FRAGMENTATION OF INTERNATIONAL LAW: REALITIES AND MYTHS

BABOKI JONATHAN DAMBE*

ABSTRACT

This paper is an analysis of whether the phenomenon of fragmentation of international law is a real or imaginary problem. It deals with concerns of fragmentation from two fundamental perspectives. The first perspective addresses institutional fragmentation as emanating from the proliferation of international courts and tribunals. In this regard the paper assesses the consequences of such proliferation in light of possibilities of conflicting decisions and overlapping jurisdiction and the impact that this has on the coherence, uniformity and predictability of international law. This assessment is supported by a critical analysis of how the existent judicial institutions have approached various questions of international law in order to discern whether concerns of fragmentation are grounded or merely superficial. Moreover, the paper assesses the notion of substantive fragmentation of international law. This entails an examination of whether international law is under threat of fragmentation due to possibilities of conflicting norms motivated by the development of numerous specialised fields of international law such as 'trade law', 'the law of the sea', 'environmental law' and 'human rights law'.

1. INTRODUCTION

The fragmentation of international law was of enough concern that in 2002, at its fifty-fourth session, the International Law Commission constituted a study group to assess the fragmentation and the difficulties that arise from the diversification and expansion of international law. In its report, the study group noted that fragmentation and diversification account for the development and expansion of international law as it responds to modern demands of a pluralistic world. It was further noted that fragmentation may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation.[1] There is a divergence of opinions as to whether concerns relating to the fragmentation of international law are justified or overly inflated. The paper assesses the fragmentation of international law is real or imaginary and the challenges posed by the fragmentation of international law. The paper enunciates and analyses the various

* LL.B. (UB) LL.M (Edinburgh) Lecturer, Department of Law, University Of Botswana

[1] Report of the Study Group of the ILC- Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law, A/CN.4/L.702, 18 July 2006, 5

mechanisms and solutions that are either already in place or could be put in place in order to contain and curb the fragmentation of international law and preserve coherence thereof.

2. INSTITUTIONAL FRAGMENTATION: THE PROLIFERATION OF INTERNATIONAL COURTS

It is an indubitable fact that recent years have witnessed a dramatic increase in the number of international courts and tribunals in various fields of international law. Addressing the consequences of such multiplication of international courts, former President of the International Court of Justice Gilbert Guillaume succinctly summarised it as giving 'rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases'.[2] The possibility of divergent interpretations and conflicting jurisdictions threaten the coherence and unity of international law.[3] This will undermine the authority of the law and encourage forum shopping, create uncertainty[4] and have adverse impacts on the 'legitimacy of the international judicial system'.[5]

There is a divergence of opinion as regards the implications of the proliferation of international courts. Some view it as an undesirable occurrence that can do international law no good. Koskenniemi contends that this multiplication is more detrimental to international law because the decision making of these courts is largely premised on a "structural bias" that seeks to promote a particular agenda of the particular institution without necessarily being interested in what may be the resultant implications on the coherence of international law.[6] Charney observes that the international courts and tribunals are established to serve interests of the treaty regime they are created within and at times:

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[2] Report of Gilbert Guillaume, President of the International Court of Justice, U.N G.A.O.R 55th Session, UN Doc A/55/PV.42 26th October 2000, http:www.icj.cij.org (accessed on 1st April 2010)

[3] Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction-Problems and Possible Solutions' (2001) 5 Max Planck Yearbook of United Nations Law 67, 70

[4] Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2005) at 131

[5] S Spelliscy, "The Proliferation of International Tribunals: A Chink in the Armor", 40 *Columbia Journal of Transnational Law* (2001) 143 at p170; G Haffer, "Pros and Cons Ensuing From Fragmentation of International Law," *Michigan Journal of International Law* (2004) Vol. 25 849 at p856

[6] M Koskenniemi, "The Fate of Public International Law: Constitutional Utopia or Fragmentation" (2006) at p5

> [T]he allegiance to that treaty regime may become greater than the allegiance to the international legal system as a whole.[7]

On the other hand others view it as a positive development as it indicates that international law is going through a phase of diversification and expansion.[8] Simma maintains that the consequences of the multiplication of courts have been overstated and submits that the debate that has ensued has 'made international judges even more aware of the responsibility that they bear for a coherent construction of international law' and as such fragmentation is less likely to result.[9] He further observes that the various judicial institutions dealing with questions of international law have displayed the utmost caution in avoiding contradicting each other.[10]

It is perhaps worthy to note that in 1999 Charney conducted an examination of the jurisprudence of some judicial institutions and came to the conclusion that there was no breakdown in international law as the tribunals held coherent views in key areas of international law.[11] However, there have been numerous developments since then and as such this paper endeavours to find out whether the same still holds true today.

3. THE INTERNATIONAL COURT OF JUSTICE and INTERNATIONAL CRIMINAL TRIBUNAL for the former YUGOSLAVIA "DUEL": *NICARAGUA-TADIC*

An epitome of the possibilities and realities of divergent interpretations of the same question of law by different courts is the "duel" between the ICJ and the ICTY on the question of the degree of control required to impute state responsibility for acts performed by individuals not having the status of state officials. In the *Nicaragua* case[12] the ICJ formulated the test as being whether the state exercised "effective control" over the third parties. Contrastingly, the ICTY in the *Tadic* case[13] held that the relevant test was that of "overall control". In 2007 the

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[7] J I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of international Law and Politics* 697, 706

[8] A Boyle & C Chinkin, *The Making of International Law* (2007) at p263; Articles In Symposium: The Proliferation of International Tribunals: Piercing Together the Puzzle *New York University Journal of International Law and Politics* 1999; J I Charney, *supra* at p700

[9] B Simma, "Universality of International Law from the Perspectives of a Practitioner", *European Journal of International Law* Vol 20 No 2 (2009) 265 at p265

[10] B Simma, "Fragmentation in a Positive Light", *25 Michigan Journal of International Law (*2003) 845 at p846

[11] J Charney "Is International Law Threatened by Multiple International Tribunals?", 271 *Recuiel des Cours* (1998) at pages 161 and 378. See also A Boyle & C Chinkin, *supra.*

[12] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* ICJ Reports 14

[13] ICTY, Appeals Chamber, *Prosecutor v. Tadic,* Judgment of 15 July 1999 IT 94-1-A

ICJ had another bite at the cherry in the *Bosnia Genocide* case[14]wherein it noted that the "overall control" test formulated in *Tadic* was "unpersuasive" and had stretched the concept of state responsibility to 'almost breaking point'.[15] The court then upheld the "effective control" test as being the applicable one.

