

# AN INSTITUTIONAL HIERARCHY TO COMBAT THE FRAGMENTATION OF INTERNATIONAL LAW: HAS THE ILC MISSED AN OPPORTUNITY?

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## I. INTRODUCTION

In 2006, the International Law Commission (ILC) issued a final report on the “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.”<sup>1</sup> In its 2002 inaugural report, the Study

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1. Int'l Law Comm'n, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *Fragmentation Report*]. The ILC study group was established in 2002, building on Gerhard Hafner's feasibility study of 2000, and is chaired by Professor Martti Koskenniemi. See Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Second Session*, U.N. GAOR, 55th Sess., Supp. (No. 10) at 144, U.N. Doc. A/55/10 (2000) [hereinafter *ILC 52nd Report*]. The ILC has reported on its progress every

Group had expressed internal agreement that the ILC should not deal with questions relating to the creation of or relationships among international judicial institutions.<sup>2</sup> This meant that in addressing the challenges of the fragmentation of international law, the ILC would not consider how changes could be made to international courts and tribunals, the very institutions that render decisions of international law. Nor would the ILC make proposals regarding how courts interact with one another. Instead, the ILC would only look at how the law operates—how substantive law itself creates a hierarchy of norms such as *jus cogens* or obligations *erga omnes*—and how this hierarchy could be employed to bring order to a potentially fragmented landscape of international decisions.

In its 2005 report, the study group reaffirmed its intent to focus on the *substantive* aspects of fragmentation in light of the Vienna Convention on the Law of Treaties (VCLT),<sup>3</sup> while leaving aside institutional considerations pertaining to fragmentation.<sup>4</sup> The study group wanted to arrive at an outcome with practical value, especially for legal experts in foreign offices and international organizations.<sup>5</sup>

In October 2005, the American Branch of the International Law Association held a conference in New York addressing the topic of United Nations (UN) Reform and the International Court of Justice (ICJ). I asked the panelists why they

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year since its inception. See International Law Commission, <http://www.un.org/law/ilc/> (last visited June 27, 2007) [hereinafter ILC website].

2. Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Fourth Session*, U.N. GAOR, 57th Sess., Supp. (No. 10) ¶ 505, U.N. Doc. A/57/10 (2002) [hereinafter *ILC 54th Report*].

3. The Convention was adopted on May 22, 1969 and opened for signature on May 23, 1969 by the United Nations Conference on the Law of Treaties. The Conference was convened pursuant to General Assembly resolutions 2166 and 2287. G.A. Res. 2166 (XXI), U.N. Doc. A/Res/2166 (Dec. 5, 1966); G.A. Res. 2287 (XXII), U.N. Doc. A/Res/2287 (Dec. 6, 1967). The Conference held two sessions, both at the Neue Hofburg in Vienna. The first session was from March 26 to May 24, 1968 and the second session from April 9 to May 22, 1969. It entered into force on January 27, 1980, in accordance with article 84(1) of the Vienna Convention. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

4. Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Seventh Session*, U.N. GAOR, 60th Sess., Supp. (No. 10) at ch. XI, U.N. Doc. A/60/10 (2005) [hereinafter *ILC 57th Report*].

5. *Id.* at 9 n.6.

thought the ILC had chosen not to address the question of *institutional* hierarchy in conjunction with its study of substantive hierarchy in international law.<sup>6</sup> The consensus among the panelists was that this was an extremely complex issue and thus that the ILC had correctly decided not to take it on.

Curious as to why this question was so complex, I seek in this paper to unpack some of the reasons behind the ILC's decision not to make proposals as to how international courts and tribunals should work together to resolve the challenges of the fragmentation of international law. Even though I ultimately agree with this decision, I argue that the ILC could have addressed the institutional question simply by placing the International Court of Justice (ICJ) at the head of a hierarchy of international courts.

In seeking to construct a hierarchy with the ICJ at its apex, I identify a number of "foundation stones" for an institutional framework—key normative and doctrinal points crucial to the debate surrounding the need for an institutional hierarchy. Although I agree with the ILC's decision not to consider institutional hierarchy in its report, I believe the ILC will have to address this issue at some future point. This Note considers whether such a hierarchy could exist and how new courts and tribunals established in coming years ought to accommodate the basic "foundation stones" within their own normative structure. In other words, I argue that new courts should be designed in light of the eventual necessity of conforming to a larger judicial hierarchy. Knowing *how* international courts and tribunals could fit together in a hierarchy is something we should begin to consider now.

## II. THE FRAGMENTATION OF INTERNATIONAL LAW

Before further describing my hypothetical institutional hierarchy with the ICJ at the top, I will first consider the meaning of the phrase "fragmentation of international law." The term "fragmentation of international law" incorrectly presupposes that international law was once in a solid state and has since broken apart. In fact, international law has always been an amorphous body of complicated and shifting inter-relationship-

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6. I.e., why had the ILC chosen not to debate how international courts and tribunals interact with one another but instead chosen only to look at the substantive norms of international law?

ships and obligations. Rather than a solid, its incomplete codification would better justify comparison with a gas or fluid. Gerhard Hafner describes international law as consisting of:

erratic parts and elements which are differently structured so that one can hardly speak of a homogeneous nature of international law. This system is full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different levels of legal integration. This nature of international law resulting from separate erratic legal subsystems undoubtedly has a positive effect insofar as it enforces the rule of law in international relations; nevertheless, it is exposed to the risk of generating frictions and contradictions between the various legal regulations and creates the risk that States even have to comply with mutually exclusive obligations.<sup>7</sup>

Fragmentation stems from a multitude of factors: the lack of centralized organs,<sup>8</sup> specialization of law,<sup>9</sup> different structures of legal norms,<sup>10</sup> parallel regulations,<sup>11</sup> competitive regu-

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7. *ILC 52nd Report, supra* note 1, at 144 (annex).

8. The growing popularity of ad hoc tribunals as the institutional means of resolving disputes under treaty regimes such as international trade associations reinforces decentralized law-making powers. See *Fragmentation Report, supra* note 1, ¶ 489. Latin America, for example, has frequently relied on such tribunals as an attempt to reduce costs attributable to sitting courts and circumvent perceptions of corrupt local judiciaries.

9. For example, "international law" is composed of separate bodies of law such as the law of the sea, environmental law, human rights law, law of development, and the laws of war. This compartmentalization of international law is well illustrated by the Court's approach in its advisory opinion on the legality of nuclear weapons. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226* (July 8).

10. See Stanley Hoffmann, *International Systems and International Law, in THE INTERNATIONAL SYSTEM* 205, 212-15 (Klaus Knorr & Sidney Verba eds., 1961) (explaining a three-way division of international legal norms between the laws of reciprocity (in which states make bilateral commitments to one another as opposed to or in addition to multilateral arrangements), the laws of the political framework (innovative international norms derived from political events, such as the classification of 'unlawful enemy combatants' by the United States government in the aftermath of the September 11, 2001 attacks on New York and Washington, D.C.), and the laws of the community (multilateral obligations owed to a community of states, such as those under the UN Charter)).

11. For example, the UN Convention on the non-navigational uses of international watercourse of 1998 and the European Convention in interna-

lations,<sup>12</sup> an enlargement of the scope of international law,<sup>13</sup> and different regimes of secondary rules.<sup>14</sup> In fact, one could almost say international law is a victim of its own success.<sup>15</sup> What started as the early twentieth century trend of institutionalizing international law has, over the last half-century, raised expectations of harmonization through codification.<sup>16</sup> International law has gone through several phases, demarcated by, according to David Kennedy, the Treaty of Westphalia, the

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tional watercourses of 1992. G.A. Res. 51/229, U.N. Doc. A/Res/51/229 (May 21, 1997); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312. See *Fragmentation Report*, *supra* note 1, ¶ 30.

12. See, e.g., United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1958, 21 U.N.T.S. 2517 (providing that a “court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration”); Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 248 (containing no comparable provision).

13. For example, there has been an undeniable growth in the field of international human rights law (through bodies such as the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR)) and international economic law (through North American Free Trade Association (NAFTA) tribunals), which have afforded individuals new *locus standi* rights against states. See *Fragmentation Report*, *supra* note 1, ¶ 15.

14. For example, UN General Assembly resolutions are broadly regarded as not constituting “hard” law but as nonetheless being important enough to establish evidence of *opinio juris* and customary international law. Depending on the degree of support, such resolutions can be persuasive in establishing secondary rules. Different regimes of secondary norms also arise in the context of “self-contained regimes” and *lex specialis*. See, e.g., *Fragmentation Report*, *supra* note 1, ¶ 492.

15. In this context it is appropriate to consider international law in terms of a global administrative law whereby both sources and subjects of international law can be identified in terms that do not strictly adhere to conventional state delimitations. See, e.g., Institute for International Law and Justice, Global Administrative Law: Concept and Working Definition, [http://www.iilj.org/global\\_adlaw/GALConceptandWorkingDefinition.htm](http://www.iilj.org/global_adlaw/GALConceptandWorkingDefinition.htm) (last visited June 27, 2007).

16. The ILC has been engaged in the codification of customary international law, including issues of state responsibility, treaty interpretation, responsibility of international organizations, reservations to multilateral conventions, and numerous other topics. See ILC website, *supra* note 1; INTERNATIONAL LAW COMMISSION, THE WORK OF THE INTERNATIONAL LAW COMMISSION, U.N. Sales No. E.04.V.6 (2004).

League of Nations, and the UN Charter.<sup>17</sup> More recently, globalization has accelerated the trend of fragmentation and arguably defines the current phase in which international law is situated.

The ILC report does not address one of the most apparent manifestations of the fragmentation of international law: the establishment of numerous and unrelated international courts and tribunals. This development has compounded the risk of an inconsistent and incongruent development of international law, undermining the certainty and perhaps the legitimacy of this field.<sup>18</sup> Globalization has compounded this risk due to the instantaneous and widespread dissemination of judicial decisions.<sup>19</sup> To date, our collective desire to establish and enforce internationally applicable rights has outweighed our desire to ensure that their promulgation and exercise are coherently managed.<sup>20</sup> Thus, *lex specialis*, special law that prevails over general law, has been allowed to flourish. Similarly, issue-specific tribunals constituting targeted institutional responses to contemporary events of political magnitude—for example, atrocities committed in the Former Yugoslavia leading to the establishment of the International Criminal Tribu-

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17. See David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 83-101 (1999).

18. International judicial decisions frequently affect not only the parties to the particular dispute, but contribute to the framing of innumerable negotiations and settlement discussions. See, e.g., Gilbert Guillaume, President of the International Court of Justice, Speech to the General Assembly of the United Nations (Oct. 30, 2001) ("The proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations.").

19. This instantaneous global availability is evidenced by the fact that international courts and tribunals each have their own designated websites, most of which provide copies of judgments, orders, pleadings, and transcripts. See, e.g., International Court of Justice, <http://www.icj-cij.org> (last visited Sept. 25, 2007); The Court of Justice of the European Communities, <http://curia.europa.eu/> (last visited Sept. 25, 2007).

20. See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law?: Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 561 (2002) ("Here, perhaps is the core of the problem: not so much in the emergence of new sub-systems but in the use of general law by new bodies representing interests of views that are not identical with those represented in old ones.").

nal for the Former Yugoslavia (ICTY)<sup>21</sup>—continue to proliferate.

