law and fact. There is an incentive for international decision-makers to pay careful attention to the work of their colleagues. Given that the ICJ is a court of general jurisdiction, there is inevitably some overlap in subject matter. What is striking is not the differences between the international courts and tribunals, but the efforts at compliance with general international law, even within the context of specialized institutional treaties<sup>54</sup>.

Two further observations may be added. First, the existence of diverging judgments by different courts or tribunals is not an alarming occurrence, unless it amounts to consolidated trends that clash with each other. Divergent judgments can be seen as elements of inconsistent practice in the formation of customary rules. The best judgments, because of their technical qualities and because of their correspondence to the needs of the time, will prevail, the others will be overcome or forgotten. This assumption seems to underlie the dispute-settlement mechanism of the U.N. Law of the Sea Convention, an instrument binding for more than 150 States. Having adopted, although with exceptions, the principle that jurisdiction shall be compulsory, the contracting parties have chosen to entrust the task to adjudicate to a plurality of bodies: the International Tribunal for the Law of the Sea, the International Court of Justice, arbitration tribunals with general or specialized competence.<sup>55</sup> This shows that the parties were more concerned to have a compulsory system than to have a single adjudicating body. To ensure uniform interpretation of the Convention avoiding

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<sup>54</sup> Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the tenth anniversary of the International Tribunal for the Law of the Sea, 29 September 2006, in <http://www.itlos.org>. See also, for more elaborate views by President Higgins on this subject, her article *A Babel of Judicial Voices? Ruminations from the Bench*, quoted above, 791-804.

<sup>55</sup> See article 287 of the UN Convention on the Law of the Sea of 10 December 1982.

possible divergences of jurisprudence these bodies might develop was clearly not a priority for the States that adopted the Convention<sup>56</sup>.

Second, even admitting that in some cases divergent trends may create a situation of uncertainty not fostering the unity of international law, a costs and benefits analysis remains necessary. In other words: one has to determine whether these negative effects are offset by the positive one that, through the multiplication of available courts and tribunals, more disputes can be, and in fact are, judicially settled. While it is true that judgments are an important element of international practice in the development of international law, it is also true that their immediate function, the reason why they are established, is that of settling disputes<sup>57</sup>.

7. In light of the developments illustrated in the present paragraph, the tension in the atmosphere of the discussion concerning the two alleged main culprits of «fragmentation» seems to have subsided. «Fragmentation» has become a description of the unavoidable plurality of rules and regimes of today's world. Seen in this perspective, the problems and difficulties can in most cases be solved with the usual tools of international law, even though, admittedly, especially in the perspective of the existence of a plurality of competent international courts and tribunals, there remains a core of open questions<sup>58</sup>.

A broader perspective, focusing on a plurality of legal systems encompassing groups transcending State borders, but not necessarily comprised in international law, put forward by sociologists of law, links fragmentation to the emergence of a «fundamental multidimensional fragmentation of global society» which makes the «aspiration to a normative unity of global law doomed from the outset». They invoke the development of conflict law that, in a situation in which «fragmentation cannot be combated», might achieve a «weak normative compatibility of the fragments»<sup>59</sup>. While less optimistic on the possibilities of legal techniques, also this view equates fragmentation with plurality of regimes and envisage it as a factual situation whose negative sides are to be dealt with by the application of a number of techniques.

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<sup>56</sup> T. TREVES, *Dispute-Settlement in the Law of the Sea: Disorder or System?*, in M. KOHEN, *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch*, Leiden, 2007, 927-949, espec. 928-29.

<sup>57</sup> I made the last two points in my Castellón lectures of 1997: T. TREVES, *Recent Trends in the Settlement of International Disputes*, J. CARDONA (ed.) *Cursos Euromediterráneos de Derecho Internacional*, vol. I, 1997, Pamplona, 1998, 395-437, at 436 f.

<sup>58</sup> This is the approach developed in particular by J. PAUWELYIN, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law*, Cambridge, 2003.

<sup>59</sup> A. FISCHER-LESCANO & G. TEUBNER, *Regime collisions: the vain search for legal unity in the fragmentation of global law*, 25 *Michigan J. Int. L.*, 2004, 999-1046, at 1004.

### III. The approach of the International Law Commission

8. The just mentioned approach that fragmentation corresponds to the uncoordinated expansion of international law by different groups of States in order to solve specific problems has been adopted by the ILC in the work of its Study Group on fragmentation chaired by Martti Koskienniemi that started in 2002 and was concluded in 2006. As stated in the final Report of the Study Group «the fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules and rule-complexes, legal institutions and spheres of legal practice»<sup>60</sup>. The Commission adopted the view that fragmentation, so understood, has both positive and negative sides. On the one hand, «it does create the danger of conflicting and incompatible rules, principles, rule-systems, and institutional practices»; on the other, «it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques». «Fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world. At the same time, it may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation»<sup>61</sup>.

The Commission remarked that fragmentation «raises both institutional and substantive problems». It decided to leave the institutional problems aside and to concentrate on the substantive ones<sup>62</sup>. I will say more later on this decision. As regards the substantive questions, the ILC states that «although fragmentation is inevitable, it is desirable to have a framework through which it may be assessed and managed in a legal-professional way»<sup>63</sup>.

In the view of the Commission, such framework is provided by the Vienna Convention on the Law of Treaties. So it was that the Commission approached fragmentation looking for the rules of general international law, in particular those on the law of treaties, that could provide means to overcome the difficulties raised by fragmentation.

9. Such approach was followed in the studies its members prepared on specific aspects as well as in the «condensed set» of «conclusions» which the Study Group submitted in 2006 to the Commission, together with a bulky analytical report by the Chairman<sup>64</sup>. The legal nature of the conclusions is not clarified beyond the

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<sup>60</sup> A/CN.4/L.702, 18 July 2006, para. 6.

<sup>61</sup> A/CN.4/L.702, para. 9.

<sup>62</sup> A/CN.4/L.702, para. 8. See also A/CN.4/L.628, para. 14.

<sup>63</sup> A/CN.4/L.702, para. 12.

<sup>64</sup> The report is in the already quoted doc. A/CN.4/L.682 of 13 April 2006. The Conclusions are in add.



specification set out by the Commission that the final document would contain «conclusions, guidelines or principles»<sup>65</sup>. In fact, the text of the conclusions, while clearly indicating that they do not purport to be a draft treaty, adopts a perspective close to that of scholarly work mixing descriptive and prescriptive elements. Very often the conclusions reached are rather obvious, and similar to those one can find in a standard handbook of international law. Professor Conforti has criticized the results of the ILC's work as including too many repetitions, platitudes and statements of the obvious (*répétitions, banalités et lapalissades*)<sup>66</sup>. While on many points this view seems well founded, it must nonetheless be conceded that some of the conclusions adopted by the ILC contain some added value. Such value does not consist, however, in developing new rules. It seems to lie especially in setting out guidelines for the interpreter. Notwithstanding the exceptions, and the indication that they are not binding in character, the very fact that they are set out in written form, that the ILC has adopted them, and that the UN General Assembly has taken note of them, gives them a measure of authority that might go beyond what is intended. One may wonder whether their influence on State and judicial practice will be positive. From this viewpoint, a more general criticism addressed by Conforti to the ILC work's results seems valuable. His view is that the ILC has shown «a tendency to enter into innumerable unnecessary details... on a subject—the relationship between general and special international law—that seems ill-adapted for operations of this kind». Recalling Santi Romano, Conforti invokes the need not to «make rigid what is flexible» and to avoid to «solidify what is fluid»<sup>67</sup>.

In order to show the approach followed by the Commission, it seems useful to peruse the structure of the Conclusions and consider some of the conclusions reached, even though the need to be brief will make more visible the «truism» character of many of them than the value-added ones. The approach adopted is synthesized in section 1 of the Conclusions indicating that when two or more rules apply to a situation, and it cannot be said that one serves for the interpretation of the other, there is need to make a choice (concl. 2). The basic rules for making such choice are in the Vienna Convention on the Law of Treaties (concl. 3). A «generally accepted» «principle of harmonization» according to which «when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations» is also relevant (concl. 4). The following sections deal with: the

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of 2 May 2006 to that document as well as doc. A/CN.4/L. 702 quoted above. They are also reproduced in the *ILC Report for 2006 A/61/10*, para. 251.

<sup>65</sup> A/60/10 para. 448.

<sup>66</sup> B. CONFORTI, *Unité et fragmentation* quoted at note 2, 6 and *passim*.

