

## *The Unity of Application of International Law at the Global Level and the Responsibility of Judges*

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The phenomenon of globalisation stimulates the search and identification by certain authors of the numerous manifestations of a 'globalisation of law', a search to which Professor Mireille Delmas-Marty brings a particularly stimulating contribution.<sup>1</sup> In this context, the aim of unity in the interpretation and application of international law at the universal level would imply, from a purely logical point of view, the creation of a truly global judicial system. Ideally, this model would be set up in such a way as to guarantee at every level the effective respect by states of their international obligations. There would thus be a corresponding normative and institutional hierarchy.

To this end, this global judicial system should first rely on a simplified and harmonised relationship between international law and national laws. The next step would then be, within the international legal system, to coordinate the competence of international jurisdictions.

This ideal vision is faced in reality with a certain number of obstacles of various natures.<sup>2</sup> These obstacles are not necessarily definitive. Indeed, there is both an evolution in the relationship between international and national law, as well as a search at the strictly international level of a still shaky coordination between international jurisdictions.

An analysis of the actual structure of the interaction between, on the one hand, international and national courts, and on the other hand, international courts themselves, tends to show that beyond the institutional question, it is first and foremost in the mind of judges that the problem is solved. If they are convinced that a harmonised application of the rules of international law is necessary, its unity will be guaranteed. If they disregard this fundamental

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<sup>1</sup> See, from this author: *Trois défis pour un droit mondial*, Paris, Seuil, 1998; *Leçon inaugurale au Collège de France*, Paris, Fayard, 2003; *Vers un droit commun de l'humanité*, Paris, Textuel, 2nd ed., 2005; *Le relatif et l'Universel*, Paris, Seuil, 2004 ; *Le pluralisme ordonné*, Paris, Seuil, 2006; *La refondation des pouvoirs*, 2007.

<sup>2</sup> See C. GRAY, *Judicial Remedies in International Law*, Oxford, Oxford University Press, 1990.

unity, from cultural reasons or through incompetence, then its survival can indeed be threatened.

### **I. National and international law: Between persistent dualism and progressive integration**

The unitary application of international law at the global level would imply, not so much the disappearance of the barrier between the national and international legal orders, which is unlikely, but at least its progressive diminution. If this were to happen, it would increase the porosity of the border between national law and international law. In an ideal model, which we can refer to at this stage as a simple working hypothesis, both the national legal order and the international legal order would be in charge of the application of the international norm. This model would promote at the same time normative integration and organic cooperation. It would lead quite naturally to a monist system.<sup>3</sup> The International Court of Justice, as a kind of universal supreme court, would stand at the top of this institutional pyramid. At the other end, the first instance national judge, whether civil or administrative, having become the ‘common judge of international law’ in a similar fashion to what happened from the beginning with European law, would be the first to guarantee that states respect human rights and that, more specifically, an individual be punished if he commits crimes “of concern to the international community as a whole”.<sup>4</sup>

Still according to the theoretical framework previously laid down, an organic hierarchy of national and international jurisdictions would guarantee the respect of a normative overlapping. National law would need to conform itself to the substantial requirements of international law, but beyond that, it would also make its national courts available. Without necessarily making international law directly applicable,<sup>5</sup> the national judge could be invited to set aside the application of national law, whether his own or that of another state, when an analysis of the international rule would easily show that its application does not require any reference to a national rule. The progressive globalisation of law would thus be the result of the establishment of a form of *judicial federalism*.

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<sup>3</sup> On the distinction between monism and dualism in the relationship between national and international law, see for example: **P.M. DUPUY**, *Droit international public*, Paris, Dalloz, 8th ed., 2006, §§ 416-422.

<sup>4</sup> According to the expression of the Rome Statute of the International Criminal Court, Article 5.

<sup>5</sup> **P.M. DUPUY**, *supra* note 3, §§ 412-415.

In the actual circumstances, this ideal model is far from being completed. It would however be a mistake to consider that it is merely a utopia.

All can immediately see the obstacles to a total realisation of this coordination of legal orders which requires their mutual recognition and, beyond declarations of intent, the effective acceptance at the national level of the supremacy of the international over the national, thus paving the way for an even partial integration of the second into the first.

Such a movement presupposes a belief in the need to respect the international rule of law, shared by the greatest possible number of states composing the international community, but also their judges, as we will see later.<sup>6</sup> This implies for example that national constitutions do not prevail over international rules. As we know, such a vision is fundamentally and most notably not shared by a large portion of American elites and the case-law of the Supreme Court.<sup>7</sup> Elsewhere, with less arrogance but with an equally blind determination, national legal practice shows that dualism still appears to hold a certain appeal. Its continued existence is of course at odds with a harmonious realisation of the purest form of monism described previously. Most national judges eventually accept to enforce the primacy of international law. However, even in countries which have adopted monism in their constitution, the natural tendency of the judge is to apply international law only when there exists an equivalent or compatible rule in his own national legislation. It is first and foremost national law that the judge is trained to apply and respect, in a technical but also in a psychological and ideological sense.<sup>8</sup> As for international law, one can in fact consider that it is also based on dualism when it states that national laws are simple facts.<sup>9</sup>

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<sup>6</sup> See *infra*, Section 2 D.

<sup>7</sup> See, for example, **M. BYERS and G. NOLTE**, *United States Hegemony and the Foundations of International Law*, Cambridge, Cambridge University Press, 2003; **E. JOUANNET and H. RUIZ-FABRI**, *Impérialisme et droit international en Europe et aux Etats-Unis*, Société de législation comparée, 2007.

<sup>8</sup> For the French case, see **P.M. DUPUY**, *Droit international et droit interne dans la jurisprudence comparée du Conseil constitutionnel français*, Paris, Panthéon-Assas, 2001.

<sup>9</sup> In a strict sense, international law could only be considered monist with primacy of national laws if it saw them as legal orders. The situation is however ambiguous, given that international law goes beyond the simple fact of national law, and recognises as internationally valid certain situations resulting from the application of national rules; **C. SANTULLI**, *Le statut international de l'ordre juridique étatique*, Paris, Pedone, 2001.

However, it would be a mistake to believe that the previously laid out integrationist model is purely a utopia. Far from that. In fact there have long been practical applications of this model directly inspired by Georges Scelle's *role splitting* theory,<sup>10</sup> which even seem to be expanding. Scelle defines it as the situation where "the agents granted with an institutional competence or invested by a legal order, used their functional capacity as it is organised in the legal order that instituted it to guarantee the efficiency of another legal order devoid of the organs necessary to its implementation".<sup>11</sup>

In other words, the existing organs of the internal legal order help compensate the organic deficiencies of the international legal order by providing it with their competence. Due to a lack of a sufficiently developed international institutional framework, international law relies on state organs to guarantee its effective application. These state organs thus "kill two birds with one stone". While still acting within the framework of their competence as it is defined in the national legal order, they also play a part in the application of international law.

This *role splitting* theory was elaborated in the 1930s, in a period when the organic development of the international legal order could only be described as embryonic. At least, this is the case when we compare the number of international organizations at the time with those existing today. The structuring of the international society by the United Nations and its specialised bodies, itself being a strong indicator of the appearance of an 'international community', is without comparison with what had been sketched by the League of Nations.<sup>12</sup> Back then, the organic lacunas of the system were the rule, not the exception.