A month before the *Genocide* case the International Criminal Court had also joined the fray through the case of *Prosecutor* v. *Thomas Lubanga Dyilo*[16] wherein it held that the "overall control" test as espoused in *Tadic* was applicable in determining the nature of a conflict under the ICC statute. An interesting point to note from this case is that the ICC did not even discuss the *Nicaragua* case.[17] The *Tadic* test was subsequently upheld by the ICTY in the *Celebici* case[18]and also by the ECtHR in *Behrami and Behrami v France and Saramatic v France, Germany and Norway.*[19] It is not within the scope of this paper to discuss which of the two tests is correct at international law and academic debate on this point may be found elsewhere.[20]

It is essential to note that the *Nicaragua* and *Tadic* cases are not the only instances that the ICJ and the ICTY have reached divergent opinions. In *Legality of Threat or Use of Nuclear Weapons Case*[21]the ICJ delivered an Advisory Opinion where it noted that armed reprisals in the course of an armed conflict had to be 'governed by the principle of proportionality'.[22] On the other hand, in the *Matric* case the ICTY held that armed reprisals were categorically prohibited at international law.[23]

The Inter American Court has also reached different conclusions from the ICJ. In *Right to Information on Consular Assistance in the Framework of the Due Process Law*[24] the court held that international human rights law entitled a detained foreigner to have his

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[14] *Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment of 26 February 2007
[15] *Ibid* at para 406
[16] ICC Pre-Trial Chamber 1, *Prosecutor* v. *Thomas Lubanga Dyilo,* Decision on the Confirmation of Charges, ICC 01/04-01/06 29 Jan 2007 at para 210-211
[17] B Simma, 'Universality of International Law: From the Perspectives of a Practitioner', *supra* 280
[18] *Prosecutor v. Zenjil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (Celebici Case) Decision, Case No IT-96-21-A.Ch, 20 February 2001*
[19] Decision of 2 May 2007
[20]A Cassese, "The Nicaragua and Tadic Test Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law (2007) 649*
[21] 1996 ICJ Reports 246
[22] Ibid at para 46
[23] M Koskenniemi & P Leino, "Fragmentation of International Law? Postmodern Anxieties", *15 Leiden Journal of International Law* (2002) 553 at p562
[24] Advisory Opinion OC-16/99, 1 October 1999

consular post notified of his detention. Although the ICJ had managed to sidestep the issue in the *La Grand* case, at the insistence of Mexico, it was compelled to decide on the point in the *Avena*[25] case and it contrastingly held that such a right could not be found either in Article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations or its *travaux preparatories.*

The afore-discussed cases clearly illustrate that different judicial institutions may reach different conclusions on virtually the same point and such creates uncertainty and incoherence. As Charney notes, 'if like cases are not treated alike the very essence of a normative system will be lost'.[26]

4. NOT PECULIAR TO PROLIFERATION: INCONSISTENCIES OF THE ICJ

The evidential value of divergent judicial decisions as being borne out by the proliferation of international tribunals should not be blown out of proportion. The existence of conflicting judicial decisions is not an anomaly that is peculiar and exclusive to the proliferation of judicial institutions. It is very much a possibility that a differently constituted international court would reach a different conclusion from that reached by a different panel of the same judicial institution. This is particularly true due to the absence of judicial precedent at international law.[27] One only has to look to the ICJ itself for the existence of inconsistency in judicial decisions particularly on the weight accorded both state practice and *opinio juris* in the determination of customary international law. In the *Anglo-Norwegian Fisheries* case[28] the court did not refer to any state practice. Moreover, in the *Fisheries Jurisdiction* case[29] the court held that the 12 mile exclusive fishing rule had crystallised into customary international law without reference to state practice. However, in the very same case the court referred to state practice in its assessment of preferential rights.[30] In the *Nicaragua* case the court decided to regard the state practice as breach of existing rules. Despite having considered United Nations General Assembly Resolutions as evidence of *opinio juris* in the *Nicaragua*

[25] *Avena and Other Mexican Nationals (Mexico v United States of America) (*2004) ICJ Reports 12
[26] J I Charney, The Impact on the International Legal System of the Growth of International Courts and Tribunals, *supra* at p699
[27] Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals' (2002) 15 Leiden Journal of International Law 483; A Boyle & C Chinkin *supra* at p293
[28] *Fisheries (UK v Norway)* 1951 ICJ Reports 116 at p129
[29] *Fisheries Jurisdiction Case (UK v Iceland)* 1973 ICJ Reports 3
[30] *Ibid* at para 58; A Boyle & C Chinkin *supra* p280

case the court, in the *Legality of the Threat or Use of Nuclear Weapons* case the court said that the UNGA resolutions did not constitute evidence of *opinio juris.*[31]

