

THE PROLIFERATION OF INTERNATIONAL JUDICIAL BODIES:

THE OUTLOOK FOR THE INTERNATIONAL LEGAL ORDER

**SPEECH BY HIS EXCELLENCY JUDGE GILBERT GUILLAUME,
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,
TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY
OF THE UNITED NATIONS**

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Mr. Chairman, Ladies and Gentlemen,

It is with great pleasure that I again find myself today, under your Chairmanship, addressing the Sixth Committee of the General Assembly, where I formerly appeared regularly as representative of France. It is also, for me personally, a signal honour to address the Committee for the first time as President of the International Court of Justice. I feel that it would be useful to take this opportunity to discuss with you a phenomenon currently of substantial concern among both academics and legal practitioners, namely the proliferation of international judicial bodies and its impact on international law.

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Created in 1920, the Permanent Court of International Justice was for long the only player on the international judicial stage. Its replacement by the International Court of Justice more or less coincided with the development of new judicial fora, initially at regional level, then at global level. In 1950, the European Court of Human Rights was set up, then, in 1957, the European Court of Justice, whilst the Inter-American Court of Human Rights rendered its first decision in 1981.

Over the last two decades this process has quickened and taken on a global aspect. In 1982, the United Nations Convention on the Law of the Sea gave birth to the International Tribunal for the Law of the Sea, which became operational in 1996. Meanwhile, in 1994 we had the Marrakesh Agreement, out of which was to come the quasi-judicial dispute settlement mechanism of the World Trade Organization (WTO). I should also mention at this point the agreements currently undergoing ratification which could in due course lead to the creation of an African Court of Human Rights and the International Criminal Court.

In parallel with these developments, the last 20 years have seen the establishment of a number of *ad hoc* tribunals, such as the Iran-United States Claims Tribunal, or the International Criminal Tribunals for the former Yugoslavia and Rwanda. Thus we are now seeing a multiplication, not to say a proliferation, of international judicial bodies.

This development has to be viewed in the context of more far-reaching changes in international relations. Thus the second half of the twentieth century has witnessed an expansion and diversification in the ways in which States relate to one another. The areas in which they co-operate have undergone a substantial expansion: security, education, economics, the environment, scientific research, communications, transport, etc. Nowadays there seems to be no area which is not covered.

At the same time, the non-State players — commercial companies, non-governmental organizations (NGOs), private individuals — engage increasingly in transnational activities, thus demonstrating how permeable frontiers are. Moreover, these cross-frontier transactions — in the wide sense of the word — have themselves become more diverse. This trend will undoubtedly intensify with new technological advances, for example in the field of telecommunications.

This dual expansion in inter-State relations and cross-frontier transactions, in terms both of subject-matter and of frequency, has inevitably rendered it necessary, if not essential, to make all these relationships subject to the rule of law. As a result, new areas have been opened up to international law, whilst new players have entered the arena. The proliferation of courts may be perceived as a process of adaptation to these fundamental changes.

On the one hand, the diversification of the areas governed by international law has rendered that law more complex and more diverse. Thus human rights, environmental law, economic law, the law of the sea or space law are sometimes regarded today as specialized branches of international law. Application of the specific legal rules governing these areas may require greater in-depth knowledge of science, economics or whatever. At the same time, the need to have certain types of inter-State dispute adjudicated by bodies more sensitive to specific local conditions has led to the creation of tribunals whose composition is determined at regional level.

Further, the growth in cross-frontier transactions has led to the arrival on the international law scene of new categories of player. However, the model for the settlement of inter-State disputes, while it may still be valid in many cases, was not designed with these new players in mind. As a result, there is growing pressure to have those players participate in the judicial process where it involves them¹. That pressure has not been without consequences in the economic field, as can be seen from the constitution of the Luxembourg Court, or the decisions where the body responsible for settling WTO disputes has recently accepted the intervention of an NGO as *amicus curiae*². The same has occurred with human rights. Thus, natural persons, NGOs or groups of individuals may today bring cases before the Strasbourg Court³.

