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## *Book Review*

**YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (Phillipe Sands et al. eds., 2003) 348 pp.**

Candice Whyte\*

This book examines the issue of jurisdictional competition between international courts and tribunals. The author argues for jurisdictional coordination and harmonization, rather than competition, among the international tribunals. Although his argument may be viewed as more Utopian than realistic, he nonetheless makes a convincing appeal for why this harmony must exist.

The author begins with the familiar concept of social order at the domestic level. There are domestic systems of law that regulate human behavior and provide for “peaceful settlement of disputes.”<sup>1</sup> However, as the different actors (natural persons, states, and international organizations) expand and interact in the international realm, it is necessary and inevitable that the international systems of law enacted to regulate social order at that level also experience some growth. Shany speaks in terms of *explosions*. In the build up to his ultimate question of “whether there is one co-ordinated system of international law or rather an accumulation of independent self-contained regimes,”<sup>2</sup> the author describes some of the *explosions* to which he refers. For example, in recent years international law has expanded into areas where once there was no international regulation. “New permanent and compulsory arbitration bodies invested with broad subject-matter jurisdiction,”<sup>3</sup> such as the World Trade Organization’s (WTO) panels system and the North American Free Trade Agreement (NAFTA), have developed. There are also several quasi-judicial procedures, such as the investigative procedures of the World

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<sup>1</sup> Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Phillipe Sands et al. eds., 2003).

<sup>2</sup> *Id.* at 10-11.

<sup>3</sup> *Id.* at 6.

Bank Inspection Panels and the citizens' submissions procedures of the North American Environmental Co-operation Commission, that "often exercise compulsory jurisdiction and can make a significant contribution to the settlement of international disputes."<sup>4</sup> The compulsory jurisdiction of both the Court of Justice of the European Communities (ECJ) and the European Court of Human Rights (ECHR), two of the most important international courts, has also expanded in recent years.<sup>5</sup> While this trend of expansions (or explosions) has normalized the concept of international law, it has also contributed to the greater potential for jurisdictional overlap between international courts and tribunals. The author does an excellent job of demonstrating that civil procedure issues relegated to domestic legal systems are also of grave concern in the international sphere. Practical issues such as forum shopping, parallel litigation, lack of finality, and incompatible judgments are very present in international law.<sup>6</sup>

At the end of the introduction, Shany declares his purpose to "investigate the overlaps between the compulsory jurisdictions of international courts and tribunals."<sup>7</sup> He limits his study to courts and tribunals with broad jurisdictional powers because there is an increased potential for overlap between systems with broadly defined competence.<sup>8</sup>

The author dedicates the first part of his book to defining jurisdictional overlap and jurisdictional competition. He explains that jurisdictional overlap occurs where parties have more than one forum available in which to address their particular dispute. The author posits that "jurisdictions are deemed truly to compete with one another for business only if the involved parties can hope to achieve comparable results from the rival procedures" and that "only proceedings which address

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.* at 13.

similar or related disputes (i.e. similar or related sets of opposing claims) between similar or related parties qualify as competing procedures.”<sup>9</sup>

Shany states that international courts and tribunals are sorted into four jurisdictional categories based on their geographic and subject-matter reach: universal courts and tribunals; global specialized courts and tribunals; regional courts and tribunals with unlimited competence; and regional specialized courts and tribunals.<sup>10</sup> While the author devotes many pages to the characteristics of the different jurisdictional categories, his ultimate point is that, despite the careful delineation of different types of courts, jurisdictional conflicts between international courts and tribunals are still a very real problem. For example, the entire jurisdiction of one court or tribunal may completely overlap with the jurisdiction of another judicial body. There are also instances of partial overlap that are particularly evident where specialized tribunals operate in the same area of law (i.e., the WTO and NAFTA). The author contends that as international disputes become more intricate, and international courts and tribunals grow in number (and their subject-matter jurisdiction and personal jurisdiction also expand), the overlap will only worsen, as legal issues will potentially fall under a greater variety of jurisdictions.

The second part of the book addresses both the legal and policy issues concerning the competition between the jurisdictions of international courts and tribunals. The author states that “the most significant effect of the upsurge in the number of international courts and tribunals (and the expansion of the jurisdiction of existing bodies) is an increase in the role of adjudication in international relations, in general, and in international dispute settlement, in particular.”<sup>11</sup> The positive aspect of this upsurge is that it provides a more expeditious route to resolve disputes, which only helps to legitimize and encourage

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<sup>9</sup> *Id.* at 21.

