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A SYSTEMIC PROBLEM?

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FOREWORD: IS THE PROLIFERATION OF
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The rapid proliferation of international courts and tribunals, and the increased activity of many of them, pose numerous practical problems, and stimulate reflection on conceptual questions that have come to seem more pressing because of their immediate implications for practice. This issue of the *NYU Journal of International Law and Politics (JILP)* has its origins in a symposium convened at NYU Law School in October 1998 to consider the implications of this recent proliferation. The symposium was organized jointly by the Law School, with the support of the Global Law School Program, and the Project on International Courts and Tribunals (PICT), itself a joint venture between NYU's Center on International Cooperation and the Foundation for International Environmental Law and Development in London. PICT is a substantial research enterprise concerned both with improving knowledge of, access to, and the effective running of international adjudicative bodies, and with critical study of issues ranging from *lis pendens* and amicus briefs to conflicts of jurisdiction and the composition and appointment of the international judiciary.¹ The symposium proved very rich and challenging, but its format was discussion rather than set piece papers. Having attended the symposium, the student editors of *JILP* decided that publication would be valuable for others working on these important themes, despite the heterodox nature of the materials available, and they have worked tirelessly to bring this issue to fruition, encompassing as it does a range from very substantial papers to summaries of succinct spoken presentations. The resulting collection is not a complete treatment, but it

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1. Cesare Romano's article in this issue reports some of the results of PICT's research program to date. An agenda of further research, and information on international courts and tribunals including many recent cases, is available on PICT's website. See Homepage of the Project on International Courts and Tribunals (visited Sept. 29, 1999) <<http://www.pict-pecti.org>>.

provides both a useful primer to, and the views of some distinguished international lawyers upon, a selection of the major issues arising for international lawyers from the proliferation of international tribunals.²

Reviewing the papers that follow at the request of the *Journal's* editors in order briefly to introduce them, the initial question confronted by the contributors is whether the proliferation of international courts and tribunals, in a horizontal legal arrangement lacking in hierarchy and sparse in any formal structure of relations among these bodies, is fragmenting or system-building in its effects on international law. Or, to put it more succinctly, is proliferation a problem? From this, several normative issues follow. Is there, and should there be, an international legal system? Is unification a desirable aim? What should be the judicial policy of the International Court of Justice (ICJ) and other judicial bodies in response to this non-hierarchical proliferation? What specific doctrines and practices might be elaborated to ameliorate some of the problems? A few introductory remarks may be addressed to each of these questions.

A. IS PROLIFERATION A PROBLEM?

In the past decade alone, the World Trade Organization (WTO) system, the International Tribunal for the Law of the Sea (ITLOS), the two ad hoc international criminal tribunals, the UN Compensation Commission, the World Bank Inspection Panel and its Asian and Inter-American Development Bank counterparts, the North American Free Trade Agreement (NAFTA), Andean and Mercosur systems, and several other regional economic tribunals were established, the Statutes of the International Criminal Court (ICC) and the African Court of Human and Peoples Rights were adopted, and an optional protocol allowing for complaints by individuals to the Committee on the Elimination of Discrimination Against Women was agreed. This new generation of institution-building has continued the past pattern in that there are very few for-

2. It is intended to continue the theme of a discussion convened in 1995 by the American Society of International Law and the Graduate Institute of International Studies in Geneva. See *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (AM. SOC'Y INT'L L. BULL. 9, 1995).

