

Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals

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I. President Schwebel's Proposal of 26 October 1999

In his address to the United Nations General Assembly on 26 October 1999¹, Stephen Schwebel considered the much discussed subject of the "proliferation" of international courts and tribunals, concentrating on its consequences for the ICJ. President Schwebel maintained the balanced attitude taken in his address to the General Assembly in 1998²

¹ Available on the Court's website <http://www.icj-cij.org>
This was Judge Schwebel's last address to the General Assembly as President of the ICJ.

² Available on the Court's website. In that speech President Schwebel had stated, in particular: "It is inevitable that other international tribunals will apply the law whose content has been influenced by the Court, and that the Court will apply the law as may be influenced by other international tribunals. At the same time, it is possible that various courts may arrive at different interpretations of the law. Proliferation risks conflict. But the risk should not be exaggerated. While in principle there is a single system of international law, in practice there are various views on issues of the law, and not only between international tribunals and among other authoritative interpreters of the law. There are differences within the International Court of Justice itself. This is marked not only by separate and dissenting opinions, but in adjustments of the holdings of the Court over the years. In practice international courts may be expected to demonstrate due respect

stating, in particular, that: "A greater range of international legal fora is likely to mean that more disputes are submitted to international judicial settlement. The more international adjudication there is, the more there is likely to be; the "judicial habit" may stimulate healthy imitation".

However, in President's Schwebel view, "in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance for the unity of international law".

As regards the legal feasibility of this idea, President Schwebel states: "In respect of international tribunals that are organs of the United Nations, i.e. the international tribunals for the prosecution of war crimes in the former Yugoslavia and Rwanda, no jurisdictional problem in their requesting the Security Council to request advisory opinions on their behalf appears, should they wish to do so. The Security Council is authorized by the Charter to request the Court to give an advisory opinion "on any legal question"; and nothing in the Statutes of the war crimes tribunals debars them from asking the Security Council to exercise that authority on their behalf. Nor do the Administrative Tribunals of the United Nations system lack the competence to request the General Assembly or comparable organs of the Specialized Agencies to request opinions on their behalf. There is room for the argument that even international tribunals that are not United Nations organs, such as the International Tribunal for the Law of the Sea, or the International Criminal Court when established, might, if they so decide, request the General Assembly — perhaps through the medium of a special committee established for the purpose — to request advisory opinions of the Court."

The proposal set out in the speech by President Schwebel, who had already discussed the topic in a learned paper of 1988³, has a history be-

for the opinions of other international courts. The International Court of Justice looks forward to working harmoniously with other international tribunals. But the fabric of international law is, it is believed, resilient enough to sustain such occasional differences as may arise".

³ S. Schwebel, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts", *Va. J. Int'l L.* 28 (1988), 495 et seq., reprinted in: id., *Justice in International Law*, 1994, 84. On this essay, see S. Rosenne, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts: a Reply", *Va. J. Int'l L.* 29 (1989), 401 et seq.

hind it. What is new is the combination of the considerations supporting its legal feasibility with the context of the so-called "proliferation" of international courts and tribunals.

II. An Old Idea in a New Context

The basic idea that a role could and should be entrusted to the Hague Court in order to safeguard the unity of international law, which divergent pronouncements of the variety of courts applying it may jeopardize, is not new. Already in 1905 Dionisio Anzilotti envisaged that domestic courts could suspend proceedings in order to submit incidental questions of international law to an international tribunal⁴ for a ruling. Hersch Lauterpacht put forward a similar idea in 1929 as regards the PCIJ⁵ and C. Wilfred Jenks came back to it in 1964⁶. Both authors proposed that domestic courts, when encountering certain questions of international law, could submit them to the Hague Court. According to Lauterpacht this could be done through "a formal application emanating from the highest judicial authorities of the country and addressed to the Permanent Court". According to Jenks, who was concerned to ensure that the result could be obtained without amending the Statute of the Court, domestic courts could submit a question of international law to the Hague Court for an advisory opinion through a special committee to be set up by the General Assembly for the purpose. The model he had in mind were the advisory opinions requested in the proceedings

⁴ D. Anzilotti, *Il diritto internazionale nei giudizi interni*, 1905, 139 note 1, reprinted in: Anzilotti, *Scritti di diritto internazionale pubblico*, Vol. I, 1956, 281 et seq., (436, note 41).

