Interview With Professor Bruno Simma

Former Judge, International Court of Justice

SPIL, Mumbai: What are your views on the violation of sovereignty laws by the NATO in the case of Libya?

Professor Simma: In my view the NATO countries participating in the Libya intervention based their military actions on an interpretation of the respective Security Council resolution which I consider untenable from the viewpoint of any recognized method of interpretation.

SPIL, Mumbai: You were actively involved with the LaGrand (Germany v. United States of America) dispute. What according to you is the global significance of it?

Professor Simma: In my view, the significance of the ICJ's LaGrand judgment is threefold: first, it clarified the scope of the protection of individuals by their home states' consular officers in a broad sense (important in our era of globalisation); secondly, it recognized that international law contains rights of the individual that don't at the same time have to be human rights; thirdly, it stated that the ICJ's provisional measures are legally binding.

SPIL, Mumbai: You have mentioned the role of the International Law Commission in propagating peace through law in a few of your published journals and books. How far has the International Law Commission been successful in propagating peace in times of conflict and dispute?

Professor Simma: I am not sure that I recognized for the ILC an important role in propagating peace through law in my writings. Of course, it does contribute in this direction, but in a rather abstract sense. More directly and importantly, it contributes to the universal recognition of old, but vital norms of (originally Eurocentric) international law; it modernises traditional rules (for instance, on the law of treaties) and it has contributed to the acceptance of community-oriented rules overcoming traditional bilateralism (for instance, in the law of state responsibility)

SPIL, Mumbai: You have emphasized the need of countries to adopt a bilateral approach to resolve disputes in a few of your books and journals. What are your views on the current unilateral sanctions imposed by countries like The United States of America, which have been imposed due to reasons of "speedy action"?

Professor Simma: Like in the case of the preceding question, I don't think this question captures what I have said and written about the peaceful settlement of int'l disputes. A "bilateral approach" is in place, of course, but I would not prefer it to multilateral methods where these are necessary. Besides: are proceedings before the ICJ or an international

arbitration like your current one with BanglaDesh "bilateral" or (rather) multi-(i.e., tri-lateral)?

SPIL, Mumbai: You've been a member of several international bodies such as The United Nations Committee on Economic, Social and Cultural Rights,International Olympic Committee's Court of Arbitration in Sports. Could you share your experiences of working in these international bodies?

Professor Simma: This would be a long story; besides, the C'ttee on Economic, Social and Cultural Rights and the CAS (by the way, after a short period following its creation it has established its full independence from the IOC!) are worlds apart.

SPIL, Mumbai: You were nominated to the ICJ by the Permanent Mission of Germany to the United Nations. From that time till now you have authored many works dealing with Germany's evolution in The United Nations. What are your views on the current debate which says that nations like India and Germany should get a permanent seat in The United Nations Security Council?

Professor Simma: I think that as far as Germany is concerned, its increasing integration (and important role) in the European Union ought to lead to a change in emphasis in the direction of somehow enlarging the weight of the EU in the UN and maybe also in the Council. As to India, it is on its way to be a superpower and it should thus pursue its own course in the UN, without being in any way tying itself to Germany

SPIL, Mumbai: What do you think is the biggest challenge to the development of international law in today's world?

Professor Simma: Undoubtedly the curtailment of the use of force in international relations without community (UN) authorization and the establlshment of a truly universally accepted system for the protection and fostering of human rights

SPIL, Mumbai: How has your experience been as an academician in contrast with the other positions you have held?

Professor Simma: I might have been too much of an "academician" in my practical work, at least in the ICJ. On the other hand, I think that a combination of academic work with practical functions is the most rewarding career development I can imagine. I was a professor for more than 30 years, a member of UN expert bodies, of the ICJ, and lately of the Iran-US Claims Tribunal and several arbitral tribunals and I am deeply grateful for these opportunities to acquire a personal experience of how international law actually works.

SPIL, Mumbai: You have presided over the finals of the Phillip C Jessup moot court competition in the past. In India a lot of emphasis is paid to co-curricular activities such as moot courts. How important do you think are co curricular activities such as moot court competitions for law school students?

Professor Simma: I consider them vital; first a such, but particularly in international law because they "breed" the future international law elites!