In sum, it would appear that the proliferation of judicial bodies in large measure responds to recent developments in the international community. It has, however, had certain unfortunate consequences, which I should now like to analyse before considering possible solutions to the problem thus posed.

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The proliferation of international fora is already influencing the operation of international law, both in procedural terms and as regards the actual content of that law. Its long-term consequences should not be underestimated.

In the first place, it is to be noted that, as international tribunals have multiplied, so the risks of overlapping jurisdictions have increased. And in fact today these risks have become reality. In the first half of the twentieth century, States already had the option of going to arbitration or taking their case to the Permanent Court of International Justice. The proliferation of courts has created a whole range of other possibilities, and in a sense opened the way to a form of inter-institutional "competition". Thus, under Articles 287 and 288 of the Montego Bay Convention, the Hamburg Tribunal for the Law of the Sea may be given jurisdiction to hear cases relating to the application of that Convention⁴, even though the International Court of Justice also has jurisdiction in this area⁵. It is, indeed, to the Court that States have traditionally brought their disputes of a maritime character, from the "*Lotus*" and "*Icelandic Fisheries*" cases to the numerous maritime delimitations with which it has dealt⁶. This is a situation which recurs in a number of other areas and affects a number of other institutions. It obliges us to examine two of the customary consequences of overlapping jurisdictions: on the one hand "*forum shopping*", and on the other conflicting decisions.

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The first consequence of a proliferation of courts is that it permits litigants to choose from among a range of judicial bodies, thus opening the door to what is often called in "franglais" "*forum shopping*". The existence of several fora capable of declaring themselves competent to hear a particular dispute enables the parties — more often than not the applicant acting unilaterally — to select the forum which best suits them. Considerations concerning access to the court, the procedure followed, the court's composition, its case-law, or its power to make certain types of order generally underlie the choice to be made. To take a concrete example, it is not beyond the bounds of possibility that, in the *Blue Fin Tuna* case⁷, the main reason the applicant proceeded before the Law of the Sea Tribunal was the ready enforceability of the measures which it sought⁸. It is worthy of note that, while the Law of the Sea Tribunal did grant provisional measures, these were subsequently revoked by the arbitral tribunal seised of the merits of the dispute.

While "*forum shopping*" may doubtless foster a certain spirit of competition between courts and stimulate their imagination, it nonetheless does have negative consequences, which need to be pointed out. 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, concepts or interests than that of another. Every judicial body tends — whether or not consciously — to assess its value by reference to the frequency with which it is seised. 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.

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Overlapping jurisdictions have a second worrying consequence. In effect, they not only create a choice of courts — not to say a market — for the parties concerned, but they also increase the risk of conflicting judgments. Thus two courts may be seised concurrently of the same issue

and render contradictory decisions. Systems of national law have for long had to deal with such problems. They have solved them by two methods: on the one hand, the development of a clear hierarchy among courts, on the other, the formulation of rules on litispendency and *res judicata*. By contrast, the international system is sadly lacking in this regard.

In the existing order, however, it is essential that the various international courts take steps to co-ordinate the exercise of their individual jurisdictions where more than one court considers itself competent to hear a dispute. This work of co-ordination is very much dependent on the attitude of the judges, and on their ability to determine their own competence while keeping in mind their position within the international framework. For example, in its first case, the International Criminal Tribunal for the former Yugoslavia considered the issue of the legality of its creation and itself settled this question, answering it in the affirmative⁹. It is difficult to see, however, how the Tribunal could have given a negative reply to this question, thus signing its own death warrant, and we might ask ourselves whether it would not have been more appropriate for it to have asked the Security Council to seek an advisory opinion on this question from the International Court of Justice, principal judicial organ of the United Nations.

More generally, in a case where two courts, both fully competent, are seised of the same dispute, should one of them not withdraw? And what then should be the criteria for this choice? How should the respective jurisdictions be determined where the overlap involves only one of the issues in dispute, whilst the other points fall clearly within the exclusive jurisdiction of one of the courts seised? Finally, and above all, how to ensure coherence in relation to *res judicata* as between different judicial fora, so as to guarantee the integrity of the decisions rendered?