The shortfall of international law in the face of conflicting decision is the absence of a final arbiter to authoritatively state the position of the law.[32] Despite the centrality of the ICJ, it is not an appellate court and it is therefore incapable of enforcing coherence between judgements of the different international tribunals.[33] There have been instances where arguments have been advanced unsuccessfully to the effect that other courts should be "bound" by decisions of the ICJ. In the *Celebici* case the appellants contended that the ICTY was "bound" by decisions of the ICJ by virtue of it being the "principal judicial organ of the UN". The Chamber noted that as much as it could not ignore the need for consistency it was an 'autonomous judicial organ' and as such it was in no way subordinate to the ICJ hierarchically. On that basis the court ignored the "effective control" test applied by the ICJ and upheld the *Tadic* test.[34]

Commenting on the existence of conflicting rulings before different courts, Buergenthal notes that he:

> . [D]oes not consider the likelihood of these conflicts as a major risk, at this time, to the unity of the international legal system, provided the various tribunals stay within their respective spheres of competence, apply traditional international legal reasoning, show judicial restraint by seeking to avoid unnecessary conflicts and remain open to reconsider their prior legal pronouncements in order to take account of the case-law of other international courts.[35]

Consequently, international courts have an obligation to ensure that they keep abreast with decisions of other international tribunals in an effort to avoid conflicting decisions and maintain coherence.

5. INTERNATIONAL COURTS IN HARMONY: CASES OF CONVERGENCE

[31] A Boyle & C Chinkin *supra at p283*

[32] J I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' *supra* at p699

[33] A Boyle & C Chinkin *supra* at p263

[34] See also *The Prosecutor v Kvocka, Kos, Radfic, Zigic Psca, "Omarska, Keraterm and Trnopolje Camps", Decision on the Defence "Motion Regarding Concurrent Procedures before the International Criminal Tribunal for the Former Yugoslavia and International Court of Justice on the Same Questions", Case No IT-98-30/1, T. Ch* December 2000

[35] T Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?' (2001) 14 Leiden Journal of International Law 267, 273

It ought to be noted further that the *Nicaragua-Tadic* scenario is the exception rather than the rule. Divergence of opinions between international courts has remained rare.[36] Koeskenniemi credits this absence of open challenges to the fact that the:

> [S]pecialised regimes distinguish themselves from the general law so as to avoid applying the old rule of law or underwriting precedent.[37]

For this he cites the example of the case of *Loizidou* v. *Turkey* wherein the ECtHR emphasised the difference between its role and purpose and that of the ICJ as providing a 'compelling basis' for distinguishing the practice of the two courts.[38]

Be that as it may, there is overwhelming evidence to indicate that international courts and tribunals are aware of their responsibilities towards the coherence of international law and avoiding fragmentation. In this regard, Miller states that 'by a margin of 173 to 11, tribunals are much more likely to refer to one another in a positive or neutral way than to distinguish or overrule'.[39] Simma observes that international tribunals are 'constantly and painstakingly aware of the necessity to preserve the coherence of international law.'[40] Moreover, Thirlway notes that an examination of the trends of international decisions can be interpreted as indicating the emergence of 'a solid body of coherent jurisprudence.'[41] Consequently, there has not been an outbreak of inconsistency in international adjudication to warrant an outcry.

As comprehensively enunciated by Simma, there have been numerous occasions where other international courts and tribunals have relied on the jurisprudence of the ICJ.[42] The World Trade Organisation Appellate Body has referred to decisions of the ICJ and other tribunals.[43] The ECtHR followed the *LaGrand* case in *Mamatkulov and Abdurasulovic v*

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[36] M Koskenniemi, 'The Fate of Public International Law: Between Techniques and Politics' (2007) 70 The Modern Law Review 4; P Weckel '*La CIJ et la fragmentation du droit international:* in R.H Vinaxia et K Wellens (eds), *L'influence des sur l'unite et la fragmentation du droit international* (2006) 167-185

[37] M Koeskenniemi, "The Fate of Public International Law: Constitutional Utopia or Fragmentation", *supra* at p6

[38] *Loizidou* v *Turkey*, Preliminary Objections, Judgement of 23 March 1995 ECtHR Serie A (1995) No 310 p29 at para 67

[39] Miller, 'An International Jurisprudence? The Operation "Precedent" Across International Tribunals' (2002) *15 Leiden Journal of International Law* 483, 495

[40] B Simma, "Fragmentation in a Positive Light", *25 Michigan Journal of International Law* (2003) 845 at p846

[41] Thirlway, 'The Proliferation of International Judicial Organs and the Formation of International Law', in W.P Heere (ed), *International Law and the Hague's 750th Anniversary* (1999) 434, 443

[42] B Simma, "Universality of International Law from the Perspectives of a Practitioner", *European Journal of International Law* Vol 20 No 2 (2009) 265 at pp 283-284

[43] *US Standards for Reformulated Gasoline* WT/DS4/AB/R, 29 April 1996, at p17; *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products,* WT/DS98/AB/R, 14 December 1999 at para 81; *Japan- Taxes*

Turkey[44] relating to the binding nature of provisional measures. Reliance was also placed on ICJ cases in *Stoll v Switzerland*[45] and *Belcic v Croatia.*[46] The Inter American Court has also relied on ICJ jurisprudence.[47] Furthermore, the International Trinubal for the Law of the Sea has relied on ICJ jurisprudence in numerous cases such as in *M/V Saiga*[48], the *'Grand Prince'*[49], *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*[50] as well as in *Hoshinmaru.*[51] The ICTY has also on many instances followed ICJ jurisprudence.[52] Other arbitral tribunals including ICSID have relied on ICJ jurisprudence.[53] Moreover, European Court of Justice has on numerous instances also relied on the jurisprudence of the ICJ.[54]

However, the ICJ itself has not substantially made use of the jurisprudence of other courts.[55] Such instances have been sporadic. In the *Palestine Wall*[56] case the ICJ refers to case law of the Human Rights Committee. Moreover, in the *Genocide* case the court referred to the jurisprudence of the ICTY. It is submitted that if the ICJ could also intensify its reference to the jurisprudence of other international courts and tribunals such would further fortify the coherence of international law.