mal links between different courts and tribunals, let alone hierarchies of appeal or review. That the number and activities of international courts and tribunals have grown dramatically in recent years is uncontested: Cesare Romano's paper, with its striking chart, gives a sense of the patterns and complexity of this institutional proliferation over time, and he notes some of the developments in international politics that have been conducive to recent growth. But is there a *problem* of proliferation? Jonathan Charney, in his paper here and in his compendious Hague lectures, concludes that there is not.³ His examination of the legal opinions of a variety of tribunals found a general conformity of doctrine on such systemic matters as sources of international law, the law of treaties, and state responsibility, and surprising concordance even on more specific matters such as compensation for injury to aliens and international maritime boundary delimitation. The major divergences he noted were hardly cause for alarm, and largely reflected the differences in purpose and subject matter between general tribunals and special regimes, especially those dealing with human rights. Thus there are divergences of doctrine in areas such as state responsibility for failure to take affirmative measures of protection, where the Inter-American Court of Human Rights and other human rights bodies have perhaps imposed higher standards on states than has the ICJ,⁴ purported territorial limitations on a state's acceptance of an international court's jurisdiction, which have been accepted by the ICJ but rejected and ignored in the context of Turkey's responsibility for conduct in northern Cyprus by the European Court of Human Rights,⁵ and teleological approaches to treaty interpretation, which are well established in human rights tribunals but meet with more resistance in the ICJ and elsewhere. Indeed, a multiplicity of tribunals allows for creativity and iterative development of the law through dialogue among

3. See Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 *RECUEIL DES COURS* 101 (1998).

4. Compare Velásquez Rodríguez Case, 1988 I/A Ct. H.R. (ser. C) No. 4 (Judgment of July 29, 1988), with *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). See also *Prosecutor v. Tadic*, Judgment in the Appeals Chamber, Case No. IT-94-I-A (Int'l Crim. Trib. Former Yugo., App. Chamber, July 15, 1999) (visited Sept. 28, 1999) <<http://www.un.org/icty/tadic/appeal/judgement/Tadic9julyacc.html>>.

5. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 24-30 (1995).

tribunals, a process Charney applauds in his paper here, and elsewhere chronicles in detail with respect to maritime boundary delimitation.⁶ The law of maritime boundaries is unusual, however: the dialogue has been mainly between the ICJ and ad hoc arbitral tribunals, some of which have contained serving or former ICJ judges; this is one of the very few areas in which the ICJ has thought fit to cite any tribunal other than itself; and the limited number of hard rules has left much room for discretion, minimizing explicit rule conflicts.⁷ Greater problems have begun to appear in other areas, and these may become more severe as the volume of international cases rises and more tribunals become involved in directly cognate issues. One such area where differences of doctrine could conceivably lead to different outcomes in different forums concerns the significance for the international obligations of a state of a risk it perceives of harm to the environment and/or to health. As Pierre-Marie Dupuy notes in his paper, in rejecting the European Union's reliance on the precautionary principle as a defense to a prima facie violation of international trade rules in the Beef Hormones case, the WTO Appellate Body took account of the non-adoption by the ICJ of the "precautionary principle" when it had been specifically pleaded in the Hungary-Slovakia case. As this issue goes to press, the Law of the Sea Tribunal has taken a precautionary approach, without using the term, in ordering Japan as well as Australia and New Zealand not to exceed their previously-agreed quotas in the Southern Bluefin Tuna cases, although the significance of this as a general precedent depends on how far caution is thought to be peculiarly required in the Provisional Measures phase to ensure that there is no irrevocable prejudice to the rights of the parties before the final disposition of the case.⁸

6. See Charney, *supra* note 3, at 315-45; 1-3 INTERNATIONAL MARITIME BOUNDARIES (Jonathan Charney & Lewis M. Alexander eds., 1993-1998).

7. This point was made very bluntly by Judge Oda in his Dissenting Opinion in the Jan Mayen Case, Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14) (separate opinion of Judge Oda).

8. Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan) (order of Aug. 27, 1999) (visited Sept. 28, 1999) <<http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>>.