<sup>67</sup> B. CONFORTI, *Unité et fragmentation* quoted at note 2, 6. He refers to S. ROMANO, *Frammenti di un dizionario giuridico*, Milano, 1953, 117.

maxim *lex specialis derogat legi generali*; special (self-contained) regimes; article 31, para. 3 *c*, of the Vienna Convention on the Law of Treaties; conflicts between successive norms; and hierarchy in international law: *jus cogens*, obligations *erga omnes*, article 103 of the UN Charter.

In dealing with the *lex specialis* principle, conclusion 9 states that «the application of the special law does not normally extinguish the relevant general law» and that, in accordance with the principle of harmonization, it will «continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter».

Self-contained regimes (or, following the ILC preferred designation, special regimes) are considered as a particular case of *lex specialis* (concl. 11). The specialty of the regime «often lies in the way its norms express a unified object and purpose» so that «their interpretation and application should, to the extent possible, reflect that object and purpose» (concl. 13). As mentioned above, the ILC has adopted the view that completely isolated self-contained regimes do not exist. Consequently, while as *leges speciales* self-contained regimes «may prevail over general law» (concl. 14), general rules maintain a role in filling gaps of the special regime (concl. 15) or when the special regime fails (concl. 16).

In dealing with «systemic integration» under article 31, para. 3 *c*, of the Vienna Convention, conclusion 19 states that systemic integration will apply a «presumption» that has a positive and a negative aspect. The positive aspect is that «the parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms»; the negative aspect is that «when entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law». Recourse to article 31, para. 3 *c* is particularly relevant as regards the possibility of using in interpretation developments of customary law and general principles subsequent to the time of conclusion of the treaty in derogation to the inter-temporality rule (concl. 22) or when the concepts used in the treaty are open or evolving, because of developments of technical economic or legal character or because the concept «sets up an obligation for further progressive development by the parties», has a very general nature or is expressed in such general terms that it must take into account changing circumstances (concl. 23).

Dealing with conflicts between successive norms, after considering the *lex posterior rule* and its limitations (conclusions 24 and 25) the distinction is made in conclusion 26 between treaty provisions that belong to the same regime and provisions in the same regime. On one side, «the *lex posterior* principle is at its strongest in regard to

conflicting or overlapping provisions that are parts of treaties that are institutionally linked or otherwise intended to advance similar objectives». On the other, «in case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them». In this case, obligations should be implemented as far as possible «with a view to mutual accommodation and in accordance with the principle of harmonization».

In the same section, although it does not relate exclusively to the conflicts between successive norms, conclusion 30 states that parties to treaties that might conflict with other treaties «should aim to settle the relationship between such treaties by adopting appropriate conflict clauses», which should not affect third parties, be as clear and specific as possible and, as appropriate, be linked with dispute settlement means.

Hierarchy is a means that can be utilized for solving conflicts. In the conclusions on *jus cogens*, rules setting out *erga omnes* obligations and article 103 of the UN Charter, it is specified that while all *jus cogens* rules provide for *erga omnes* obligations, the reverse is not necessarily true (concl. 38). Conclusion 41 states that while «a rule conflicting with a rule of *jus cogens* becomes *ipso facto* void» a rule conflicting with article 103 of the Charter «becomes inapplicable as a result of such conflict and to the extent of such conflict». Most of these conclusions do not go beyond what is stated or implied in modern international law doctrine. This seems to include conclusion 42 (the last one) whose purpose is to adjust the principle of harmonization to the hierarchy between international law rules: «In the case of conflict between one of the hierarchically superior norms ... and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail».

10. As mentioned, the ILC decided to concentrate on the substantive law aspects of fragmentation, although recognizing that fragmentation has also institutional problems, that «have to do with the jurisdiction and competence of various institutions applying international legal rules and their hierarchical relations *inter se*». The Commission decided «to leave this question aside». It considered that «The issue of institutional competencies is best dealt with by the institutions themselves»<sup>68</sup>.

This decision can be explained in light of the desire of the ILC to maintain its course away from politically contentious matters. In fact, the competition between international courts and tribunals, the concern for fragmentation deriving from the «proliferation» of such courts and tribunals, the proposals to entrust the ICJ with the task

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<sup>68</sup> *Supra* note 62.

to harmonize the divergent views held by different courts and tribunals and the reactions raised by such concerns and proposals clearly indicated that, had it embarked in examining the institutional side of fragmentation, the ILC would have trodden on dangerous ground. It would have intervened in discussions in which a more or less legitimate fight for power between institutions and people is going on. Moreover, the ILC could have been accused of having a vested interest, as might indicate the already mentioned proposal, floated at a very early phase of its involvement in fragmentation, to entrust the Commission with the task of verifying the «fragmentation» potential of treaties under negotiation and perhaps also to issue corresponding certificates<sup>69</sup>.

Yet, in discarding the institutional perspective, and in particular the perspective deriving from the existence of a plurality of courts and tribunals, the Commission left aside the very perspective which gives rise to the most relevant problems, one of the very perspectives from which the problem of fragmentation came to the fore. Indeed the Commission approached the subject from the beginning distinguishing three «different patterns of interpretation or conflict which were relevant to the question of fragmentation»<sup>70</sup>. These are: *a*) «Conflicts between different understandings of general law», the main example being the *Tadic* judgment of the Tribunal for Crimes in the former Yugoslavia, in light of the *Nicaragua* judgment of the ICJ; *b*) «Conflicts arising when a special body deviates from the general law not as a result of disagreement as to the general law but on the basis that a special law applies», the main examples being the decisions on reservations of human rights courts, such as the abovementioned *Loizidou* case; *c*) «Conflicts arising when specialized fields of law seem to be in conflict with each other», an example quoted being the GATT panel report on the *Tuna dolphin* disputes of 1994 which, while acknowledging that the environmental law principle of sustainable development was widely recognized in GATT contracting parties, observed that the practice under bilateral and multilateral treaties dealing with the environment «should not be taken as practice under the law administered under the GATT regime and therefore could not affect the interpretation of it».<sup>71</sup>

It seems to me that a satisfactory treatment of these problems—perhaps with the exception of the second category, where the *lex specialis* approach seems adequate—cannot be limited to the application in the abstract of the rules concerning conflicts of substantive treaty obligations on the basis of the Vienna Convention on the Law of Treaties, however useful these may be. These cases require, if one wishes to appre-

<sup>69</sup> See Hafner's study quoted above at note 1.

<sup>70</sup> See, among other documents of the Commission, A/58/10 (*ILC Report* 2003), para. 419.

<sup>71</sup> United States- Restrictions on imports of tuna, GATT Panel report June 1994, 33 *ILM*, 1994, 839, para. 5.19, 892.

ciate their difficulty and possible ways to overcome such difficulties, that the judicial perspective not be left aside.

It must be remarked, nonetheless, that among the ILC's Conclusions there is one that seems to have a relevance in the judicial perspective. This is conclusion 28 which belongs to the section on «conflicts between successive norms» even though its scope seems broader. The ILC observes that disputes concerning conflicting treaty provisions, when not solved, as preferable, by negotiation, may be submitted to «other available means of settlement». In the ILC's view, when the conflict involves «provisions within a single regime...its resolution may be appropriate in the regime—specific regime». When, however, «the conflict concerns provisions in treaties that are not part of the same regime, special attention should be given to the independence of the means of settlement chosen».

This suggestion is at the same time illuminating and disappointing. It is illuminating because it highlights the importance, from the viewpoint of possible problems of fragmentation through divergent interpretations, of the distinction between conflicts of rules of the same system, which may be solved by the dispute-settlement mechanism belonging to the system, and applying substantive law principles such as *lex specialis* and *lex posterior*, and situations of conflict between rules belonging to different systems. This is, in light of the examples quoted, the situation in which the real problems may arise. Still...and this is the disappointing aspect, all the ILC suggests is that «special attention should be given to the independence of the means of resolution chosen». This suggestion is indeed a wise instruction to the parties that may be involved in a dispute, and seems to be an implicit warning about the dangers of specialized judges embarking in the consideration of rules of other systems. It says nothing, however, of the parties' right to choose freely the competent judge, be it unilaterally when permitted by applicable rules, or by agreement, and of all the questions arising from the possible coexistence of competent judges.

#### **IV. The judicial perspective as an essential point of view**

11. It does not seem possible to appreciate fully the problems deriving from the coexistence of different courts and tribunals and of their possible different understanding of general or of particular international law without making part of the picture the perspective of the different courts.