Based on the foregoing, one can only acquiesce in the sentiments of Oellers-Frahm that 'genuine conflicting decisions are a less acute or grave danger as may seem at first sight.[57]

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on Alcoholic Beverages WT/DS11/AB/R 4 October 1996 at p12; United States- Measures Affecting Imports of Woven Wool Shirts and Blouses from India WT/DS33/AB/R, 25 April 1997 at p14.

[44] Grand Chamber App Nos 468827/99 and 46951/99 Judgment of 4 February 2005 at paras 116-117

[45] App No 68698/01 Judgment of 10 December 2007 at para 59

[46] App No 59532/00 Judgment of 8 March 2006 at para. 47

[47] IACtHR, *'White Van' (Panigua-Morales et al)* Judgment of 25 May 2001 Series C No 76 at para 75; IACtHR, *Velasquez Rodriguez v Honduras,* Judgment of 29 July 1988 Series No 4 at para 127

[48] M/V Saiga *(No. 2)* Judgement of 1 July 1999 at para 133

[49] Judgement of 20 April 2001 at para 78

[50] Provisional Measures, Order of 8 October 2003 at para 52

[51] Judgment of 6 August 2007 at paras 86-87

[52] ICTY Trial Chamber II *Prosecutor v Boskoski* Case No IT-04-82-T Judgment of July 2008 at para 192; ICTY, Trial Chamber II, *Prosecutor v Strugar* Case No IT-01-42-T Judgment of 31 January 2005 at para 227

[53] *Belgium v The Netherlands, Arbitration Regulation the Rhine (Ijzeren Rijn) Railway,* Award of 24 May 2005 at para 45

[54] A Rosas 'With Little Help from my Friends: International Case Law as a Source of Reference for the EU Courts' (2006)5 Global Community Yearbook of International Law and Jurisprudence 208

[55] A Boyle & C Chinkin *supra* at p297; B Simma, 'Universality of International Law: From the Perspectives of a Practitioner', *supra* at p284

[56] *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory at para 109*

[57] K Oellers-Frahm, 'Multiplication of International Courts and Conflicting Jurisdiction- Problems and Possible Solutions" (2001) 5 *Max Planck Yearbook of United Nations Law* 91

6. DEFINING THE DISPUTE: THE POSSIBILITY OF FORUM SHOPPING

Another challenge posed by the existence of numerous courts is that of forum shopping. As much as each court has its own jurisdictional limits, when a dispute arises it will have various facets which could be pursued before different courts.[58] By way of example, the *Mox Plant* case 'could be variously described as an environmental pollution law case, a law of the sea case, a case concerning general international law with respect to sovereignty, use of territory and the rights of neighbouring states or a case concerning European Community law.'[59] Therefore, it is crucial for the applicant to choose a forum which will best serve their interests. According to Koskenniemi, such a choice will be largely premised on the 'structural bias' of the institutions. As is shown below, this becomes even more of a concern when disputes on the same substantive matter are brought simultaneously before different tribunals.

7. PARALLEL PROCEEDINGS: THE MOX PLANT AND SWORDFISH CASES

Another problem that emanates from the proliferation of international courts and tribunals that could threaten the coherence of international law is the possibility of having parallel proceedings before different courts on the same substantive dispute.[60] A classical example of this is the *Swordfish* case.[61] The dispute arose after Chile had closed its ports to Spanish ships because of swordfish overfishing in the High Seas adjacent to Chile's exclusive economic zone. The European Union deemed the situation as being premised on trade law and consequently lodged a complaint before the WTO. Contrastingly, Chile deemed the matter as giving rise to law of the sea violations and lodged a case with the ITLOS. Proceedings before both institutions were subsequently suspended to enable the parties to amicably settle the dispute. Nevertheless, the case is an indication that parallel proceedings are a reality within the present setup of international law.[62]

The *Mox Plant Case*[63] is also an example of this reality. In this instance there were proceedings on the "same" matter before the ECJ, the OSPAR Arbitral Tribunal and an

[58] Y Shany, *The Competing Jurisdictions of International Courts* (2005) 131
[59] A Boyle & C Chinkin *supra* at p291
[60] B Simma, 'Universality of International Law: From the Perspectives of a Practitioner', *supra* 284
[61] ITLOS Case No 7 (20 December 2007), *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South Eastern Pacific Ocean (Chile/European Community)*
[62] B Simma, 'Universality of International Law: From the Perspectives of a Practitioner', *supra* 285
[63] ITLOS, *Mox Plant Case (Ireland v United Kingdom)*, Request for Provisional Measures Order 3 December 2001; Arbitral Tribunal, *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom and Northern Ireland)* Final Award of 2 July 2003; ECJ Case C-459-03, *Commission v Ireland (*2006) ECR I-4635

Arbitral Tribunal under UNCLOS. The ITLOS, being alive to the dangers of parallel proceedings, observed that;

> [T]he application of international rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to *inter alia* differences in respective contexts, objects and purpose, subsequent practice and *travaux preparatoires.*[64]

Consequently, on the basis of 'considerations of mutual respect and comity which should prevail between judicial institutions'[65] the arbitral tribunal suspended its proceedings pending a determination by the ECJ. The ECJ ultimately decided that Ireland had violated Article 292 of the EC Treaty, which grants the ECJ exclusive jurisdiction over all matters pertaining to EC law, by instituting the case before the UNCLOS Arbitral Tribunal without deciding on the substantive issues. Ireland consequently withdrew its UNCLOS claim from the Tribunal. As such, the substantive issues of the matter were never addressed. Lavnaros laments this outcome and argues that since the ECJ had not decided on the substantive issue of whether the UK had breached UNCLOS provisions the Arbitral Tribunal should have made a determination thereon and 'there would have been no risk of divergent or conflicting judgments regarding the UNCLOS provisions'.[66]

The reality is that when two institutions are simultaneously dealing with the same dispute, the risk of conflicting decisions is heightened as compared to when they decide one after the other, in which case the one that decides later will have insight into the others' reasoning and interpretation of concepts and will be in a better position arrive at a decision that seeks to achieve coherence.