If proliferation has not been accompanied by serious fragmentation in doctrine, has it had other more critical effects? An obvious concern is multiple tribunals addressing the same dispute, without adequate rules for dealing with overlapping jurisdiction. The ICJ, which has faced this issue when the validity of inter-state arbitral awards has been challenged by an aggrieved party, has been careful not to destabilize existing law-governed adjudicative decisions.⁹ Coordination has been less effective between international human rights institutions; in particular, as Mónica Pinto notes, quite often petitions by the same individual have been addressed by both the Human Rights Committee and the Inter-American Commission on Human Rights, which was one factor, in addition to delays in these bodies, precipitating the denunciations of the Inter-American Convention and/or the Optional Protocol to the International Covenant on Civil and Political Rights by Jamaica, Trinidad and Tobago, and Guyana. Significant questions remain unresolved concerning the relationship between individual criminal responsibility and state responsibility for genocide or other atrocities,¹⁰ or more generally the relationship between national amnesty decisions, international amnesty decisions, criminal responsibility, and civil responsibility. Overlapping jurisdiction between the WTO and other bodies such as the ICJ, ITLOS, the International Labor Organization, the International Center for the Settlement of Investment Disputes or human rights bodies is already theoretically possible, and is becoming increasingly likely in practice. The range of possible problems is large, and the ability of states to manage them through foreign ministry diplomacy is limited by the increasing involvement not only of other parts of government but also of non-state actors either as litigants or as the truly inter-

9. See, e.g., Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12); Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 REUEIL DES COURS 9 (1996).

10. Some such questions have already arisen concerning the relationship between the International Criminal Tribunal for the Former Yugoslavia proceedings and ICJ cases such as Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro), or Croatia v. Yugoslavia (Serbia and Montenegro). See Application of the Convention on the Prevention of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 3 (Apr. 8); *I.C.J. Press Communiqué 99/38* (visited Sept. 28, 1999) <http://www.icj-cij.org/icjwww/ipresscom/iPress1999/ipresscom9938_19990702.htm>.

ested forces behind litigation. Ad hoc resolutions may suffice for quite some time, but it would take only a few spectacular controversies to mobilize political demands for rationalization.

A different hazard of proliferation is that as international adjudication becomes more routine, and the increasingly numerous set of courts and tribunals operate in different ways, issues that could previously be delicately finessed in one body are abruptly forced in another, and adverse comparisons come to be drawn between institutions. Tribunals that rely on authority and *gravitas* rather than either clear textual sources or integration into a vibrant political regime are particularly exposed. The legal effect of provisional measures orders of international tribunals is an area in which discrepant views may be exacerbating problems for tribunals in ensuring their own effectiveness in the ultimate disposition of cases through use of such orders. In a split decision in 1991 the European Court of Human Rights decided, taking a position that seems more deferential to states than much of its other jurisprudence, that provisional measures in the Convention system as it then operated were not binding.¹¹ The ICJ has never ruled one way or the other on the question whether its provisional measures orders are binding, although it is possible the ICJ may be called upon to do so if the LaGrand case proceeds to judgment and jurisdictional issues are overcome; this is one of two death penalty cases in which inmates were put to death in the US despite ICJ provisional measures orders with which the US is alleged not to have complied.¹² The Inter-American system recently received support from the Privy Council, which indirectly upheld provisional measures orders by the Inter-American Commission in deciding that it would be a breach of the due process clause of the Trinidad and Tobago Constitution to execute convicted persons while their cases were pending before the Inter-American Commission or the Inter-American

11. See *Cruz Varas v. Sweden*, 210 Eur. Ct. H.R. (ser. A) at 36 (1991).

12. See *LaGrand Case, Case Concerning the Vienna Convention on Consular Relations (F.R.G. v. U.S.)*, 1999 I.C.J. (Mar. 3), (visited Sept. 28, 1999) <http://www.icj-cij.org/icj/idocket/igus/igusorder/igus_iorder_19990303.htm>. The *Breard* case was discontinued, Paraguay having decided, with some encouragement from the USA, not to proceed. See *Case Concerning the Vienna Convention on Consular Relations, Request for Discontinuance (Par. v. U.S.)*, 1998 I.C.J. (Nov. 10), (visited Oct. 1, 1999) <<http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>>.