SPIL, Mumbai: Lastly what would be your advice to students interested in pursuing careers in International Law?

Professor Simma: Try to acquire a solid knowledge of general international law before you start specializing (in other words: don't specialize too early); try to develop a community-based outlook on the law, going beyond the interests and needs of your home country; try to go abroad and as much as possible see for yourself how the world "ticks"; learn a foreign language!

Countermeasures And The Iranian Nuclear Issue: Problematic Tensions Between The Law Of Treaties And The Law Of State Responsibility

- Sahib Singh*

I. Introduction

The signing of the Joint Plan of Action on 24 November 2013 marks a brief respite in the escalation of the Iranian nuclear issue.[1] The most significant contemporary reason for said escalation was the International Atomic Energy Agency's (IAEA) November 2011 report on Iran.[2] It has been a dispute that has spilt over into diplomatic rows, covert military conduct and threats of military attacks. But what has remained a persistent problem throughout the ebb and flow of this dispute is the legality of some of the economic sanctions being undertaken by states and international organizations.[3] Subsequent to the 2011 IAEA Report, there was a broadening of such sanctions by the European Union and various other states, including the United States. This piece addresses the following question: Do states, beyond the scope of existing Security Council mandated sanctions, have standing to take unilateral countermeasures against Iran, and if so, upon which particular legal grounds?

This piece only examines the issue of standing in relation to Article 42(b)(ii) of the International Law Commission's Articles on State Responsibility (ILC Articles)[4] and collective non-proliferation obligations contained in the Treaty on Non-Proliferation of Nuclear Weapons (NPT).[5] It will first consider the background of the dispute and delineate the legal question at stake (section II), identify the nature of the Iranian break (section III), highlight the ambiguities arising in the law (section IV) before concluding. It determines that there is a good case to argue that states who undertake

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1 Joint Plan of Action, signed 24 November 2013 between China, France, Russia, United Kingdom, United States, Germany and Iran.

2 IAEA, Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran, IAEA Doc. GOV/2011/65, 8 November 2011.

3 See how the EU has shifted its position between various judicial pronouncements: Case T-509/10, Kala v. Council, Judgment of the General Court, 25 April 2012; Case C-348/12P, Council v. Kala, Judgement of the Court, 28 November 2013 (overturning Case T-509/10); and Case T-489/10, Islamic Republic of Iran Shipping Lines v. Council, Judgement of the General Court, 16 September 2013.

4 See J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press, 2002)

5 729 UNTS 161.

unilateral economic sanctions as a form of countermeasures against Iran, may not have a strict legal standing to do so.[6]

II. Background & Delineating The Legal Question

Since 2002, when Iran revealed uranium enrichment facilities in Natanz and Arak that had been previously concealed for nearly 18 years, the IAEA and the international community has viewed Iran's nuclear program with concern for its possible military dimensions. Iran has continuously sustained its 'inalienable right' to peaceful use of nuclear technology (including acceptable levels of uranium enrichment) under Article IV NPT. Despite mere suspicions and no conclusive evidence of a clandestine nuclear weapons program, and acting in discordance (although not necessarily in breach) with Article XII(c) of its Statute, the IAEA referred the case of Iran to the UN Security Council (UNSC) in February 2006. Since the passage of UNSC Resolution 1696 (2006), Iran's rights and obligations in relation to its nuclear program have been severely transformed, and the first of four rounds of UNSC Chapter VII economic sanctions were put in place. The most extensive of these was UNSC Resolution 1929 (2010), passed on 9 June 2010.[7]

Yet, against this background, matters were significantly inflamed by the release of the controversial IAEA Report on Iran, in early November 2011. Specifically, the Report included an Annex entitled: 'Possible Military Dimensions to Iran's Nuclear Programme', which for the first time detailed all available evidence as to Iran's clandestine program. The Report is controversial not merely for its apparent breach of the procedural confidentiality requirements relating to States' nuclear programs, but more so because the IAEA has arguably proceeded well outside its legal mandate, choosing to undertake an aggressive reading of the NPT.[8] Dan Joyner, a leading non-proliferation expert, makes a scathing and persuasive critique in this regard.[9] Yet, regardless of the principled arguments that can be made against its publication, this post concerns itself with the ramifications of the latter.