Each court has its terms of reference, especially as regards its jurisdiction. This has been clearly expressed by the International Tribunal for Crimes in former Yugoslavia. In the *Tadić* case the Appeals Chamber held that:

[i]nternational law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system...Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers...Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself<sup>72</sup>.

Similarly, in the *Kvočka* case, the Tribunal, that had been requested to suspend its proceedings to await the decision of the ICJ on «the same or allied questions», rejected the request. The Appellate Chamber, while stating that, in its view,

So far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal...the Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern<sup>73</sup>,

stressed that:

... this Tribunal is an autonomous international judicial body, and although the ICJ is the «principal judicial organ» within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts.

The just quoted positions of the Appeals Chamber of the ICTY seem to set out in a balanced way the approach of international judges in a world in which the will of States has established a growing number of judicial bodies that apply international law. Autonomy and freedom of decision are the requirement of the lack of a hierarchical system and of the consequent expectations of parties. Careful consideration of the decisions of other courts and tribunals is the requirement of the need to ensure stability and predictability.

The «self-contained» (in the meaning given by the *Tadić* judgment) character of each court and tribunal is potentially a factor of fragmentation, as it makes equally valid different interpretations of the same law or divergent solutions to conflicts. The situation is not the same, however, when similar or identical rules are set out in different treaties each of which contains a different mechanism for the settlement of disputes. In the cases concerning the *MOX Plant* raised under, respectively, the UNCLOS

<sup>72</sup> *Prosecutor v. Tadić* [Jurisdiction] [1996] 35 *ILM*, 1996, at 39.

<sup>73</sup> Decision of the Appeals Chamber of 25 May 2001 in *Prosecutor v. Kvočka*, para. 15, repeating observations set out in *Judge Sababuddeen's* separate opinion in *Le Procureur c. Laurent Semanza*, Appeals Chamber of the International Criminal Tribunal for Rwanda, 31 May 2000, para. 25 (cf. <[www.un.org/ity/kvočka/appeal/decision](http://www.un.org/ity/kvočka/appeal/decision)>).

and the OSPAR Convention, both the ITLOS and the OSPAR Arbitration Tribunal agreed on that:

The application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*<sup>74</sup>.

The OSPAR Arbitral Tribunal, considering the «similar language» of EC Directive 90/313 and article 9(1) of the OSPAR Convention, drew conclusions from this statement in observing that:

Each of the OSPAR Convention and Directive 90/313 is an independent legal source that establishes a distinct legal regime and provides for different legal remedies. The United Kingdom recognized Ireland's right as an EU Member State to challenge the implementation of the Directive in the United Kingdom's domestic legal system before the ECJ. Similarly, a Contracting Party to the OSPAR Convention, with its elaborate dispute settlement mechanism, should be able to question the implementation of a distinct legal obligation imposed by the OSPAR Convention in the arbitral forum<sup>75</sup>.

The autonomy (or self-contained character) of each international adjudicating body must, however, be seen in light of two elements of the law regulating each court or tribunal, be it its constitutive instruments, its rules of procedure or its jurisprudence. One such element is what we could call the «degree of openness» or, seen from the other side, its degree of «exclusiveness», of the court or tribunal, in determining the scope of its jurisdiction in light of the existence of other courts, tribunals or similar bodies. Rules setting out criteria of openness or of exclusivity contribute to prevent conflicts of jurisdiction, and so the possibility that the same dispute be submitted to different courts or tribunals. They thus help to avoid conflicts of decisions which might derive from more than one tribunal giving different interpretations of the same rules of international law in their application to the same facts. The other element consists in the rules concerning applicable law. By broadening the applicable law beyond the treaties that contain compromissory clauses granting jurisdiction to

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<sup>74</sup> *The MOX Plant case*, provisional measures, Ireland v. United Kingdom, Order of 3 December 2001, *ITLOS Reports*, 2001, 95, at para. 51, quoted with approval in the Award of the Arbitral Tribunal on the *dispute concerning access to information under article 9 of the OSPAR Convention*, Ireland v. United Kingdom, 2 July 2003, 42 *ILM*, 2003, 1118, at para. 141. Both decisions are quoted and followed on this point in the *Methanex Nafta* Chapter 11 Arbitral Tribunal Award of 3 August 2005 (Methanex corp. v. United States), 44 *ibid.*, 2005, 1345, para. 16. In the abundant literature raised by the MOX saga, see the very thoughtful, updated and well-referenced essay by S. MALJEAN-DUBOIS, J.-C. MARTIN, *L'affaire de l'Usine Mox devant les tribunaux internationaux*, *J. dr. int.*, 2007, 437-471.

<sup>75</sup> Arbitral Award quoted above, para. 142 (and see also 143).

a court or tribunal they help in avoiding that compromissory clauses fragment the law applicable to a given dispute.

12. As regards jurisdiction, a remarkable example of a high degree of openness can be found in the UN Convention on the Law of the Sea. According to that Convention, the compulsory jurisdiction of the courts or tribunals under article 286 is conditioned upon that other courts and tribunals do not have equally compulsory jurisdiction on the case. So article 282 of the Law of the Sea Convention states that:

If the States parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

On the other side, examples of «closeness» or of «exclusivity» can be found in the WTO Disputes Settlement Understanding article 23, and in article 292 of the EEC Treaty. Article 23, para 2*a* of the WTO Disputes Settlement Understanding, in particular states that:

[...]. Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

Article 292 of the EEC Treaty states that:

Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

The European Convention on Human Rights seems to be in-between closeness and openness. On the one hand, article 55 states that:

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention<sup>76</sup>.

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<sup>76</sup> The use of the term «petition» in the English (authentic) version seems odd. «Application» (used in articles 34 and 35) would have been preferable. The equally authentic French text uses «requête» as in articles



The claim to exclusivity, which seems limited to inter-state cases, as article 55 addresses States, does not, however, rule out derogating special agreements<sup>77</sup>. Moreover, the relevance of procedures outside the European Convention's system is acknowledged and given legal consequences as regards individual applications. In fact, paragraph 2 of article 35, concerning admissibility criteria for individual applications, states, on the other hand, that:

The Court shall not deal with any application submitted under Article 34 [i.e. individual applications] that (...) (b) ... has already been submitted to another procedure of international investigation or settlement and contains no relevant new information<sup>78</sup>.

The rules on «openness», by subordinating the exercise of jurisdiction by the court or tribunal they regulate to the existence of jurisdiction of other courts or tribunals, avoid that parties find themselves submitted to concurrent jurisdictions. The rules on «exclusivity», while not making it impossible that another court or tribunal entertain a case already submitted, or that can be submitted, to the court or tribunal with exclusive jurisdiction, makes this costly for the party submitting the case, as such submission would be a violation of an international obligation. This conflict-avoiding function of the «openness» and «exclusivity» clauses, however, work only as long as the disputes that can be submitted to one or another adjudicating body are the same, and, especially, are considered as being the same by both such bodies.

An example confirming the above observation can be found in the *MOX* case, in which, indeed, it was controversial whether the dispute presented to the adjudicating body whose constitutive instrument provided for «openness» was the same as (or substantially overlapped with) the dispute that could be submitted to an adjudicating body whose constitutive instrument provides for exclusivity. The case against the United Kingdom was brought, invoking the compulsory jurisdiction provisions of the UNCLOS, by Ireland to an Arbitral Tribunal established under annex VII of the UNCLOS, claiming that the UK had failed to comply with a number of provisions of the same Convention. On the basis of the assumption that the case was substantially the same that could be based on European Community law and which would fall consequently under the compulsory and exclusive jurisdiction of the European Court of Justice, the UK invoked the above quoted «openness» clause of article 282 of the UNCLOS and held that the arbitral tribunal lacked jurisdiction. The ITLOS,

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34 and 35. In any case, the meaning would seem to encompass all cases in which a case may be submitted unilaterally by a party to a Court or Tribunal.

<sup>77</sup> See European Commission for Human Rights, decision of 28 June 1996 (Appl. No. 25781/94) *Cyprus v. Turkey*, Decisions and Reports 86-A, 104, at 138, underscoring that the departure from the principle of «monopoly» of the Convention's institutions is permitted, through special agreements, «only exceptionally».

