

**PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS:  
IMPLICATIONS FOR THE DEVELOPMENT OF INTERNATIONAL LAW**

**BY**

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**G62/79654/2012**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE MASTER OF LAWS DEGREE  
OF THE UNIVERSITY OF NAIROBI**

**SEPTEMBER 2015**

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**DECLARATION**

I, MARY WANJIKU KINYANJUI, do hereby declare that this is my original work and that the same has not been submitted nor is currently being submitted for a degree in any other University.

Signed

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This thesis is submitted for examination with my approval as University Supervisor

Signed

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PROF. F.D.P. SITUMA

## **ACKNOWLEDGEMENTS**

I would like to express my sincere gratitude to my supervisor, Professor Situma, for his availability, patience and immense knowledge. His guidance has seen me research and complete this thesis.

My sincere thanks also go to Jude and our lovely sons Jude Junior and Baz, for their love, support and attention.

I also thank my mother, Julia, my grandmother, Mary and my brothers, James, Stephen, Peter and John, for their encouragement and prayers.

## **DEDICATION**

This thesis is dedicated to my family.



## **LIST OF ABBREVIATIONS**

DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECHR	European court of Human Rights
GA	General Assembly
GATT	General Agreements on Tariffs and Trade
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICSID	International Centre for Settlement of Investment Disputes
ITLOS	International Tribunal for the Law of the Sea
PCIJ	Permanent Court of International Justice
SC	Security Council
WTO	World Trade Organization
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UK	United Kingdom
US	United States

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2. Aegean Sea Continental Shelf Case (Jurisdiction) (1978) ICJ Rep
3. Application for Review of Judgment No. 158 of the UN Administrative Tribunal (1973) ICJ Rep 167.
4. Cameroon v. Nigeria, (1999) ICJ Rep 1034.
5. Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) (1988) ICJ Rep 69.
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8. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (Application for Permission to Intervene) (1984) ICJ Rep 1.
9. Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (1986) ICJ Rep.
10. Case of Loizidou v. Turkey (Preliminary Objections) (1995) ECHR.

11. Case of S.S. Wimbledon (1923) P.C.I.J Ser. A No. 1.J
12. Certain Norwegian Loans (France v. Norway) (1957) ICJ Rep 9.
13. Conditions of Admission (1948) ICJ Rep
14. Corfu Channel Case (Preliminary Objection) (1948) ICJ Rep 15.
15. Diplomatic and Consular Staff in Tehran (1980) ICJ Rep
16. Government of Sudan and Sudan's people's Liberation Movement/Army Abyei (July 22 2009) 40 ILM 983 (2001)
17. Indonesia/Malaysia, (2001) ICJ Rep 575.
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2. 1907 Hague Convention for the Pacific Settlement of International Disputes, 18 October 1907; 93 LNTS 342.
3. 1907 Hague Convention for the Pacific Settlement of international Disputes, 18 October 1907, 93 LNTS 342
4. Agreement Establishing the World Trade Organization; 1994; 1867 UNTS 154;
5. American Treaty on Pacific Settlement (Pact of Bogota), 30 April 1948; 30 UNTS 55;
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7. General Act for the Pacific Settlement of International Disputes, 28 April 1949; 71 LNTS 101;
8. League of Nations, Covenant of the League of Nations, 28 April 1919; [1920] ATS 1
9. Montevideo Convention on the Rights and Duties of States, 26 December 1933; 165 LNTS 19
10. Revised Geneva General Act for the Pacific Settlement of International Disputes, 28 April 1949, 71 UNTS 101

11. Treaty Establishing the Organization of Eastern Caribbean States, 2 July 1981, 1338 UNTS 97
  
12. Treaty of Amity, Commerce and Navigation, November 19, 1794, United States-Great Britain; 52 Parry's T.S. 243.
  
13. United Nations Convention on the Settlement of Investment Disputes, 18 March 1965; 575 UNTS 159;
  
14. United Nations, Convention on the Law of the Sea, 10 December 1982; 1833 UNTS 397
  
15. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969; 1155 UNTS 331;
  
16. Vienna Convention on the Representation of States in their relations with International organizations of a Universal Character, Vienna, 21 March 1978; 25 ILM 543;

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background

To appreciate the question of proliferation of international courts and tribunals, it is pertinent to analyze the International Court of Justice (ICJ) which is established as the “principal judicial organ” of the United Nations.<sup>1</sup> Proliferation may thus be said to be a departure by States in appreciating the ICJ as the principal world court.<sup>2</sup> Under the Optional Clause in the Statute of the ICJ, states are free to submit to the jurisdiction of the ICJ.<sup>3</sup> ICJ, therefore, lacks compulsory jurisdiction over disputes between states. In fact, states have the liberty of choosing pacific methods of settlement, such as negotiation, mediation or even other judicial processes, to resolve their dispute.<sup>4</sup> They also have the option of referring disputes to other tribunals by virtue of agreements they enter into.<sup>5</sup>

The establishment of the International Court of Justice (“the ICJ or Court”) was a culmination of a long development of methods for the pacific settlement of international disputes.<sup>6</sup> Early practice favoured settlement of disputes by reference to a third party

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<sup>1</sup>United Nations, *Charter of the United Nations*, 24 October 1945; 1 UNTS XVI; Article 92.

<sup>2</sup> Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford, Oxford University Press, Oxford, 2008), p. 596.

<sup>3</sup>United Nations, *Statute of the International Court of Justice*, 18 April 1946; 1 UNTS XVI; Article 36.

<sup>4</sup>Supra, note 1, Article 33.

<sup>5</sup>ibid., Article 95.

<sup>6</sup> A. Bozeman, ‘Politics and Culture in International History’ [1960] 266<[www.jstor.org/stable/40400886](http://www.jstor.org/stable/40400886)> (accessed 7 March 2015).

arbiter. For instance, the Italian city states born during the renaissance period adopted a practice of referring their disputes to the Catholic Church in Rome.<sup>7</sup>

Modern states, such as the United States of America (“the US”) and the United Kingdom (“the UK”), continued with the practice of referring disputes to a third party. Illustrative of this is the signing of the Jay Treaty in 1794 setting up a Commission to dispose of disputes.<sup>8</sup> Under the Treaty of Washington of 1871, the US and the UK agreed to submit to arbitration claims by the US for breaches of neutrality by the UK during the American Civil War.<sup>9</sup> In the said treaty, the US and the UK agreed on appointment of five members to the Commission.

In the subsequent years, states contemplated the establishment of a permanent world adjudicatory body. As early as mid 1900, states began to include compromisory clauses for declaration of acceptance of jurisdiction by states in several international conventions on various subjects.<sup>10</sup>

During the Hague Conference in 1899, while discussing the rising level of armaments possessed by European nations, two points of view emerged regarding dispute settlement.<sup>11</sup> The first point of view favoured the establishment of a standing court of arbitration which states could use as they pleased. The second view favoured the

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<sup>7</sup>ibid.

<sup>8</sup>Treaty of Amity, Commerce and Navigation, November 19, 1794, United States-Great Britain; 52 Parry’s T.S. 243.

<sup>9</sup> Treaty for the Amicable Settlement of all Causes of Difference, May 8, 1871, Great Britain – United States; 143 Parry’s T.S. 145.

<sup>10</sup>S. Rosenne, ‘The World Court: What it is and How it Functions’ 11 (1973)  
<<http://www.brill.com/rosennes-world-court-what-it-and-how-it-works>> (accessed 7 March 2015).

<sup>11</sup>Ibid.



establishment of an arbitral body.<sup>12</sup> The vast majority of states preferred the idea of non-compulsory arbitration.<sup>13</sup>

The 1899 Hague Conference gave rise to the Permanent Court of Arbitration which consists of a list of names from which states could select arbitrators if and when they decided to arbitrate a dispute.<sup>14</sup> On the other hand, the Second Hague Conference of 1907 confirmed and expanded voluntary arbitration through pacific settlement of international disputes. Notable in the two Hague Conventions of 1899<sup>15</sup> and 1907<sup>16</sup> was the exemption from arbitration of disputes “involving vital interests, independence and honor.”<sup>17</sup> Article 38 of the Second Hague Convention adopted in the Second Hague Conference in 1907<sup>18</sup> provided that parties could have recourse to arbitration in so far as circumstances permit. Although Article 53 of the second Hague Convention provided an illusion of compulsory jurisdiction by providing that one party to a dispute could unilaterally invoke the Permanent Court of Arbitration, it left it to the other party to decide if the dispute belonged to the category of disputes which could be submitted to compulsory arbitration.<sup>19</sup>

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<sup>12</sup>ibid.

<sup>13</sup> J.B. Scott, *The Reports To the Hague Conference of 1899 and 1907* (1917) <<https://books.google.co.ke/books?id=IMNrlwDkhE8C&lpq=jb+scott+the+reports+to+the+hague>>(accessed 7 March 2015).

<sup>14</sup>David Patterson, ‘The United States and the Origins of the World Court’(1976) 91 *Political Science Quarterly* 279 <[www.jstor.org/stable/2148413](http://www.jstor.org/stable/2148413)> (accessed 7 March 2015).

<sup>15</sup>1899 Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899; 187 Parry’s TS 410.

<sup>16</sup>1907 Hague Convention for the Pacific Settlement of International Disputes, 18 October 1907; 93 LNTS 342.

<sup>17</sup>ibid, Article 38.

<sup>18</sup>ibid.

<sup>19</sup>ibid.

Despite the existence of the Permanent Court of Arbitration and other modes of pacific settlement, World War I still erupted, leaving doubt as to the effectiveness of the existing dispute settlement mechanisms.<sup>20</sup> Scholars from the US and the UK proposed the establishment of an international system featuring a court with some measure of obligatory jurisdiction.<sup>21</sup>

The outbreak of the First World War and its conclusion made it necessary for the establishment of a world court. The League of Nations adopted the Statute of the Permanent Court of Justice (“the PCIJ”) in December 1920.<sup>22</sup> However, the PCIJ did not have compulsory jurisdiction over international disputes involving member states.<sup>23</sup> A minority of the Advisory Committee which was mandated to draft the Statute of the PCIJ felt that owing to Covenant of the League of Nations, the jurisdiction of the PCIJ was to be based on consent.<sup>24</sup> The PCIJ only had competence to hear and determine disputes of an international character submitted to it by parties or by the Council or the Assembly.<sup>25</sup> This, therefore, meant that the Statute of the PCIJ did not give the Court compulsory jurisdiction, save for disputes relating to treaty interpretation and reparations.<sup>26</sup> The Council drafted the Optional Clause to allow states to accept jurisdiction, if they so desired, as well as to allow them to make reservations to limit acceptance of the PCIJ’s

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<sup>20</sup> Minutes of the Meeting of the Executive Council, April 27, 118, 1918  
<[www.jstor.org/stable/22656573](http://www.jstor.org/stable/22656573)>(accessed 7 March 2015).

<sup>21</sup> *ibid.*

<sup>22</sup> League of Nations, *Covenant of the League of Nations*, 28 April 1919; [1920] ATS 1, Article 14

<sup>23</sup> *ibid.*

<sup>24</sup> Anthony Giustini, 'Compulsory Adjudication in International Law: The Past, The Present and Prospects for the Future' (1985) 9 *Fordham Int'l L.J.* 213 <<http://ir.lawnet.fordham.edu/ilj/vol9/iss2/>> (accessed 8 March 2015).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

jurisdiction.<sup>27</sup> States retained the power to choose what form of dispute resolution to use.<sup>28</sup> Besides, if a dispute was not submitted to arbitration or judicial settlement under Article 13 of the Statute of the PCIJ, the said dispute was to be decided by the Council of the League of Nations.<sup>29</sup> Consequently, like the arbitration under the Hague Conventions, judicial settlement under the League of Nations was not compulsory.

World War II outbreak in 1939 marked the end of the PCIJ. During the Dumbarton Oaks Conference in Washington, DC (August- October 1944), delegates discussed the formation of a new world court.<sup>30</sup> Consequently, at the San Francisco Conference in June 1945, delegates approved the new International Court of Justice as one of the principal organs of the United Nations.<sup>31</sup> The UN Charter established the ICJ as the principal judicial organ of the United Nations.<sup>32</sup> The UN Charter also offers parties to any dispute the option of seeking a solution through pacific settlement such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or any other peaceful means the parties may choose.<sup>33</sup>

## **1.2 Statement of Problem**

The UN Charter establishes the International Court of Justice (“the ICJ”) as “the principal judicial organ of the United Nations.”<sup>34</sup> In exercising its functions, the ICJ is guided by

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<sup>27</sup> *ibid*

<sup>28</sup> *Supra*, note 21, Article 11 and 12.

<sup>29</sup> *Supra*, note 27, Article 13.

<sup>30</sup> <[www.Britanica.com/event/Dumbarton-Oaks-Conference](http://www.Britanica.com/event/Dumbarton-Oaks-Conference)>(accessed 10 March 2015).

<sup>31</sup> *ibid*.

<sup>32</sup> *Supra*, note 1, Article 92.

<sup>33</sup> *Supra*, note 3, Article 33.

<sup>34</sup> *Supra*, note 31.

its own Statute which is an integral part of the Charter of the United Nations.<sup>35</sup> Although the ICJ has been established as the principal judicial organ of the United Nations, its jurisdiction is based strictly on the referral of disputes by the states parties.<sup>36</sup> The states parties to the Statute of the ICJ are not obliged to refer international disputes to the ICJ, but rather have the option of making such reference.<sup>37</sup> Indeed Article 95 of the UN Charter allows member states to create and chose tribunals of their preference in resolving international legal disputes.

The creation of the ICJ as the principal judicial organ of the United Nations and the reservation of states' sovereignty through the creation of other tribunals and courts give rise to existence of a parallel legal system.<sup>38</sup> States parties have exercised this right and created several international courts and tribunals with specialized jurisdictions. The decisions of these courts and tribunals are final and binding and not appealable to a higher organ or institution.

The question then arising is the effect of proliferation of international courts and tribunals for the development of international law. It has been argued that the many international courts and tribunals give rise to competing jurisdictions amongst themselves hence posing the danger of fragmenting international law. The problem which this paper seeks to address is whether the jurisprudence of international law can develop in the parallel system of international courts and tribunals.

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<sup>35</sup> *ibid.*

<sup>36</sup> *Supra*, note 3, Article 36.

<sup>37</sup> *ibid.*

<sup>38</sup> *Supra*, note 1, Article 95.

### **1.3 Hypothesis**

This study is based on the assumption that the increasing diversity of jurisdictions and decisions from the several international courts and tribunals has positive implications for the development of international law jurisprudence.

### **1.4 Research Questions**

This research seeks to answer the following questions, namely,

- (i) Why is there a multiplicity of international courts and tribunals?
- (ii) What are the implications of having a multiple system of international courts and tribunals?
- (iii) What are the prospects of development of unified international law jurisprudence from the various international courts and tribunals?

### **1.5 Theoretical Framework**

The theoretical framework for this is based on the principle of sovereignty. This is because international law, applied by international institutions, must be in existence and should not be left to speculation. In this regard, in exercising the sovereign rights, states enter into engagements, such as treaties and conventions, and even define the mode of solution of their disputes which may arise in the course of their relations with one another.<sup>39</sup>

According to John Austin (1790-1859), law is the general command of a sovereign supported by the threat of sanctions.<sup>40</sup> Sovereignty has been defined as the supreme,

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<sup>39</sup> Hudson, *World Court Reports* (1934) 175.

<sup>40</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> edn (Routledge, London, 2010), p. 17.

absolute and uncontrollable power by which any independent state is governed.<sup>41</sup> It is the international independence of a state with the right to form treaties of alliance or commerce with foreign nations.<sup>42</sup> When looked at internally, sovereignty defines the supremacy of government institutions, while when looked at externally, sovereignty defines the supremacy of the state as a legal person.<sup>43</sup> States are at liberty to regulate their relations and to create institutions through the making and signing of treaties.<sup>44</sup>

Sovereign states originated at the Peace of Westphalia in 1648 when Europe consolidated its transition from the Middle Ages to sovereign states.<sup>45</sup> The sovereign state system gained worldwide acceptance in the next centuries.<sup>46</sup> The United Nations Charter, indeed, recognizes territorial integrity and restricts intervention in matters within the domestic jurisdiction of a state.<sup>47</sup>

Sovereignty is, however, not absolute. Legal obligations of states cooperating within a network of international instrument may restrain their freedom of action.<sup>48</sup> Sovereignty, thus, denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the government, executive, legislative or judicial, jurisdiction of a foreign state or foreign law other than public international law.<sup>49</sup> In exercising their

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<sup>41</sup> Henry Campbell Black, *Black's Law dictionary*, 9th edn(West Publishing Company, Eagan, Minnesota, United States, 1979), p. 1568.

