

Interest Group Discussion Session Papers
Moderator Comments

THE INTERNATIONAL JUDICIAL FUNCTION¹

*Remarks of President Gilbert Guillaume*²

The moderator, President Gilbert Guillaume, former President of the International Court of Justice, made the following remarks:

Professor Koskeniemi has recalled that, according to Hersch Lauterpacht, “[t]he existence of a sufficient body of clear rules is not at all essential to the existence of the law and the decisive test is whether there exists a judge competent to decide upon disputed rights and to command peace”.

At the time Lauterpacht wrote *The Function of Law*, a great step had already been made into that direction with the creation in 1920 of the Permanent Court of International Justice. However in 1933 the Permanent Court was the only player on the international judicial stage. This is no longer the case. Its replacement in 1945 by the International Court of Justice was followed shortly by the development of new judicial fora, initially at the regional level, then worldwide.

In 1950, the European Court of Human Rights was established, followed in 1957 by the European Court of Justice. Courts of human rights were later created in the Americas and in Africa.

Over the last decades, this process quickened and took a global aspect. A dozen of international administrative tribunals were established. Then, in 1982, the Montego Bay Convention gave birth to the International Tribunal for the Law of the Sea. In 1994 we had the Marrakech Agreement, out of which was to come the quasi-judicial settlement mechanism of the World Trade

¹ Cite as: Gilbert Guillaume, 'The International Judicial Function' in James Crawford and Margaret Young (eds), *The Function of Law in the International Community: An Anniversary Symposium*, (2008), Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law. Available at http://www.lcil.cam.ac.uk/25th_anniversary/book.php.

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

Organization (WTO). Finally under the Rome Treaty, the International Criminal Court was created.

In parallel with these developments, the last thirty years have seen the establishment of a number of ad hoc tribunals, such as the Iran-United States Claims Tribunal and the International Criminal Tribunals for the former Yugoslavia and Rwanda. Moreover, arbitration is more and more institutionalised. Thus we are now experiencing a multiplication of international judicial bodies.

This development has to be viewed in the context of more far-reaching changes in international relations. The second half of the twentieth century witnessed an expansion and diversification in the ways in which a greater number of States relate to one another. At the same time, non state players, such as multinational companies and NGOs entered the international arena. As a result, international law has become more complex and more diverse, and this applies to international courts. The proliferation of such courts thus represents a response to the new needs of the international society. It nonetheless raises a number of problems.

As soon as 1995, Sir Robert Jennings noticed the tendency of some tribunals to regard themselves “as separate little empires, which must, as far as possible be augmented” and stressed “the danger of fragmentation of international law due to the proliferation of international tribunals” (ASIL Bulletin No 9-November 1995). President Schwebel in 1999 and myself in 2000, we drew the attention of the United Nations General Assembly on the fact that such proliferation gives rise to serious risks of forum shopping and conflicting jurisprudence, thus impugning the unity – not to say the certainty – of international law.

All commentators agree on the existence of such risks, but many stress that “fragmentation is an unavoidable fact of life in the current situation of the world”. Some add that the concerns so expressed are exaggerated or premature. Finally, there are even some who go so far as to say that the existence of diverging judgments by different courts or tribunals is not an alarming occurrence. It could contribute to the so-called “development” of international law, which, for them, is more important than unity and certainty of the law.

I hope we shall have a lively debate on the subject. However, before starting that debate, let me first try to identify more clearly the risks resulting from the multiplication of courts and tribunals, then to see whether those risks have been significant in the last decades and eventually what solution could be found if necessary.

It is not disputed that the present situation first increases the risk of overlapping jurisdiction, thus opening the door for forum shopping. The existence of two or more fora capable of declaring themselves competent to hear a particular case permits the parties – more often than not the applicant acting unilaterally – to select the forum which best suits them, in presenting their submissions accordingly. Considerations concerning access to the court, the procedure followed, the court's composition, its case law or its power to offer emergency relief, generally underline States' choices. Such forum shopping may doubtless foster a certain spirit of competition between courts and stimulate their imagination. However, in my opinion, it does have some negative consequences. The choice of court may, for example, be motivated by the fact that the case law of a particular court happens to be more favourable to certain doctrines or interests than that of another (for instance with respect of the rights of fishing or coastal States). Every judicial body tends – whether or not consciously – to assess its importance by reference to the frequency with which it is seized. Certain courts could, as a result, be led to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. Such a development would be profoundly damaging to international justice. The law of the market place, under the pressure of the media cannot be the law of justice.

