THE NORMALIZATION OF INTERNATIONAL ADJUDICATION: CONVERGENCE AND DIVERGENCIES

Editor's Note: Due to an unfortunate editorial oversight, Prof. Abi-Saab's essay was omitted from our Summer 2009 issue, featuring a symposium on *The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems*. It is printed here as a complement to that symposium.

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Ten years after the 1998 pioneering Colloquium on what was then perceived as a sudden and new phenomenon "The Proliferation of International Tribunals: Piecing Together the Puzzle,"[1] it is my pleasure and honor to participate once again in the present Symposium that will hopefully enable us to see how this phenomenon has evolved, as well as our perception of it, during the intervening decade.

The subject I was asked to address—"The Normalization of International Adjudication: Convergence and Divergencies" —falls neatly into three parts, turning around three words: "normalization", which is the focus of the title itself, and the two components of the subtitle, "convergence" and "divergencies".

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1. *See* Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

I. The Normalization of International Adjudication

The term "normalization" infers that this is a new trend or phenomenon. Indeed, my teacher and mentor Sir Robert Jennings persistently criticized in his lectures and writings the adjective "pacific" in the title of the Hague Convention for the Pacific Settlement of Disputes, adopted in 1899 and revised in 1907. This is because it gives the impression that the act of going to court is of the same momentous importance as what it suggests to be its alternative, i.e. the "non-pacific" act of going to war; whilst it should be considered, as in municipal law, a mere ordinary or routine act. However, the title of the Convention probably reflected how resort to international adjudication was envisaged at the time; which raises the question why, at the turn of the twentieth century when the Convention was adopted, resort to litigation was thus considered. In order to answer this question we have to go back to the origins of the international legal system as we know it today.

The lineage of the system and how far back it goes is subject to controversy. What we do know, however, is that the Peace of Westphalia, which put an end to the Wars of Religion in Europe, constituted a decisive landmark in the transformation of its structure from the vertical system of double allegiance of Princes to Pope and Emperor, which had become by then completely moot and was finally shattered by the Reformation and the Wars, into a horizontal system of formally equal sovereigns. "Sovereigns" mean that they are not (or no longer) subjected to any higher authority, and the sovereign is defined by the fact that he has the last word.

Such a structure is inimical to adjudication and to the existence of judicial bodies. A judicial body settles disputes between the parties by a final and compulsory decision; and the new sovereigns did not really appreciate giving with the left hand what they had just acquired with the right one, by relinquishing the power of ultimate decision, even to a tribunal. The German historian of international law Wilhelm Grewe, in his book *The Epochs of International Law*,[2] wrote that the period starting with the Peace of Westphalia constituted the "nadir"

2. Wilhelm G. Grewe, The Epochs of International Law 363-67 (Michael Byers trans., rev. ed. 2000).

of international arbitration, precisely because of this new legal structure of international society.

This pattern persisted until the nineteenth century. The few cases that can be found were not arbitration as we understand it now. They consisted in fact of two sovereigns appealing to another sovereign and asking for his "arbitration" in the generic sense of merely settling their dispute. Rarely, if at all, did those decisions provide reasoning or "motivation." It was more like two sovereigns soliciting the political intercession by a peer.

By the end of the eighteenth and the beginning of the nineteenth century, the emergence of the United States foreshadowed a new system of arbitration, with the Jay Treaty of 1794 with the United Kingdom. But here again, it was not real arbitration in the contemporary sense of the term. It was, rather, the settlement of the disputes arising from the War of Independence by mixed commissions, in fact joint organs without neutral participation; a pattern which was replicated later on, particularly in the practice of the United States with other nations. Only much later, around the last quarter of the nineteenth century, did another dispute between the United States and the United Kingdom (relating this time to the American Civil War) lead to the Alabama case (1872) that marked the start of inter-state arbitration in the modern sense of settling disputes according to law by organs independent from the parties, i.e. organs with decisive third-party participation.

Thus started, in the late nineteenth century and the early twentieth century, a flourishing period for arbitration that coincided with the rise of the peace movement, and its efforts to codify and develop international law and to create permanent judicial bodies, particularly at the two Hague Peace Conferences of 1899 and 1907; a movement that produced the so-called "Permanent Court of Arbitration," that was, as Judge Manley Hudson described it, neither a court nor even permanent, but merely a roster of potential arbitrators and a permanent bureau (secretariat).