<sup>42</sup> *ibid.*

<sup>43</sup> Malcom N. Shaw, *International Law*(6<sup>th</sup>edn, Cambridge University Press, Cambridge1997) 487.

<sup>44</sup> *ibid.*

<sup>45</sup> <<http://plato.stanford.edu/entries/sovereignty>>(accessed 26 March 2015).

<sup>46</sup> *ibid.*

<sup>47</sup> *Supra*, note 1, Article 2(7).

<sup>48</sup> Miyoshi Masahiro, 'Sovereignty and International Law' Aichi University, Japan<<https://dur.ac.uk/resources/ibru/.../sos/masahiro-miyoshi-paper.pdf>> (accessed 31 March 2015).

<sup>49</sup> *ibid.*

sovereignty, states have endeavored to enter into agreements creating international courts and tribunals to which they refer cases. For instance, by ratifying the Charter of the United Nations, member states elect to be bound by the Charter which establishes the International Court of Justice as the principal judicial organ of the United Nations.<sup>50</sup> In the 1923 *Wimbledon Case*,<sup>51</sup> the PCIJ affirmed that the right of entering into international engagements is an attribute of state sovereignty. In the said case, Germany had refused passage of an English steamship, S.S. Wimbledon, through to pass through the Kiel Canal forcing the vessel an alternative route through the Danish Straits. The PCIJ held that German was obliged to observe the Treaty of Versailles entered into on June 28<sup>th</sup> 1919. Under the said Treaty, Germany had a definite duty of allowing the passage of the S.S. Wimbledon through the Kiel Canal.

The study will draw on theory of sovereignty of states to make the argument that states have the sovereign right to determine international institutions that may address their international disputes. The principle of sovereignty has been given credence in the Charter of the United Nations. The ICJ has been established as “the principal judicial Organ of the United Nations,” The jurisdiction is not compulsory, and states have the freedom to submit or not to submit to the Court’s jurisdiction. The jurisdiction of the Court in a dispute between parties is based on the consent of parties.<sup>52</sup> Besides, member states have the freedom to create other international courts or tribunals of their choice.<sup>53</sup> Proliferation of international courts and tribunals is, thus, a result of states’ exercise of their sovereignty.

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<sup>50</sup>Supra, note 1, Article 92.

<sup>51</sup>*The Case of S.S. Wimbledon* (1923) P.C.I.J Ser.A No. 1.

<sup>52</sup>Supra, note 3, Article 36.

<sup>53</sup>Supra, note 1, Article 95.

## 1.6 Literature Review

The traditional view has been that proliferation of international courts and tribunals poses inherent dangers of conflicting jurisdictions and eventual fragmentation of international law.<sup>54</sup> The main concern is that proliferation leads to fragmentation of international law when the same legal norm receives multiple differing interpretations by more than one judicial body.<sup>55</sup> This, in turn poses, a threat to the credibility, reliability and authority of international law.<sup>56</sup> However, there are several jurists who welcome the idea of proliferation seeing it as contributing to the enrichment of international law. The following is a review of literature touching on proliferation of international courts and tribunals.

It has been argued that proliferation of international courts and tribunals poses practical problems, given the fact that the courts and tribunals are arranged in a horizontal manner lacking hierarchy and formal relations.<sup>57</sup> Divergences, therefore, exist in purpose and subject matter between the general tribunals and special regimes.<sup>58</sup> For instance, divergences of doctrine exist in areas such as state responsibility for failure to take affirmative measures of protection where human rights bodies impose higher standards on states than has the ICJ.<sup>59</sup> Similarly, divergence has existed in teleological approaches

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<sup>54</sup>Karim Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions*, Vol 2 (UOP 2010) 317.

<sup>55</sup>*ibid.*

<sup>56</sup>Agnieszka Szpak, 'Proliferation of International Courts and Tribunals and Its Impact on the Fragmentation of International Law' [2014] International Law Annual Publication, Mumbai <[www.spilmumbai.com/issues/international-law-annual-2.aspx](http://www.spilmumbai.com/issues/international-law-annual-2.aspx)> (accessed 30 March 2015).

<sup>57</sup>Benedict Kingsbury, 'Is proliferation of International Courts and Tribunals a Systemic Problem?' (2003) 35 NYU Journal of Int'l Law & Politics 291 <[www.pict.pict.org/publications/PICT\\_articles/JILP/Kingsbury](http://www.pict.pict.org/publications/PICT_articles/JILP/Kingsbury)> (last accessed 20 May 2015).

<sup>58</sup>*ibid.*

<sup>59</sup>*Case of Loizidou v. Turkey (Preliminary Objections)* (1995) ECHR 24.



to interpretation of treaties which are well established in human rights tribunals but meet more resistance in the ICJ.

Benedict Kingsbury further argues that although proliferation does not threaten to cause fragmentation in doctrine, an obvious concern is the likelihood of multiple tribunals addressing the same dispute without adequate rules for dealing with overlapping jurisdiction.<sup>60</sup> The ICJ encountered this problem when the validity of inter-state arbitral award was challenged by an aggrieved party and ICJ was careful not to destabilize existing adjudicative decisions.<sup>61</sup>

On the other hand, Yuval Shany posits that jurisdiction overlap is not a hypothetical scenario, but that competition between international courts and tribunals, resulting in multiple proceedings, has actually taken place.<sup>62</sup> Jurisdictions are deemed to truly compete with one another for business if the parties involved can achieve comparable results from rival procedures.<sup>63</sup> Jurisdictional competition or overlap would, thus, occur when a certain dispute can be addressed by more than one available forum.

Similarly, Roger P. Alford appreciates that one of the key challenges of proliferation is the impact on sources of international law.<sup>64</sup> The international courts and tribunals often deliver judicial decisions which essentially create bases for international law.<sup>65</sup> Agnieszka Szpak is also of the view that with proliferation of international courts

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<sup>60</sup>Supra, note 58.

<sup>61</sup>*Guinea-Bissau v. Senegal*(1991) ICJ Rep. 53.

<sup>62</sup>Supra, note 2, p.596.

<sup>63</sup>ibid.

<sup>64</sup>Roger P Alford, 'The Proliferation of International Courts and Tribunals: International adjudication in Ascendance, Notre Dame Law School, 2000  
<[http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/9](http://scholarship.law.nd.edu/law_faculty_scholarship/9)>(accessed 20 April 2015).

<sup>65</sup>ibid.

and tribunals, there is a risk of having the same norm of international law being interpreted differently in cases decided by distinct international courts and tribunals.<sup>66</sup>

According to Judge Gilbert Guillaume, proliferation of judicial bodies largely responds to recent developments in international community.<sup>67</sup> For instance, the diversification of the areas governed by international law has rendered the law more complex and more diverse. Consequently, human rights, environmental law, economic law, the law of the sea or space law are regarded as specialized branches of international law. The need to have certain types of inter-state disputes adjudicated by bodies which are more sensitive to specific local conditions has led to creation of tribunals whose composition is determined at the regional level.<sup>68</sup>

Guillaume posits that as international tribunals continue to multiply, the risks of overlapping jurisdictions have increased and this, in turn, leads to forum shopping and conflicting decisions.<sup>69</sup> Forum shopping occurs when litigants are permitted to choose from among a range of judicial bodies in resolution of their differences. The existence of several fora with competence to hear a particular dispute enables the parties, especially the applicant, to select the forum that best suits them. Such a choice is normally guided by factors, such as access to the court, the procedure followed, the court's composition, the court's past decisions or the power to make certain types of order.<sup>70</sup> For instance, in the *Blue Fin Tuna Case*, the main reason the applicant proceeded before the International Tribunal for the Law of the Sea was the ready enforceability of the measures which it

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<sup>66</sup>ibid.

<sup>67</sup>Judge Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The outlook for the International Legal Order' (Address to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000) <[www.icj-cij.org/court/index.php](http://www.icj-cij.org/court/index.php)> (last accessed 19 May 2015).

<sup>68</sup>ibid.

<sup>69</sup>ibid.

<sup>70</sup>*Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures)*(1999) 38 ILM 1624.

sought.<sup>71</sup> The motive for such forum shopping is often led by the fact that the past decisions of a particular court may be favourable to particular doctrines, concepts or interests. Certain courts may, thus, be led to tailor their decisions so as to encourage a growth in their caseload to the detriment of a more objective approach to justice. Forum shopping also increases the risk of conflicting judgments. Two courts may be seized concurrently of the same issue and render contradictory decisions.

Despite the traditional view on proliferation by many jurists, there are some jurists who have welcomed the idea of proliferation. In the recent past, there has been a high growth of international courts and tribunals with no formal link to each other. Although such formal link is absent between the international courts and tribunals, there is a general conformity of doctrine on systemic matters, such as sources of international law, the law of treaties, and state responsibility. There is general appreciation in specific matters, such as compensation for injury to aliens and international maritime boundary delimitation.<sup>72</sup>

It is argued that the multiplication of judicial and quasi-judicial institutions does not necessarily lead to a negative impact on the international legal system.<sup>73</sup> It is argued that since the ICJ cannot deal with every international dispute efficiently and effectively, proliferation is beneficial for international law in general. By referring disputes to other international courts and tribunals, the workload before the ICJ has tremendously decreased and this has, in turn, led to quick resolution of disputes.<sup>74</sup> Proliferation has allowed wider access to international judicial bodies for private parties and international

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<sup>71</sup>ibid.

<sup>72</sup>Supra, note 58.

<sup>73</sup>Piree-Marie Dupuy, 'The Danger of Fragmentation or Unification of International Legal System and the International Court of Justice' <[www.pict-pict.org/publications/PICT-articles/JILP/Dupuy.pdf](http://www.pict-pict.org/publications/PICT-articles/JILP/Dupuy.pdf)>(accessed 25 March 2015).

<sup>74</sup>ibid.

organizations a practice that is not viable before the ICJ which only has jurisdiction over states.<sup>75</sup>

The Judge Guillaume appreciates the fact that proliferation has led to a significant increase in the number of cases coming before the courts in various fields, thus contributing to the development of international law, hence its enrichment.<sup>76</sup> Similarly, multiplication of jurisdictions enlarges the scope of justiciability of international disputes in the promotion of a legal order.<sup>77</sup> Proliferation of international courts and tribunals reflects a decisive step in the evolution of the international legal system as it develops a real judicial function.

It is further argued that the divergences brought about by proliferation of international courts and tribunals allows for creativity and interactive development of international law through dialogue among tribunals.<sup>78</sup> In the law of maritime boundaries, there has been dialogue, mainly between the ICJ and the ad hoc tribunals whereby the ICJ has cited the tribunals, hence minimizing explicit rule conflicts.<sup>79</sup>

As regards the dangers posed by proliferation, several jurists have proposed ways of dealing with the emerging challenges. According to Herbert Hart, a legal system is the union of primary and secondary rules contained in international law.<sup>80</sup> A legal order consists of a system of norms, binding on determined subjects, which triggers, some pre-

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<sup>75</sup>ibid.

<sup>76</sup>Supra, note 68.

<sup>77</sup>Supra, note 73.

<sup>78</sup>Supra, note 58.

<sup>79</sup>*Jan Mayen case, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, (1993) ICJ Rep 38 (separate opinion of Judge Oda).

<sup>80</sup>H.L.A. Hart, *The Concept of Law* (2<sup>nd</sup>edn,OUP 1994) 79.

established consequences when the subjects breach their obligations.<sup>81</sup> It is contended that public international law is endowed with a full set of secondary rules which enables it to create, modify or extinguish international norms.<sup>82</sup> On the other hand, it contains primary rules, such as rules of international responsibility for wrongful acts or establishes the conditions under which an injured state may have recourse to counter measures.<sup>83</sup>

In promoting unity of the rules, the authors have suggested that tribunals should look at the UN Charter as the foundation of a fully-constituted international legal system.<sup>84</sup> Different strands of international constitutionalism offer different kinds of solutions to the problems of the international legal system. One approach looks for the constitution in the UN Charter and, thus, attaches great importance to the supremacy of the UN Charter over other treaties.<sup>85</sup> However, this approach has difficulty accounting fully for roles of actors other than states.

A second approach in promoting a unified legal system calls for the construction of a democratically-legitimate international legal system in which judicial institutions may have power to review and strike down undemocratic international legislation.<sup>86</sup> A related approach calls for denunciation of existing international institutions as they are bureaucratic and backward. There is, thus, need for reconstruction of international law

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<sup>81</sup>Supra, note 73.

<sup>82</sup>Ibid.

<sup>83</sup>Ibid.

<sup>84</sup>Ibid.

<sup>85</sup>ibid.

<sup>86</sup>ibid.

and international courts and tribunals in line with the current international social consciousness.<sup>87</sup>

However, the question arising would be whether a single unified system is a desirable aspiration. From the foregoing, most jurists would answer the question in the affirmative. However, a few jurists, such as David Kennedy, have argued that international law is not a simple abstraction, such as the law governing relations among states, but is, instead a set of particular human projects situated in time and place.<sup>88</sup>

On the other hand, coordination between the existing international courts and tribunals has been proposed to address the issue of overlapping jurisdiction between different courts.<sup>89</sup> This may mean that a court may withdraw from hearing a case where another court has been seized of the same dispute between the same parties.<sup>90</sup> However, a clear criterion is needed to govern such coordination.

However, imposing strict legal hierarchy may be difficult because international law is normally mired with not only legal, but also diverse economic, social and security interests and considerations.<sup>91</sup> A less formal structural relationship between the international courts and tribunals may, thus, be desirable as this would allow international law to be more dynamic and flexible. It has, therefore, been proposed that the judges

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<sup>87</sup>Philip Allot, *The International Court and the Voice of Justice, in Fifty Years of the International Court of Justice* [1995]

<sup>88</sup>David Kennedy, *New Approaches to comparative Law: Comparativism and International Governance* (ULR1997) p. 545.

<sup>89</sup>Judge Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The outlook for the International Legal Order' (Speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000) <[www.icj-cij.org/court/index.php](http://www.icj-cij.org/court/index.php)> (last accessed 19 May 2015).

<sup>90</sup>*Ibid.*

<sup>91</sup>Agnieszka Szpak, 'Proliferation of International Courts and Tribunals and Its Impact on the Fragmentation of International Law' [2014] *International Law Annual* <[www.spilmumbai.com/issues/international-law-annual-2.aspx](http://www.spilmumbai.com/issues/international-law-annual-2.aspx)> [accessed 30 March 2015].

ought to show good faith and exhibit respect not only to their own previous holding on a subject, but should also respect relevant holdings of other international tribunals in the interest of judicial harmony, certainty and predictability of law.<sup>92</sup>

The foregoing literature review points out the potential dangers and gains brought about by the proliferation of international courts and tribunals. It is evident that little has been said about the merits and compromise position resulting from multiplication of international courts and tribunals. Secondly, most authors have not written on justification of proliferation of these international courts and tribunals. Rather, the authors have focused on the possible negative impact of proliferation of international courts and tribunals. This study, therefore, seeks to objectively analyze the merits, demerits and compromise position arising from proliferation of international courts and tribunals. This study will also look at the justification of having the multiple international courts and tribunals.

### **1.7 Research Methodology**

In seeking to look at the effect of proliferation of international courts and tribunals on the development of international law, focus will be given to review of primary and secondary materials. The secondary materials will include text books, journals and online sources. The review of secondary materials will aid in proving or disproving the assumption that proliferation has had only negative impact on the development of international law.

This study will also focus on review of primary materials such as treaties, conventions, statutes, protocols and cases. The said materials will be sourced from the library at the School of Law of the University of Nairobi as well as from internet resources. These materials will be used in proving or disproving the assumption that proliferation has had only negative impact on the development of international law.

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<sup>92</sup>ibid.

