Proliferation Of International Courts And Tribunals And Its Impact On The Fragmentation Of International Law

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I. INTRODUCTION

As Polish scholar W. Czapliński noted, a significant growth in the number of international courts and tribunals (including international criminal tribunals) is a characteristic feature of the contemporary institutional system of international relations. This growth is commonly known as proliferation. Nowadays, one can observe not only numerical growth of international courts and tribunals but also their qualitative expansion. Additionally, changes in their competence is visible, meaning that they not only resolve disputes between States but also monitor and ensure respect for international law. The basic question in the context of proliferation reads as follows: does the proliferation of international courts and tribunals result in the weakening and breaking the unity of international law or rather in its strengthening? Here appears the mostly feared consequence of such proliferation, namely fragmentation of international law. There is a risk that the same norm of international law will be interpreted differently in cases decided by distinct tribunals. However, as the international relations are becoming more and more complicated, a kind a specialization is necessary: specialized sets of norms may be needed. One may conclude that the division of workload or caseload between different international courts and tribunals and their specialization marks the higher degree of evolution and development of international law and international community itself. Accordingly, one might state that fragmentation is a natural consequence of such development. Apart from the basic questions mentioned above I will also analyze the advantages and disadvantages of the proliferation and its impact on the fragmentation and coherence of international law. Even at the national law level reaching complete unity of judicial decisions seems impossible. Very often courts render contradictory judgments. Hence, the risk of and fear of fragmentation as a result of proliferation seems exaggerated. The questions I will pose in this paper will also include: what is the influence of

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2 Czapliński, supra note 1.

proliferation on fragmentation? Is the risk of fragmentation huge? I will try to answer these questions generally and not on a case study basis, although I will briefly refer to the ICTY Tadić case and the ICJ Nicaragua case with regard to tests of effective and overall control.

II. **Positive and Negative Aspects of Proliferation. Is the Risk of Fragmentation Real?**

The most common concern about proliferation is that there is a risk that the same norm of international law will be interpreted differently in cases decided by distinct tribunals. Therefore, a dialogue between courts and tribunals is crucial. Such an opinion – stressing the negative effects of proliferation – was expressed by the former International Court of Justice (ICJ) presidents, judges S. Schwebel and G. Guillaume. Judge Guillaume spoke in 2000 about the emerging prospect of forum-shopping that may “generate unwanted confusion” and “distort the operation of justice” and exacerbate “the risk of conflicting judgments”. On the other hand, even judge Schwebel indicated that increased number of international tribunals has some advantages as potentially more and more cases will be resolved by legal proceedings. As M. Koskenniemi and P. Leino noted, “[w]hat is remarkable about the statements by the Presidents of the International Court of Justice […] is not only their anxiety about what at first sight seems a rather theoretical, even esoteric problem – “proliferation of courts,” “unity” of international law – but also the narrow platform from which the critiques have emerged. In reading through the academic debates, the Presidents stand almost alone in expressing such anxiety”. They continue: “[t]he fact that the anxiety comes almost exclusively from the confines of the ICJ highlights the way in which concern about “loss of control” or absence of “an overall plan” can perhaps be translated into the concrete worry at the Hague about loss of control by me, absence of an overall plan under my institution”.

One may also refer to another view expressed by Polish judge and president of the ICJ, M. Lachs who in a 1978 separate opinion in the Aegean Sea Continental Shelf case (Greece v. Turkey) stated that “[t]he frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multi-dimensional issues involved […]”. This opinion points to the advantages flowing from the proliferation of international tribunals. Moreover, the work of international

4 Ibid., at 69.
6 Quote from: Czapliński, supra note 1, at 82.
7 Koskenniemi, Leino, supra note 5, at 574.
8 Aegean Sea Continental Shelf case (Greece v. Turkey), 1978, separate opinion of M. Lachs, at 52; available at:http://www.icj-cij.org/.
courts strengthens the rule of law and ensures more effective respect for international law. The advantages that proliferation provides for States, in other words advantages of the work of independent courts and tribunals, include strengthening the credibility and reliability of international commitments undertaken in specific multilateral contexts. It is a result of raising the probability that violations of those commitments will be detected and accurately labeled as noncompliance. Detection of these violations also encourages future compliance, maximizing the long-term value of the agreement to all parties to the multilateral regime, including the defecting state.  