All of these questions need answering. But no answer can be given as things currently stand, any more than instant solutions can be found for the problems arising from the proliferation of international courts in relation to substantive issues of law.

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Proliferation has led to a significant increase in the number of cases coming before courts in an increasing number of fields, thus contributing to the development of international law and to its enrichment. This is a phenomenon which one is bound to welcome.

Nonetheless, the proliferation of international courts engenders serious risks of inconsistency within the case-law. Admittedly, the courts have shown themselves anxious to avoid such inconsistency. Thus, the International Court of Justice keeps careful track of the judgments rendered by other courts and tends increasingly to make reference to them. I have noted, in all, some 15 Judgments of the Court containing such references. For example, in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*¹⁰, the Court, in 1992, referred to a 1917 Judgment of the Central American Court of Justice, whilst in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*¹¹, the Court, in 1993, analysed an award handed down in 1977 by the Anglo-French Court of Arbitration regarding the *Mer d'Iroise*, adopting the award's reasoning. More recently, in the *Kasikili/Sedudu Island* case between Botswana and Namibia, the Court found support for its decision in the Arbitral Award rendered in the *Laguna del Desierto* case between Chile and Argentina¹².

By the same token, certain specialized courts have frequently drawn on the jurisprudence of our Court or of its predecessor. The Inter-American Court of Human Rights has quoted abundantly

from the *Chorzów Factory*, "*Lotus*" and *Corfu Channel* cases, whilst the International Criminal Tribunal for the former Yugoslavia has made a number of references to the Court's decision in the *Barcelona Traction* case. The body responsible for settling WTO disputes has made frequent reference to the case-law of our Court. Thus, in its recent decision on *European Community measures regarding hormones*¹³, it took account of the Court's findings in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* regarding the existence of the precautionary principle. Finally, the Iran-United States Claims Tribunal has also relied to a substantial extent on our jurisprudence.

Despite these efforts, the risks of inconsistency nonetheless remain substantial. In academic circles, the issue of the unity of international law was in its time debated at length in relation to the Chambers of the International Court of Justice. The point at issue was whether these Chambers, whose composition may vary according to the wishes of the parties, were not at risk of developing their own separate case-law, with possibly chaotic results.

This issue has virtually ceased to be of current concern, with States tending nowadays to prefer to have their cases heard by the full Court. Moreover, I would make the point that the risk of a conflict of case-law is far greater when one is dealing not with separate entities established within the same forum, but with separate courts having to apply the same rules of law. This is particularly so in the case of specialized courts, which are inclined to favour their own disciplines¹⁴. Let me give you two examples.

The first concerns the European Court of Human Rights and the rules for the interpretation of treaties. In the case of *Loizidou v. Turkey*, the Strasbourg Court took a position different from that of the International Court of Justice on the question of territorial reservations in declarations of compulsory jurisdiction. Our Court, like its predecessor the Permanent Court of International Justice, has consistently held that such reservations are legal and must be upheld, whereas the European Court of Human Rights has adopted a different solution¹⁵. Admittedly, this decision may be regarded as an instance of *lex specialis*, being founded on the specific characteristics of the system of the European Human Rights Convention¹⁶. However, the decision does refer to the Vienna Convention on the Law of Treaties and diverges from the case-law of the International Court of Justice in this regard.

Still more to the point, when, on 15 July 1999, the International Criminal Tribunal for the former Yugoslavia rendered its judgment on the merits in the case of *Prosecutor v. Dusko Tadic*, it expressly criticized and declined to follow a decision of the International Court of Justice. In order to determine whether it was competent, the Criminal Tribunal had to establish whether there was an international armed conflict in Bosnia-Herzegovina by showing that certain of the participants in the internal conflict which had arisen in that country were acting under the control of a foreign power, in this case Yugoslavia. In its analysis of the question, the Tribunal referred to, but did not follow, the decision of the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In that case, the Court had imposed the test of effective control by the United States of the activities of the *contras*. However, the Tribunal rejected this approach, adopting a new interpretation of international law in the matter of State responsibility. It opted for a less strict criterion in relation to the imputation of responsibility, holding that, in the case of organized groups of combatants, it was sufficient to demonstrate that those groups as a whole were under the overall control of a foreign State¹⁷. This criterion was judged sufficient by the Tribunal to engage the responsibility of that State for the activities of the group, irrespective of whether each individual act was specifically imposed, requested or directed by the State in question¹⁸. In short, as these examples show, the growing specialization of international courts carries with it a serious risk: namely loss of the 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. How can this be achieved?