<sup>78</sup> On this provision, C. SANTULLI, *Droit du contentieux international*, Paris, 2005, 98.

requested to prescribe provisional measures under article 290, para. 5, of UNCLOS, decided *prima facie* that the Arbitral Tribunal had jurisdiction denying that article 282 was applicable. In its view, the case submitted to it was different from the case that could be submitted to the European Court because the claims were based on a different treaty<sup>79</sup>. The Arbitration Tribunal did not take a decision on this point as it decided to suspend its proceedings (invoking comity considerations, as we shall see further) in order to wait for clarification as to whether the European Court of Justice had exclusive jurisdiction on the matter<sup>80</sup>. Such clarification came with a decision of the European Court of Justice on an action brought by the European Commission against Ireland claiming that Ireland, by instituting proceedings against the UK, another Member State of the EC, had failed to fulfil obligations ensuing from article 292 of the EC Treaty, which as remarked, makes the jurisdiction of the European Court exclusive in cases concerning the application or interpretation of Community law<sup>81</sup>. The European Court in its judgment of 30 May 2006 upheld the Commission's views and decided that Ireland had failed to fulfil its obligations under article 292<sup>82</sup>.

The Court did not need to base its decision on that the dispute that could have been submitted to it was the same as that submitted to the Annex VII Arbitral Tribunal because it involved the application of Community rules equivalent to those of the UNCLOS (the argument discussed before ITLOS)<sup>83</sup>. It held that, as the Community is a party to UNCLOS, UNCLOS is Community law, and article 292 of the EC Treaty applies to disputes concerning the application and interpretation of such law<sup>84</sup>. This makes disputes between EC member States unique, but potentially disrupting of the dispute-settlement system of UNCLOS, in light of that 27 out of 151 States parties to UNCLOS are members of the EEC. It has been observed that:

...this massive protection of its exclusive jurisdiction by the ECJ comes at a price. It may interfere not only with the freedom of EU Member States in selecting the dispute

<sup>79</sup> *The MOX Plant case, provisional measures*, order of 3 December 2001, *ITLOS Reports*, 2001, 95, at paras. 50-53.

<sup>80</sup> Arbitration Tribunal constituted pursuant annex VII of the UN Convention on the Law of the Sea on *The MOX Plant case*, Ireland v. United Kingdom, Order No. 3, 24 June 2003, 42 *ILM*, 2003, 1187, paras. 20-30.

<sup>81</sup> Which included treaties of which the Community is a party as is the case of UNCLOS.

<sup>82</sup> Judgment of 30 May 2006, case C-459/03, in <http://curia.europa.eu/jurisp>, also in 45 *ILM*, 2006, 1051.

<sup>83</sup> See however, paragraphs 124-125, referring to article 282 of UNCLOS which, in the view of the ECJ, «makes it possible to avoid such a breach of the Court's exclusive jurisdiction in such a way as to preserve the autonomy of the Community legal system» (124). In the context of the ECJ this statement—however correct from the point of view of the exercise of the *Kompetenz-Kompetenz* of an adjudicating body under the UNCLOS—seem to be an *obiter dictum*.

<sup>84</sup> Paragraphs 126-127, in light of paragraphs 119-123.

settlement systems of their choice, but also with the authority of other international courts and tribunals and of the regimes they serve<sup>85</sup>.

It is interesting to note that in an arbitration between two member States of the EC, the *Iron Rhine (Ijzeren Rijn) Railway* case between Belgium and the Netherlands<sup>86</sup>, in which the question to be decided concerned the interpretation of a treaty of 1838 and subjects, transportation and environmental protection, on which there exists extensive EC legislation, the parties and the Tribunal went to great lengths to avoid a repetition of the *Mox* case situation. The parties had instructed the Tribunal «to render its decision on the basis of international law, including European law if necessary, while taking into account the Parties' obligations under article 292 of the EC Treaty»<sup>87</sup>. The Tribunal proceeded to analyze the aspects of the dispute in which EC law might have been relevant. It stated that it found itself in a situation analogous to that of an EC member State's domestic Court that has to decide whether to submit a request for a preliminary ruling to the European Court of Justice<sup>88</sup>. On this basis, it decided that it was not necessary for it to engage in an interpretation of EC law and that the points of EC law raised were not «determinative» for the settlement of the dispute «or conclusive in the sense of bringing Article 292 of the EC Treaty into play»<sup>89</sup>.

Perhaps the main difference, from the viewpoint here adopted, between this *Iron Rhine* and the *Mox* cases is that in the *Iron Rhine* case the parties seem to have been in agreement to do all they could to keep the case within the jurisdiction of the Arbitral Tribunal. The Arbitral Tribunal followed them and found that the dispute could be adjudicated without interpreting the EC legislation. In order to reach this conclusion, however, it engaged in extensive examination of such legislation. This, according to a commentator, could have provoked an action for failure to fulfill obligations under the EC Treaty against the two parties in dispute<sup>90</sup>. While such action has not been started, it may be, as another commentator suggests, that the particularly strong

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<sup>85</sup> N. LAVRANOS, *Protecting its Exclusive Jurisdiction: the MOX Plant-Judgment of the ECJ*, 5 *L. and Practice of Int. Courts and Trib.*, 2006, 479-493, at 493. See also E. CANNIZZARO, *Le relazioni esterne della Comunità: verso un nuovo paradigma unitario?* *Dir. Unione eur.*, 2007, 223-238; F. CASOLARI, *La sentenza MOX: la Corte di giustizia delle Comunità europee torna ad occuparsi dei rapporti tra ordinamento comunitario ed ordinamento internazionale*, *Dir. Unione eur.*, 2007, 327-367; P.J. CARDWELL, D. FRENCH, *Who Decides? The ECJ's Judgment on Jurisdiction in the MOX Plant Dispute*, *Journal of Environmental Law*, vol. 19, 2007, 121-129.

<sup>86</sup> Award of 24 May 2005, [www.pca-cpa.org](http://www.pca-cpa.org), to be published in U.N. *Reports of International Arbitral Awards*, vol. XXVII.

<sup>87</sup> Paragraph 97.

<sup>88</sup> Paragraphs 103-106, 107-141.

<sup>89</sup> Paragraph 141.

<sup>90</sup> N. LAVRANOS, *The Mox Plant and Ijzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, *Leiden J. Int. Law*, 2006, 241; and, of the same author, *The Mox plant judgment of the ECJ: how exclusive the jurisdiction of the ECJ?*, *European Environmental Law Journal*, 2006, 295.

terms of the *Mox* judgment of the European Court of Justice can be read as including a message against the «circumventing» of its exclusive jurisdiction in the *Iron Rhine* case<sup>91</sup>.

13. As regards applicable law, even when the jurisdiction of a court or tribunal is limited to the interpretation and application of a given treaty or group of treaties, the application of other rules of international law is usually possible. This is the case, for instance, of the adjudicating bodies competent under the UN Law of the Sea Convention and under the WTO Disputes Settlement Understanding. In these cases, the relevant instruments provide that the law to be applied in the exercise of such jurisdiction is not limited to those treaties. So article 293, paragraph 1, of the Law of the Sea Convention states that:

A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

Article 3(2), of the WTO Dispute Settlement Understanding states that the WTO dispute settlement system serves

... to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law ...

As the reference to general international law in the Law of the Sea Convention is broader than in the Disputes Settlement Understanding, it has not been necessary for the International Tribunal for the Law of the Sea to go through the painful process undertaken by the Appellate Body of affirming through its case law the applicability of general international law<sup>92</sup>. In its very first case, the Appellate Body has stated, nevertheless, that article 3(2) of the Dispute Settlement Understanding «reflects a measure of recognition» that the GATT (and by implication the other applicable treaties) «is not to be read in clinical isolation from public international law»<sup>93</sup>. In further cases one can find examples of references to international law rules different from those explicitly mentioned on interpretation<sup>94</sup>. In a Report of 19 January 2000

<sup>91</sup> S. MALJEAN-DUBOIS, J.-C. MARTIN, *L'affaire de l'Usine Mox* quoted above, 452.

<sup>92</sup> For the practice under article 293 and the other references to international law contained in the UNCLOS see T. TREVES, *The International Tribunal for the Law of the Sea: Applicable Law and Interpretation*, in G. SACERDOTI, A. YANOVICH, J. BOHANES (eds.), *The WTO at Ten, The Contribution of the Dispute Settlement System*, Cambridge, 2006, 490-500. See also the Award of the Tribunal constituted pursuant to article 287, and in accordance with Annex VII, of the UNCLOS, of 17 September 2007, *Guyana v. Suriname*, paras 403-406, in [www.pca-cpa.org](http://www.pca-cpa.org).