## **1.8 Chapter Breakdown**

### **Chapter 1: Introduction**

- Background
- Statement of the Problem
- Hypotheses
- Research Questions
- Theoretical Framework
- Literature Review
- Research Methodology

### **Chapter 2: International Dispute Resolution**

- Judicial Settlement of Disputes – the International court of Justice
- Other Judicial and Quasi-Judicial Settlement Of International disputes – Courts and Tribunals
- Pacific Methods of Settlement of International Disputes

### **Chapter 3: - The ICJ and the other International Courts and Tribunals**

- Jurisdiction of the ICJ
- Legal Status of Decisions of the ICJ
- Jurisdiction of Decisions of the other international courts and tribunals
- Legal Status of Decisions of the other international courts and tribunals

### **Chapter 4: Implication of Proliferation Of International Courts and Tribunals for the Development of International Law**

- Is the Jurisdiction of the ICJ compulsory?
- Supposed Threat posed by Proliferation of International Courts and Tribunals
- Diversity of international Law
- The Principle of Sovereignty of States
- Development of International Law in Light of Proliferation of International Courts and Tribunals

### **Chapter 5: Conclusion and Recommendations**



## CHAPTER 2

### INTERNATIONAL DISPUTE RESOLUTION

#### 2.1 Introduction

The main current throughout the history of dispute settlement has been a quest to avoid war as a legitimate means of resolving interstate controversies. The Charter of the United Nations provides for settlement of international disputes by peaceful means in such a manner that international peace and security are not endangered.<sup>93</sup> Further, member states are obliged to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.<sup>94</sup> This chapter expounds on both the judicial and non-judicial means of settlement of international disputes. On judicial means of settlement, the Charter establishes the International Court as the principal judicial organ of the United Nations.<sup>95</sup> The Charter also allows member states to entrust solution of their differences to other tribunals by virtue of agreements.<sup>96</sup> On the other hand, as regards other pacific settlement of disputes, the Charter provides for negotiation, enquiry, mediation, conciliation, arbitration or resort to regional agencies or arrangements.<sup>97</sup>

#### 2.2 Judicial Settlement of International Disputes

States parties to a dispute may seek a solution thereto by submitting the dispute to a pre-constituted court or tribunal. Such a court or tribunal is composed of independent judges

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<sup>93</sup>United Nations, *Charter of the United Nations*, 24 October 1945; 1 UNTS XVI; Article 2(3).

<sup>94</sup>*ibid.*, Article 2(4).

<sup>95</sup>*ibid.*, Article 92

<sup>96</sup>*ibid.*, Article 95.

<sup>97</sup>*ibid.*, Article 33.

whose tasks are to settle claims on the basis of international law and render decisions which are binding between the parties to the case.

The first international court was the Permanent Court of International Justice (“the PCIJ”) which was established by the Covenant of the League of Nations.<sup>98</sup> It was succeeded by the International Court of Justice (“the ICJ”) in 1946 as a principal judicial organ of the United Nations.<sup>99</sup> Under the Statute of the ICJ, the ICJ has general jurisdiction in cases referred to it by parties and all matters provided for in the Charter of the United Nations as well as in treaties and conventions in force between parties.<sup>100</sup>

Another example of an international institution is the International Tribunal for the Law of the Sea (ITLOS) established under the 1982 United Nations Convention of the Law of the Sea.<sup>101</sup> Other examples include the World Trade Organization Dispute Settlement Mechanism (DSS)<sup>102</sup> and the International Centre for Settlement of Investment Disputes (ICSID).<sup>103</sup>

Settlement of international disputes by international courts is subject to the recognition by the States concerned of the jurisdiction of the courts over such disputes. Such recognition of jurisdiction may be expressed by way of a special agreement between the States parties to a dispute (*compromis*) conferring jurisdiction upon a court in a particular dispute or by

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<sup>98</sup>League of Nations, *Covenant of the League of Nations*, 28 April 1919; [1920] ATS 1, Article 14.

<sup>99</sup>Supra, note 1, Article 92

<sup>100</sup>United Nations, *Statute of the International Court of Justice*, 18 April 1946; 1 UNTS XVI; Article 36.

<sup>101</sup>United Nations, *Convention on the Law of the Sea*, 10 December 1982; 1833 UNTS 397; Article 287 (1) (a).

<sup>102</sup>Agreement Establishing the World Trade Organization; 1994; 1867 UNTS 154; Annex 2, Article 1.

<sup>103</sup>United Nations Convention on the Settlement of Investment Disputes, 18 March 1965; 575 UNTS 159; Article 17.

a compromisory clause in a convention or treaty in force providing for agreed or unilateral reference of a dispute to a court.<sup>104</sup>

Contentious proceedings before international courts are instituted either unilaterally by one of the parties to a dispute or jointly by the parties, depending on the terms of the agreement in force between them. The procedure for instituting contentious proceedings is defined in the basic statute of the individual international court or tribunal. For instance, as regards the ICJ, the Statute of the ICJ provides for comprehensive procedure of instituting cases before the ICJ.<sup>105</sup> On the other hand, the Commission or Tribunal formed under the ICSID will automatically apply Rules of the ICSID, unless the parties have agreed to other rules.<sup>106</sup>

In the various multilateral treaties establishing international courts, provisions are made for the composition of the court in question and the selection of judges. The size of the actual body varies in accordance with the terms of each instrument. For instance, the ITLOS is composed of 21 members; the ICJ is composed of 15 members while the Benelux Court of Justice is composed of 9 members.<sup>107</sup> In the case of the Court of Justice of the European Communities, each member state is attributed a seat on the bench.<sup>108</sup> As for the ICJ and the ITLOS, the members are composed of independent judges elected regardless of their nationality.<sup>109</sup>

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<sup>104</sup>Supra, note 8, Article 36.

<sup>105</sup>Supra, note 8, Article 40.

<sup>106</sup>Supra, note 11, Article 36(2).

<sup>107</sup>Supra, note 9, Article 2, Annex VI

<sup>108</sup>Statute of the Court of Justice of the European Union; article 9.

<sup>109</sup>Supra, note 8, Article 2; United Nations, *the Statute of the International Tribunal for the Law of the Sea*, 10 December 1982; 1833 UNTS 397; Article 2 (2).

The selection of members of the international courts or tribunals is generally provided for in the statute of the court or tribunal concerned. The fifteen members of the ICJ are elected by the General Assembly and Security Council from a list of qualified persons drawn up by the national groups of the Permanent Court of Arbitration or by specially appointed national groups in the case of the states members that are not represented in the Permanent Court of Arbitration.<sup>110</sup> On the other hand, the 21 members of the ITLOS are elected by the parties to UNCLOS from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. Judges will normally be elected for a renewable nine-year term.<sup>111</sup>

### **2.3 Other Pacific Methods of Settlement of International Disputes**

Although the ICJ is the principal judicial organ of the United Nations, member states to the Charter of the United Nations are not obliged to submit their disputes to its jurisdiction.<sup>112</sup> In its Chapter I (Purposes and Principles), the Charter provides that the purposes of the United Nations are to “...bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to breach of peace.”<sup>113</sup> Further, members are obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered. Chapter VI of the Charter mandates states parties to any dispute to first seek a solution through peaceful means of settlement. Such peaceful means of settlement of disputes include negotiation,

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<sup>110</sup>Supra, note 8, Article 4.

<sup>111</sup>Supra, note 16, Article 4 (4).

<sup>112</sup>Supra, note 8, Article 36.

<sup>113</sup>Supra, note 8, Article 1

inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means that the parties may choose.<sup>114</sup>

The process of negotiation is normally a prerequisite to resort to other means of peaceful settlement of disputes. The ICJ has laid emphasis on the fact that “there is no need to insist upon the fundamental character of negotiation” since, unlike other means of settlement, negotiation leads to “direct and friendly settlement of ...disputes between parties.”<sup>115</sup>

On the hand, inquiry is normally resorted to in instances where there is a difference of opinion on points of facts. The states concerned may agree to initiate an inquiry to investigate a disputed issue of fact. Similarly, states parties to a dispute may resort to inquiry when other means of settlement have been involved and there arises a need for clarification of information to elucidate the facts giving rise to the dispute.

As regards mediation, it involves third party intervention with a view of reconciling the claims of the contending parties. The third party would normally give his own proposal aimed at a mutually acceptable compromise solution. Mediation may be initiated with the object of preventing the rupture of pacific relations.<sup>116</sup> The mediator is thus mandated to reconcile the opposing claims and to appease the feelings of resentment which may have arisen between the parties to a dispute.<sup>117</sup> It may thus be said that mediation is aimed at achieving a provisional solution, such as bringing about a cease-fire when fighting has began.

Conciliation combines the elements of both inquiry and mediation.

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<sup>114</sup>Supra, note 8, Article 33.

<sup>115</sup>*North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* (1969) ICJ Rep. p 48.

<sup>116</sup>1907 Hague Convention for the Pacific Settlement of international Disputes, 18 October 1907; 93 LNTS 342; Article 8.

<sup>117</sup>ibid.,Article 4.

The task of the conciliation commission shall be to elucidate the questions in dispute, to collect all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.<sup>118</sup>

In essence, the basic functions of conciliation are to investigate and clarify the facts in dispute and to endeavour to bring parties together in order to reach an agreement by suggesting mutually acceptable solutions to the problem. In the various multilateral treaties establishing a conciliation commission, provisions are made for the appointment generally of an odd number of conciliators.<sup>119</sup>

A conciliation process may be set in motion either by mutual consent of the states parties to an international dispute relying upon a treaty in force between them, or in accordance with the terms of an applicable treaty which either establishes a permanent conciliation commission or the basis for constitution of an ad hoc conciliation. Since conciliation involves elements of fact-finding, it accordingly relies upon techniques for gathering and evaluating the facts giving rise to the dispute.<sup>120</sup>

The history of modern arbitration is attributed to the 1794 Jay Treaty of Amity, Commerce and Navigation between Britain and the United States whereby the states agreed to settle, by an arbitration commission, claims for damages by British and American nationals whose property had been taken by the new government.<sup>121</sup> The Jay Treaty was negotiated by John Jay following tensions between the United States and Britain due to the location of British military posts in the American territory and British

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<sup>118</sup> Revised Geneva General Act for the Pacific Settlement of International Disputes, 28 April 1949, 71 UNTS 101, Article 15.

<sup>119</sup> *Supra*, note 23.

<sup>120</sup> *ibid.*

<sup>121</sup> H.J. Schlochauer, 'Jay Treaty' 1(1982) EPIL p. 108.

interference with the American trade and shipping.<sup>122</sup> The Jay Treaty was ratified by both countries by February 1796. However, France saw the ratification as a violation of its own treaty of 1778 with the US hence leading to naval war. The commissions provided for in the Jay Treaty gave an impetus to the principle of arbitration.<sup>123</sup>

The object of international arbitration is the settlement of disputes between states by judges chosen by the parties themselves and on the basis of respect for law.<sup>124</sup> Recourse to international arbitration normally implies that the parties submit to the award of the tribunal, hence the results of arbitration are binding upon the parties to the dispute. Arbitration is, therefore, a compulsory means of dispute settlement due to its power to render binding decisions like judicial settlement by international courts. However, structurally, arbitration differs from judicial settlement since arbitration is constituted by mutual consent of the state parties to a specific dispute, while judicial settlement relies on pre-constituted international courts or tribunals.

The 1899 Hague Convention for the Pacific Settlement of Disputes provided for the creation of the Permanent Court of Arbitration (PCA). The 1907 Hague Convention revised the 1899 Convention, but maintained the PCA for the facilitation of settlement of disputes in instances in which diplomacy had failed to settle.<sup>125</sup> The PCA began functioning in 1902 and is still in existence, but it is neither a court nor a permanent institution. It is rather a panel of 300 persons from whom states may select one or more arbitrators in constituting a tribunal for the settlement of a particular dispute.

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<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*

<sup>124</sup> 1907 Hague Convention for the Pacific Settlement of international Disputes, 18 October 1907; 93 LNTS 342; Article 37.

<sup>125</sup> Rebecca M.M Wallace et al, *International Law*, (7<sup>th</sup> edn Sweet & Maxwell, London 2009) 337.

The PCA has been used severally in settlement of disputes and the recent example is the case between the Government of Sudan and Sudan's People Liberation Movement/Army with regards to the territorial sovereignty over the region of Abyei.<sup>126</sup> The Abyei area is an area of South Sudan that had been transferred for administration convenience to the Northern Sudan in 1905. However, the exact boundaries and size of the area were never known nor did any maps exist. In the year 2001, the parties agreed to establish Abyei Boundaries Commission to define and demarcate the area transferred to the North.<sup>127</sup> A report was completed and presented in July 2005, but the Government of Sudan was not happy with the report hence stalemate ensued between the parties for three years, marked by frequent clashes. On 22 July 2008, the parties concluded the Arbitration Agreement between the Government of Sudan and Sudan Peoples' Liberation Movement on Delimiting the Abyei area.<sup>128</sup> Under the said agreement, the two parties agreed to refer their dispute for final and binding arbitration under the Arbitration Agreement and the Permanent Court of Arbitration. The main issue submitted for determination by the tribunal was whether the Abyei Boundaries Commission had exceeded its mandate in defining and demarcating the Abyei area and, if so, the tribunal to give its own demarcation. In its decision in July 2009, the Tribunal demarcated the Abyei area in a way that decreased considerably the demarcation by the Abyei Boundaries Commission.<sup>129</sup>

Arbitration may consist of a group of individuals appointed to form an arbitral tribunal. In most treaties establishing an arbitration tribunal, an odd number of arbitrators is usually provided. For instance, in the agreement between the United Kingdom and France of 10 July 1975 regarding the establishment of an arbitration tribunal for the resolution of

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<sup>126</sup>*Government of Sudan and Sudan's People's Liberation Movement/Army Abyei* (July 22 2009); 40 ILM 983 (2001), Arbitration Award.

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*



the Continental Shelf boundary disputes in the English Channel, it provided for a court of arbitration consisting of five members; one appointed each by France and the United Kingdom and three neutral members.<sup>130</sup>

Parties to a dispute submitted to an arbitral tribunal are represented by agents whose powers and appointment may be stipulated in the *compromis*. The agents of the parties to the dispute file written pleadings which may be limited to memorials and counter memorials.<sup>131</sup>

Article 33 of the Charter of the United Nations lists resort to regional agencies or arrangements as a pacific mode of settlement of international disputes. Similarly, Article 52 of the Charter allows states of a region to undertake regional agreements to regulate their relations with respect to the question of the settlement of disputes.

International practice shows that regional agencies or arrangements have dealt with a number of disputes, applying the relevant provisions on peaceful settlement contained in their constituent instruments. For instance, within the Organization of African Unity (Africa Union), the Council of Ministers or the Assembly of Heads of State and Government created ad hoc organs in their efforts towards the peaceful settlement of disputes among African States.<sup>132</sup> In the aftermath of the armed incident which took place in October 1963 between Algeria and Morocco in connection with disputed area of Sahara, an ad hoc commission was established by the Heads of State with the mandate to examine the questions connected with the frontier dispute and make recommendations for

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<sup>130</sup><[www.un.org/depts/los/doalos/digest\\_website\\_version.pdf](http://www.un.org/depts/los/doalos/digest_website_version.pdf)> (accessed 8 July 2015).

<sup>131</sup> Article 5 of the 24 February 1955 *Compromis* between Greece and the United Kingdom in the Ambatielos arbitration <[www.legal.un.org/riaa/cases/vol\\_XII/83-153\\_ambatielos.pdf](http://www.legal.un.org/riaa/cases/vol_XII/83-153_ambatielos.pdf)> (last accessed 8 June 2015).

<sup>132</sup>C.F David Meyers, 'Intraregional conflict Management by the Organization of the African Unity' international Organization, 28 (1974) 354.

its peaceful settlement.<sup>133</sup> Through the recommendations of the ad hoc commission, the parties eventually settled the dispute amicably.

## **2.4 Conclusion**

In looking at the impact of proliferation of international courts and tribunals, this research found it pertinent to highlight other modes of settlement other than judicial means of settlement. The international court and tribunals fall under judicial methods of settlement of international dispute. The Charter of the United Nations does not only provide for judicial settlement but also for pacific methods of settlement like negotiations, inquiry and mediation.

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<sup>133</sup>ibid.

## CHAPTER 3

### THE INTERNATIONAL COURT OF JUSTICE *VIS A VIS* OTHER INTERNATIONAL COURTS AND TRIBUNALS

#### 3.1 Introduction

This chapter seeks to compare the organization and jurisdiction of the International Court of Justice (“the ICJ” or “the Court”) *vis a vis* other international courts and tribunals. As regards the other international courts and tribunals, the chapter focuses on the International Tribunal for the Law of the Sea (“ITLOS”), the World Trade Organization Dispute Settlement System, the International Centre for Settlement of Investment Disputes (“ICSID”), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court of Human Rights (ECHR). The reasons for narrowing to the said institutions vary. First, is the time factor whereby it would not be practical to analyze all existing international courts and tribunals in the world. A second criterion is based on the jurisdiction *ratione personae* before the said institutions. It was important to highlight the courts which have jurisdictions over states parties as well as individuals. The choice of the ICTY and ECHR was also informed by the fact that most writers tend to use cases decided before the said courts to show existing “conflicting” jurisdiction with the ICJ as expounded later in Chapter 4.

#### 3.2 The International Court of Justice

##### 3.2.1 Organization

The International Court of Justice is composed of fifteen members who are elected regardless of their nationality, from persons of high moral character and who possess the qualifications required in their respective countries for appointment to the highest judicial offices.<sup>134</sup>

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<sup>134</sup>United Nations, *Statute of the International Court of Justice*, 18 April 1946; 1 UNTS XVI; Article 2.

