The Growth of Specialized International Tribunals and the Fears of Fragmentation of International Law

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1 The Creation of the International Tribunal of the Law of the Sea as a Specialized Tribunal and the Concern of Some Members of the ICJ

Probably the most important innovation in the United Nations Convention on the Law of the Sea (UNCLOS)'s regime for the compulsory settlement of disputes is the creation of the International Tribunal for the Law of the Sea (ITLOS) with a broad *ratione materiae* and *ratione personae* jurisdiction. This has served as a model for the establishment of other specialized courts or quasijudicial bodies in response to the transformation of the international society as a result of globalization: the participation of individual and non-State actors in the international system; the creation of new international institutions; and the expansion of the norms of international law to areas formerly regulated exclusively by domestic law, among other factors.

There are a number of disputes on the law of the sea in respect of which an overlap of jurisdiction between the International Court of Justice (ICJ) and the ITLOS is unlikely to occur. Concerning jurisdiction *ratione materiae,* the Seabed Disputes Chamber of the ITLOS is almost exclusively competent to hear disputes arising in connection with activities in the Area and to give advisory opinions at

Member, *Institut de Droit International*. It is indeed a great honour and pleasure to contribute to this collection of studies in honour of Tullio Treves, an eminent international legal scholar and a distinguished representative of the Italian school of international law.

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the Assembly or the Council of the Authority. Furthermore, the Tribunal has the authority, subject to certain conditions, to prescribe, modify or revoke binding provisional measures in a dispute submitted by the parties to an arbitral tribunal. Lastly, it also has a somewhat exclusive jurisdiction in the prompt release of vessels and their crews. Regarding jurisdiction *ratione personae,* non-State parties have access to the ITLOS, whereas under Article 34.1 of the Statute of the ICJ, only States may be parties in cases before the Court. In accordance with Articles 291.1 and 305 UNCLOS, self-governing associated States and territories enjoying full internal self-government, in addition to international organizations, provided that they have ratified or formally confirmed their adherence to the Convention, also have *locus standi* before the Tribunal. In addition, in cases under Part XI, these may include State enterprises, natural or juridical persons sponsored by a State Party or consortia composed of such enterprises or persons. In cases submitted on the basis of other agreements, it may include corporations, international organizations and other entities.

The case law on maritime delimitation—the area of the law of the sea where the ICJ has decided a number of cases—"demonstrates how the ICJ and *ad hoc* arbitration tribunals can engage in a symbiotic relationship."[1] In fact, "a consistent jurisprudence on this international law subject has been developed by the ICJ and several *ad hoc* tribunals, which, unlike the ITLOS and the ICJ, are not standing universal judicial bodies and whose composition reflect the diversity of the international community."[2]

The creation of specialized international judicial bodies prompted two successive Presidents of the ICJ—Stephen M. Schwebel and Gilbert Guillaume—to state their apprehension that the "proliferation" of international tribunals would lead to cases of overlapping jurisdictions, opening the way to "forum shopping", giving rise to a serious risk of conflicting jurisprudence and to the fragmentation of international law. This view is shared by Judge Shigeru Oda.

In his course at the Hague Academy of International Law in 1993, Judge Oda was critical of the creation of ITLOS. He stated: "The Convention is so misguided as to deprive the ICJ of its role as the sole organ for the judicial settlement of ocean disputes by setting up a new judicial institution, ITLOS, in parallel with the long established Court." In his opinion, because the law of the sea is an integral part of international law, "if the development of the law of the sea were to be separated from the genuine rules of international law and placed under the jurisdiction of a separate judicial authority, this could lead to the destruction of the very foundation of international law."[3]

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[1] Charney 1998, p. 345.

[2] This argument was raised by Prof. Oxman at the 96th Annual Meeting of the ASIL in the Panel on "The 'Horizontal' Growth of International Law and Tribunals: Challenges or Opportunities?", Washington, D.C., 16 March 2002.

[3] Oda 1993, pp. 13–55.

In his address before the UN General Assembly in 1999 President Schwebel affirmed "[C]oncerns that the proliferation of international tribunals might produce substantial conflict among them, and evisceration of the docket of the International Court of Justice, have not materialized, at any rate as yet". However, "in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the ICJ on issues of international law that arise in cases before these tribunals that are of importance to the unity of international law."