<sup>93</sup> *United States – Standards for Reformulated and Conventional Gasoline*, AB-1996-I, Appellate Body Report of 29 April 1996, 35 *ILM*, 1996, 603 at 17.

<sup>94</sup> For a recent review, with detailed references, P.-T. STOLL, *Article 3 DSU*, in R. WOLFRUM, P.-T. STOLL, K. KAISER, *WTO, Institutions and Dispute Settlement*, Leiden, Boston, 2006, 281-314, at 287-302. Among the most recent studies on the relevance of general international law for the WTO dispute settlement

(*Korea-Measures affecting Government procurement*) a WTO panel, having referred to article 3(2) of the Dispute Settlement Understanding and its mention of the rules of interpretation of public international law, specified that:

...the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between WTO members. ...[T]o the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO<sup>95</sup>.

Furthermore, especially recently, courts and tribunals have resorted to the already mentioned technique of «systemic» integration, on the basis of article 31(3)© of the Vienna Convention on the Law of Treaties. This technique—even though only from the perspective of interpretation—permits to broaden the law applicable in a specific case.

There are however limits beyond which an adjudicating body whose jurisdiction is based on a clause concerning disputes on the application and interpretation of a given treaty cannot go. The *MOX* Arbitration Tribunal, in its Order of 2003, has sketched such limits by stating the following:

The Tribunal agrees with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under article 288, para 1, of the [UN Law of the Sea] Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand. It also agrees that, to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible<sup>96</sup>.

The key to this statement seems to be the distinction between claims arising «directly» and those not arising directly (arising indirectly?) under the instrument that defines the scope of jurisdiction of the adjudicating body. This might be a promising avenue. It requires, however, further exploration.

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bodies, J. PAUWELYIN, *The Role of Public International Law in the WTO: How far Can We Go?*, 85 *Am. J. Int. L.*, 2001, 235; M. DISTEFANO, *Soluzione delle controversie nell'OMC e diritto internazionale*, Padova, 2001; M. GARCIA-RUBIO, *On the Application of Customary Rules on State Responsibility by the WTO Dispute Settlement Organs*, Geneva, 2001; P. PICONE, A. LIGUSTRO, *Diritto dell'Organizzazione Mondiale del Commercio*, Padova, 2002, 623-634; F. FRANCONI, *The WTO in context: the integration of international human rights and environmental law in the dispute settlement process*, in G. SACERDOTI, A. YANOVICH, J. BOHANNES, *The WTO at Ten* quoted above, 143-154. See also doc. A/CN.4/L. 682, paras. 165-171.

<sup>95</sup> WT/DS163/R, para. 7.96.

<sup>96</sup> Order No. 3 quoted above, para. 19.

## V. The impact of compromissory clauses on the unity of disputes

14. Compromissory clauses concerning jurisdiction to adjudicate disputes relating to interpretation and application of a given treaty or group of treaties can be seen as tools to split disputes and creating a form of fragmentation<sup>97</sup> as, in some cases, different aspects of the dispute could be submitted to different courts under different clauses, and, in other cases, some aspects could be submitted to a court, while others would remain outside the jurisdiction of whatever court. The drawbacks of these situations, and especially of the latter, may be eliminated or attenuated by resorting to the above considered possibilities of applying rules of international law other than those set out in the treaty whose interpretation and application is the object of the compromissory clause. These possibilities, although helpful, do not eliminate altogether difficult choices that judges may be required to make.

In fact, jurisdiction based on compromissory clauses concerning disputes relating to the application and interpretation of a given treaty may put the adjudicating body exercising its *Kompetenz-Kompetenz* before a delicate alternative. On the one hand, it may decide that it has jurisdiction under the compromissory clause arguing that the scope of the dispute before it is defined by the clause, so that it includes the matters encompassed in the provisions of the relevant treaty and nothing more. This seems to be the attitude taken by the ITLOS and by the OSPAR Arbitration tribunal in the *MOX Plant* cases, as seen above, as well, as we will see, by the ITLOS in the *Southern Bluefin Tuna* case. On the other hand, the adjudicating body may decide that if the «real» dispute between the parties is not completely (or prevalently) encompassed by these provisions, it has no competence to adjudicate as not all the dispute between the parties is covered by the agreement providing jurisdiction. This seems to be the view taken by the Arbitral Tribunal deciding in 2000 on the *Southern Bluefin Tuna* case.

The first alternative has the positive consequence that adjudication will be possible in more cases, and the negative consequence that certain questions in dispute between the parties will remain separated and not adjudicated, or at least not adjudicated by the same judge. The second alternative has the advantage of keeping together connected questions in dispute between the parties, and the drawback that, in a number of cases, they will be kept together outside the jurisdiction of all courts and tribunals, making adjudication, and the settlement of the dispute through it, unlikely. The alternative is between a form of fragmentation and a restrictive approach to

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<sup>97</sup> See the discussion by E. CANNIZZARO, B. BONAFÉ, *Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ on the Oil Platforms case*, 16 *Eur. J. Int. L.*, 2005, 481-497.

adjudication that may be seen as frustrating clauses providing for it. Of course, the determination of what is meant by «real» dispute may be decisive.

15. The *Southern Bluefin Tuna* case (New Zealand and Australia v. Japan) and the *Swordfish* case (Chile/European Community) seem to be appropriate illustrations of this kind of problems. In the first case, the parties were in dispute about a matter encompassed by two different international conventions, only one of which contained a compromissory clause permitting unilateral recourse to a judge or arbitrator. In the second case, the matter was encompassed by two different international agreements, both of which contained compromissory clauses permitting such unilateral recourse to different adjudicating bodies.

In the *Southern Bluefin Tuna* case, the plaintiff States held that the conduct of Japan as regards southern bluefin tuna fisheries amounted to a violation of certain provisions of the UN Convention on the Law of the Sea (UNCLOS) and of a 1993 Convention between the three States concerning the southern bluefin tuna<sup>98</sup>. As the UNCLOS contained a provision for compulsory settlement of disputes, and the 1993 Convention did not, the plaintiff States instituted proceedings before an Arbitral Tribunal to be established under annex VII of UNCLOS and, according to article 290, para. 5 of the same, requested provisional measures to the International Tribunal for the Law of the Sea (ITLOS).

In determining the *prima facie* jurisdiction of the arbitral tribunal, the ITLOS was not concerned that the parties were also in dispute as regards the application of the 1993 Convention and considered it sufficient that they were in dispute as regards provisions of the UNCLOS. It was concerned, however that the 1993 Convention might exclude the plaintiffs' right to invoke the UNCLOS and stated that it did not<sup>99</sup>. It was also concerned in establishing a form of relevance of the 1993 Convention within the framework of UNCLOS and stated that the conduct of the parties under the 1993 Convention was «relevant to an evaluation on the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea»<sup>100</sup>. The ITLOS proceeded to prescribe provisional measures on the basis of article 290 in order to preserve the rights of the parties or prevent serious harm to the environment.

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<sup>98</sup> Convention for the Conservation of Southern Bluefin Tuna of 10 May 1993, U.N., Law of the Sea Bulletin, No. 26, October, 1994, 57. The Convention entered into force of 20 May 1994.

<sup>99</sup> ITLOS Order of 27 August 1999, *ITLOS Reports*, 1999, 280, at 294, paras. 51 and 55.

<sup>100</sup> *ITLOS Reports*, 1999, 294, para. 50.

As regards the Arbitration Tribunal, its award of 4 August 2000<sup>101</sup> states that the «real dispute»<sup>102</sup> between the parties (concerning Japan's role in the management of the Southern Bluefin tuna stocks) «while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea»<sup>103</sup>. The Arbitral Tribunal then reached the conclusion that the condition precluding compulsory jurisdiction under UNCLOS set out in UNCLOS article 281, namely, that an agreement between the parties excludes «any further procedure», was satisfied in light of article 16 of the 1993 Convention. This article, while providing only for consensual means of settlement, states that failure to reach agreement on a binding settlement procedure «shall not absolve the parties from the responsibility of continuing to seek to resolve it [i.e. the dispute] by any of the various peaceful means referred to in para. 1», which set out a list of consensual means. Consequently, the Arbitral Tribunal decided that it had no jurisdiction. This interpretation of article 281 can be and has been criticized arguing that an express exclusion is the preferable interpretation, and also that, even accepting that article 16 has an exclusionary effect, it refers to disputes concerning the 1993 Convention, and not UNCLOS<sup>104</sup>.