The members of the Court are elected by the General Assembly and Security Council from a list of qualified persons drawn up by the national groups of the Permanent Court of Arbitration or by specially appointed national groups in the case of the state members that are not represented in the Permanent Court of Arbitration.<sup>135</sup>

The members of the Court are elected for nine years and may be re-elected.<sup>136</sup> With a view to the speedy dispatch of business, the Court is mandated to form annually a Chamber composed of five judges.<sup>137</sup> Such a Chamber may hear and determine cases by summary procedure.

The Court has power to frame rules for carrying out its functions.<sup>138</sup> In exercising this power, the Rules of the Court, which govern its procedure and operations were adopted in 1946 and later revised in 1972, 1978, 2000 and in 2005.

### **3.2.2 Jurisdiction**

#### **3.2.3 Jurisdiction in Contentious Cases**

In the exercise of its judicial function as the principal judicial organ, the ICJ has the power to interpret the UN Charter.<sup>139</sup> In interpreting the UN Charter, the ICJ is not only entitled to give advisory opinions at the request of the General Assembly,<sup>140</sup> but may also interpret the UN Charter in contentious cases between states parties to a dispute. All members of the United Nations are, ipso facto, parties to the Statute of the ICJ.<sup>141</sup>

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<sup>135</sup>ibid., Article 4.

<sup>136</sup>ibid., Article 13.

<sup>137</sup>ibid., Article 29.

<sup>138</sup>ibid, Article 30.

<sup>139</sup>*Conditions of Admission* (1948) ICJ Reports 57.

<sup>140</sup>United Nations, *Charter of the United Nations*, 24 October 1945; 1 UNTS XVI; Article 96 (1).

<sup>141</sup>ibid.,Article 93 (1).

However, a state which is not a member of the United Nations may become a party to the Statute of the ICJ on conditions to be determined in each case by the General Assembly upon recommendation by the Security Council.<sup>142</sup>

### 3.2.3.1 Special Agreement

The jurisdictional link established by states parties in their exercise of the sovereignty is the basis of the ICJ's jurisdiction. States parties to a dispute may express recognition of the jurisdiction by way of special agreement (*compromis*) conferring jurisdiction to the Court.<sup>143</sup> In the Special Agreement of 23 May 1976 concerning the *Delimitation of the Continental Shelf (Libya/Malta)*, the Government of the Republic of Malta and the Government of the Libyan Arab Republic agreed to have recourse to the International Court of Justice.<sup>144</sup>

The jurisdiction of the Court is, thus, founded on the basis of the consent of the parties. Such consent may be express or implied. In the *Corfu Channel Case*, the Court inferred consent from the unilateral application of the plaintiff state (the United Kingdom) coupled with subsequent letters from the other party involved (Albania) intimating acceptance of the Court's jurisdiction.<sup>145</sup> In the said case, two British destroyers struck mines in Albanian territorial waters in the Corfu Channel. The explosions caused damage to the vessels and loss of life. Holding that the responsibility of the Albanian Government was involved, the Government of the United Kingdom, following upon diplomatic correspondence with Tirana, submitted the matter to the Security Council. That body invited Albania, which was not a Member of the United Nations, to participate in the discussion, on condition that she accepted all the obligations of a Member in a similar

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<sup>142</sup>*ibid*, Article 93 (2).

<sup>143</sup>*Supra*, note 1, Article 36.

<sup>144</sup>*Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (1984) ICJ Rep 1.

<sup>145</sup>*Corfu Channel Case (Preliminary Objection)* (1948) ICJ Rep 15.

case. Albania accepted and the Security Council adopted a resolution recommending the Governments concerned immediately to refer the dispute to the ICJ in accordance with the provision of the Statute. The Government of the United Kingdom then addressed an application to the Court asking for a decision to the effect that the Albanian Government was internationally responsible for the consequences of the incidents referred to above and that it must make reparation or pay compensation. On the other hand, the Albanian Government deposited with the registry of the Court a letter in which it expressed the opinion that the application of the United Kingdom was not in conformity with the Security Council's recommendation, because the institution of proceedings by unilateral application was not justified by the Charter, by the Statute or by general international law. The Court held that Albania had voluntarily submitted to the jurisdiction of the Court through its correspondence to the Court.

However, the question as to whether a party has a right to appear before the Court does not depend on consent, but is an issue which the Court itself must inquire into and determine prior to any objections to jurisdiction and admissibility.<sup>146</sup> The Court has laid emphasis on the fact that the existence of jurisdiction is a question of law and dependent upon the intention of the parties.<sup>147</sup>

### **3.2.3.2 Compromisory Clauses**

Parties may also submit to the Court's jurisdiction through compromisory clauses in a treaty or convention.<sup>148</sup> For instance, under the General Act for the Pacific Settlement of International Disputes, all legal disputes are subject to compulsory adjudication by the

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<sup>146</sup>*Legality of Use of Force (Serbia and Montenegro v. United Kingdom)* (1954) ICJ Rep 19.

<sup>147</sup>*Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* (1988) ICJ Rep 69.

<sup>148</sup>*Supra*, note 1, Article 36(1).

Court, unless the parties agree to submit them to arbitration or reconciliation.<sup>149</sup> Similarly, the Vienna Convention on the Law of Treaties of 23 May 1969<sup>150</sup> confers jurisdiction to the ICJ for disputes concerning the application or interpretation of articles 53 and 64 relating to conflicts of treaties with *jus cogens*, unless they are submitted to an ad hoc arbitration by common agreement of the parties.

### **3.2.3.3 Optional Clause**

Under Article 36 paragraph 2 of the Statute of the ICJ, states parties have the option of making a declaration by which they accept in advance the jurisdiction of the ICJ. Such declaration relate to “all legal disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.”

However, states are bound by such a declaration only with respect to states which have made a similar declaration. The declaration so made may be unconditional or on condition of reciprocity on the part of several or other states, or for a certain time. Most declarations contain reservations and the ICJ’s jurisdiction is restricted to those disputes that states have not excluded from its jurisdiction. Such reservations mostly exclude disputes for which another peaceful means is provided disputes which arose before a specific date, or which relate to a situation prior to that date and disputes which arose during or because of hostilities or which arose between certain states, among others.

### **3.2.4 Incidental Jurisdiction**

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<sup>149</sup>General Act for the Pacific Settlement of International Disputes, 28 April 1949; 71 LNTS 101; Articles 1 and 17.

<sup>150</sup>United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969; 1155 UNTS 331; Article 1.

The ICJ may be called upon to exercise incidental jurisdiction over preliminary objections, applications to intervene,<sup>151</sup> and applications for interim measures.<sup>152</sup> Such jurisdiction is independent of the main proceedings.

#### **3.2.4.1 Preliminary Objection**

A state party to a case before the ICJ may challenge the jurisdiction of the Court by raising a preliminary objection.<sup>153</sup> The filing of a preliminary objection usually suspends the proceedings on the merits and gives rise to independent proceedings. The Court may uphold or reject a preliminary objection.

#### **3.2.4.2 Third-Party Intervention**

A state which considers that it has an interest of a legal nature which may be affected by the decision in the case may submit a request to the Court for permission to intervene.<sup>154</sup> A state which is party to a convention, the construction of which is before the Court, but is not a party to the main proceedings has the right to intervene.<sup>155</sup>

For the first time in the history of the ICJ, the Court granted permission in the *Case Concerning the Land, Island and Maritime Frontier (El Salvador/Honduras)*.<sup>156</sup> The parties to the case had requested the Court to delimit the frontier line between them and determine the legal situation of the islands and maritime spaces. Nicaragua then filed a request for permission to intervene in the proceedings. The Court held unanimously that

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<sup>151</sup>Supra, note 1, Article 62.

<sup>152</sup>ibid, Article 41.

<sup>153</sup>Rules of the Court of the International Court of Justice, 14 April 1978; Article 79

<sup>154</sup>Supra, note 1, Article 62.

<sup>155</sup>Supra, note 1, Article 63.

<sup>156</sup>*Land, Island and maritime Frontier Dispute (El Salvador/Honduras)* (1990) ICJ Rep 133.



Nicaragua had demonstrated a basis of jurisdiction, since the competence of the Court is not founded upon the consent of the parties in becoming parties to the Court's Statute.<sup>157</sup> It was also held that Nicaragua had demonstrated an interest of a legal nature which may be affected by part of the judgment on the merits in the case.

Similarly, in *Cameroon v. Nigeria*, the Court stated that it followed from the juridical nature and purpose of intervention that the existence of a valid link of jurisdiction between the intended intervener and the parties was not a requirement for the success of the application.<sup>158</sup> In the case, Equatorial Guinea filed an application for permission to intervene. It stated that the purpose of the intervention was to inform the Court of Equatorial Guinea's legal rights and interests so that they remain unaffected as the Court addressed the question of the maritime boundary between Cameroon and Nigeria. In support of the reason, Equatorial Guinea argued that one of the claims presented by Cameroon ignored the legal rights of Equatorial Guinea by disregarding the median line. It averred that the general maritime area where the interests of Equatorial Guinea, Nigeria and Cameroon come together is an area of oil and gas exploration and a judgment extending the boundary between Cameroon and Nigeria would ignore Equatorial Guinea's right to explore and exploit oil and gas. The Court unanimously allowed Equatorial Guinea to intervene in the case in the manner and purposes set out in its application.<sup>159</sup>

In the *Indonesia/Malaysia Case*, the Court concluded that the "interest of a legal nature" referred not only to the dispositive, or the operative paragraphs, of the judgment but also to the reasons constituting the necessary steps to it.<sup>160</sup> In deciding whether to permit an

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<sup>157</sup>ibid.

<sup>158</sup>*Cameroon v. Nigeria* (Permission to intervene by Equatorial Guinea Intervening) (1999) ICJ Rep 1034.

<sup>159</sup>*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Permission to Intervene by Nicaragua Intervening)(1990) ICJ Rep 92.

<sup>160</sup>*Indonesia/Malaysia* (Permission to Intervene by Philippines)(2001) ICJ Rep 575.

intervention, the Court had to decide, in relation to all the circumstances of the case, whether the legal claims which the proposed intervening state had outlined might indeed be affected by the decision in the case between the parties. The state seeking to intervene must demonstrate convincingly what it asserts and where the state relies on an interest of a legal nature other than in the subject matter of the case itself, it bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have.<sup>161</sup>

### **3.2.4.3 Interim Measures**

The ICJ has power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.<sup>162</sup> A request for interim measure is given priority. The Court will indicate provisional measures if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before a final decision is given.<sup>163</sup> Such interim measures would require parties not to take any action that may aggravate the tension between the parties or increase the difficulty of resolving a dispute.<sup>164</sup> In dealing with provisional measures, the Court has to be satisfied that a good basis for exercise of its jurisdiction has been established. The provisional measures indicated by the Court are binding since the power of the Court is based on necessity and to safeguard and to avoid prejudice to the rights of the parties as determined by the final judgment.<sup>165</sup> The Court has categorically declared that:

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<sup>161</sup> *ibid.*

<sup>162</sup> *Supra*, note 1, Article 41.

<sup>163</sup> *Passage through the Great Belt, Finland v. Denmark* (1991) ICJ Rep. 91.

<sup>164</sup> *Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep. 3.

<sup>165</sup> *Lagrand (Germany v. United States)* (2001) ICJ Rep 466.

The context in which article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of article 41 when read in its context, that the power to indicate provisional measures entails that such measures should be binding, in as much as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the right of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under article 41 might not be binding would be contrary to the object and purpose of the article.<sup>166</sup>

### 3.2.5 Advisory Opinion

In addition to its function of settling international disputes, the ICJ has power to give advisory opinions on any legal question.<sup>167</sup> The advisory opinion is advisory in nature and not determinative. According to the Charter, the General Assembly and the Security Council may request the ICJ to give an advisory opinion on any legal question.<sup>168</sup> In addition, other organs of the UN and specialized agencies, when authorized by the General Assembly, may also request advisory opinions of the ICJ on legal questions touching on their activities.<sup>169</sup>

Advisory opinions are not binding in nature, but are relied upon and cited as legal authority. In the United Nations, it is customary for the requesting organ to vote on whether to accept the opinion and some international agreements provide that advisory opinion, requested by an organization is binding on the organization and the member states.<sup>170</sup>

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<sup>166</sup> Ibid.

<sup>167</sup> Supra, note 1, Article 65.

<sup>168</sup> Supra, note 1, Article 96 (1).

<sup>169</sup> Supra, note 1, Article 96 (2).

<sup>170</sup> R. Ago, 'Binding Advisory Opinions of the International Court of Justice' (1991) Am. J. Int'l L. 439.

According to the carelia principle, an advisory opinion will not be given by the Court when in effect it would be tantamount to giving a decision on a dispute between parties, one of whom refuses to participate in the proceedings.<sup>171</sup> However, in the *Namibia Case*, the Court found that there was no dispute pending between states and the carelia principle could not therefore apply.<sup>172</sup> The Court has emphasized that its advisory opinions are given to the requesting organ, not to the states, and that they are not legally binding.<sup>173</sup>

There are three roles of advisory opinions. Firstly, an advisory opinion of the Court has been used as a means of securing an authoritative interpretation of the Charter provisions or of the provisions of the constitutional documents of the specialized agencies.<sup>174</sup> For instance, such usage was manifested in advisory opinions given in *Admissions and Competence Cases*.<sup>175</sup> In the advisory opinion, the General assembly sought the interpretation of the court of Article 4 of the Charter of the United Nations touching on the question of admission of a state to membership of the United Nations. On a vote of nine to six, the ICJ advised that the conditions set out at Article 4 of the Charter of the UN are exhaustive and are not merely stated by way of information or example.<sup>176</sup>

Advisory opinion has also been used to secure guidance for various organs in carrying out their functions.<sup>177</sup> For instance, in the *Reservations*<sup>178</sup> and *Reparations cases*.<sup>179</sup> In the

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<sup>171</sup>*The Eastern Carelia Case*, (1923) P.C.I.J Ser. B No. 5.

<sup>172</sup>*Namibia Case* (1971) ICJ Rep 30.

<sup>173</sup>*Peace Treaties Cases* (1950) ICJ Rep 56.

<sup>174</sup>D.W. Bowett, *The Law of International Institutions* (4<sup>th</sup>edn, Stevens & Sons 1982) 280.

<sup>175</sup>*Admissions and Competence Cases* (1948) ICJ Rep 57.

<sup>176</sup>*ibid*.

<sup>177</sup>*Supra*, note 39.

<sup>178</sup>*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (Advisory Opinion) (1951) ICJ Rep 15.

*Reservations case*, the General Assembly requested the ICJ for its advisory opinion on the question concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The question was whether a state ratifying the Convention subject to a reservation would be regarded as being a party to the Convention. By a vote of seven to five, the ICJ opined that a state which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that state cannot be regarded as being a party to the Convention.<sup>180</sup>

On the other hand, in the *Reparations case*, the question concerning reparation for injuries suffered in the service of the United Nations was referred to the ICJ by the General Assembly. The Court was called upon to give its opinion on whether the United Nations, as an Organization, had the capacity to bring an international claim against the responsible government with a view of obtaining the reparation due in respect of the damage caused to the United Nations and to the victim or persons entitled through him. The court unanimously agreed that the United Nations, as an organization, has the capacity to bring an international claim whether or not the responsible state is a member of the United Nations.<sup>181</sup>

Thirdly, an advisory opinion has been used as a means of introducing a form of recourse from judgments of administrative tribunals.<sup>182</sup> In the application for review of Judgment No. 158 of the UNAT, the ICJ re-affirmed that equality was satisfied by the opportunity

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<sup>179</sup>*Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) (1949) (ICJ) Rep. 174.

<sup>180</sup> *Supra*, note 45.

<sup>181</sup> *Supra*, note 47.

<sup>182</sup> *ibid.*

to submit written statements and it upheld the judgment of the UN Administrative Tribunal.<sup>183</sup>

### **3.3 Other International Courts and Tribunals**

Although the ICJ has been established as the principal judicial organ of the United Nations, its jurisdiction is based strictly on the referral of disputes by the states parties.<sup>184</sup> The states parties to the Statute of the ICJ are not obliged to refer international disputes to the ICJ, but rather have the option of making such reference.<sup>185</sup> The Charter reserves states' sovereignty through the creation of other tribunals and courts.<sup>186</sup> States parties have exercised their right under the Charter and created several international courts and tribunals with specialized jurisdictions.

Among the various international courts with specialized jurisdiction, the most impressive development has been establishment of courts associated with human rights, such as, the European Court of Justice, the European Court of Human Rights, the African Court of Human Rights, and the Inter-American Court of Human Rights.

Another example of an international court with specialized jurisdiction is the International Tribunal for the Law of the Sea ("the ITLOS") and its Sea-Bed Disputes Chamber (SBDC). The establishment of the ITLOS was a reflection of the preference which many states had for a special tribunal to handle disputes arising out of the UN Convention on the Law of the Sea.

