

# Multiplication of International Courts and Tribunals and Conflicting Jurisdiction — Problems and Possible Solutions

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## I. Introduction

"The proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases. ... A dialogue among judicial bodies is crucial. The International Court of Justice, the principal judicial organ of the United Nations, stands ready to apply itself to this end if it receives the necessary sources."<sup>1</sup>

This statement of the President of the ICJ, Gilbert *Guillaume*, which repeats a similar statement of former President *Schwebel*<sup>2</sup> meets a central concern of international lawyers who meanwhile are involved in a lively discussion of this issue.<sup>3</sup>

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<sup>1</sup> Statement of the President of the ICJ to the United Nations General Assembly of 26 October 2000; cf. website of the ICJ <http://www.icj-cij.org>

<sup>2</sup> ICJ Press Communiqué 99/46 of 26 October 1999.

<sup>3</sup> J. I. Charney, "Is International Law Threatened by Multiple International Tribunals?" *RdC* 271 (1998), 101 et seq.; "The Proliferation of International Tribunals: Piecing Together the Puzzle, Symposium Issue, *N. Y. U. J. Int'l L. & Pol.* 31 (1999), 679 et seq. with reports by B. Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systematic Problem?", 679 et seq.; J.I. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals", 697 et seq.; C. P. R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", 709 et seq.; E.-U. Petersmann, "Constitutionalism in International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?", 753 et seq.; P.-M. Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", 791 et seq.; T. Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice", 809 et seq.; J. H. Jackson, "Fragmentation or Unification Among International Institutions: The World Trade Organization", 823 et seq.; M. Pinto, "Fragmentation or Unification Among International Institutions: Human Rights Tribunals", 833 et seq.; G. Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks", 919 et seq.; H. Thirlway, "The Proliferation of International Judicial Organs and the Formation of International Law", in: W.P. Heere (ed.), *International Law and The Hague's 750th Anniversary*, 1999, 433 et seq.; T. Treves, "Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals", *Max Planck UNYB* 4 (2000), 215 et seq.; T. Treves, "Le Tribunal International du Droit de la Mer et la multiplication des juridictions internationales", *Riv. Dir. Int.* 83 (2000), 726 et seq.

While some fifty years ago it seemed rather unrealistic to imagine a dramatic multiplication of international courts and while at that time a main concern in international law was to convince states of the attractiveness and usefulness of third-party dispute settlement<sup>4</sup>, we now are faced with a multitude of third-party dispute settlement instruments<sup>5</sup>. This state of affairs should, and does, essentially cause satisfaction because it shows that the development of peaceful dispute settlement may be regarded as a success story. As a matter of fact, we are confronted not only with a quantitative development of dispute settlement bodies but also with a qualitative expansion and transformation of the nature and competence of those bodies which are not only aimed at the settlement of disputes but also at ensuring and monitoring compliance with international law. Thus, international dispute settlement is no longer restricted only to resolve interstate disputes; the number of judicial bodies granting standing to non-state entities outnumber meanwhile the traditional jurisdictions limited to disputes between sovereign states. For the purpose of this article, however, it is not necessary to go deeper into this aspect of the transformation of international dispute settlement<sup>6</sup>, but it is sufficient to clarify that the terms "jurisdiction", "judicial body", "international courts and tribunals" will describe essentially those organs that are established by an international legal instrument, that apply international law and that deliver binding decisions<sup>7</sup>.

The problems which may arise — and to a small extent have already arisen — in the context of the multiplication of international courts are worthy of detailed examination as to the question whether and to what extent those problems are really imminent and what can be done to counter them in due course. The main issues in this context refer to the

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<sup>4</sup> For an overview over the efforts in the framework of the United Nations see H. Mosler, "Chapter XIV. The International Court of Justice," in: B. Simma (ed.) *Charter of the United Nations, A Commentary*, 1994, 973 et seq., (981–982).

<sup>5</sup> In the second edition of K. Oellers-Frahm/A. Zimmermann, *Dispute Settlement in Public International Law, Texts and Materials*, 2001.

<sup>6</sup> For more details cf. Romano, see note 3, 709 et seq.

<sup>7</sup> For the criteria characterising an international court, tribunal or body cf. C. Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction", in: *Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation: An International Symposium*, Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht, 1974, 285 et seq.

increased danger to the unity of international law by conflicting jurisdiction. Therefore, we must first look at the reasons for conflict which are not explained merely by reference to the multiplication of judicial bodies in international law but relate to the particularities of international law as reflected in international jurisdiction (cf. II.). On this basis, some cases will be analysed in more detail in order to illustrate what exactly has to be understood as “conflicting jurisdiction”, whether it really constitutes a danger to the unity or cohesiveness of international law and what means are available in order to avoid passive and active conflicting jurisdiction (cf. III.). Finally, the above cited proposal made by the two Presidents of the ICJ has to be examined, namely whether the ICJ should or might be the forum to guarantee the unity of international law by way of rendering advisory opinions on the interpretation of international law questions referred to it by other courts or tribunals (cf. IV.). An evaluation of the situation and outlook will serve as concluding remarks (cf. V.).

## II. Reasons for Conflicting Jurisdiction

The main concern with regard to the multiplication of international courts and tribunals is the imminent danger for the unity of international law, arising from the possibility of conflicts of jurisdiction either active or passive, between these bodies and the risk of contradiction or conflict of findings and interpretation, for the same rule of law may be given different interpretations in different cases before different institutions<sup>8</sup>. This danger is not only a virtual one, but it is a real one, as the following examples, which will be examined in more detail in the relevant context, may confirm: in the *LaGrand* Case before the ICJ the Court will have to state upon the question whether article 36 para. 1 lit.(b) of the Vienna Convention on Consular Relations contains the right for an individual to have his consul informed of his being taken into custody; the same question has already been considered by the Inter-American Court of Human Rights, although not in a judgment, but in an advisory opinion<sup>9</sup>; a similar situation was present in the *Loizidou*

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<sup>8</sup> Abi-Saab, see note 3, 919 et seq., (922).

<sup>9</sup> Advisory Opinion OC-16/99 of 1 October 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, [http://corteidh-oea.nu.or.cr/ci/PUBLICAT/SERIES\\_A/A\\_16\\_ING.HTM](http://corteidh-oea.nu.or.cr/ci/PUBLICAT/SERIES_A/A_16_ING.HTM)

Case<sup>10</sup>, where the European Court of Human Rights had to state on the consequences of an illegal reservation to a declaration of acceptance of jurisdiction, a question which had been pending more than once before the ICJ although the latter never had to decide definitely on this issue; further mention may be made of the conflicting findings on state responsibility for acts of armed forces by the ICJ in the *Nicaragua* Case and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* Case<sup>11</sup>; and finally, the *Swordfish* Case<sup>12</sup> may serve as an example of the increasing danger of overlapping jurisdiction leading to the simultaneous seizing of two judicial bodies of the same case involving the same parties. These are not the only relevant cases, but they can be regarded as models for the reasons and the kind of conflict that may arise if different courts or tribunals have to interpret the same rule of law or to judge upon the same conflict.

## 1. Peculiarities of International Law

The concern that the multiplication of international judicial bodies may endanger the unity of international law requires as a first approach some although brief considerations on the characteristics of international law. The main features of international law are that it is not a comprehensive body of law consisting of a fixed body of rules applicable to all states and that there is no central legislative organ.

International law is in permanent development<sup>13</sup>, its actors and its ambit of activity have increased considerably over the last fifty years and so have the institutions consecrated to ensure compliance with in-

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<sup>10</sup> *Loizidou v. Turkey*, ECHR, Series A, Vol. 310, 23 March 1995.

<sup>11</sup> *Prosecutor v. Tadic*, Judgment of the Appeals Chamber, *ILM* 38 (1999), 1518 et seq.

<sup>12</sup> This case between Chile and the EU had arisen as a consequence of the closing of Chilean ports to vessels flying the flag of an EU Member State and had been brought at the same time before the ITLOS and the WTO dispute settlement regime. It would have been interesting under several aspects, namely the aspect of litispence or forum shopping, to see how the two judicial bodies would handle the situation. At the moment of writing it seems, however, that the case will not be judged upon because of an amicable extra-judicial settlement between the parties; cf. <http://europa.eu.int/trade/miti/dispute/swordfish.htm>

<sup>13</sup> Jackson, see note 3, 823 et seq., (828 et seq.).

ternational legal obligations<sup>14</sup>. The evolution of international law is necessary in order to adapt it to new conditions of international life; however, since international law-making is slow and not concentrated in a law-making body, this adaptation is, in the first place, the task of the international judges, or, to be more precise, the judges have to state whether an adaptation has taken place — because judges do not *make* law. It is therefore possible that the question of whether a rule of customary international law has already come into existence or not and what exactly is its content may be differently answered by different judicial bodies. In this context it would in fact be desirable and helpful to have a central organ to which such questions may be referred for decision, as exists e.g. in several national systems.