As a consequence, one could have thought that the opportunities to apply the role splitting theory would diminish as the international legal order created an increasing number of organs directly guaranteeing the effectiveness of international law. This hope was shared,

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<sup>10</sup> For a presentation of this theory: **G. SCELLE**, *Précis de droit des Gens*, Vol I., *Principes et systématique*, 1932, pp. 43, 54-56 et 217; Vol. II, 1934, pp. 10, 319 et 450; "Le phénomène du dédoublement fonctionnel", *Rechtfragen der Internationalen Organisation, Festschrift für H. Weberg*, 1956, p. 324-342. For a commented presentation of the theory: **H. THIERRY**, "The Thought of Georges Scelles et A. Cassese: Remarks on Scelles's Theory of 'Role Splitting'", *EJIL*, Vol. 1, No 1, <http://www.ejil.org/Journal/Vol/N°1>.

<sup>11</sup> **G. SCELLE**, "Le phénomène du dédoublement fonctionnel", *o.c.*, p. 331; "Quelques réflexions hétérogènes sur la technique de l'ordre juridique interétatique", in *Hommage d'une génération de juristes au Président Basdevant*, 1960, pp. 473-488.

<sup>12</sup> On the ambiguities of the notion of "international community", and its different possible meanings, we refer to our analysis in: *L'unité de l'ordre juridique international*, *RCADI*, 2002, Vol. 297, p. 245-269.

among others, by Wolfgang Friedmann.<sup>13</sup> In fact, the opposite seems to be happening. Indeed, two phenomena have simultaneously been taking place. Of course, the last sixty years have seen a spectacular organic development of the international judicial system. However, this institutional expansion has been accompanied by a similarly spectacular expansion in the scope and density of international norms. In other words, if there are many more international organs, there are also many more international norms the respect of which must be guaranteed than seventy or eighty years ago. To say things differently, the ratio between the number of international norms and the number of international organs in charge of enabling their application has not necessarily become more favourable than at the time Scelle was writing.

Moreover, the economic and social evolution of the international system, encouraged by the ambiguous 'globalisation' phenomenon, has modified the ways in which the national and the international spheres establish links. As we mentioned at the start of this article, some claim an irreversible *globalisation of law*,<sup>14</sup> identifiable by an increased porosity of legal orders enabling a better adaptation of the regulation of human activity in the context of a multiform and increasing overtaking of state structures.

In any case, it must be said that international law needs help! And the one it is getting at this stage does not allow in a lot of cases its effective application. This considerable increase in the content of international law, both general and special, has led, since the end of the Second World War, to an increase in the number of situations where states are called upon to lend a hand to guarantee its effectiveness, even if it remains imperfect.

Already, in the context of the most orthodox general international law, the conditions of exercise of diplomatic protection demonstrated the organic dependency of international law's legal institutions on internal law, as illustrated by the requirement to exhaust all local remedies. As was pointed out by Roberto Ago in his reports to the International Law Commission, this requirement triggers a procedural mechanism allowing internal jurisdictions

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<sup>13</sup> **W. FRIEDMANN**, *The Changing Structure of International Law*, Londres, Stevens & Sons, 1964. On a recent analysis of this author's contribution, see the special edition of the *European Journal of International Law*, 1998, Vol. 9, No 2; especially, **G. ABI-SAAB**, "Whither the International Community?", pp. 248-265.

<sup>14</sup> See **M. DELMAS-MARTY**, *supra* note 1.

to get their states to respect their binding international obligations. Thus, they can remove the need to call upon the international responsibility of that state.<sup>15</sup>

The development of Human Rights has further strengthened this phenomenon.<sup>16</sup> The dozens of treaties adopted in this field have for the most part inbuilt mechanisms to monitor their respect by states. However, the national judge remains the one to control the respect of the obligations undertaken. An application to both the European Court of Human Rights and its American counterpart is conditioned on the same procedural rule, that of the exhaustion of local remedies. For example, when a national judge hears a case on issues such as the right to life, to liberty or to a fair trial, there is a role splitting by which he controls at the same time the respect of international law as laid down in the treaty and the conformity of national law to the treaty, particularly if it is not directly integrated in the national legislation.

In the context of the current evolution of state responsibility, the most striking feature, crystallised in the codification process, is without doubt that of the multilateralisation of international obligations. The recognition of the *erga omnes* obligations by the ICJ in 1970, around the same time as the recognition of *ius cogens* by the Vienna Convention on the law of treaties, has led, beyond the failed attempt to realise the idea of state crimes, to the recognition of legal standing for all states, based on their membership of the international community. When “the obligation breached is owed to the international community as a whole, any state other than an injured state is entitled to invoke the responsibility of another state”, to require from that state the cessation of the internationally wrongful act, guarantees of non-repetition, the recognition as well as the execution to the right to reparations. Thus is the system promoted by Article 48 of the Draft Articles on State Responsibility adopted by the International Law Commission in 2001.<sup>17</sup> It would be wrong to believe that such rules will not be applied in the future. Indeed, Article 48 found its inspiration in a developing state practice that started in the 80ies: that of measures taken by some states other than the injured one

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<sup>15</sup> See **P.M. DUPUY**, *Droit international public, o.c.*, §§ 477-479; **J. DUGARD**, Deuxième rapport sur la protection diplomatique, 28 feb. 2001, **A/CN.4/514**.

<sup>16</sup> See **TOMUSCHAT**, *Human Rights, between Idealism and Realism*, Oxford, Oxford University Press, Academy of European Law, Vol. XIII/1.

<sup>17</sup> See **M. IOVANE**, “E possibile codificare la responsabilità dello stato per violazione delle norme internazionali d’importanza fondamentale?”, in **M. SPINEDI, A. GIANELLI et M.L. ALAIMO**, *La Codificazione della responsabilità internazionale degli Stati alla prova dei fatti*, Milano, Giuffrè, 2006, pp. 342-384; **P.M. DUPUY**, *Obligations multilatérales, droit impératif et responsabilité internationale des états*, Colloque de Florence, IUE, Paris, Pedone, 2003.

against states accused of breaching their obligations against the international community as a whole. This practice has been amply commented upon, and here is not the place to develop further the analysis.<sup>18</sup> Let us just point out that when a state takes an initiative against another state based on the protection of a rule of “fundamental importance” for the international community, he is acting through his national organs, including the judiciary ones, in favour of international law.

The situation is identical when, in the context of the law of peace and security, states put in practice sanctions decided by the Security Council in conformity with Chapter VII, to, among other things, freeze foreign assets, impose bans on the sale of weapons or on international flights to the country towards which the sanctions are aimed at. In such a case, we have further evidence of Scelle’s role splitting.