⁵ H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", *BYIL* 10 (1929), 65 et seq., (94-95). Lauterpacht mentions the opinion of Anzilotti and a paper by W.R. Bisschop, "Immunity of State in Maritime Law", *BYIL* 3 (1922-23), 159 et seq., (166), (which was followed by another study of the same author "International Interpretation of National Case Law", *BYIL* 4 (1923-24), 131-137) which discusses a similar proposal made by Bisschop at a meeting of the *Comité Maritime International* held in London in 1922 on the question of immunity of State-owned ships.

⁶ W.C. Jenks, *The Prospects of International Adjudication*, 1964, 160-161.

for review of decisions of the Administrative Tribunals of the United Nations and of the ILO⁷.

The idea was further discussed in the seventies and early eighties, especially in the context of the United Nations and in the United States⁸. The House of Representatives supported it, in a form similar to that put forward by Jenks, in a resolution of 1982 urging the President to "explore the appropriateness" of the proposal⁹.

As put forward by Hersch Lauterpacht and also, it would seem, by C. Wilfred Jenks, these proposals were motivated by the need to ensure the guidance of the World Court in light of the developing, and not always entirely satisfactory, case law of domestic courts on matters of international law. Concern for possible dangers for the unity of international law arising from decisions of international arbitral tribunals, or other international tribunals, such as the "mixed arbitral tribunals" or, more recently the European Court of Human Rights, were not at the forefront. As late as in 1988, the need to overcome the variable "knowledgeability of national courts about international law" and the possibility that in the judgements of these courts "national and parochial perspectives may come into play" were the main reasons put forward by Judge Schwebel to advocate the idea of preliminary rulings of the Hague Court on questions of international law¹⁰.

⁷ As regards the United Nations Administrative Tribunal, this possibility of requesting an advisory opinion of the International Court (introduced in 1955) has been abolished by A/Res/50/54 of 11 December 1995, see further S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, 1997, 1028-1038.

⁸ H. Golsong, "Role and Functioning of the International Court of Justice", *ZaōRV* 31 (1971), 673 et seq., with a summary of the proposals made in the context of the United Nations; L. Gross, "The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order", *AJIL* 65 (1971), 253 et seq., (308-313); P. Szasz, "Enhancing the Advisory Competence of the World Court", in: L. Gross (ed.), *The Future of the International Court of Justice*, II, 1976, 499 et seq., (524-531); L. Caflisch, "Reference Procedures and the International Court of Justice", in: id., 372 et seq.; L.B. Sohn, "Broadening the Advisory Jurisdiction of the International Court of Justice", *AJIL* 77 (1983), 124-129.

⁹ H.R. Con. Res. 86, as revised, of 17 December 1982, quoted in Sohn, see above, 129, note 23.

¹⁰ Schwebel, "Preliminary Rulings ...", see note 3, 499-500; in: Schwebel, *Justice ...*, see note 3, 87.

The revival of the discussion during the seventies was probably encouraged by the success of the system of prejudicial questions which domestic courts of the Member States of the European Community may, or must, as the case may be, submit to the Court of Justice of the European Communities for a ruling on the interpretation of Community Treaties and subordinate legislation¹¹. This revival of the discussion was, however, triggered by the fact that the Court had very few cases on its list. The proposal that the Hague Court would be entitled to play a role in the consideration of issues of international law brought before domestic courts was a part of the broader discussion on how to make the Court busier, a discussion from which came, in particular, the changes in the Rules of the Court aimed at encouraging states to submit cases to Chambers of the Court, and which, at least for some years, have enjoyed remarkable success.

More recently the Court has been particularly busy¹². The need for more cases does not seem to be as vital any more. The concern for obtaining the means necessary to cope swiftly enough with a growing list of cases is now at the forefront. This explains why proposals for entrusting to the Court a task in solving problems of international law arising before domestic courts have been almost forgotten. Current proposals — among which that put forward by President Schwebel in 1999 is probably the most elaborate — aim at granting the ICJ a position of supremacy as regards decisions on at least some questions of international law arising before other international tribunals. The idea of the ICJ as the “supreme court of the international community” has

¹¹ Article 177 (now 234) of the Treaty of Rome establishing the European Economic Community. It is significant that, in discussing proposals for applying similar procedures to the ICJ, Gross, see note 8, 309–311, and Caflisch, see note 8, 577–588, devote detailed developments to this provision and the practice it originated.