It is, however, not only the developing character of international law which may be the reason for real or only apparent differences in stating what is the law, but also the fact that international law is not a *corpus* of law binding equally upon the whole community of states — as is the case in national law as well as in the framework of international organisations, particularly those with a high degree of integration, such as the European Union (EU). International law only contains very few rules which are binding upon all members of the state community, namely *ius cogens*. The remaining rules of law, in particular the large body of customary international law, allows derogation in the form of special regional customary law or by agreement. As a consequence, in international law we have a multitude of treaties creating special law binding only upon the parties to the treaty<sup>15</sup>. Therefore, international law is characterised by “fragmentation” or “decentralisation” so that the term “unity” of international law cannot be understood in a formal sense of a body of rules applicable equally to the whole state community. Only in exceptional fields may a kind of “unity” of international law, generally circumscribed as “regime”<sup>16</sup>, be found to exist, such as in the field of human rights or the law of the sea, where general acceptance by the majority of states has been given to a codified body of rules. These remain, however, until now, exceptions but constitute a first step in the direction of unity of international law in fields of common concern. Whether in general international law there does already exist at least

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<sup>14</sup> Abi-Saab, see note 3, 919 et seq., (923).

<sup>15</sup> Charney, see note 3, 101 et seq., (235).

<sup>16</sup> Cf. M Ruffert, “Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft”, *AVR* 38 (2000), 129 et seq., (141 et seq.).

some kind of obligation of respect or coordination between the different actors in international law in order to avoid conflicts or collisions of law, cannot to be answered in this context<sup>17</sup>. The few remarks made above make it already clear that the existing fragmentation of international law will be reflected also in international jurisdiction: this does, not however, amount to "conflicting" jurisdiction but only to variances flowing from the particularities of international law. What is at stake in this context is therefore not really the *unity* of international law, but rather the *consistency* or *cohesiveness* of international law in the sense that the interpretation and application of all rules of international law, in particular special rules of international law, has to be effected in respect of the concepts, the basis of legitimacy and the formal standards of pertinence governing international law<sup>18</sup>. Therefore, conflicting jurisdiction does not exist where differing obligations are found to exist or where similar obligations are embedded in a different context which has to govern their interpretation; these situations require for the sake of consistency of international law only, that the process of finding what is the law in a particular case, does follow or rely on the basic governing principles of international law<sup>19</sup>.

Conflicting jurisdiction therefore may only occur where the same rule of law is interpreted or applied in a divergent manner by different international judicial bodies, a situation, which will be rather the exception, since the majority of international judicial bodies have been created within a special, even very special, context to decide disputes arising in this context. Nevertheless, such conflicts are possible<sup>20</sup>, and may even increase due, on the one hand, to the multiplication of courts and tribunals competent in the same subject-matter, or, on the other hand, the fact that the interpretation of a special provision has to be made in the context of other fields of international law, as e.g. the interpretation of human rights may have to give regard to questions of humanitarian international law, or environmental provisions to aspects of the law of the sea etc. As there is no hierarchy between either the rules of international law or the judicial bodies, the concern for diverging ju-

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<sup>17</sup> Cf. Ruffert, see above, 132.

<sup>18</sup> *Abi-Saab*, see note 3, 919 et seq., (926).

<sup>19</sup> F. O. Vicuña/ C. Pinto, "The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century, Preliminary Report prepared for the 1999 Centennial of the First International Peace Conference, *Council of Europe*, Doc. CAHDI (98) 15, 1998, 45.

<sup>20</sup> Cf. *infra* under III. 4.

isdiction is well-founded. Without going deeper into this issue, these brief considerations on the status of international law already explain that the possibilities of international courts and tribunals to preserve the “unity” of international law are rather limited because they, too, are part of the decentralised system of international law; therefore, their task is primarily to identify the basic principles of international law governing the decentralised international society.

## 2. Peculiarities of International Jurisdiction

### a. General Principles of International Jurisdiction

In international law, the judicial settlement of disputes is not entrusted to a pre-disposed system of jurisdiction; there does not exist an obligatory jurisdiction as in national law. Under Article 33 of the UN Charter, states are free to settle their disputes by any means they want to, so long as these means are peaceful; there is, thus, no obligation to have recourse to judicial settlement. However, the fact that the growing number of actors in the international field and the globalisation and multiplication of activities and agreements have considerably increased the body of international law has consequently also led to an increased recourse to judicial settlement. But, since in international law, courts and tribunals are created by the states according to their needs, a growing number of treaties — unfortunately also different treaties with different parties concerning the same subject-matter — provide for special judicial bodies for the settlement of disputes arising in the framework of that particular treaty<sup>21</sup>. Moreover, as those treaties often concern very special matters, the judicial organs created by them are not necessarily composed of persons chosen for their knowledge in international law, but for their knowledge in the specific subject-matter provided for in the treaty which will not necessarily be aware of the implications, connections, and legal relationship between some newly-established mechanism and the norms of general international law which still are applicable<sup>22</sup>. This may easily lead to conflicting jurisdiction in particular with regard to treaties ruling on similar or identical subject-matters, e.g. in the field of environment or other technical matters.

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<sup>21</sup> E. Brown Weiss, “The new international legal system”, in: J. Nandasiri (ed.), *Perspectives on International Law*, 1995, 63 et seq., (80-81).

<sup>22</sup> Dupuy, see note 3, 791 et seq., (797).



## b. Decentralisation of International Judicial Bodies

The fragmentation or decentralisation of international law is reflected in the decentralisation of judicial bodies which are not part of a closed judicial system but function independently of each other in the framework of a treaty concerning a particular subject-matter. There is only one international court with universal jurisdiction, namely the ICJ, which is open to *all* states and may decide *all* questions of international law. All other international courts and tribunals have been created within a particular context which generally is not only subject-matter oriented, but also regionally confined so that regionally prevailing concepts of the relevant rule of law in the context of the specific subject-matter of the instrument creating the court will play a major role in the decision-finding of the court.

As already mentioned, all these different judicial bodies are autonomous institutions and do not stand in an organised relationship<sup>23</sup>; they reach their decisions independently of each other since there exists neither a hierarchy between them nor even a general obligation of coordination or cooperation. The only common denominator, therefore, is the fact that in all cases and before all courts and tribunals it is international law which has to be applied; no “self-restrained” regimes leaving the framework of international law are admissible<sup>24</sup> and even if sometimes extremely specific matters have to be dealt with, they have to be embedded in international law concepts.

## c. Consequences of the Decentralisation of International Judicial Bodies

The fact that there does not exist a hierarchy between international judicial bodies has a further disadvantageous consequence for the uniformity of international law and international jurisdiction. Since each

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<sup>23</sup> The only exception exists for the new *ad hoc* Criminal Tribunals for the former Yugoslavia and for Rwanda which not only provide for a two degree jurisdiction with an appeal possibility, but where, according to the decision of the Appeals Chamber in the *Aleksovski* Case, decisions of the Appeals Chamber are binding upon the Trial Chambers, and generally also upon the Appeals Chamber unless strong reasons plead for derogation, cf. ICTY, *Prosecutor v. Zlatko Aleksovski, Judgment of the Appeals Chamber*, IT-95-14/1-A, 24 March 2000, § 92 et seq.

<sup>24</sup> Cf. *Abi-Saab*, note 3, 919 et seq., 926.

judicial body is autonomous with regard to the other ones the principles of *stare decisis* and *lis pendens* (or litispendence), which in national law play a major role in avoiding conflicting jurisdiction, have no place in international jurisdiction<sup>25</sup>.

*aa. The Principle of stare decisis*

The principle of *stare decisis* which is known from the common law system and according to which final judgments constitute generally — even for the judging court — binding precedents is an appropriate means, although no guarantee, to preserve the unity or consistency of the law. The lack of any organisational relationship between international judicial bodies, however, which all have only to decide the case before them with binding force for the parties to the case only makes decisions of other courts and tribunals *res inter alios acta*. As international courts and tribunals exist on the same footing so do their decisions; there is no obligation to take into account their own previous decisions or those of other judicial bodies, even if they do concern the same subject-matter and even if there are bodies more specialised or experienced in a particular subject-matter. Nevertheless, it may be stated that international courts and tribunals, and especially the ICJ, usually refer at least to their own precedent jurisdiction and only derogate from it in exceptional situations<sup>26</sup>. Furthermore, as a rule, international courts concentrate their decision on the concrete dispute brought before them and avoid to give *obiter dicta* or to generalise their findings to situations not covered by the concrete dispute<sup>27</sup>. In particular the jurisprudence of the ICJ is often referred to by other judicial bodies as stating the generally applicable law, be it with regard to rules of customary international law, the interpretation of treaty provisions or other ques-

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<sup>25</sup> Charney, note 3, 101 et seq., 129.

<sup>26</sup> As an example reference may be made to the question concerning the requirement of a jurisdictional link in interventions under Article 62 of the Statute of the ICJ. Although the ICJ had never based the dismissal of a request for admission of intervention on the lack of a jurisdictional link, this aspect had clearly been of decisive influence in the cases of Malta and Italy, ICJ Reports 1981, 3, et seq., (20), respectively ICJ Reports 1984, 3 et seq., (28). The turn came when, in the El Salvador Case, the judges forming the dissenters in the foregoing cases were on the bench of the 5 member chamber and found that for an intervention according to Article 62 of the Statute a jurisdictional link was not required, ICJ Reports 1990, 92 et seq.

<sup>27</sup> Cf. Dupuy, see note 3, 791 et seq., (802 et seq.).

tions of international law<sup>28</sup>. Although this serves the unity and consistency of international law it has to be kept in mind that there is no obligation to do so because there is no general binding force flowing from decisions of international courts, since they are only binding upon the parties to the case.