There are other examples of even more recent developments of international law, in the field of international criminal law, where role splitting can come into play. These developments, rather than the integration of national and international law, are concerned with the coordination of these laws in order to allow the first one to help in the application of the second one through the judicial bodies of the competent state. Echoing the preamble, Article 1 of the Rome Statute affirms that the International Criminal Court “shall be complementary to national criminal jurisdictions”.<sup>19</sup> Article 17 then considers the examples of inadmissibility of cases, the first one of which is when “the case is being investigated or prosecuted by a state which has jurisdiction over it”. Therefore, contrary to the two *ad hoc* tribunals competent to try crimes committed in former Yugoslavia and Rwanda, the International Criminal Court does not have primacy over national courts to try those responsible for committing the crimes listed in Articles 5 to 8.<sup>20</sup> The state in which the acts were committed, or of which the accused person is a national of, will have priority over the ICC if they decide to prosecute the crime. The rationale for the principle of complementarity is laid down in the preamble which states that the state parties are “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. There must therefore be no

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<sup>18</sup> See our Cours at the Hague Academy of International Law on international wrongful acts, *RCADI*, 1984, Vol. 188, pp. 13-133.

<sup>19</sup> See the text of the Rome Statute, most notably in **P.M. DUPUY**, *Grands textes de droit international public*, Paris, Dalloz, 2006, pp. 232-ff.

<sup>20</sup> *Ibid.*, pp. 207-ff.

gap in the allocation of judicial competence to prosecute the crimes. Criminals must not escape prosecution, first at the national level, and, if need be, at the international level.

The novelty of this principle resides in the fact that it organises, in the context of a treaty, the distribution of competences between national jurisdictions and a specialised international one. For the rest, it follows in fact a time-old logic: it respects territoriality, as well as active nationality, as basis for determining competence. Tribute is thus paid to the traditional attributes of sovereignty. Complementarity, applying the role splitting model, recognizes the competent national jurisdictions as the common jurisdictions to prosecute those who committed the *core crimes*, those that Article 5 of the ICC Statute calls “the most serious crimes of concern to the international community as a whole”. This principle establishes a hierarchy in the exercise of jurisdiction. The organic priority that it recognises is made possible by the fact that the national judge and the international one have the same goal: punish crimes committed against the community.

Concerning the functioning of internal jurisdictions, similar remarks could be made in situations when a state prosecutes someone accused of a crime affecting the community, based not on the territoriality or nationality principles, but on *universal jurisdiction*. Without detailing the conditions under which it is recognised in positive law,<sup>21</sup> it is interesting to notice that in such a case, the judicial organs of the prosecuting state act on behalf of the international community. We therefore remain within the role splitting framework.

We can thus see that the ideal model of integration, both organic and normative, is far from being a simple utopia. Classical institutions, such as the exhaustion of local remedies, but mostly new developments linked to the institutionalisation of the international community, in fields such as peace and security, the multilateralisation of obligations and its consequences on state responsibility, or even more recent innovations in international criminal law, illustrate the articulation of the international and national legal orders. This contradicts the dualist tendencies, despite their persistency.

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<sup>21</sup> See **A. CASSESE**, “Is the Bell Tolling for Universality? A Plan for a Sensible Notion of Universal Jurisdiction”, *Journal of International Criminal Justice*, Vol. 1, No 3, pp. 589-595; **D. VERMEERSCH**, “La compétence universelle”, in **A. CASSESE et M. DELMAS-MARTY**, *Juridictions nationales et crimes internationaux*, Paris, 2001, pp. 589-611.



Thus, there is a dynamic tension between the defence of the national legal setting which still often defines itself in opposition to international law, and the corresponding recognition of what one could call the *rights of the international community* which call on the contrary for more openness on the part of national legal orders towards the international sphere. It is possible to see in this confrontation of opposing logics one example of the fundamental tension existing between the two principles of unity of the international legal order, one formal, and the other substantial, the theoretical analysis of which having been done elsewhere.<sup>22</sup>

## **II. International jurisdictions: Towards an empirical coordination around the International Court of Justice?**

In the ideal model of vertical organic integration mentioned in the introduction of this paper, the International Court of Justice occupied the top of the pyramid. More particularly, in this pure monist approach, the Court would impose its authority on the other international jurisdictions of the international legal order, at least in respect of the interpretation of the general rules of international law that might be applied by all. As we know, proposals have been made to achieve this result, whether, as was suggested by Pinto and Orrego-Vicuna, by formally recognising the ICJ as the supreme court of the international legal order, by granting prejudicial competence<sup>23</sup> to the Court, by extending the field of its consultative role, or by accepting *de lege ferenda* that the Court has a compulsory competence as an international *tribunal des conflits*. It would thus determine the competent international jurisdiction to settle an international dispute in a case of competing jurisdictional claims from courts belonging to different sub-systems of the international legal order.<sup>24</sup> All these proposals should be taken seriously. It is not impossible that some of them have, in the future, an influence on the

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<sup>22</sup> See, **P.M. DUPUY**, *L'unité de l'ordre juridique international, o.c.*, notamment pp. 399-ff.

<sup>23</sup> See Président Schwebel's statement before the United Nations General Assembly on 26 October 1999, *Annuaire CIJ (1999-2000)*, pp. 282-ff., et that of President Guillaume before the Sixth Committee of the General Assembly on 27 October 2000, *Annuaire CIJ (2000-2001)*, pp. 326-ff. See also **G. GUILLAUME**, "The Future of International Judicial Institutions", *ICLQ*, 1995, pp. 848-ff., at p. 862. For similar proposals dating back to 1905, see **TREVES**, "Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals", *Max Planck United Nations Yearbook*, 2000, pp. 215-ff.; **G. ABI-SAAB**, "Fragmentation or Unification: Some Concluding Remarks", in *Symposium NYU*, pp. 919-ff., at p. 928.

<sup>24</sup> See **P.M. DUPUY**, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", *NYU Journal of International Law & Policy*, 1999, dans le cadre du symposium *The Proliferation of International Tribunals: Piercing Together the Puzzle*, pp. 791-sv. [NYU Symposium].

elaboration of a structured international judicial system.<sup>25</sup> They are all challenged, at various degrees, on political or technical grounds. Some of the challenges have been examined elsewhere.<sup>26</sup>

These proposals were made in the context of the multiplication of international jurisdictions, a particularly discussed topic in academic literature, and strongly linked to the fragmentation concept.<sup>27</sup> Some authors express their concern about the dangers of incoherent case-law,<sup>28</sup> while others contest even the idea of the unity of international law.<sup>29</sup> However, they do this in the theory, without also checking if in reality, such difficulties have actually arisen in the recent past.<sup>30</sup> Given that it is fact not the case,<sup>31</sup> these authors based their analysis on only *one* precedent, which has become famous for this reason. As we all know, it is the divergence in approaches between the ICJ in the *Nicaragua Case* (1986) and the ICTY in the second appeal decision by the Appeals Chamber in the *Tadic Case*, in respect of the conditions under which the actions of an armed non-state actor can be attributed to a state. In any case, this divergence in case-law was resolved in the February 2007 decision by the ICJ in the *Genocide Case* opposing Bosnia and Yugoslavia.<sup>32</sup>

Without forgetting that it is necessary to distinguish two separate questions, that of competing jurisdictional claims and that of potential of real conflicting decisions,<sup>33</sup> the *Tadic Case* is a reminder of the relativity if not the weakness of the position of the ICJ in respect to

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<sup>25</sup> See **MARTINEZ**, “Towards an International Judicial System”, *Stanford Law Review* 2003, pp. 429-460.