Still, in spite of the increasing resort to adjudication during that period—starting with the Alabama award until the outbreak of the First World War—this was exclusively through arbitral tribunals or mixed commissions that were created on

an *ad hoc* basis to deal with one particular case or series of cases; each constituting an ephemeral adjudicative universe by itself. They went their separate ways, and all efforts to create standing organs remained barren until the end of the First World War and the coming into being of the Permanent Court of International Justice ("PCIJ") in 1922. In fact, there had already been a standing judicial organ on the regional level, the Central American Court of Justice, established in 1907, which had obligatory jurisdiction over its member states; but probably because of that, they did not prorogate it after the lapse of the initial ten-year period provided for in the treaty.

The PCIJ was indeed a great innovation. It was a Permanent Court on the universal level. But unfortunately, the innovation fell short of conferring on it obligatory jurisdiction over states members of its Statute; whence the odd system of article 36, paragraph 2, euphemistically called the "optional clause of compulsory jurisdiction." For how compulsory is a system that requires one to opt for it to become compulsory?

As a result, whilst the institution was a standing one, its use was rather restrained during the eighteen years of its effective life (from 1922 to 1939): thirty-two judgments in twenty-four contentious cases and twenty-seven advisory opinions—apart from an *ad hoc* arbitration once in a while. In terms of economics, the international legal system functioned at a far less than optimal level, as far as adjudication according to law is concerned. This situation did not change much after the Second World War, in spite of the reconfiguration of the PCIJ into the International Court of Justice ("ICJ") and its formal integration within the framework of the United Nations; or so it seemed for a long while—in fact until the 1990s.

What brought about a radical change of outlook and served as a shock of recognition at the beginning of the 1990s was the creation in quick succession of several high-visibility international tribunals, such as the two *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda (followed later on by the International Criminal Court), the International Tribunal for the Law of the Sea, and the Appellate Body of the World Trade Organization. It is at that point in time that internationalists started to speak of the "proliferation" of international courts and tribunals, as a new and rather sudden phenomenon triggered, according to a largely shared opinion, by the end of the Cold War.

However, this general impression needs correction on two scores. In the first place, the apparent novelty and sudden character of the phenomenon were based on the quantitative evaluation of the preceding work of the World Court and high-profile international arbitrations. It was to some extent a deceptive impression, as it did not take into account the dynamic legal forces at work within the international body politic since the end of the Second World War. For, in parallel with the rapidly growing complexity of international relations, international law has undergone prodigious developments, not only in updating its traditional fields, but also in expanding into new and more specialized ones, particularly through the creation of special regimes that are usually institutionalized, with a strong judicial component.[3] Thus progressively emerged a multitude of judicial and quasi-judicial organs, particularly on the regional level, such as the European and the Inter-American Courts of Human Rights, and the European Court of Justice; but also on the universal level, such as the administrative tribunals of international organizations and the panels of the GATT. But as they covered regional, sectoral, or technical areas, they remained on the sidelines of international attention. The quickening pace of this cumulative process, through the establishment within a short time span of several highly conspicuous fora (most of which were permanent), brought it into the limelight, whence the impression of novelty and suddenness.

Secondly, the current use of the term "proliferation", with its negative connotation, to describe this seemingly new phenomenon, was rather unfortunate. "Proliferation" is extremely dangerous when we speak of nuclear or other weapons of mass destruction. But it is a totally different matter when we speak of tribunals in a legal system that has notoriously suffered throughout its existence from the dearth, not to say absence, of mechanisms of ascertainment of the law via third-party determination.

It is true that what drew first the attention of the internationalists to this seemingly new phenomenon was their sudden

3. On this move from the Westphalian classical model of the "law of coexistence", which is self-managed, towards the "law of co-operation", which is institutional by nature, see Georges Abi-Saab, *Whither the International Community?*, 9 Eur. J. Int'l L. 248 (1998).

realization that the international judicial universe, which used to look like an empty sky with a lone star (the International Court), traversed occasionally by a meteorite (the odd arbitration), looks now suddenly studded with a number of, not to say numerous, stars that are unconnected to each other; with greater risk that they may collide, i.e. that different international courts and tribunals may run into conflicts of jurisdiction or decision whether on a specific matter or in the manner in which they interpret and apply the law, thus undermining rather than enhancing legal certainty and the unity of the system.

In other words, it was the entropic risks of the seemingly new phenomenon rather than its potential benefits that occupied the attention of the internationalists and favored the use of the term "proliferation" with its negative connotation. This was indeed the main focus and concern of the 1998 Colloquium and much of the writings since.