Whatever the strength of these views, in the present context it seems interesting to observe that, in the presence of a compromissory clause (articles 286-288 of the UNCLOS) providing for compulsory jurisdiction for disputes concerning the interpretation and application of UNCLOS, one tribunal, the ITLOS, has chosen the first of the two alternatives set out above. Although with the brevity necessary in a provisional measures order, it considered the dispute as defined by the provisions invoked of the UNCLOS and affirmed its jurisdiction. The other tribunal, the Arbitral Tribunal, has followed the second alternative<sup>105</sup>. It has looked for the «real dispute» and, once decided that it arose under two different conventions, instead of following the path of deciding that it had no jurisdiction under one of the two conventions (the 1993 one) and consequently that it could not adjudge the whole of the «real

<sup>101</sup> Award on Jurisdiction and Admissibility, 39 *ILM*, 2000, 1359.

<sup>102</sup> This expression is used in para. 48 of the Award, 39 *ILM*, 2000, 1386.

<sup>103</sup> Para. 49 of the Award, 39 *ILM*, 2000, 1387.

<sup>104</sup> See the separate (and dissenting) opinion of Sir Kenneth Keith (*ILM*, vol. 35, 2000, 1395). Among the published comments on the Award, the interpretation of article 281 is especially criticized by P. WECKEL, *Rev. gén. dr. int. pub.*, 2000, 1037; as well as by C. ROMANO, *The Southern Bluefin Tuna Dispute: Hints of a World to Come... Like it or not*, 32 *Ocean Development and International Law*, 2001, 313 ff., at 331; by N. TANAKA, *Some observations on the Southern bluefin tuna arbitration award*, 44 *Japanese Annual International Law*, 2001, 9-34, espec. 26-30; and by P. SANDS, *ITLOS: An International Lawyer's Perspective*, in M. NORDQUIST, J.N. MOORE (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, The Hague, London, New York, 2001, 141-158, at 150-53. Broader implications of the Award are explored by B.H. OXMAN, *Complementary Agreements and Compulsory Jurisdiction*, 85 *Am. J. Int. L.*, 2001, 277 ff.

<sup>105</sup> Some useful observations are in M. KAWANO, *L'affaire du thon à nageoire bleue et les chevauchements de juridictions internationales*, *Ann. français dr. int.*, 2003, 516-541, espec. 536-540.



dispute»<sup>106</sup>, preferred to start the examination of its jurisdiction from the more controversial other, finding that it lacked jurisdiction on the basis of it. One may wonder what would the Arbitral Tribunal have done had it found that article 16 of the 1993 Convention did not meet the exclusionary requirement of UNCLOS article 281. Would it then have moved to consider its jurisdiction under the 1993 Convention and come to the conclusion negating its jurisdiction mentioned above? Or would it have considered that it had jurisdiction under UNCLOS and ignored the 1993 Convention as applicable law, or would it have considered it as «other rules of international law applicable in the relations between the Parties», or would it, as suggested by the ITLOS, have looked at the parties' conduct under the 1993 Convention as relevant in determining compliance with obligations under UNCLOS?

In the *Swordfish* case, Chile argued that European Community (Spanish) fishing vessels in their activities on the high seas adjacent to its exclusive economic zone infringed certain provisions of the UNCLOS, and prohibited the unloading of the fish captured in its ports. In the European Community's view, Chile's contention under UNCLOS was unfounded and the prohibition of access to ports was an infringement of GATT provisions. Chile started proceedings against the EC under the UNCLOS, while the EC requested the setting up of a WTO panel to decide on the violation of the GATT<sup>107</sup>. Contacts between the parties made the two submissions practically simultaneous. As regards the one under the UNCLOS, the parties agreed to submit the case, rather than to the arbitration tribunal which would have had jurisdiction under article 287, to a Chamber of the ITLOS which would judge on an agreed set of questions related to the UNCLOS «to the extent that they are subject to compulsory procedures entailing binding decisions under part XV of the Convention». As a provisional settlement was later reached by the parties, the two cases, while still pending, are not actively pursued and it seems unlikely that they will be resumed<sup>108</sup>.

It would seem that each side to the case considered that the treaty whose violation it claimed defined the scope of the dispute it could submit, under the compulsory settlement provisions applicable to that treaty, to the dispute settlement bodies provided in it. Neither side seemed to consider as problematic that the «real» dispute

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<sup>106</sup> See E. CANNIZZARO, B. BONAFÉ, *Fragmenting International Law* quoted above, 486.

<sup>107</sup> As regards the ITLOS case, *case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean*, see the order of 20 December 2000, *ITLOS Reports*, 2000, 148; as regards the WTO case, docs. WT/DS 193 and WT/DS 193/2.

<sup>108</sup> See ITLOS order of 29 December 2005 prolonging for the second time time-limits for submitting written pleadings in [www.itlos.org](http://www.itlos.org), and T. TREVES, *The International Tribunal for the Law of the Sea (2005)*, in 15 *Italian Yearbook Int. L.*, 2005, 255-25-262, at 258-261. In informal documents presented by the parties to the Tribunal the link with the WTO case was underlined, and a remark was made that dispute could be seen as one, which was divided up because of the division of competence of ITLOS and of the Panel.

could not be adjudicated as a whole by one body. The fact that neither of the two available dispute settlement mechanisms could cover the whole of the «real dispute» did not discourage the parties. Both sides seemed to consider normal that, although the basis of the contrast between them could perhaps be seen as one «real dispute» about the alleged violations by the EC of the UNCLOS and the countermeasures taken by Chile, the two aspects could and would be kept separate as two distinct disputes, the scope of each defined by the treaty to which the respective compromisory clause applies. The agreement of the parties to start simultaneously the two cases and to suspend (and possibly to revive) them are clear indications of this, and, at the same time, of their approach to the existence of one «real» disputes falling under the jurisdiction of two separate adjudicating bodies.

Had the two cases run their course in parallel, questions relevant from the point of view of «fragmentation» (or of conflict of jurisdictions) could have arisen. Two seem of particular interest. The first concerns the determination of facts and evidence: would the ascertainment of facts by one adjudicating body have had an influence on the other and would such influence be made dependent of the rules of evidence applied? And, provided that no negative answer would have been given to this question, to what, in legal terms, would such «influence» amount? The rather open attitude mentioned above as regards facts ascertained by the ICTY taken by the ICJ in its *genocide* judgment of 26 February 2006, would seem to indicate that the answer that a court or tribunal may recognize a very relevant influence to the findings of fact by another court or tribunal is possible. The second concerns the fact that at least one of the questions submitted to the ITLOS Chamber can be seen as overlapping with the question submitted to the WTO panel. This question concerns violation of non-discrimination rules of the GATT by Chile in prohibiting entry into ports by the EC vessels. In fact, among the questions submitted to the ITLOS Chamber on behalf of Chile there is the following: «whether the European Community has challenged the sovereign right and duty of Chile, as a coastal State, to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports, in a non-discriminatory manner, as well as the measures themselves, and whether such challenge would be compatible with the Convention». In light of this question, it would have become possible that the WTO panel declare the Chilean prohibition illicit as a violation of GATT, while the ITLOS Chamber could have declared it compatible with the UNCLOS. This would not amount to any form of fragmentation: a court seized of one dispute encompassing the two could very well have so ruled. Still, the possible determination of the «discriminatory» character of the measures in a contradictory way by the two adjudicating bodies could raise concerns.

## VI. General concepts and techniques judges may resort to in order to avoid conflicts of jurisdiction

16. In order to enhance the «openness» of the judicial system in which they operate judges may resort to general concepts and particular techniques. One such concept that has been recently utilized is that of comity, or of respect for other judicial institutions. Such concept was utilized by the Arbitral Tribunal established on the basis of Annex VII to the UN Law of the Sea Convention for the settlement of the *MOX Plant* dispute between Ireland and the United Kingdom. Invoking «considerations of mutual respect and comity which should prevail between judicial institutions», the Arbitral Tribunal suspended its proceedings awaiting a decision of the European Court of Justice on the question whether the European Community has exclusive or partial competence on matters dealt with by certain provisions of the Law of the Sea Convention<sup>109</sup>. Other possible concepts that could be utilized could be those of litispence, *res judicata*, *forum non conveniens*, abuse of rights<sup>110</sup>.