¹² This point is made at the beginning of President Schwebel’s speech of 26 October 1999. For a study of the reasons of the difficulties the Court encounters in dealing with an increased list of cases, and of the ways to remedy them, see the “Report of the Study Group (composed of Professors Bowett and Crawford and Sir Ian Sinclair and Sir Arthur Watts) established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law”, in: D. Bowett et al., *The International Court of Justice, Process, Practice and Procedure*, 1997, 27–84. For a short survey of the levels of activity of the Court since its establishment, I. Sinclair, “The Court as an Institution: Its Role and Position in International Society”, in: Bowett, see above, 21 et seq., (22–3).

been mentioned by one of its former Presidents, Sir Robert Jennings¹³. Its present President, Gilbert Guillaume, writing in 1995, envisaged the possibility of transposing to international law questions arising before international courts and tribunals, the mechanism set out in article 177 of the Treaty of Rome establishing the European Economic Community. He stated: "This would mean that, if any international court or international tribunal were to encounter serious difficulties in a question of public international law, and if it were to consider that a decision of that question was necessary to enable it to render judgment, the International Court could be requested to make a ruling"¹⁴.

III. Divergent Interpretations of International Law by Different International Tribunals

The concern that the growing number of international tribunals may endanger the unity of international law would seem at least premature, in light of detailed studies of the decisions of international tribunals which differ from the ICJ¹⁵. To the contrary, references to the judgments of the ICJ, are not infrequent, for instance, in decisions of the Appellate Body of the World Trade Organization¹⁶, of the International

¹³ R. Jennings, "The International Court of Justice after Fifty Years", *AJIL* 89 (1995), 493 et seq., (504); reprinted in: *The Collected Writings of Sir Robert Jennings*, 1998, 588 et seq., (607). In his speech of 27 October 1998, quoted above at note 2, President Schwebel had remarked: "As domestic legal systems have a supreme court, the international community has its principal judicial organ. But the International Court of Justice is not, or at any rate is not now, a supreme court of appeal from other international judicial bodies, and still less a court of appeal from national courts".

¹⁴ G. Guillaume, "The Future of International Judicial Institutions", *ICLQ* 44 (1995), 848 et seq., (862); and id., "La Cour internationale de Justice: quelques propositions concrètes à l'occasion du cinquantième", *RGDIP* 100 (1996), 323 et seq., (332-333).

¹⁵ See in particular J. Charney, "Is international law threatened by multiple international tribunals?" *RdC* 271 (1998), 101 et seq.

¹⁶ See, for instance: Report of 5 January 1998 on *EC measures concerning Meat and Meat Products (Hormones)* Doc.WT/DS26/AB/R-WT/DS48/AB/R, note 93, quoting the Judgement of the ICJ in the *Gabčíkovo-Nagymaros Project* case (ICJ Reports 1997, 4 et seq., (64 et seq., paras 111-114 and page 74, para. 140)) to support the point made in para. 123 that "the precautionary principle, at least outside the field of international envi-

Tribunal for the Law of the Sea¹⁷, and also of the Court of Justice of the European Communities¹⁸. In all such references these Courts and Tribunal rely on the authority of the ICJ.

Of course, it is impossible to predict whether the possibility “of significant divergent interpretations of international law”, to use President Schwebel’s words, will in fact occur, leaving aside the discussion as to whether such development would be dangerous for international law¹⁹. What seems to have prompted the concern of the ICJ, or at least of those of its members, or former members, which have made public their views, are a few decisions of other international courts which have been perceived as overt challenges to the authority of the Court.

ronmental law, still awaits authoritative formulation”; and note 154 quoting two Judgements of the Court in support of the interpretative principle *in dubio mitius* followed in para. 165. And also: Report of 12 October 1998 on *United States – Import Prohibition of Certain Shrimp and Shrimp Products AB-1998-4*, Doc. WT/DS58/AB/R (reprinted in: *ILM* 38 (1999), 118 et seq.), note 109 quoting the ICJ Advisory Opinion in the *Namibia* case ICJ Reports 1971, 16 et seq., (31) and the ICJ Judgement in the *Aegean Sea Continental Shelf* case in ICJ Reports 1978, 3 et seq., to support the point made in para. 130 that the meaning of a term is “by definition evolutionary”; and note 136 quoting three Judgements of the ICJ in supporting the reference made in para. 158 to the principle of good faith.

