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Book review: Y. Shany, The Competing Jurisdiction of International Courts and Tribunals

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The Competing Jurisdictions of International Courts and Tribunals. By Yuval Shany. Oxford, New York: Oxford University Press, 2003. Pp. lxix, 348. Index. \$95, £60.00.

The notion of *jurisdictio* in the international legal order is currently undergoing some dramatic changes. Because of a sharp increase in the number of international courts and tribunals—frequently termed a “proliferation”—the power to state what is lawful (*jus dicere*) at the international level is increasingly fragmented. This proliferation has resulted mainly from the extension of international law into new areas previously subordinated to states’ sovereignty (for example, criminal justice) or to those areas that were basically not regulated multilaterally at all (for example, international trade in services). Since the early 1990s, the following mechanisms have been established: the Appellate Body of the World Trade Organization (WTO), 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 counterparts at the Asian Development Bank and the Inter-American Development Bank, the North American Free Trade Agreement (NAFTA) dispute settlement mechanisms, the Andean and Mercosur dispute settlement systems, and several other regional economic tribunals. In addition, the International Criminal Court (ICC) and the African Court on Human and Peoples’ Rights were recently established. What is also noticeable is that in addition to the multiplication of dispute settlement procedures, more permanent tribunals have been established and, perhaps, there has been lesser use of ad hoc tribunals.

These recent developments, especially in view of their uncoordinated nature, inherently carry the danger of overlaps in jurisdictional scope. Thus, a given dispute might be brought before more than one dispute settlement mechanism. By way of example, the International Court of Justice (ICJ), which has jurisdiction to adjudicate any legal dispute between states, may have concurrent jurisdiction with other international tribunals like ITLOS or the WTO dispute settlement mechanisms.

Yuval Shany, a full-time lecturer at the Academic College of Management in Israel, has conducted an important new study on the proliferation of dispute settlement mechanisms and on its legal and policy implications for the international legal

order.¹ *The Competing Jurisdictions of International Courts and Tribunals*, an edited version of the author’s Ph.D. dissertation, was published as part of Oxford University Press’s newly launched “International Courts and Tribunals Series.” It was awarded an ASIL Certificate of Merit in March 2004 for its “preeminent contribution to creative legal scholarship.” Facilitating reader access to the materials in the book are various tables of cases, treaties, domestic law, and authorities, as well as a thorough index.

The goal of Shany’s book is to search for possible methods of regulating the problem of competing jurisdictions in international law, as jurisdictional conflicts, be they partial or total, “are not only possible, but are a real and inevitable phenomenon” (p. 73). The first part of the book deals with the jurisdiction of the principal international courts and tribunals, and delineates overlapping domains. The book describes cases and situations that have indeed caused multiple proceedings. In the second part of the book, the author discusses some of the potential systemic and practical problems that may be generated by this jurisdictional rivalry. He then discusses possible ways of mitigating these problems. In the third part of his study, Shany analyzes existing rules of international law that regulate interjurisdictional competition, and he also suggests possible additional norms or legal arrangements. One of the book’s most significant legal contributions is that it is the first major work to consider the application in public international law of doctrines developed and applied traditionally as part of domestic law and private international law—for example, *forum non conveniens*, *lis alibi pendens*, *res judicata*, and *electa una via*.

Shany’s book convincingly demonstrates that the proliferation of dispute settlement forums raises complex questions. There are, in fact, several types of proliferation, and they all have an impact on the issue of competing jurisdictions. For the sake of clarity, one can distinguish the multiplication of forums (which can be named proliferation *ratione fori*) that encompasses the constellation of courts and tribunals, from the multiplication of actors (proliferation *ratione personae*)

¹ For previous work on this issue, see Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 RECUEIL DES COURS 101 (1998); Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U.J. INT’L L. & POL. 679 (1999); Panel: *The “Horizontal” Growth of International Courts and Tribunals: Challenges or Opportunities?* 96 ASIL PROC. 369 (2002).

and the expansion both of specific areas of law (proliferation *ratione materiae*) and of spatial jurisdiction (proliferation *ratione loci*). They are all various facets of the same problem and are linked to one another.

The notion of proliferation *ratione loci* refers both to the enlargement and fragmentation of the spatial aspect of dispute settlement jurisdiction through the intermingling of national and international courts, and to the sharp increase of regional dispute settlement forums. The notion of proliferation *ratione materiae* reveals the possible pitfall created by the issue of *lex specialis*. There is a risk of competition between various sets of rules as they have emerged, and consequently between the relevant dispute settlement forums. Proliferation *ratione personae* refers to an interesting situation: in addition to the institutionalization of dispute settlement, a significant development has been its gradual opening to all international actors, be they sovereign states, international organizations, or nonstate actors. Shany shows that the international judicial process has changed from a method developed by states to serve their own interests to a tool increasingly available to all entities to obtain justice and further the international rule of law. International organizations have *locus standi* before several forums. Nonstate actors, such as individuals, nongovernmental organizations, and private firms, have gained *locus standi* before various dispute settlement mechanisms (for example, human rights bodies and the Permanent Court of Arbitration). In other contexts (for example, the World Trade Organization and the North America Free Trade Agreement), they have been granted the right to submit *amicus curiae* briefs.

