

The Role of the Judge in International Law

Benedetto Conforti*

I. Introduction

In the last ten years, the role of international and national judges in the elaboration and application of international norms has grown enormously. With respect to international tribunals, their multiplication at global, but above all, at regional level, is being keenly watched – though this is not the place to furnish a list. In turn, international law is gradually extending its valence to matters which pertain directly to individuals within various communities of states, to an ever-greater extent, national judges base their decisions on international law.

II. International tribunals and self-contained regimes

The multiplication of international tribunals has been the focus of ample doctrinal debate with the aim of defining or redefining the role of these judges. Three aspects of the debate seem important. First, there are risks which may result from a fragmentation of international law: given that many tribunals like various human rights courts, the International Tribunal for the Law of the Sea, the Appellate Body of the World Trade Organization, the international criminal courts have sectoral characters or competences, the greatest risk is of parochial decisions which fail to take heed of, and therefore compromise, the unity of the international juridical order. Second, and connectedly, there is the problem of divergent interpretation of the same norms by different tribunals. Third, now that international judges numerous, what effect will they have on the elaboration of general international law.

As regards the first aspect, the concept of ‘self-contained’ regimes has emerged. The question is as to whether or not the various orders (*e.g.*, the European Union, the sundry human rights conventions, the law of the sea, international commercial law) created by way of

* Professor Emeritus of International Law, University of Naples; Former Judge of the European Court of Human Rights; Member of the Institute of International Law

treaties and the sectoral tribunals which regulate them can be self-sufficient and impermeable to general international law.

Put this way, the question does not make sense. In reality, the norms of special(ist) regimes prevail over general law by dint of the ancient rule, that the specific takes precedence over the general. However, these regimes are founded upon international norms and it is therefore difficult to argue that general law may not be invoked to bridge the gaps or resolve ambiguities. It is obvious that the ascertainment of the extent to which the special regime is subordinate to the general law is a question of pure interpretation. The interpretation will be more efficacious -and it is here that the proliferation of juridical or quasi-juridical organs controlling these regimes plays an extremely important role- the greater the sphere of competence of these organs. Indeed, it is the hermeneutic function of these mediating organs that tends to sustain the integrity of the orders of which they form part. With respect to human rights, the practice of the international courts and, in particular, the European Court of Justice has furnished us with ample examples. Moreover, here the concern is no more than a tendency, more or less accentuated, depending on the circumstances, which is never entirely verifiable, not even in that particularly 'under-internationalized' order; namely, the European Union Law.

III. The possibility of divergent interpretations between international courts

A further question, and this is the second aspect to examine, is if the multiplication of the tribunals might give rise to divergent interpretations of identical norms, threatening the unity of the international juridical order or having a deleterious effect on the principle of legal certainty. In the absence of an ordered hierarchy of international courts, the need for coordination amongst their decisions is clear.

It should be said immediately that, up until now, the examples of verified divergences are few and are always the same: the most documented is the discrepancy between the decision of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua Case* (1996) and the International Tribunal for the Former Yugoslavia in *Tadic* (1999), with respect to the notion of 'effective control' of a state intervening in an armed conflict in another state. A further example is the jurisprudence of courts with respect

to reservations to human rights obligations. This case law would seem to rebut the classic principle -affirmed recently by the ICJ in the case on its competence to determine a fisheries dispute (1998) and in the case concerning the aerial incident of 10 October 1999 (2000)- according to which an invalid reservation excludes the reserving state from the treaty. This clashes with the norm which stipulates that participation in a treaty may only be based on a validly expressed consent; according to human rights case law, in such a circumstance, the applicable principle would be *utile per inutile non vitiatur* (cf the leading case of *Belilos* by the European Court of Human Rights, in 1988).