*bb. The Principle of lis pendens*

The doctrine of litispendence is aimed, as well as that of *stare decisis*, at avoiding conflicting jurisdiction. In national law, litispendence means that a question pending before one tribunal may not be brought before another tribunal or at least that one of the tribunals shall declare it inadmissible because of its pendency before another tribunal. Several rules exist in national law providing for the different constellations which may lead to litispendence which for the sake of the unity of jurisdiction should by all means be avoided<sup>29</sup>. Whether this principle may be transposed into the sphere of international law, seems, however, questionable. Although there is no doubt that litispendence should be avoided also on the international plane<sup>30</sup>, only some authors accept the existence of this principle in international law<sup>31</sup>, while the majority of modern authors do not even cite it, but plead for the application of other means to reach the same aim such as denial of admissibility of the claim or of standing or of the legal interest to sue. The reason therefore is that due to the character of international jurisdiction, namely organs of a different character created by the states for particular needs not standing in any hierarchical relationship, the prerequisites constituting litispendence will be present only in very exceptional cases. Those prerequisites are, according to the PCIJ that two *identical* actions are *pending at the same time before courts of the same character*<sup>32</sup>. Although it may be possible also in international law that two or more

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<sup>28</sup> Charney, see note 3, 101 et seq., (347).

<sup>29</sup> In France there exists even a particular tribunal, the "Tribunal des Conflits" whose sole task it is to decide cases of conflicting jurisdiction, cf. G. Dupuis/ M.-J. Guédon, *Droit Administratif*, 1993, 539.

<sup>30</sup> G. Dahm, *Völkerrecht*, Vol. 2, 1961, 515.

<sup>31</sup> The existence of the principle of litispendence in international law is accepted e.g. by D.P. O'Connell, *International Law*, Vol. I, 1965, 13 and P. Guggenheim, *Traité de droit international public*, Vol. 2, 1954, 149.

<sup>32</sup> Cf. Case concerning certain German interests in Polish Upper Silesia, PCIJ Series A, No. 6, 20.

actions are identical, in the majority of cases in international law the courts or tribunals seized will, however, not be of the same character so that even if the doctrine of litispence would be accepted it would, in general, not be applicable.

### III. Cases of “Conflicting” Jurisdiction

On the basis of these preliminary remarks we must look very closely at some of the cases said to be “conflicting” which shall serve as models for the different categories giving reason for possible conflicts. The cases concern on the one hand deviations in *subsequent* decisions rendered by different courts on identical questions and raise the problem of genuine conflict as opposed to only apparent conflict of jurisdiction which may result from a development in international law or from the differing context in which the issue arose. After that, cases of possible conflicts of jurisdiction due to the *simultaneous* seizing of more than one judicial body with the same matter will be illustrated. Both alternatives call for a thorough examination of the special circumstances of the case in order to delimit genuine cases of conflicting jurisdiction from merely apparently ones.

#### 1. The Nicaragua and the Tadic Case

The case most often cited as an example of conflicting jurisdiction<sup>33</sup> is the *Nicaragua* Case decided in 1986 by the ICJ<sup>34</sup> in comparison to the *Tadic* Case decided in 1999 by the Appeals Chamber of the ICTY<sup>35</sup>. In its decision on appeal against the *Tadic* judgment of the Trial Chamber<sup>36</sup> the Appeals Chamber had to determine whether the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs of the Republika Srpska and the central authorities of Bosnia and Herzegovina could be qualified as an international conflict from the date when the Yugoslav

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<sup>33</sup> See note 1, 4; Sir R. Jennings, “The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers”, in: *ASIL, Bulletin Nr. 9* (1995), 5 et seq.

<sup>34</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq.

<sup>35</sup> *Prosecutor v. Tadic*, Judgment of the Appeals Chamber, *ILM* 38 (1999), 1518 et seq.

<sup>36</sup> Judgment of 7 May 1997, Case No. IT-94-1-T.

National Army had withdrawn from Bosnia and Herzegovina. The question at stake was whether the armed forces of the Bosnian Serbs were to be regarded as armed forces of the Federal Republic of Yugoslavia or of Bosnia and Herzegovina. If they were regarded as part of the armed forces of the Federal Republic of Yugoslavia, the conflict was an international one according to article 4 of the Geneva Convention (III) relative to the Treatment of Prisoners of War of 1949. According to the Appeals Chamber, the requirement of article 4 concerning the “belonging [of armed forces] to a Party to the conflict” implicitly “refers to a test of control”<sup>37</sup>. In the context of the examination of the degree of control which defines whether armed forces belong to one or the other party, the Appeals Chamber referred to the notion of control as defined by the ICJ in the *Nicaragua* Case. In that case, the ICJ came to the conclusion that the control exercised by a state over armed forces acting in another state, here the *Contras* acting in Nicaragua, had to be an “effective control of the military or paramilitary operations in the course of which the alleged violations were committed”<sup>38</sup>, because what it had to decide upon were not the violations of international humanitarian law enacted by the *Contras*, but the unlawful acts for which the United States were to be held directly responsible in connection with the activities of the *Contras*. In its decision, the Appeals Chamber did not only not share these findings of the ICJ — what is legitimate, but ought to be motivated — but entered into an exhaustive discussion and even review of the findings of the ICJ going so far as to criticise the decision of the ICJ as “not always following a straight line of reasoning” and as “at first sight somewhat unclear”<sup>39</sup>. It is not the place here to retrace in detail the arguments of the ICJ nor those of the Appeals Chamber on this topic because the few indications given above already show clearly that the Appeals Chamber has by far overstepped its judicial function<sup>40</sup> which is the review of judgments of the Trial Chambers of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), not the review of judgments of the ICJ or any other court or tribunal. Although it is not only legitimate but even desirable that a court or tribunal in finding its decisions gives regard to decisions of other courts and

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<sup>37</sup> Ibid., para. 95 of the judgment.

<sup>38</sup> ICJ Reports 1986, 14 et seq., (62 et seq.).

<sup>39</sup> *Tadic* Case, see note 11, paras 108 and 114 et seq.

<sup>40</sup> So also Judge Shahabuddeen in his separate opinion to the decision of the Appeals Chamber in the *Tadic* Case, see note 11, para. 5 of the separate opinion.

tribunals on comparable items, the scope of regard given to a decision of another court or tribunal cannot, however, result in a review of that decision but has to be restricted to examining how far that decision may serve as a guideline for the case in hand and whether the circumstances of the case allow its application.

If the circumstances are more or less identical and plead for the application of the decision referred to, the deciding tribunal may nevertheless deviate from the decision of the other court, however by giving convincing reasons. In the case under discussion, the time span between the two decisions was more than ten years; ten years during which exactly the question of armed conflict played a rather significant role and led to the gathering not only of state practice but also of judicial practice<sup>41</sup>. Therefore, it was not at all improbable that changes might have occurred in the handling of the control required for attributing acts of armed forces to a certain state and that the standards applied by the ICJ in the *Nicaragua* Case would no longer be tenable. A finding to this effect would not have constituted a "conflict" between two decisions, but rather a clearly visible development of international law and practice and the statement by a tribunal of such international development. If the Appeals Chamber had proceeded in this way, it would not be necessary to criticise, for it would have acted according to the restraint required from each court and tribunal, namely to decide merely the case submitted and to analyse decisions of other courts only to the extent necessary to find its own decision, but in no circumstances to review the decision of another court in the manner as the Appeals Chamber did in this case. Therefore it may be concluded that the *Tadic* Case is not one of *conflicting* jurisdiction, but one of *ultra vires* jurisdiction which is plainly unacceptable and hopefully will remain an exception.

The considerations developed above in the context of the *Tadic* Case, show furthermore, that "conflicting jurisdiction" has to be looked at very closely and that it depends to a high degree on the particularities of the case and on the reasons given by the tribunal concerned whether we are confronted with "conflicting" or simply "developing" or "varying" jurisdiction — what makes a decisive difference. As a matter of fact, this statement should not, however, be strained to its extremes, for each case may be distinguished from any other, so that the

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<sup>41</sup> Most of the state and judicial practice cited by the Appeals Chamber under the heading "The *Nicaragua* Test is at Variance with Judicial and State Practice", see note 11 paras. 1124 et seq. dates from years *after* the *Nicaragua* decision.

particularities of each case could always lead to the conclusion that there is no consistency and coherence among international law cases and that therefore variations in international judicial decisions do not amount to a conflict. To argue in this way seems however too artificial; for what is relevant is whether the tribunals are engaged in the same dialectic and render their decisions under compatible systematic aspects, despite minor differences which are always present.<sup>42</sup>

## 2. The Loizidou Case

A case which may be cited as confirming this view, but which, however, is often cited under the heading of “conflicting jurisdiction”, is the *Loizidou v. Turkey* Case decided by the European Court of Human Rights<sup>43</sup>. In this case, the Court was faced with questions concerning reservations to declarations accepting the compulsory jurisdiction of the Court and of the European Commission of Human Rights. In the actual case the reservation concerned the restriction of the territorial scope of the acceptance of jurisdiction made by Turkey according to the then valid arts 25 and 46 of the European Convention on Human Rights (ECHR), namely the exclusion of acts having been committed in the “Turkish Republic of Northern Cyprus”. The Court found that a territorial restriction of the acceptance of its jurisdiction was not compatible with the Convention thus giving a restrictive interpretation to arts. 25 and 46 para. 2 of the Convention. The wording of these articles is materially identical to Article 36 para. 3 of the Statute of the ICJ which, however, had always given a large interpretation to Article 36 para. 3 of the Statute and until now never had declared a reservation incompatible with the Statute<sup>44</sup>. Therefore, the ICJ was never confronted with the question which the Court had to decide in the *Loizidou* Case, namely what are the consequences for the declaration of acceptance if one of the reservations is found to be invalid, a question that had only

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<sup>42</sup> In this sense also Charney, see note 3, 101 et seq., 137.