In my opinion, the growth of issue-specific tribunals has introduced new challenges for the international judiciary and has contributed to the fragmentation of international law. For example, courts and tribunals established by treaty face an immediate challenge to their legitimacy. Such courts have to justify the political will entrusted to them<sup>22</sup> both by actually administering justice and by being seen to administer justice.<sup>23</sup> In determining or exercising their jurisdiction, judges and arbitrators<sup>24</sup> of these kinds of courts are explicitly compelled to opine in a particular way and to observe their jurisdiction as defined by the founding treaties of the institution for which the courts operate. When judges and arbitrators look to those founding treaties, they will often be required to consider the treaty's *lex specialis* before considering general principles of international law. For example, a NAFTA arbitral tribunal is required to look to "NAFTA law" as well as applicable rules of international law<sup>25</sup> when reaching a binding decision. "Gap

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21. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by Security Council Resolution 827, passed on May 25, 1993. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

22. The ICTY does this through the United Nations Security Council. *Id.*

23. The ICTY's objectives are stated as being fourfold: (1) "to bring to justice persons allegedly responsible for serious violations of international humanitarian law"; (2) "to render justice to the victims"; (3) "to deter further crimes"; and (4) "to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia." Ambassador Stephan M. Minikes, Statement on the International Criminal Tribunal for the Former Yugoslavia to the Permanent Council (Nov. 4, 2003) (transcript available at [http://italy.usembassy.gov/viewer/article.asp?article=/File2003\\_11/alia/a3110505.htm](http://italy.usembassy.gov/viewer/article.asp?article=/File2003_11/alia/a3110505.htm)); The ICTY at a Glance, <http://www.un.org/icty/glance/index.htm> (last visited Sept. 11, 2007).

24. Judges and arbitrators are referred to interchangeably during the course of this paper, along with courts and tribunals.

25. Treaties will stipulate that disputes must be resolved first in accordance with the terms of the treaty (often presumptively describing such agreements as "law") and subsequently in accordance with principles of international law. See, e.g., *S.D. Myers, Inc. v. Canada* (U.S. v. Can.), ¶ 48 (NAFTA Ch. 11 Arb. Trib. 2002) (Final Award on Costs), available at <http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersAwardCosts.pdf>; *Pope & Talbot, Inc., v. Canada* (U.S. v. Can.), (NAFTA Ch. 11 Arb. Trib. 2002) (Damages Award), available at <http://www.naftaclaims.com/Disputes/Canada/Pope/PopeAwardonDamages.pdf> (discussing both customary international law and NAFTA rules).

filling,” the process by which judges fill voids where relevant jurisprudence is silent, allows courts to interpret the founding treaties expansively, often relying on the *travaux préparatoires* or other circumstances surrounding the treaty’s execution to define their powers.<sup>26</sup> This is a technique familiar to judges of all kinds, whether common law, civil law, or international. Each judge or arbitrator will approach the resolution of a dispute primarily from the perspective of an institutional actor looking at one specific issue, rather than as an arbiter with a global role in a broader scheme of public international law. Consequently, the result of gap filling, as multiplied by numerous issue-specific international courts and tribunals, is a furthering of the fragmentation of international law. Issue specific tribunals perceive themselves as independent and, in the belief that their mandate is to address the ‘specific issues’ before them,<sup>27</sup> will thus develop their jurisprudence based on doctrines such as *kompetenz-kompetenz*,<sup>28</sup>—even at the expense

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26. Although it is risky to draw a comparison between national and international courts of law, domestic courts follow similar principles. It is a commonly accepted principle in civil law traditions for national courts to rely on their own developing jurisprudence, even in the absence of *stare decisis*, over “external” sources of law. *E.g.*, CONST. POLITICA DEL PERU 1993 art. 239. A court’s interpretation of international law will also be guided, where applicable, by the Vienna Convention on the Law of Treaties. Vienna Convention, *supra* note 3, art. 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”).

27. In 1995, the Appeals Chamber of the ICTY reviewed the legality of its own establishment. While the Chamber acknowledged the UN Charter, and the powers of the Security Council, it held that the Chamber’s powers did not disappear, and that “the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.” *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 20 (Oct. 2, 1995).

28. *Kompetenz-kompetenz* (also called competence-competence or *compétence de la compétence*), is the principle broadly accepted among international tribunals and courts that a tribunal or court has jurisdiction to determine its own jurisdiction; i.e., it has the competence to decide upon its own competence to hear a particular matter. *See, e.g.*, W. LAWRENCE CRAIG, WILLIAM PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (2000).



of a harmonious global jurisprudence.<sup>29</sup> Although the norm is that *stare decisis* does not apply to the decisions of international courts,<sup>30</sup> courts frequently look introspectively to their own developing jurisprudence when formulating decisions (perhaps as a means of self-legitimization), if not to the decisions of other courts.<sup>31</sup>

In the absence of an international court that has an all-encompassing umbrella jurisdiction, both civil and criminal, the greatest challenge is to reconcile the introspective focus of international courts with the fact that their proclamations and opinions form the international legal order.<sup>32</sup> The ILC has addressed the problem of the fragmentation of international law by proposing various means for resolving conflicts. Interim reports issued by the ILC Study Group proposed a substantive hierarchy of international law, referencing more general principles such as *jus cogens*, obligations *erga omnes*, and article 103 of the UN Charter as potential rules for resolving conflicts.<sup>33</sup> In its final report, the ILC also observed that the categorizations of international law, as laid out in article 38 of the Statute of the ICJ—namely, treaty law, customary international law, general principles of international law, judicial decisions, and teachings of highly qualified publicists—could

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29. The *Tadic* decision declined to follow two rulings of the ICJ, while the ICTY Appeal Chamber in the *Celebici* decision implicitly questioned the coherence of the international legal order by holding that the ICTY was an “autonomous international judicial body” and that while there was a recognized need for consistency with the general state of law, there was no “hierarchical relationship” between it and the ICJ. This is discussed below. *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶ 24 (Feb. 20, 2001), available at <http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf>.

30. *See, e.g.*, Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055. *But see* MALCOLM N. SHAW, *INTERNATIONAL LAW* 109 (4th ed. 1997) (explaining when *stare decisis* is used in international law).

31. Recent decisions of various NAFTA tribunals frequently cite their own previous decisions. *See, e.g.*, *S.D. Myers, Inc. v. Canada*, Final Award on Costs; *Pope & Talbot, Inc. v. Canada*, Damages Award. The doctrine of *stare decisis* is also discussed *infra*.

32. The specific difference between the *lex specialis* rule and self-contained regimes is one that receives considerable attention from the ILC reports, and will not be considered in further detail here.

33. *ILC 57th Report*, *supra* note 4, ¶¶ 480-93. The ILC based its discussions in this respect on an oral presentation by Mr. Zdzislaw Galicki. *See id.*; *Fragmentation Report*, *supra* note 1, ¶ 4.

also serve as potential mechanisms for resolving conflicts.<sup>34</sup> Finally, the ILC has been considering VCLT articles 30<sup>35</sup> and 31<sup>36</sup> as a third potential means of resolving conflicts.

### III. UNDERSTANDING THE ILC'S DECISION TO AVOID PROPOSING AN INSTITUTIONAL HIERARCHY

There are numerous legal and political reasons why the ILC decided not to consider the question of an institutional hierarchy. In this section, I consider some of the possible reasons as suggested by remarks of the ILC study group chairman, Martti Koskenniemi.<sup>37</sup>

The first reason is the ILC's lack of authority to propose such a significant change to the international legal community. The ILC was set up by the UN and mandated to consider contemporary issues of international law with a view to their development and codification.<sup>38</sup> This close association with the UN might at first suggest that the ILC has a powerful mandate regarding issues affecting the international legal order. In fact, however, the ILC does not have power to make pronouncements of universal or obligatory application.<sup>39</sup> UN Member States have not been willing to delegate a quasi-legislative power to the ILC to make controversial proposals that involve restructuring the international legal community.<sup>40</sup>

34. See Statute of the International Court of Justice, *supra* note 30, art. 38.

35. See Vienna Convention, *supra* note 3.

36. See *id.* art. 31, ¶ 3(c) (discussing the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties").

37. Martti Koskenniemi, Address at the New York University School of Law (Apr. 4, 2006) [hereinafter Koskenniemi, NYU Address].

38. The ILC was established by G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947) [hereinafter ILC Statute] in order to give effect to article 13(1) of the UN Charter, which called on the General Assembly to initiate studies and make recommendations for the purpose of progressively developing and codifying international law. U.N. Charter art. 13, para. 1. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 304 (2005); IAN M. SINCLAIR, THE INTERNATIONAL LAW COMMISSION (1987).

39. The ILC, in fact, has limited authority. Its work is defined as the "more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine." ILC Statute, *supra* note 38, art. 15.

40. The increasingly prominent role the ILC is assuming has put it at the forefront of the UN's law-making machinery. However, there remains considerable controversy over the UN Security Council's "legislative" powers, so

A second possible reason for the ILC to avoid proposing an institutional-based response to the fragmentation of international law is that doing so would have entailed hard and controversial choices. For instance, if the ILC were to propose a hierarchy of courts and tribunals, which courts should be at the top and bottom of the hierarchy?<sup>41</sup> Such a proposal would reflect heavily the ILC's opinion of the strengths and weaknesses of the respective courts, tribunals, judges, and arbitrators. Moreover, since it is unclear the ILC has the authority to make such judgments, these choices would be vulnerable to subsequent criticism.

Third, even if the ILC were so bold as to propose a hierarchy, it is not clear any court would accept a proposal subordinating it to other courts.<sup>42</sup> Similarly, there is no reason to believe that any court or tribunal would accept a proposal requiring it to become superior to others. Indeed, "supreme" status might reduce a court's ability to avoid sensitive legal and political issues, something most courts, including the ICJ, have frequently done.<sup>43</sup> Moreover, such "supreme" status would inevitably enhance the court's judicial profile, reinvigorating the debate over that court's legitimacy and over how well, as an international court, it represents its constituents.<sup>44</sup>

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the likelihood of the ILC assuming greater "legislative" powers is low. *See generally* B.G. RAMCHARAN, *THE INTERNATIONAL LAW COMMISSION: ITS APPROACHES TO THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW* (1977).

41. On what basis would the ICJ reside at the top of any such hierarchy? Would this expose the ILC to allegations of bias towards a fellow UN institution? Alternatively, why should a sitting court sit above an ad hoc or non-sitting court? Decisions like this might come down to arbitrary or subjective reasoning.

42. Again, the ILC does not possess any particular authority that would compel courts to accept any of its proposals. Therefore, a court might simply reject any such proposal if it disagreed with its placement in the hierarchy of international courts and tribunals.

43. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

44. *See, e.g.*, *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 117-38 (A.S. Muller, D. Raic & J.M. Thuránsky eds., 1997). Such a debate could be much like the debate surrounding the ideologically and politically divided U.S. Supreme Court. However, it is important to recall that the U.S. Supreme Court has certiorari jurisdiction, allowing the justices the discretion to decline jurisdiction on political questions deemed inappropriate for consideration. At least four Supreme Court justices must

A fourth possible reason why the ILC avoided the issue of institutional hierarchy is that it would have distracted the ILC from its considerable workload, especially given the amount of work required by the substantive hierarchy analysis already underway.<sup>45</sup>

Fifth, it is also possible to reason that a clear substantive hierarchy of international law, once established, will facilitate the convergence of decisionmaking by courts and tribunals. The substantive hierarchy itself should go a long way to remedying the inconsistencies an institutional hierarchy would seek to address.

Finally, the complexity of the subject of international law, as explored *infra*, may illustrate the need for different courts to consider different issues in ways uniquely suited to their context, a point that Professor Koskenniemi makes with some force.<sup>46</sup> This is to say, it is often incidental that two or more different courts from different branches of the legal community will deal with the same principles of international law. Moreover, there is nothing wrong with an environmental law court and a trade law court, for example, dealing with similar issues of international law in their distinct ways. Indeed, for Koskenniemi, this is the beauty of international law.<sup>47</sup> If one agrees with this view, a plethora of courts with no formal organization is quite appropriate.<sup>48</sup>

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agree in order for the court to exercise its certiorari jurisdiction over lower courts. See generally DAVID D. SAVAGE, GUIDE TO THE U.S. SUPREME COURT (2004).

45. Professor Koskenniemi and the committee compiling the ILC report have limited resources. It would have required great effort, perhaps more than their resources would have allowed, to explore an institutional hierarchy and reconcile the competing political and normative issues identified in this paper.