In his address to the UN General Assembly in 2000, his successor, President Guillaume, referred to "the problem raised for international law and the international community by the proliferation of international courts". He alluded to overlapping jurisdiction, forum shopping, the risks of conflicting jurisprudence and the cohesiveness of international law. He endorsed the suggestion put forward by his predecessor in 1999 to allow other international tribunals to request advisory opinions from The Hague.[4]

The legal basis for the creation of new international tribunals is set forth in Article 95 of the UN Charter. As Judge Yankov stated, "more than fifty years ago the drafters of the Charter in its Chapter XIV on the International Court of Justice with clear sightedness anticipated the need for States to make use of the plurality of options in choosing the appropriate means of dispute settlement."[5]

Commenting on Article 95 of the UN Charter, Kelsen observes: "Hence the Members (…) may establish a special court with compulsory jurisdiction, excluding the jurisdiction of any other tribunal, even the jurisdiction of the International Court of Justice established by the Charter."[6]

Therefore, the ICJ, and the Permanent Court of International Justice, were not created with the "object and purpose" of establishing a centralized international judicial system.

1.1 Positive Responses to the Cause and Effect of the Outgrowth of Specialized International Tribunals

In her analysis of the question of the multiplication of international legal institutions, Judge Rosalyn Higgins mentions among the main features of the present state of affairs with regard to international litigation, the vast corpus of norms of international law, the indefinite expansion of the subject matter, and the effects of globalization that "have encouraged the realization that at least in certain (…)

[4] The speeches of Presidents Schwebel and Guillaume can be found on the website of the ICJ: http://www.icj-cij.org.

[5] Yankov 1997, p. 365.

[6] Kelsen 1950, p. 477.

areas of international law, actors other than States have access to the legal procedures".[7] As a result,

> we have today a certain decentralization of some of the topics with which the ICJ *can* in principle deal to new highly specialized bodies, whose members are experts in a subject matter which becomes even more complex, which are open to non-state actors, and which can respond rapidly. I think this is an inevitable consequence of the busy and complex world in which we live and not a cause of regret.[8]

In respect of the suggestions by Presidents Schwebel and Guillaume, she further states:

> I do not agree with the call of successive Presidents, made at the UN General Assembly, for the ICJ to provide advisory opinions to the other tribunals on points of international law. This seeks to reestablish the old order of things and ignores the very reasons that have occasioned the new decentralization.[9]

The late Professor Jonathan I. Charney, in his Course at The Hague Academy in 1998, entitled "Is International Law Threatened by Multiple International Tribunals?", examined this issue exhaustively.[10]

In concluding his study, Charney stated,

> that in several core areas of international law the different tribunals of the late twentieth century do share a coherent understanding of that law. Although differences exist, these tribunals are clearly engaged in the same dialectic. The fundamentals of general international law remain the same regardless of which tribunal is deciding this issue (…) the views of the ICJ, when on point, are given considerable weight (…). In my opinion, an increase in the number of international tribunals appears to pose no threat to international legal system (…). It is hard to argue that other tribunals have taken cases away from the ICJ (…). Nor does it appear likely that a decline of the ICJ is on the horizon (…). Rather, the overall increase in the role of international law in third party settlement of international disputes through law based forums seems to reflect an increase in the role of international law in third party settlements of international disputes (…) in recent years, the ICJ has had the heaviest caseload in history.[11]

Another risk mentioned by the critics of the multiplicity of specialized international tribunals is "forum shopping". However, this is—as Treves observes—"the perfect legitimate search by parties and their counsel of the forum that appears most favorable to their interest".[12] It also encourages acceptance by States of the judicial or arbitral settlement of international disputes, thereby increasing the role of international law.

Finally, it is argued that the multiplicity of tribunals in a decentralized judicial system will result in the fragmentation of international law. However, the

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[7] Higgins 2001, p. 121.

[8] Ibidem, p. 122.

[9] Ibidem.

[10] Charney 1998, pp. 101–382.

[11] Ibidem, pp. 347, 349 and 359.