<sup>43</sup> *Loizidou v. Turkey*, ECHR, Series A, Vol. 310, 23 March 1995.

<sup>44</sup> *Interhandel*, ICJ Reports 1959, 6 et seq., *Certain Norwegian Loans*, ICJ Reports 1957, 9 et seq., (56 et seq.) – and most recently *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment of 21 June 2000 and *Fisheries Jurisdiction* (Spain v. Canada), ICJ Reports 1998, 432 et seq.

been discussed in separate opinions to judgments of the ICJ<sup>45</sup>. The Court found that the invalidity of the reservation did not affect the validity of the acceptance as such, since the reservation was severable from the declaration. The Court gave detailed reasons not only for the restrictive interpretation of the validity of reservations to the acceptance of jurisdiction, but also to its finding of the severability of reservations from the declaration of acceptance, nevertheless it has been criticised for being in conflict with the jurisprudence of the ICJ<sup>46</sup>. This critique is, however, a rather isolated one, since other commentators rightly underlined that, although the wording of the articles which the Court had to interpret were nearly identical, that does not mean that they have to be construed identically, for treaty interpretation has to give regard not only to the wording of the provisions but also to the purpose of the treaty itself and the intent of the parties<sup>47</sup>. Since the European Court of Human Rights gave a detailed explanation of its decision, especially with regard to the jurisdiction of the ICJ in similar matters,<sup>48</sup> and since this explanation was fully consistent with the Vienna Convention on the Law of Treaties, we cannot speak of “conflicting jurisdiction” because the context, object and purpose of the treaties at stake, the ECHR and the Statute of the ICJ, are different. Therefore, it may even be regarded as a “confidence building measure” that the Court took into account the particularities of adjudication under the Convention as compared to the dispute settlement under the Statute of the ICJ<sup>49</sup> and thereby acted explicitly in consonance with international law which does not require that merely formally similar commitments have to be treated alike but which rather requires that each situation be judged according to its specific characteristics and in accordance with international law<sup>50</sup>.

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<sup>45</sup> Cf. in particular the separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans Case*, ICJ Reports 1957, 9 et seq., (55–59); cf. also most recently *Fisheries Jurisdiction Case* (Spain v. Canada), ICJ Reports 1998, 432 et seq., (paras 36 et seq. and separate and dissenting opinions).

<sup>46</sup> Sir R. Jennings, “The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers”, in: *ASIL, Bulletin Nr. 9* (1995), 5 et seq.; see also Treves, *Advisory Opinions..*, see note 3, 223.

<sup>47</sup> Thirlway, see note 3, 437–438.

<sup>48</sup> *Loizidou v. Turkey*, see note 10, paras 83 et seq.

<sup>49</sup> Charney, see note 3, 161 et seq.

<sup>50</sup> As a confirmation of these findings of implementing effectively the Convention reference is made to the recent “gypsy” cases of 18 January 2001 (*Chapman v. United Kingdom*; *Jane Smith v. United Kingdom*; *Coster v.*



The special significance of human rights and human rights instruments is generally recognised in international law, and by its decision in the *Loizidou* Case, the Court underlined this state of affairs, which calls for a more restrictive interpretation of reservations of declarations of acceptance than in areas not as sensitive as human rights. It may, by the way, be permitted to see the *Loizidou* decision in the context of the efforts to amend the Convention and the adoption of Protocol No. 11 in 1994 according to which the jurisdiction of the Court is no longer optional nor subject to reservations. For the reasons given above the *Loizidou* Case is, at most, one of seemingly conflicting jurisdiction; materially it is an example of differentiating according to the special treaty goals within the framework of a systematically consistent application of international law. The same terms in a provision appearing in different treaties do not necessarily call for identical interpretation, since under international law not only the terms, but the context, purpose and object of the treaty have to be taken into consideration. This shows that the danger of conflicting jurisdiction due to the multiplication of international courts and tribunals is in fact less acute than it may seem at first sight. In his impressive lecture at The Hague, *Charney*<sup>51</sup> has demonstrated, by citing abundant practice, that as a matter of fact there are variations in international jurisdiction, which however may be justified with a view to the different substantive regimes within which such tribunals have to decide. So long as these tribunals operate within the same dialectic and reach compatible conclusions, one cannot speak of conflicting jurisdiction but rather may consider these variations as "some healthy experimentation and movement in international law itself"<sup>52</sup>. Nevertheless, these examples demonstrate the pressing need for inter-court dialogue and respect for decisions of other judicial bodies as well as the importance of detailed reasoning in order to make comprehensible the result reached by the tribunal.

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United Kingdom; *Lee v. United Kingdom*) where the Court underlined that it is not bound by previous judgments and has to consider the changing conditions in Contracting States (para. 70 in the *Chapman* Case, cf. also to the more explicit statement in para. 1 of the joint dissenting opinion of judges Pastor Ridruejo, Bonello, Tulkens, Strasnicka, Lorenzen, Fischbach and Casadevall.

<sup>51</sup> See note 3, 101 et seq.

<sup>52</sup> *Ibid.*, 352.

### 3. The Case Concerning Article 36 para. 1 lit.(b) of the Vienna Convention on Consular Relations

The interpretation of the same rule of law, namely article 36 para. 1 lit.(b) of the Convention on Consular Relations was pending at the same time before the Inter-American Court of Human Rights and the ICJ. This provision concerns the consular assistance in cases of detention of a person in a foreign country and the consequences of a violation of giving such assistance to a detainee. The problem had arisen in several cases and had led Mexico to submit on 9 December 1997 a request for an advisory opinion to the Inter-American Court including among others the question of the interpretation of article 36 para. 1 lit. (b) of the Convention on Consular Relations; at nearly the same time, namely 3 April 1998, Paraguay brought the same issue before the ICJ in order to stay the imminent execution of a Paraguayan citizen in the United States who had not been timely informed of his rights under the Consular Convention. While Paraguay desisted from the case after the disregard by the United States of the provisional measures ordered by the Court<sup>53</sup>, a second request on the same subject was brought before the ICJ by Germany on 2 March 1999<sup>54</sup>, concerning the stay of the imminent execution of the German citizen *LaGrand* sentenced to death in the United States and who likewise had not been informed of his rights under the Convention. Thus, the same question, namely whether article 36 para. 1 lit.(b) of the Convention gives the individual the right to have his consular authorities informed without delay of his detention, was pending simultaneously before the ICJ and the Inter-American Court, although the latter was not called upon to give a binding decision but “only” a non-binding advisory opinion. The Inter-American Court, in delivering its opinion on 1 October 1999, was fully aware of the fact that the same question was pending before the ICJ. It was, however, of the opinion that although, in principle, it may decline to give an advisory opinion there was no reason to do so in this case. It argued that the purpose of its advisory function is to assist the American States in fulfilling their international human rights obligations and to assist the different organs to carry out the function assigned to them in this field<sup>55</sup>. The fact that the same question was also pending before the ICJ in a contentious case cannot, in the view of the Court, restrain it from exer-

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<sup>53</sup> ICJ Reports 1998, 248 et seq.

<sup>54</sup> ICJ Reports 1999, 9 et seq.

<sup>55</sup> See note 9, para. 59.

cising its advisory jurisdiction because it is an “autonomous judicial institution”<sup>56</sup>. The Court then made some remarks on the danger of conflicting interpretation of the same provision which it regarded as a “phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. ... Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law”<sup>57</sup>. The Court referred at the same time to the possibility that the UN Security Council or the General Assembly might ask the ICJ to render an advisory opinion concerning the interpretation of a treaty, that would, however, not restrain the Inter-American Court from also rendering an advisory opinion on the same provision. The Court thus did not see any obstacle in the fact that the same question was pending before the ICJ, neither in that this was in contentious proceedings nor in that this would be in advisory proceedings. The Court consequently rendered its opinion and found “that Art. 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State”<sup>58</sup>. At the time of writing, the *LaGrand* Case had not been decided on the merits by the ICJ and it remains to be seen how or whether at all the ICJ will consider the advisory opinion of the Inter-American Court.

This case clearly comes close to what is known as litispendence in national law. According to this principle as applied in national law, the Inter-American Court was right to decide the question because it was the first court seized with the matter and moreover because the ICJ had, at the moment of the decision of the Inter-American Court, not yet addressed the merits of the case<sup>59</sup>. However, even if it were submitted that the principle of litispendence is transferable to the international sphere — what seems rather questionable as explained above<sup>60</sup> —, the case at hand would not be covered by this principle because of the different character not only of the courts seized, but also of the decision to be taken: the Inter-American Court was called upon to give an advisory

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<sup>56</sup> Ibid., para. 61.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid. para. 141, no. 1.