Overlapping jurisdictions have a second worrying consequence: they increase the risk of conflicting judgments. Thus two courts may be seized concurrently of the same issues and render contradictory decisions. More generally and probably more often, two courts, in the reasoning of their judgments, may interpret the same rule of law in different ways. Some have welcomed such an evolution, stressing that inconsistent practice could be positive: for them, at the end, the best judgments will prevail, the others will be overcome or forgotten and through this process, international law will progress. Personally, I cannot share that point of view. In the light of my former experience as legal adviser, I think that, if international law becomes uncertain, ambiguous and vague, governments will be tempted to ignore it or to use it to justify any of their activities. One must always remember that international law is not made for judges and professors. It is made for users, and in particular for States.

In reality, the growing specialization of international courts carries with it a serious risk: namely the loss of overall perspective. Certainly, international law must adapt itself to the variety of fields with which it has to deal, as national law has always done. It must also adapt itself to local and regional requirements. Nonetheless, it must preserve its unity and provide the players on the

international stage with a secure framework. The proliferation of courts should be a source of enrichment, not of anarchy.

Are the fears thus expressed premature or exaggerated? Can we assess in this perspective the experience gained in the last twenty years?

With respect to overlapping jurisdiction and forum shopping, the first example which comes to mind is the dispute between Chile and the European Union over Swordfish fishing. In that case, Chile in 2000 started proceedings against the Union in the International Tribunal for the Law of the Sea, while Europe requested the setting of a WTO panel. Happily, a provisional settlement was reached by the Parties and the two cases, while still pending, are not actively pursued. However had the two proceedings run their course in parallel, it would have become possible that the WTO panel declared the Chilean measures illicit as a violation of GATT, while the Hamburg Tribunal could have declared it compatible with the UN Convention on the Law of the Sea (or vice-versa). Discrimination would have been established by one of the adjudicating bodies and excluded by the other (and, of course, this could still happen if the proceedings are resumed).

In the *Southern Bluefin Tuna case (New Zealand and Australia v. Japan)*, the Claimant States held that the conduct of Japan amounted to violation both of the UN Convention on the Law of the Sea and a 1993 Convention concerning this type of fish. This last Convention had no compulsory settlement of dispute clause. As a consequence, Australia and New Zealand instituted proceedings before an arbitral tribunal as provided for in the Montego Bay Convention. The Hamburg Tribunal was requested to take provisional measures and decided on that occasion that the arbitral tribunal had jurisdiction *prima facie*. However, the Tribunal itself considered later that the real dispute concerned the implementation of the 1993 Convention and held that it had no jurisdiction.

The *MOX Plant* case raised comparable problems. In that case, Ireland submitted its dispute with the United Kingdom to an arbitral tribunal under the Law of the Sea Convention. The United Kingdom held that the case fell under the exclusive jurisdiction of the European Court of Justice (ECJ). The Hamburg Tribunal, again, was requested to take provisional measures and, again, decided that the arbitral tribunal had jurisdiction *prima facie*. However, the Tribunal itself, when seized of the substance, decided to suspend its proceedings in order to wait for clarification of the point by the ECJ. The Luxemburg Court decided in 2006 that it had exclusive jurisdiction on

the case and that Ireland, in going to arbitration violated its obligations under Article 292 of the EC Treaty. The Tribunal consequently had no jurisdiction.

A similar problem could have been raised in the *Iron Rhine* case (Belgium v. The Netherlands). In the special agreement concluded in that case, the Parties, indeed, asked the Tribunal to “take into account” Article 292 of the EC Treaty. However they never objected to the jurisdiction of the arbitral tribunal. Thus, in 2005, the Tribunal was able to decide without protest from the Parties that it was not necessary for it to engage in an interpretation of European Law and to request a preliminary ruling from Luxembourg.

It thus appears that, except in this last case, States did not hesitate to recourse to forum shopping and that contradictory decisions were rendered in two cases with respect to jurisdiction.

Were inconsistent judgments also rendered on questions of substantive law?