Immediately after the Report was released certain steps were taken: (a) the EU, some of its member states and the US implemented a new round of sanctions;[10] (b)

6 S. Singh, 'Non-proliferation Law and Countermeasures' in D. Joyner & M. Roscini (eds.), Non-proliferation Law as a Special Regime (Cambridge University Press, 2012) 196-249, 204-219 (see for a more detailed examination of the legal issues).

7 Ibid. 235-241 (for a more detailed discussion of parts of the Resolution).

8 IAEA, Communication dated 8 December 2011 received from the Permanent Mission of the Islamic Republic of Iran to the Agency regarding the Report of the Director General on the Implementation of Safeguards in Iran, IAEA Doc. INFCIRC/833, 12 December 2011 (outlining the considered Iranian response and this reading of the relevant legal provisions by Iran).

9 D. Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA', Jurist, 9 November 2011.

10 For a detailed up to date designation of sanctions undertaken by the US and the legal basis for these, see Kenneth Katzman, 'Iran Sanctions' Congressional Research Service Report No. RS20871, 11 October 2013, 65-74. For the EU, see EU Council Decision 2010/413/CFSP, 26 July 2010; Council Decision 2012/457/CFSP, 2 August 2012; Council Regulation No. 267/2012, 23 March 2012; and Council Regulation No. 1203/2013, 26 November 2013.

further UNSC action was contemplated, but rejected, despite meetings with the 1737 Committee;[11] (c) the escalation of the matter led to Iran threatening to suspend transit through the Strait of Hormuz in December 2011 – a threat subsequently without teeth (on its right to do so, refer to Articles 37, 38 and 44 of UNCLOS, though Article 44 seems to decide the issue against Iran).

I am concerned with only the first of these, namely, the implementation of unilateral economic sanctions upon Iran. This piece, broadly speaking, is also potentially applicable to previous economic sanctions implemented by various states since 2006, including Japan and Australia.

But the legal question to be answered here requires five points of delineation. First, I am only concerned with those sanctions that may be regarded as breaches of international law, and not as retorsions. Second, I am only concerned with those sanctions that extend beyond those mandated by the UNSC in its various resolutions between 2006 and 2010. This is the majority of actions taken by the US and the EU. Third, I am not concerned with those sanctions that can be justified upon the basis of a bilateral breach: i.e. of an obligation simply between the sanctioning state and Iran. The substantive law of bilateral countermeasures may be applicable to these. Fourth, I presume that in accordance with the current position of international law, unilateral countermeasures are permissible, despite the UNSC having taken Chapter VII action.[12] Fifth, I will only consider standing to take countermeasures under the traditional criteria of Article 42 ILC Articles only. The role of Articles 48 and 54 are not only too murky to be dealt with in such a small piece, but there has been an insufficient development in practice to say that the right to resort to countermeasures is permissible under such articles. This criterion also presumes that I am talking only of the legality of measures taken by States, although certain parallels may be found in the law of international organizations.

III. Identifying The Nature Of The Iranian Breach

Before being able to answer the question identified in the first paragraph, there is an anterior issue that needs to be clarified: the source and nature of the obligation(s) breached by Iran, in response to which the countermeasures are being taken.

The evidential information provided in the IAEA Iran Report is comprehensive and certainly does not paint a pretty picture. The Report details Iranian possession of a certain document that would give it partial knowledge on how to build a nuclear warhead, or some of its component parts. The Report also expresses a considerable concern with the ability of Iran to enrich uranium as a fissile material. Whilst constituting a continuing breach of numerous UNSC Resolutions, these are irrelevant for the purpose of analyzing states' standing to take unilateral countermeasures. The

11 UN Doc. SC/10502, 21 December 2011.

12 See (1992) 1 Yearbook of the International Law Commission 144 (contra opinion expressed by Pellet)

dominant arguments rest on stating that Iran has breached two specific collective obligations contained in the NPT. First, the Article II obligation "not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices" has been breached. Second, it is argued that, Iran has breached its obligations to follow and apply accepted IAEA safeguards in contravention of Article III(1). The veracity of these claims shall not be broached here, but for the reader's interest I would refer to Joyner's eloquent argument as to why there has been no breach of Article II – based on a comprehensive and objective examination of the term "manufacture" and its misuse.[13] It is widely accepted that Iran has breached certain IAEA safeguard obligations, but the scope of these are unclear (i.e. whether they simply relate to the IAEA-Iran Safeguards Agreement INFCIRC/214[14] or whether they extend to the Additional Protocol which Iran has not ratified (but has been made binding through UNSC Res. 1929 (2010) and not Art. III(1) NPT), and even subsidiary agreements).