The World Trade Organization establishes its own dispute settlement mechanism. The system exists to deal with disputes concerned with trade agreements.

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<sup>183</sup>*Application for Review of Judgment No. 158 of the UN Administrative Tribunal* (1973) ICJ Rep 167.

<sup>184</sup>Supra, note 1, Article 36.

<sup>185</sup> *ibid.*

<sup>186</sup>Supra, note 6, Article 95.

On the other hand, the International Centre for Settlement of Investment Disputes (ICSID) aims at fostering private foreign investment by providing a mechanism for settlement of investment disputes.

Another category includes tribunals which deal with international crimes, such as of war crimes, genocide, and crimes against humanity. Such courts and tribunals include the International Criminal Tribunal for the former Yugoslavia,<sup>187</sup> the International Criminal Tribunal of Rwanda,<sup>188</sup> and the International Criminal Court.<sup>189</sup> This paper will focus on courts and tribunals which have jurisdiction to determine civil disputes between states rather than individuals facing criminal charges in their individual capacity. The paper will also look at the European Court of Human Rights as well as the International Criminal Tribunal for the former Yugoslavia. The latter two courts are important in this research as their decisions have been compared by the decision of the ICJ by most critics of proliferation.

### **3.3.1 The International Tribunal for the Law of the Sea (ITLOS)**

The International Tribunal for the Law of the sea (ITLOS) is a permanent international judicial body established by the 1982 UN Convention on the Law of the Sea (UNCLOS).<sup>190</sup> It became operational in 1996 and is based in Hamburg, Germany. The parties to UNCLOS may elect, upon ratification, one or more dispute settlement mechanism from the four procedures provided under Article 287 of the UNCLOS namely, ICJ, ITLOS, general arbitration or special arbitration. ITLOS is to decide cases in accordance with the substantive provisions of UNCLOS and other rules of

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<sup>187</sup>Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993; UN.S/RES/827.

<sup>188</sup>Statute of the International Criminal Tribunal of Rwanda, 8 November 1994; UN.S.RES/955.

<sup>189</sup>Statute of the International Criminal Court, 20 July 1998; 2187 UNTS 90.

<sup>190</sup>United Nations Convention on the Law of the Sea, 10 December 1982; 1833 UNTS 2; Annex VI.

international law not incompatible with the Convention.<sup>191</sup> Like the ICJ, if parties agree, ITLOS can decide a case *ex aequo et bono*.<sup>192</sup>

ITLOS is composed of 21 judges who are elected by the parties to UNCLOS from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. Judges will normally be elected for a renewable nine-year term.<sup>193</sup> ITLOS will hear cases in plenary (a quorum of 11 judges is required) but it may form special chambers for dealing with particular categories of disputes.<sup>194</sup> The Tribunal has established a Chamber for Fisheries Disputes, a Chamber for Marine Environment Disputes and a Summary Procedure Chamber.<sup>195</sup> The jurisdiction extends to state parties to the UNCLOS.<sup>196</sup> Any two state parties may agree ad hoc or through general declarations of acceptance under article 287 to refer to ITLOS any dispute over the interpretation or application of UNCLOS.<sup>197</sup>

ITLOS enjoys compulsory jurisdiction over all state parties to UNCLOS in three areas. Firstly, in cases involving requests for prompt release of vessels and crews, ITLOS will exercise jurisdiction over any two state parties, if the parties to the dispute fail to agree upon an alternative forum.<sup>198</sup> An application for prompt release of vessel can be made by the flag state of the detained vessel or on its behalf. Secondly, in disputes which are to be

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<sup>191</sup>Ibid., Article 293 (1).

<sup>192</sup>Ibid., Article 293 (2).

<sup>193</sup>Statute to the International Tribunal for the Law of the Sea, 10 December 1982; 1833 UNTS 2; Article 4 (4).

<sup>194</sup>Ibid., Article (15) (1).

<sup>195</sup>Ibid., Article 15 (3).

<sup>196</sup>Supra, note 56, Article 20 (1).

<sup>197</sup>Supra, note 53, Article 287 (1).

<sup>198</sup>Ibid., Article 92.



referred to an arbitral tribunal, ITLOS has compulsory jurisdiction to hear requests for provisional measures, if the parties fail to agree upon an alternative forum.<sup>199</sup> Thirdly, ITLOS or SBDC exercises compulsory jurisdiction over sea-bed area related disputes between states parties to UNCLOS.<sup>200</sup>

The SBDC's jurisdiction is wider and, unlike ICJ, extends also to private persons. Its jurisdiction includes disputes between states parties to UNCLOS, between a state party and the International Sea-Bed Authority, between parties to a contract governing activities in the sea bed area, and between the authority and prospective contractors.<sup>201</sup>

ITLOS jurisdiction generally extends to all disputes concerning the interpretation and application of UNCLOS.<sup>202</sup> However, certain disputes involving the rights and obligations of coastal states are excluded, including disputes involving the rights and obligations of a coastal state pertaining to marine scientific research in the exclusive economic zone or continental shelf, and fisheries disputes involving the sovereign rights of the coastal states over the living resources of the exclusive economic zone.<sup>203</sup> Such disputes are dealt with by the national courts of the Coastal States affected. Parties may also, upon ratification of UNCLOS, submit a declaration excluding from compulsory jurisdiction certain other categories of disputes.<sup>204</sup>

### ***3.3.1.1 Is there a Conflict of Jurisdiction between the ICJ and ITLOS?***

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<sup>199</sup>Supra, note 53, Article 290 (5).

<sup>200</sup>Ibid., Article 288 (2).

<sup>201</sup>Ibid., Article 187.

<sup>202</sup>ibid., Article 288.

<sup>203</sup>ibid., Article 297.

<sup>204</sup>ibid., Article 297 and 298.

It has been argued that the jurisdiction of both the ICJ and the International Tribunal for the Law of the Sea (“ITLOS”) conflict since they both encompass cases concerning the interpretation or application of the 1982 United Nations Convention on the Law of the Sea.<sup>205</sup> However, the supposed conflict between the ICJ and ITLOS is more theoretical than practical since the submission of the same case to the ICJ and ITLOS is not possible.

When a case is submitted by notification of a special agreement, the parties will inform either the ICJ or the ITLOS. The potential jurisdiction of the body to which the case has not been submitted becomes irrelevant.

When a case is submitted by application, one could imagine the possibility of forum shopping in the sense that the applicant chooses the forum it prefers. However, in practice, this is not the case since the Convention precludes forum shopping.<sup>206</sup>

In the relationship between the ICJ and the ITLOS, the acceptance of jurisdiction of the ICJ under the Optional Clause can be considered as the “agreement” under the Convention.<sup>207</sup> However, the jurisdictional priority given to the ICJ over the ITLOS as between states that have accepted the optional clause applies to all cases of compulsory jurisdiction of the ITLOS provided for in Part XV (Settlement of Disputes) the Convention. The fear of conflict of jurisdiction between the ICJ and the ITLOS is therefore unfounded.

### **3.3.2 World Trade Organization Dispute Settlement System**

In 1994, the World trade Organization (WTO) members agreed on the Understanding on Rules and Procedures Governing the Settlement of Disputes or Dispute Settlement

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<sup>205</sup>Tullio Treves, ‘Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice’ <[www.pict-picti.org/publications/PICT\\_articles/JILP/Treves.pdf](http://www.pict-picti.org/publications/PICT_articles/JILP/Treves.pdf)> (accessed 22 August 2015).

<sup>206</sup>Supra, note 40.

<sup>207</sup>ibid.

Understanding (DSU).<sup>208</sup> Pursuant to the rules in the DSU, member states can engage in consultations to resolve trade disputes pertaining to a covered agreement or if unsuccessful, have a WTO panel hear the case.<sup>209</sup> The operation of WTO dispute settlement process involves the parties and third parties to a case and may also involve the DSB panels, the appellate body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions.<sup>210</sup>

The jurisdiction of the WTO dispute settlement system is compulsory, whereby a responding state has, as a matter of law, no choice, but to accept the jurisdiction when a complaint is brought against it.<sup>211</sup> Just like the ICJ, only states can be parties to a dispute before the WTO dispute settlement system. However, access is limited to WTO member states only.<sup>212</sup>

If a member state considers that a measure adopted by another member state has deprived it of a benefit accruing to it under one of the covered agreements, it may call for consultations with the other member state.<sup>213</sup> If consultations fail to resolve the dispute within 60 days after receipt of the request for consultations, the complainant state may request the establishment of a panel.<sup>214</sup>

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<sup>208</sup> Agreement Establishing the World Trade Organization; 1994; 1867 UNTS 154; Annex 2.

<sup>209</sup> *ibid.*

<sup>210</sup> *ibid.*, Annex 2, Article 1.

<sup>211</sup> Peter Van den Bossche, 'Use of the WTO Dispute Settlement System by LDCs and LICs' [2013] Trapca 1 <[www.trapca.org/documents/trapca\\_DSS\\_paper\\_2013.pfd](http://www.trapca.org/documents/trapca_DSS_paper_2013.pfd)>(accessed 8 July 2015).

<sup>212</sup> *ibid.*

<sup>213</sup> Andreas F Lowenfeld, *International Economic Law* (2<sup>nd</sup> edn OUP 2008), 153.

<sup>214</sup> *Supra*, note 65, Article 4 (7).

It is not possible for the respondent state to prevent or delay the establishment of a Panel unless the DSB, by [consensus](#), decides otherwise.<sup>215</sup> The panel, normally consisting of three members appointed *ad hoc* by the Secretariat, sits to receive written and oral submissions of the parties, on the basis of which it is expected to make findings and conclusions for presentation to the DSB.<sup>216</sup> The proceedings are confidential, and even when private parties are directly concerned, they are not permitted to attend or make submissions separate from those of the state in question.<sup>217</sup>

The final version of the panel's report is distributed first to the parties; two weeks later it is circulated to all the members of the WTO.<sup>218</sup> In sharp contrast with other systems, the report is required to be adopted at a meeting of the DSB within 60 days of its circulation, unless the DSB by consensus decides not to adopt the report or a party to the dispute gives notice of its intention to appeal.<sup>219</sup>

A party may appeal a panel report to the standing Appellate Body, but only on issues of law and legal interpretations developed by the panel.<sup>220</sup> Each appeal is heard by three members of the permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership.<sup>221</sup> Members of the Appellate Body have four-year terms. They must be individuals with recognized standing in the field of law and international trade, not affiliated with any government.<sup>222</sup>

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<sup>215</sup>*ibid.*, Annex 2, Article 6.1.

<sup>216</sup>*ibid.*, Annex 2, Article 12 (7).

<sup>217</sup>*Supra*, note 69.

<sup>218</sup>*Supra*, note 65, Annex 2, Article 16 (1).

<sup>219</sup>*ibid.*, Annex 2, article 16 (4).

<sup>220</sup>*ibid.*, Annex 2, Article 17 (6).

<sup>221</sup>*ibid.*, Annex 2, Article 17 (2).

<sup>222</sup>*ibid.*, Annex 2, Article 17 (3).

The Appellate Body may uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.<sup>223</sup> The possibility for appeal makes the WTO dispute resolution system unique among the judicial processes of dispute settlement in general [public international law](#).<sup>224</sup>

### **3.3.3 The International Centre for Settlement of Investment Disputes (ICSID)**

The International Centre for Settlement of Investment Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between states and nationals of other states, sponsored by the World Bank and entered into force in 1966.<sup>225</sup> Unlike the ICJ, the private investor individual is directly a party to the dispute with a state litigating on the international plane.<sup>226</sup>

ICSID does not itself settle disputes but rather maintains separate panels of conciliators and arbitrators who are nominated by the contracting parties and settlement is made by the said conciliators and arbitrators acting in their personal capacity.<sup>227</sup>

As is with the ICJ, consent is the basis of the jurisdiction and the said consent must be in writing, though it can be expressed in a contract or in a compromise concluded after the

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<sup>223</sup> Article 17 of the Dispute Settlement Understanding

<sup>224</sup> Marion Panizzon, 'Good Faith in the Jurisprudence of the WTO; the Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement' [2006] HPL 396 <[www.hartpub.co.uk/asp?ISBN=9781841136202](http://www.hartpub.co.uk/asp?ISBN=9781841136202)> (accessed 8 July 2015).

<sup>225</sup> International Convention on the Settlement of Investment Disputes, 18 March 1965; 575 UNTS 159; Article 17.

<sup>226</sup> *ibid*, Article 27.

<sup>227</sup> *ibid*.

dispute has arisen or even separate submissions to the Centre.<sup>228</sup> Once consent has been given by both parties, it may not be withdrawn unilaterally.<sup>229</sup>

The parties are the state, on one hand, and the private investor, on the other hand. The private investor must be a national of another contracting state and can be an individual or a corporate entity.<sup>230</sup>

The process of settlement is initiated by a request filed with the Secretary General who registers the request unless he finds it to be manifestly outside the jurisdiction of the Centre.<sup>231</sup> The request would normally indicate whether conciliation or arbitration is required. In either event, the parties are free to select the Conciliation Commission or Arbitration Tribunal and they are not confined to choosing persons from the two Panels.<sup>232</sup>

Once constituted, the Commission or Tribunal will automatically apply Rules of the Centre, unless the parties have agreed to other rules.<sup>233</sup> The Conciliation Commission will clarify the issues and attempt to bring about an agreement, though its recommendations are not binding on the parties. On the other hand, the Arbitration Tribunal produces a binding award. It applies rules of law as may be agreed between parties or the law of contracting states and any applicable rules of international law.<sup>234</sup> Consequently, just like the ICJ, ICSID proceedings are self-contained. Under the standard procedure for the

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<sup>228</sup> *ibid.*, Article 25.

<sup>229</sup> *ibid.*

<sup>230</sup> *ibid.*, Article 25 (2).

<sup>231</sup> *ibid.*, Article 36(3).

<sup>232</sup> *Supra*, note 29, 284.

<sup>233</sup> *Supra*, note 84, Article 36(2).

<sup>234</sup> *ibid.*, Article 44.

appointment of arbitrators, each party appoints one arbitrator and the third is appointed by the agreement of the parties.<sup>235</sup>

The ICSID Convention offers only a procedure for settlement, but as for substantive rules, the Convention directs tribunals primarily to decide in accordance with any choice of law made by the parties.<sup>236</sup> In the absence of an agreement on applicable law, the Tribunal may apply the law of the host state and international law.<sup>237</sup>

ICSID awards are not subject to setting aside or any other form of scrutiny by domestic courts. ICSID has its own self-contained system for review of its awards.<sup>238</sup> The awards are final and binding upon the parties.<sup>239</sup> The award must be enforced in the territory of the Contracting States as if it were a final judgment of a court of the State.<sup>240</sup>

Parties to a dispute may refer to the ICJ any dispute regarding the interpretation or application of the Convention.<sup>241</sup> However, such a reference does not allow the ICJ to be used to challenge the validity of an award or the appeal to ad hoc committee for nullification of an award.<sup>242</sup>

### **3.3.4 The International Criminal Tribunal for the Former Yugoslavia (ICTY)**

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<sup>235</sup>ibid., Article 37.

<sup>236</sup>ibid., Article 42 (1).

<sup>237</sup>ibid., Article 42 (1).

<sup>238</sup>ibid., Article 52.

<sup>239</sup>ibid.

<sup>240</sup>ibid., Article 53.

<sup>241</sup>ibid., Article 64.

<sup>242</sup>Report of the Executive Directors, Doc. LCSID/2, Annex (1966).

The international Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the Security Council through resolution 827 as an enforcement measure.<sup>243</sup> The ICTY is an ad hoc international criminal tribunal that was stashed to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Social Federal Republic of Yugoslavia after January 1, 1991.<sup>244</sup> The tribunal has power to prosecute individual persons who commit grave breaches of the Geneva Conventions of August 12 1949 or violate the laws or customs of wars or commits genocide or crimes against humanity.<sup>245</sup>

Unlike the ICJ and ITLOS, the tribunal has jurisdiction over natural persons.<sup>246</sup> The prosecution of cases before the tribunal is the responsibility of an independent prosecutor, who investigates all matter falling within the jurisdiction of the ICTY.<sup>247</sup> The prosecutor is appointed the Security Council on nomination by the Secretary General.<sup>248</sup> The tribunal comprises of fourteen permanent judges who are appointed by the General Assembly from a list submitted by the Security Council.<sup>249</sup> The tribunal also has judges ad litem.<sup>250</sup>

### **3.3.5 The European Court of Human Rights (ECHR)**

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<sup>243</sup>UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

<sup>244</sup>UN Security Council, *Statute of the International Criminal tribunal for the Former Yugoslavia*, 25 May 1993; Article 1.