46. This was discussed most recently in his address to NYU School of Law. Koskenniemi, NYU Address, *supra* note 37.

47. *Id.*

48. This is compounded by the fact that, while the ICJ (for example) will only resolve disputes between states, other courts will hear claims from individuals. See, e.g., Statute of the International Court of Justice, *supra* note 30, art. 34, para. 1 ("Only States may be parties in cases before the Court."). This is not insignificant, since the party submitting a claim greatly influences the way it is framed, which in turn impacts dispute resolution. It remains to be seen whether an institutional hierarchy could allow such subtleties to flourish.

#### IV. THE ROLE OF AN INSTITUTIONAL HIERARCHY INVOLVING THE ICJ

Broadly speaking, Professor Koskenniemi concludes that the current legal landscape does not suggest that the international legal system is in danger of an apocalyptic outcome.<sup>49</sup> Notwithstanding this upbeat conclusion, I am more skeptical of the future coordination between international courts and tribunals. I believe the fragmentation of international law *does* risk undermining the reliability and credibility of international law if left uncontrolled.

International law is already an amorphous set of rules, a perilously close relative to fickle foreign affairs imbued with the power-struggle of international relations. If confusion effectively reigns among international tribunals, each opining in different ways, neither state actors nor individuals will be able to maintain legitimate expectations nor confidently rely on the jurisprudence of international law.

Judicial experimentalism by the diverse number of courts is a potential contributive phenomenon, but judicial experimentalism can too easily convert to judicial activism and ultra vires missions.<sup>50</sup> Further, the absence of appeal processes or other accountability mechanisms is a cause for concern.<sup>51</sup> Therefore, despite the ILC's proposition that "the system [is] not in a crisis"<sup>52</sup> and Jonathan Charney's contention that "alternative forums complement the work of the ICJ and strengthen the system of international law, notwithstanding some loss of uniformity,"<sup>53</sup> new decisions of international tribunals evincing a lack of coordination continue to

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49. See Koskenniemi, NYU Address, *supra* note 37.

50. See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment (Feb. 20, 2001).

51. In the absence of an international court or tribunal can be reviewed. See Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT'L ORG. 555, 560 (1997).

52. See Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Sixth Session*, U.N. GAOR, 59th Sess., Supp. (No. 10) ¶ 323, U.N. Doc. A/59/10 (2004).

53. Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 351 (1998) [hereinafter Charney, *Threatened*].

emerge.<sup>54</sup> Many millions of dollars are invested every day based on the legislative acts of nation states and their interpretation by international courts and tribunals. In the absence of certainty, investor confidence, a factor fundamental to economic development on the national and international stage, will wane.

Without an institutional hierarchy, the dangers posed by the fragmentation of international law will continue to exist. The remainder of this Note thus seeks to accomplish two things. First, it addresses the immediate question of what institutional hierarchy could exist among international courts by examining whether the ICJ could act as an international supreme court. Second, it argues that, despite the dangers of fragmentation, the ILC was right to omit an institutional hierarchical analysis from the ambit of its report.

With respect to the first question, the proposal of an institutional hierarchy takes the substantive analysis the ILC has already undertaken a step further. Such a hierarchy would organize the institutions themselves into a framework whereby the very loci of judicial decision-making carries with it a dominant or subordinate role. I have decided to adopt a focused and pragmatic approach to this question. The focused element involves simply choosing to place the ICJ above all other international courts and tribunals.<sup>55</sup> The challenge of constructing a complex hierarchy, whereby all international courts and tribunals would fit within a structure of multiple tiers and branches, is too ambitious a task for this study. Relying on the premise that a hierarchy is established the moment a flat structure is converted into even a two-tier structure, and that *parvis e glandibus quercus* ("tall oaks from little acorns grow"), my

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54. See, e.g., *EnCana Corp. v. Ecuador*, London Ct. of Int'l Arb., U.N. 3481 (2006), available at <http://ita.law.uvic.ca/documents/EncanaAwardEnglish.pdf>; *Occidental Exploration & Prod. Co. v. Ecuador*, London Ct of Int'l Arb., U.N. 3467 (2004), available at <http://ita.law.uvic.ca/documents/oxyc-EcuadorFinalAward001.pdf>.

55. On the one hand, the ICJ is an arbitrary choice to make the case for hierarchy. On the other hand, the choice of the ICJ is very intentional. It is one of the most obvious courts to assume the position of superior international status. In fact, it could be said that if an argument cannot be made whereby the ICJ resides at the top of a hierarchy of international courts and tribunals, then little hope could be held out for other courts to successfully assume the same status.

hope is that this small step towards constructing a hierarchy will reveal other possibilities.

The pragmatic element of my approach is to examine the feasibility of such a hierarchy *without* proposing an amendment to the UN Charter. While an amendment to the UN Charter is the most direct way to create an institutional hierarchy,<sup>56</sup> the chances of such an amendment happening are almost non-existent.<sup>57</sup> The UN Charter can only be amended upon a two-thirds approval by the General Assembly and ratification by Member States pursuant to article 108 of the Charter.<sup>58</sup> It is commonly accepted that institutional reform, such as formally elevating the significance of the ICJ above all other courts, is not likely to garner the necessary international support for a Charter amendment.<sup>59</sup>

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56. Such an amendment could stipulate, for example, that each specific court shall observe as paramount the decisions, opinions, and resolutions of the ICJ and that any decision of the specific court should be consistent with such norms and instruments emanating from the ICJ.

57. Each of the hundreds of international courts and tribunals has a founding treaty or document, the change of which would require the express consent of each respective member state to pass amendments. This would require mounting a legislative change on an unprecedented scale. Therefore, to propose a hierarchy subject to such an amendment would be a political fantasy.

58. Article 108 provides: "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council." U.N. Charter art. 108; *see also* U.N. Charter art. 109.

59. Article 108 of the UN Charter provides that any proposed amendment of the Charter can be obstructed by a veto from one of the five permanent members of the Security Council. *Id.* art. 108. Given the recent discontentment of the United States with the ICJ and its decision to withdraw consent to much of the Court's jurisdiction, it is very unlikely the United States would approve an amendment to the UN Charter or to the Statute of the International Court of Justice that would increase the ICJ's jurisdictional powers. *See, e.g.*, Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST., Mar. 10, 2005, at A1. Furthermore, to date, only three formal changes have been made, in 1965 and 1973. These changes increased the size of the Security Council membership to 15 members and the size of the UN Economic and Social Council. Membership of the Security Council, <http://www.un.org/sc/members.asp> (last visited Oct. 1, 2007); United Nations in Belarus, <http://un.by/en/documents/ustav/> (last visited Oct. 1, 2007). Informal amendments to the UN Charter have been made without

Similarly, I do not propose amendments to the existing treaties and/or legal instruments establishing other international courts and tribunals. This would ordinarily be required to formalize any international hierarchy that would promote or subordinate courts, because the obligation to respect other courts' decisions goes to the very heart of a court's jurisdiction and decisionmaking powers.<sup>60</sup> The amendment of all such treaties would require a tremendously strong political consensus and well-coordinated legal reform that would make an amendment of the UN Charter seem relatively easy by comparison.

Given these difficulties, I propose instead to establish "organically" a hierarchy whereby all international courts and tribunals defer to the ICJ and its jurisprudence. To create this hierarchy without the benefit of amendments to the UN Charter or other existing treaties, I will use available juridical "tools," including constitutional rights (Part V.A), treaty rights (Part V.B), contemporaneous international consensus (Part V.C), inherent powers of the judiciary (Part V.D), and jurisprudential arguments in favor of the ICJ's primacy (Part V.E).

Of course, the notion of a hierarchy and its possible implementation can lead to different results. For example, does proposing that the ICJ should be the sole court with authority over other international courts, as I do here, presuppose a right of appeal to the ICJ? If not, since I do not make this assumption, what is the effect of the ICJ's authority on

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observing the strict requirements of article 108. For example, the U.S.S.R.'s membership in the Security Council was replaced by Russia. The Union of Soviet Socialist Republics was an original Member of the United Nations from October 24, 1945. The United Nations website explains that in a letter dated December 24, 1991, Boris Yeltsin "informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States." UN Security Council Members, [http://www.un.org/sc/searchres\\_sc\\_year\\_english.asp?year=1991](http://www.un.org/sc/searchres_sc_year_english.asp?year=1991) (last visited July 9, 2007).

60. While it is commonly recognized there is no *stare decisis* in international law, there are international courts, such as the Caribbean Court of Justice (CCJ), that are empowered to recognize their own earlier decisions on a formal basis. Judgments of the CCJ constitute legally binding precedents. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy art. 221, July 5, 2001, *available at* <http://www.sice.oas.org/Trade/caricom/caricind.asp>.



subordinate courts? Similarly, would the authority of the ICJ be best served by expanding the circumstances in which other institutions, including courts, could request an advisory opinion from the ICJ?<sup>61</sup> Should the ICJ have the authority to uphold its preferred jurisprudence by seizing to itself a case that it determined had been decided erroneously, irrespective of whether its *ex post facto* decision had binding effect? In my opinion, such authority is a natural corollary of the ICJ assuming a supreme court role.

Most international courts are excused from *having* to observe earlier court decisions, given the absence of *stare decisis*.<sup>62</sup> Recalling that no Charter or treaty amendments are contemplated by this study, under my proposal, the ICJ's decisions would not be strictly binding on other international courts, but rather *instructive* for the jurisprudence of other courts. Admittedly, the difference between "binding" and "instructive" authority is fine, but such a distinction allows my proposal to avoid contradicting pre-existing jurisprudence indicating that although decisions of international courts are not strictly binding on one another,<sup>63</sup> other international courts and tribunals may look to ICJ decisions for guidance.

To illustrate this point, imagine a spectrum with ICJ decisions having neither formal nor informal binding force at one end and strict binding force at the opposite end. Current practice would probably place the authoritativeness of ICJ judgments closer to the non-binding end of the spectrum. As such, judges, practitioners, and academics do not feel strictly bound by ICJ decisions.<sup>64</sup> However, they nonetheless afford some deference to the court, depending on the individual justices' opinions and the quality of the legal arguments. This

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61. See Judge Stephen Schwebel, President, I.C.J., Address to the Plenary Session of the General Assembly of the United Nations (Oct. 26, 1999) (transcript available at [http://www.uparis2.fr/cij/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54\\_19991026.htm](http://www.uparis2.fr/cij/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54_19991026.htm)) (discussing the growth of the jurisdiction of the I.C.J.).

62. However, this depends on whether or not *res judicata* is deemed applicable as a matter of international law. See Statute of the International Court of Justice, *supra* note 30, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

63. See Charney, *Threatened*, *supra* note 53, at 145-53.

64. Statute of the International Court of Justice, *supra* note 30, art. 59.

proposal builds on that reality while trying to move practice further towards the binding end of the spectrum without requiring that ICJ decisions be regarded as fully binding. Thus, under this proposal, all practitioners would be conscious of the *de jure* and not simply *de facto* persuasive or “*instructive*” force of ICJ decisions.

Of course, simply stating that other courts “*should*” follow the predominance of the ICJ is not sufficient justification for them to do so. Therefore, this Note also considers the position of a judge or arbitrator in a hypothetical subordinate international court. I explore the legal compulsion that a lower court would be under to observe such a hierarchy, notwithstanding the ostensible autonomy of international courts as proclaimed so clearly by the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>65</sup> The five sub-sections of Part V will explore whether the ICTY’s opinion stands up to scrutiny.<sup>66</sup>

#### V. LEGAL SUPPORT FOR AN INSTITUTIONAL HIERARCHY WITH THE ICJ AT ITS APEX

Each of the following five sub-sections provides a different justification for the proposed superior status of the ICJ. In Part V.A (Constitutional Rights), I argue that the UN Charter resembles an international constitution and thus supports the superiority of the ICJ. In Part V.B (Treaty Rights), I argue that the body of treaty law and the VCLT similarly might be interpreted to support the supreme status of the ICJ. Part V.C (Contemporaneous International Consensus) will demon-

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65. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 20 (Oct. 2, 1995).