Given the argued and, for present purposes, presumed breach is of collective obligations contained in the NPT, Art. 42(b) ILC Articles is triggered as the only reasonable basis of standing for countermeasures. Art. 42(b)(i)'s threshold is not met in the present case. Standing to take unilateral countermeasures can only be justified under Art. 42(b)(ii) if the 'breach of the obligation … is of such a character as radically to change the position of all other States to which the obligation is owed with respect to the further performance of the obligation.'

IV. Logical Inconsistencies: Interdependent Obligations In The Law Of Treaties And Art. 42(B)(II) ILC Articles

Article 42(b)(ii) is premised on defining a legal rule for standing to invoke responsibility for the breach of an interdependent obligation (ILC Commentaries, para (5) of Art. 42), as a subset of collective obligations. This article operates on the presumption that a diverse (including countermeasures) and decentralized response to the breach of interdependent obligations arises from the inherent characteristics and nature of such obligations. Yet, Article 42(b)(ii)'s text and conceptual grounding in interdependent obligations is founded upon the ILC's work on the law of treaties, and in particular Fitzmaurice's exposition of different types of multilateral treaties and obligations.[15] It is argued that overreliance on this foundation has led to logical inconsistencies in conceptualizing when an obligation can be classified as interdependent, and thus, when responsibility may be invoked to undertake available countermeasures. This has particularly unsettling consequences for nonproliferation

13 D. Joyner, Interpreting the Non-Proliferation Treaty (Oxford University Press 2011); International Law and the Proliferation of Weapons of Mass Destruction (Oxford University Press 2009), 16-18.

14 IAEA, The Text of the Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, INFCIRC/214, 13 December 1974.

15 Second Report on the law of Treaties, by Mr. G.G. Fitzmaurice, Special Rapporteur, A/CN.4/107, (1957) 2 Yearbook of the International Law Commission, 31 and 37.

law and identifying how the law on standing to take countermeasures should be applied in the current situation with Iran.

The central question is whether the Art. II NPT obligation not to "manufacture" nuclear weapons, as well as, the Art. III(1) obligation to apply accepted IAEA safeguards are to be considered as interdependent obligations. If so, a breach of them shall certainly trigger Art. 42(b)(ii), thereby enabling standing to take countermeasures. Approaches to this question have loosely classified the NPT as an interdependent treaty and therefore a breach of the safeguards provisions or substantive provisions would permit recourse to countermeasures through Article 42(b)(ii).[16] This approach collapses the distinction between treaties and obligations, as well as, the law of treaties with the law of state responsibility. One must be concerned with classifying obligations as interdependent or not; the classification of the treaty is irrelevant to an application of the law of state responsibility.

Fitzmaurice defined interdependent obligations as those in which 'performance by any party is necessarily dependent on an equal or corresponding performance by all other parties'[17]and whose breach 'tends to undermine the whole regime of the treaty between all the parties'.[18] Crawford defined it as that where 'performance of the obligation by the responsible state is a necessary condition of its performance by all the other States' (ILC Commentaries, para (5) of Art. 42).[19] Forgive the quick statements of quite complex positions, but my paper can be viewed for more detail.[20] In short, what emerges is that the defining or core principle of what comprises an interdependent obligation differs based on whether considered from a treaty law or state responsibility law perspective. From a treaty law perspective, the core characteristic is that a breach of a specific treaty obligation of an interdependent nature renders future performance of the treaty by all other parties to it impossible, indeed breach of a specific obligation threatens the entire structure of the treaty and the sum of its obligations. However, from a state responsibility law and Art. 42(b)(ii) perspective, the determining characteristic of an interdependent obligation is that a breach of the specific obligation would per se affect and undermine every other state's future performance of solely that same specific obligation. Thus far there is a stable and predictable logic to the different regimes.