¹⁷ Judgement in *The M/V “Saiga” (No. 2) case* of 1 July 1999 (*ILM* 38 (1999), 1323): in para. 120 the Tribunal quotes the PCIJ Judgement on the *Case concerning certain German interests in Polish Upper Silesia* (PCIJ Ser. A, No. 7, 19) to support a point made as to the competence of the Tribunal to examine the domestic law of Guinea; in paras 133–134 the Tribunal refers to the ICJ *Gabčíkovo-Nagymaros Project* Judgement (ICJ Reports 1997, 40–41) to support the position taken on the requirements of the defence of state of necessity; in para. 170 the Tribunal quotes the PCIJ Judgement on the *Factory at Chorzów (merits)* in PCIJ Ser. A, No. 17, 47, as an illustration of the general international law rule on reparation of damage resulting from an international wrongful act.

¹⁸ In its Judgement of 16 June 1998, *A Racke GmbH v. Hauptzollamt Mainz*, ECR, 1998, I, 3655, at para. 50 the Court quotes the *Gabčíkovo-Nagymaros Project* Judgement of the ICJ to support the point made that a fundamental change of circumstances may be invoked only in exceptional cases.

¹⁹ On this aspect, also for further references, see T. Treves, *Le controversie internazionali, Nuove tendenze, nuovi tribunali*, 1999, 59–67; and id., “Recent trends in the settlement of international disputes”, in: *Bancaja Euro-mediterranean Courses of International Law*, I, 1997, 305 et seq., (431–436).

One such instance is the *Loizidou* case decided in 1995 by the European Court of Human Rights²⁰. In this Judgement the Court examined a reservation by Turkey to its acceptance of the jurisdiction of the Court and of the European Commission of Human Rights. Such acceptance was based on arts 25 and 46 of the European Convention on Human Rights. These provisions, as stated in the Judgement, were "modelled on Article 36 of the Statute" of the ICJ²¹. The Strasbourg Court held that from the fact that restrictions are possible under article 36 of the Statute of the Hague Court "it does not follow that such restrictions to the acceptance of the jurisdiction of the Commission and Court must also be permissible under the Convention"²². The Court emphasized the different context in which the Hague and the Strasbourg courts operate²³ and concluded that: "Such fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance under Articles 25 and 46, provides a compelling basis for distinguishing Convention practice from that of the International Court"²⁴. Consequently, the territorial restriction to Turkey's acceptance of the jurisdiction of the European Human Rights Commission and Court was considered invalid, even though a different conclusion would probably have been reached in the context of the Statute of the Hague Court²⁵.

In commenting this Judgement of the European Court of Human Rights, Sir Robert Jennings, former President of the Hague Court, stated: "I feel bound to say that I find this insistence on separateness disturbing; and wonder whether this is what the parties to the treaty intended when they took over the wording of the International Court of Justice Statute"²⁶. This statement does not contend that this decision of the European Court of Human Rights is inconsistent with general

²⁰ *Loizidou v. Turkey* (preliminary objections), Judgement of 23 February 1995, *ILR* 103 (1996), 622 et seq.

²¹ *Ibid.*, para. 83.

²² *Ibid.*, para. 83.

²³ *Ibid.*, para. 84.

²⁴ *Ibid.*, para. 85.

²⁵ *Ibid.*, para. 89.

²⁶ R. Jennings, "The Judiciary, International and National, and the Development of International Law", in: *Collected Writings*, see note 13, 796 et seq., (802); also in *ILR* 102 (1996), IX-XXIII, (XIV), and *ICLQ* 45 (1996), 1 et seq., (5-6).

international law — a contention far from being beyond doubt²⁷ in light of the rule according to which a treaty must be interpreted in context and “in the light of its object and purpose”²⁸. What seems remarkable in it is the adjective “disturbing” and the reference to “insistence on separateness”. In commenting on the *Loizidou* Judgement in a less formally published address made a few weeks after that Judgement was handed down by the Strasbourg Court, the same eminent author was even more explicit when he stressed that the above quoted passage of the Judgement “indicates the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented”²⁹.