Court of Human Rights.¹³ Orders for provisional measures by the ITLOS are explicitly binding under Article 290(6) of the 1982 United Nations Convention on the Law of the Sea, and both orders issued by the Tribunal to date have been respected. The law and practice concerning provisional measures in international tribunals is thus somewhat chaotic, a situation which threatens to work injustice in particular cases, may erode respect for provisional measures, especially those that are not explicitly binding, and might encourage forum shopping. Were there to recur a situation such as that which confronted New Zealand and Australia in deciding how to proceed in the dispute with Japan about southern bluefin tuna, for instance, it is at least theoretically possible that the explicitly binding nature of the ITLOS provisional measures would be one factor to weigh in choosing to proceed under Part XV of the Law of the Sea Convention rather than invoking the jurisdiction of the ICJ pursuant to declarations made under Article 36(2) of its Statute (the "optional clause").¹⁴ Tullio Treves, a judge of the ITLOS, draws attention in his paper to some of the complexities of the relation between acceptance of ICJ and ITLOS jurisdiction, and to the likelihood that ITLOS's cases will not be confined to the relatively small group of states that have accepted its jurisdiction by express prior declaration.¹⁵

13. See *Thomas and Hilaire v. Baptiste*, 3 W.L.R. 249 (P.C. 1999) (appeal taken from Trin. & Tobago). *But cf.* *Fisher v. Minister of Public Safety and Immigration* (No. 2), 2 W.L.R. 349 (P.C. 1999) (appeal taken from Bah.) (reaching a different conclusion under the Bahamas Constitution). For background on the Inter-American system, see Mónica Pinto's paper in this issue.

14. As it happened, all three of the states involved in this dispute had made declarations under the International Court of Justice Statute, Article 36, paragraph 2, a scenario raising interesting questions of priority as between ITLOS and the ICJ under Article 282 of the 1982 Law of the Sea Convention—questions that the parties apparently elected not to take up in the ITLOS provisional measures proceedings. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 282.

15. ITLOS's provisional measures powers extend not only to ITLOS cases but also to cases over which the default body of final decision is an ad hoc arbitral tribunal. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 290(5). A significant architectural flaw is that, if the states parties to a dispute are unable to agree on appointment of arbitrators, the power of appointment devolves on the President of the Law of the Sea Tribunal or upon other members of that Tribunal by virtue of the 1982 Con-

While these examples suggest that possible problems associated with proliferation may prove more serious than some of the contributors suggest, the preponderant view, expressed here by Charney, Dupuy, Georges Abi-Saab, and several others, is that whatever the hazards of non-hierarchical proliferation, it has been the only way, and perhaps a very good way, to increase third-party settlement of international disputes through law-based forums. This in turn is regarded as an immense contribution in making more disputes effectively justiciable in practice, and in deepening the body of authoritative pronouncements of international law—the better to guide legal actors and to make future adjudicative decisions more predictable. The strongest opposition to this internationalist orthodoxy is couched in the form of objections based on sovereignty, which are pressed with increasing urgency as international regimes become more independent, effective, and potentially intrusive on local decisions. Some American opponents of the ICC express themselves in these terms. John Bolton, for example, writes:

The ICC does not fit into a coherent international “constitutional” design that delineates clearly how laws are made, adjudicated, and enforced, subject to popular accountability and structured to protect liberty. There is no such design. Instead, the court and the prosecutor are simply “out there” in the international system. This approach is clearly inconsistent with, and constitutes a stealth approach to eroding, American standards of structural constitutionalism.¹⁶

In this issue, Brown offers a very full defense of the ICC against the sovereigntist and constitutionalist charges of Bolton and others. A different kind of challenge to the presumption that more international adjudication is better has been leveled by internationalist critics of the utility and the motivations of the rush to form international criminal tribunals. José Alvarez, for example, argues that the creation by the United Nations Security Council in 1994 of the International Criminal Tribunal for Rwanda, seated far away in Tanzania, without Rwandan

vention, Annex VII, article 3(e), yet these judges may already have been involved in the case under their provisional measures power.