<sup>26</sup> See *supra* note 25

<sup>27</sup> See, among others, **RAO**, “Multiple International Judicial Forums”, in Symposium organisé par la Law School of the Michigan University et publié au *Michigan Journal of International Law*, 2004, under the title *Diversity or Cacophony?* [*Symposium Michigan University*], pp. 929-ff.; see also, *La multiplication des juridictions internationales: Un système anarchique?*, Paris, Pedone, 2003 (Colloque de Lille); more particularly the reports done by **E. JOUANNET**, pp. 343-ff., and **S. KARAGIANNIS**, pp. 82-ff.

<sup>28</sup> See, among others, **CHARNEY**, “Is International Law Threatened by Multiple International Tribunals?”, *Recueil des Cours*, 1998, Vol. 271, p. 101; **TREVES**, “Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice”, *Symposium NYU*, pp. 809-sv.; “Le tribunal international du droit de la mer et la multiplication des juridictions internationales”, *Rivista di diritto internazionale*, 2002. All these authors justly point out that the multiplication of international tribunals does not necessarily imply that there will be contradictions in the case-law.

<sup>29</sup> See **M. KOSKENNIEMI**, “Fragmentation of International Law? Postmodern Anxieties”, *Leiden Journal of International Law*, 2002, pp. 553-ff.; **FISCHER LESCANO and TAUBNER**, “Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, in *Symposium Michigan University*, pp. 999-ff.

<sup>30</sup> For a comprehensive overview of the question, see **A. GATTINI**, “Un regard procédural sur la fragmentation du droit international”, *RGDIP*, 2006, pp. 303-337.

<sup>31</sup> See the report of **P. WECKEL**, in **R. HUESA VINAIXA and K. WELLENS**, *L'influence des sources sur l'unité et la fragmentation du droit international*, Bruxelles, Bruylant, 2006.

<sup>32</sup> See the analysis of the case made in the *Revue générale de droit international public*, 2007 No 2; particularly the comments made by **P.M. DUPUY** and **H. ASENSIO**.

<sup>33</sup> The second being a consequence of the first.

other existing international courts, whatever its prestige. The still valid idea that the resort to the international judge is consensual is at odds with the idea of an international judicial hierarchy with the ICJ at the top.

Even if the ICJ remains the only jurisdiction with general competence, thus giving it an unquestionable moral authority, its primacy over other courts is far from being unquestionable (A). As a result, when faced with potentially conflicting views from other courts, as is more and more frequently the case, the Court tries to avoid any conflict (B). General principles of law in the field of the procedural articulation of legal decisions can sometimes be a guide for the Court. However, they cannot in most situations be the basis for the establishment of a systematically effective coordination between international judges (C). Empiricism and ‘courtesy’ between tribunals is thus necessary in order to allow the parties to a dispute to adequately choose the *forum conveniens* when several areas of law are concerned. But, more than that, it is an extremely subjective element, therefore fragile, that will best guarantee the coherence of the system, namely the *culture* of international judges and the extent to which they believe that they are part of one and the same international legal order (D).

**A. Statutory situation of the distribution of competence between the ICJ and other jurisdictions: The absence of primacy of the first over the others**

Whatever the considerable prestige of the ICJ and its moral authority, both fluctuating according to its case-law, the Court is far from being recognised as an international supreme court. This is in any case the result of a statutory reality. The Charter contains two dispositions establishing a fairly balanced situation. On the one hand, Article 92 describes the court as “the principal judicial organ of the United Nations”. On the other hand, Article 95 adds that this special position does not impose on states any obligations in terms of dispute resolution: “nothing in the present Charter shall prevent members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future”. In other words, the Court has a superior hierarchical position in the *institutional* framework, but is a tribunal like any other from a

*relational* perspective.<sup>34</sup> This last perspective still relies on autonomy and the consensual basis to the recourse to a judge.

Going further, the *Tadic* precedent is proof of something else. Within the institutional framework of the UN, a judge has contested the authority of the ICJ, based on the independent nature of each jurisdiction. In this sense, the ICTY did not see in Article 92 an obligation not to depart from the case-law of the ICJ on an important point of the law of state responsibility.<sup>35</sup> The analysis made by the Court on the question of attribution had of course only been exposed in the motifs of the June 1986 decision, not its merits. But one could still have argued that given the importance of this pointing in international law in the institutional context of the United Nations, a subsidiary organ of the Security Council, given its judicial nature, would feel bound by the terms of Article 92. The ICTY did not feel bound and this approach was received with a certain degree of suspicion in academic circles.<sup>36</sup> The sharp response made by the ICJ in its February 26th decision seems to be a call to order from a superior to a subordinate, implicitly based on Article 92 of the Charter.<sup>37</sup> In any case, outside the institutional framework of the UN, the Court remains challenged by other international tribunals, each one having its own special jurisdiction.

All conventional systems do not contain dispute resolution mechanisms, far from that. In those systems that do, there is not necessarily an exclusive competence afforded to the established organ. The EU system is the one that goes the furthest in terms of establishing autonomy. As the European Court of Justice said once again in its May 30th decision in relation to the dispute between the United Kingdom and Ireland over the *Mox Plant*, Article 292 of the EC Treaty calls for a strict jurisdictional monopoly for the ECJ to guarantee the “respect of the EU legal system”. This monopoly thus defined in favour of the Luxembourg court must of course be respected by all tribunals, including the ICJ. The ECJ recently imposed on an arbitration tribunal sitting on the *Rhine* dispute to verify whether part or whole

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<sup>34</sup> On the distinction between the institutional and the relational, see **R.-J. DUPUY**, *Le droit international*, Paris, PUF, 1961, 2001.

<sup>35</sup> See the **Appeal’s Chamber of the ICTY**: “In international law, every tribunal is a self-contained system (unless otherwise provided)”, *Prosecutor v. Tadic*, **IT- 94-1**, 2 Oct. 1995, § 11. The same tribunal also claimed that “there is no hierarchical link” between the tribunal and the ICJ, *Celebici, Delalic et al.*, **IT-96-21**, decision of 20 Feb. 2001, § 24.

<sup>36</sup> See **L. CONDORELLI**, “Jurisdictio et (dés)ordre judiciaire en droit international: Quelques remarques au sujet de l’arrêt du 2 octobre 1995 dans l’affaire Tadic”, in *Mélanges en l’honneur de Nicolas Valticos: Droit et justice*, Paris, Pedone, 1999, pp. 281-286.

<sup>37</sup> See *supra*, note 33.

of the legal questions to be dealt with did not in fact fall within the scope of community law, which, as is confirmed by the *Mox* decision, is like the universe: in perpetual expansion!<sup>38</sup>

Outside of this extreme example, Article 55 of the European Convention on Human Rights is generally considered to give exclusive competence to the Strasbourg Court, through its consultative function, on matters of interpretation of the Convention when the issue arises between states.<sup>39</sup>

In terms of jurisdictional monopoly, one must also consider the WTO system.<sup>40</sup> Articles 23 and 25 of the Memorandum of understanding on Rules and Procedures governing the Settlement of Disputes are generally construed as establishing a strict monopoly with regards to international disputes relating to trade. This would seem to be confirmed by the Panel decision in the *Us-Sect. 301-310 of the Trade Act of 1974* case.<sup>41</sup> However, there is no lack of voices to claim that the parties to a dispute can always choose another forum, including the ICJ, at least when the situation has a sufficient amount of elements which are outside the system defined in the Marrakech agreement to justify leaving the strict scope of application of the Memorandum.<sup>42</sup>

The Convention on the Law of the Sea, on the other hand, is notable for its openness and variety of approaches.<sup>43</sup> We know that Article 282 recognises the priority that states might want to give to a “a procedure that entails a binding decision” in the context of another

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<sup>38</sup> See §§ 97-141 of the arbitral award, <http://www.pca-cpa.org/upload/files/BE-NL%20240505.pdf>; see also commentary by **S. MALJEAN-DUBOIS**, “L’affaire de l’usine Mox devant les tribunaux internationaux”, *Journal de droit international (Clunet)*, 2007.