A second instance is the Judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadic* case, rendered on 15 July 1999, just three months before the address of President Schwebel to the United Nations General Assembly³⁰. In this Judgement 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 classified as an international armed conflict after 19 May 1992, the day when the Yugoslav National Army withdrew from Bosnia and Herzegovina. The Appeals Chamber considered that in order to determine whether the armed forces of the Bosnian Serbs “belonged” to the Federal Republic of Yugoslavia, making the armed conflict international according to the terms of article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, a “test of control” had to be applied³¹. The test of control established by the ICJ in the *Nicaragua* Judgement of 1986³² for determining whether the United

²⁷ Charney, see note 15, 160–163.

²⁸ Vienna Convention on the Law of Treaties of 23 May 1969, article 31 para. 1.

²⁹ R. Jennings, “The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers”, in: *ASIL Bulletin* No. 9, November 1995; the author mentions the *Loizidou* case as “the ideal case” to illustrate the danger of fragmentation of international law due to proliferation of international tribunals (*ibidem*). This paper is not included in the *Collected Writings of Sir Robert Jennings* quoted above at note 13.

³⁰ *Prosecutor v. Tadic*, *ILM* 38 (1999), 1518 et seq.; *Riv. Dir. Int.* 82 (1999), 1072 et seq.

³¹ *Ibid.*, para. 95.

³² Case concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq.

States was responsible for the violations of international humanitarian law committed by the *contras* was considered as not persuasive by the Appeals Chamber³³. According to the Appeals Chamber, such test required a control extending not only to the military or paramilitary group in general but also to the specific operation in the course of which breaches may have been committed. The Judgement of the Appeals Chamber comes to this conclusion, after interpreting the Hague Court's Judgement, which "admittedly ... did not always follow a straight line of reasoning" and stating that the Judgement made distinctions that "at first sight seem somewhat unclear"³⁴. The criticism of the test of control accepted by the Court in the *Nicaragua* Judgement is developed arguing at length that "it may be held as unconvincing" in light of "the logic of the law of State responsibility"³⁵ and of its being "at variance with judicial and State practice"³⁶.

There is no need for the purposes of this paper to express a view as to whether the criticism of the *Nicaragua* Judgement is well founded. It seems significant, however, to mention a reaction from an eminent Judge whose contribution to the work of the ICJ is well known. This reaction is demonstrated in the separate opinion of the presiding judge of the Appeals Chamber, Mohamed Shahabuddeen, a former member of the ICJ (although he was not in that position at the time of the *Nicaragua* Judgement)³⁷. While agreeing with the general direction of the Judgement, Judge Shahabuddeen states: "I am unclear about the necessity to challenge *Nicaragua* ... I am not certain whether it is being said that that much debated case does not show that there was an international conflict in that case. I think it does, and that on this point it was both right and adequate"³⁸. Later, after observing that "it may be that there is room for reviewing" the *Nicaragua* Judgement as regards "its holding on the subject of the responsibility of a state for the delictual acts of a foreign military force", he states: "I am not persuaded that it is necessary to set out on that inquiry for the purposes of this case, no issue being involved of state responsibility for another's breaches of international humanitarian law"³⁹.

³³ *Tadic* Judgement, see note 30, paras 115–145.

³⁴ *Tadic* Judgement quoted above, paras 108 and 114.

³⁵ *Ibid.*, paras 116–123.

³⁶ *Ibid.*, paras 124–145.

³⁷ *ILM* 38 (1999), 1611.

³⁸ *Ibid.*, para. 5.

³⁹ *Ibid.*, para. 20.

It seems clear that Judge Shahabuddeen would have found it preferable that the Appeals Chamber had reached its conclusions without coming explicitly at odds with a Judgement of the ICJ, especially as, in his view, this was not necessary.

