

Interest Group Discussion Session Papers
Group Discussion

THE INTERNATIONAL JUDICIAL FUNCTION¹

*Group Discussion*²

The Rapporteur, Professor Georges Abi-Saab, considered the question of “one or many”; namely, whether there exists a single judicial function or multiple ones. He first considered the concept in its historical context. The concept of the international judicial function was almost non-existent until World War I. The Peace of Westphalia represented a nadir of international arbitration and adjudication. The rise of sovereignty led to a great reluctance to submit disputes to any form of judicial settlement. The history of the international judicial function was therefore very limited until the end of the 19th century, with the exception of the *Alabama* case. Even at the time of the call for a Permanent Court of Justice there was no discussion of the “international judicial function”, although the Permanent Court of International Justice, established in 1922, and its later reincarnation, the International Court of Justice, implicitly attempted to define it, particularly in the context of its new species, the advisory function. The concept of “international judicial function” became explicit in the 1960s when discussion focussed on its *limits*.

Professor Abi-Saab reflected on some of the limits to the international judicial function. The concept absorbs the essentials of the generic judicial function, but is refined further by the fundamental principle of international law, the consensual basis of jurisdiction. Drawing on his personal experiences, Professor Abi-Saab reflected on his arrival at the ICJ. He commented at the time that the judges, most of whom had previous experience as domestic judges, needed to train like cosmonauts, in order to be “weightless” in the rarefied atmosphere of the international system. Pointing to an example of the limits of the international judicial function as expressed by the International Court, Professor Abi-Saab cited the *Nuclear Tests* case, when the court refused to give judgment on a moot point.

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² Reported by: Dr Isabelle Van Damme and Ms Margaret Young.

What was the effect of the proliferation of international courts and tribunals on the concept of the international judicial function? Each court or tribunal attempted to remain within the international judicial function, while adapting to its particular context and especially its mandate. Although he acknowledged the risks of the proliferation of international courts and tribunals, the fact was that the number of cases involving conflicts of jurisdiction or jurisprudence had been quite limited. The “epistemic community of international adjudication” was crucial in containing these risks, and should be considered as an important unifying factor of the international judicial function. But success in containing risks of proliferation was mostly due to the judicial wisdom of judges and their caution in not stepping beyond the clear limits of their mandate. Drawing again on his personal experience as a Member of the WTO Appellate Body, Professor Abi-Saab commented that the Appellate Body is currently criticized for doing precisely that. This demonstrates the limit of the judicial function and the link between law-creation and law-adjudication. Parties prefer to settle their disputes in specialized forums with compulsory jurisdiction, such as the WTO. But they sometimes raise issues, such as the precautionary principle, over the existence and contents of which in international law, trade judges do not feel equipped or competent to decide. Such issues have to be resolved in the proper specialized (or general) fora, which would in turn inform the trade judge. To conclude, adjudication must occur in the proper forum, and judges must remain within the limits of their mandate, which taking into account the developments in the international legal system at large.

Professor Willem Van Genuchten, Tilburg University, said that the creation of so many courts and tribunals since 1950s demonstrated progress in international law and a sense of pragmatism in responding to particular problems. He nevertheless encouraged more reflection on the conditions for creating any new court or tribunal, more research on the legal and historical aspect of this development and more understanding of the substantive links between tribunals.

Margaret Young, Fellow of the Lauterpacht Centre and Pembroke College, Cambridge, wondered whether the problems of proliferation might be addressed by innovative institutional and procedural arrangements, which would, in turn, test the concept of the international judicial function. She invoked the current example of proposals for fisheries subsidies disciplines at the WTO, which have recommended new authority-sharing arrangements whereby a WTO panel would sit with other international organisations such as the FAO to adjudicate upon disputes. This would confront problems of the WTO’s lack of relevant expertise in ruling upon “unsustainable” fisheries subsidies as well as more general problems of fragmentation. In

response, President Guillaume emphasised the distinction between the fragmentation of international law and the proliferation of courts and tribunals.