66. To avoid doubt, the authority of the ICJ I propose in this Note does not extend to resolving the questions posed by the cases concerning Article 36(1) of the Vienna Convention on Consular Relations. *See* Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Request for the Indication of Provisional Measures of Apr. 9); *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27). The tension between the Inter-American Court of Human Rights and the ICJ regarding these decisions does, of course, raise serious questions regarding when a court should accede to the pending hearing in the ICJ. While the affair evidences the autonomous nature of the two courts, I do not propose to address this jurisdictional question in this paper. Instead, I believe that the Inter-American Court of Human Rights can precede the ICJ when it is indeed first seized of a matter.

strate that recent pronouncements of hard and soft law and in particular the increasingly popular concept of the international rule of law support my proposal. Part V.D (Inherent Powers of the Judiciary) argues that judges and arbitrators should use their inherent judicial powers—powers a judge possesses by virtue of the position he or she holds—to promote a “greater purpose,”<sup>67</sup> namely the efficient and fair administration of justice. I argue that the efficient and fair administration of justice requires a coordinated international judiciary, with the ICJ at the apex. Finally, Part V.E (Jurisprudential Arguments) claims that the relative breadth and depth of the ICJ’s jurisprudence entitles it to assume the mantle of a “supreme” international court.

### A. *Constitutional Rights*

There is already international acceptance that the ICJ is the principal judicial organ of the UN.<sup>68</sup> The significance of this acceptance cannot and should not be underestimated.<sup>69</sup> Thomas Franck has described the UN Charter as a constitution.<sup>70</sup> As Professor Franck notes, the UN Charter embodies a

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67. Special thanks are also given to Chester Brown for allowing me to read his unpublished work. Chester Brown, *The Inherent Powers of International Courts and Tribunals* (2006) (unpublished manuscript, on file with the New York University Journal of International Law and Politics). Very little has been published on the subject of the inherent powers of the international judiciary; therefore, Brown’s work is of particular interest and relevance to Part V.D.

68. U.N. Charter arts. 7, 92; Statute of the International Court of Justice, *supra* note 30, art. 1.

69. One hundred ninety-two countries have become members of the United Nations. List of Member States, U.N. Doc. ST/SG/SER.A/295/Add.5 (Oct. 3 2006). All are signatories to the UN Charter, and consequently all have acceded to the Statute of the ICJ. U.N. Charter art. 93 (“All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”).

70. See Thomas M. Franck, *Is the United Nations a Constitution?*, in VERHANDELN FÜR DEN FRIEDEN—NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL, at 95 (Jochen Abr. Frowein et al. eds., 2003). Upon consideration of the meaning of the term “constitution,” the UN Charter certainly qualifies: an authoritative ordinance or enactment; an established law or settled custom; a mode in which a state or society is organized; the manner in which sovereign power is distributed; the system or body of fundamental rules and principles of a nation, state or body politic that determines the powers and duties of the government and guarantees certain rights to peo-

sense of community,<sup>71</sup> perpetuity,<sup>72</sup> indelibility,<sup>73</sup> equality,<sup>74</sup> institutional autochthony,<sup>75</sup> and perhaps most importantly, a constitution-esque primacy encapsulated explicitly in article 103 of the UN Charter: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail.*”<sup>76</sup> The UN Charter effectively prescribes the ICJ as the highest court, or the court of foremost importance.<sup>77</sup> While Jonathan Charney contends that the ICJ was not intended to be an all-encompassing supreme court of international law,<sup>78</sup> no other court is founded upon a treaty that truly can be declared a constitution.<sup>79</sup>

A close reading of article 103 reveals how powerful it is.<sup>80</sup> Article 103 expressly recognizes the potential for conflict between Member State obligations under the Charter and obliga-

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ple. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 378 (1986). THE NEW SHORTER OXFORD ENGLISH DICTIONARY 488 (4th ed. 1993) (1933) defines the verb “to constitute” as make up, appoint, or set.

71. Most recently shown by the UN's ability to emerge from its test during the 2003 Iraq War. See Franck, *Is the United Nations a Constitution?*, *supra* note 70.

72. See *id.* (noting the absence of provisions in the Charter that would facilitate the withdrawal of a member from the UN, and the presence of other provisions, such as article 2(6), that acknowledge obligations upon those who are not members).

73. *Id.* While possessing an aspect of indelibility, the Charter is also organic enough to recognize the need for change. See, e.g., U.N. Charter arts. 108, 109.

74. For example, there are no reservations to the Charter, meaning that all states are bound to the same extent.

75. For example, the principal institutions of the U.N are self-operating.

76. U.N. Charter art. 103 (emphasis added).

77. *Id.* art. 92.

78. See Jonathan Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 698. This is consistent with Rosalyn Higgins' position as argued in 1963. ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 66 (1963), *quoted in* Franck, *Is the United Nations a Constitution?*, *supra* note 70, at 100.

79. See Franck, *Is the United Nations a Constitution?*, *supra* note 70.

80. Indeed, the ILC has already expressly acknowledged the uniqueness of article 103 in its reports. See ILC 52nd Report, *supra* note 1, at 144; *Fragmentation Report*, *supra* note 1, ¶¶ 328-60.

tions under other international agreements.<sup>81</sup> The Charter does not specify or define what “international agreement” means. However, a plain reading must conclude that it is meant to encompass any type of agreement and not merely a treaty-based agreement. Moreover, the final part of article 103 unequivocally upholds “their” obligations under the Charter, with “their” referring to “Members of the United Nations.” Therefore, the effect of article 103 is to uphold the obligations of all 192 UN member states under the UN Charter over their obligations under all other international agreements. This interpretation of the UN Charter is reinforced by article 30(1) of the VCLT, which explicitly recognizes the uniqueness of article 103.<sup>82</sup> I consider this in more detail below.<sup>83</sup>

Read alongside articles 1 and 2 of the Charter, article 92 suggests a role for the ICJ as the principal judicial organ of the UN. One, the ICJ is to operate within its sphere of judicial influence<sup>84</sup> as a center for harmonization.<sup>85</sup> Two, the interna-

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81. This was affirmed by the ICJ. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392, ¶ 107 (“[I]t is also important always to bear in mind that all regional, bilateral and even multilateral, arrangements that the Parties to this case may have made, touching on the issues of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter.”).

82. Vienna Convention, *supra* note 3, art. 30 (“Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.”).

83. Note that it is fair to say that the predominance of article 103 was overlooked during the Cold War. See *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1292 (Bruno Simma et al. eds., 1994). However, the renewed confidence shown by both the Security Council and the ICJ in the force of article 103 confirms its suitability to address contemporary risks ensuing from the fragmentation of international law. See *id.*; see also G.A. Res. 42/22, U.N. Doc. A/Res/42/22 (Nov. 18, 1987); *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, 1971 I.C.J. 99 (June 21) (separate opinion of Vice-President Ammoun); *Application of Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunis. v. Libya)*, 1985 I.C.J. 232, 235 (Dec. 10) (separate opinion of Judge Ruda).

84. U.N. Charter arts. 1, 2, 92; Statute of the International Court of Justice, *supra* note 30, art. 38.

85. See *id.* art. 1, para. 4 (describing UN purpose “[t]o be a centre for harmonizing the actions of nations . . .”).

tional community, consisting of members and non-members of the UN, should work collectively<sup>86</sup> in pursuit of international peace, security, and justice. Furthermore, these members and non-members, in order to ensure that the purpose of harmonization and the principles outlined above are satisfactorily achieved by the ICJ to the extent its judicial role permits, shall observe the primacy of their obligations in good faith.<sup>87</sup> In sum, the UN Charter allows us to consider the ICJ as a supreme court of international law because of the UN Charter's own supremacy in international law.

Unfortunately, even the most ardent supporters of the "UN charter as constitution" school of thought—Pierre-Marie Dupuy, for example—still couch the term "constitutional" in inverted commas and thereby reveal a basic discomfort with the notion.<sup>88</sup> Others, such as Professor Koskenniemi, find flaws in the broad proposition that the UN Charter is a constitution by questioning, inter alia, whether the Security Council, by virtue of article 103 of the UN Charter, was genuinely envisaged to have primacy over human rights treaties.<sup>89</sup> Even if one

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86. *See id.* art. 2, para. 6 ("The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.")

87. *See id.* arts. 2, 103. It is also important to recognize the significance of the ILC's hierarchical consideration of article 103 in logically construing an institutional hierarchy. Moreover, article 95 of the Charter does not undermine the reading of the ICJ's authority, as it merely acknowledges the existence of other international courts. This interpretation of the UN Charter is reinforced by article 30(1) of the Vienna Convention, which explicitly recognizes the uniqueness of article 103. Vienna Convention, *supra* note 3, art. 30, ¶ 1.

88. *See* Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, in 1 MAX PLANCK Y.B. U.N. L. 3 (Jochen A. Frowein ed., 1998).

89. *See* Koskenniemi & Leino, *supra* note 20, at 559. James Crawford arguably falls victim to the same effort to fit the UN organs into prescribed domestic models. For example, Professor Crawford queries why the UN did not distinguish "between the Organization as a piece of 'international machinery,' with its own institutional identity (e.g., under Article 100, establishing the independence of the Secretariat, or Articles 104-5 dealing with legal capacity and privileges and immunities), and the Organization as a means of giving effect to the common policies of the members within its areas of competence." James Crawford, *The Charter of the United Nations as a Constitution*, in *THE CHANGING CONSTITUTION OF THE UNITED NATIONS* 5, 7 (Hazel Fox ed., 1997) [hereinafter Crawford, *Charter*]. Professor Crawford claims that

fully subscribes to the existence of an international constitution, there remains the outstanding issue of how a constitution may be sustained without what lawyers typically expect of a national constitutional framework: a legislature, executive, and judiciary.

The ILC rightly states in its first report of 2002 on the fragmentation of international law that one should be careful not to draw comparisons between domestic and international systems of law.<sup>90</sup> Accordingly, there is in my opinion no reason why the UN Charter, with explicit constitutional aspirations, should necessarily require that all its principal organs<sup>91</sup> fit neatly within the same roles that a national constitution would typically establish for its principal organs. Thus, the serious challenge in reconciling the Security Council and General Assembly to the roles any “legislature” or “executive” might be able to play on the international stage should not adversely affect the ICJ’s right to ascend in the international legal order as a legitimate judicial body.<sup>92</sup>

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the failure of the UN Charter to make this distinction and its failure to refer to the United Nations in the plural sense outside of the preamble weakens its constitutional claim. *Id.* I believe the reliance Professor Crawford places on article 16 of the Declaration of the Rights of Man and of the Citizen of August 26, 1789, which provides that “a society in which the separation of powers [is] not clearly established, has not constitution” is outdated and misplaced. *Id.* at 12. It is notable that the ICJ also consistently signals the importance of article 103. *See, e.g.,* Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.K.), Provisional Measures, 1992 I.C.J. 114, 126 (Apr. 14).

90. “There was also agreement that drawing analogies to the domestic legal system may not always be appropriate. It was thought that such analogies introduced a concept of hierarchy that was not present on the international legal plane, and should not be superimposed.” Int’l Law Comm’n, *Report of the Study Group on Fragmentation of International Law*, ¶ 15, U.N. Doc. A/CN.4/L.628 (Aug. 1, 2002).