IV. Difficulties of a General Character Raised by the Proposal

It is not essential to determine whether the proposal of President Schwebel was prompted by a few perhaps unpleasant, although not very far-reaching, challenges to the authority of the ICJ, or by the need to prevent further and more far-reaching "conflicting interpretations of international law". In light of the high authority of the proponent, it seems important to assess whether, in the form President Schwebel has introduced his ideas, they are realistic enough to overcome difficulties of a political and legal nature, or whether they must be seen as yet unripe proposals to be kept in mind should the need arise in the future.

It would seem far from certain that, in the present circumstances, states share the perception of a need to avoid the possible "fragmentation" of international law by taking the step proposed by President Schwebel towards replacing the present haphazard co-existence of different international courts and tribunals with a hierarchically ordered "judicial system". It is a fact that all the existing courts and tribunals have been established by states and correspond to a need of these states. States establish courts and tribunals in most cases directly by treaty. As regards the *ad hoc* criminal Tribunals for the Former Yugoslavia and Rwanda, they have done so through a decision of the Security Council. Apart from the *ad hoc* criminal tribunals, all the others have specific constituencies. This is obvious as regards regional courts and tribunals, but it is also true as regards adjudicating bodies, such as the International Tribunal for the Law of the Sea and the future International Criminal Court, which have been conceived as universal, but which, in fact, are treaty bodies elected and financed only by the States parties to their constitutive instruments.

There is wisdom in the distinction proposed by President Schwebel between courts and tribunals which are and those which are not organs of the United Nations. In fact, there is an important objection against President Schwebel's proposal which does not apply to the case of the tribunals that are organs of the United Nations, such as the above men-

tioned *ad hoc* criminal Tribunals. This is the objection which States parties to the constitutive instruments of the relevant court or tribunal could raise against allowing states that are not parties to those instruments to play a role which may have relevant consequences for the decision of a pending dispute, be that as members of the Security Council, of the General Assembly or of a possible screening committee set up for filtering requests for advisory opinions. A similar objection might be raised by the States parties to the constitutive instrument of the relevant court or tribunal also against entrusting a role to the ICJ, as the composition of the Court corresponds to a constituency and to a mode of election different from those on which the composition of the court or tribunal before which the case is pending is based. Obviously, this kind of objection is inconceivable as regards the possibility of the *ad hoc* criminal Tribunals requesting the Security Council to request an advisory opinion of the ICJ.

There is, however, an objection which applies both to the requests for advisory opinions originating from courts and tribunals that are and to those that are not organs of the United Nations. This objection may be raised in light of the fact that, in order to comply with Article 96 of the United Nations Charter, the request for an advisory opinion has to go through the Security Council or the General Assembly, or another authorized United Nations organ or Specialized Agency. In other words, the request would come before a political body. The intervention of a political body in a case pending before a court or tribunal may introduce elements which are not consonant with the decision of a case according to international law.

A direct reference from a court or tribunal to the ICJ for an advisory opinion, or even for a ruling in the form of a prejudicial question, would avoid this objection, but would require amendments to the Statute of the Court. Such reference would, in any case, require also a provision to that effect in the instruments regulating the court or tribunal which could request the opinion of the ICJ. This aspect has been taken into consideration by the President of France, in addressing the ICJ during a visit on 29 February 2000. He stated: "...perhaps we should see to it that treaties containing dispute-settlement mechanisms ought to establish an explicit linkage to the Court. When treaties or conventions set up a new jurisdiction, would it not be desirable for that juris-

diction to be able to refer questions to the Court for preliminary ruling, for guidance on points of law of general interest?"⁴⁰

V. Specific Difficulties as Regards the International Tribunal for the Law of the Sea

The above considerations apply in general to the courts or tribunals different from the ICJ. It seems interesting to add further observations as regards the specific problems arising for the possible application of President Schwebel's proposal to the *ad hoc* criminal Tribunals and to the International Tribunal for the Law of the Sea. They are the main examples of existing tribunals not having a regional or bilateral character being, in one case, and not being, in the other case, an organ of the United Nations.

As regards the *ad hoc* criminal Tribunals, it certainly can be argued (and this seems to be the basis of President Schwebel's argument) that, as they have been established by a resolution of the Security Council, the same Security Council may, if requested by one of the Tribunals, request an advisory opinion of the ICJ on an issue of international law arising in a case before such Tribunal. One may agree that this would require no change to Article 96 of the Charter or to Article 65 of the Statute of the ICJ.