According to another point of view, “the creation of multiple international judicial tribunals is a function of the ever-expanding nature of international law and that the creation of such tribunals is a sign of the growing maturity of international law.” In the context of international criminal tribunals judge M. Shahabuddeen emphasized that it is necessary for them to correctly apply customary international law and any relevant treaty law, including the Statute establishing the tribunal and the crimes defined therein. He added that when pronouncing what the international law is in a particular case, these tribunals should be conscious of the desirability of achieving consistency within the same system. Further, in pursuance of the duty to maintain consistency, the tribunals should show deference to the holdings of the ICJ, even if they are not by law bound by the ICJ’s decisions. It is the general international law that is indispensable to ensure coherence and unity between different treaty regimes.

J. Charney as well points to some positive aspects of proliferation and more precisely of the lack of strict hierarchy in international law, namely it provides opportunity for healthy experimentation and creativity. Thus, various tribunals can collectively contribute to the development of international law. G. Abi-Saab is of a similar view when “he argues that as things become more complex, the scope of international law will continue to increase the number of these tribunals, reflecting a higher degree of division of labor, or specialization, which is a higher stage of evolution.” M. Balcerzak in turn suggests treating the international courts and tribunals more like participants of a dialogue (interlocutors) rather than rivals or destroyers of the unity and coherence of international law.

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12 Ibid., at 956.
14 Quote from: Rao, supra note 11, at 959.
15 Ibid., at 959-960.
16 M. Balcerzak, Zagadnienie precedensu w prawie międzynarodowym praw człowieka (2008), at 58.
F. Pocar believes that “proliferation of international criminal courts, or at least of mixed courts with international participation, should not be regarded as a negative development, but rather a necessity in the current situation of international relations, aimed at progressively strengthening the incipient international system of criminal jurisdiction. What is more important than unity of jurisdiction is that all tribunals that are established, in whatever form, meet the criteria of independence and impartiality set forth in international norms, including human rights legal instruments, and receive the support of the international community as a whole”\(^\text{17}\). I think this opinion is relevant not only in the context of international criminal tribunals but also other international courts and tribunals.

Let me now turn to the issue of fragmentation of international law although I cannot clearly separate proliferation from fragmentation and that is why those two issues will be intertwined below.

Fragmentation of international law presupposes some basic unity and integrity to the structure of international law that governs international or transnational relations. Since the establishment of the United Nations (UN) all members of the UN have been participating in the process of formation, development, and application of international law. Thus we witness a truly universal participation of all States in the decision-making of the international conferences that conclude treaties on a variety of international law subjects. But behind the facade of universal participation there is much that does not meet the eye. The participation of developing countries is not as effective as it ought to be for a variety of reasons which I am not going to elaborate on. Whether in international trade, the environment, or human rights, there is a divergence of approaches both in the formation of law and in its interpretation and application among different States of the international community\(^\text{18}\). M. Koskenniemi and P. Leino made similar observations: “[…] it is doubtful if any such “unity” ever existed. The ICJ never stood at the apex of some universal judicial hierarchy. Its judgements have been binding only as res judicata, and other subjects have remained free to accept or reject them”\(^\text{19}\).

In 2000 the International Law Commission (ILC) conducted a preliminary survey on the risks caused by the fragmentation of international law, which “could endanger international law’s stability as well as the consistency of international law and its comprehensive nature”. The background study suggested that the absence of hierarchy posed a threat to the “credibility, reliability and, consequently, authority of international law” and should be further studied by the ILC\(^\text{20}\). In 2006 the ILC


\(^{18}\) Rao, supra note 11, at 930-931.

\(^{19}\) Koskenniemi, Leino, supra note 5, at 576.

\(^{20}\) Ibid., at 560.
adopted Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law\(^{21}\) where it stated that “[i]nternational law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them\(^{22}\).