<sup>10</sup> *Id.* at 29.

<sup>11</sup> *Id.* at 77.

the development of international law. However, the author is quick to provide the negative aspect to this upsurge: a decreasing reliance on diplomacy and a more litigious global environment.

Shany reminds us that the goal is jurisdictional harmony, which is available in the more legitimate and longstanding tradition of domestic systems of law, but missing in the uncoordinated and incoherent system of international law. The author deftly points out the need to alleviate procedural problems currently plaguing jurisdictional overlaps, as well as the need for a unified international judiciary, by creating rules that will provide greater harmony and coordination between the various international courts and tribunals. The author queries whether jurisdiction-regulating norms governing competition at the domestic level should be introduced into international law. For example, whereas domestic systems intervene when a party engages in forum shopping, there are very few restrictions on forum shopping in the international sphere.<sup>12</sup>

In the third and final part of the book, the author concludes that either there is only partial regulation or that regulatory developments have been insufficient. Due to the dearth of established practice, there are no precise guidelines that can provide "an overarching principle that should govern the choice of procedure in each and every case, and there does not seem to be a 'common law' on this specific issues."<sup>13</sup> There has yet to be a general principle significantly restricting parties' choice of forum in international disputes. While there seems to be some regulation in the area of parallel proceedings, there has been insufficient practice to lead to any definitive conclusions or principles. Finally, because *res judicata* is the most developed and accepted of the traditional rules of managing multiple proceedings, there are actually cases of international law that regard *res judicata* as having a preclusive effect regarding re-litigation of settled disputes.<sup>14</sup>

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<sup>12</sup> *Id.* at 173-174.

<sup>13</sup> *Id.* at 227.

<sup>14</sup> *Id.* at 269-270.

In closing, the author finds that structural reforms are needed, and he addresses the possibility of avoiding further jurisdictional overlap between international courts and tribunals. Due to the lack of coordination and harmonization among the various international judicial bodies, "international courts and tribunals do not at present constitute a real judicial system, i.e. a structured or organized institutional order."<sup>15</sup> This lack of proper structure is dangerous, as it can lead to inconsistent decisions by various courts on the same dispute, and it might create an incentive for parties to "engage in abusive forum shopping, to initiate multiple proceedings, and to challenge final judgments."<sup>16</sup> According to Shany, structural reform could be radical and run the gamut from international legislation geared toward redefining jurisdictional competence to the creation of a universal appellate court vested with mandatory jurisdiction. However, the author points out that such possibilities are perhaps too radical and would necessitate extreme changes in the present condition of international law. More reasonable structural reform might include increasing the role of the International Court of Justice (ICJ) as the body capable of providing coordination and harmony.<sup>17</sup> Another area for improvement is increased judicial cooperation among international courts and tribunals. Courts should defer to the prior decisions of other international tribunals, and the courts should regularly exchange information.<sup>18</sup> Furthermore, the author finds that conflict of law problems would be minimized if states would simply engage in better strategic planning regarding their "various procedural obligations to submit to dispute resolution."<sup>19</sup>

In sum, the author's purpose is to examine the interaction between international courts and tribunals within their respective jurisdictions. He concludes that there is an existing jurisdictional overlap and that the problem will

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<sup>15</sup> *Id.* at 272.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 273-275.

<sup>18</sup> *Id.* at 278-280.

<sup>19</sup> *Id.* at 281.

inevitably grow worse as international disputes increase and international actors resort to the judicial system more often than the diplomatic system. The author also addresses the adverse implications of jurisdictional competition as it relates to inconsistencies in judicial determinations and found that rules governing this competition were noticeably absent. As the scope of international law and the availability of various international fora expands, the problem of competing jurisdictions becomes more widespread. Shany concludes that "the present situation is unsatisfactory and that measures necessary to mitigate multiplicity of proceedings relating to the same disputes ought to be adopted (including general measures of harmonization, reducing the incentive for engaging in multiple proceedings)."<sup>20</sup> The reader is left wondering whether "appropriate steps will be taken in good time by those states, persons, and institutions responsible for the well-being of the international community."<sup>21</sup>

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<sup>20</sup> *Id.* at 288.

<sup>21</sup> *Id.*