[12] Treves 2000, p. 74.

existence of different international fora for the settlement of disputes goes back to the beginning of international arbitration. A number of arbitral tribunals coexisted with the Permanent Court of International Justice and continue to coexist today with its successor. The study by Charney reveals that "while differently, the variations do not loom so large that they could possibly undermine the legitimacy of international law or the importance of the International Court itself".[13]

In quite similar terms, Brownlie stated:

> In fact, I think the multiplicity of tribunals reflects the multiplicity of relations between states, the complexities of regional customs and the way of doing things. It gives a wide range of preferences so you may have a State that is quite happy to use one mechanism but not another, there is a choice. There is competition between the international courts of arbitration, not an antagonistic competition but a simple competition. If everybody used arbitration, the people in The Hague would get less business and they would not be too happy about that. But it is not an antagonistic competition, it is a set of options of procedural options and I see no great harm in it… it reflects the complexity of the world.[14]

In discussing the establishment of the ITLOS, Rosenne stated that

> [T]here is no evidence to support the view that a multiplicity of international judicial institutions for the settlement of disputes seriously impairs the unity of jurisprudence (a difficult proposition at the best of times). The Convention requires ITLOS to perform tasks that are beyond the competence of the International Court under its present Statute. If only for that reason, the cautious observer will hesitate before crying redundant.[15]

In stating his singular view on the multiplication of international tribunals, Sir Robert Jennings takes all the factors into account. For instance, he brings up the jurisdictional restriction contained in Article 34.1 of the Statute of the ICJ by which "[O]nly States may be parties in cases before the Court", which today is in important senses a juridical anachronism. The new kind of international law, he observes

> which directly concerns individuals and entities other than States is, moreover, a rapidly growing part of the whole system of international law. There is accordingly a considerable and growing area of international law which does not find its way to the world Court (…). Thus, The Hague Court finds itself increasingly cut off from a growing and very important part of international law.

One possible remedy to this situation, Jennings states, would be to somehow change or adapt Article 34.1 of the Statute.

However, he concludes that this

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[13] Charney 1998, p. 355.

[14] Brownlie 1995, p. 276.

[15] Rosenne 1996, p. 814.

> "would probably produce a flow of cases with which the Court, with its present staff, organization and recourses could not possible cope". Then, realistically, he puts forward a question: Is the international community ready to finance such a radical change in the nature and function of the ICJ?[16]

Another possible remedy, according to the former President of the ICJ, is

> the creation of other kinds of international tribunals and courts. This route has already been followed to the extent that there is some concern at what is sometimes called the problem of proliferation of new and permanent tribunals and courts (…) *the development, even the proliferation, of new and permanent tribunals is probably a good thing*. None of them share the ICJ's global jurisdiction in matters involving general international law.[17]

In his conclusion, Jennings expresses his concern about the future: the organization of the Court and its relationship with the other organs of the United Nations and with the many other courts and tribunals. "The present proliferation of tribunals may do well for a time; (…) but the price eventually to be paid is the danger of the gradual fragmentation of the substantive and procedural international law". He refers to the *system* of tribunals found in most States where there is usually one court at the top of a hierarchy.

> The ICJ, being the principal judicial organ of the United Nations (…) would seem apt to fill this role (…)" But, he admits, "there is the difficulty of article 34(1) of the Statute, the separate histories of the specialized tribunals, and not least the regional character of them and (…) many problems of legal policy.

No doubt a mountain of problems to which we could add that of Article 95 of the Charter.[18]

Jennings recognizes that "there is probably at least for the time being no question of any kind of a general new law-making reform of the situation". However, he suggests,

> there is no reason why the present chaotic jumble of acronyms should not be subjected to a searching academic exposition and analysis, and perhaps some suggestions made for the creation out of it all, of a recognizable judicial system for the international community as a whole.[19]

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[16] Jennings 1998, pp. 57–59. According to Jennings, "[T]he new Law of the Sea Tribunal of Hamburg was set up partly as a result of political opposition to the Hague Court in the 1970s: nevertheless, although these is a considerable overlap with the remit of the World Court in law of the sea matters, the Hamburg Court can also deal with some important classes of cases that probably could not get before the Hague Court". Considering the WTO, he expresses that its "subject matter and indeed the procedure, is probably better dealt with by persons with specialized knowledge or experience of the kind of practical problems involved".

[17] Ibidem, p. 59 (emphasis added).

[18] Ibidem, pp. 62–63.

[19] Ibidem.