16. John Bolton, *Reject and Oppose the International Criminal Court*, in *Toward an International Criminal Court?* 37-8 (Alton Frye ed., 1999).

judges, and with primacy over Rwandan courts but with competence over only certain internationally-opprobrious offenses committed within a politically convenient time period, represented the pursuit of an international political and liberal-legalist agenda that may have been less helpful to justice and to the future of Rwandan society than would have been joint proceedings or trials in Rwandan courts with international observers.¹⁷ He expresses concern that the ICC Statute appears likewise to favor "ethnic neutrality" over local engagement of judges, the application of uniform international norms over local traditions and sentiments, and remote international trials of high-level perpetrators rather than any kind of reconstruction of the judicial system and locally-engaged trials in situations where, as in Rwanda in mid-1994, a country has been torn apart and its judicial system has disintegrated.¹⁸

Like all adjudicative institutions in which jurisdiction does not depend simply on case-by-case consent of the parties, international tribunals not only decide cases, they cast their shadows. Charney makes the argument that the beneficial effect of proliferation has thereby been magnified, in that the more readily the jurisdiction of law-governed forums can be invoked, the more states and other actors involved in disputes will negotiate solutions that take account of law without instituting formal proceedings or before a final third-party decision is reached. Jackson in his paper expresses broad support for this view, based on his close observation of the WTO. If states were unitary rational actors with perfect information engaging in non-coercive negotiation without transactions costs, and if judicial decisions were entirely law-governed, predictable, and routinely given full effect by all parties, negotiated settlements would be the norm and strongly law-influenced. But these assumptions are vastly too demanding in practice. Work on political economy and negotiation theory suggests that in practice, relationships between settlement and the availability of an adjudicative forum are affected by many variables, including institutional design. Mavroidis and others have drawn attention to failure of states to report many settlements of trade disputes to the WTO and suggested that the

17. See José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INT'L L.* 365, 458-68, 481-82 (1999).

18. See *id.* at 476-80.

terms of some such settlements may be inconsistent with fundamental objectives of the WTO.¹⁹ The whole question of the empirical impact of international courts and tribunals on behavior and attitudes has not yet been sufficiently studied, although the body of work on compliance and on other effects of rules and decisions is growing steadily. Nevertheless, it is an article of faith among most international lawyers that the growing availability and use of international tribunals advances the rule of law in international relations. Within this professional cadre, most of the concern expressed with regard to the proliferation of international courts and tribunals is not about the intrinsic desirability of creating such institutions but about the systemic problems to which proliferation may give rise.

B. AN INTERNATIONAL LEGAL SYSTEM?

Basic conceptual views and normative commitments are implicated by the questions: is there, and should there be, an international legal system? The papers that address these questions squarely answer them in the affirmative. Dupuy focuses on the concept of a "legal order," which he defines as "a system of norms binding on determined subjects which trigger some pre-established consequences when the subjects breach their obligations." This necessitates a definition of a "legal system," for which he turns to Herbert Hart's account of the union of primary and secondary rules.²⁰ He credibly refutes Hart's contention that international law lacks secondary rules of recognition, adjudication, and change. Finding therefore that international law has a set of primary and secondary rules, he concludes that there exists an international legal system. The appeal of Hart to the academic-practitioner community of international lawyers is readily apparent. Hart was the first to introduce into the Austinian tradition of analytic jurisprudence a concern with the substantive content of laws in a legal system, and Hart's theory lends itself to the kind of sociological description of the normative usages, externally-observable practices, and internal normative understandings that Dupuy and Abi-Saab both employ in defending the systematic unity of

19. See Henrik Horn, Petros C. Mavroidis and Hakan Nordstrom, *Equity in the WTO Dispute Settlement System: Participation*, Presentation at the Annual NBER Conference (June 3-4, 1999).