91. For example, the General Assembly, Security Council, and the ICJ.

92. This has relevance to the international legal order even beyond members of the UN, by virtue of the accessibility of non-members to the ICJ. U.N. Charter art. 93, para. 2. *See* Aerial Incident at Lockerbie, 1992 I.C.J. at 26 (separate opinion of Judge Lachs) (“The framers of the Charter, in providing for the existence of several main organs, did not effect a complete separation of powers, nor indeed is one to suppose that such was their aim. Although each organ has been allotted its own Chapter or Chapters, the functions of two of them, namely the General Assembly and the Security Council, also pervade other Chapters than their own. Even the International Court of Justice receives, outside its own Chapter, a number of men-

Perhaps the most vocal challenge to the ICJ's constitutional role comes from the previously cited ICTY Appeals Chamber decision in *Celebici*, where the court explicitly held:

The Appeals Chamber agrees that "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." However, 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. 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>93</sup>

While I see no danger in a court establishing (and where necessary, asserting) its jurisdiction, I believe this statement is not only excessive but misplaced. First, the ICTY was established pursuant to Security Council Resolutions 808 and 827, in accordance with the Council's Chapter VII powers.<sup>94</sup> Accordingly, as the ICTY recognizes in the above excerpt, its authority is derived from the very Charter and Organization that

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tions which tend to confirm its role as the general guardian of legality within the system. In fact the Court is the guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction.").

93. *See* Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 24 (Feb. 20, 2001). Ironically, the court held this in the context of the legal test of "degree of authority or control." *Id.* ¶ 13.

94. S.C. Res. 827, U.N. Doc. S/RES/827 (May 15, 1993). However, Security Council Resolution 808 did not explicitly invoke Chapter VII. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993). *See also* S.C. Res. 1166, U.N. Doc. S/RES/1166 (May 13, 1998); S.C. Res. 1329, U.N. Doc. S/RES/1329 (Dec. 5, 2000); S.C. Res. 1411, U.N. Doc. S/RES/1411 (May 17, 2002); S.C. Res. 1431, U.N. Doc. S/RES/1431 (Aug. 14, 2002); S.C. Res. 1481, U.N. Doc. S/RES/1481 (May 19, 2003); S.C. Res. 1597, U.N. Doc. S/RES/1597 (Apr. 20, 2005).



maintains the ICJ as its principal judicial organ.<sup>95</sup> Second, the ICTY did not need to assert its authority by preemptively negating the existence of a hierarchical relationship. It was entitled to highlight the absence of *stare decisis*, as it does in this excerpt, or the inapplicability of *lis pendens*, but the Appeal Chamber's muscle-flexing was excessive.

The responsibility for the ICTY Appeal Chamber's robust opinion might be laid more appropriately at the door of counsel in that case, Mr. Thomas Moran. Mr. Moran argued, presumably to force the court's hand, that "either *Nicaragua versus United States* is authoritative and binding on this Tribunal or it's not."<sup>96</sup> In an exchange between Mr. Moran and Judge David Hunt, Mr. Moran submitted that the Tribunal was bound by the ICJ's decisions because the ICJ is the "primary judicial organ of the organisation of the United Nations," and "essentially the Supreme Court of the United Nations," whereas the Tribunal was "an organ of another principal organ, the Security Council."<sup>97</sup>

This slightly unwieldy submission by counsel was made at the end of a full day's hearing and at a moment where Judge Hunt clearly expressed concern that the court was pressed for time.<sup>98</sup> Furthermore, counsel did not adequately or comprehensively respond to the Judge's inquisitiveness about why the court should be *bound* by the ICJ.<sup>99</sup> In fact, the brief submissions already quoted constituted the totality of this argument. Furthermore, as Mr. Moran's submission evidenced, he sought to tell the court that its discretion was fettered by virtue of its origin.<sup>100</sup> In retrospect, it was unfortunate Mr. Moran chose this moment to make such a significant argument. The result of this unfortunate series of events was the complete rejection

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95. Notably, the same argument would apply to the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court (ICC), and the International Centre for the Settlement of Investment Disputes (ICSID), under the auspices of the World Bank. However, undercutting this is the fact that none of these courts are structured to permit appeals to the ICJ. Arguably, if the UN had intended to ensure the ICJ remained superior to these courts an appeal or revision mechanism might have been introduced.

96. Prosecutor v. Delalic, Case No. IT-96-21-A, Appeal Transcript, at 375 (June 6, 2000).

97. *Id.* at 375-76.

98. *Id.* at 374.

99. *See, e.g., id.* at 376.

100. *Id.* at 375.

of the argument in the resultant judgment of the Appeals Chamber.<sup>101</sup> In essence, the court's sharp response against the ICJ as a supreme court can be traced to a badly timed argument by counsel—hardly definitive evidence against the proposition as a whole.

Moreover, while the *Celebici* decision rejects the argument that the ICTY is *bound* by the ICJ, my proposed hierarchy does not require the ICTY or any other court to be strictly *bound* by the ICJ. Rather, under my proposal, the ICTY and other courts are required to be conscious of the persuasive *de jure*, not simply *de facto*, force of ICJ decisions. The fact that the ICJ is a well-established court with an experienced bench, rich and broad caseload, and a track record of being cited by numerous other international courts and tribunals as a matter of custom<sup>102</sup> confirms that its authoritativeness is at the very least instructive. The ICTY's recognition that it "will necessarily take into *consideration* other decisions of international courts"<sup>103</sup> also supports my claim that ICJ decisions should be understood as instructive.<sup>104</sup> Furthermore, as commentators recognize, the existence of *stare decisis* is not a precondition to the creation of judge-made law. While the non-applicability of *stare decisis* strictly means "the court cannot create law, it does not mean that the court's decisions do not have precedential effect."<sup>105</sup>

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101. See Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 24 (Feb. 20, 2001).

102. See Charney, *Threatened*, *supra* note 53, at 129.

103. Delalic, Judgment, ¶ 24.

104. See *id.* ¶ 22.

105. MOHAMED SHAHABUDDEN, PRECEDENT IN THE WORLD COURT 107 (1996) ("[R]eliance on Article 59 is too narrow a basis on which to rest the binding force of a judgment of the Court. The judgment of the Court—and its advisory opinion—binds all states by virtue of their quality as authoritative statements of the law. This is a point of the greatest importance . . . almost by definition, what the Court has said is the law." (quoting Hersch Lauterpacht)); see also *id.* at 41-43 ("[T]here is an inevitable sense in which precedents are always used, even where the specific common law doctrine of *stare decisis* does not prevail. This is because, although any given international tribunal is adjudicating only as between the parties before it, it is at the same time functioning as an expression of the legal norms of the larger international community. . . . [I]t is legitimate to construe the Charter and the Statute as also accepting, if only by implication and subject to any specific provisions, that the decisions of the Court would, in some measure, inevita-

As Judge Hunt's ruling in the *Celebici* decision perfectly illustrates, the compulsion of an individual judge to follow the jurisprudence of another court can be a very personal reaction guided by an array of legal principles. The following subsections focus on some of those guiding legal principles.

### B. *Treaty Rights*

I draw attention to the treaty rights relevant to establishing a hierarchy of international courts in order to emphasize their absence. If any direct treaty authority promoting an institutional hierarchy were created and universally ratified it would render this study obsolete. However, there is no international judicial convention that reflects the order imposed by statutes that exist at the level of national law.<sup>106</sup> Nevertheless, the proposition that the ICJ can assert primacy over other international courts can be implied from article 31 of the VCLT.

I have already highlighted the express reference within article 30 of the VCLT acknowledging the primacy of article 103 of the UN Charter and carving out an exception to *lex posteriori*. However, article 31 of the VCLT also provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.

...

3. There shall be taken into account, together with the context:

...

(c) any relevant rules of international law applicable in the relations between the parties.<sup>107</sup>

Article 31 of the VCLT emphasizes the need to look to "any relevant rules of international law applicable in the relations between the parties." These are rules of international law existing beyond the scope of treaty law pertaining to the particular treaty. Summarized well by the ILC, article 31(3)(c)

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bly have the precedential effect normally associated with judicial decisions, the question whether that effect would be binding being another matter.").

106. *See, e.g.*, Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.).

107. Vienna Convention, *supra* note 3, art. 31 (emphasis added).

helped to place the problem of treaty relations in the context of treaty interpretation. It expressed what could be called a principle of ‘systemic integration,’ that is to say, a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law—in other words, international law understood as a system.<sup>108</sup>

In my opinion, article 31’s endorsement of the international legal order and its cohesiveness is critical to the propositions that ostensibly autonomous international courts actually occupy a place within that broader order and international courts should be required to interpret treaties so as to reflect this composition.

Before the ICJ heard *Oil Platforms*,<sup>109</sup> article 31(3)(c) of the VCLT was not considered significant.<sup>110</sup> In that case, however, the ICJ realized the provision’s potential as a mechanism to ensure that treaties, as creatures of international law, would be “applied and interpreted against the background of the general principles of international law.”<sup>111</sup>

“The process of interpretation,” says Campbell McLachlan, “encapsulates a dialectic between the text itself and the legal system from which it draws breath.”<sup>112</sup> Therefore, when article 31 of the VCLT is read in light of article 30, the relevance of the UN Charter and of article 103 become immediately apparent. Under this analysis, when any treaty is interpreted according to its “object and purpose” in line with article 31(1) of the VCLT, that object and purpose must cohere with or at least not offend the purpose and principles embodied in the UN Charter that article 103 seeks to protect.<sup>113</sup> Even when an international court is not called upon to inter-

108. See *ILC 57th Report*, *supra* note 4, ¶ 467.

109. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6).

110. See Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 52(2) INT’L & COMP. L.Q. 279, 280 n.8 (2005) (citing McNair, *THE LAW OF TREATIES* 466 (1961)).

111. *Id.*; see also *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. at 182.

112. McLachlan, *supra* note 110, at 287.

113. U.N. Charter art. 103; see also Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 30 ¶ 6, Mar. 21, 1986, 25 I.L.M. 562 (“The preceding paragraphs are without prejudice to the fact that, in the event of a con-

pret a treaty, it is still required to observe the coherence of the international legal system given both the peremptory norm status of article 103<sup>114</sup> and the broad reading of article 103's reference to international agreements as discussed *supra*.

Professor Charney observes that most international courts adhere to the interpretation mechanism embodied in the VCLT.<sup>115</sup> The General Agreement on Tariffs and Trade (GATT),<sup>116</sup> the World Trade Organization (WTO) Appellate Body,<sup>117</sup> the North American Free Trade Association (NAFTA) tribunals,<sup>118</sup> the European Court of Human Rights (ECHR),<sup>119</sup> the Inter-American Court of Human Rights

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flict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.”).

114. Stanislaw E. Nahlik, Book Note, 84 AM. J. INT'L L. 779 (1990) (reviewing LAURI HANNIKAINEN, *PREEMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* (1988)).

115. See Charney, *Threatened*, *supra* note 53, at 152-53.

116. See, e.g., GATT Panel Report, *European Community—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, BISD 42/S/17 (July 4, 1995). Furthermore, the GATT fits into the broader context of international law, which includes security exceptions, by permitting trade sanctions “in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.” General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994). However, the WTO treaty does not explain its role within the broader context of international law, except that article 3.2 of the Dispute Settlement Understanding provides that WTO covered agreements must be clarified “in accordance with customary rules of interpretation of public international law,” which are generally understood as articles 31 and 32 of the Vienna Convention. *Id.*

117. See, e.g., Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, §III(B), WT/DS2/9 (May 20, 1996).

118. See, e.g., P.R. Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec, (U.S.-Can), USA-93-1807-01 (CUFTA) (June 3, 1993), available at <http://www.worldtradelaw.net/cusfta18/uhtmilk-cusfta18.pdf>. Note that article 102(2) of the NAFTA contains a provision similar to article 31 of the Vienna Convention on the Law of Treaties. North American Free Trade Agreement, U.S.-Can.-Mex., art. 102, para. 2, Dec. 12, 1992, 32 I.L.M. 289 (“The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.”); Vienna Convention, *supra* note 3, art. 31.