In the context of proliferation and the threat of fragmentation it is so important that judges show good faith and exhibit respect, not only to their own previous holdings on a subject, but should show equal respect to the relevant holdings of other international tribunals in the interest of judicial harmony, certainty, and the predictability of law. In this respect “restraint and economy should play just as important a role as judicial activism plays to help bridge gaps in law. The ultimate justification for the existence of a diversity of international tribunals is to achieve unity of the international legal system, which is dedicated to justice and equity in international relations”\(^{23}\).

As M. Koskenniemi and P. Leino indicated, “the fact is that […] “fragmenting” normative orders […] arise[s] as effects of politics and not as technical mistakes or unfortunate sideeffects of some global logic. If a human rights treaty body or a WTO panel interprets the 1969 Vienna Convention on the Law of Treaties (‘VCT’) so as to reinforce that body’s jurisdiction or the special nature of the relevant treaty, and in so doing deviates from the standard interpretation, then this is bound to weaken the authority of that standard interpretation and to buttress the interests or objectives represented by the human rights body or the WTO panel. The interpretations express institutional moves to advance human rights or free trade under the guise of legal technique”\(^{24}\). They call different courts reaching different conclusions and deviating from general international law “institutional struggles”\(^{25}\).

These struggles have been most visible in the way the ICTY has taken positions that diverge from those taken by the ICJ. For example, the two tribunals have differed in their approach to their power to review Security Council resolutions (based on Chapter VII). In the Lockerbie case, as is well-known, the ICJ found that both Libya and the US were obliged to accept and carry out the decisions of the Council, and that by virtue of Article 103 of the Charter this obligation overrode whatever rights


\(^{22}\) Ibid., para. 1 (1).

\(^{23}\) Rao, supra note 11, at 961. See also: Higgins, ‘The ICJ, the ECJ, and the Integrity of International Law’, 52 Int’l & Comp. L. Q. 1 (2003), at 19.

\(^{24}\) Koskenniemi, Leino, supra note 5, at 561-562.

\(^{25}\) Ibid., at 562.
they may otherwise possess. An indication of provisional measures as requested by Libya would have been “likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council resolution 748 (1992)”26. No review of the legality of that resolution was carried out at this stage. The ICJ simply refused to review the Security Council’s power to adopt Chapter VII resolutions and their compliance with international law as it found itself incompetent. By contrast, the Appeals Chamber of the ICTY expressly reviewed the legality of its own establishment by way of a Security Council resolution based on Chapter VII of the UN Charter. While the Chamber accepted that the Charter left the Security Council much discretion as to its choice of measures, the power of the Tribunal did not disappear, especially “in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter”27. Having concluded that it did have jurisdiction to examine the plea founded on the invalidity of its establishment, the conclusion followed almost as a matter of course that “the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter”28.

Probably the most famous example usually given in the context of proliferation and fragmentation is the Tadić case. In this case ICTY had to decide whether or not the grave breaches regime of the 1949 Geneva Convention – and thus Article 2 of its Statute – was applicable. As that required showing that the conflict was international in character, the Tribunal needed to conclude that the acts by Tadić (and more generally by the agents of the Republika Srpska) could be attributed to the Federal Republic of Yugoslavia (‘FRY’). In its final decision in Tadić in 1999, the Appeals Chamber analyzed in detail the jurisprudence of the ICJ in Nicaragua in which the United States had not been held responsible for the breaches of humanitarian law committed by “contras” merely on account of organising, financing, training and equipping them. To create responsibility, the ICJ had held, the United States should have exercised “effective control […] with respect to the specific operation in the course of which the alleged violations were committed”29. The Appeals Chamber found this reasoning unpersuasive. It stressed the “degree to which the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities”30. It distinguished between the attribution of the acts of unorganised individuals to a State and the attribution of


28 Ibid., paras. 21–22 and 40. See also: Koskenniemi, Leino, supra note 5, at 562-563.


30 Ibid., para. 121.
those of an organised military group. The Nicaragua requirement of “acting under specific instructions” could be reasonably applied to the former, but not to the latter. An organised military group acts in a relatively autonomous way. To create accountability it is sufficient that the group is under the overall control of a State irrespective of whether each of its activities was done under specific instructions. M. Koskenniemi and P. Leino stated that on this basis, the Appeals Chamber overruled Nicaragua. The question is – did it really overrule Nicaragua? I will go back to this question later. What needed demonstrating was only that the State had a “role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”.