20. See H.L.A. HART, *THE CONCEPT OF LAW* 79-99 (2d ed. 1994).

international law. It may be wondered whether this account of the identity and structure of an international legal system with individuated norms and laws is sufficiently rigorous to satisfy formal non-content based analytical approaches such as that proposed by Joseph Raz.²¹ Rather than defend such a formal theory, however, Dupuy emphasizes the substantive norms of the UN Charter system as the foundation of a fully-constituted international legal system.²² 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 Charter over other treaties, as Article 103 of the Charter provides. This Westphalian approach has difficulties accounting fully for roles of actors other than states, or for the strength of the contending view that international law and international relations are large canvases in which the UN is just one part. A second approach calls for the construction of a democratically-legitimate international legal system in which judicial institutions may eventually have the power to review and strike down undemocratic international legislation. Ernst-Ulrich Petersmann takes such a process-oriented institutionalist approach in calling for a vigorous international rule-of-law constitutionalism drawing inspiration from the achievements of European institutions and the depth of cooperation attained in the WTO. A third, emancipatory approach involves denunciation of existing institutional machinery as backward-looking bureaucracy, and calls for international law and international tribunals to be reconstructed and supplanted through the realization of an international social consciousness. Philip Allott, for example, writes of the need to displace the "global public realm" of intergovernmental organizations by a new sense of a "society of all societies and of the whole human race."²³ He writes, "It is obvious that traditional international law, with its aura of feudal land-

21. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2d ed. 1980).

22. See also Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. U.N. L. 1 (1997). Cf. Bardo Fassbender, *The United Nations Charter as Constitution of the International Legal Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998).

23. Philip Allott, *The International Court and the Voice of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 17, 38 (Vaughan Lowe and Malgosia Fitzmaurice eds., 1995).

holding and its repertory of timorous civil-law analogies, can do next to nothing to establish itself as a power-above-power in relation to such an overwhelmingly dense and dynamic phenomenon [as the emergence of a global public realm]."²⁴ The second and third approaches have in common a call for a sophisticated international administrative law that does not yet fully exist, although there is much debate as to whether a developed constitutional law is a precondition for, or rather might flow from, administrative law.

But is the substantive content and efficacy of international law as it now exists—which in the ordinary-language understanding of its practitioners comprises a plethora of sources, rules, and tribunals—sufficiently coherent and grounded to amount to a single unified system? If the notion of a legal system depends on its substantive content, does it matter that inter-state politics continues to be something of an "anarchical society," and that other forms of international political organization are, like international civil society, very thin and unrepresentative? Pointing to problems of coherence or silence in the law on such fundamental matters as intervention, territory, treaties, and state formation, the critical-historical scholar Anthony Carty not so long ago argued that international law can not be defended as a system in positivist terms. "The reason is nothing more or less than the fact that States, generally agreed to be the principal subjects of the system, exist in a state of nature. . . . The state of nature signifies more than the absence of the marks of a world State, legislature, executive, and judiciary. It means that there is no legal system which defines comprehensively the rights and duties of States towards one another."²⁵ It seems necessary, if the field is to advance, to investigate alternative hypotheses, even if only to negate them. The autopoietic approach to systems pursued by Gunther Teubner, for instance, suggests investigation of the possibility that there exist many effectively self-regulating systems.²⁶ Or it might be argued that an international legal system exists, but that not everything loosely described as international law is within it. Issues of this kind are often dismissed as passé in the

24. *Id.*

25. ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW?* 1 (1986).

26. See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993); *GLOBAL LAW WITHOUT A STATE* (Gunther Teubner ed., 1997).

pragmatic Anglophone traditions, partly because these issues have been associated with analytic positivism, partly also because of some confusion between the question whether international law is law and the question whether all of what is called international law is encompassed in a single coherent system. Systemic issues have been central in several historical traditions of international law scholarship, including those associated with Triepel,²⁷ Kelsen, and Luhmann.²⁸ It is increasingly necessary again to face the systemic questions as the development of international courts and tribunals, and the prospects of conflict or incoherence amongst them, bring systemic problems to the fore.²⁹

Quite distinct from the jurisprudential questions regarding the nature and existence of the international legal system is the normative question whether a single unified system is a desirable aspiration. For Abi-Saab, Dupuy, Charney, and others the answer is a resounding "Yes." But at least one strand of critical opinion challenges this position. David Kennedy, for example, argues 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":

So let us imagine thousands of international lawyers setting out for work each morning, with quite different ideas about where they work, the object of their endeavors, the measure of their success, the nature of their opponents, even the discipline within which they will work. International law is simply the prod-

27. Triepel's *VÖLKERRECHT UND LÄNDESRECHT* (1899) is currently the subject of a multi-year project by a group of Japanese scholars, convened by Professor Masaharu Yanagihara.