Andres Rigo Sureda, Former Deputy General Counsel, World Bank, expressed surprise at the great interest in the phenomenon, considering the small number of cases illustrating possible risks of the proliferation of courts and tribunals. Another possible dimension of this development is the reality that many courts and tribunals refer to each other. In other words, the development was accompanied by increasing cross-fertilization of jurisprudence. There was a tendency in the discourse to emphasize the problems of proliferation, instead of focusing on the cross-fertilization between the jurisprudence of various forums.

Professor John H. Jackson, Georgetown University Law Center, agreed with Professor Abi-Saab that different tribunals operate in different contexts and have different goals. Overall, at least 12 goals of international dispute settlement could be identified, some of which conflict. For example, the objective of redressing harm by offering compensation did not sit easily with the prime objective of the WTO dispute settlement system to have Members change their WTO-inconsistent measures. Similarly, the goal of efficiency could conflict with the objective of the WTO dispute settlement system to provide predictability and security to the world trading system. It was important to recall that some of these objectives do not merely relate to the interests of States. In the WTO context, entrepreneurs need predictable rules to protect their operations and investments. Moreover, *precedent* was a concept with variable meanings, depending on the context to which it is applied. While general international law provided the common infrastructure within which all these courts and tribunals operate, some parties had a tendency to claim more rules as part of this common infrastructure than they are justified to claim.

Professor Alain Pellet, Université Paris X-Nanterre, observed three characteristics of international society: it is increasingly decentralized; does not have a judicial structure similar to that of domestic law (where jurisdiction can be exercised even if the protagonists do not accept it); and is a society without a legislator. These characteristics have important consequences for our understanding of the international judicial function. First, the acceptance of dispute settlement between States is a positive development. Even if the international judicial process does not always operate efficiently, it remains the most civilized form of dispute resolution based on the consent of States. As a result, the proliferation of courts and tribunals is a positive development, providing more opportunities for States to consent to the jurisdiction of one or more courts or tribunals. This result is more important than the technical inconveniences that

accompany this fragmentation (with the exception, perhaps, of certain cases of ICSID which are of concern). Second, the characteristics of the international society point to a paradox; namely, within a society lacking a legislator, the judges play a far more important role than at the domestic level. Third, one of the major challenges and limits of the role of the judiciary in the international society is their lack of powers to enforce implementation. Even if most States accept and comply with judgments, the problem of enforcement is increasingly worrying. Finally, the proposals from President Guillaume to strengthen the jurisdiction of the ICJ in advisory proceedings are not feasible in the light of the Court's inability to provide quick decisions in complex disputes. Overall, for the time being, the proliferation of courts and tribunals should be tolerated.

Professor Yuval Shany, Hebrew University Jerusalem, commented that dispute settlement forums such as the ICTY, the ICJ, and the WTO fulfilled different functions. Nevertheless, a common understanding of the core meaning of the judicial function was shared, outweighing the differences between various courts and tribunals. That being so, more attention should be given to techniques and mechanisms to ensure procedural and substantive coordination between these forums. Such effort would help to sustain fragmentation over time, while allowing the powers of specialization to manifest themselves.

Dr Mark Villiger, Judge of the European Court of Human Rights, speaking in his private capacity, expressed some unease, even irritation, in relation to some perspectives on the proliferation of courts and tribunals. He emphasized that it was States who drafted the European Convention of Human Rights (ECHR) and created the European Court of Human Rights. This court is now the largest court in the world. Every year 50,000 applications are filed and 30,000 are dealt with. There are 47 judges and a registry of 650 staff members. Although the Court will consider the jurisprudence of other courts where relevant and necessary, ultimately it is the interpretation of the Convention that is the Court's core function.

Professor Colin Warbrick, Birmingham Law School, observed that fragmentation is a fact of life, neither positive nor negative. He expressed more concern over the lack of discipline between tribunals. These tribunals are made up of a small community of judges and decision-makers who often develop their own customs. A similar phenomenon was observed by Simpson in relation to the development of the common law. This raises questions about the notion of precedent in international law, but equally requires consideration of the risk of estranging States if the customs of judges were used excessively to remedy the negative features of fragmentation. Is there any indication, as fragmentation has developed, that this is having an effect on the willingness on the

part of states to participate in international law? Is there evidence the other way: that states are more willing to sign up? It would be useful to understand more of the sociology of fragmentation and its impact on international law.