<sup>39</sup> There is no need here to consider the ordinary competence of the ECHR as it does not create a conflict with the ICJ, given that a case is brought forward by an individual before the first tribunal and by a state before the second one.

<sup>40</sup> See **P. NEUMANN**, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen – Konflikte des materiellen Rechts und Konkurrenzen der Streitbeilegung*, Berlin, 2002, pp. 5170-ff.

<sup>41</sup> US-Sect. 301-310 of the **Trade Act of 1974**, 22 déc. 1999, **WT/DS 152/R**, § 7.43: “members have to have recourse to the DSU dispute settlement system to the exclusion of any other system”; confirmed by **E.-U.PETERSMANN**, “The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948”, *Common Market Law Review*, 1994, p. 1208. See also: **LUFF**, *Le droit de l’organisation mondiale du commerce*, Bruxelles-Paris, 2004, p. 803: “Article 34 of the Memorandum of understanding even seems to suggest the pre-eminence of the WTO dispute settlement mechanism over any other competing international jurisdiction in issues relating to areas covered by WTO agreements”.

<sup>42</sup> For a critical appraisal of such a proposition, see **G. MARCEAU**, “Conflict of Norms and Conflict of Jurisdictions: The Relationship Between the WTO Agreement and MEAS and Other Treaties”, *Journal of World Trade*, 2001, p. 1119.

<sup>43</sup> See **R. RANJEVA**, “Règlement des différends”, in **R.-J. DUPUY et D. VIGNES**, *Traité de nouveau droit de la mer*, Paris-Bruxelles, Pedone-Bruylant, 1985, pp. 1105-ff.

agreement. As for Article 287, it proposes a wide range of solutions to the parties in terms of choice of procedure, the International Tribunal for the Law of the Sea being only one option among others, including recourse to the ICJ or an arbitral tribunal. However, this generosity in the choice of procedure left to the state parties to resolve disputes related to the law of the sea, illustrates once again how the principle of consensualism is at odds with the dream we presented at the beset of an organic integration of the international judicial system. This is the principled objection to the statutory recognition of pre-eminence of the ICJ over the others modes of dispute resolution. The case-law of the ICJ itself has consistently acknowledged this lack of priority over other jurisdiction, at least when it is clear that the choice of another mode of dispute resolution is actually based on the consent of the parties.<sup>44</sup> Contrary to what we were describing about the relationship between national and international law previously, there is no indication of a clear establishment of a priority of the ICJ over other tribunals. Its authority being moral, not technical, despite being real, it remains fragile.

### **B. Increase in disagreements of the ICJ with previous positions of other dispute settlement bodies**

If the Court does not benefit from a superior position in respect to other jurisdictions from a statutory point of view, how does it consider other international justice decisions, and more generally, other modes of dispute resolution, whether judicial or not, which might be strongly linked to its own jurisdictional competence? What must be considered here is not so much the way in which special tribunals apply general international law (as in the case of the ICTY ruling on the attribution of a conduct to a state), but the way the ICJ and other tribunals deal with rules or legal situations governed by a secondary international legal order endowed not only with specific secondary norms, but also with its own dispute settlement mechanism.<sup>45</sup>

To illustrate this second hypothesis, one can notice in the case-law of the ICJ of the past 25 years a multiplication of situations where the Court has encountered the existence of *leges specialia*, where, either there were ongoing parallel dispute settlement proceedings (cases of “connexity”) or where there had been past decisions on issues being dealt with by the ICJ. The 1992 decision concerning the *Land, Island and Maritime Frontier* dispute

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<sup>44</sup> The main precedent for this proposition is *Concessions Mavrommatis en Palestine* [Greece v. United Kingdom], 30 Aug. 1924, *CPJI Series A*, No 2, p. 31.

<sup>45</sup> Which does not make it necessarily “self-sufficient”.

between El Salvador and Honduras fits within the second category. In it, the ICJ had to deal with an old decision by the central American court of justice dating back to 1917 in which this regional court, first of its kind, had ruled on the dispute between three bordering states over the waters of the Gulf of Fonseca.<sup>46</sup>

In the 1988 case opposing Nicaragua and Honduras, which remained at the admissibility stage for empirical reasons, the Court was asked by the defendant to take into account the ongoing mediation attempt with the Organisation of American States called ‘Contadora Procedure’ and the Bogota Pact on Inter-American Dispute Settlements.<sup>47</sup>

In the *Fisheries* dispute between Spain and Canada, the Court was invited to consider the distribution of competences between the European Union and the member states. This type of question also arose recently, as we saw earlier, before arbitration tribunals in the *Mox Case*<sup>48</sup> and the *Rhine Case*.<sup>49</sup>

Moreover, in the *Lagrand Case* and the *Avena Case*, which gave rise to decisions respectively in 2001 and 2004, Germany and Mexico were claiming support against the USA

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<sup>46</sup> **I.C.J.**, *Land, Island and Maritime Frontier Dispute [El Salvador v. Honduras]*, 11 Sept. 1992, <http://www.icj-cij.org/docket/files/75/6670.pdf>

<sup>47</sup> *Border and Transborder Armed Actions [Nicaragua v. Honduras]*, 20 Dec. 1988, admissibility, *Recueil CJI*, 1988, § 91. Honduras had, among other things, raised an issue about admissibility in respect to article IV of the Bogota Pact according to which another peaceful procedure could not be used as long as the current one had not been completed. The parties were in disagreement about the qualification as a “special procedure” of Contadora Peace Process. The Court acknowledged that the parties agreed to proceed with the ongoing mediation, but also found that at the time when Nicaragua filed its motion in July 1986, the Contadora process was exhausted and that the ulterior intervention of the Contadora group initiated by the 1987 Esquipulas II agreement was to be considered as independent. The Court also establishes that the Contadora group had not claimed an exclusive role in the peace process (§ 97). See **E. DECAUX**, “L’arrêt de la Cour internationale de justice dans l’affaire des actions armées frontalières et transfrontalières”, *Annuaire français de droit international*, 1988, pp. 147-sv.; **BUFRET-TCHAKALOFF**, “La compétence de la Cour internationale de justice dans l’affaire des Actions frontalières et transfrontalières”, *RGDIP*, 1989, pp. 623-ff.