One cannot but note the exponential "demand" for dispute settlement and, as a consequence, an elastic "supply" of mechanisms and procedures. As revealed in Shany's book, this proliferation, in its various guises, is generating concern and is seen by some as a threat to the international system. "Forum shopping," "parallel litigation," "lack of finality," "incompatible judgments," and "accelerated fragmentation of the law" are some of the notions used to characterize the potential risks. Shany shares this concern and argues that jurisdictional competition might "introduce deharmonizing tensions" (p. 94). He also observes that "the lack of binding precedent under international law . . . , combined with the poor level of jurisdictional co-ordination . . . , threatens the coherence of international law" (p. 111, footnote omitted).

The discrepancies between courts' and tribunals' rulings on international issues have, so far, not been significant enough to challenge either the coherence or the legitimacy of international law in a systemic sense. Nevertheless, one cannot ignore the potential for such problems to emerge in the future. Shany thinks that the various international tribunals do, in fact, have their own specific agendas. They were arguably created to serve the interests of those states that cooperated in their establishment. The tribunals' allegiance to the particular treaty regimes that incorporate them may actually supersede, however, their allegiance to the international legal system as a whole. There is a risk that these specialized tribunals may be driven away from the core of international law through their own centrifugal forces, consequently damaging the coherence of the international legal system. There is no reason to think, however, that these developments will go so far as to create completely autonomous subsystems, each with its own judicial system (or other legal means of control and enforcement) that would operate as if it were independent from the general international legal order.

The fragmentation of international law is undoubtedly due, in part, to the absence of hierarchy among courts and tribunals, and also to the absence of any requirement to refer to previous decisions. The International Law Commission, in *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*,² has noted the possibility of conflicts emerging as a result of dispute settlement institutions that interpret and apply international law. The scenario in the *Tadić* case³ is often quoted as a likely illustration of such fragmentation. In its appellate judgment, the International Criminal Tribunal for the Former Yugoslavia deviated from the test of "effective control" used in the *Nicaragua* case⁴ in relation to *de facto* organs, retaining a looser "overall control" test. It remains to be seen, however, whether this interpretation conflicts with the one given by the ICJ. The respective contexts appear to be quite different.

If, within the broader perspective of the expanding international legal order, the development of

² Report of the International Law Commission on the Work of Its Fifty-fifth Session, UN GAOR, 58th Sess., Supp. No. 10, ch. X, UN Doc. A/58/10 (2003), at <<http://www.un.org/law/ilc/>>.

³ Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment (July 15, 1999), at <<http://www.un.org/icty/>>.

⁴ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 109 (June 27), at <<http://www.icj-cij.org>>.

new frameworks of obligations spawns new bodies to implement them, it is reasonable to assume that, in the long term, the development of this new generation of dispute settlement institutions will contribute to the reduction, or even elimination, of separate international legal domains that remain outside any legal control by third-party entities. In this context, one might well ask whether it might be possible to establish a hierarchy among the various available options for third-party settlement of international disputes. There is currently no political will to establish such a hierarchy of international tribunals—one that would impose the preeminence of the ICJ or, indeed, of any other tribunal. Shany emphasizes that this situation is linked to the absence of hierarchy that is inherent to the international system. Unlike a domestic legal system, which is fairly unified, the international system is characterized by interconnected and nonhierarchical relations:

[T]here is no real international judicial system comparable to those found under domestic legal systems. As a result, rules harmonizing domestic jurisdictional competition (the 'intra-systematic model'), which are premised upon the existence of a coherent system of adjudicative institutions, are *prima facie* inapplicable to international courts and tribunals, where one finds looser forms of jurisdictional coordination and harmonization. (P. 126)

In the absence of an *ipso jure* and ex officio hierarchy in the international legal system, the book attempts to identify the rules that govern jurisdictional conflicts. From the network of treaty obligations currently in place (essentially the constitutive instruments of international courts and tribunals), it is not possible to deduce established principles of international law that can be implemented to address jurisdictional conflicts. Given the wide range of forum-selection provisions (which may or may not establish exclusive jurisdiction) and the scarcity of jurisdiction-regulating norms addressing multiple proceedings (such as *lis alibi pendens*, *electa una via*, or *res judicata*), Shany concludes that there are no clear and common jurisdictional-regulating rules. This conclusion reflects his extensive exploration of the statutes, practices, and case law of international courts and tribunals.