Robert Volterra, Latham & Watkins, recalled that the number of disputes between States brought before international courts and tribunals is only a very small percentage of the actual number of disputes that exist. In most cases, dispute resolution takes place without any further step of judicialization. Similar to national jurisdictions, only a small minority of formulated disputes actually progress to judicial decision. The basis for dispute resolution is also extremely varied, and can include political bases, economic basis, and reference to sources of international law. If courts and tribunals have flourished, this is because States have allowed this to happen.

Sarah Nouwen, PhD Candidate, University of Cambridge, questioned how “international” should be defined and invoked the examples of tribunals for the prosecution of international crimes in Sierra Leone and Cambodia. The scope of the discussion of the international judicial function was perhaps broader than what emerged from the debate. It was also necessary to consider the role of national courts, and to examine how to bridge substantive and procedural differences between the national and the international. Fragmentation, understood broadly, may ultimately enhance access to international justice.

Dr Melissa Perry QC, Wentworth Chambers, Sydney, agreed that it was necessary to widen the scope of the discussion to include the role and impact of international law in domestic courts. She identified a number of common areas that indicated a potential platform upon which to resolve diversity in jurisprudence: respect for others’ jurisdictions (comity); respect for the parties’ choices; and the need to maintain the confidence of the parties. Within domestic courts there is a view that fragmentation poses several difficulties, for example in determining which weight to give to decisions of different international bodies concerning norms that appeared in a range of instruments, such as human rights.

Professor Craig Jackson, Texas Southern University, Thurgood Marshall School of Law returned to the issue of precedent and supported the idea that an expectation existed that the earlier decision of a court or tribunal would be followed.

President Guillaume reflected on the comments made about the importance of judicial settlement as compared to other forms of dispute settlement. He stressed the importance of

international judicial settlement, although he acknowledged that most disputes in international law were resolved through negotiations between foreign ministries without any judicial intervention. President Guillaume also responded to the discussion relating to the notion of cross-fertilization of jurisprudence. He found that a useful concept, but cautioned that cross-fertilization could not extend as far as a “government of judges”, nor was case law a source of international law. The example of the characterization of certain norms as *jus cogens* demonstrates that a number of courts have found rules of *jus cogens* without the proper elements, mentioning only previous judgments of other Courts. Similarly, cross-fertilization of jurisprudence should not become a method for law-creation where no law exists. President Guillaume alluded to the ICJ’s *Nuclear Weapons* advisory opinion to emphasize that the Court did not declare a *non liquet* in that case. The jurisdiction of the Court was advisory, not contentious, and thus the Court had more freedom to declare that the law was unclear on a certain point. Had the same legal question been raised in a contentious proceeding, the Court could not have refused to decide the case.

Professor Abi-Saab concluded that the use of the word “proliferation” was improper, as it has a negative connotation. For the international legal system, which has long suffered from a dearth of third-party resolution of disputes between States, the increasing number of third-party determinations according to law is a positive development. Perhaps the optimum number of international courts and tribunals has yet to be reached. Ultimately, a single dispute resolved by the ICJ will resolve a great number of disputes outside the judicial context. Despite some negative side-effects, the proliferation of courts and tribunals is thus a healthy development, prompting a return to the debate, introduced by Friedmann, on the relationship between the law of cooperation and the law of coexistence. It also creates the need to examine further how special regimes can co-exist with general international law, and how they relate to municipal law. A useful subject of study would be to consider how different forums perceive their international judicial function, and to see what is common about these perceptions.

But unlike the US Supreme Court, international courts cannot pick and choose their cases. Judges with a mandate to resolve a particular international dispute do not have the opportunity to find “*forum non conveniens*” because that would be a denial of justice. This is perhaps fortunate, because judges ought not decline difficult cases.