This decision was challenged in Celebici, where the appellants argued that the ICTY was bound by the decisions of the ICJ because of the latter’s position as the “principal judicial organ” of the UN. The Appeals Chamber accepted that the Tribunal could not ignore the need for consistency with the general state of the law. But it stressed that the Tribunal was an “autonomous judicial body” and that there was no “hierarchical relationship” between it and the ICJ. Accordingly, it dismissed the appellant’s arguments and upheld the “overall control” test set up in Tadić case.

Let’s go back to the question – did the ICTY really overrule Nicaragua verdict? Some international lawyers heavily criticized ICTY for unnecessary verification of the ICJ test which test had little or no meaning at all for the Tadić case, mostly because of different factual state of both cases. Hence, the ICTY could have avoided harmful and unnecessary undermining the conclusions of the main judicial organ of the international community.

M. P. Scharf also pointed to a very different factual state of both cases – Nicaragua and Tadic. T. Meron similarly indicated that facts of both cases were so divergent that ICTY should not have referred to the ICJ test at all. Meron clarifies that “the ICTY’s use of the Nicaragua standard produces artificial and incongruous conclusions” […] this was not an issue of (state) responsibility at all. Identifying the foreign intervenor was only relevant to characterizing the conflict. Thus, the problem

31 Ibid., para. 122.
32 Ibid., para. 137.
in the trial chamber’s approach lay not in its interpretation of Nicaragua, but in applying Nicaragua to Tadic at all. Obviously, the Nicaragua test addresses only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal. In other words, ICTY did not have to had recourse to the effective control test at all and still arrive at the same conclusions.

M. Sassoli and L Olsen are afraid that as a result of such divergences in the jurisprudence of the ICJ and ICTY there will appear double standards which they regard as harmful. But it should be stressed once again that both cases were about different sets of facts so it is difficult to agree that standards should be the same.

For all those reasons I believe that the ICTY did not overrule Nicaragua but adopted a different standard (different test) for quite different facts of the case. This also proves that the risk of fragmentation is rather theoretical and strongly exaggerated. Naturally, ICTY could have handled the case differently without creating the impression that it deviated from or overruled the Nicaragua test. This test was simply adopted for different purposes than overall control test from the Tadić case.

III. CONCLUDING REMARKS

As already mentioned the main fear about proliferation is that of fragmentation and lack of unity in international law. On the other there are also certain positive effects usually enumerated such as strengthening credibility of international law, opening more channels for conflict resolution, the possibility for experimenting and creativity as well as increasing specialization, the latter being the higher stage of evolution and development of international community and international law itself. I believe that in the contemporary state of international law proliferation should not be so feared of. J. Symonides also argues that the risk of fragmentation is rather theoretical. The advantages of proliferation seem to outweigh its disadvantages, including the fragmentation. Furthermore, this process seems unstoppable. According to A. Kozłowski, fragmentation of international law is a natural consequence of the development of international law.

As I already mentioned, for most commentators proliferation is either an unavoidable minor problem in a rapidly transforming international system, or even a rather positive demonstration of the responsiveness of legal imagination to social change. Even as the analysis of fragmentation is largely held to be correct, most lawyers

express confidence in the ability of existing bodies to deal with it. As J. Charney observed, “alternative forums complement the work of the ICJ and strengthen the system of international law, notwithstanding some loss of uniformity”. Even different approaches adopted in relation to the same subject may only represent a healthy “level of experimentation in a collective effort to find the best rule to serve the international community as a whole”. Therefore, “based on the information available at this time […] a serious problem does not appear to exist”.39

39 Koskenniemi, Leino, supra note 5, at 575.