In this respect, attention has often been drawn on the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). In 1996 in the *Tadic* case, the Tribunal first held that “[e]very tribunal is a self-contained regime” and it added in 2001 in the *Kvočka* case that “[t]his Tribunal is an autonomous international judicial body, and although it will take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion”. Thus, in the *Tadic* case, in 1999, the ICTY found there was an international armed conflict in Bosnia on the basis that certain participants in the hostilities were acting under the “overall control” of the Yugoslav authorities. In doing so the ICTY explicitly disregarded a former ruling of the ICJ which, in a dispute between Nicaragua and the United States, had held in 1986 that the latter was only responsible for acts that it has specifically imposed, decided or ordered, excluding any general responsibility for the acts of the Nicaraguan groups they were supporting.

Later, in the *Genocide* case, in the ICJ, Bosnia and Herzegovina invoked that judgment. In that case, the Court decided in 2007 to take “fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute”. But it added: “[t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it”. The Court went on explaining why it shall maintain the Nicaragua jurisprudence and then applied it.

This clear case of conflicting jurisprudence is not the only one. In the *Avena* case, the ICJ did not consider in 2004 that the rights embodied in the UN Convention on Consular Relations could be considered as human rights, contrary to what had been previously decided by the Inter-American Court of Human Rights. Conversely, in the *Loizidou* case, the European Court of Human Rights, in 1995, interpreted differently from the ICJ a provision on jurisdiction of the European Convention practically identical to article 36 of the Statute of the World Court. With respect to the nationality of claims rule, the Iran-United States Claims Tribunal adopted a more flexible approach than was recognized by the established arbitral case law. The United Nations Compensation Commission went even further on humanitarian grounds. Finally ICSID Tribunals have recently rendered contradictory awards relating to state of necessity in the Argentine crisis.

This situation will certainly be subject to divergent appreciations. Some may stress that, in fact, consistency is the rule and inconsistency the exception. Some will minimize these divergences and justify them in marking distinctions between situations and texts and in opposing general international law and *lex specialis*. Some, on the contrary, will insist on the necessary unity and clarity of international law. But, in any event, it seems advisable to see what can be done to avoid or at least to limit the risks of conflicts of jurisdiction or conflicts of jurisprudence.

First and foremost, it seems important in this respect not to worsen the current situation. Before setting up any new court, international lawmakers should consider whether an existing court could not properly exercise the proposed jurisdiction.

At the same time, the judges themselves must realise the dangers inherent in the proliferation of international courts, keep themselves informed of the case law developed by their peers and maintain regular contact with them. Tribunals must also be careful not to extend their jurisdiction beyond the limits fixed by their constitutive texts, following the examples given by the arbitral tribunal in the *Southern Bluefin Tuna* case or by an ICSID tribunal in the *MGS v. Philippines* case. In some disputes, tribunals must also consider suspending their proceeding to await the judgment of another court, as it was done in the *MOX Plant* case or by a compliance committee established under the Aarhus Convention with respect to the Bystroe canal project undertaken by Ukraine in the Danube delta.

In my opinion, however, it is to be feared that these minimalist solutions will not be sufficient in the long run. Every organisation, whether judicial or not, has a tendency to develop autonomously. The judicial process is particularly open to this risk, in particular within specialized courts.

Municipal systems have solved this problem by establishing supreme courts. This solution could be transposed to the international sphere by giving the ICJ appellate or review jurisdiction over judgments handed down by other international courts. This solution is not new, since it was already adopted by the 1944 Chicago Convention in the field of international civil aviation. However, for such a solution, States would need to demonstrate strong political will, which certainly does not exist at the present moment.

Accordingly, other solutions must be sought. It has in particular been suggested that international courts and tribunals be encouraged to seek advisory opinions from the ICJ through the Security Council or the General Assembly. This was common practice at the time of the League of Nations and has been done once by the ICTY. I remain convinced that it must be considered seriously.

Judicial wisdom has, until now, limited the risks resulting from the proliferation of international courts. However, those risks have not disappeared and must be kept in mind. Conflicts of jurisdiction could still encourage the development of forum shopping. They are probably unavoidable in the present state of the international society. Conflicts of jurisprudence could still happen and weaken international law. They are to be regretted and we must continue to search for solutions diminishing those risks. In this perspective, I look forward with great interest to the exchange of views we shall now have.