Insofar as parallel proceedings are concerned, no coherent principle has emerged from the case law. According to Shany, however, it is plausible that *lis alibi pendens* has indeed become a general principle of law that has been developed in most national legal systems in order to govern

such proceedings. Considerations of comity and the doctrine of abuse of rights may also regulate parallel proceedings. The status of the *res judicata* rule seems to be clearer since it is both a rule of customary international law and a general principle of law. Nevertheless, the question of its application deserves more attention. Different courts and tribunals have issued inconsistent rulings on the scope of the "same dispute" and also on the question of whether to allow exceptions to *res judicata*. The current rules that serve to regulate overlapping jurisdiction between forums are not really adequate. New rules are needed, both for the protection and improvement of the international legal system and for more effective harmonization. As wisely stated by Shany:

[I]n the future, given the need to strengthen the coherence of the international legal system, new methods ought to be explored in order to unify further the international judiciary and to alleviate procedural problems associated with jurisdictional overlaps, *inter alia*, by introducing additional jurisdiction-regulating rules capable of providing greater levels of co-ordination and harmonization to the relations between the various international courts and tribunals. It is submitted that the combined effect of more organized jurisdictional inter-fora relations and a higher degree of jurisprudential consistency could transform international courts and tribunals into a judicial system, enjoying meaningful levels of inner-coherence, and thus result in the strengthening of the unity of international law. (P. 127).

To conclude, one is surely tempted to share Shany's view that better-coordinated relationships between courts and tribunals will contribute to the reinforcement of the international legal order and to the emergence of an international judicial system. The number of international disputes capable of being decided by third-party techniques is constantly growing, a factor that is decisive for assessing the value, if not—as maintained by some scholars—the very existence, of any legal order. Even though we are far from having what could be considered an international judicial system, it can be said that the increasing number of international courts and tribunals, together with the numerous diplomatic mechanisms of control and compliance, represent a key element in the development of a real judicial function within the international order. This non-hierarchical proliferation certainly has certain weaknesses, but it seems to be the only way to improve third-party settlement of international disputes in law-based forums. The international legal

order is not some kind of chaotic bazaar; dispute-settlement mechanisms and procedures are important machinery for ensuring its well-ordered functioning. The great majority of courts and tribunals have developed an increased awareness of their possible contribution to this end.

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International Organizations Before National Courts.

By August Reinisch. Cambridge, New York: Cambridge University Press, 2000. Pp. lxviii, 443. Index. £80, \$110.

If one were asked to identify a single dramatic change in the structure of international law since the end of World War II, the prime candidate would likely be the rise of international organizations. Without the United Nations, the process of peaceful settlement, the reconciliation of competing differences, and the task of promoting respect for human rights would be, if not seriously weakened, at least very different. Without numerous specialized agencies and other similar inter-governmental organizations, the business of running the international system in areas as diverse and critical as world trade, the law of the sea, and environmental protection would be equally hard to visualize. It has become clear that no state, however powerful, can conduct international relations without taking into account the existence and functioning of international organizations.

Such institutions have not only significantly shifted the focus and orientation of international law at the international level, they have also begun to impact more and more upon domestic political systems. In so doing they have raised questions that challenge our vision of the place and role of international law—both horizontally and vertically. Contemporary activity on such issues ranges from the current consideration of the responsibility of international organizations by the International Law Commission under Special Rapporteur Professor Gaja¹ to the work of the International Law Association's Committee on the Accountability of International Organizations, whose final report was presented to the Berlin Conference in August 2004.²

¹ See, e.g., Report of the International Law Commission on the Work of Its Fifty-fourth Session, UN GAOR, 57th Sess., Supp. No. 10, at 228, UN Doc. A/57/10 (2002), available at <<http://www.un.org/law/ilc/>>.

² It should be noted for the sake of completeness that the reviewer is co-rapporteur of this committee, of which Reinisch is a member.

August Reinisch, professor of public international law at the University of Vienna, has produced a book that takes our understanding of the impact of international organizations one step further. It is not a general work describing the nature and scope of these organizations such as the volumes of Schermers and Blokker³ or Amerasinghe⁴ or Klabbbers;⁵ nor is it a book that takes as its subject one particular aspect of the work of international organizations.⁶ Reinisch's book discusses the nature of international organizations in relation to domestic legal systems and thus raises a host of critical and fascinating issues.