119. See, e.g., *Golder v. United Kingdom* (No. 18), Eur. Ct. H.R. (ser. A), ¶ 29 (1975); *Soering v. United Kingdom* (No. 161), Eur. Ct. H.R. (ser. A), ¶ 87 (1989) (explaining that “any interpretation of the rights and freedoms guaranteed has to be consistent with ‘the general spirit of the Convention, an

(IACHR),<sup>120</sup> the Iran-U.S. Claims Tribunal,<sup>121</sup> multiple ad hoc tribunals,<sup>122</sup> and the European Court of Justice (ECJ),<sup>123</sup> in addition to the ICJ itself, have all relied on the VCLT as a means of interpreting treaties. Notably, in the process of relying on the VCLT, most of the aforementioned courts also relied on previous ICJ decisions as a partial or full basis for their legal reasoning.<sup>124</sup> This may suggest that the international judiciary instinctively reconciles treaty interpretation with the “object and purpose” of the UN and the (principal) role of the ICJ.<sup>125</sup>

Unfortunately, the reality is that any international court tasked with interpreting either its founding treaty or another treaty will look to the terms of the treaty before consulting rules or principles of international law—and, more pertinently, before feeling compelled to contribute purposefully to a broader international jurisprudence pursuant to the

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instrument designed to maintain and promote the ideals and values of a democratic society”).

120. *See, e.g.*, “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion, Inter-Am Ct. H.R., OC-1/82, OEA/Ser.A/1, ¶¶ 23-41 (1982) (citing with approval judgments by the ICJ); Interpretation of the American Declaration of Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, Inter-Am Ct. H.R., OC-10/89, OEA/Ser.A/10, ¶ 37 (1989) (“[A]n international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.” (quoting Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 19)).

121. *See, e.g.*, Iran v. U.S., 19 Iran-U.S. Cl. Trib. Rep. 273, 287 (1989).

122. Rainbow Warrior (Fr. v. N. Z.), 82 I.L.R. 499, 550-51, 568 (Arb. Trib. 1990).

123. *See, e.g.*, Case C-312/91, *Metalsa Srl. v. Italy*, 1993 E.C.R. I-3751, 3773. However, the ECJ is not the strongest example, since it tends to regard itself as a sui generis court within its own special framework rather than as part of the international legal order. To this extent, the ECJ arguably undermines the argument that reliance on the Vienna Convention supports belief in an international legal order.

124. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 24 (Oct. 2, 1995).

125. Again, the ICTY conspired to rain on the ICJ’s parade when, in the controversial decision of Tadic, it assessed its own jurisdiction without express reference to the Vienna Convention. *See id.*

VCLT.<sup>126</sup> One of the reasons for this tendency is that such practices enable international courts to legitimize themselves.<sup>127</sup>

Nevertheless, once a court has determined it has jurisdiction to hear a dispute, it will often be mandated to apply both the law of the treaty—i.e., “NAFTA law” for NAFTA tribunals—and general principles of international law.<sup>128</sup> As the International Centre for the Settlement of Investment Disputes (ICSID) tribunal indicated in the highly scrutinized *CMS v. Argentina* case,<sup>129</sup> courts should apply *both* sets of law. Thus, it appears that international courts and tribunals are encouraged to respect simultaneously the jurisprudence of their own institutions and the “international system” that the ILC identifies and seemingly promotes.

The *travaux préparatoires* of article 31(3)(c) of the VCLT also demonstrate that this article was foreseen as a rule to accommodate evolution in international law.<sup>130</sup> Were the fragmentation of international law to become a potent problem for the legal system, this might further legitimize the ICJ’s invocation of article 31(3)(c) of the VCLT in *Oil Platforms*.<sup>131</sup>

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126. Such a view has been broadly supported by a number of commentators. See, e.g., DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 28 (1999). Furthermore, the doctrine of *kompetenz-kompetenz* perpetuates the dynamic under which the tribunal will presume jurisdiction to establish its own jurisdiction.

127. For example, while international tribunals ostensibly consist of independent and impartial arbitrators, their juridical equilibriums reflect their institutions; the underlying purpose of the tribunal is to legitimize both itself and its founding institution. Clearly, there is an economic incentive for arbitrators to comply with this phenomenon: “Once a particular equilibrium is chosen, institutions lock it in.” Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT’L ORG. 729, 746 (1998).

128. Other tribunals are required to apply the law of the host state. See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42, para. 1, Mar. 18, 1965, 4 I.L.M. 532.

129. *CMS Gas Transmission Co. v. Arg.*, ICSID (W. Bank) Arb/01/8, 34-37 (2005), reprinted in 44 I.L.M. 1205 (2005) (noting that “[t]he Tribunal must apply the relevant domestic and international law” since “both sources have a role to play”).

130. See *Report on the Law of Treaties*, [1964] Y.B. Int’l L. Comm’n, Vol. II, 8-9, U.N. Doc. A/CN.4/167.

131. See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 182.

In summary, it is possible to discern the existence of a coherent international legal order.<sup>132</sup> It is also arguable that, if such an order exists, it implicitly requires a substantive alignment of international courts so that their decisions are focused on the common objective of providing certainty through a consistent jurisprudence.<sup>133</sup> Finally, this substantive alignment in the international legal order empowers the ICJ to assert itself as the “supreme international court” by virtue of article 103 of the UN Charter and the deference shown to the Court by the parties to the VCLT, and, arguably, by customary international law.<sup>134</sup>

### C. *Contemporaneous International Consensus*

So far, we have considered the proposed role of the ICJ as a supreme court from the perspective of how the ICJ could begin to legitimately *assume* a lead role in the international judicial order. In this Part, I argue that there is an existing consensus regarding the ICJ as the supreme international court.

International law is consent-based and inextricably linked to the will of states. The ICJ in the *Lotus* case held the “rules of law binding upon States . . . emanate from their own free will.”<sup>135</sup> Moreover, as Professor Koskeniemi reported in the 2004 Preliminary Report of the ILC, “[t]here is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives—they are ‘bargains’ and ‘package-deals’ and often result from spontaneous reactions to events in the environment.”<sup>136</sup>

Thus, while the flow and direction of international will is hard to forecast, its ultimate form results from random coagulation rather than systemic coordination.<sup>137</sup> However, no mat-

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132. See, e.g., U.N. Charter art. 103; Vienna Convention, *supra* note 3, art. 31, ¶ 3(c).

133. See, e.g., Oil Platforms, 2003 I.C.J. 161.

134. See generally JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 272 (2003).

135. S.S. *Lotus* (Fr. v. U.S.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

136. See Martti Koskeniemi, *Preliminary Report of the Chairman on the Study of the Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes*, ¶ 28, ILC(LVI)/SG/FIL/CRD.1 (2004).

137. See David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9 (1999) (discussing lawyers with “projects”).



ter how international consensus is formulated, the legitimacy and authority of international law depends quantitatively on the underlying consent of states.<sup>138</sup> Similarly, laws derived pursuant to political frameworks, the principle of reciprocity, and “community” enterprises all hinge on a broad international consensus to underline their authoritativeness.<sup>139</sup>

The underlying consent of states is also crucial to my proposal that the ICJ assume supreme status. In other words, if an international court were to resolve a particular case through judicial deference to the ICJ, the states party to that case would have to recognize the jurisdiction of the ICJ. I argue that there is a broad consensus among states recognizing the supremacy of the ICJ. This consensus is encapsulated by the UN Charter and thus the formalized acceptance of the ICJ is impressive and unparalleled.<sup>140</sup>

Sovereign states are converging in the belief that the international rule of law includes the recognition of an institutional order.<sup>141</sup> This growing understanding, in turn, contributes to greater respect for the international rule of law. This convergence is reflected in the 2005 World Summit Outcome

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138. Historically, under the foreign office model, the acceptability of a principle of international law would depend in part on the number of states adhering to said principle or rule of law. In many respects, this continues to be the case, particularly in determining customary international law. However, the evolution of global administrative law does much to challenge this method of measurement and assessment of the content of international law. See Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, 99 AM. SOC'Y INT'L L. PROC. 143 (2005); Benedict Kingsbury et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, LAW & CONTEMP. PROBS. (SPECIAL ISSUE), Summer/Autumn 2005), at 1.

139. See Stanley Hoffman, *International Systems and International Law*, in THE INTERNATIONAL SYSTEM: THEORETICAL ESSAYS 205 (Klaus Knorr & Sidney Verba eds., 1961) (framing his narrative of international law by reference to these three categories).

140. The membership of the United Nations is currently 192 states. List of Member States, *supra* note 69. No other treaty or organization can boast a membership of comparable size.

141. There is of course a significant counter-argument: An institutional hierarchy encompassing the entire legal order is not necessary to satisfy the objective of the rule of law or, rather, to make any source of public authority exercise lawmaking power in an accountable, balanced, and coherent manner. Thus, in my opinion, the rule of law could be respected even if the institutional landscape remained without a hierarchy.

Document adopted at the sixtieth session of the General Assembly (“GA60”) with regard to the rule of law at the international level and the role of the ICJ.<sup>142</sup>

The notion of the rule of law is essentially derived from a concept of domestic law compelling states to respect the rule of law internally.<sup>143</sup> Yet it also has a role at the international level in terms of compelling respect for international law in states’ relations with other states.<sup>144</sup> Its relevance to this study comes from the way the theory of the rule of law directly demands that institutions exercising public authority be subject to the law.<sup>145</sup> Such “public authority” institutions, such as courts of law, are therefore subject to police powers and some form of supervisory jurisdiction. Accordingly, respect for the principle of legality and for the hierarchy of norms, precisely the work the ILC is undertaking with respect to the fragmentation of international law, logically extends to inviting coordination among international courts, servants of the international legal order.<sup>146</sup>

The 2005 World Summit placed considerable importance on observance of the rule of law at the international level, identifying it as an essential component of sustained economic growth, sustainable development, and the eradication of poverty and hunger;<sup>147</sup> international finance;<sup>148</sup> domestic re-

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142. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

143. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183 (Liberty Fund Publishing 2001) (1885).

144. See generally IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS (1998).

145. See 2005 World Summit Outcome, *supra* note 142.

146. Perhaps the most compelling statement of this servitude came from Thomas A. Mensah, President of the arbitral tribunal constituted under the Law of the Sea Convention, in June 2003 in the matter of *Ireland v. United Kingdom*. In deferring to the jurisdiction of the European Court of Justice, Mr. Mensah stated that the courts were only there to “assist states.” MOX Plant Case (Ir. v. U.K.), 126 I.L.R. 310 (2003). See Martti Koskenniemi, Keynote Address at Harvard Law School Symposium on Comparative Visions of Global Public Order: Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought (Mar. 5, 2005) (transcript available at <http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf>) [hereinafter Koskenniemi, Harvard].

147. 2005 World Summit Outcome, *supra* note 142, ¶ 11.

148. *Id.* ¶ 21.

source mobilization;<sup>149</sup> investment;<sup>150</sup> and human rights.<sup>151</sup> Paragraph 134 of the Outcome Document notes expressly that

[r]ecognizing the need for universal adherence to and implement of the rule of law at both the national and international levels, we: Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States; . . . (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work . . . .<sup>152</sup>

The Outcome Document similarly emphasizes “the obligations of States to settle their disputes by peaceful means in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice.”<sup>153</sup>

It would be easy to disregard these expressions of agreement in the GA60 as merely aspirational, with little legal effect. However, this would underestimate its real significance. For example, the Swiss Mission to the UN, in conjunction with a number of other missions, already has begun to concretize and operationalize the international rule of law in the context of recent institutional developments regarding terrorism.<sup>154</sup>

The above extracts illustrate the UN member states' affirmation that the ICJ is the UN's principal judicial organ and the need to strengthen the ICJ's role where appropriate. This offers contemporary support for the proposition that, should the fragmentation of international law require international courts to affirmatively recognize and operate within a hierar-

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149. *Id.* ¶ 24 (b).

150. *Id.* ¶ 25 (a).

151. *Id.* ¶ 119.

152. *Id.* ¶ 134 (emphasis added).

153. *Id.* ¶ 73.

154. Unreleased documents provided to author by senior UN official (on file with author).

chical system, few courts other than the ICJ would be as well placed to assume such responsibility.

The outstanding question is whether it is realistic to equate the large number of states acceding to the UN Charter as representative of an international consensus on the primacy of the ICJ, as compared to other courts. For example, if the WTO could boast the same number of members as the UN, would this jeopardize the supremacy of the ICJ under the current proposal?