<sup>48</sup> *Mox Plant [Ireland v. United Kingdom]*, provisory measures, 3 Dec. 2001, *ILM*, 2002, pp. 405-ff. In June 2001, Ireland had also initiated an arbitration process based on Article 32 of the 1992 Paris Convention on the protection of the maritime Environment in the North-East Atlantic, claiming a violation of Article 9 on the exchange of environmental impact information. The tribunal rendered its decision on 2 July 2003, rejecting the Irish claim, *ILM*, 2003, pp. 1118-ff.; see also the commentary by **SHANY**, “The First MOX Plant Award: the Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures”, *Leiden Journal of International Law*, 2004, pp. 815-ff. See **CHURCHILL and SCOTT**, “The MOX Plant Litigation: The First Half-Life”, *ICLQ*, 2004, pp. 643-ff.; **RÖBEN**, “The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the Mox Plant at Sellafield: How Much Jurisdictional Subsidiarity?”, *Nordic Journal of International Law*, 2004, pp. 223-ff. See also: **S. MALJEAN-DUBOIS**, *supra* note 39.

<sup>49</sup> *Belgium v. the Netherlands*, 24 May 2005, <http://www.pca-cpa.or/upload/files/BE-NL%Award20240505pdf>, §§ 97-141.

from an advisory opinion rendered by the Inter-american Court on Human Rights concerning Article 36 § 1 of the 1963 Vienna Convention on Consular relations.<sup>50</sup>

In the *Certain Property Case* between Liechtenstein and Germany, which was decided in 2005, the Court was aware that the same facts had given rise to a decision by the ECHR following a submission by Prince Adam of Liechtenstein.<sup>51</sup> Finally, in the *Genocide Case*, the Court was confronted with the previous legal qualification by the ICTY of the facts under consideration.<sup>52</sup>

In those cases where the Court had to examine judicial findings or points of law already dealt with by a special international jurisdiction, how was it going to deal with these previous cases, which did not constitute ‘precedent’, in the technical sense of the term? The procedural conditions pertaining among other things to the strict identity required between the subject and object of the two cases having never been verified in the previously cited decisions, the principle of *res iudicata*, although sometimes referred to by the Court, has never been applied as such. The only possible situation could have been where the Court, convinced by the reasoning of another tribunal have not decided on the same issue, adopted for itself the same solution. This approach seems verified in the 11 September 1992 decision on El Salvador and Honduras on the legal status of the waters of the Gulf of Fonseca<sup>53</sup> and in the 26 February 2007<sup>54</sup> decision, to the extent that the ICJ adopted the analysis and even the legal qualification that the ICTY had made of the facts under consideration.<sup>55</sup>

For the rest, the Court rightly refuses to consider argumentations based on legal arguments or positions held by other jurisdictions if they are irrelevant to solving the case at hand. This judicial economy can be seen in the *Fisheries Case*, the *Lagrand* and *Avena Cases* or the *Certain Property Case*.

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<sup>50</sup> In its *advisory opinion on 36 § 1 (b) of the Convention on Consular Rights* [Adv. Op., **OC-16/99**, § 85], the Court refused to give any importance to the fact that the same question of interpretation had been raised before the ICJ in the *Lagrand Case*, because the two institutions were autonomous judicial bodies.

<sup>51</sup> **E.C.H.R.**, *Prince Hans-Adam de Liechtenstein v. Germany*, 12 July 2001.

<sup>52</sup> For doubts about the ‘monopoly’ instituted by Article 55, see: **A. GATTINI**, “A Trojan Horse for Sudeten Claims?”, *EJIL*, 2002, p. 537; “La renonciation au droit d’invoquer la responsabilité internationale”, in **DUPUY, SHAW and SOMMERMANN**, *Essays in Honour of Tomuschat*, 2006, pp. 317-ff.

<sup>53</sup> *Land, Island and Maritime Frontier Dispute [El Salvador v. Honduras]*, 11 Sept. 1992, <http://www.icj-cij.org/docket/files/75/6671.pdf>

<sup>54</sup> <http://www.icj-cij.org/docket/files/91/13684.pdf>

<sup>55</sup> We do know however that the Court did not feel bound by the position held by the same tribunal on the conditions of attribution to a state of illicit acts committed by a non-state entity.



In any case, it appears that until the recent *Genocide Case* opposing Bosnia and Serbia-Montenegro, and even then it was on a point of general international law, the Court has never felt the need to openly *contradict* a position taken by another jurisdiction. On the contrary, it either adopted the findings of the Central-American Court, or avoided pronouncing itself on legal points which were the object of a decision by a another jurisdiction. In that sense, the *Genocide Case* appears as a noticeable exception to past practice of the Court. However, as stated previously, in that exceptional situation the Court remained within the institutional framework of the UN, with its position as ‘primary judicial body’ is recognised by the Charter.<sup>56</sup> Outside of this relative institutional protection, the Court remains exposed to the competition of other tribunals.

In the absence of an organic organisation of international tribunals, could the Court therefore be possible for the Court to resort to a normative guidance, by referring to an assortment of general principles of law allowing for a procedural articulation of judicial decisions?

### **C. The limits of the guidance provided by general principles of procedural law**

All systems that reach a certain level of sophistication are faced with the question of competing jurisdictions and its consequence, the danger of contradictory case-law. In that sense, the problems encountered by the international legal order are more a sign of its increasing maturity rather than endemic crisis.<sup>57</sup> However, the help that international law, having reached this level of development can hope for by borrowing general principles from national orders is very limited: it is not by reverting to using Latin in an erudite way like the processualists that it will be saved<sup>58</sup>. There are quite substantial reasons to this fact. All the procedural principles relating for example to *lis pendens* or *res iudicata* were elaborated in the

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<sup>56</sup> This hierarchical position of the Court is recognised only in relation to the ICTY, the ICTR and the administrative Court of the UN.

<sup>57</sup> See B. SIMMA, “Fragmentation in a Positive Light”, *Symposium Michigan University*, pp. 847-ff.: “interest triggered by the increase in the number of international courts and tribunals”.

<sup>58</sup> In its report on the international liability of states, in respect to Article 44 on the “admissibility of the request”, the ILC mentions that the articles do not consider the question of jurisdiction of international courts and tribunals and therefore, “they don’t have as a function to deal [...] with doctrines of *lis pendens* or choice of jurisdiction, that can affect the competence of an international tribunal in respect to another”; *ILC Report to the General Assembly at its Fifty-Third Session*, A/56/10, p. 328, § 1.

context of already well integrated legal systems, at the organic as well as the material level. More particularly, there is an organic hierarchy between jurisdictions within national legal systems which is precisely what is missing in the international order.