In a comprehensive article on the fragmentation of international law, Marttii Koskenniemi and Päivi Leino refer to the above-mentioned speeches of the Presidents of the ICJ.[20] They begin by stating that

> [i]t would seem natural to assume that when the President of the International Court of Justice chooses to express his concern about a matter in three consecutive speeches before the United Nations General Assembly on proliferation of international tribunals, one may feel puzzled that among all aspects of global transformation, it is *this* they should have enlisted their high office to express anxiety over.[21]

With reference to the allegations by Judges Schwebel and Guillaume, the authors affirm that

> the statements (…) are to be seen as defensive moves in a changing political environment. 'Specialized courts (…) are inclined to favor their own disciplines', Judge Guillaume stated in 2000. This is true—but it applies equally to his own Court. If the Presidents argue that other tribunals should request advisory opinions from their Court, then surely this should be read as an effort to ensure position at the top of the institutional hierarchy. But if the conflict has to do with preferences for future development, then it is unsurprising that not one body has expressed interest in submitting its jurisdiction to scrutiny by the ICJ.[22]

In another comment the Finnish scholars state

> [w]hat is remarkable about the statements by the Presidents of the International Court of Justice in 1999–2001 is not only their anxiety about what at first sight seems a rather theoretical, even esoteric problem—'proliferation of courts,' 'unity' of international law—but also the narrow platform from which the critiques have emerged. In reading through the academic debates, the Presidents stand almost alone in expressing such anxiety (in addition to a small number of suspected war criminals waiting for trial at The Hague)—sometimes joined by colleagues such as Judge Oda (…) For most commentators, however, proliferation is either an unavoidable minor problem in a rapidly transforming international system or even a rather positive demonstration of the responsiveness of legal imagination to social change.[23]

Koskenniemi and Leino observe that

> [e]ven as the analysis of fragmentation is largely held to be correct, most lawyers express confidence in the ability of existing bodies to deal with it. In fact, Jonathan Charney expresses (…) alternative forums complement the work of the ICJ and strengthen the system of international law, notwithstanding some loss of uniformity… different approaches adopted in relation to the same subject may only represent a healthy level of experimentation to find the best rule to serve the international community as a whole.[24]

Based on the information available at this time, the authors state that "a serious problem does not appear to exist."

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[20] Koskenniemi and Leino 2002, pp. 553–579.

[21] Ibidem, p. 553.

[22] Ibidem, p. 562.

[23] Ibidem, pp. 574–75 (footnotes omitted).

[24] Ibidem, p. 575 (footnotes omitted).

Regarding the concerns of Judge Guillaume about the way special regimes might be breaking up international law in such a manner as to jeopardize its unity, Koskenniemi and Leino state:

> [B]ut it is doubtful if any such 'unity' ever existed. The ICJ never stood at the apex of some universal judicial hierarchy. Its judgments have been binding only as *res judicata*, and other subjects have remained free to accept or reject them (…). As Charney puts the main view on this matter: I do not doubt, however, that a hierarchical system for deciding international legal questions would contribute to a more orderly and coherent legal system. One should understand, nevertheless, that this has not been the case for as long as international law has existed.[25]

Finally, the authors observe that

> to construe the debate about fragmentation as if it had only to do with coherence in the abstract is to be mistaken about what is actually at stake. Special regimes and new organs are parts of an attempt to advance beyond the political present that in one way or another has been revealed unsatisfactory. The jurisdictional tensions, they state, express deviating preferences held by influential players in the international arena. Each institution speaks its own professional language and seeks (…) to have its special interests appear as the natural interests of everybody. Here neither anxiety nor complacency are in place (…). To avoid cynical professionalism will require facing the institutional tensions on their merits. Here no overall solution—a single hierarchy—is available (…). The universalist voices of humanitarianism, human rights, trade or the environment should be (…) heard. But they may also echo imperial concerns (…) at that point, the protective veil of sovereign equality, and the consensual formalism of the ICJ will appear in a new light: as a politics of tolerance and pluralism, not only compatible with institutional fragmentation, but its best justification.[26]

According to Bruno Simma, "until present, and only with only few exceptions, the various judicial institutions dealing with questions of international law have displayed utmost caution in avoiding to contradict each other". He would go as far as to claim "that if there are international institutions that are constantly and painstakingly aware of the necessity to preserve the coherence of the international law, it is the international courts and tribunals (…)."[27]

1.2 The ILC and the Topic of the Fragmentation of International Law: a Brief Reference

In 2002, the International Law Commission (ILC) included the topic "Risk ensuing from the fragmentation of international law" in its long-term program of work. In the following year, the General Assembly requested the Commission to give further consideration to the topics in that long-term program. In 2002, the

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[25] Ibidem, pp. 576–77.