<sup>59</sup> L. Caflisch, “La subsidiarité des mécanismes de la Convention de 1992”, in: L. Caflisch (ed.), *The Peaceful Settlement of Disputes between States: Universal and European Perspectives*, 1998, 55 et seq., (56).

<sup>60</sup> Cf. supra under II. 2 c. bb.

opinion which is not covered by the force of “chose jugée”, while the ICJ will deliver a judgment which has binding force although — formally — only between the parties. This might have been the reason why the Inter-American Court did not go closer into the question of litispence but rather seemed to deny that *lis pendens* plays a role in international law, thus underlining the lack of hierarchical relationship between international courts.

#### 4. The Swordfish Case

The *Swordfish* Case may serve as example of a situation which, due to the multiplication and speciality of international judicial bodies causes the greatest concern because its occurrence is increasing without means at hand to avoid it, namely the fact that the same parties bring the “same” dispute before two or even more different judicial bodies which evidently may lead to conflicting jurisdiction. In the *Swordfish* Case the underlying dispute concerned the closing of the ports of Chile for ships flying the flag of a Member State of the EU impeding EU vessels to import their catches into Chile. This measure violated, according to the opinion of the EU, not only the provisions of the Convention on the Law of the Sea concerning fishing on the high seas but also arts V and XI of GATT 1994. After fruitless negotiations the question was brought before a WTO panel and before the Law of the Sea Tribunal (ITLOS). It is not necessary to go into more details of this case<sup>61</sup> since the case has meanwhile been suspended before both fora due to an amicable settlement<sup>62</sup>, but the constellation of this case may serve as a model for a great number of possible similar cases which may arise with regard to trade related disputes under the WTO system<sup>63</sup>. What is at stake in such cases is not strictly a question of *lis pendens* because the claims brought before the WTO dispute settlement system and the ITLOS concerned different aspects of the matter, due to the fact that the ITLOS is competent to decide on matters of the law of the sea while the WTO panels decide on trade and related questions; in this case, ITLOS was seized with questions of the freedom of fishing on the high seas

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<sup>61</sup> Cf. J. Neumann, “Konfrontation oder Kooperation internationaler Streitbeilegungsorgane? Der Schwertfisch-Fall und das Verhältnis völkerrechtlicher Ordnungen, ZAÖRV forthcoming.

<sup>62</sup> Cf. <http://www.europa.eu.int/trade/miti/dispute/swordfish.htm>

<sup>63</sup> Cf. Petersmann, see note 3, 753 et seq., 774 et seq.

while the WTO panel had to answer questions of freedom of transit. In such cases the danger of conflicting jurisdiction concerns the fact that each of the judicial bodies seized would have to implicitly apply a set of rules governing the other judicial body, here the application or at least consideration of GATT law before the ITLOS and the law of the sea before the WTO panel.

This example is illustrative of a large number of imaginable cases brought simultaneously before different judicial bodies, because those judicial bodies, although created within a particular treaty framework and competent only to apply the law as specified in that treaty, will often have to consider "external" law for deciding a pending case. This may occur in human rights cases which imply questions of humanitarian law, in cases concerning environmental law implying questions of the law of the sea or in cases of trade law implying questions of human rights, environment, law of the sea etc. Since principles such as *stare decisis* or *lis pendens* are neither applicable nor helpful in such situations and since also a general rule of international law requiring coordination or respect of competencies of other organs does not yet exist<sup>64</sup>, other means to avoid conflicts of jurisdiction may be referred to, such as the interdiction of abuse of rights or the principle of good faith or even means for the dismissal of the case for lack of standing or lack of legal interest of protection due to its pendency before another forum. However, for several reasons, it does not seem very likely that an international court or tribunal would be ready to resort to such means<sup>65</sup>. Since all international judicial bodies are "autonomous instruments" they will decide cases brought before them unless compelling reasons are present which would probably result from the instrument establishing its jurisdiction, than from reasons of judicial propriety, good faith or judicial coordination and cooperation. Therefore, there is no obstacle in general international law to decide cases brought before a judicial body if an apparently identical or similar matter is pending or is brought before another judicial body. Even the relevant provisions of the Vienna Convention on the Law of Treaties concerning the applica-

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<sup>64</sup> Cf. Ruffert, see note 16, 161; H.G. Schermers/ N.M. Blokker, *International Institutional Law*, 3rd edition, 1995, para. 1580.

<sup>65</sup> Cf. Opinion of the Inter-American Court, see note 9, para. 61; see also ICTY, *Prosecutor v. Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *ILM* 35 (1996), 32 para. 11: "In international law, every tribunal is a self-contained system (unless otherwise provided)".

tion of the *lex posterior* or *lex specialis* rule<sup>66</sup>, are not really helpful because only in rather exceptional cases will the conditions of arts. 30 and 59 of the Vienna Convention on the Law of Treaties be present and give preference to one or the other treaty providing for a dispute settlement mechanism<sup>67</sup>.

The only means to counter possible active and passive collisions of jurisdictions lies therefore in the hands of the states concluding dispute settlement agreements, namely by including specific provisions to this effect, such as provisions on subsidiarity or exclusivity of dispute settlement agreements<sup>68</sup>.

## 5. Treaty Provisions Concerning Avoidance of Conflicting Jurisdiction

Due to the multiplication of international judicial bodies, states have, in fact, become more aware of the danger of conflicting jurisdiction and thus have given more attention to this concern in creating judicial bodies by introducing provisions concerning the subsidiarity of dispute settlement obligations undertaken by the states concerned. The most impressive example in this context is the Court on Conciliation and Arbitration within the OSCE<sup>69</sup>. This court has been created in the aftermath of the breakdown of the bloc-system not because there were no courts or tribunals to settle possibly forthcoming disputes but because of the reticence of the new states to accept already existing courts or tribunals which were thought to be western oriented and characterised by an already existing jurisprudence to which the new states had not been able to contribute. Therefore, the question of conflicting jurisdiction was present when the Convention was framed and led to a ruling on subsidiarity which subordinates the new mechanism to those already

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<sup>66</sup> Cf. arts 30 and 59 of the Vienna Convention on the Law of Treaties of 1969.

<sup>67</sup> Cf. in this context M. Hilf, "Freiheit des Welthandels contra Umweltschutz", *Neue Zeitschrift für Verwaltungsrecht* 19 (2000), 481 et seq., (483); I.M. Sinclair, *The Vienna Convention*, 2nd edition 1984, 94–98.

<sup>68</sup> See in this context the considerations of the President of the Republic of France made on the occasion of his visit to the ICJ on 29 February 2000 reproduced in: Treves, *Le Tribunal...*, see note 3, 728.

<sup>69</sup> Convention on Conciliation and Arbitration within the CSCE of 15 December 1992, in: Oellers-Frahm/ Zimmermann, see note 5, 173 et seq.

existing thus leaving almost no room for actual activity of the court<sup>70</sup>. According to article 19 para. 1 lit.(a) of the Convention the competence of the arbitration court is not only subsidiary to that of any other court or tribunal "whose jurisdiction in respect of the dispute the parties thereto are under an obligation to accept" if this court or tribunal has been seized of the matter prior to one of the organs of the Convention or if a decision has already been given on the merits, but also in a case where the parties have accepted in advance "the exclusive jurisdiction of a jurisdictional body other than a tribunal ... which has jurisdiction to decide with binding force, on the dispute ... or if the parties thereto have agreed to seek to settle the dispute exclusively by other means" (article 19 para. 1 lit.(b)). Moreover, article 19 para. 4 of the Convention provides for the possibility to make a reservation "in order to ensure the compatibility of the mechanisms of dispute settlement that this Convention establishes with other means of dispute settlement resulting from international undertakings applicable to that State" which also includes non-binding instruments. These far - reaching provisions on subsidiarity make it impossible to see which matter would be qualified for adjudication by the arbitration court under the Convention and therefore it is not surprising that neither the arbitration procedure nor the conciliation procedure have ever been seized. Although this may be an extreme example, there are other instruments providing for avoidance of conflicting jurisdiction, such as the Law of the Sea Convention which in Part XV contains in arts 281 and 282 rules of subsidiarity; the same is true of the ECHR which provides in article 35 para. 2 lit.(b) more generally that the Court may not hear cases that are "substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement".

While such provisions certainly are helpful in order to canalise overlapping jurisdiction they are until now the exception in dispute settlement agreements and, more importantly, they are not always sufficient to solve the problem. This insufficiency is obvious when we look, for instance, at the wording in article 35 ECHR which speaks of "substantially" the same matter. What are "substantially" the same matters?

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<sup>70</sup> Cf. Caflisch, see note 59 and K. Oellers-Frahm, "The Arbitration Procedure Established by the Convention on Conciliation and Arbitration within the OSCE", in: L. Caflisch (ed.), *The Peaceful Settlement of Disputes between States: Universal and European Perspectives*, 1998, 55 et seq. and 79 et seq., (89).