Reinisch approaches his task from a practical and practice-oriented point of view. His methodologically empirical perspective, termed "phenomenological" (p. 1), has many advantages, for it enables the reader to see exactly how domestic courts deal with problems involving international organizations and thus illuminates in a comparative manner the area of interaction or overlap between domestic and international law. It is an invaluable and instructive lesson in the advantages that the "practical" approach may bring to international law, since theory in the absence of an examination of actual dilemmas faced by those individuals or institutions that must make decisions can never be more than part of the story. However, this volume is more than simply an exposition of practice. It addresses various themes, dominant among them the relationship between the protection of the independence of international organizations and the need for accountability (referred to as the debate between "functionalists" and "constitutionalists"). Reinisch believes that this balance is currently weighted in favor of the former to the detriment of the latter (p. 319), a situation that he seeks to redress.

The heart of the book is contained in the analysis of practice in part I. Here the author seeks to explain on the basis of a thorough and avowedly descriptive case-by-case examination how domestic judges actually tackle issues where international organizations are involved. This analysis is divided into two sections which deal with "avoidance techniques" and "strategies of judicial involvement,"

³ HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY (3d rev. ed. 1995).

⁴ CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (1996).

⁵ JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2002).

⁶ E.g., KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS (2002).

that is, respectively, the grounds upon which national courts either refrain from exercising jurisdiction over international organizations or proceed to exercise such jurisdiction. In many ways the two sections constitute a mirror image of the problems at issue, and these focus on the legal or juridical personality of such organizations and immunity. The policy issues underpinning such approaches are discussed in part II, with particular focus upon the functional need for immunity and the position of third parties. The practice and the policy come together in part III, which raises broad issues of principle to which reference will be made later.

A national court may avoid adjudication most radically by treating the international organization in question as a legal or juridical nonentity thus unable to sue or be sued. This refusal to recognize the organization as a legal person under domestic law, although dramatic, is as Reinisch shows, rare in case law (p. 38). However, the question of legal personality relies on the incorporation and applicability of international rules within the national legal order and thus raises the issue of the relationship between international and domestic law as seen from the perspective of the domestic court. Reinisch takes the position that the declaratory theory, according to which the domestic system simply accepts the international legal personality of the organization and applies it internally, is probably not correct and that it is the constitutive approach, which posits the need for a domestic legal act in order for domestic legal personality to exist, that "rest[s] on firm ground" (p. 62). This analysis is correct on the basis of current case law, although one should note that, for example, national courts are willing to accept that, in relevant instances concerning the nature and structure of the international organization, the applicable law is public international law.⁷ One of the consequences of the current globalization trend covering not only trade but also environmental, human rights, and international criminal law issues is the problem posed to domestic courts of how to reconfigure the executive/judicial relationship faced with the acceptance of increasing jurisdiction over extraterritorial events. Reinisch discusses this important and topical question of nonjusticiability and similar claims made with regard to international organizations. Although concluding that such claims have not apparently been successful as a ground for refusal of jurisdiction, Reinisch does intriguingly point

to hints of the doctrine in the case law and suggests that further developments may take place in this area (pp. 90-92 and 99).

While it is argued that immunity is only one of a variety of sophisticated techniques used by domestic courts in deciding whether or not to take jurisdiction with regard to an international organization, it is clear that immunity is the most frequently used avoidance technique in this sense (p. 127). Reinisch helpfully points out that immunity from jurisdiction possesses a dual international and domestic nature and stresses that a failure by the national courts to comply with the rules of international law in this respect (irrespective of domestic law) will entail the responsibility of the state concerned on the international level. Immunity under international law will depend upon relevant treaty provisions as well as customary law. However, Reinisch concludes on the basis of state practice that no customary obligation of states to accord immunity to organizations to which they are not members has yet emerged (p. 157).

The techniques used by national courts for asserting jurisdiction reflect the main themes developed earlier, ranging from nonqualification as an international organization to the personality issue (recognition of the organization as a legal person under domestic law), the denial or restriction of the scope of immunity, and the broad interpretation of waivers. In each case, Reinisch deploys his materials persuasively and skillfully. One should particularly note the valuable section on human rights concerns and the balance that must be struck between the right of access to a court and immunity (pp. 278-313, and discussion at pp. 324-327). Some of this has been presented before organs of the European Convention on Human Rights,⁸ and it is unlikely that we have heard the last of this particular problem.

The book concludes with a section on future developments, bringing together practice and policy. The key issue explored here is the value of national courts in providing an appropriate forum for disputes involving international organizations. In this analysis Reinisch moves beyond the descriptive and explanatory to concentrate upon the necessity for an acceptable balance between the need to maintain the independence and proper functioning of international organizations on the one hand, and the right of access to a court for individuals seeking redress against the organization on the other hand. Reinisch seeks to redress

⁷ See, e.g., *Westland Helicopters Ltd. v. Arab Org. for Industrialisation*, [1995] 2 All ER 387.

⁸ See, e.g., *Waite v. Germany* (Eur. Ct. H.R. Feb. 18, 1999), at <<http://www.echr.coe.int/Eng/Judgments.htm>>.