Although stay of proceedings can be a useful tool in avoiding fragmentation arising from parallel proceedings, there are indications that it has not been widely accepted. The Inter American-Court refused to stay its proceedings pending a determination of the ICJ on the

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[64] *The MOX Plant Case (Ireland v The United Kingdom)* Order No 3 (Suspension of Proceedings on Jurisdiction and Merits and Request for further Provisional Measures), 24 June 2003 at paras 50-52

[65] *ibid* at para 28. See also N Lavranos, 'The MOX Plant and the IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?', (2006) 19 Leiden Journal of International Law 223

[66] N Lavnaros, 'The Epilogue in the MOX Plant Dispute: An End Without Findings', (2009) European Energy and Environmental Law Review 180, 183

same legal question, categorically stating that it was 'an autonomous judicial institution'.[67] It has also been argued that the concept of *lis pendis* would not be of much help at international law as there will only be limited instances where it can be properly applied.[68]

Another possible solution to avoid parallel proceedings is including clauses in treaties and dispute settlement mechanisms to avoid parallel proceedings.[69] Unfortunately most treaties and judicial instruments do not contain such clauses and it has been further submitted that even where such clauses exist they are hardly effective.[70] Boyle and Chinkin observe as follows:

> By reformulating cases to fit the jurisdictional requirements of a particular tribunal, restrictive provisions such as those prohibiting the same matter from being examined 'under another procedure of international investigation or settlement' may be avoided.[71]

The International Law Commission has advised that conflict clauses must be 'as clear and specific as possible'. They should be couched in a manner that does not defeat the objects and purpose of the treaty bearing in mind that such clauses cannot affect the rights of third parties.[72]

8. THE ICJ AS A SOURCE OF COHERENCE

A suggestion that has been put forth to address possibilities of fragmentation arising out of the proliferation of international courts and tribunals is for the ICJ to:

> [S]erve as a central organ to which questions of interpretation and application of international law may be directly referred by other courts and tribunals or by means of the request of an advisory opinion by the Security Council or the General Assembly.[73]

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[67] *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process,* Advisory Opinion OC-16/99 at paras 61-65; See also B Simma, 'Universality of International Law: From the Perspectives of a Practitioner', *supra* 286

[68] K Oellers-Frahm, Multiplication of International Courts and Conflicting Jurisdiction- Problems and Possible Solutions (2001) 5 Max Planck Yearbook of United Nations Law 77-78

[69] Article 292 of the EC Treaty, Article 23 of the WTO Dispute Settlement Understanding, Article 55 of the ECHR, Article 282 of UNCLOS and the Convention on Conciliation and Arbitration Within the CSCE

[70] K Oellers-Frahm *supra* at p89; B Simma, 'Universality of International Law: From the Perspectives of a Practitioner', *supra* at 286

[71] A Boyle and C Chinkin *supra*

[72] Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Adopted by the International Law Commision at its fifty- eighth Session(2006) Conclusion No. 30

[73] K Oellers –Frahm, *supra* at p91-92

Proponents of an increased role of the ICJ include former President Schwebel and Guillaume. Schwebel suggested that

> [T]here might be virtue in enabling other international tribunals to request advisory opinions of the ICJ on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law.[74]

Whereas in principle this is an appealing suggestion, in practice it may face hurdles. The extent to which states would accept this is questionable.[75] As previously noted, the existent international tribunals are autonomous institutions and it is inconceivable how they could be placed under an obligation to refer cases to the ICJ. Moreover, due to the non binding nature of the advisory opinions, the concerned tribunals would still be at liberty to depart from the opinion and this could even be more detrimental to the 'prestige' and legitimacy of the ICJ and the cohesiveness of international law.[76]

Opinions are also polarised as to the suitability of giving the ICJ a central role. Higgins contends that the move would not be wise as it 'seeks to return to the old order of things and ignores the very reasons that have occasioned the new decentralisation'.[77]

That notwithstanding, it has been argued that even if the ICJ is not given such competence, it still 'remains a prodigious force' to the extent that its pronouncements on the interpretation of general international law constitute persuasive authority and will contribute to the coherence of international.[78]

9. SUBSTANTIVE FRAGMENTATION: SOLUTIONS AND SAFEGUARDS

The issue of substantive fragmentation of international law was extensively dealt with by the International Law Commission and the analysis below is largely premised on its findings. The ILC conceded that as international law diversifies in the manner it is doing, fragmentation is 'inevitable' and as such there has to be a framework to manage it. The Commission noted that the framework is provided by the Vienna Convention on the Law of Treaties which the Commission heralded as a useful tool for 'unification' of international

[74] Quoted in M Koskenniemi & P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553, 554

[75] Ibid p92

[76] Ibid at p95- p97

[77] R Higgins, 'Respecting Sovereign States and Running a Tight Court Room'*(*2001) International and Comparative Law Quarterly 122

[78] J I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals', *supra* 705; G Abi-Saab, Fragmentation or Unification: Concluding Remarks' (1999) 31 New York University Journal of International Law and Politics 919, 929-930

law.[79] The existing modes of dealing with a conflict of norms and the role of the Vienna Convention will be addressed hereunder.