<sup>245</sup>*ibid*, Articles 2, 3, 4 and 5.

<sup>246</sup> *ibid*, Article 6.

<sup>247</sup> *ibid*, Article 16.

<sup>248</sup> *ibid*.

<sup>249</sup> *ibid*, Article 13 bis.

<sup>250</sup>*ibid*, article 13 ter.



The European Court of Human Rights is a regional permanent court with power to monitor compliance of European states with their obligations under the European Convention on Human Rights.<sup>251</sup> Unlike the ICJ and ITLOS, the ECHR has jurisdiction over individuals. The Court deals with complaints by state parties and individuals concerning the protection of human rights.<sup>252</sup>

The European Court for Human Rights is composed of full-time judges and divided into four sections. Dependent on the significance of the case, the Grand Chamber (consisting of 17 judges), the Chamber (consisting of 7 judges) or the Commission (consisting of 3 judges) will decide. The Additional Protocol No. 14 also instituted single judge formations which can definitely disallow individual complaints that are self-evidently invalid, and shall in this way help to take the pressure off the Court. At present, the European Court for Human Rights consists of 47 judges, equivalent to the number of signatory parties. They are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates presented by the respective country. But, the elected judges are independent and do not represent a country.

### **3.4 Conclusion**

Besides the ICJ, the ITLOS, WTO dispute settlement system and the ICSID are just but a few of the existing international courts and tribunals. These courts normally have specialized jurisdictions such as the ITLOS specialty is the law of the sea while the ICSD deals with international investment disputes. On the other hand, other international Courts have jurisdiction over individual parties such as the European Court of Human Right and the International Criminal Tribunal for the former Yugoslavia. The Court's jurisdiction over individuals is a departure from the traditional jurisdiction of international courts such as the ICJ whose jurisdiction is limited to state parties.

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<sup>251</sup>Convention for the Protection of Human Rights and Freedoms (European Convention on Human Rights, as amended) [1950] ETS 5, as amended [1994] ETS 155.

<sup>252</sup> *ibid*, Article 33.

## CHAPTER 4

### IMPLICATIONS OF PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS FOR THE DEVELOPMENT OF INTERNATIONAL LAW

#### 4.1 Introduction

The creation of the International Court of Justice (“the ICJ”) as the principal judicial organ of the United Nations and the reservation of states’ sovereignty through the creation of other tribunals and courts gives rise to existence of a parallel legal system.<sup>253</sup> State parties have exercised this right and created several international courts and tribunals with specialized jurisdictions.

Most critics against multiplication of international courts and tribunals argue that proliferation poses a threat to the development of international law. Problems cited range from the overlap of jurisdiction between the judicial institutions to fragmentation of international law. It is also argued that the lack of hierarchical relationship between the various international courts and tribunals hinders the growth of the jurisprudence of international law.

This chapter will look at the merits, demerits and compromise position of proliferation of international courts and tribunals. In looking at the merits, demerits and compromise position, the chapter will use three parameters: jurisdiction, state sovereignty and the horizontal and decentralized nature of international law.

#### 4.2 Is the Jurisdiction of the ICJ Compulsory?

The first international court was the Permanent Court of International Justice (“the PCIJ”) which was established by the Covenant of the League of Nations.<sup>254</sup> It was succeeded by

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<sup>253</sup>United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 95.

<sup>254</sup>League of Nations, *Covenant of the League of Nations*, 28 April 1919; [1920] ATS 1, Article 14.

the International Court of Justice (“the ICJ”) in 1946 as “the principal judicial organ of the United Nations.”<sup>255</sup> Under the Statute of the ICJ, the ICJ has general jurisdiction in cases referred to it by parties and all matters provided for in the Charter of the United Nations as well as in treaties and conventions in force between parties.<sup>256</sup>

States’ access to the ICJ is, however, not automatic. First, all members of the UN are *ipso facto* parties to the Statute of the ICJ and the Statute is an integral part of the UN Charter.<sup>257</sup> Second, a state which is not a member of the UN may become a party to the Statute of the ICJ on conditions to be determined in each case by the UN General Assembly upon the recommendations of the UN Security Council.<sup>258</sup>

The consent of state parties is the basis of the jurisdiction of the international courts and tribunals. The consent of a state can be expressed in a variety of ways. First, states parties to a dispute may express recognition of the jurisdiction by way of a special agreement (*compromis*) conferring jurisdiction to the Court.<sup>259</sup> Second, parties may also submit to the Court’s jurisdiction through compromisory clauses in a treaty or convention.<sup>260</sup> Third, parties may adhere to Optional Clause choice whereby they may at any time declare that they recognize the compulsory jurisdiction of the ICJ.<sup>261</sup> Such declaration relates to “all legal disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a

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<sup>255</sup>Supra, note 1, Article 92.

<sup>256</sup>United Nations, *Statute of the International Court of Justice*, 18 April 1946; 1 UNTS XVI; Article 36.

<sup>257</sup>Supra, note 1, Article 93 (1).

<sup>258</sup>*ibid*, Article 93 (2).

<sup>259</sup>Supra, note 4, Article 36.

<sup>260</sup>*ibid*, Article 36(1).

<sup>261</sup>*ibid*, Article 36 (2).

breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.”<sup>262</sup>The declaration is deposited with the Secretary General of the United Nations.

The declaration under Article 36 (2) is a unilateral act, creating an international obligation for the respective state which establishes the relationship between that state and the ICJ on the basis of the compulsory jurisdiction.<sup>263</sup> The state gives, in advance, its consent to submit to the jurisdiction of the ICJ. The legal obligation is created by the declaration itself and no subsequent consent is required with respect to a specific case that falls under its scope. As a result, other states that have assumed the same obligation acquire the right to bring cases before the Court against a State that has made a unilateral declaration through their own unilateral action. Consequently, the unilateral declaration under Article 36(2) establishes not only a relationship between the declarant State and the ICJ, but also a relationship between the declarant State and any other State that has made a declaration under the Optional Clause.

The declaration is subject to any reservation or reservations made by the declarant State. The term “reservation” in the context of the compulsory jurisdiction of the Court is used in the broadest sense to include reservations, conditions, exclusions, exceptions or limitations on the jurisdiction recognized by a particular declaration.<sup>264</sup>

Declarations may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.<sup>265</sup> Most declarations accepting the compulsory jurisdiction of the ICJ contain reservations excluding certain categories of

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<sup>262</sup>ibid.

<sup>263</sup>Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (Kluwer Academic Publishers, U.S.A. 1995) 9.

<sup>264</sup>Herbert W. Briggs, ‘theUnited States and the International Court of Justice: A Reexamination’ (1959) 53 AJIL301.

<sup>265</sup>Supra, note 4, Article 36 (3).

disputes.<sup>266</sup> A state may rely on the reservation of the opponent party in a case by virtue of the principle of reciprocity. Reciprocity is referred in the Statute as an alternative to an unconditional acceptance.<sup>267</sup>

The principle of reciprocity forms part of the system of the Optional Clause by virtue of the express terms of Article 36 of the Statute and of most declarations of acceptance. The ICJ has repeatedly affirmed and applied the principle in relation to its jurisdiction. For instance, in the case of *Certain Norwegian Loans*, the ICJ formulated the same conclusion, pointing out that jurisdiction is conferred upon the Court only to the extent to which the declarations of both parties coincide in conferring it, since the basis of the Court's jurisdiction is the common intention of the parties.<sup>268</sup>

In the *Case of Certain Norwegian Loans*, the French Government made an application to the ICJ requesting for determination that certain loans issued on the French market and other foreign markets by Norway stipulated in gold the amount of the borrower's obligation and that the borrower could only discharge the debt by paying the gold value of the coupons and of the redeemed bonds. According to the French Government, the bonds contained a gold clause which varied from bond to bond. On the other hand, Norway disputed the French Government's view and sought to rely on its own national law which would allow suspension of debt by the French Government and the Bank of Norway would be exempted from its obligation to redeem its notes in accordance with their nominal value. In order to resolve the impasse, France then sought to rely on international dispute settlement while the Norwegian Government insisted that the claims of bondholders were within the jurisdiction of the Norwegian courts and involved solely the interpretation and application of Norwegian law. The French bondholders

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<sup>266</sup> Supra, note 11.

<sup>267</sup> Supra, note 13.

<sup>268</sup> *Certain Norwegian Loans (France v. Norway)* (1957) ICJ Rep 9.

refrained from submitting their case to the Norwegian courts, hence the French Government referred the matter to the ICJ.

The application expressly referred to Article 36(2) of the Statute of the Court and to the Declarations of Acceptance of the compulsory jurisdiction made by France and by Norway.

The Norwegian Government raised Preliminary Objection to the effect, *inter alia*, that Norway was entitled, by virtue of the condition of reciprocity, to invoke the reservation relating to national jurisdiction contained in the French Declaration; and that the said reservation excluded from jurisdiction of the Court the dispute which had been referred to it in the Application of the French Government.

The Norwegian Government contended that by virtue of the clause of reciprocity, it had the right to rely upon the restrictions placed by France in its Declaration accepting the compulsory jurisdiction of the Court. The French Declaration provided that “This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic”.

The ICJ upheld the preliminary objection. The Court noted that the jurisdiction of the Court in the case depended upon the Declarations made by parties on condition of reciprocity. Since two unilateral declarations were involved, the jurisdiction was conferred upon the Court only to the extent to which the Declarations coincided in conferring it. The common will of the parties which was the basis of the Court’s jurisdiction, existed within the narrower limits indicated by the French reservation.

From the foregoing, the Optional Clause allows states the choice of accepting compulsory jurisdiction in all or any category legal disputes, with the possibility that they might be found to have accepted it with respect to different categories.

A state, being free either to make a declaration or not, is entitled, if it decides to make one, to limit the scope of its declaration in any way it chooses, subject always to

reciprocity. Another state seeking to found the jurisdiction of the Court upon it must show that the declarations of both states concur in comprising the dispute in question within their scope.

### **4.3 Supposed Threats Posed by Proliferation of International Courts and Tribunals**

#### **4.3.1 Same Norm Being Interpreted Differently**

One of the main concerns posed by proliferation of international courts and tribunals has been the risk of having the same norm of international law being interpreted differently in cases decided by different international courts and tribunals.<sup>269</sup> This, in turn, results in the fragmentation of international law when the same legal norm receives multiple differing interpretations by more than one judicial body.<sup>270</sup> This poses a threat to the credibility, reliability and authority of international law.<sup>271</sup> It is argued that the decisions in by the European Court of Human Rights in *Loizidou v. Turkey*<sup>272</sup> contradicted the consistent decisions like in the *Case of Certain Norwegian Cases*<sup>273</sup> by the ICJ on the issue of reservations. Similarly, it has been said that the International Criminal Tribunal for Yugoslavia in the *Prosecutor v. Tadic*<sup>274</sup> rejected the ICJ's criteria on establishing state

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<sup>269</sup> Agnieszka Szpak, 'Proliferation of International Courts and Tribunals and Its Impact on the Fragmentation of International Law' [2014] International Law Annual <[www.spilmumbai.com/issues/international-law-annual-2.aspx](http://www.spilmumbai.com/issues/international-law-annual-2.aspx)>(accessed 30 July 2015).

<sup>270</sup> Sang Wook Daniel Han, 'Decentralized Proliferation of International Judicial Bodies' <[www.archive.law.fsu.edu/journals/transnational/vol16-1/Han.pdf](http://www.archive.law.fsu.edu/journals/transnational/vol16-1/Han.pdf)>(accessed 23 July 15).

<sup>271</sup> Supra, note 3.

<sup>272</sup> *Case of Loizidou v. Turkey (Preliminary Objections)* (1995) ECHR.

<sup>273</sup> *Certain Norwegian Loans (France v. Norway)* (1957) ICJ Rep 9.

<sup>274</sup> *Prosecutor v. Dusko Tadic* (Appeal Judgment) (1999) IT-94-1-A, ICTY.

responsibility as established in the *Case Concerning Military and Paramilitary activities in and against Nicaragua*.<sup>275</sup> The said cases will now be analyzed briefly.

#### 4.3.1.1 Certain Norwegian Loans Case vis a vis *Loizidou v. Turkey*

Though the European Court of Human Rights is a regional court rather than an international court, the case of *Loizidou v. Turkey*,<sup>276</sup> has been used to illustrate the possibility of conflict of decisions by those who argue against proliferation of international courts and tribunals.<sup>277</sup> In the case of *Loizidou v. Turkey*, the European Court of Human Rights took a position different from that of the ICJ on the question of reservations contained in state parties' declarations of acceptance of compulsory jurisdiction.<sup>278</sup> The ICJ, as demonstrated earlier in the *Case of Certain Norwegian Loans*, has consistently held that such reservations are legal and must be upheld.<sup>279</sup>

In the case of *Loizidou v. Turkey*, the Government of Cyprus made an application against the Republic of Turkey. In the said application, the Court was asked to determine whether the facts of the case concerning a Cypriot national's (Mrs. Titina Loizidou) property disclosed a breach by Turkey of its obligations under Article 1 of the Protocol Number 1 and Article 8 of the Convention.<sup>280</sup> The Turkish Government then raised a preliminary

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<sup>275</sup>*Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (1986) ICJ Rep.

<sup>276</sup>Supra, note 20.

<sup>277</sup>Judge Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The outlook for the International Legal Order' (Address to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000) <[www.icj-cij.org/court/index.php](http://www.icj-cij.org/court/index.php)> (accessed 19 August 2015).

<sup>278</sup>*Case of Loizidou v. Turkey (Preliminary Objections)* (1995) ECHR 100.

<sup>279</sup>*Certain Norwegian Loans (France v. Norway)* (1957) ICJ Rep 9.

<sup>280</sup>Convention for the Protection of Human Rights and Fundamental Freedoms, 3 September 1953; 213 UNTS 221.



objection to the effect that the case fell outside the jurisdiction of the Court on the grounds that it related to events which occurred before Turkey's declaration of acceptance of the compulsory jurisdiction of the Court dated 22<sup>nd</sup> January 1990, and did not concern matters arising within the territory covered by the said declaration. According to the Turkish declaration, "This declaration extends to allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to 28 January 1987, date of the deposit of the first declaration made by Turkey under Article 25 of the Convention."<sup>281</sup>

In dismissing the preliminary objection, the Court observed that Turkey was aware of the consistent practice of Contracting States to accept unconditionally the competence of the Commission and Court. The impugned restrictive clauses were of questionable validity under the Convention system. According to the Court, it had to decide the issue in light of the special character of the Convention which would militate in favour of severance of the impugned clauses. By applying such a technique, the rights and freedoms set out in the Convention<sup>282</sup> would be ensured in all areas falling within Turkey's jurisdiction within the meaning of Article 1 of the Convention.<sup>283</sup> By separating the impugned restrictions, the remainder of the text left intact the acceptance of the compulsory jurisdiction of the Court under the optional clause.

The decision of the European Court of Human Rights thus differed sharply from the decisions of the ICJ regarding reservations in a declaration accepting compulsory jurisdiction of a court. While the ICJ has consistently held that that the jurisdiction of the Court in a case involving consent vide optional clause depended upon the declarations made by parties on condition of reciprocity, the ECHR held that a reservation could be

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<sup>281</sup> *ibid.*

<sup>282</sup> *ibid.*

<sup>283</sup> *ibid.*

severed from the rest of the text of a declaration, hence acceptance of compulsory jurisdiction will not be interfered with the separated restriction.

#### **4.3.1.2 Case Concerning Military and Paramilitary Activities in and against Nicaraguavis a vis Prosecutor v. DuskoTadic**

In its judgment on the merits in the case of *Prosecutor v. Dusko Tadic*,<sup>284</sup> the International Criminal Tribunal for the former Yugoslavia (“the ICTY”) criticized and declined to follow a decision of the ICJ. In order to determine whether it was competent, the ICTY had to establish whether there was an international armed conflict in Bosnia-Herzegovina by showing that certain of the participants in the internal conflict which had arisen in that country were acting under the control of a foreign power, in this case Yugoslavia. In its analysis of the question, the Tribunal referred to, but did not follow, the decision of the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.<sup>285</sup> In *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ had imposed the test of “effective control” by the United States of the activities of the *contras*. However, the Tribunal rejected this approach, adopting a new interpretation of international law in the matter of state responsibility. It opted for a less strict criterion in relation to the imputation of responsibility, holding that, in the case of organized groups of combatants, it was sufficient to demonstrate that those groups as a whole were under the “overall control” of a foreign State. This criterion was judged sufficient by the Tribunal to engage the responsibility of that State for the activities of the group, irrespective of whether each individual act was specifically imposed, requested or directed by the State in question.

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<sup>284</sup>Supra, note 22.