Does this refer only to the subject-matter of the case or also to the circumstances in which the case came up? Referring to the “gypsy-cases” of the Court<sup>71</sup> it must be stressed that a formal interpretation of the term “substantially” the same matter would not be acceptable, for the Court underlined in these cases that it must “have regard to the changing conditions in the Contracting States and respond, for example, to an emerging consensus as to the standards to be achieved”. This statement makes it clear that not only in cases where there is a subsidiarity provision but also in cases where there is no such provision it is extremely difficult to define two cases as the “same” cases. As to the subsidiarity provisions it has to be stressed, on the basis of what has been said above, that they seem more effective if they relate to other dispute settlement obligations of the parties concerned than if they exclude “substantially” the same matter as article 35 ECHR. The definition of several matters as “the same” will be unambiguous only in very rare cases, one of which being, e.g. the interpretation of a particular treaty provision, as in the matter before the Inter-American Court and the ICJ where, however, the different procedures, advisory respectively contentious procedure, made the difference. Besides the inclusion of subsidiarity provisions it might also be thought of provisions establishing a link to the ICJ in the sense of entrusting it with an appellate function<sup>72</sup> or of making use of its advisory functions<sup>73</sup>.

## 6. Conclusion

From the above remarks it must be concluded that the role that international courts and tribunals may play in order to preserve the uniformity of international law is rather limited: international law is decentralised and fragmented, judicial bodies are consequently autonomous instruments lacking structural coherence and their decisions are binding exclusively upon the parties to the case and do not have any legal effect for other judicial bodies. Principles such as *stare decisis* or *lis pendens* which constitute an effective bar to conflicting jurisdiction in national law, are not transferable to the international law level. Only the

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<sup>71</sup> See note 50.

<sup>72</sup> This has been done with regard to the ILO and the UN Administrative Tribunals but has raised a number of problems so that, at least the UN Administrative Tribunal terminated the review competence of the ICJ in 1996.

<sup>73</sup> Cf. in this context Vicuna/ Pinto, note 19, 52.



principle of non-interference with the competencies of other international organs could be of some relevance if accepted as a rule of law. For the moment, therefore, the only, however insufficient means to avoid conflicting jurisdiction, is the indispensable subordination of all the numerous autonomous judicial bodies created in the framework of specific and mostly even rather specialised subject matter to the international legal order; no totally self-contained regimes without relationship to the legal order are admissible; all judicial bodies are part of the international legal order which guarantees that the same legal basis of legitimacy and of formal standards are applicable<sup>74</sup>. Since this is obviously not sufficient to prevent conflicts of jurisdiction, the proposal to have the ICJ involved as a means to guarantee the consistency of international law is, indeed, attractive; however, it has to be tested with a view to its feasibility and acceptability.

#### IV. The ICJ as Guarantor of the "Unity" of International Law

The considerations made above are in so far reassuring as they lead to the conclusion that genuine conflicting decisions are a less acute or grave danger as may seem at first glance because the particular case must be looked at very thoroughly and because the reasoning of the judicial body concerned is of utmost significance in order to distinguish it apparent from genuine conflicts<sup>75</sup>. What has, however, been found to be really worrying is the interpretation of rules of law external to a particular judicial body which, in principle, only has to apply or construe the law defined in the underlying treaty, but often will be forced to have regard to other sets of rules of law<sup>76</sup>. Therefore, the danger of conflicting jurisdiction requires more attention than the laconic statement of the Inter-American Court according to which conflicting jurisdiction is "a phenomenon common to all legal systems with certain courts which are not hierarchically integrated ...". Having found that international law as it stands does not offer sufficient means to prevent conflicting jurisdiction, the idea advanced by President *Guillaume* has to be analysed in more detail according to which the ICJ could serve as a central organ to which questions of interpretation and application of international

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<sup>74</sup> *Abi-Saab*, see note 3, 919 et seq., (927).

<sup>75</sup> *Charney*, see note 3, 101 et seq., (371).

<sup>76</sup> Cf. *supra* under III. 4.

law may be referred directly by other courts and tribunals or by means of the request for an advisory opinion by the Security Council (SC) or the General Assembly (GA) according to Article 96 para. 1 of the Charter. Since the ICJ is the only international court with universal jurisdiction *ratione personae* and *ratione materiae* this proposal does seem convincing. But even if one leaves aside the burden of cases already before the ICJ and the question of financial implications, attention has to be drawn to some not inconsiderable objections which may be opposed to this idea.

### 1. Advisory Function of the ICJ

According to Article 96 para. 1 of the UN Charter only the SC and the GA, which both are political organs, may request advisory opinions on any legal questions. Therefore, it would be possible without an amendment of the Charter or the ICJ Statute that these organs refer questions of international law to the ICJ, *proprio motu* or at the instigation of other organs or judicial bodies. The opinions given by the Court are as a matter of fact and, unless otherwise provided for explicitly, not binding. Consequently, it may be stated that reference of questions of international law to the Court is, under the law as it stands and in principle, possible. However, in international law feasibility alone is generally not sufficient, for what is essential is acceptability. Whether the reference of questions of law pending before judicial bodies to the ICJ through the SC or the GA will meet general acceptance seems at least questionable. For, as already mentioned, international judicial bodies are created by states to which, at least so far as interstate disputes are concerned, the ICJ is open anyway so that it could directly be entrusted with the solution of disputes. That means that by creating and seizing a special court or tribunal, although the ICJ could be addressed, states generally pursue particular aims which may pose objections — not only on the side of the states concerned, but also of the special judicial bodies — against the involvement of the advisory procedure of the ICJ for the resolution of a pending case. Therefore and without questioning the merits of the proposal to use the advisory procedure of the ICJ in order to preserve the unity of international law its possible objections and inconveniences have briefly to be considered.

### a. Courts and Tribunals created in the Framework of the UN

The acceptability of the use of the advisory function of the ICJ will present itself differently depending on whether the tribunals seeking advisory opinions are part of the UN System or not<sup>77</sup>. Judicial bodies that are organs of the UN could more easily accept that each request has to pass through the Security Council or the General Assembly because these are all organs of the "UN-family". Nevertheless, they also may prove some concern with regard to the fact that the Security Council and the General Assembly are political organs and as such have to decide within their competent organs not only whether, but also in which formulation the question shall be submitted to the ICJ. Also the composition of the ICJ representing "the main forms of civilisation and of the principal legal systems of the world"<sup>78</sup> may be regarded as problematic, although it may be supposed that courts and tribunals created as organs of the UN could not see serious obstacles to the ICJ being the "apex" of the judicial system empowered to care for the unity or cohesiveness of international law because all "participants" belong to the same system. However, out of the large number of international courts and tribunals, only the two *ad hoc* criminal tribunals, the one for the Former Yugoslavia and the one for Rwanda, are organs of the UN and would, therefore, not pose problems for using the ICJ's advisory functions as a means for preserving the unity of international law. Although some other tribunals have been created under the auspices of the UN, such as ITLOS and the forthcoming Permanent International Criminal Court, or within its specialised agencies (ICSID) or equivalents (WTO)<sup>79</sup>, they are not organs of the UN and may therefore be opposed to using the advisory procedure by means of the SC or GA. That there might be some need for authentic interpretation of international law even between judicial bodies of the UN family is impressively demonstrated by the *Tadic* Case<sup>80</sup>, and that not only with regard to the decision of the Appeals Chamber on the merits, but moreover by its decision on jurisdiction concerning the legality of the creation of the ICTY<sup>81</sup>; this question was in any case one which would have been bet-

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<sup>77</sup> Treves, *Le Tribunal...*, see note 3, 742.

<sup>78</sup> Article 9 ICJ Statute.

<sup>79</sup> Abi-Saab, see note 3, 928.

<sup>80</sup> Cf. *supra* under III. 1.

<sup>81</sup> See note 65.

ter qualified for a decision by the ICJ by the request of an advisory opinion than for a decision taken by the ICTY itself<sup>82</sup>.

### **b. Courts and Tribunals not created within the Framework of the UN**

With regard to the great number of international courts and tribunals that are not organs of the UN, the reference of questions of interpretation and application of international law to the ICJ is much more complicated. The dictum of the Inter-American Court underlining its "autonomous character" already hints at one of the objections which may be raised in this context. International courts and tribunals are in general created by a treaty — the only exception being the *ad hoc* criminal tribunals — because the states parties to the treaty feel a need for the institution of a special tribunal, be it a regional one or one concerned with a specific subject-matter or both, which in their opinion better satisfies their demands than any other already existing tribunal, in particular the ICJ, or which better convenes to their requirements by allowing, e.g. also non-state entities access to the court<sup>83</sup>. From this it follows that they will not readily be willing to have the ICJ involved in the adjudication of the special court by means of the request of an advisory opinion by the Security Council or the General Assembly and thus representatives of states which may not be parties to the special instrument. The case of ITLOS, although created under the auspices of the UN, is illustrative in this context: since under the ITLOS adjudication-system states may choose between the ICJ, the ITLOS, an arbitral tribunal or a special arbitral tribunal it is hard to see why states which

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<sup>82</sup> Abi-Saab, see note 3, 928.