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In this connection, an initial comment is called for. Before creating a new court, the international legislator should, it seems to me, ask itself whether the functions which it wishes to entrust to that court could not properly be carried out by an existing body, as is the practice for example with the international administrative tribunals (UNAT and ILOAT). There is also the question of how to deal, within the current system, with the absence of a structured relationship between the various courts. Should we leave it to the common sense of the judges, or should some form of structural change be undertaken?

As a judge myself, I should like to be able to leave it to the discretion of court members to counteract the undesirable effects of the proliferation of courts. Thus I consider that the judges must take cognizance of the dangers of legal fragmentation, and of inconsistency in the case-law, as a result of the quasi-anarchic proliferation of international courts¹⁹. They must inform themselves more fully of the case-law developed by their colleagues, conduct more sustained relationships with other courts and, in a word, engage in constant inter-judicial dialogue²⁰. The International Court of Justice could do this, if it had the necessary resources.

I fear, however, that this minimalist solution is not sufficient. Every institution, whether judicial or not, has a tendency to go its own separate way, and the judicial process has particular risks in this respect. It seems to me, therefore, that what needs to be done is to institutionalize relations between courts.

Courts have proliferated in an anarchic manner, without any form of relationship being established between them. Certainly, the International Court of Justice remains the "*principal judicial organ of the United Nations*"²¹ and, as a result, occupies a privileged position in the international judicial hierarchy. Moreover, it is the only court with a universal general jurisdiction. Lastly, its age endows it with special authority.

However, the mechanisms that would enable the Court to assume that status and to take on this role remain extremely limited. Thus while, for example, the International Court of Justice can act as a court of appeal from the decisions of the Council of the International Civil Aviation Organization²², appeal or review procedures are very seldom used in the international order. Moreover, the Court has recently had its power of review over decisions of international administrative tribunals restricted²³. In short, the possibility of seeking an advisory opinion from the International Court of Justice is currently restricted to certain organs of the United Nations and specialized agencies²⁴. Given that the International Court of Justice is the sole judicial body possessing general jurisdiction, we might ask ourselves whether its powers are not too limited, in light of the role which it could and should play.

It has sometimes been suggested that the Court be entrusted with the task of acting as a court of appeal or review from judgments rendered by other international courts. This would, however, require a powerful political will on the part of States and far-reaching changes in the Court, which would need to be given substantial resources. I am not certain whether such a will exists.

An alternative solution was put forward last year by my predecessor, in his address to the General Assembly, and I think it would be helpful to bring it up again today. In order to reduce the risks of conflicting interpretations of international law, should we not encourage other international courts to seek the opinion of the Court on doubtful or important points of general international law raised in cases before them?

Such a procedure exists in European Community law under Article 234 of the Treaty of Rome (the former Article 177). It enables national courts of member States of the European Union to refer preliminary questions to the European Court of Justice, and sometimes requires them to do so. Thus the unity of Community law is assured.

Comparable procedures could be used in general international law. Thus the International Court of Justice is competent to hear requests for advisory opinions from such bodies as the Security Council and the General Assembly. Hence, those international courts which are organs of the United Nations, such as the tribunals charged with prosecuting those responsible for war crimes committed in the former Yugoslavia or in Rwanda, could ask the Security Council to seek advisory opinions on their behalf from the Court. The United Nations Administrative Tribunal could do likewise through the General Assembly.

As regards international courts which are not organs of the United Nations, as for example the International Tribunal for the Law of the Sea or the future International Criminal Court, the same solution could be adopted. This was formerly the practice of the Council of the League of Nations, which sought opinions from the Court on behalf *inter alia* of other international bodies, even though the Covenant of the League of Nations made no provision for this. It would be open to the General Assembly to do likewise tomorrow on behalf of various judicial bodies. Perhaps the General Assembly might encourage those bodies in this regard.