<sup>285</sup>Supra, note 23.

In the case involving military and paramilitary activities conducted by the United States against Nicaragua from 1981 to 1984, Nicaragua asked the ICJ to find that these activities violated international law.<sup>286</sup>

Nicaragua alleged that the United States was effectively in control of the contras, the United States devised their strategy and directed their tactics and that they were paid for and directly controlled by United States personal. Nicaragua also alleged that some attacks were carried out by United States military, with the aim of overthrowing the Government of Nicaragua. Attacks against Nicaragua included the mining of Nicaraguan ports, and attacks on ports, oil installations and a naval base. Nicaragua alleged that aircrafts belonging to the United States flew over Nicaraguan territory to gather intelligence, supply to the contras in the field and intimidate the population.

The United States did not appear before the ICJ at the merit stages, after refusing to accept the ICJ's jurisdiction to decide the case. The United States, at the jurisdictional phase of the hearing, however, stated that it relied on an inherent right of collective self-defence guaranteed in Article 51 of the UN Charter by "providing, upon request, proportionate and appropriate assistance..." to Costa Rica, Honduras and El Salvador in response to Nicaragua's alleged acts of aggression against those countries.

One of the key questions before the ICJ was whether the United States breached its customary international law obligation by violating the sovereignty of another State when it directed or authorized its aircraft to fly over Nicaraguan territory. On this question, the Court held that the United States breached its customary international law obligation when it trained, armed, equipped and financed the contra forces or encouraged, supported and aided the military and paramilitary activities against Nicaragua.

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<sup>286</sup> *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (1986) ICJ Rep 14.

The Court held that the United States did not devise the strategy, direct the tactics of the contras or exercise control over them in manner so as to make their acts committed in violation of international law imputable to the United States. The Court stated:

In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is a fortiori unable to determine that the contra force may be equated for legal purposes with the forces of the United States...The Court has taken the view that the United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary.

For the ICJ, the question of responsibility was a question of “degree” that the secessionist entity depends on the outside power which, in turn, indicates the outside power’s actual exercise of control over the secessionist entity. The Court distinguished strict control based on complete dependence and effective control in cases of partial dependence.

In the *Prosecutor v. DuskoTadic Case*, the International Criminal Tribunal for Yugoslavia was called upon to decide whether the accused could be found guilty of grave breaches of the Geneva Conventions during the armed conflict in Bosnia and

Herzegovina.<sup>287</sup> This depended, inter alia, on whether the acts of the armed forces of the RepublikaSrpska, a Bosnian Serb secessionist entity within the territory of Bosnia and Herzegovina fighting the recognized Government of that State, could be attributed to an outside power, that is, the Federal Republic of Yugoslavia, thus making a prima facie internal armed conflict an international one.

Although concerned with questions of individual criminal responsibility, the ICTY Trial and Appeals Chamber framed the question as one of state responsibility, namely, whether the Federal Republic of Yugoslavia was responsible for the acts of the armed forces of the RepublikaSrpska. While the Trial Chamber, by applying the “effective control” test enunciated by the ICJ in the Nicaragua Case, found that the conduct of the armed forces of the RepublikaSrpska could not be attributed to the Federal Republic of Yugoslavia, and that, for that reason the armed conflict in Bosnia and Herzegovina was not of an international character, the Appeals Chamber reached the opposite conclusion.

The Appeals Chamber held that the conduct of the Bosnian Serb armed forces could be attributed to the Federal Republic of Yugoslavia, on the basis that the forces ‘as a whole’ were under the overall control of that state. To reach this conclusion, the Appeals Chamber rejected the ICJ’s ‘effective control’ test which it held ‘not to be persuasive’ in the case of organized groups. The Appeals Chamber, instead, applied a test of ‘overall control’. According to the Appeals Chamber, the ‘requirement of international law for the attribution to states of acts performed by private individuals is that the state exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case.’

In order to attribute the conduct of secessionist entity to an outside power by applying the ‘overall control’ test, it must be proved that the outside power wields overall control over the entity, not only by financing, training, equipping or providing operational support to

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<sup>287</sup>*Prosecutor v. DuskoTadic* (Appeal Judgment) (1999) IT-94-1-A, ICTY.

it, but also by having a role in organizing, coordinating, planning or directing its military or other activities.

The Appeals Chamber, therefore, held that, on the basis of the ‘overall control’ test, the Bosnian Serb forces could be regarded as ‘de facto organs’ of the Federal Republic of Yugoslavia. Consequently, the Bosnian Serb armed forces engaged its responsibility for all their activities.

#### **4.3.1.3 Commentary on the Cases**

Although the above comparison may seem to show a conflict of findings between the ICJ and ICTY regarding an international rule, there was, indeed, no conflict. The Appeals Chamber of ICTY misread ICJ’s *Nicaragua case* and misinterpreted rules of customary international law governing state responsibility. In the *Nicaragua case*, the ICJ had applied two distinct tests of ‘strict control’ and ‘effective control’. The Appeals Chamber erroneously treated the ‘effective control’ test as setting out one of the requirements of dependence and control which form part of the ‘strict control’ test. It thereby, in effect, replaced the ‘strict control’ test with the ‘overall control’ test.

As regards the comparison of decisions on reservations in the *Certain Norwegian Loans Case*<sup>288</sup> and *Loizidou Case*,<sup>289</sup> though the findings by the ICJ and ECHR sharply contrast, it should be remembered that the ICJ in the *Certain Norwegian Loans Case* was not called to look at the validity of the reservation, but rather of the reciprocity of reservations. The cases cannot, thus, be cited as examples of conflicting decisions on the international norm on reciprocity of reservations or restrictions in declarations accepting compulsory jurisdiction of a court.

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<sup>288</sup>Supra, note 21.

<sup>289</sup>Supra, note 20.

On the contrary, the ICJ has made a similar finding on severance of a reservation in the *Aerial Incident of 10 August 1999 (Pakistan v. India)*.<sup>290</sup> In the said case, Pakistan filed an Application instituting proceedings against India in respect of a dispute relating to the destruction, on 10 August 1999, of a Pakistani aircraft. Pakistan argued that the acts of India constitute breaches of the various obligations under the Charter of the United Nations, customary international law and treaties specified in the body of this Application for which the Republic of India bears exclusive legal responsibility. In its Application, Pakistan founded the jurisdiction of the Court on Article 36, paragraphs 1 and 2, of the Statute and the declarations whereby the two Parties have recognized the compulsory jurisdiction of the Court.

India then raised a preliminary objection to the jurisdiction of the Court citing, *inter alia*, that Pakistan's Application failed to take into consideration the reservations to the Declaration of India dated 15 September, 1974 filed under Article 36 (2) of its Statute. According to the declaration, Pakistan, being a Commonwealth country, was not entitled to invoke the jurisdiction of the Court as the reservation excluded all disputes involving India from the jurisdiction of the Court in respect of any State which 'is or has been a Member of the Commonwealth of Nations'.

The Court addressed Pakistan's contention that the Commonwealth reservation is an extra-statutory reservation going beyond the conditions allowed for under Article 36, paragraph 3, of the Statute. According to Pakistan, the reservation was neither applicable nor opposable to it in this case, in the absence of acceptance. The Court observed that paragraph 3 of Article 36 of its Statute has never been regarded as laying down in an exhaustive manner the conditions under which declarations might be made. Neither did the Court accept Pakistan's argument that India's reservation was a discriminatory act constituting an abuse of right because the only purpose of this reservation was to prevent Pakistan from bringing an action against India before the Court. It noted in the first place

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<sup>290</sup>*Case Concerning the Aerial Incident of 10 August 20199 (Pakistan v. India) (Jurisdiction of the Court) (2000) ICJ Rep 15.*

that the reservation refers generally to States which are or have been members of the Commonwealth.

The Court addressed, secondly, Pakistan's contention that the Commonwealth reservation was obsolete, because members of the Commonwealth of Nations were no longer united by a common allegiance to the Crown, and the modes of dispute settlement originally contemplated had never come into being. The Court held that it "will . . . interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court"

In the Court's view, it followed from the foregoing that the Commonwealth reservation may validly be invoked in the present case. Since Pakistan "is . . . a member of the Commonwealth of Nations", the Court found that it had no jurisdiction to entertain the Application under Article 36, paragraph 2, of the Statute.

Consequently, the comparison of decisions on reservations in the *Certain Norwegian Loans Case*<sup>291</sup> and *Loizidou Case*<sup>292</sup> does not bring out conflicting decisions between the ECHR and the ICJ. In contrast, in the *Aerial Incident Case*,<sup>293</sup> the ICJ reached a similar finding as that of the ECHR on the issue of reservations. According to both courts, a reservation may be invalid hence can be severed from the rest of the declaration accepting the jurisdiction of a court. Further, the standard of proof in cases touching on violation human rights of an individual is usually more liberal so as to ensure promotion of the fundamental rights of the individual. On the other hand, in cases involving state parties, the standard of proof appears to be stricter given the equality in the bargaining powers of the parties.

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<sup>291</sup>Supra, note 27.

<sup>292</sup> Supra, note 26.

<sup>293</sup> Supra, note 38.



### 4.3.2 Overlapping Jurisdiction

It is also argued that proliferation of the international courts and tribunals leads to overlapping jurisdictions where parties concerned have a choice of courts.<sup>294</sup> Two or more courts may be seized concurrently of the same issue and render contradictory decisions. This, in turn, increases the risk of conflicting judgments.<sup>295</sup>

#### 4.3.2.1 The Swordfish Case

The *Swordfish Case*<sup>296</sup> has been cited as an illustration of the possibility of having overlapping jurisdiction, whereby the same parties bring the same dispute before two or even more different judicial bodies. The *Swordfish Case* concerned the closing of the ports of Chile for ships flying the flag of a Member State of the European Union (“EU”), impeding EU vessels to import their catches into Chile. According to the EU, the said measure violated not only the UN Convention of the Law of the Sea,<sup>297</sup> but also violated Articles V and XI of the General Agreement on Tariffs and Trade 1994.<sup>298</sup> The case was taken before a WTO Panel and also before the International Tribunal for the Law of the Sea (“ITLOS”). The WTO Panel was seized with questions of the freedom of transit, while the ITLOS was seized with questions of the freedom of fishing on the high seas. Though the case was withdrawn by parties from both the WTO Panel and ITLOS, it is argued that the case presents the danger of conflicting jurisdiction. This would arise whereby, had the case been determined by both the WTO Panel, as well as the ITLOS

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<sup>294</sup>Judge Gilbert Guillaume, ‘The Proliferation of International Judicial Bodies: The outlook for the International Legal Order’ (Address to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000) <[www.icj-cij.org/court/index.php](http://www.icj-cij.org/court/index.php)> (last accessed 19 August 2015).

<sup>295</sup>ibid.

<sup>296</sup>*Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stock in the South-Eastern Pacific Ocean (Chile/European Commission)* (2001) 40 ILM 475.

<sup>297</sup>United Nations Convention on the Law of the Sea, 10 December 1982; 1833 UNTS 2.

<sup>298</sup>General Agreement on Tariffs and Trade (1994) 33 ILM 1154.

would have had to implicitly apply a set of rules governing the other. WTO Panel would, at least, have considered the UNCLOS while the ITLOS would have had to consider the GATT.

#### **4.3.2.2 Commentary on Overlapping Jurisdiction**

It ought to be remembered that the judicial institutions such as the WTO panels and ITLOs, solely depend on the agreement between states. The above situation is, thus, rare and can be taken care of by the state parties concluding dispute settlement agreements. A good dispute settlement agreement would have specific provisions on subsidiary or exclusivity of the dispute settlement mechanisms chosen by parties. An example of such specific provisions regards the Court on Conciliation and Arbitration (“CCA”) within the Organization for Security and Cooperation in Europe (“OSCE”).

The CCA was created in the aftermath of the breakdown of the bloc-system in Europe not because there were no courts or tribunals to settle possible disputes, but because the new states were reluctant to accept already existing courts and tribunals. The question of conflicting jurisdiction was present when the Convention on Conciliation and Arbitration within OSCE was framed and it was decided that the new courts would have subsidiarity, which would subordinate them to the existing courts and tribunals.

According to Article 19(1) of the Convention, the competence of the arbitration court is not only subsidiary to that of any other court or tribunal “whose jurisdiction in respect of the dispute the parties thereto are under an obligation to accept” if this court or tribunal has been seized of the matter prior to one of the organs of the Convention. The arbitration court is also subsidiary in a case where the parties have accepted in advance “the exclusive jurisdiction of a jurisdictional body other than a tribunal...which has jurisdiction to decide with binding force, on the dispute...or if the parties thereto have agreed to seek to settle the dispute exclusively by other means”.

Similarly, the UN Convention on the Law of the Sea provides that ITLOS may not hear cases that are substantially the same as a matter that has already been examined by the

Court or has already been submitted to another procedure that entails a binding decision.<sup>299</sup>

#### **4.4 Diversity of International Law**

The universality concept presupposes that international law constitutes an organized whole, a coherent legal system.<sup>300</sup> It is viewed in terms of the ‘unity’ or ‘coherence’ of international law with strong connotations of predictability and legal security.<sup>301</sup>

The critics of proliferation of international courts and tribunals forget the decentralized character of international law. They call for promotion of a unified fully-constituted international legal system.<sup>302</sup> It is argued that due to the rapid multiplication of international courts and tribunals, international law is becoming fragmented. That fragmentation occurs when international law loses its unity and coherence through the development of new institutions handling different aspects of international law.

This argument seems to be premised on municipal law systems which come with hierarchy of judicial systems at the national level. Domestic law is taken to be the paradigm of how a legal system should work.

It should be remembered that legal rules at the domestic level are promulgated and updated by a legislature or by common law courts subject to legislative revision.<sup>303</sup>

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<sup>299</sup>Supra, note 37, Article 282.

<sup>300</sup>Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 EJIL, 267.

<sup>301</sup>ibid.

<sup>302</sup>Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ <[www.pict-pcti.org/publications/PICT\\_articles/JILP/Dupuy](http://www.pict-pcti.org/publications/PICT_articles/JILP/Dupuy)> (last accessed 19 July 2015).

<sup>303</sup> Jack Goldsmith and Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122 HLR <<http://www.jstor.org/stable/40379772>> (accessed 1 August 2015).

Courts authoritatively resolve ambiguities and uncertainties about the application of law in particular cases. The individuals to whom laws are addressed have an obligation to obey legitimate lawmaking authorities, even when legal rules stand in the way of their interest or are imposed without consent. And in cases of disobedience, an executive enforcement authority, possessing a monopoly over the use of legitimate force stands ready to coerce compliance.<sup>304</sup>

Measured against the benchmark of domestic law, international law is different and is deficient along the aforesaid dimensions. International law has no centralized legislature or hierarchical system authorized to create, revise or specify the application of legal norms.<sup>305</sup> International law is a voluntary system that obligates only states that have consented to be bound, hence obligations cannot be imposed on states against their consent. Consequently, the truth at the international level is different. International law system, unlike national law system, is horizontal in character.

The international courts and tribunals render decisions that are final and without appeal.<sup>306</sup> For instance, the decisions of the International Court of Justice (“the ICJ”) do not form *stare decisis* for other international courts or tribunals to follow. The ICJ is not mandated to follow its own judgment. Its judgment only has a binding force upon the parties to the dispute and in respect only of that particular case.<sup>307</sup>

Common to all the international courts and tribunals is the fact that they address rules of international law and render decisions. The fact that the decisions on the rules of international law may differ is a healthy process in the development of international law. This is because such differing decisions attract debates from international law scholars

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<sup>304</sup> *ibid.*

<sup>305</sup> *ibid.*

<sup>306</sup> *Supra*, note 4, Article 60.

<sup>307</sup> *ibid.*, Article 59.

and the views of the scholars ultimately help the international community to discover the most acceptable interpretation of the rules of international law. A unified international legal order is thus not only impossible, but undesirable as it would hinder the diversified nature of international law.

#### **4.5 The Principle of Sovereignty**

Sovereignty is the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the government, executive, legislative or judicial jurisdiction of a foreign state or foreign law other than public international law.<sup>308</sup>

Much literature seems to have forgotten the principle of sovereignty which has been given credence through Article 95 of the Charter of the United Nations. Members of the United Nations have the freedom to create other tribunals to which they may refer their international legal disputes.<sup>309</sup> In exercising their sovereignty, states have endeavored to enter into agreements creating international courts and tribunals.

The Statute of the ICJ also gives weight to the principle of sovereignty of states by providing that the decision of the ICJ has no binding force except between the parties and in respect of that particular case.<sup>310</sup> Proliferation is, thus, a result of the desire of states to enter into agreements with each other with their preferred dispute settlement mechanisms.