*Res judicata* was invoked by Argentine to oppose a request of provisional measures submitted in 2006 by Uruguay to the ICJ in the *Pulp Mills on the River Uruguay* case<sup>111</sup>. The principal measure sought by Uruguay consisted in requesting Argentina to prevent and end blockades to the traffic between the two countries. Argentina objected that the matter had already been decided by an arbitral award in the framework of Mercosur<sup>112</sup> which constituted *res judicata* for the parties. The Court did not deny the abstract possibility to invoke *res judicata*. It denied, however, its relevance in the case as

[...] the rights invoked by Uruguay before the Mercosur *ad hoc* arbitral tribunal were different from those that it seeks to have protected in the present case<sup>113</sup>.

In light also of the argument by Uruguay that the decision of the Mercosur Arbitral Tribunal «concerned different blockades»<sup>114</sup>, the order of the Court seems to confirm the

<sup>109</sup> Arbitral Tribunal chaired by Judge *T. A. Mensab*, Order No. 3, 24 June 2003, in [www.pca-cpa.org](http://www.pca-cpa.org), and in 42 *ILM*, 2003, 1187, para. 29. The case brought in connection to the *MOX Plant* dispute by the European Commission against Ireland has been decided by European Court of justice with judgment of 30 May 2006 (case C-459-03, Commission of the European Communities v. Ireland, 45 *ILM*, 2006, 1051, *Riv. dir. int.*, 2006, 823), affirming the exclusive competence of that very court on the basis of article 292 of the EEC treaty quoted above.

<sup>110</sup> See Y. SHANY, *The Competing Jurisdiction of International Courts and Tribunals*, Oxford, 2003, 212-271; A. GATTINI, *Un regard procédural sur la fragmentation du droit international*, *Rev. gén. dr. int. pub.*, 2006, 303-334.

<sup>111</sup> ICJ Order of 23 January 2007, [www.icj-cij.org](http://www.icj-cij.org), para. 21.

<sup>112</sup> Tribunal Arbitral del Mercosur, award given in Montevideo on 6 September 2006 (on file with the present author).

<sup>113</sup> ICJ Order of 23 January 2007, 46 *ILM*, 2007, 311, para. 30.

<sup>114</sup> ICJ Order of 23 January 2007, para. 23.

traditional approach (based on identity of parties<sup>115</sup>, *causa petendi* and *petitum*) to the determination of the cases which can be invoked as a basis for a claim of *res judicata*<sup>116</sup>.

None of the general concepts mentioned above was explicitly mentioned in a recent case submitted to the Compliance Committee (thus not to a judge) set up by the Aarhus Convention of 25 June 1998<sup>117</sup>, even though the Committee's decision was similar to that of the *Mox plant* arbitration tribunal. The Committee decided to await the conclusion of an inquiry procedure started under another Convention, the Espoo Convention of 25 February 1991<sup>118</sup>, in order to decide «in light of the findings» of that procedure, whether the Bystroe Canal project undertaken by Ukraine in the Danube Delta would be «likely to have a significant environmental impact»; this would «in turn determine whether the project was indeed subject to an environmental impact assessment procedure» as prescribed by article 6, paragraph 2(e) of the Aarhus Convention, the compliance with which (together with other provisions of the Convention) the Compliance Committee was supposed to examine<sup>119</sup>. The Inquiry Commission report handed out in Geneva on 10 July 2006 concluded unanimously that the project was likely to have significant transboundary impact<sup>120</sup>. The Aarhus Compliance Committee, while observing that the findings of the Enquiry Commission raised a problem of interpretation of the concept of being «subject to a transboundary environmental impact procedure» in article 6, paragraph 2(e) of the Aarhus Convention, stated that «it was neither necessary nor constructive to attempt to resolve this question». What was «a priority» for Ukraine was «to ensure that the public concerned was notified of any forthcoming transboundary environmental impact procedure required under the Espoo Convention, such notification being in any event required under article 6, paragraph 2(e), of the [Aarhus] Convention»<sup>121</sup>. In other words, the Aarhus Compliance Committee seems to assume that compliance with the prescriptions of the Espoo Convention, after the determinations of the Enquiry Commission, was certain and would be, at the same time, compliance with the relevant provision of the Aarhus Convention and with the recommendations of the Compliance Committee.

<sup>115</sup> This aspect is underlined in the *genocide* judgment of 26 February 2007, para. 135.

<sup>116</sup> On these requirements, C. SANTULLI, *Droit du contentieux* quoted above, 92-93.

<sup>117</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 38 *ILM*, 1999, 517.

<sup>118</sup> Convention on Environmental Impact Assessment in a Transboundary Context, 30 *ILM*, 1991, 800.

<sup>119</sup> See docs ECE/MP.PP/C.1/2005/2/Add. 3, para. 8; and ECE/MP.PP/C.1/2006/6, para. 11, as well as decision II5b of Second Meeting of States Parties in doc. ECE/MP.PP/2005/2/Add.8.

<sup>120</sup> See *Espoo Enquiry Commission, Report on the likely significant adverse transboundary impacts of the Danube-Black Sea Navigation Route at the Border of Romania and the Ukraine, July 2007* in [www.unece.org/env/eial/documents/inquiry/Final%Report%2010%20July%202006.pdf](http://www.unece.org/env/eial/documents/inquiry/Final%Report%2010%20July%202006.pdf), and the UNECE Press release of 10 July 2006, [www.unece.org/press/pr2006/06env\\_p05e.htm](http://www.unece.org/press/pr2006/06env_p05e.htm)

<sup>121</sup> Doc. ECE/MP.PP/C.1/2006/6, paras. 13-14.

As regards possible recourse to a principle of comity, the Inter-American Court of Human Rights in advisory proceedings on the interpretation of article 36, para. 1(b) of the Vienna Convention on Consular Relations of 1963, declined to follow such principle, invoked by the United States in order to await that the ICJ take its decision in a pending case (the *Breard* case) involving the same question, and refused to suspend the proceedings<sup>122</sup>. It may be added that comity, to be considered a viable option, should be perceived by the court or tribunal considering whether to resort to it, as a concept likely to be endorsed also by the other court or tribunal concerned. This seems unlikely if the court or tribunal resorting to it belongs to an «open» system (as the UN Law of the Sea Convention system) and the other to an «exclusive» system as that of the European Community.

The above developments show that the perspective of a judge, and of a specific adjudicating system, is a necessary one in order to envisage the questions of «fragmentation» caused by the presence of a number of international courts and tribunals. These developments also indicate, however, that the perspective of a specific judge and adjudicating system, while necessary, may help in developing ideas and techniques that attenuate conflicts or make them less likely, and do ensure that they are eliminated altogether.

A different conclusion could perhaps be reached if one could consider the abovementioned general concepts, or some of them, as having their roots in general international law, either as customary rules or as general principles of law, or as otherwise having become applicable by all adjudicating bodies. This seems to be, in light of the practice just mentioned, more than actual law, a development for the future that can be wished for. Through the diffusion of provisions and judicial trends for the openness of international judicial systems, general concepts might emerge that could attain the status of customary law or of general principles of law. Scholars have developed the concept of «general principles of international procedural law»<sup>123</sup>. This could be a terrain favorable to the development as legal principles of the general concepts here considered. Prudence is nevertheless essential in pursuing this route. This seems especially true in light of the quoted ICJ judgment on the *genocide* case of 2007. In this judgment the Court rejected arguments based on the rules of other international tribunals concerning the timing for challenging the admissibility of a case. The Court argued that regulations of other courts and tribunals.

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<sup>122</sup> Consultative Opinion OC-16/99, 1 October 1999, upon the request of Mexico. See paras. 61 ff., as regards the relationship of the Inter-American Court with the ICJ, and the observations by T. BUERGENTHAL, *International Law and the Proliferation of International Courts, Cursos Euromediterráneos Bancaja de Derecho Internacional*, V, Pamplona, 2001, 29, at 38-41.

<sup>123</sup> R. KOLB, *General Principles of Procedural Law*, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, *The Statute of the International Court of Justice, A Commentary*, Oxford, 2006, 792-835.

[...] reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court...<sup>124</sup>

17. Resort to these concepts could develop rather than as a matter of law, as a matter of judicial propriety and of practical expediency. This was probably the idea underlying the reference to «mutual respect» and «comity» in the *Mox* case order quoted above<sup>125</sup>. Professor Gaja has given a list of possible elements that might induce the ICJ or other adjudicating bodies to decide against a decision to decline to exercise jurisdiction for propriety reasons:

The other court or tribunal might not have jurisdiction over the whole dispute; the settlement of the dispute could be delayed; deciding the dispute would require an examination of questions of international law that are not included among those for which the other court or tribunal is regarded as particularly qualified; the procedure before the other court would not provide the same opportunities for defense<sup>126</sup>.