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In conclusion, I wish simply to say once more that the proliferation of courts presents us with risks, the seriousness of which it would be unwise to underestimate. In my view, to leave it to the common sense of the judges to deal with these consequences may well prove insufficient. What needs to be done is to determine the relative positions of the new judicial bodies within the modern international framework and, to this end, to establish new links between these bodies. This seems to me to be essential, if the law is to remain coherent, and to continue to operate to the benefit of all members of the international community.

In the words of the English poet John Donne: "No man is an island, entire of itself. Every man is piece of the continent, a part of the main". I should like to take over this image and to propose to you that it be applied also to the players on the international stage. Thus we must work together to instil, into each and every international judicial body, awareness of the fact that it is but one part of a single whole and never an end in itself. I can assure you that it is the wish of the International Court of Justice to remain faithful to this ideal, an ideal in which I hope that all will share.

¹C. P. R. Romano, "The Proliferation of international judicial bodies: The Pieces of the Puzzle", 31 *NYUJ Int'L & Pol.*, 170.

²See the interpretation of Article 13, Annex 2, of the General Agreement on Tariffs and Trade, Understanding on Rules and Procedures Governing the Settlement of Disputes, in the *Shrimps Case (United States — Prohibition on the importation of certain shrimps and certain shrimp-based products)*.

³Article 34 of the Convention, as amended by the 11th Protocol, which entered into force on 11 November 1999.

⁴Articles 287-288, United Nations Convention on the Law of the Sea; Annex VI, Statute of the International Tribunal for the Law of the Sea.

⁵*Ibid.*

⁶See for example: *Fisheries Jurisdiction (United Kingdom v. Iceland)*; *North Sea Continental Shelf (Federal Republic of Germany/Denmark) (Federal Republic of Germany/Netherlands)*; *Fisheries Jurisdiction (United Kingdom v. Iceland) (Federal Republic of Germany v. Iceland)*; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*; *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*.

⁷(*New Zealand v. Japan*), Case No. 3; (*Australia v. Japan*), Case No. 4, Order of 27 August 1999.

⁸Suggestion raised by Professor Benedict Kingsbury: "Is the Proliferation of International Courts and Tribunals a Systematic Problem?", 31 *NYUJ Int'l L. & Pol.* 679, p. 685.

⁹See *Prosecutor v. Dusko Tadic* (2 October 1995).

¹⁰Judgment of the Chamber of 11 September 1992, *I.C.J. Reports 1992*, p. 351.

¹¹Judgment of 14 June 1993, *I.C.J. Reports 1993*, pp. 63 and 67.

¹²Judgment of 13 December 1999, para. 20.

¹³Decision of 16 January 1998, para. 123.

¹⁴G. Guillaume, "La Cour internationale de Justice. Quelques propositions concrètes à l'occasion du Cinquantenaire", *RGDIP*, 1996-2, p. 331.

¹⁵*Loizidou v. Turkey (ECHR Series A, Vol. 310)*, at 29, paras. 83-85, 20 *EHRR*, at 136, cited by J. I. Charney, "Is International Law Threatened by Multiple International Tribunals?", *RCADI*, Vol. 271, 1988, pp. 162-163.

¹⁶J. I. Charney, "Is International Law Threatened by Multiple International Tribunals?", *RCADI*, Vol. 271, 1998, pp. 162-163.

¹⁷Judgment of the International Criminal Tribunal for the former Yugoslavia of 15 January 2000, para. 120.

¹⁸*Ibid.*, para. 122.

¹⁹See G. Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks", 31 *NYUJ Int'l L. & Pol.* 919, p. 927.

²⁰J. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals", 31 *NYUJ Int'l L. & Pol.* 697, p. 707.

²¹Article 92, United Nations Charter.

²²Article 84, International Civil Aviation Convention (Chicago, 1944)

²³I am referring to the abrogation of Article 11 of the Statute of the United Nations Administrative Tribunal, which allowed the Tribunal's decisions to be referred for review to the ICJ.

²⁴Article 96, United Nations Charter.