<sup>83</sup> This raises the central question whether it would not be appropriate to open the ICJ also at least to international organisations or even to individuals for contentious or at least for advisory opinions. Such enlargement of the competence of the ICJ could probably solve quite a number of problems of conflicting jurisdiction. Cf. for further information: Dupuy, see note 3, 799; J. Sztucki, "International Organizations as Parties to Contentious Proceeding before the International Court of Justice?", in: A.S. Muller/ D. Raic/ J.M. Thuransky, *The International Court of Justice, Its Future Role after Fifty Years*, 1997, 141 et seq.; P. C. Szasz, "Granting International Organizations *Ius Standi* in the International Court of Justice", *ibid.*, 169 et seq.; I. Seidl-Hohenveldern, "Access of International Organizations to the International Court of Justice", *ibid.*, 189 et seq.; M.W. Janis, "Individuals and the International Court", *ibid.*, 205 et seq.

clearly expressed their option not to be submitted to the ICJ would accept the ICJ as the last instance for interpreting the Law of the Sea Convention in a special case<sup>84</sup>, at least if this would be possible without their consent given not only to the involvement of the ICJ but also to the precise question to be submitted.

### c. Procedural Questions

This leads to the question of whether in case of using the advisory function of the ICJ by means of the SC and the GA the consent of the parties to the relevant case would be, if not necessary, at least desirable. As international jurisdiction relies on the principle of consent of states it might be regarded as obvious to require consent also if another court, e.g. the ICJ, is involved in deciding the pending case. Whether this argument may be invalidated by reference to the fact that the involvement of the ICJ would only be advisory, not binding, and, moreover, that international courts and tribunals generally have the power to seek expert information on special matters or even entrust selected bodies to carry out an enquiry<sup>85</sup> in order to have reliable information for taking the decision seems rather doubtful. That means that the reference of questions of law to the ICJ would have to be provided for in the treaty instituting the judicial body concerned<sup>86</sup>. This, however, raises the next question: could it be acceptable for the ICJ to be involved in the interpretation and application of international law at the request instigated by an international court or tribunal without this opinion being then binding upon the court or tribunal? Would it not be detrimental to the prestige of the ICJ if it gives an advisory opinion on a question of international law which then may be disregarded by the tribunal seeking information for deciding the case pending before it?<sup>87</sup> Although the respect given to decisions of the ICJ by other courts and tribunals makes it rather improbable that an advisory opinion would be disregarded, this would, however, not be impossible or illegal so that good reasons would plead for the binding character of such opinions which could be provided for

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<sup>84</sup> Treves, *Le Tribunal...*, see note 3, 744.

<sup>85</sup> Cf. e.g. Article 50 of the Statute of the ICJ which may be regarded as a model rule in this context.

<sup>86</sup> Cf. in this respect the proposal of the President of France before the ICJ; Speech by President Chirac of 29 February 2000 before the ICJ, ICJ Press Communiqué 2000/7 of 29 February 2000.

<sup>87</sup> Charney, see note 3, 369–370.

in the treaty provisions concerning the power to refer questions to the ICJ.

A further question arises in the context of the power of the SC and the GA to request advisory opinions. Unless it is not intended to restrict that power by an amendment of the Charter and the Statute e.g. that the SC or GA simply serve as a means to formally transfer a request on a question formulated by the judicial body seeking assistance<sup>88</sup>, both organs remain free to request an opinion or not. That means, on the one hand, that it is possible that no majority for a request is reached in the organ competent to decide on the request so that no assistance for the tribunal seeking clarification of a specific question will be available. On the other hand, they could decide not to request an opinion with a view to the concrete question at stake, serving thus as a "filter" that would hardly be acceptable by the court or tribunal concerned. Finally, as the SC or the GA have to decide whether to request the opinion or not, it would also be up to them to formulate the question themselves; at least, they would not be bound to transfer simply a question pre-formulated by the tribunal concerned to the ICJ. The practice of the advisory function of the ICJ in cases where this function is used as replacing the contentious proceedings in cases where not only states are involved<sup>89</sup>, shows that there may be difficulties as to the question posed to the Court that may induce the requesting tribunal not to respect the opinion delivered by the ICJ or to argue that the Court did not answer the question at stake before that tribunal.

Finally, the fact that the SC and the GA are political organs of the UN may pose further problems to accepting the new role of the ICJ, a concern that is also objectionable to the composition of the ICJ which in some cases is the reason why states choose another tribunal composed of members more familiar with the circumstances of the case, in particular persons selected under regional or subject-matter aspects<sup>90</sup>.

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<sup>88</sup> In this case, however, it would not be necessary to involve the SC or the GA but the courts and tribunals could be empowered to directly request advisory opinions, cf. Article 65 of the Statute of the ICJ.

<sup>89</sup> Cf. cases arising under the Convention on the Privileges and Immunities of the United Nations of 1946, in particular the Advisory Opinion of 29 April 1999 concerning *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, 62 et seq.

<sup>90</sup> Treves, *Advisory Opinions...*, see note 3, 226.

A last aspect which has already been addressed by the Inter-American Court concerns the power of the SC and the GA to request an advisory opinion on any legal question, that means that they might act *proprio motu* to bring a question pending before a judicial body before the ICJ. The probable reaction of the court concerned has also already been advanced by the Inter-American Court which stated that this would not restrain the court from itself also rendering an advisory opinion or decision<sup>91</sup>. For requesting an advisory opinion of the ICJ without a request of the court concerned, although legally correct, would certainly not be appreciated by the judicial body concerned, which would regard it as an interference with its autonomy and probably would disregard the opinion that would be detrimental not only for the acceptance of the ICJ, but also for the cohesiveness of international law. Therefore, the initiative for referring a question pending before an international court or tribunal to the ICJ should in any case be left to the court or tribunal concerned according to a special provision included in the underlying treaty.

## 2. Direct Reference by Courts and Tribunals to the ICJ

This rather sceptical evaluation of the possible new role of the advisory function of the ICJ without an amendment of the Charter would not change essentially if reference to the Court of questions of international law would not be made by means of the SC or the GA requesting an advisory opinion, but directly by the court or tribunal seeking clarification<sup>92</sup>. In this alternative, acceptance would perhaps be easier to reach because the question would be formulated by the tribunals or courts themselves, and not by an external and indeed political organ. However, the filtering effect would be missing which may be exercised in cases of requesting advisory opinions through the SC or the GA. Thus it would be possible that numerous questions are put to the ICJ in order for the referring court to be on the safe side or to prove the seriousness of the case. Whether the ICJ could in such cases, as it is empowered under its advisory function, dismiss a request for reasons of judicial propriety seems more than questionable, although it has to be stressed that until now no single request has been dismissed for reasons of judicial propri-

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<sup>91</sup> Cf. note 9.

<sup>92</sup> Treves, *Le Tribunal...*, see note 3, 744.

ety<sup>93</sup>. In any case, direct reference by other courts of questions of law to the ICJ would require an amendment of the Statute of the ICJ as well as a provision to this end in the treaty establishing the jurisdiction of the judicial body concerned. That means that in any case there will be no "closed" system providing for reference of controversial questions of interpretation and application of international law to the ICJ since states remain free to introduce such clauses into dispute settlement obligations<sup>94</sup>. If those clauses are, however, introduced in such treaties this will constitute an effective means to avoid conflicting jurisdiction if the judicial bodies concerned will make reasonable use thereof.

### 3. Creation of a Special Body

The above considerations, which on the one hand, centred particularly on the possible objections to the use of the advisory function of the ICJ and, on the other, on the disadvantages of a direct referral of questions of international law by international judicial bodies to the ICJ raise the idea of creating a "neutral", that is to say a non-political body entrusted to decide on which requests should be forwarded to the Court. There would be no serious obstacles to the creation of such a body by the GA since the GA has a large amount of discretion in broadening the advisory function of the ICJ and therefore is empowered to establish a special committee for that purpose<sup>95</sup>. Such a body could be attached to, but independent of the ICJ, and its members could be appointed by the ICJ among distinguished jurists. The task of this body would be the screening of requests for advisory opinions coming from different sources, i.e. international judicial bodies, or even national courts or tribunals or other organs as international organisations, in order to ascertain that such requests meet the requirement of relating to issues of sub-

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<sup>93</sup> The only request which has been dismissed, was the one of WHO concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, ICJ Reports 1996, 66 et seq. The reason of dismissal was, however, not judicial propriety, but the fact that the request did not fall within the scope of the activities of WHO.

<sup>94</sup> The readiness of states to provide for a link between other international judicial bodies and the ICJ seems, however, at the time being, rather unlikely; Charney, see note 3, 371.

<sup>95</sup> L. B. Sohn, "Important Improvements in the Functions of the Principal Organs of the United Nations that can be made without Charter Revision", *AJIL* 91 (1997), 652 et seq., (660).



stance in the development of principles of international law, interpretation of basic treaties or other significant rights and questions<sup>96</sup>. Requests that would not meet these requirements could be directed to alternative dispute settlement mechanisms or other procedures. The involvement of such a body would make sure that the referral of questions to the ICJ would lead to a decision on an item "qui confirme les principes du droit international et les articule ensemble et par rapport aux conditions actuelles de la vie internationale [et ainsi] contribue d'avantage à asseoir et à consolider le système juridique international et même à l'apaisement des rapports entre Etats, qu'une multitude d'affaires portant sur des questions secondaires..."<sup>97</sup>.

The creation of such a committee would, on the one hand, put aside the concerns regarding the political character of the SC and the GA, and on the other, maintain the filtering function in order not to overburden the ICJ with questions of a secondary importance, and seems therefore to constitute a workable alternative.