Conversely, the opposite situations could be mentioned as elements that could militate in favor of a decision to decline exercising jurisdiction for reasons of propriety<sup>127</sup>.

Judicial propriety is a very flexible notion that each adjudicating body can develop in its own way. As such it is not per se much more than an avenue for making possible overlaps of jurisdiction less likely. Not being strictly linked to legal texts, but rather based on ideas concerning good administration of justice, it seems, nevertheless, particularly promising as a terrain on which uniform trends could develop in different tribunals, perhaps contributing to the emergence of inter-tribunal general principles.

In the present situation of international law, different from their attenuation, the elimination of the problems arising from a plurality of international courts and tribunals remains an elusive objective. It might perhaps be attained through institutional engineering of the kind proposed by Presidents Schwebel and Guillaume and mentioned above. Independently of the political and legal obstacles that make these proposals unrealistic and difficult to implement, it remains, however, to be seen—as mentioned above—whether it is really necessary, urgent, and worthwhile

<sup>124</sup> Paragraph 119.

<sup>125</sup> This view is shared by S. MALJEAN-DUBOIS, J.-C. MARTIN, *L'affaire de l'Usine Mox* quoted above, 451.

<sup>126</sup> G. GAJA, *Relationship of the ICJ with Other International Courts and Tribunals*, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, *The Statute of the International Court of Justice, A Commentary*, Oxford, 2006, 533-544, at 541.

<sup>127</sup> Admittedly, G. GAJA, *loc. cit.* does not go so far. He states that «various elements would have to be weighed by the Court before reaching the conclusion that the dispute be referred to the other court or tribunal».

to go beyond attenuation and seek total elimination of the difficulties deriving from the existence of a plurality of international courts and tribunals.

In light of these observations, the choice made by the ILC to exclude the institutional and judicial aspect of fragmentation, although understandable, may be regretted, as it takes away from the discussion the aspect that is at the center of current debates and from whose developments important contributions to an attenuation of the problems may derive.

## VII. The consideration of the decisions of other international courts and tribunals for the avoidance of conflicts of jurisprudence

18. Conflicting interpretations may be reduced by interpreting the applicable law also in light of the decisions of other courts and tribunals. As mentioned above, notwithstanding a small number of very publicized cases in which the views of different courts and tribunals diverged, such practice is quite widespread,<sup>128</sup> even though it happens more often that specialized international courts and tribunals pay attention to each others' judgments or to judgments of the ICJ<sup>129</sup>, than that the ICJ refers to judgments of other permanent and still existing international courts and tribunals, although an indication of a change of policy emerges in the *genocide* judgment of 26 February 2007<sup>130</sup>.

There are some cases in which such taking into account is prescribed in the basic instrument of a court or tribunal. Such a treaty-based prescription is in article 20 of the Statute of the Special Court for Sierra Leone according to which:

The Judges of the Appeal Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda...<sup>131</sup>

Similarly, the EFTA Court of Justice is bound by treaty to interpret the applicable law «in conformity with the relevant rulings of the Court of Justice of the European Communities», if adopted before 2 May 1992, and, if adopted after that date, to do so «taking into due consideration» the rulings of that Court<sup>132</sup>.

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<sup>128</sup> See *supra* paragraph 6.

<sup>129</sup> A review of the references to decisions of the ICJ, of the European Court of Human Rights and of other international dispute-settlement bodies by the European Court of Justice is in A. ROSAS, *With Little Help from my Friends: International Case-Law as a Source of Reference for UE Courts*, in *The Global Community, Yearbook Int. L. and Jur.*, 2005, I, (2006), 203-230.

<sup>130</sup> President Higgins' speech of 10 October 2006 referred to above can be seen as an announcement of such a change of policy.

<sup>131</sup> Annex to the agreement between the United Nations and Sierra Leone of 16 January 2002, <http://www.specialcourt.org>.

<sup>132</sup> See, also for comments and references, D. GALLO, *Nuovi sviluppi in tema di rapporti tra Corte EFTA e*

Still, outside these rare cases of treaty-based prescription, and similarly to the provisions for «openness» and on the applicable law that have their roots in each dispute-settlement system, respect in specific cases for the decisions on similar questions of law by other courts and tribunals always depends on the judge in charge of the decision of the specific case. This is confirmed by recent practice.

The Appeals Chamber of the Tribunal for former Yugoslavia stated that:

Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion<sup>133</sup>.

Similarly, in its 2007 judgment on the *genocide* case, the ICJ, in confirming, as mentioned, the views it had held in the *Nicaragua* case, and that the ICTY had rejected in the *Tadic* case, makes the following points:

The Court has given careful consideration to the Appeals Chamber's reasoning ...but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called in the *Tadic* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal; and extends over persons only. Thus in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it<sup>134</sup>.

Thus the Court confirms that at the end each court or tribunal is free to decide—on the basis of its appreciation of the law—on the relevance to be given to decisions and findings of other courts and tribunals and that, however, these decisions and findings deserve attentive consideration and respect.

A new element set out in this judgment is the specification of criteria to be used in order to determine when such consideration and respect are called for<sup>135</sup>. These

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*Corte CE: la sentenza Pedicel A/S and social-og helsedirekoratet, Studi sull'integrazione europea*, 2006, 367-392; Id., I rapporti tra Corte EFTA e Corte CE nell'ambito del processo di «cross-fertilization» tra le due giurisprudenze, *Dir. Unione eur.*, 2007, 153-182.

<sup>133</sup> Decision of 25 May 2001 on the *Kvocka* case quoted at footnote 69, para. 16.

<sup>134</sup> Paragraph 403.

<sup>135</sup> E. CANNIZZARO, *Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ*, *Eur. J. Legal Studies*, issue 1, 2007, while conceding that the Court's approach might be explained as an exercise of judicial discretion (as it would seem to be the case to the present writer), argues that it could be seen also as a conflict-avoidance technique based on that the decisions of the ICTY could be considered



are that the positions adopted by the other court or tribunal be necessary for the decision of the other court or tribunal and that they be within the purview of such court or tribunal's jurisdiction. In the case of the relationship between the ICJ and a specialized Tribunal, these criteria apply for positions taken «on issues of general international law». The ICJ is more open as far as positions concerning the field of specialization of the other court or tribunal are concerned.

The criterion of the necessity for the decision of the other court or tribunal had been hinted at in the separate opinion of Judge Shahabuddeen in the *Tadic* case<sup>136</sup>. The fact that this view has been taken from the point of view of the tribunal making the statement of law suggests that the criteria put forward by the ICJ may be seen as useful parameters for self-restraint by all international courts and tribunals, indicating the kind of statements that are less likely to be taken in consideration by other courts and tribunals. The court or tribunal taking the position is the best judge of such position's necessity for its judgment and of whether it is within its jurisdiction. Seen as criteria to be used by a court or tribunal in order to specify how it is to exercise its discretion in considering the decisions of other courts or tribunals, as is the case in the *genocide* judgment, they seem basically sound, but with the important qualification that their application may not always be easy or wise. The assessment of whether a statement of law is necessary for a certain decision and whether it is within a court or tribunal's jurisdiction is undoubtedly delicate if made by another court or tribunal<sup>137</sup>. It would seem that this is a ground on which prudence is of the utmost importance and that only the most evident cases of lack of necessity or lack of jurisdiction should be relevant.

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as rules of international law in force as between the parties to the case before the the ICJ. Although this approach is indeed stimulating and could help in some situations, it would seem difficult to the present writer to share the view that decisions of the ICTY are law in force for all the parties to the Statute (all the members of the UN). This view might go too far if applied to findings of general international law made, without going outside its jurisdiction, by the ICTY. Moreover the distinction between conflict of jurisdiction and conflict of jurisprudence seems blurred in Cannizzaro's argument.

<sup>136</sup> *Supra* note 36.

<sup>137</sup> Such a situation arises, however, when in provisional measures proceedings under article 290, paragraph 5, of the UNCLOS, the ITLOS is called to decide *prima facie* on the jurisdiction of an arbitral tribunal that has yet to be established. In that case, however, the arbitral tribunal, once established, is entitled to «modify, revoke or affirm» the provisional measures prescribed by the ITLOS, including on the basis of divergent views as to its own jurisdiction. See T. TREVES, *Provisional measures granted by an international tribunal pending the constitution of an arbitral tribunal*, *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Napoli, 2004, 1243-1263, at 1257.