28. Reference may also be made to the large body of work on the problem of lacunae and their implications for the legal system. *See, e.g.*, ULRICH FASTENRATH, *LÜCKEN IM VÖLKERRECHT: ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE, UND FUNKTIONEN DES VÖLKERRECHTS* (1991).

29. Even the contributors to this issue who do not regard systemic problems as serious acknowledge the need for vigilance, noting for instance the risk of a particular tribunal going its own way without regard to general international law—becoming a "legal Frankenstein" as Abi-Saab puts it.

uct, however messy and contradictory and confused, of all that endeavor.³⁰

The notion that there is or will or should be an international legal system is thus to be understood as one of the fantasies legal internationalists employ in the hope of getting beyond the mere aggregation of individuals' projects, providing them with a generalized cause they can champion as a detached professional collectivity: "Progress or reform means that the 'international system' defeats great power statecraft or national particularism. . . ."³¹ Abi-Saab takes issue with this view, urging that liberal institution-building internationalists call the critical scholars to account for the political implications of their criticism in a world of the second- and third-best. This goes beyond the poignant interrogatory, attributed to Abram Chayes: "How can you deconstruct it when we haven't even constructed it yet?"³² Abi-Saab's question is whether, even if it is granted that the world is of our making, any alternative to the internationalist aspiration for an international legal system can be crafted that is politically or morally preferable. That this question is seldom fully answered suggests that the critical challenge is not so much to this project as to the self-understandings, the sociology, the concerns, and the methodologies of those whose project this has been. Indeed, the critical rejoinder which also sometimes goes unanswered is that there is no neutral international legal system: its structure, its functioning, and its conception are for the benefit of some groups and interests in preference to others, and what is needed is an international politics of international law in which these struggles are explicit.

Normative debates about the desirability of unification also focus on specific regions or subject areas. Pinto raises the question whether unification of human rights tribunals might be desirable. The Council of Europe has been one of very few international organizations willing to abolish a standing international body whose mandate was still viable, consolidating the European Commission on Human Rights with the Euro-

30. David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 18 (1999).

31. *Id.* at 85.

32. See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, UTAH L. REV. 545, 562 (1997).

pean Court of Human Rights. The perennial question of reform of United Nations human rights treaty bodies has not resulted in any consolidation, and one of the leading academic proponents seems to have stepped back from this as a real possibility in his most recent report to the UN.³³ Defenders of fragmentation argue that the multiplicity of UN human rights bodies permits the development of special expertise, and that a unified body would be less diverse and representative, would devote less time to each issue, and might make unappealing trade-offs, focusing on some kinds of rights abuses but neglecting others.³⁴

C. ROLES OF THE ICJ

Abi-Saab urges that the ICJ has a special role to play in unifying the international legal system, but argues that it is for the International Court of Justice to act so as to earn a place as the higher court in a non-hierarchical order, seizing opportunities to assert control over other bodies and to provide an authoritative interpretation of general international law rather than basing decisions on narrow or fact-specific grounds. Dupuy's prescription is similar—he urges the ICJ to assume the full mantle of its role as the principal judicial organ of the United Nations, decries the hesitancy of the ICJ to play such an assertive role since its 1986 decision in *Nicaragua v. US*,³⁵ and urges that the judges must commit themselves to the idea of a true international legal order. Three grounds for hesitation about this prescription were strongly represented at the symposium. One argument is that tribunals, like all decision-makers, must act in context, and systemic aspirations are only one part of such a context. Michael Reisman, for instance, has argued strongly against idealist self-expansion by the ICJ of its jurisdiction where powerful states do not consent, and in favor of substantial deference to the Security Council in certain situ-

33. See P. Alston, *Final report on enhancing long-term effectiveness of the United Nations human rights treaty system*, UN Doc. E/CN.4/1997/74 (Mar. 7, 1997).