Alternatively, are the forces of regionalism in international law and the claim of regional *jus cogens*<sup>155</sup> more convincing manifestations of state consent which specifically represent agreement within a particular constituency? The ILC's 2005 report suggests not. The ILC reported:

Although it is possible to trace the sociological, cultural and political influence that particular regions have had on international law, such influences do not really address aspects of fragmentation as coming under the mandate of the Study Group. These remain historical or cultural sources or more or less continuing political influences behind international law. There is a very strong presumption among international lawyers that, notwithstanding such influences, the law itself should be read in a universal fashion. There is no serious claim that some rules should be read or used in a special way because they emerged as a result of a "regional" inspiration.<sup>156</sup>

The ILC and the GA60's focus on universal adherence to the rule of law is compelling in terms of supporting the ICJ's legitimacy as founded in both the UN Charter and in its own widely ratified statute.<sup>157</sup> The ICJ benefits from legal and po-

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155. Regional *jus cogens* is a concept tied closely to the concept of *lex specialis*, whereby legal norms can pertain to particular geographical regions for a number of legal, cultural and historical reasons. At one level, the term "regional *jus cogens*" might seem to be a contradiction in terms, given that a norm of *jus cogens* is a universal norm of blanket application with peremptory status. See generally THE FUNDAMENTAL RULES OF INTERNATIONAL LEGAL ORDER: *JUS COGENS AND ERGA OMNES* (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

156. *ILC 57th Report*, *supra* note 4, ¶ 453 (citations omitted).

157. U.N. Charter; Statute of the International Court of Justice, *supra* note 30.

litical support unrivaled by any other court,<sup>158</sup> particularly in light of the explicit proclamations made during the GA60.<sup>159</sup> Therefore, the ICJ should feel confident in asserting itself as the best choice for a supreme international court.

#### D. *Inherent Powers of the Judiciary*

A substantial limitation on procuring deference to the ICJ is that judges in other international courts are frequently precluded from acting beyond the powers prescribed by their court's constitutive regime.<sup>160</sup> Given the absence of *stare decisis* and the juridical autonomy that every international court strives to achieve, there are relatively few ways in which a court might find itself able to exercise deference to the ICJ.<sup>161</sup> There are, however, two closely related means by which a judge can operate outside the express terms of his or her constitutive instrument. First, international courts have the (rarely exercised) option of *implying* powers from their constitutive instruments.<sup>162</sup> Second, judges have the option of invoking *inherent* powers derived from the position of authority that they occupy and the privileges engendered in ensuring

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158. For example, the Statute of the International Court of Justice is endorsed by the 192 members of the United Nations, affording it unparalleled support among the international community. Due to the political compulsion felt by the member states, states frequently comply with ICJ decisions. CONSTANZE SCHULTE, *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* (2004) (describing a systematic study of state practice in relation to compliance with ICJ decisions).

159. See 2005 World Summit Outcome, *supra* note 142.

160. See *supra* Part V.B.

161. "[T]he jurisprudence of the ICJ is often referred to by other judicial bodies as stating the generally applicable law, be it with regard to rules of customary international law, the interpretation of treaty provisions or other questions of international law. But there is no obligation to do so because there is no general binding force flowing from decisions of international courts, since they are only binding upon the parties to the case." Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction—Problems and Possible Solutions*, 5 MAX PLANCK Y.B. U.N. L. 65, 76-77 (2001).

162. See, e.g., PAOLA GAETA, *The Inherent Powers of International Courts and Tribunals*, in *MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* 353 (Lal Chand Vohrar et al. eds., 2003); Brown, *supra* note 67.

the proper administration of international justice.<sup>163</sup> It is this second source of inherent power that I wish to explore here.

While identifying all sources of inherent powers would require an analysis beyond the scope of this Note, one recognized source is the necessity to ensure the fulfillment of functions of international courts.<sup>164</sup> Inherent powers are an essential weapon in the armory of international adjudication, existing to safeguard such crucial aspects of a court as its general judicial functions, *raison d'être*, *kompetenz-kompetenz*,<sup>165</sup> and operability.<sup>166</sup> Most courts recognize inherent powers, even if not explicitly.<sup>167</sup> Thus, in the course of resolving procedural orders, granting provisional measures, and assuming jurisdiction or opining to facilitate an enforceable decision, judges and arbitrators alike are often exercising inherent powers.<sup>168</sup>

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163. See Brown, *supra* note 67.

164. *Id.* at 13.

165. See, e.g., Nottebohm (Liech. v. Guat.), 1953 I.C.J. 111, 120 (Nov. 18); Legality of Use of Force (Serb. & Mont. v. U.K.), Preliminary Objections Judgment, 2004 I.C.J. 1307, 1322-23 (Dec. 15) (citing Statute of International Court of Justice, *supra* note 30, art. 36, para. 6).

166. See Brown, *supra* note 67, at 13.

167. See, e.g., Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20) (“[I]t should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the ‘inherent limitations on the exercise of the judicial function’ of the Court, and to ‘maintain its judicial character’ . . . Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.”); see also Prosecutor v. Blaskic, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 33 (Oct. 29, 1997).

168. There is authority to suggest that inherent powers are not created by a legal instrument. However, the substantial gap-filling required of most, if not all, international courts in the dispensation of justice bears witness to the fact that inherent power(s) *must* exist. See JAMES CRAWFORD, *International Law as an Open System*, in INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS 17, 35 (2002).

For example, in his separate opinion in *Northern Cameroons*,<sup>169</sup> Sir Gerald Fitzmaurice held:

But also, there is the Court's preliminary or "incidental" jurisdiction (e.g., to decree interim measures of protection, admit counterclaims or third party interventions, etc.) which it can exercise even in advance of any determination of its basic jurisdiction as to the ultimate merits; even though the latter is challenged; and even though it may ultimately turn out that the Court lacks jurisdiction as to the ultimate merits. Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or any court of law—being able to function at all.<sup>170</sup>

Inherent powers serve to deny abuses of process in both substantive and procedural terms.<sup>171</sup> They are often invoked in terms of functional necessity.<sup>172</sup> Accordingly, inherent powers are directly relevant to addressing the risks of the fragmentation of international law, such as uncertainty, inconsistency, and decisions undermining the authoritativeness of the court(s) and the international legal system en masse.<sup>173</sup>

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169. *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15 (Dec. 2) (separate opinion of Judge Fitzmaurice).

170. *Id.* at 103.

171. See generally Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 *MCGILL L.J.* 389 (2002) (describing the history and importance of the "abuse of rights" doctrine).

172. See, e.g., *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion, 1962 I.C.J. 151, 162-63 (July 20); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11) ("Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as essential to the performance of its duties.").

173. There is of course a presumption in this analysis that all international judges and arbitrators recognize the existence of inherent powers. The concept is primarily one more familiar to common law lawyers than those from civil law traditions. Civil law trained judges instead assume a truth-finding role, whereby their (explicit) authority is limited to applying the relevant codified law to the dispute in hand. However, civil law trained judges are still required to fill gaps. The judicial exercise of looking beyond the written

Once state parties have consented to the creation of an international court and the referral of a dispute to that body, it is up to that body to decide how to fulfill its functions.<sup>174</sup> Those functions should thereafter typically consist of what could be described as both private and public functions. The former is the international court's objective to settle disputes referred to it.<sup>175</sup> The latter goes beyond settlement of the immediate dispute and compels a court to emphasize the efficiency and coherence of the international legal order.<sup>176</sup>

The more specific question, therefore, is how a court reconciles its public and private functions when they lead to conflicting decisions, either vis-à-vis its own jurisprudence or with another international court. This really is the hub of this study, since the public function is precisely the means by which a judge or arbitrator might feel compelled to respect the authority of the ICJ and conform to the ICJ's purported institutional primacy in the international legal order.

Several inherent powers have been justified on the basis of needing to ensure the proper administration of international justice: to give two examples, the power to dismiss proceedings summarily<sup>177</sup> and the power to suspend proceedings.<sup>178</sup> International courts' tendency to cite ICJ decisions is arguably another exercise of an "inherent power"—i.e., the power to cite to the opinions of another court notwithstanding the absence of *stare decisis* and in the interest of a broader public function of ensuring that justice is done *and* seen to be done. Judges like, or perhaps feel compelled, to cite authorities to affirm a collective and public sense of effective administration. This practice reinforces the citing court's place in the

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law to ensure, for example, *pact sunt servanda* or that principles of good faith are not abused, introduces even the civil law trained judge to more amorphous tools of judicial decisionmaking. See BLACK'S LAW DICTIONARY 1140 (8th ed. 2004).

174. See Brown, *supra* note 67.

175. See, e.g., Statute of the International Court of Justice, *supra* note 30, art. 38, para. 1 (stating that the court is to "decide in accordance with international law such disputes as are submitted to it").

176. See Brown, *supra* note 67.

177. See *Legality of Use of Force (Yugo. v. Spain)*, 1999 I.C.J. 761, 773-74 (June 2); *Legality of Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. 916, 925-26 (June 2).

178. See *SPP v. Egypt*, 3 ICSID (W. Bank) 112, 129-30 (1985); *MOX Plant (Ir. v. U.K.)*, 42 I.L.M. 1187, 1191 (Perm. Ct. Arb. 2003).



international legal order, and helps legitimize the jurisprudence of that particular court.

There is little question that international courts serve a public function in addition to their private functions. For this reason, courts such as the ICTY, ICTR, the ECHR, and the International Criminal Court (ICC) have express powers to accept *amicus curiae* briefs.<sup>179</sup> Other courts, namely the WTO Appellate Body, the IACHR, NAFTA tribunals, and ICSID tribunals, have created that right through their own jurisprudence.<sup>180</sup> The principle of comity, or *courtoisie internationale*, also reinforces the proposition that judges owe a broader obligation to the international legal order.<sup>181</sup> In this vein, the Ad-

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179. The ICJ has also previously expressed interest in canvassing the views of third parties. *See, e.g.*, *Continental Shelf (Libya v. Malta)*, 1984 I.C.J. 4 (Mar. 21) (dissenting opinions of Vice President Sette-Camara, Judges Oda, Ago, and Schwebel, and Sir Jennings); *see also* *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226 (July 8). Recent ICJ practice directions have also encouraged submissions from non-governmental organizations. *See* International Court of Justice Practice Direction XII (Dec. 6, 2006), <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (last visited Sept. 16, 2007); *see also* Brown, *supra* note 67.

180. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998). *See* Jona Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals*, 2 NON-STATE ACTORS AND INT'L L. 169 (2002).

181. The counter-argument is that few judges would describe their role as first and foremost to serve the international legal order. However, although a more standard definition of the judicial role might be resolution of particular disputes in accordance with settled norms, applying those norms offers evidence that judges also believe that they exist to serve the international legal order. First, from a cultural standpoint, international lawyers who aspire to become and succeed in becoming judges in international courts or tribunals inherently tend to subscribe to the view that there is an international legal order important to public life. Without overly romanticizing the point, this bias might significantly steer decisionmaking, even on a sub-conscious level. Second, judges on sitting international courts might feel a greater sense of compulsion or even loyalty to ensure that their decisions are consistent with broader principles upheld by their particular institutions and the international community. Since judges and arbitrators often face decisions that will have direct or indirect repercussions for states or parties other than those appearing before them, even the most experienced arbiters will likely keep one eye on the impact of decisions beyond the four corners of the specific judgment or award. Indeed, to do otherwise might open floodgates to unwanted claims. Third, nominations stem from institution-held lists of ad hoc arbitrators or appointment through word-of-mouth, both of which depend on an arbitrator's reputation among her peers. It is a curious

visory Committee of Jurists that drafted the Permanent Court of International Justice (PCIJ) Statute constituted a Sub-Committee that opined that “it would be one of the Court’s important tasks to contribute, through its jurisprudence, to the development of international law.”<sup>182</sup>

While this public function clearly applied to the PCIJ and similarly applies to its successor, the ICJ,<sup>183</sup> there is no apparent reason why each and every international court does not fall under the same obligation to contribute to the strengthening of the international legal order.<sup>184</sup> As Sir Hersch Lauterpacht argues, “the development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction.”<sup>185</sup> As explained by Thomas Mensah, President of the International Tribunal for the Law of the Sea (ITLOS) Tribunal, in the *Mox Plant Case*:

The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions

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self-regulating dynamic of tribunals that promotion by one’s peers might tend to instill a sense of loyalty to the very system that supports the institution’s existence. Finally, there is an underlying respect for the need to ensure a concerted effort to regulate issues of international law. Consequently, notwithstanding the absence of *stare decisis*, judges will look to support their decisions by reference to existing judicial authority.