There is no point in delving here into this subject, which is brilliantly treated in Judge Bruno Simma's keynote address in this Symposium.[4] Suffice it to say that even in the 1998 Colloquium, voices were heard saying that these risks should not be exaggerated and suggesting ways and means to minimize, if not to eliminate, them.[5] Moreover, these risks did not materialize to any significant degree during the intervening decade, revealing themselves to be minor nuisances rather than a serious danger; the more so if we compare these risks with the benefits of the present trend towards the creation of new fora, and the normalization of the resort to adjudication in a legal system that has suffered since its inception from the paucity of objective third-party determinations.

That much for "normalization", which brings me to the two components of the subtitle: "convergence" and "divergencies."

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4. This address is reflected in Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265 (2009).

5. See for example the contributions of Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999); Abi-Saab, *supra* note 3, at 919.

II. Convergence

Convergence raises the question of what brings this motley collection of fora together? And what can be their common denominator (if there is one), in spite of the absence of a formal institutional framework that correlates them to each other?

Personally I see at least two such common denominators, one more objective than the other. The first is the shared concept of the international judicial function, i.e. that all these fora exercise a parcel or a particle of the "international judicial function," which constitutes the DNA of their genes. But what is this function? And is it any different from the "judicial function" *tout court*, that is as we understand it in municipal law? Obviously, there is a generic hard core of the concept which can be found in all systems: a requisite degree of independence, due process, and binding determinations according to law. But this is not all there is to it.

When I was elected to the bench of the International Criminal Tribunal for the former Yugoslavia (ICTY), most of my colleagues were Chief Justices or senior Judges in their respective national judiciaries and they had very set ideas about what could or could not be done; ideas they transposed lock, stock, and barrel into what we were supposed to do. Apart from their divergence, these ideas were sometimes obviously unworkable in an international environment. So I used to tell them: "We have to train like legal cosmonauts, to learn to evolve in the weightlessness of the ethereal and rarified atmosphere of international law that does not rest on a gravitational centralized power, as does municipal law on the power of the state. We do not have a legislature above us or an executive below us, so we have to stretch out and adjust to these institutional peculiarities (not to say shortcomings) of the international legal system, in order to be able to function."

In other words, the generic concept of "judicial function" has to be fitted into the particular structure and adapted to the special parameters of the international legal system. One such parameter is the fundamental principle of the consensual basis of jurisdiction in international law; and it is precisely this consensual basis that differentiates the international adjudicative process from that of municipal law and makes for many of the specificities of the international judicial function.

The concept of the international judicial function emerged slowly and at the beginning rather imperceptibly from the jurisprudence of the International Court (a term covering both the PCIJ and the ICJ) over its eighty some years of its existence as the first, and at the beginning (and for much of this period) the only standing or permanent tribunal of general international law on the universal level. The treatment of the concept became more conscious and explicit with time, especially under the ICJ (elaborating particularly on the limits of the function).

Throughout this period, the great achievement of the International Court lies in its constant fine-tuning, adjusting the generic concept to the conditions of the international environment, and thus tracing the specific contours and limits of its judicial function: How to act as an independent judicial organ (and the organ of the international legal system at large), while drawing its jurisdiction from the consent of the parties, and what is compatible or incompatible with this posture? This was particularly clear in the way the Court drew the configurations and modalities of what was in 1922 a novelty in international law; i.e. its advisory jurisdiction: How to give authoritative legal opinions to political organs on what can be highly political matters, while preserving its independence vis-à-vis these organs and the judicial character of the process and the outcome.

Though developed through the practice of the International Court and for its own purposes, the concept proved to be "generalizable." It provided a general profile of what can be considered as the proper pattern of conduct for an international judicial organ; a profile that served as a model for all the international tribunals which came later on.

In 1967 I published a book in French on the preliminary objections before the International Court.[6] In the introduction, I wrote that the rules of procedure developed by the International Court (rules that largely trace the parameters of the exercise of its judicial function) can be considered as the common law, or rather the general international law of procedure, to be followed, unless there is an agreement to the con-

6. Les exceptions préliminaires dans la procédure de la Cour Internationale : Etude des notions fondamentales de procédure et des moyens de leur mise en oeuvre (1967).

trary; and I was criticized for that. But now, more than four decades later, and having sat on several international benches, I can reiterate with much more confidence the same proposition. It almost goes without saying that in laying down its own rules (or addressing their *lacunae* or ambiguities), an international judicial organ starts by looking at what the International Court does; unless there is a special reason to deviate from it that can be drawn from the Statute or the particular nature of the judicial organ.