34. See Craig Scott, *Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights*, in *THE FUTURE OF HUMAN RIGHTS TREATY MONITORING* (Philip Alston & James Crawford eds., forthcoming 2000).

35. *Military and Paramilitary Activities*, *supra* note 4.

ations.³⁶ Gennady Danilenko reinforces this point in the specific context of advisory opinions, noting that the Economic Court of the Commonwealth of Independent States has had problems with compliance where it has used its advisory jurisdiction in an attempt to settle a dispute where not all of the states affected are before the court. A second argument is that the disputes before the ICJ are frequently dangerous enough that it is understandable that the Court gives a higher priority to settling them than to issuing sweeping legal pronouncements, so that Abi-Saab's trenchant denunciation of the ICJ for engaging in "transactional justice" is easier to accept in the abstract than in real cases. A third and more sweeping view is that the ICJ is not likely to be the site of the radical renovation of the international legal system that is increasingly called for. Christine Chinkin, Hilary Charlesworth and others have called for reform of the whole range of international lawmaking processes to encompass many more actors and voices.³⁷ Other critics press for an assortment of reforms of process and substance that are not all compatible, and which in many cases the ICJ would have great difficulty in leading. Nevertheless, there are signs that the barrage of calls for change may be having some incremental effect.

D. NATIONAL AND INTERNATIONAL

Perhaps the greatest problem associated with the growth in the jurisdiction and activities of international courts and tribunals is the connection between these bodies and national law and institutions, particularly national courts and tribunals. This issue has been much considered elsewhere and is not a focus of this collection,³⁸ but several of the contributors draw attention to doctrines of international law that may bear use-

36. See MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 19-45 (1992); Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 97-99 (1993).

37. See Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 421; Christine Chinkin, *Enhancing the International Law Commission's Relationships with Other Law-Making Bodies and Relevant Academic and Professional Institutions*, in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50 333 (United Nations, 1998).

38. See INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996).

fully on these questions. Jackson points to the articulation by states of an explicit doctrine of judicial restraint in the establishment of the WTO Dispute Settlement Body, an approach discussed but not so easily followed in the ICC negotiations. Brown provides a lucid account of the doctrine of complementarity as it has emerged in the ICC, inviting questions as to its potential utility in other contexts. He points also to arguments against the revival of a doctrine long eclipsed in noting the parallels between modern assertions by states of exclusive jurisdiction over nationals as against an international tribunal whose statute they have not accepted, and doctrines of exclusive jurisdiction over nationals whose discrediting led to the demise of consular courts in the late nineteenth and early twentieth centuries. Eyal Benvenisti enters into the debate about whether international courts should explicitly allow a "margin of appreciation" to states in determining policy on issues involving internationally protected human rights—such a doctrine has become a staple of European Court of Human Rights jurisprudence but has generally not been accepted by the Human Rights Committee or the Inter-American Court of Human Rights. Benvenisti's argument is that no such margin should be allowed where the allegation is that the majority in a state is oppressing a minority—he sees international tribunals as a safeguard to help overcome the majoritarian problem in democracy. It may be wondered, though, whether it is always possible for international bodies legitimately to second-guess local decisions, even on issues of fundamental rights. International tribunals may not have the legitimacy necessary to play such roles in every situation, and, in deeply divided societies, they may be wiser to defer to a complex national compromise than to take the sometimes dangerous step of overturning it. These issues go in part to the question of international constitutionalism and in part to the limits of the judicial function. They remind us that while questions concerning the roles, capacities, and proliferation of international courts and tribunals are of great importance, much of international law does not take place in international courts and tribunals. While the attention of scholars and practitioners properly and necessarily is engaged with the implications of the increase in adjudica-

tion and other forms of third-party decision-making, it is useful to recall that other forms of legal knowledge, normative argument, and legal change, which have contributed so much to making present possibilities realizable, remain important.