182. See Report Submitted to the Third Committee by M. Hagerup on Behalf of the Sub-Committee, in PERMANENT COURT OF INTERNATIONAL JUSTICE, DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL OF THE LEAGUE OF NATIONS UNDER ARTICLE 14 OF THE COVENANT AND THE ADOPTION BY THE ASSEMBLY OF THE STATUTE OF THE PERMANENT COURT 206, 211 (1921), available at [http://www.icj-cij.org/pcij/serie\\_D/D\\_documents\\_conseil\\_de\\_la\\_societe\\_des\\_nations.pdf](http://www.icj-cij.org/pcij/serie_D/D_documents_conseil_de_la_societe_des_nations.pdf).

183. By virtue of the role the ICJ inherited from the PCIJ, and the ICJ’s power to issue advisory opinions. U.N. Charter arts. 92, 96.

184. See, e.g., Vienna Convention, *supra* note 3, art. 31 ¶ (3)(c).

185. See HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 37 (1958); HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 319-20 (1933) (“[The Court] exercises in each case a creative activity, having as its background the entirety of international law and the necessities of the international community.”).

deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.<sup>186</sup>

In summary, the functions of international courts, particularly the public functions, justify both the existence of inherent powers and their exercise in pursuit of the effective and proper administration of international justice. To the extent that the fragmentation of international law becomes a real obstacle to the proper administration of international justice, there is a justification for international judges and arbitrators to observe the overriding need for an institutional hierarchy.<sup>187</sup>

#### E. *Jurisprudential Arguments in Favor of the ICJ's Primacy*

Finally, consider what jurisprudential compulsion there is on the international judiciary to regard the ICJ as the principal court of all international courts. The increased specialization of international courts and tribunals means that no single court can ever match the expertise of all others on an individual basis. Thus, if the ICJ were to become a "supreme" international court, it would always suffer from such a relative disadvantage. As Oellers-Frahm states, "international courts and tribunals are created in order to decide on highly specific or technical issues that never reached the [ICJ] before, such as questions dealing with trade, finances and similar matters."<sup>188</sup> Moreover, other international courts hear more cases than the ICJ and their judges or arbitrators are faced with higher evi-

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186. See *MOX Plant (Ir. v. U.K.)*, President's Statement of June 13, 2003, 126 I.L.R. 310 (2003), available at <http://www.pca-cpa.org/upload/files/statement%20by%20the%20president.pdf>.

187. Provided, of course, that exercise of this inherent power is not inconsistent with the constitutive instrument of the court in question.

188. Oellers-Frahm, *supra* note 161, at 100. Oellers-Frahm also states that "courts and tribunals have themselves to contribute to avoid real or apparent conflicts of jurisdiction by giving detailed reasons for their decisions and elaborating on the differences existing with regard to similar cases decided by other courts. This presupposes not only active relationship and dialogue between international judicial bodies, but also attentive study of decisions of other courts, essentially those active in a comparable field of law." *Id.* at 102.

dentiary thresholds and standards of proof.<sup>189</sup> If this is true, what “authority” does the ICJ have to persuade other courts on issues of law deriving from trade disputes or human rights affairs, which “even the ICJ may not be able to resolve without expert assistance and which more importantly would not substantially contribute to the preservation of the cohesiveness and uniformity of international law”?<sup>190</sup>

In addition, it is possible to argue that the current state of fragmentation allows institutional experimentalism to flourish.<sup>191</sup> Confrontational exchanges produce dialogue, analysis, review, and contemplation that is, in the opinion of many, healthy for the international community.<sup>192</sup> Charney is apparently not concerned about the multiplicity of regimes.<sup>193</sup> Likewise, Koskenniemi seeks to convince us that fragmentation’s bark is much worse than its bite:

I am not worried about multiplicity of regimes or the clash of legal rationales. On the contrary, they are the platform for today’s politics. The real concern is the homogeneity of the cultural and professional outlook of the participants, the pretense that the decisions follow cognitive or technical grounds and are therefore immune to political contestation. As a prelude to that, however, I want to suggest that the discourse of multiplicity should itself be re-described in political terms, as a competition between different systems and criteria for allocating resources between social groups.<sup>194</sup>

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189. For example, the ICTY benefits from a Prosecutor’s office of mammoth proportion, employing a degree of factual scrutiny to cases that other sitting courts, including the ICJ, do not share. See International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty/> (last visited Sept. 25, 2007).

190. Oellers-Frahm, *supra* note 161, at 100. Given the ICJ’s limited fact-finding capabilities, why, for example, should the ICTY accede to the former’s legal analysis? The ICTY and other issue-specific courts often have considerably greater resources to investigate and hear prosecutions, including witness testimony and cross examinations in abundance.

191. See *generally* TRANSATLANTIC REGULATORY CO-OPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann, Matthias Herdgen & Peter L. Lindseth eds., 2001).

192. See Koskenniemi, NYU Address, *supra* note 37.

193. See Charney, *Threatened*, *supra* note 53, at 373.

194. See Koskenniemi, Harvard, *supra* note 146.

While I agree with Professor Koskenniemi's broad political sensitivities and the need to manage our expectations with international courts, I am less ready to concede that inherent uncertainty in the international legal system is a good thing. The diversity fostered by different courts and different fields of law is indeed part of the rich tapestry of international law. However, the corollary of this diversity should not be uncertainty; to accept uncertainty is akin to accommodating indefinitely an unwelcome house guest.

The ICJ's jurisprudence is extremely broad; the Court has most recently heard arguments on a diverse range of topics including the use of force, genocide, maritime delimitation, title to territory, location of borders, law of treaties, state responsibility, international criminal law, immunity, treatment of aliens, consular relations, diplomatic protection, and human rights.<sup>195</sup> Such disputes arise from the state-state general jurisdiction accommodated by the ICJ, as one would expect.

Nevertheless, there are certain areas of law that are increasingly the focus for international courts even though they do not derive from state-state relationships and hence would not typically be heard by the ICJ. For example, investor-state regional trade disputes are prompting a debate on the definition of expropriation, fair and equitable treatment, and national treatment.<sup>196</sup> International administrative tribunals<sup>197</sup> frequently wrestle with questions relating to labor disputes or migration. Environmental or implementation monitoring bodies review flag state implementation, pollution controls, and desertification standards.<sup>198</sup>

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195. See International Court of Justice, Latest Decisions, <http://www.icj-cij.org/homepage/index.php?lang=en> (last visited July 6, 2007).

196. This debate is ongoing in, among other places, NAFTA disputes, IC-SID international arbitral disputes, and institutional and ad hoc international arbitrations.

197. For example, the International Labor Organization Administrative Tribunal, the Appeal Board of the Organisation for Economic Co-operation and Development (OECD), the Council of Europe Appeals Board, the Appeals Board of the North Atlantic Treaty Organization (NATO), the Appeals Board of the Intergovernmental Committee for Migration, the Appeals Board of the European Space Agency, and the World Bank Administrative Tribunal.

198. For examples, look to the work of the Implementation Committee under the Montreal Protocol on Substances that Deplete the Ozone Layer,

The breadth of the ICJ's jurisprudence is impressive but not all-encompassing, especially since it originates only from state-state controversies. Clearly, no court can hold itself to be authoritative on an area if its jurisprudence is silent.<sup>199</sup> As Professor Koskenniemi tries to convince us, "[t]he ICJ, a human rights body, a trade regime or a regional exception may each be used for good and for ignoble purposes and it should be a matter of debate and evidence, and not of abstract "consistency," as to which institution should be preferred in a particular situation."<sup>200</sup>

On the other hand, every international court will, to some degree, suffer from the same problem. Since no other court has universal jurisdiction, the ICJ's relative advantage is that its jurisprudence has a potential reach other courts cannot boast. The ICJ therefore has an arguable claim as the principal international court in a hierarchical system in which it leads by example and provides instructive and authoritative precedent based principally on the public function it serves. As early as 1950, Judge Alejandro Alvarez proclaimed that ICJ judges "create precedents" and bring about dynamic changes through case law no less than do than national courts.<sup>201</sup> The general jurisdiction the court enjoys enables the ICJ to endorse or refine particular interpretations of law with the harmonizing effect that the UN Charter envisions.

## VI. CONCLUSION

As a small child, I once watched my friend slowly insert a sharp thorn into the skin of his new football. Fascinated by

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the IMO Sub-Committee on Flag State Implementation, the Implementation Committee on the Protocols to the 1979 ECE Convention on Long-Range Transboundary Air Pollution, the Committee for the Review of the Implementation of the Desertification Convention, the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal Compliance Committee, the Aarhus Convention on Access to Information, the Public Participation in Decision-making and Access to Justice in Environmental Matters Compliance Committee, and the Compliance Committee of the Cartagena Protocol on Biosafety.

199. See Crawford, *Charter*, *supra* note 89, at 3.

200. See Koskenniemi & Leino, *supra* note 20, at 578.

201. See Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 15 (Mar. 3) (Alvarez, J., dissenting).

the question of *when* it would burst, we witnessed his new toy shrivel like a prune within seconds. Through this experiment, we learned, albeit painfully, the limitations of the toy. In a similar vein, this study has revealed the limitations of the proposed hierarchy involving the ICJ. Many of the legal “tools” available to overcome existing doctrines and to construct such a hierarchy are ambiguous and fragile at best. In particular, the ICJ’s role within a constitutional framework as a “supreme” court is subject to the acceptance of a concept still too novel for wide scholarly acceptance:<sup>202</sup> that the UN Charter constitutes an international constitution.

There has, however, been a clear evolution of constitutional trends. This evolution has been reinforced by globalization and the development of an integrated international legal system.<sup>203</sup> Moreover, treaty interpretation under the VCLT now explicitly requires courts to look to such a system and defer to the peremptory status of article 103 of the UN Charter.<sup>204</sup> Likewise, the international legal system requires self-regulation. The recent support for the international rule of law in the GA60 as a means of policing international courts is a move towards institutionalizing such police powers. The support shown for the ICJ in the same context further supports the ICJ’s prospective role in such a hierarchy.<sup>205</sup> Finally, international judges’ inherent powers suggest that they have a duty to the maintenance of a harmonious legal system, a system that could just as easily be implemented to set up an institutional hierarchy as it could a substantive hierarchy of international norms.

For the reasons laid out in Part III, the ILC cannot be faulted for its decision not to consider an institutional hierarchy. In fact, it will likely take a considerable display of fragmentation to muster sufficient impetus for the creation of the

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202. See *supra* Part V.A.

203. The unparalleled growth of international courts, tribunals, and disputes in the past twenty years has contributed significantly to the increased profile of international law and international dispute resolution. See, e.g., Project on International Courts and Tribunals, <http://www.pict-pcti.org/> (last visited Sept. 24, 2007) (“The recent exponential growth of international courts and tribunals is a well-known and well-studied phenomenon.”).

204. See *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

205. See *supra* Part V.C.

sort of institutional hierarchy proposed in this Note.<sup>206</sup> If the fragmentation of international law continues unabated, however, international courts and tribunals will eventually be called upon to address this problem directly. In failing to consider an institutional hierarchy now, the ILC missed out on an opportunity to get an early start in resolving the huge complexities that will certainly be involved in the future.

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206. This assumes that there is in fact an authority that can take the lead to organize an institutional response to such fragmentation.