#### 4. Concerns on Behalf of the ICJ

Even if it would be possible to reach the consent of states to entrust the ICJ with the competence to decide questions referred to it by other organs, there remain concerns as to the feasibility on behalf of the ICJ which finally shall briefly be considered. A first and rather general concern regards the impressing number of courts and tribunals all over the world<sup>98</sup> and the multitude of special subject-matters entrusted to their jurisdiction. One may ask whether the ICJ would really be prepared to consider a possible flood of questions referred to it. While this concern remains for the moment a rather theoretical one and may be countered by the interposition of a filtering body, other more substantial ones, remain. As example, attention may be drawn to the fact that an increasing number of international courts and tribunals provide for rather strict time-limits for deciding a case because the issues at stake need speedy clarification, be it for reasons of high financial impacts that are at issue or that long-lasting legal uncertainty would be prejudicial. Unless the rules of procedure would be changed, the ICJ is not, however,

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<sup>96</sup> Cf. Vicuna/ Pinto, see note 19, 53.

<sup>97</sup> G. Abi-Saab, "De l'évolution de la Cour internationale. Réflexions sur quelques tendances récentes", *RGDIP* 96 (19923), 273 et seq., (295).

<sup>98</sup> Cf. Oellers-Frahm/ Zimmermann, see note 5.

or only under extreme difficulties, in a situation to respect time-limits or to apply a summary procedure which does not exist in the case of advisory opinions. Additionally, it has to be kept in mind that many of the international courts and tribunals are created in order to decide on highly specific or technical issues that never reached the Court before, such as questions dealing with trade, finances and similar matters<sup>99</sup> which even the ICJ may not be able to resolve without expert assistance and which, more importantly, would not substantially contribute to the preservation of the cohesiveness and uniformity of international law; moreover, there are fields of international law where it is not, or not yet, possible to state what is the law<sup>100</sup>. As the ICJ would certainly be involved in the first place in questions of developing international law, the stating of a *non liquet* as in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*<sup>101</sup> would surely not enhance the attractiveness of the Court and would be detrimental to the acceptance which after a long period of reticence has, fortunately, in recent years considerably increased.

Finally, two more points may be mentioned in this context. On the one hand, it has to be stressed that even the use of the ICJ as the organ to review questions of international law referred to it by other courts or tribunals would not be a guarantee for the maintenance or establishment of the unity or consistency of international law. No court or tribunal could be obliged to refer questions to the ICJ and aspects of prestige as well as the autonomous character of those judicial bodies may be a reason for not referring questions to the ICJ so that conflicting jurisdiction would still be possible.

The second point concerns the body of law against which the questions referred to the ICJ would have to be reviewed. The idea underlying the proposal of entrusting the ICJ with the maintenance of the unity of international law was motivated by the power accorded to the European Court of Justice (ECJ) which, according to article 234 of the EC-Treaty as amended by the Treaty of Amsterdam, may be seized for a preliminary ruling concerning: a) the interpretation of the treaty, b) the validity and interpretation of the acts of the institutions of the Community; c) the interpretation of the statutes of bodies established by an

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<sup>99</sup> Cf. Vicuna/ Pinto, see note 19, 46.

<sup>100</sup> Cf. *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226 et seq.; see also Thirlway, see note 3, 435.

<sup>101</sup> Ibid.

act of the Council, where those statutes so provide.<sup>102</sup> This competence of the ECJ serves to guarantee the uniform application of EC law, e.g. a *corpus iuris* binding equally upon all member states of the EC. In international law, however, as already mentioned, we are confronted with a rather different situation: the only overall binding rules of international law are those of *ius cogens*. Although there undoubtedly exists in international law a corpus of rules – besides the *ius cogens* – valid for the international community, these rules are not mandatory in the same manner as is the European law for the EC-Member States. For all rules of international law, except those of *ius cogens*, may be derogated by agreement. States and all other actors in the international sphere are free to agree on almost anything they want so that the authentic interpretation of treaty law by the ICJ could only be a rather relative one stating what is the law under the special treaty for the parties of that treaty, not, however, stating what is the law for the international community. Undoubtedly, there is some merit also in this limited effect of authentic interpretation, but, it is questionable whether this would satisfy the idea behind the initiative to “guarantee the unity of international law”. Reference to the ICJ would therefore be of general use if restricted to, on the one hand, questions of *ius cogens* or questions concerning the existence and meaning of a rule of customary international law as well as the governing principles of international law and, on the other hand, the interpretation of codification treaties or treaties accepted by the majority of states<sup>103</sup>. For in these cases we are concerned with international law binding upon all or nearly all states, calling therefore for uniform interpretation and application.

This aspect, however, leads immediately to the correlative question of whether then the competence to refer questions of law to the ICJ could be limited to international courts and tribunals. Questions of international law arise increasingly also before national jurisdictions and the unity and consistency of international law could only be sufficiently protected if national courts and tribunals would also be empowered to refer questions to the ICJ.

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<sup>102</sup> G. Guillaume, “Quelques propositions concrètes à l’occasion du Cinquantenaire”, *RGDIP* 100 (1996), 322 et seq., (332–333); cf. also Sohn, see note 95, 660–661.

<sup>103</sup> Cf. Vicuna/ Pinto, see note 19, 48–49.

## V. Concluding Remarks

The particular character of international law and international jurisdiction are the reasons why conflicting jurisdiction is more likely to occur in international than in national jurisdiction. Instruments impeding conflicting jurisdiction in national law, such as the doctrine of *stare decisis* or *lis pendens*, are of little value in international law mainly because there is no "international judiciary" in the sense of a systematic and hierarchical construction of judicial bodies. Therefore, courts and tribunals have themselves to contribute to avoid real or apparent conflicts of jurisdiction, by giving detailed reasons for their decisions and elaborating on the differences existing with regard to similar cases decided by other courts. This presupposes not only active relationship and dialogue between international judicial bodies, but also attentive study of decisions of other courts, essentially those active in a comparable field of law. Although these means can surely not exclude the possibility of conflicting jurisdiction it can help to minimise it and, with regard to the jurisprudence available, it is a positive fact to state that genuine conflicting decisions are scarcely to be found<sup>104</sup>, but that international judicial bodies, in general, use traditional sources of general international law in addition to international treaty law, and that they refer to opinions and judgments of other courts or tribunals, in particular the ICJ.

As to the role that the ICJ can play in order to preserve the consistency of international law it certainly has to be put in perspective and cannot be regarded as the panacea curing the structural shortcomings inherent in the international law system. There is no doubt that the involvement of the ICJ could be of great value in giving authentic interpretation of questions of customary law or generally accepted treaty law; however, even leaving aside questions of consent of states, willingness of judicial bodies to seize the ICJ or procedural and other questions, it seems to be evident that the ICJ should only be entrusted with the centralised function of identification, interpretation and application of the governing principles of international law and that every international judicial body should not automatically be able to refer questions of international law, hence also rather specific ones, to the Court. Therefore, not only would the involvement of a sort of a central "pre-trial committee"<sup>105</sup> be an effective means for filtering the questions coming to the Court, it could, moreover, be thought of a regionally or

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<sup>104</sup> Charney, *Is International...*, see note 3, 235.

<sup>105</sup> *Supra* under IV. 3.

subject-matter oriented two-degree-system as known in national law of which the ICJ would only be the apex. This would presuppose a certain structure between judicial bodies created within particular fields of international law or on a regional basis. Thus, it might be thought of structuring judicial bodies in the framework of e.g. human rights<sup>106</sup> and to provide them with an organ to which questions of interpretation and application of the law in force may be referred<sup>107</sup>. Whether this organ would be one of the existing judicial bodies concerned with human rights or a newly created body consisting of members of those bodies can not be answered here; in the field of commercial and trade law the WTO appeals body could be considered as an organ to which questions of law could be referred to; in the field of international criminal and humanitarian law the Permanent International Criminal Court could be the forum of last resort. This solution would offer the advantage of also allowing reference to the international organ of relevant questions by national courts that would enhance the preservation of uniform interpretation and application of the respective body of law. These "second-degree" organs could then be linked to the ICJ in the sense that they could refer controversial questions directly or by means of an interposed body to the ICJ which thereby would not be confronted with a multitude of extremely specialised and sometimes secondary questions but with questions "filtered" and examined by judicial bodies specialised in the field concerned. It is obvious that, for the time being, only some fields of public international law would be appropriate for such structuring; however, other fields will join, such as e.g. environmental law, space law or telecommunication law. States may be more ready to accept a limited hierarchical order between judicial bodies created in a special field of international law or on a regional basis than to accept an all over competence of the ICJ. Furthermore, a regionally or subject-matter related centralised judicial system might induce states not to create more courts in a special field of international law but to make use of those already in existence and thereby to contribute, if not to the centralisation of international law, but at least to the centralisation of jurisdiction which then may have the effect of enhancing the unity and consistency of the relevant body of law. So long as some sort of hierarchical judicial system is not established or does not cover all fields of international jurisdiction, it may, however, be comforting to underline that the

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<sup>106</sup> Pinto, see note 3, 842.

<sup>107</sup> See in this context also Vicuna/ Pinto, see note 19, 108.

**danger of conflicting jurisdiction is, in the final analysis, preferable to other, in particular, non-peaceful means of dispute settlement.**