The difficulty would seem to lie in that the proceedings for the purpose of which the advisory opinion would be requested are criminal proceedings in which the accused enjoys certain rights. In the proceedings for an advisory opinion before the Court (which would be incidental to the criminal proceedings before the *ad hoc* Tribunal) the position of the accused would be weaker than it is before the *ad hoc* criminal Tribunal. Differently from what would happen were the proceedings kept entirely within the *ad hoc* criminal Tribunal, the accused, unless Article 34 para. 1, of the Statute were suitably amended, would not be allowed to appear before the ICJ. He would thus not be allowed to present arguments in support of his views on the question of international law submitted for the consultative opinion, even though his personal freedom may ultimately depend on this question. Moreover, the possibility, given by Article 66 of the Statute to all states entitled to appear

⁴⁰ Speech by President Chirac of 29 February 2000 available on the ICJ website quoted in note 1.

before the Court, to present written and oral statements makes the position of the accused even weaker as he cannot reply to these statements.

As regards the International Tribunal for the Law of the Sea, it must be emphasized that President Schwebel, in saying that "there is room for the argument" requesting the General Assembly "perhaps through the medium of a special committee established for the purpose" to request an advisory opinion to the Hague Court, addresses the question in a more hesitant manner than he does as regards Tribunals that are organs of the United Nations. Indeed, while this proposal might not require amendments to the Charter and Statute, it seems incompatible with the United Nations Convention on the Law of the Sea (with, perhaps, marginal exceptions) in each of the different cases in which the jurisdiction of the Tribunal may be established⁴¹.

One may consider, first, the exercise by the International Tribunal for the Law of the Sea of compulsory jurisdiction in a contentious case. Such jurisdiction depends, under article 287 of the Law of the Sea Convention, on a declaration of choice of the Tribunal made by both parties to the dispute⁴². According to para. 4 of the said article, in this case the dispute may be submitted "only" to the Tribunal. It does not seem that the Tribunal would be within its powers under the Convention (or that an amendment of the Convention for that purpose would be compatible with the system of article 287) if it decided to request an opinion from the ICJ, a court excluded by the concordant choices of the parties

⁴¹ These cases are analyzed in T. Treves, "The Jurisdiction of the International Tribunal for the Law of the Sea", *IJIL* 37 (1997), 396 et seq. and id., *Le controversie internazionali etc.*, see note 19, 107 et seq.

⁴² In the *M/V "Saiga" (No. 2) case*, the Tribunal's jurisdiction was based on article 287 in a peculiar way. The plaintiff State (Saint Vincent and the Grenadines) had brought the case before an arbitral tribunal. As neither the plaintiff nor the defendant State (Guinea) had made a declaration under article 287, compulsory jurisdiction belonged to an arbitral tribunal according to paras 3 and 4 of article 287. Since, however, the parties had agreed on 20 February 1998 (the 1998 Agreement) that the "dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea" as from the date it had been submitted to the arbitral tribunal, the Tribunal considered that "the basis of its jurisdiction in this case *was* the 1998 Agreement, which transferred the dispute to the Tribunal, together with articles 286, 287 and 288 of the Convention" (Judgement of 1 July 1999, para. 43, see note 17).

to the dispute, and which, had they so wished, they could have indicated as their preferred procedure⁴³.

Secondly, one may mention the cases in which the jurisdiction of the Tribunal is both compulsory and exclusive. These include proceedings for the prompt release of vessels⁴⁴, proceedings for provisional measures pending the establishment of a competent arbitral tribunal⁴⁵, and the various proceedings before the Sea-Bed Disputes Chamber⁴⁶. The involvement of the ICJ, even for a consultative opinion would, in my view, be inconsistent with the Convention as in these cases the Convention has chosen the International Tribunal for the Law of the Sea to the exclusion of other courts and tribunals. As regards proceedings for prompt release of vessels and crews and for provisional measures, a request of a consultative opinion of the ICJ would also be hardly compatible with the urgency and expeditiousness which are essential characteristics of these proceedings. In proceedings before the Sea-Bed Disputes Chamber further difficulties might derive from the fact that in these proceedings physical and juridical persons may be parties, while they may not appear before the Hague Court.