This last point also relates to the other common denominator or element that helps bringing these fora to converge around the concept of "the international judicial function." It is what can be called the "epistemic community" of international adjudication, composed of the persons who are the "usual suspects" or actors on the international adjudicative scene. If we consider who have been the judges, the counsel, the arbitrators, and the commentators on the ensemble of international courts and tribunals, we will find that it is a fairly limited number; much the same persons appear at different times, in different capacities, at different fora. And this limited community is socialized in and adheres to the same epistemology, i.e. it shares roughly the same understanding of the concept of the international judicial function, and deals with or adjusts to it according to the variable geometry of the mandates and environments of the different fora.

This brings me to the third and last part of my presentation on what makes for the "divergencies" in the judicial policies of the different fora, in spite of the commonality of the function they all exercise.

III. Divergencies

As someone who has had the opportunity to squat in several international benches, every time I moved into a new forum, I instinctively sensed that it had something in common with those I had known before. Still, one feels that he is moving into a new house and a new environment. What is common is the fact that it is a house—a judicial organ—built and functioning according to certain laws of architecture that distinguish it from a makeshift tent or hut. These are the parameters of the concept of international judicial function. What is different—the equivalents of location, orientation, layout, fit-

tings, droughts, etc.—are the variables of the equation that account for the divergencies in the judicial policies of the various international courts and tribunals.

Indeed, each tribunal, beyond respecting the parameters of the international judicial function, has to exercise its judicial activities within the bounds of its specific mandate, taking account of its particular constituency and environment.

This implies, from the perspective of the judicial organ, and more particularly of the judge, that he has to situate himself within several concentric circles. First, he has to relate to the legal universe in which he is supposed to act, through his own understanding of the international judicial function and what it implies for the role of the international judge as well as his understanding of the specific mandate of the tribunal. In the second place, he has to relate to the other judges and their own understandings of the same in the small group dynamics within the tribunal, particularly in decision-making and the formulation of the judicial policy of the tribunal at large. In the third place he, and the tribunal *in corpore*, have to relate to the political organ or organs that have established it or take part in its functioning through the election of judges, financing, etc., within a larger institutional setup. Finally, the tribunal has to relate itself, beyond its institutional setup, to the international community at large, to preserve its credibility and legitimacy as a tribunal.

I shall try briefly to illustrate how considerations relating to the third and fourth circles affect the judicial policy and are reflected in the interpretations and the articulation of decisions of a tribunal by examples drawn from three judicial organs I came to know from the inside.

As was mentioned before, the International Court, in its first incarnation the PCIJ, was the first standing court of general international law in modern times. It enjoyed the largest measure of independence vis-à-vis the political organs, as it was established formally outside the League of Nations, in order to allow for the participation in its Statute of non-League Members, particularly the United States (although the judges were elected and its budget was covered by the League).

This situation of great independence did not change much after the Second World War, in spite of the reconfiguration of the PCIJ into the ICJ and its formal integration into the

institutional setup as one of the six principal organs of the UN. But it was not totally insulated, as exemplified by the great fury raised in the General Assembly by the "catastrophe of 1966," the ICJ decision in the second phase of the *South West Africa cases*. The Court was heavily attacked as acting as a nineteenth-century arbitral tribunal rather than the "principle judicial organ of the UN." Since then, the Court has followed a policy of openness and emphasizes its responsibility to uphold the principles of the Charter and the cardinal principles of contemporary international law, as it did in the *Nicaragua* case in 1986 and in its recent advisory opinion on the *Wall constructed by Israel in the Palestinian Occupied Territory*.

Two other cases illustrate most vividly the impact of the fourth circle. In the *Platform* case, the Court examined at great length the issue of the use of force and made findings of violation, although according to the logic of its own reasoning, it had no need to do so, and it finally decided the case on other grounds. Similarly, in the *East Timor* case, the Court, before declaring that it had no jurisdiction, acknowledged the right of the East Timor people to self-determination. In both these cases, the Court had to act within the bounds of its jurisdiction and applicable law. But it felt compelled to say something—be it in a contrived way or as an *obiter dictum*—about the wider and more fundamental issue underlying the case, such as the use of force and the limits of self-defense or the right to self-determination. It could not have avoided addressing these issues (though this was technically possible) without destroying its image in the eyes of the international community at large (and perhaps its self-image) as the guardian of the international legal system, and suffering a severe loss of credibility and legitimacy.

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") is a creature of the Security Council; it is in a way a daughter of hypocrisy. The Security Council, not having the courage to put an end to the war and atrocities taking place in the former Yugoslavia that were creating great outrage in public opinion, and in order to give vent to this outrage, established the Tribunal in 1993 to prosecute the perpetrators of atrocities if and when they are caught.