[26] Ibidem, pp. 578–79.

[27] Ibidem, p. 553.

Commission decided to include the topic renamed "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" in its program and to establish a Study Group chaired by Mr. Bruno Simma. In 2003, Simma was elected Judge of the ICJ and Mr. M. Koskenniemi was appointed Chairman of the Study Group.

As Simma explains

> when start[ing] its actual debate (…), its members soon agreed that the emphasis on risks in the original title of the topic was not adequate because it depicted the phenomena described by the term 'fragmentation' in a negative light. Thus, the title of the topic was changed". As he further clarifies: "the Commission move, while retaining the term 'fragmentation' with its rather negative connotations, the risks following from it were downgraded to 'difficulties', such difficulties now been regarded as arising from two developments that are described in decidedly positive terms, namely diversification and expansion of international law.[28]

A study of the Report of the Study Group of the ILC on the renamed topic of "Fragmentation of international law" would transcend the range of this tribute. For our purposes suffice it to say that the Report does not agree with what Simma calls the "initial and exaggerated fears" arising from the creation of specialized tribunals. It declares that, on the

> [o]ne hand fragmentation does create the danger of conflicting and incompatible rules, principles, rules-systems and institutional practices, [o]n the other hand, it reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques (…). Although there are 'problems', they are neither altogether new nor of such a nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that have arisen in the past.[29]

What can be further stated on the alleged risk of fragmentation of international law? As Judge Treves rightly says, "[d]ivergent decisions of different judicial bodies may not always be synonymous of fragmentation of international law." In support of the opinion that the existence of different views has always been fuel for the development of international law, he recalls "the harmonious coexistence in the field of delimitation of maritime areas of the jurisprudence of the Hague Court and of arbitral tribunals" and asks: "why should not the reciprocal influence of the perhaps sometimes divergent decisions of the Hague Court and the Hamburg Tribunal yield a similar positive result?" After stating that the function of international judicial bodies is mainly to prevent and settle disputes, and if it happened that, because of the presence of ITLOS, a lesser number of conflicts were to arise and that those which arose were settled as legal disputes, he asks, "wouldn't this

[28] Simma 2003–2004, p. 845.

[29] ILC Report, p. 14.

mark a progress for international law and the international community? Wouldn't this dwarf the disadvantages represented by some differences in the contents of the achievement of the various tribunals?"[30]

References

Brownlie I (1995) The peaceful settlement of international disputes in practice, Blaine Sloan lecture. Pace Univ Sch Law Int Law Rev 7:257–279

Charney JI (1998) Is international law threatened by multiple international tribunals? Recueil des Cours 271:101–382

Higgins R (2001) Respecting sovereign and running a tight courtroom. Int Comp Law Q 50:121–132

Jennings R Sir (1998) The role of the International Court of Justice. British Yearb Int Law 68:1–63

Kelsen H (1950) The law of the United Nations: a critical analysis of its fundamental problems. Praeger, New York

Koskenniemi M, Leino P (2002) Fragmentation of international law? Postmodern anxieties. Leiden J Int Law 25:553–579

Oda S (1993) The International Court of Justice from the bench. Recueil des Cours 244:9–190

Rosenne S (1996) Establishing the international tribunal for the Law of the Sea. Am J Int Law 89:806–814

Simma B (2003–2004) Fragmentation in a positive light. Michigan J Int Law 25:845–847

Treves T (2000) New trends in the settlement of disputes and the Law of the Sea Convention. In: Schreiber HN (ed) The Law of the Sea. Kluwer, The Hague, pp 61–86

Yankov A (1997) The International tribunal for the law of the sea: its place within the dispute settlement system of the UN Law of the Sea Convention. Indian J Int Law 37:356–371

[30] Treves 2000, pp. 85–86. So far, ITLOS jurisprudence shows no indication of any threat to the unity of international law.