Illustrative of the desire of states to be governed by judicial institutions is the establishment of the International Tribunal for the Law of the Sea. It has been argued that the dismissal of the *South West Africa Case*<sup>311</sup> and other ICJ decisions made African

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<sup>308</sup>Miyoshi Masahiro, Sovereignty and International Law<<https://dur.ac.uk/resources/ibru/.../sos/masahiro-miyoshi-paper.pdf>> (accessed 30 July 2015)

<sup>309</sup>Supra, note 1, Article 95.

<sup>310</sup> Supra, note 3, Article 59.

<sup>311</sup>*South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (Second Phase) (1966) ICJ Rep. 6.

states wary of the ICJ, hence the creation of the International Tribunal for the Law of the Sea.<sup>312</sup>

In the *South West Africa Cases*, the Applicants (Ethiopia and Liberia) put forward various allegations of contraventions of the League of Nations Mandate for South West Africa by the Republic of South Africa. Issues arising were, *inter alia*, whether the mandate for South West Africa was still in force and whether South Africa had contravened the provisions of the Mandate. The ICJ did not address these questions, but rather emphasized the ancillary question of whether the Applicants had legal interest in the case. The Court concluded that the Applicants did not possess a legal right or interest in the matter.<sup>313</sup>

The dismissal of the complaint against South Africa on the rather formal ground of an insufficiency of legal interest on the part of the complaining states seemed to endorse South Africa's racial policies.<sup>314</sup> This generated a negative attitude toward the ICJ by the African and Asian States which felt that the ICJ was biased in favour of developed states.

In exercise of their sovereignty, the developing countries found a unique opportunity at the international conference on the law of the sea which led to the adoption of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>315</sup> The developing countries ensured that their own ideas and needs were considered in the adoption of the UN Convention on the Law of the Sea which establishes the ITLOS. The extension of

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<sup>312</sup>Tullio Treves, Conflict between the International Tribunal for the Law of the Sea and the International Criminal Court <[www.pict-pict.org/publications/PICT\\_artic;es/JILP/Treves.pdf](http://www.pict-pict.org/publications/PICT_artic;es/JILP/Treves.pdf)>(accessed 20 September 2015)

<sup>313</sup> *Supra*, note 8.

<sup>314</sup>Richard A. Falk, 'The South West Africa Cases: An Appraisal' (1967) 1 <<http://www.jstor.org/stable/2705701>> (accessed 1 August 2015).

<sup>315</sup>Emmanuel G. Bello, 'International Equity and the Law of the Sea: New Perspectives for Developing Countries' <<http://www.jstor.org/stable/43108919>> (accessed 1 August 2015).

territorial waters and the establishment of exclusive economic zone directly or indirectly impinge on the economic status of the developing countries.<sup>316</sup>

## **4.6 Development of International Law**

### **4.6.1 The International Tribunal for the Law of the Sea**

The ITLOS has made a great contribution to the current international law of the sea, mainly through the dispute settlement mechanism. The UNCLOS provides that the parties to a dispute concerning the interpretation or application of the Convention have full freedom to choose, by written declaration deposited with the Secretary General of the United Nations, among one or more of the following solution oriented approaches or dispute settlement institutions, namely, (i) the ITLOS; (ii) the ICJ; (iii) an arbitral tribunal constituted in accordance with the provisions of Annex VII of the UNCLOS; or (iv) a special arbitral tribunal established under Annex VIII of the UNCLOS. Therefore, the ITLOS is only one of the four specific mechanisms of marine dispute settlement.<sup>317</sup>

Other than the innovative mechanism of dispute settlement under the UNCLOS, the ITLOS has made several landmark decisions in the branch of the law of the sea. The decision in the *Southern Bluefin Tuna Case*<sup>318</sup> is seen as a great contribution regarding provisional measures in respect of marine living resources.

The *Southern Bluefin Tuna Case*<sup>319</sup> was the first case in which the ITLOS acted on a request for provisional measures under Article 90(5). The case involved Australia and New Zealand as the applicants and Japan as the Respondent. It concerned the conservation of the population of the Southern Bluefin Tuna fish species ('SBT'). In the

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<sup>316</sup>Ibid.

<sup>317</sup>Ibid, Article 287.

<sup>318</sup>*Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures)*(1999) 38 ILM 1624.

<sup>319</sup>Ibid.

face of the fish stock decline, the parties established the Convention for the Conservation of Southern Bluefin Tuna in 1993<sup>320</sup> ('CSBT Convention') and agreed upon a total allowable catch for each country. However, in 1998, Japan undertook unilaterally what it called experimental fishing in the Southern Indian Ocean of 1,400 tones of the SBT. The applicants claimed that Japan, by conducting unilateral experimental fishing, had failed to take the required measures for the conservation and management of the SBT in the high seas and had, thereby, breached the UNCLOS. Moreover, Japan had violated the precautionary principle which, according to the applicants, had become a norm of customary international law.

Japan argued that ITLOS lacked jurisdiction since its jurisdiction was limited to the interpretation and application of the UNCLOS and the CSBT Convention. Japan also argued that even if the ITLOS had jurisdiction, the prescription of provisional measures was not appropriate in this case, because there was no risk of 'irreparable damage' and that there was no 'urgency' in the requests of the applicants as required by the UNCLOS.

On the issue of jurisdiction, the Tribunal held that the conditions set in Article 290(5) of the UNLOS were met by the applicants and implied that it had prima facie jurisdiction in this case.

The standard for provisional measures specified in Article 290(1) 'to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment', differs, on its face, from the comparable standard established in Article 41 of the Statute of the ICJ, which authorizes the Court to "indicate", rather than "prescribe," provisional measures which ought to be taken "to preserve the respective rights of either party."

However, in this case, due to scientific uncertainties about the parental biomass of a fish stock, it could have been difficult to predict the urgency of the situation. This raised the

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<sup>320</sup>10 May 1993; 1819 UNTS 360.



question whether, in the context of marine living resources, the application of the precautionary approach rendered the requirement of urgency obsolete. The Tribunal, although it terminated the Experimental Fishing Program (EFP) for SBT, did not mention the precautionary approach, but rather applied common sense and morality.

#### **4.6.2 The International Centre for Settlement of Investment Disputes**

The International Centre for Settlement of Investment Disputes ('ICSID') was established by a multilateral convention in 1965.<sup>321</sup> The ICSID is located in Washington, D.C. and is affiliated with the World Bank. This Convention broke new ground. It gave both private individuals and corporations who were 'investors' in a foreign State the right to bring legal proceedings against that State, before an international arbitral tribunal. It is no longer necessary for such investors to ask their own governments to take up their case, at an inter-state level, through exercise of the right of 'diplomatic protection'.

#### **4.6.3 Variety of Judicial decisions**

In carrying out its functions, the International Court of justice (ICJ) is mandated to apply judicial decisions as a means for determination of rules of law.<sup>322</sup> Proliferation has led to a significant increase in the number of cases coming before the courts in various fields hence a wider base of decisions. For instance, in the law of maritime boundaries, there

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<sup>321</sup>International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965; 575 UNTS 159 .

<sup>322</sup>United Nations, *Statute of the International Court of Justice*, 18 April 1946; 1 UNTS XVI; Article 38.

has been dialogue, mainly between the ICJ and the ad hoc tribunals whereby the ICJ has cited the tribunals, hence minimizing explicit rule conflicts.<sup>323</sup>

#### **4.7 Conclusion**

The UN Charter has given credence to the principle of sovereignty by giving member states the freedom to create international tribunals where they may refer disputes to.<sup>324</sup> The multiplication of the international courts and tribunals, contrary to the predominant view of critics, contributes to the positive growth of international law. It improves efficiency through the generation of a more refined and precise system of interpretation of norms.

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<sup>323</sup>*Jan Mayen case, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, (1993) ICJ Rep 38 (separate opinion of Judge Oda).

<sup>324</sup>Supra, note 1.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

The International Court of Justice (“the ICJ”) is established as “the principal judicial organ of the United Nations.” However, though it is the principal judicial organ, it is not the only or exclusive judicial organ available to states. Members of the United Nations are free to create and make use of other international courts or tribunals for the resolution of their disputes.

States have not hesitated to create such courts and tribunals and in the recent years, there has been a rapid proliferation of international courts and tribunals. The question then arising is whether proliferation weakens or strengthens the international law.

#### 5.2 Findings on:

##### 5.2.1 The Statement of the Problem

This study defines and articulate the research problem to be whether the proliferation of international courts and tribunal has any impact for development of international law. In resolving this problem, it was necessary to look at the jurisdiction of the International Court of Justice (“ICJ”) vis a vis other international courts and tribunals. The study has found that although the ICJ has been established as “the principal judicial organ of the United Nations”, its jurisdiction is not compulsory. States parties to a dispute may express their acceptance of the jurisdiction by way of a special agreement, *compromise*,<sup>325</sup> or by submitting to the Court’s jurisdiction through compromisory clauses in a treaty or

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<sup>325</sup>*Statute of the International Court of Justice*, 18 April 1946; 1 UNTS XVI; Article 36.

convention<sup>326</sup> through the Optional Clause choice whereby they may at any time declare that they recognize the compulsory jurisdiction of the ICJ.<sup>327</sup>

Other than the freedom to consent to jurisdiction of the ICJ, states have the freedom to create and refer cases to other international courts and tribunals of their choice.<sup>328</sup> It is through the exercise of this freedom that there now exist many international courts and tribunals. Consequently, it has become pertinent to look at the impact of proliferation of international courts and tribunals in the development of international law.

In Chapter 4, the study critically looks in details at the demerits of proliferation as posed by the several scholars. The Chapter then sets three parameters in arguing a case in favour of proliferation.

As regarding the demerits, it is shown that most critiques argue that proliferation poses a risk of having the international law fragmented due to the possibility of having an international norm being given different interpretations by different international courts and tribunals. The two cases used to highlight this scenario is the *Loizidou v. Turkey*<sup>329</sup> decided by the European Court of Human Rights vis a vis *Certain Norwegian Loans*<sup>330</sup> case decided by the international Court of justice. Similarly, it has been said that the International Criminal Tribunal for Yugoslavia in the *Prosecutor v. Tadic*<sup>331</sup> rejected the

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<sup>326</sup>ibid, Article 36(1).

<sup>327</sup>ibid, Article 36 (2).

<sup>328</sup>Charter of the United Nations, 24 October 1945, UNTS XVI, Article 95.

<sup>329</sup>*Case of Loizidou v. Turkey (Preliminary Objections)* (1995) ECHR.

<sup>330</sup>*Certain Norwegian Loans (France v. Norway)* (1957) ICJ Rep 9.

<sup>331</sup>*Prosecutor v. Dusko Tadic (Appeal Judgment)* (1999) IT-94-1-A, ICTY.

ICJ's criteria on establishing state responsibility as established in the *Case Concerning Military and Paramilitary activities in and against Nicaragua*.<sup>332</sup>

A critical analysis of the argument and the cases so cited has shown that the argument does not hold water. Each case must be seen in its own peculiar circumstances and indeed no contrasting interpretation has been shown by the critiques. As regards the comparison of decisions on reservations in the *Certain Norwegian Loans Case*<sup>333</sup> and *Loizidou Case*,<sup>334</sup> though the findings by the ICJ and ECHR sharply contrast, it should be remembered that the ICJ in the *Certain Norwegian Loans Case* was not called to look at the validity of the reservation, but rather of the reciprocity of reservations. On the other hand, it has been shown that the Appeals Chamber of ICTY in the *Prosecutor v. Tadic* misread ICJ's *Nicaragua case* and misinterpreted rules of customary international law governing state responsibility.

The above notwithstanding, owing to the diversified nature of international law, the fact that the decisions on the rules of international law may differ ought to be seen as a healthy process in the development of international law. This is because such differing decisions attract debates from international law scholars and the views of the scholars ultimately help the international community to discover the most acceptable interpretation of the rules of international law.

A second prominent argument advanced by critiques of proliferation is that there is a risk of overlapping jurisdiction between the various international courts and tribunals since they do not stand in a hierarchical manner. The research finds that such scenario is rare and can be taken care of by the state parties concluding dispute settlement agreements. A

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<sup>332</sup>*Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (1986) ICJ Rep.

<sup>333</sup>Supra, note 21.

<sup>334</sup>Supra, note 20.

good dispute settlement agreement would have specific provisions on subsidiary or exclusivity of the dispute settlement mechanisms chosen by parties.

In looking at the issues arising from the Statement of the problem, this study has found that through the principle of sovereignty of states, states have the freedom to not only choose international courts or tribunals of their preference but create them. Article 95 of the UN Charter has given weight to this principle of sovereignty. The members of the United Nations have the freedom to create other tribunals to which they may refer their international legal disputes.<sup>335</sup>

The study has also found that through proliferation of international courts and tribunals, there has been a tremendous development of international law. For instance, since the establishment of the International Tribunal for the Law of the Sea, there have been several landmark decisions in the branch of the law of the sea. In the *Southern Bluefin Tuna Case*<sup>336</sup>, The OTLOS in determining the standard for provisional measures applied common sense and morality hence a departure from the traditional precautionary principle.

### **5.2.2 The Hypothesis**

This research is based on the assumption that the parallel legal system resulting from proliferation of international courts and tribunals poses positive implications for the development of international law jurisprudence.

From its finding, the research confirms the hypothesis as true. It has been found that the nature of international legal system, unlike national law system, is horizontal in

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<sup>335</sup>Supra, note 4, Article 95.

<sup>336</sup>*Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures)*(1999) 38 ILM 1624.

character. International law has no centralized legislature or hierarchical system authorized to create, revise or specify the application of legal norms.<sup>337</sup>

The decision in *Southern Bluefin Tuna Case*<sup>338</sup> has been used as an example to illustrate one of the landmark decisions contributing to the area of provision of provisional measures by international judicial institutions. The decision was delivered by ITLOS. The ITLOS, in itself, is a result of the UN member's exercise of sovereignty in creating a settlement mechanism of their choice in the law of the sea.<sup>339</sup>

The multiplication of the international courts and tribunals therefore contributes to the positive growth of international law. It improves efficiency through the generation of a more refined and precise system of interpretation of norms.

### **5.2.3 The Research Questions**

This research began by posing two research questions as follows:

- What are the implications of having a parallel system of international courts and tribunals?
- What are the prospects of development of unified international law jurisprudence from the various judicial and quasi-judicial organs?

In looking at the first question touching on the implication of having a parallel system of international courts and tribunals, the study has found that though there may be negative implications such as overlapping of jurisdiction and different interpretation of the same

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<sup>337</sup> Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 HLR <<http://www.jstor.org/stable/40379772>> (accessed 1 August 2015).

<sup>338</sup> Supra, note 12.

<sup>339</sup> United Nations Convention on the Law of the Sea, 10 December 1982; 1833 UNTS 2; Article 293 (1).

norm, such scenario are likely to be rare hence negligible in causing fragmentation of international law.

On the other hand, international law is bound to progressively develop because, owing to the decentralized nature of international law, differing decisions on a rule of international law is likely to attract debates from international law scholars. Such views ultimately help the international community to discover the most acceptable interpretation of the rules of international law. Consequently, in answer to the second research question, the prospects of development of international law are high in light of proliferation of international courts and tribunals.

### **5.3 Conclusion**

Due to the rapid increase of international courts and tribunals, most scholars have argued that proliferation has a negative impact in the development of international law. The main concern is that proliferation is likely to cause fragmentation of international law.

This paper has sought to show that, contrary to the traditional view, proliferation of international courts and tribunals lead to the strengthening rather than the weakening of international law.

The risk of weakening due to fragmentation is rather theoretical. International law is diverse in its nature. The courts and tribunals usually render decisions that are final and without appeal. The fact that the decisions on a particular rule may differ is healthy process in the development of international law. Such differing views, if any, would attract debates from scholars and ultimately help in achieving more defined international legal rules.

Further, those who call for unification of international legal system forget that each state enjoys its own sovereignty. States are eager to regulate their international relations including the mode the resolution disputes which may arise from international relations with other states. The courts and tribunals are therefore created to address new technical



and functional requirements. In this respect, proliferation of international courts and tribunals therefore enlarges the scope of the determination of international disputes. It reflects a growth in international law.

#### **5.4 Recommendations**

This research has investigated the implication on the development of international law posed by proliferation of international courts and tribunals. The research concludes by arguing out a strong case in favour of proliferation of international courts and tribunals. Although many writers argue that proliferation has led to fragmentation of international law, the arguments are not strong and if such fragmentation were to occur, it is very rare. Consequently, it is the recommendation of this research that the existing international courts and tribunals should cooperate by following each other's decisions in interpretation of rules of law. The decisions of the courts or tribunals do not have to bind each other but can be used for persuasive purposes in interpretation of the law. This will improve coherence and avoid fragmentation that may result from conflicting decisions.

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