The ICTY was established by a resolution of the Security Council and is thus legally a "subsidiary organ" of that Council. An awkward status that explains much of the original ten-

sions resulting from the efforts of the Tribunal to assert the large margin of independence requisite for the exercise of the judicial function, in the face of the constant meddling of the legal services of the UN. More serious were the persistent rumors circulating during the negotiations of the Dayton Agreements in the autumn of l995, that this would be done at the expense of justice, i.e. in exchange for a promise to soft-peddle on the prosecution of the ex-Yugoslav leadership. This led the judges to contemplate a resounding collective resignation in such a contingency, which happily did not materialize.

Another problem facing the Tribunal resulted from the imperfections of its Statute that was prepared by the legal services of the Secretariat. Not only did it follow closely the U.S. system, not necessarily the most efficient or best suited model for international criminal justice, but more important, its definitions of the crimes were approximate and did not always coincide with what was largely considered as general international law on the subject, as hazy as this general international law was, not having received much application or elaboration post-Nuremberg. The Tribunal was highly conscious that it had to establish its credibility, hence legitimacy, as an international criminal tribunal, beyond its creator, the Security Council, to the international community at large. It thus followed a forward-looking and dynamic judicial policy of emphasizing the principle of legality—that it was applying general international law as it existed at the time of the commission of the crimes, and not merely the *ex post facto* definitions of the Statute—while interpreting both of them boldly to make them coincide; conscious of its pioneering role in resuscitating and rationalizing international criminal law when everybody thought it had withered away after Nuremberg.

Finally, the Appellate Body of the WTO is part of a special regime, a conventional regime with a normative and an institutional component. The Treaty provides the substantive rules and establishes mechanisms to settle disputes over alleged violations. Here, unlike the ICTY, there is an abundance of substantive law; and the institutional setup is also very different, because the Appellate Body is not formally called a tribunal. There are well known historical reasons for that, going back to the fact that the GATT (the predecessor of the WTO) was a transitional arrangement, pending the institution of the ITO. Although it was not formally an organization, it developed like

one. It had a general assembly called "the Contracting Parties," and rightly so, because everything was decided by consensus, i.e. by consent of all contracting parties. The great transmutation that took place when, fifty years later, the WTO was established, included the introduction of a relatively tight Dispute Settlement System. Indeed, one of the conditions by several states, and not the least, for accepting the vast extension of substantive regulation operated by the Marrakesh Agreements was the establishment of a mechanism of judicial control. As a result, the system completely changed, from a purely consensual one under the GATT, where the reports of the Panels had to be adopted by the "Contracting Parties" by consensus, i.e. by all the GATT membership, including the two parties to the dispute; to one which is compulsory, because the reports of the Panels (unless they are appealed) and of the Appellate Body are automatically adopted ("shall be adopted") by the Dispute Settlement Body (DSB, the general assembly), unless the same old consensus obtains—but in reverse—to set them aside. This means that in reality they bear the authority of *res judicata*, in spite of the formal ritual of their being adopted by the DSB, which cannot set them aside barring consensus.

However, form and ritual enable old ideas to persist. Thus, the same paragraph 14 of Article 17 of the DSU (Dispute Settlement Understanding) that provides for the automatic adoption of the reports of the Appellate Body, also provides that "this adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report"; a right they readily exercise, particularly during the session in which the report is declared adopted, by copiously commenting on, and on occasion heavily criticizing, the reasoning and conclusions of the Appellate Body report.

The Appellate body thus came into being as part of an Organization whose pervasive atmosphere, lingering from the GATT era, is encapsulated in the mantra that "this is a member-driven Organization", and the general feeling that it is the members themselves that take all the final decisions. It had for mandate to interpret and apply very detailed treaty provisions, shoddily drafted, with the injunction that its rulings "cannot add to or diminish the rights and obligations provided in" these treaties; and with the political organs and the member states closely watching (not to say looking over its shoulder)

how it interprets and applies them. But at the same time, the Appellate Body had to act with the necessary degree of independence requisite for the exercise of the international judicial function.

These opposing considerations led the Appellate Body to stick closely to the specificities of the matter put before it, and to follow a judicial policy of "strict constructionism" in interpretation, with marked reluctance to indulge in interpretation on the basis of general principles or even the object and purpose of the agreements. But I have to say that this initial judicial policy has been slowly evolving towards more openness in the face of scathing criticisms of the WTO in general, and its Dispute Settlement System in particular, as a ruthless vehicle of economic globalization, oblivious (and to the detriment) of other major values or concerns of the international community.

I hope these few examples sufficiently illustrate how different judicial organs try to conciliate and satisfy through their judicial policies the requirements of the exercise of the international judicial function with the needs and demands of their particular environments and mandates, as well as the legitimizing expectations of the international community as a whole.