It would seem that the possibility that interpretive divergences between different courts occur cannot be ruled out. In fact, the fact of divergences can be considered an important medium for the growth of international law. Together with the reciprocal influence exerted by courts through the dialectic process, divergences of interpretation contribute to the evolution of interpretation of international norms. From the other perspective, divergent interpretations of international norms are a common feature of domestic courts (think for example about state immunity), and it would not seem that this should be considered a danger for international legal certainty; rather it reflects a healthy dialogue between courts. It should be recalled that the principal effect of judgments is to adjudicate only between the parties involved. Thusly, the *ultra partes* effects, which of course do obtain, are accepted only with caution. We shall return to this point when discussing the role of the judge in the elaboration of norms of general international law.

It is also said that, often, the divergences in interpretation of the same norm are justified by the diverse contexts in which the norm is examined. It is clear, for example, that though the ICJ and the ICTY differed in their interpretation of the principle of “effective control” in armed conflicts, this was dependent on the fact, that the former concerned state responsibility, and the latter, the criminal responsibility of organs or individuals – hence, the stricter reading of control adopted by the ICJ was justifiable. It is strange that authors regard context-dependent hermeneutics as scandalous: naturally, the legality of the use of nuclear weaponry might produce different results if considered from the different vantage points of human rights law and humanitarian law. Correctly, in its *Mox Plant* decision of 2001, the Tribunal for the Law of the Sea held that, in principle, a divergence in the interpretation of a norm might be a necessary function of the differences in the respective contexts; the object,

scope, and preparatory work of the treaty from which the norm derives; and successive practice.

Subsequently, it has been suggested that interpretive divergences between courts could increase the incidence of *forum shopping*. This opinion does not seem convincing. In fact, the competence of international judges is based on consensus between the parties. Consequently, it is unclear why, if the parties are agreed, they cannot avail themselves of a judge of their choice. In cases where unilateral recourse is possible (and thereby unilateral choice of the judge), this is nothing more than the consequence of the acceptance of competence of this judge, manifested in turn, by the other party.

In conclusion, given the current state of play and mindful of the dialectic and the possibility of reciprocal influence between courts, it would certainly be utopian to assign to the ICJ a role of preeminence. It would seem that the ICJ enjoys a kind of preferential regard with respect to controversial questions of interpretation.

IV. The contribution of international tribunals to the elaboration of customary norms

The final aspect to examine with respect to the role of international tribunals is their contribution to the elaboration and development of general international law.

There is no doubt that the contribution is of extraordinary importance, a contribution which becomes more extensive with the proliferation of judges. No small amount of general norms exists that have their roots in international decisions. This, as is acknowledged, is true above all for the advisory and contentious activity of the ICJ. It would be enough to cite the rules formed with respect to reservations in the famous Advisory Opinion of 1951 or, with regard to international organizations, in the Advisory Opinions of 1948 on damages functionaries of the United Nations and of 1980 on the interpretation of the agreement of 25 March 1951 between the World Health Organization and Egypt.

As a consequence, and as always in the reconstruction of the content of general rules of international law, it is useful and salutary to take as a reference point, the activity of

international judiciary, with the ICJ in mind. Nevertheless, one should not exaggerate the extent to which reference to this source is an exhaustive indicator of the existence of said norms. The present writer has the impression that research into the elaboration of customary norms or general principles of international law is unduly limited to case law, particularly that of the ICJ. Such an approach overlooks that the decisive word, according to the classic principles of the *diuturnitas* and *opinio iuris*, must come from the states, and only the states.

In practice, there are plenty of cases in which the states have demonstrated their repudiation or their partial rejection of principles affirmed in the jurisprudence. Recall for example, with respect to the principles which can be deduced from the Charter of the United Nations, of questions of the earnest obligation incumbent on states to contribute to the costs which stem from resolutions of the General Assembly or the Security Council with respect to its 'actions' for peace. This obligation was affirmed in the celebrated Advisory Opinion of the ICJ in the case pertaining to certain expenses of the United Nations Congo (1962). The decision was and is frequently cited to explain the effects of resolutions of the United Nations. However, in reality, in light of the decision of the General Assembly in 1965 (confirmed by subsequent practice), rather than an obligation to contribute, it would seem that the states are expected to cover this expenditure with voluntary contributions.