9.1 Fragmentation and the Hierarchy of Norms at International Law

It is worthy to note that international law does not have a hierarchy of norms between the various sources. However, there are some norms that are so fundamental that derogation from them is not permitted and are binding on all states.[80] *Jus cogens* norms, which are peremptory norms, are:

> [A]ccepted and recognised by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character.[81]

The status of some norms as being *jus cogens* has been upheld in a number of judicial pronouncements. In *Case Concerning Armed Activities on the Territory of the Congo*[82] the court enunciated examples of *jus cogens* being *inter alia;* prohibition of torture, slavery and slave trade, racial discrimination and apartheid, the right to self determination and prohibition of genocide. The ICJ also confirmed the *jus cogens* status of the prohibition of genocide in the *Bosnia Genocide* case.[83] Other judicial institutions such as the ICTY[84], the European Court of Human Rights[85] as well as the Inter American Court on Human Rights[86] have also recognised and affirmed some norms as falling within the realm of *jus cogens.*

The significance of *jus cogens* to the coherence of international law is that as much as specialised regimes and treaties may be entered into which on some points may be deviations or exceptions to general international law, at least at the basic level of these fundamental norms there is no possibility of fragmentation and as such all spectra of international law is 'coherent' in so far as relates to *jus cogens*.

The hierarchy of norms which could ensure coherence in international law may also be discerned from obligations *erga omnes* as classically formulated in the *Barcelona Traction*

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[79] Report of the Study Group of the ILC, *supra* at p6
[80] *Legality of the Threat or Use of Nuclear Weapons Case* Advisory Opinion (1999) ICJ Reports at para 79
[81] Article 53 of the Vienna Convention on the Law of Treaties
[82] (*Democratic Republic of Congo v Rwanda)* ICJ Reports 2006 para 64
[83] Genocide case *supra* at para 161
[84] ICTY, Trial Chamber, *Prosecutor v Furundzija,* Judgment of 10 December 1998 IT-95-17/1 at para 153
[85] ECtHR, *Al Adsani v United Kingdom,* App No. 35763/97, Judgment of 21 November 2001
[86] IACtHR, *Juridical Conditions and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03, 17 September 2003 at para 97

judgement.[87] The Court identified four erga omnes obligations being; the outlawing of acts of aggression, the outlawing of acts of genocide, protection from slavery and protection from racial discrimination.[88]

A positive aspect of *jus cogens* and *erga omnes* in the field of international law is that consent on the part of states is not required for the states to be bound thereby. Rather regrettably, in the case of *Armed Activities on the Territory of the Congo*, although the court held that the prohibition against genocide had attained the status of *jus cogens* it held that Rwanda's consent was still a prerequisite for it to adjudicate on the matter.[89]

Article 103 of the UN Charter provides that, in the event of conflict, the UN Charter supersedes 'any other international agreement'. This creates a form of hierarchy of norms in international law and serves as a solution in the event of conflicting norms where the other norm emanates from the UN including decisions of Security Council. Thus in the *Lockerbie*[90] case the inconsistency between the 1971 Montreal Convention and the resolution of the Security Council was easily resolved in favour of the latter in accordance with the dictates of Article 103.

9.2 *Lex Specialis*

Fragmentation of international law in terms of normative conflicts can also be resolved by lex specialis principle. This essentially means that in the event of a conflict between a general norm and a specific norm the specific norm should prevail.[91] This rule has been in existent for some time as evinced by the following sentiments by *Grotious*

> What rules ought to be observed in such cases (i.e. where parts of the document are in conflict). Among agreements which are equal...that should be given preference that which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.[92]

[87] Report of the ILC, *supra at* pp22-24
[88] Barcelona Traction (*Belgium v Spain*) ICJ Reports 1970 3 at para 34
[89] *(Congo v Rwanda)* Judgment of 3 February 2006 at para 67; B Simma 'Universality of International Law: From the Perspectives of a Practitioner', *supra* 273
[90] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident Lockerbie (Libyan Arab Jamarahiriya v United States of America) (Provisional Measures)* ICJ Reports 1998 para 42; Also (Libyan Arab Jamarahiriya v United Kingdom) (Provisional Measures) ICJ Reports 1992 at para 39-40.
[91] Report of the ILC,*supra* at p8
[92] Hugo Grotious, *De Jure belli ac pacis, Libri Tres, Quoted in the ILC Report.*

As noted by the ILC study group, the rationale behind *lex specialis* is that 'such special law, being more concrete often takes better account of the particular features of the context in which it is to be applied than any applicable law.'[93]

The *lex specialis* approach can be used to resolve conflicts in the same treaty[94], between two different treaties[95], between a treaty and a non treaty norm[96] as well between two non treaty norms.[97]

It ought to be noted that even where some specific law exists, general international law still continues to apply to those aspects that are not covered by the specific law.[98] Moreover the specific law still needs to be interpreted and applied against the backdrop of other principles of international law. In *Bankovic v Belgium and Others*[99] the court noted that although the Convention had a 'special character' it 'cannot be interpreted and applied in a vacuum' and further that it 'should be interpreted as far as possible in harmony with other principles of international law of which it forms part'.[100]

9.3 *Lex Posterior*

Conflicts between successive norms may also be resolved by the principle of *lex posterior derogate legi priori.* This rule is encapsulated the Vienna Convention on the Law of Treaties[101]which provides that the latest law takes preference over the earlier one.[102] Application of the *lex posterior* principle will resolve a conflict where both parties are parties to the conflicting treaties. The effectiveness of Article 30 may be limited by complexities involved in time computation and deciding what treaty is to be deemed to be earlier or latter. Vierdag notes this problem as follows:

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[93] Report of the ILC Study Group, *supra* at p9
[94] *Beagle Channel Arbitration (Argentina v Chile)* ILR Vol 52 (1979) at para 36, 38 and 39.
[95] *Mavronmmatis Palestine Concession Case* PCIJ Serie A No 2 (1924) p31
[96] *INA Corporation v Government of the Republic of the Islamic Iran US CTR Vol 8 1985-I at p378*
[97] *Case Concerning the Right of Passage over India Territory (Portugal v India) (Merits)* ICJ Reports 1960 6 at p44
[98] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion ICJ Reports 1996 at p240 para 25
[99] ECtHR 2001 XII
[100] Ibid at para 57
[101] Article 30
[102] Report of the ILC, *supra* at p17

> Article 30 rests on an assumption that will often appear not to be correct, as it fails to take account of the complication in time of multilateral treaty making through complex procedure.[103]

Moreover, it has been noted that the principle of *lex posterior* is limited beyond treaties in relation to a rule of custom. Pauwelyn observes:

> Nonetheless, whereas treaties and acts of international organisations may have a precise date on which they were concluded, it is virtually impossible to pinpoint the precise date on which a general principle of law of custom emerged.[104]

Despite its limitations, once the hurdle of determining which norm came into existence first is overcome, the principle of *lex posterior* can be a useful tool of resolving a conflict between norms.

10. SELF CONTAINED REGIMES

It has been argued that the mere emergence of different specialised regimes, such as the WTO, is not in itself an undesirable development. Due to the expertise and specialised nature of these regimes, they may 'show the way forward for general international law, as both laboratories and boosters for further progressive development at the global level'.[105] It is also noted that 'new types of specialised law do not emerge accidentally but seek to respond to new technical and functional requirements.[106]

Cassese correctly observes that:

> Any international court charged with the application of a specific body of international law (human rights, the law of the sea, humanitarian law) is authorised to apply rules belonging to other bodies of international law *incidenter tantum*, that is for purposes of construing or applying a rule that is part of the corpus of legal rules on which it has to primarily pronounce.[107]

In that regard, even where a court is called upon to make a determination on questions of, for instance, trade law, it would have to give due regard to implications on environmental protection or human rights. Therefore, as a corollary of the principle of *pacta sunt servanda*,

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[103] Quoted in J Pauwelyn, *Conflict of Norms in Public International Law* (2003 p369

[104] *ibid* at p363

[105] B Simma, 'Universality of International Law: From the Perspectives of a Practitioner'*supra* 276

[106] Report of the Study Group of the ILC- Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, A/CN.4/L.702, 18 July 2006 at p5

[107] Cassese, "The Nicaragua and Tadic Test Revisited in Light of the ICJ Judgment on the Genocide in Bosnia", *European Journal of International Law* (2007) 649 at p668

specialised institutions have to take into account general international law and the law from other institutions.[108] As Simma points out:

> As to fragmentation, it seems to me that many of the concerns about this phenomenon have been overstated. No "special regime" has ever been conceived as independent of general law. And no master plan of *divide et impera* lies behind this development.[109]

10.1 The WTO as a Specialised Regime

The WTO represents a specialised regime that has existed for quite some time. Most importantly, it has conducted its dispute settlement in a manner that takes into account the fact that it exists within a broader plane of international law.

Article 3(2) of the Dispute Settlement Understanding mandates the panels and the Appellate body to interpret the agreements with reference to 'customary rules of interpretation of public international law'. In this regard in the *US Gasoline Case* the Appellate Body authoritatively stated that WTO agreements 'should not be read in clinical isolation from public international law'.[110] Moreover, in *Korea-Measures Affecting Government Procurement*[111] it was stated that the Appellate Body is entitled to apply general international law to the extent that the agreements have not contracted out of it.[112] Consequently, the WTO Panels and Appellate Body have on numerous occasions applied Articles 31 and 32 of the Vienna Convention on the Law of Treaties in their interpretation of WTO agreements.[113]

There is an indication that states within the WTO system are aware of the interrelation of their obligations emanating from different regimes and have attempted to rely on obligations from other fields as defences against claims before the WTO. In the *US Shrimps* case[114] the US sought to rely on environmental treaties to justify its move to place an import

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[108] J Paulweyn 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands'(2003 25 Michigan Journal of International Law 903, 904

[109] B Simma, 'Universality of International Law: From the Perspectives of a Practitioner', *supra* 289

[110] United States- Standards for Reformulated and Conventional Gasoline WT/DS4/AB/R 10 April 1995

[111] WT/DS163/AB/R 19 June 2000

[112] Ibid at para 7.96

[113] JH Jackson, 'Fragmentation or a Unification Among Judicial Institutions: The World trade Organisation' (1999) 31 New York University Journal of International Law and Politics 823; A D Mitchell, 'The Legal Basis for Using Principles in WTO Disputes' (2007) 10 Journal of International Economic Law 795, 810-818

[114] *United States- Import Prohibition of Certain Shrimp and Shrimps Products* WT/DS61/AB/R

ban on shrimps. In the *EU-Beef Hormones* case[115] the EU raised the "precautionary principle" as a justification for its decision to ban hormone treated beef. The Appellate Body noted that irrespective of the status that the principle had at international environmental law it had not become binding for the WTO. The upshot of this is that if the principle had been regarded as having crystallised into customary international law it would have been applicable in the WTO.