It is furthermore not possible to solve the problems related to the multiplication, connexity or even interrelation of international legal sub-orders through the use of private international law. First of all, this law remains private (*i.e.*, also internal), before being international, which brings us back to the previously mentioned objection. It relates to the impossibility of transposing rules which have been elaborated in an organically integrated system, to one which is not. Moreover, private international law developed its judicial procedural principles with in mind the idea of coexisting distinct and autonomous legal orders. The situation is not the same in international law. Each of its legal sub-orders, for example that of the WTO, the EU or the Kyoto Protocol on climate change, has in common something with the other international sub-orders: they *are* international law. Contrary to the internal private laws, each of which defines as ‘international’ the rules which define its relation with the others, these international sub-orders belong to the same order, the international legal order. Except if one chooses the easy way of accepting the fad of the ‘fragmentation’ of international law, the inanity of which was proven, both with certain authors, by the ILC,<sup>59</sup> it is obvious that the international legal order remains unified, if not homogenous. Therefore, it is difficult to resort to general principles of procedural law because international law is both unified substantially but organically not integrated. Whatever the situation, we must not refuse to test the operability of these principles, especially when the ICJ itself refers to them.<sup>60</sup>

Let us first recall that the Court determines in every case the specific object of the dispute it must decide and the extent of its material competence based on the way it is seized. The *electio fori* is dependent on the parties. Whether through a unilateral request or a *compromis*, the formal expression of the will of the states involved in a dispute is a determining factor to ascertain a competence dependent on this will. We have already established that the Court is ready, in principle, to declare itself incompetent if it appears that

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<sup>59</sup> See the articles published in the first edition of the *European Journal of Legal Studies*; more particularly, our article: *Un débat doctrinal à l'ère de la globalisation: Sur la fragmentation du droit international*, <http://www.ejls.eu>

<sup>60</sup> See A. GATTINI, “Un regard procédural sur la fragmentation du droit international”, *RGDIP*, 2006, pp. 303-337.

a previous agreement between the states gives competence to another jurisdiction.<sup>61</sup> Alternatively, it sees no reason to decline competence when non-jurisdictional attempts have in parallel been made to solve the dispute, whether through a mediation or any other diplomatic process mentioned in Article 33 of the UN Charter.<sup>62</sup>

In any case, it is according to the identification of the questions that are put to it that the Court will be able to decide if and to what extent there is possibly an interference between its own jurisdiction and that of other international bodies. In relation to the object of the dispute, the decision on the applicable law on the basis of Article 38 of the Statute will play a crucial role. More specifically, if the Court establishes that a treaty is applicable to the dispute, and that the treaty contains specific dispositions on this point, it is according to these dispositions that it will determine whether it is competent or not. It is not necessary to insist on this point given that it is obvious.

In relation to the applicable law and the choice of the *fora* that it might contain, one can ask the question of whether the *posterior derogat priori* principle might be of any help in identifying the competent tribunal.<sup>63</sup> The answer is both affirmative and limited. This principle can certainly help decide between a jurisdiction with general competence and one with specific competence. Basically, it can only play between the ICJ and another court with a judicial organ with a narrower scope of action, and always to the detriment of the Court itself. This has long been made clear in the ICJ case-law, in the *Mavromatis Case*.<sup>64</sup> We can therefore only agree with Andrea Gattini when he says that “if this situation did not seem to

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<sup>61</sup> *Mavrommatis Concessions in Palestine [Greece v. United Kingdom]*, 30 Aug. 1924, *CPJI Series A*, No 2, p. 31.

<sup>62</sup> See *Plateau continental de la mer Egée [CIJ Recueil, 1978, p. 12, § 29]*; “the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued paripassu”. In the case of *Zones franches de la Haute-Savoie et du Pays de Gex, 1932, CPJI Series A*, No 22, p. 13; the PCIJ had considered that the judicial resolution of international disputes was to be seen as an “alternative to the direct and amicable resolution of conflicts between the parties”. See also: the order of 29 July 1991 of the ICJ in the case of *Passage par le Grand-Belt [Finland v. Denmark]*, *ICJ Recueil, 1991, p. 20*; “pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed”. A Gattini rightly notes in the previously referred to article: “it is therefore astonishing that in the [*Nicaragua Case*] the Court referred to Article 103 of the UN Charter to impose its primacy over the Contadora diplomatic negotiations”; **A. GATTINI**, *o.c.*, p. 318.

<sup>63</sup> See **A. GATTINI**, “Un regard procédural sur la fragmentation”, *o.c.*, pp. 311-312; **LINDROOS**, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex specialis*”, *Nordic Journal of International Law*, 2005, pp. 27-ff.: “*lex specialis* is not a substantive rule of international law that might help determine which rule is special in relation to a more general rule; it is a descriptive principle that has little independent normative force”.

<sup>64</sup> *Mavrommatis Concessions in Palestine [Greece v. United Kingdom]*, 30 Aug. 1924, *CPJI Series A*, No 2, p. 31.

both the PCIJ or the ICJ when the objective was to determine their competence in respect to arbitration tribunals, it is not at all certain that things will be the same when face with the perspective of relinquishing jurisdictional competence to permanent judicial or quasi-judicial organs”.<sup>65</sup>

Rules borrowed to national law relating respectively to *lis pendens* and the principle of *res iudicata* have at least one common point in order to be applicable in international law.<sup>66</sup> They impose the verification of the identity of cases at three levels: the subjects, the cause and the object. If these conditions are rarely met for *lis pendens*, they are partially put in question, at least in academic literature, in cases of *res iudicata*, the previously quoted author being right to point out that its scope is blurry.<sup>67</sup> As for the decisions of the Court, Article 59 of its Statute limits the effects of *res iudicata* in two ways: it concerns only the courts “holding”; *i.e.*, the *ratio decidendi* of the Court and is only compulsory for the parties to the dispute.<sup>68</sup> One must therefore distinguish between, on the one hand, the importance of an opinion expressed by the Court, itself relative when it is related to the justification of one of its decisions<sup>69</sup>, and *res iudicata* in the technical sense of the term.<sup>70</sup>

We must therefore accept that the coordinated articulation of judicial competences is possible only through an empirical alliance between flexibility and authority.<sup>71</sup> Flexibility calls for each judge to evaluate empirically what should be the answer given in a specific context to the following question: should he declare himself incompetent in order to allow another institution to handle the case, taking into account more specifically the scope of competence of each jurisdiction? The answer might lead the judge to stay his decision.<sup>72</sup> At

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<sup>65</sup> See **A. GATTINI**, “Un regard procédural sur la fragmentation”, *o.c.*, p. 312.

<sup>66</sup> See **A. REINISCH**, “The Use and Limits of *res iudicata* and *litis pendens* as procedural tools to avoid conflicting dispute settlement outcomes”, *Law and Practice of International Courts and Tribunals*, 2004, p. 48.

<sup>67</sup> **A. GATTINI**, *o.c.*, pp. 326-ff.

<sup>68</sup> **V. LOWE**, “*Res Iudicata* and the Rule of Law of International Arbitration”, *African Journal of International & Comparative Law*, 1996, pp. 38-ff.

<sup>69</sup> See **L. CONDORELLI**, “La juridiction internationale”, in *Colloque de la Société française de droit international*, 1987, p. 309; **RÖBEN**, “Le précédent dans la jurisprudence de la Cour internationale”, *German Yearbook of International Law*, 1989, p. 398; **I. SCOBIE**, “*Res Iudicata*, Precedent and the International Court: A Preliminary Sketch”, *Australian Yearbook of International Law*, 1999, p. 303.

<sup>70</sup> See **SHAHABUDDEN**, “Consistency in Holdings by International Tribunals”, in **ANDO et al.**, *Liber Amicorum Oda*, The Hague, 2002, pp. 633-ff.

<sup>71</sup> See **R. HIGGINS**, “Respecting Sovereign States and Running a Tight Courtroom”, *ICLQ*, 2001, p. 122; **R. WOLFRUM**, “Konkurrierende Zuständigkeiten internationaler Streitentscheidungsinstanzen: Notwendigkeit für Lösungsmöglichkeiten und deren Grenzen”, in **ANDO et al.**, *Liber Amicorum Oda*, *o.c.* p. 657.