Thirdly, the jurisdiction of the Tribunal may be based on a special agreement of the parties. In this case it cannot be ruled out — although it seems highly unlikely — that the parties could authorize the Tribunal to request an advisory opinion of the Hague Court. Still, it might be questioned whether this would be wholly consistent with the rights of the other parties to the Law of the Sea Convention.

⁴³ Some doubts might be raised about this conclusion if both States parties to the case before the Law of the Sea Tribunal have expressed their preference, under article 287 of the Law of the Sea Convention, for the ICJ together with the Tribunal. This is the case of Belgium, Finland, Italy and Oman.

⁴⁴ Article 292 of the Convention. See the Judgements of the Tribunal of 4 December 1997 in the *M/V "Saiga" (No. 1) case*, reprinted in: *ILM* 37 (1998), 360 et seq. and in *Max Planck UNYB* 2 (1998), 429 et seq.; and of 7 February 2000 in the "*Camouco*" case (Panama v. France) available in the U.N. website <http://www.un.org>

⁴⁵ Article 290 para. 5, of the Convention. See the Order of the Tribunal of 27 August 1999 in the *Southern Bluefin Tuna cases* (request for provisional measures, New Zealand v. Japan; and Australia v. Japan) reprinted in: *ILM* 38 (1999), 1624 et seq.

⁴⁶ Article 187 of the Convention.

VI. Conclusions

Almost a century has elapsed since Anzilotti mentioned the idea of granting an international Court the power to make rulings on questions of international law submitted to it by domestic courts. Undoubtedly, there have been important changes since then. Now there is an International Court of general competence to which all states are parties, while, when Anzilotti wrote, the Permanent Court had yet to come. Now domestic courts are confronted much more often with questions of international law. Now many new international courts and tribunals, regional or specialized, have been established and produce a flow of judgements.

In light of this, the idea can no longer be dismissed as a "flight of fancy" (*un volo di fantasia*) as Anzilotti did almost a century ago after having envisaged it as part of an imaginary situation⁴⁷. It seems important that these kinds of proposals are made and continue to be discussed. It would be misleading to think that they are the mere product of competition between courts and tribunals or of a feeling of uneasiness of the ICJ. They are an appropriate subject for serious discussion in view of concerns which cannot be set aside lightly.

The time for transforming these proposals into reality does not seem, however, to have come as yet. The present unstructured coexistence of international courts and tribunals is the product of the will of states. Divergent decisions seem, for the time being, very limited and hardly causing the fragmentation of international law. Even as regards the possible increase of divergent views between international tribunals in the future, there is room for arguing that the drawbacks of such situation would be more than offset by the advantages of the more vigorous growth of international law which the availability of an increased number of possibilities of adjudication could entail⁴⁸. This makes it difficult to presume that states today would accept a general restructuring of international adjudication by which a hierarchically ordered judicial system replaced the present coexistence of uncoordinated sets of self-contained systems⁴⁹.

⁴⁷ Anzilotti, see note 4.

⁴⁸ I have developed this argument in the writings quoted above at note 19.

⁴⁹ The speech of the President of France quoted above (note 40) seems, however, very significant. It probably is the first instance of attention paid by a Head of State to the problem of coherence of the international legal system. It is noteworthy that President Chirac sees this problem as arising not only

Even proposals presented as not requiring radical changes, such as those put forward by President Schwebel, have their difficulties. They would require some amendments to existing treaties. Such amendments would not perhaps concern the Charter, but, at least as regards Courts and Tribunals that are not organs of the United Nations, they would concern their constitutive instruments. In the form proposed by President Schwebel, involving a request to the Security Council or the General Assembly to request an advisory opinion of the ICJ, the involvement of political bodies in the disposal of a concrete dispute pending before a court or a tribunal adds to the difficulty.

from the "proliferation" of dispute-settlement bodies but also from the proliferation of "institutions and treaties that has accompanied globalization, embracing an ever broader diversity of fields". In his view the consultative jurisdiction of the Hague Court could and should be utilized to reconcile conflict between the different "international laws" (*les droits internationaux*, in the original, not rendered clearly in the English translation) emerging in fields such as the environment, trade, and labour standards.