It is contended that another case of this nature is that of the obligation, enjoined by general international law, to avoid damaging the environment. As is acknowledged, this obligation, recognized by the majority of commentators, was affirmed in the Advisory Opinion on the legality of the threat or use of nuclear weapons (1996), and in the judgment of the *Gabčikovo-Nagymaros Case* (1997). The same was already proclaimed in the Stockholm Convention (1972) and the Rio Declaration (1992), neither of which is binding. But what independent of specific international conventions that are principally concerned with responsibilities in internal legal orders, is the significant state practice? It is difficult to give a positive response.

It is further impossible to say that the category of obligations *erga omnes*, which have their roots in a *dictum* in the *Barcelona Traction* judgment (1970), have been the subject of certain and precise application in state practice. In particular, it is not clear what the 'omnes' can do in the event of a violation of an obligation of this nature, as demonstrated *inter alia* by

the divergent opinions and reservations which states registered to the work of the International Law Commission on the responsibility of states.

This is not the place to search for other examples. All that should be said at this point is that the problem of the relationship between juridical practice and the practice of states could be the profitable subject of a scientific analysis.

V. Domestic judges and international law

Moving onto domestic judges, it is clear, first of all, that their decisions contribute to, and are, interpretations and elaborations of international norms of both the customary and conventional varieties. In a sense, their influence on the evolution of international law is more 'direct' as they function as state organs and, as a result, their practice in this capacity animates state practice.

That said, one is constantly embattled, either for the independence of the judiciary from the executive when it comes to questions of international law, or to extend the review jurisdiction of judges over the actions and inactions of states. In brief, the following rules, upon which the present author has had the occasion to insist in various *fora*, and which were adopted by the International Law Institute in the Milan session of 1993, should govern the judiciary:

- International law rules should be treated in a manner similar to rules of domestic legal orders. In particular, the judges should enjoy the same liberty in the elaboration and interpretation of the former as they do with respect to the latter.

- The determination, naturally limited to the case in hand, of the existence, the validity, the modification or extinction of an international treaty should be carried out in total judicial independence. In reality, the practice in many countries of requesting the binding opinion of the executive is slowly dying out.

- Judicial fact-finding about relevant international conduct should be carried out with equal independence. In this case too, anachronistic rules subordinating the judiciary to the

executive branch are gradually disappearing, most noticeably in civil law jurisdictions. For example, as early as the 1980s, the French Court of Cassation held that its opinion on the reciprocity of application of international treaties could be arrived out without reference to the executive. Even the Italian Constitutional Court interfered with the norm which attributed to the minister of justice the competence to certify the reciprocity of foreign state immunity with respect to the enforcement of judgments. If the judicial practice, prevalent in common law countries, to refer to executive opinion in fact-finding (with regard to the existence of states, the existence of a state of warfare) persists, it attributes an unseemly superiority or *prima facie* status to executive evidence.

- The notion of a political act or question which acts as a limit on the court's powers of review should be repudiated in cases of violations of the international legal obligations of the forum state. Moreover, even with respect to internal law, the eighth-century notion of political act or question is progressively being revised in civil and common law orders alike.

- In the cases in which, pursuant to the international private law of the forum, a foreign law falls to be applied (*e.g.*, in expropriatory proceedings), that law should be set aside if it violates a rule of international law.

VI. Conclusion

The proliferation of international tribunals represent a clear erosion of the old maxim according to which international law boasted *ni lois, ni judges, ni gendarmes*. With the exception of the gendarmerie, still missing, no doubt can be had about the laws, conventions or judges of the international legal order. Additionally, there is a growing willingness of national tribunals to tackle the interpretation and application of international norms, an area which, in the past, either because of inadequate judicial familiarity with international rules, or parochial prejudices, was considered the exclusive preserve of the executive. This strengthening of the judicial function, so long as it does not degenerate into 'rule by judges', must be greeted with enthusiasm.