11. SYSTEMIC INTERGRATION AND FRAGMENTATION

Another measure that has been heralded as a means of dealing with fragmentation is that of 'systemic integration' by way of interpretation.[116] Koskenniemi observes that 'legal interpretation and thus legal reasoning, builds systemic relationships between rules and principles.[117]

There is a presumption in international law that when states venture to create new rules they are fully aware of the pre-existing rules and as such do not intend to violate them.[118] The existence of this presumption was affirmed by the ICJ in *Case Concerning the Right of Passage over Indian Territory (Portugal v India)*[119] the court observed:

> It is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.[120]

The Vienna Convention on the Law of Treaties stipulates that in interpreting a treaty 'any relevant rules of international law applicable in the relations between the parties' ought to be taken into account.[121] There is some uncertainty as to what exactly the scope of the phrase 'the parties' is. In the *EC-Approval and Marketing of Biotech Products* case the WTO Panel interpreted the phrase to mean all parties to the relevant treaty. However, the tenable interpretation is that 'parties' refers to parties to the dispute as the former interpretation

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[115] *European Communities- Measures Concerning Meat and Meat Products(Hormones)* WT/DS26/AB/R 26 January 1996

[116] C McLachlan, 'The Principle of Systemic Integration and Article 31(3) (c) of the Vienna Convention on the Law of Treaties' (2005) 54 International and Comparative Law Quarterly 279,319

[117] M Koskenniemi 'Study on the Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes' (ILC(LVI/SG/FIL/CRD.1) 29

[118] R Jennings and A Watts, *Oppenheim's International Law* (1992) 1275; See generally, Report of the ILC, *supra* at pp13-16

[119] (Preliminary Objections) ICJ Reports 1957 125

[120] Ibid at p142

[121] Article 31 (3) (c)

would render the provision nugatory since it would be impossible to get 'precise congruence of membership' of many treaties.[122]

The principle of systemic integration found application in *Oil Platforms Case*[123] where the ICJ noted that the 1955 Treaty did not 'operate whole independently of the relevant rules of international law' and to that extent the court took into account general international law rules on the prohibition against the use of force in dismissing the US's contention that it acted in self defence. Systemic integration was also employed by the ICJ in *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* where the court took into account provisions of the 1977 Treaty of Friendship and Cooperation when interpreting the Convention on Mutual Assistance in Criminal Matters.

Article 31(3) (c) can be used as an instrument for ensuring consistency between two different treaties applicable between the parties. Moreover, it can be utilised to take into account subsequent factual changes and changes in the law to ensure that the treaty is interpreted in a manner that is in keeping with the times. This found expression in *Islands of Palmas*[124] case where the court observed that 'a juridical fact must be appreciated in the light of the law contemporary with it'. Moreover, in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*[125] case the ICJ stated that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation'. In *Gabcikovo-Nagymaros*[126] case the court noted that the treaty was 'not static and is open to adapt to the emerging norms of international law' and as such the court noted that it had to take into consideration both economic and environmental changes:

> [I]n such a way as to accommodate both economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.[127]

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[122] Report of the ILC para 471
[123] *(Iran v United States of America)* (Merits) ICJ Reports 2003 at para 41
[124] *Islands of Palmas (Netherlands v United States of America)* Award 4 April 1928 UNRIAA Vol II 829 at p845
[125] *(1970)* Advisory Opinion ICJ Reports 16 at p31 at para 53
[126] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1997 at p112
[127] Ibid at p80 at para 146

This is an indication that inserting open and evolving provisions in the treaty the parties can preserve the coherence of international law in that the treaty will always be interpreted in light of legal developments and in accordance with the law at the relevant time.

Furthermore, as was stated in *George Pinson Case*[128], there is a presumption that all questions not provided for by treaty are to be governed by customary international law and general international law.

It is to be noted that although the principle of systemic integration goes to some length in ensuring coherence of international law, it has its own limitations and shortcomings that render it 'far from being a panacea for fragmentation'[129] However, it has a major role to play, alongside other measures.[130]

12. CONCLUSION

Fragmentation of international law is a possibility owing to the proliferation of international courts and tribunals as well the emergence of various substantive fields of international. As indicated by the *Nicaragua* and *Tadic* cases, fragmentation can lead to conflicting decisions which brings about uncertainty. Be that as it may, the paper has indicated that the reality of fragmentation of international law does not warrant an outcry. This is particularly because the various international courts and tribunals have, to a large extent, endeavoured to preserve the coherence and unity of international law. International courts and tribunals often favourably refer to each others' jurisprudence. Moreover, as indicated by the findings of the ILC, there are already solutions and safeguards in place in order to address the fragmentation. Modes such as systemic integration have been widely utilised by the various regimes to ensure coherence. Consequently, to refer to fragmentation of international law as a problem would be to overstate the extent and implications of the phenomenon.

On the other hand, the coherence and consistency of international law in the fight against fragmentation can only be achieved by a concerted effort from all those concerned in the international law fora. Simma admirably captures this need as follows:

> [S]tates as the principal creators of international legal rules ought to be aware of the need for coherence of the international legal system as a whole, for instance when

[128] *(France v United Mexican States)* Award of 13 April 1928 UNRIAA Vol V at p422
[129] B Simma, 'Universality of International Law: From the Perspectives of a Practitioner' *supra,*277
[130] C McLachlan, 'The Principle of Systemic Integration and Article 31(3) (c) of the Vienna Convention on the Law of Treaties' (2005) 54 International and Comparative Law Quarterly 279,319

> they negotiate new international agreements. Secondly, international organisations and courts, when they interpret and apply international law, need to bear in mind that they are acting within an overarching framework of international law, residual as it may be. Last but not least, national courts which play an even more relevant role in the application of international law must also be aware of the impact that their activities can have on the development of a coherent international system.[131]

Consequently, if all the participants remain alive to the risk of fragmentation then the phenomenon will remain reasonably contained.

[131] B Simma, "Universality of International Law: From the Perspectives of a Practitioner", at *supra* at p271; See also J I Charney, "The Impact on the International Legal System of the Growth of International Court and Tribunals", *supra* at p708; G Abi-Saab, "Fragmentation or Unification: Concluding Remarks", *supra* at p927