<sup>72</sup> See **V. LOWE**, “Overlapping Jurisdictions in International Tribunals”, *Australian Yearbook of International Law*, 1999, p. 197.

this stage, and by imitation of the German Bundesverfassungsgericht, the so called *So lange* doctrine can be of great help. This method, by which a tribunal accepts to limit its own jurisdiction in order to respect that of another one, has already been applied by the European Court of Human Rights in the *Bosphorus* Case in relation to the European Court of Justice. Nevertheless, this precedent, abundantly criticized by scholars, shows that this path is not an easy one to go down. The assessment of the scope and conditions of application of the jurisdiction of one court by another tribunal remains indeed subject to errors or approximations<sup>73</sup>. A similar approach could allow waiting for another court to legally qualify facts relevant for both proceedings.<sup>74</sup> Another question is whether the case can be divided in separate questions, each one being able to be the object of a distinct resolution.<sup>75</sup>

This return to the appreciation of judges shows that the split portrait of international justice gives them a crucial role in the strengthening or dereliction of the unity of interpretation and unity of international law.

#### **D. Judges' culture and actions as the final guarantor of the unitary interpretation and application of international law**

In the absence of mechanisms and procedural principles guaranteeing an always effective coordination of international jurisdictions, we are left to acknowledge that at the end of the day, the integration of international law will depend on what the judges decide to do with it.

Concerning the national judge, whichever his hierarchical level, and given the now inevitable phenomenon of globalisation, he must increasingly broaden his horizon in order to take into account the impact of international law on the national laws he has to apply. For

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<sup>73</sup> See **A. Ciampi**, *L'Union européenne et le respect des droits de l'homme dans la mise en oeuvre des sanctions devant la Cour européenne des droits de l'homme*, *RGDIP* 2006/1, pp. 85-117.

<sup>74</sup> In the previously quoted study, A. Gattini notes that in the *Kvočka et al.* [IT-98-30/1] before the ICTY, one of the indicted had made a request for the suspension of proceedings pending the decision of the ICJ on relevant questions in the *Genocide Case*. The Appeals Chamber confirmed the denial of the claim, considering that there was no legal basis to bind the tribunal to decisions of the ICJ; *Decision on the Interlocutory Appeal by the accused Zigic against the decision of Trial Chamber I dated 5 December 2000*, 25 May 2001. See **ADJOVI and DELLA MORTE**, "La notion de procès équitable devant les Tribunaux Pénaux Internationaux", in **H. RUIZ FABRI**, *Procès équitable et enchevêtrement des espaces normatifs*, Paris, 2002.

<sup>75</sup> See, among others, **G. GAJA**, "Relationship of the ICJ with Other International Courts and Tribunals", in **ZIMMERMANN et al.**, *The Statute of the International Court of Justice*, Oxford, 2006, p. 543.

example, one can hardly conceive that a national judge can ignore not only the content of the European Convention on Human Rights, but also the often evolutive interpretation of it by the Strasbourg Court. Such a situation exists not only for regional *lex specialis*, as in the previous example, but also for the evolutions of general international law. This is for example what the Italian Supreme Court has understood in its *Ferrini Case*, dealing with the application of the classical rule of state jurisdictional immunity before national courts when what is considered is the violation of a *ius cogens* norm. The Italian judge finally set aside the immunity to allow access to the courts based on the legal nature of the obligation to prevent and enforce the prohibition of torture and forced labour, considered in this case as war crimes.<sup>76</sup> The attitude of the national judge here shows the rare knowledge and conscience he had of the deep evolutions of international law, moulded by the tensions, and sometimes the confrontation between some of the rules guaranteeing its formal unity (based, as the principle of immunity, on sovereign equality), and others, telling of a still emerging substantial unity, based on a hierarchy of norms founded not merely on their form, but also on their content, of importance to the international community as a whole (formal unity), of which the compulsory norms identifiable in the field of human rights are the most striking example.<sup>77</sup> The openness of national judges in respect to international law is moreover not limited to accepting the effects of compulsory norms in its national law. It also covers the acceptance of the international obligations of the state in technical fields such as international trade or the international protection of the environment. Beyond the fact that one rarely finds today a clear-cut choice between pure monism and radical dualism concerning the relationship of national and international law, it is increasingly difficult for a national judge from a member state of the WTO to ignore reports from the group of experts and the decisions by the Appeals panels of the institution.<sup>78</sup> In the same way, it is likely that state parties to the Kyoto Protocol will soon produce national case-law on its application.

At the international level, there is a need for a jurisprudential coordination in order to guarantee the unity of interpretation and application of international law. There too, however, all will depend on the state of mind of the judges. Concerning specialised judges, they must

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<sup>76</sup> See **P. DE SENA et F. DE VICTOR**, “State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini Case*”, *EJIL*, 2005, pp. 89-113.

<sup>77</sup> On the dialectic between formal and substantial unity, we refer once again to our Hague Course: **P.M. DUPUY**, “L’unité de l’ordre juridique international”, *RCADI*, 2002, Vol. 297.

<sup>78</sup> See **J.H.H. WEILER**, *The EU, the WTO and the NAFTA, Towards a Common Law of International Trade?*, EUI, Academy of European Law, Oxford University Press, 2000.

remain aware of the fact -as did the Appeals' panel of the WTO in its first report- that their special law cannot be applied in a clinical void but must be considered in the framework of the international legal order it is a part of, which governs more than the rules relating to its interpretation.<sup>79</sup>

As for the ICJ, its members are delusional in believing that they will succeed in imposing the idea of a preliminary question procedure, by which other tribunals would require enlightenment on the interpretation of rules of international law. It will not succeed either in being officially granted a role as a referee in situations where there might be a jurisdictional conflict between different international tribunals. The measures to structure international justice and make it coherent can seem appealing on paper. However, they have but a minute link with political realism and diplomacy! The authority of the ICJ as a *de facto* supreme court in the international legal order will depend on the judges themselves. He cannot be claimed, it has to be conquered. The way to proceed in through its case-law, which must not limit itself to merely resolving the dispute at hand, but must take every opportunity is has to advance the interpretation of law, as is has started to do again in recent times, for example by finally recognising that *ius cogens* is part of positive law.<sup>80</sup> Here again, the institutional architecture is less important than the mental one.

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<sup>79</sup> Report in *Etats-Unis – Normes concernant l'essence nouvelle et ancienne formules*, 29 Apr. 1996, p. 9; see the commentary by G. MARCEAU, "A Call for Coherence in International Law: Praises for the Prohibition against 'Clinical Isolation' in WTO Dispute Settlement", *Journal of World Trade*, 1999, No 5, pp. 87-152.

<sup>80</sup> See I.C.J., *Activités armées sur le territoire du Congo (new application 2002)* [Congo v. Rwanda], 3 Feb. 2006, <http://www.icj-cij.org/docket/files/126/10434>, §§ 60 and 64; I.C.J., *Application de la convention pour la prévention et la répression du crime de génocide* [Bosnia-Herzegovina v. Serbia-Montenegro], 26 Feb. 2007, <http://www.icj-cij.org/docket/files/91/13684.pdf>; for a critical analysis of the ICJ's judicial policy between 1986 and 2000, see P.M. DUPUY, *L'unité de l'ordre juridique international, o.c.*, pp. 473-478.