16 J. Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' (2009) 42 Vanderbilt Journal of International Law 1393.

17 Second Report, note 15, at 31 and para. 126.

18 Report of the International Law Commission to the General Assembly on the second part of its Seventeenth Session and Eighteenth Session, UN Doc. A/6309/Rev.1, (1966) 2 Yearbook of the International Law Commission 255 (ILC Draft Articles on the Law of Treaties and Commentaries).

19 See also, Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/507, para. 91.

20 Singh, note 6, at 204-221.

The application of this logic to Iran's Article II and III(1) NPT obligation leads to some worrying ambiguities. Dealing first with Iran's Article II obligation not to "manufacture" nuclear weapons. From a treaty law perspective, Iran's breach of this obligation would clearly call into question the ability of all other NPT state parties to perform most of their substantive obligations. Indeed, the other state parties' performance of these obligations is effectively conditioned upon the performance of the other state parties of their substantive obligations (not actually conditioned, as for synallagmatic obligations). Iran's nonperformance of its obligation not to manufacture would thereby radically modify other states performance of their obligations. It cannot be questioned that non-performance by one party of such an obligation would threaten the entire treaty structure of the NPT. However, under the narrower state responsibility perspective, Iran's breach of this obligation would not undermine or modify the position of all other States to which the obligation is owed, with respect to the future performance of that same specific obligation. Two reasons emerge as to why these requirements of Article 42(b)(ii) cannot be met. First, not all other state parties to the NPT will have their further performance of this particular obligation compromised or affected, for the simply reason that not all other states are required to perform the obligation not to manufacture. The obligation not to "manufacture" only attaches to non-nuclear weapon states (NNWS), not to nuclear weapon states (NWS) such as the US, and is owed to all the NPT state parties. Second, as a direct consequence of the first point, the future nonperformance of the same specific obligation is not necessarily at issue (as required by the core criteria of interdependent obligations). For NWS, potential non-performance would attach to different, but related, substantive obligations contained in Article I NPT. The apparent asymmetry between those obligations being breached and those obligations in danger of future non-performance, reveals a core problem as to which substantive nonproliferation obligations can be qualified as interdependent (despite the common conception that all of them are).[21]

Turning to Iran's safeguard obligations under Article III(1), it should be clear that from a state responsibility and Art. 42(b)(ii) perspective, these cannot be considered as interdependent within the strict test. Yet, under a treaty law perspective it is my position that only a specific sub-set of safeguard obligations (namely those with a distinct and concrete link to substantive obligations) only in cases of a significant breach, can be qualified as interdependent. There are two sub-issues here; the type of verification obligation involved and the type of breach involved. First, one must differentiate those procedural safeguard obligations that have a distinct and direct connection to substantive obligations (e.g. the obligation to disclose and report and the existence of a facility utilizing WMDs for peaceful purposes) and those that do not (e.g. reporting within a specific timeframe). Second, one must consider that for

21 Singh, note 6, at 214-5 and fn. 67.

the first type of obligation just submitted, the significance of the breach involved is critical. Should it be a case of technical non-compliance, which are manifest, of a safeguard obligation that is strongly linked to substantive ones, then this is hardly sufficient to enable standing for all state parties to that obligation to take countermeasures.

V. Conclusion

Worryingly, it emerges that it is difficult to find a legal basis for standing to take countermeasures for the assumed Iranian breaches of Articles II and III(1) NPT, for the likes of NPT state parties such as the US, certain EU member states, Japan and many others taking economic sanctions. This difficulty arises from the expedient but logically inconsistent transference of a treaty law conceptualization almost directly, without much modification, into the law of state responsibility. There are two ways to read Article 42(b)(ii), namely: (1) it provides standing to the aforementioned states because it is premised on the broad understanding of interdependent obligations in the law treaties – and such an understanding of the concept should be read into the Article. (2) it must pertain solely to the situation where it is concerned with the modification of the future performance of the same specific obligation that has been breached; this is the only conceptually coherent reading available if one it to maintain the methodology of the ILC Articles on State Responsibility. I personally fall into the latter camp, because Article 42(b)(ii) must be conceived of as articulating a rather novel legal position based on conceptualizations with significant intellectual baggage – the relevance of this baggage to the particularities of the law of state responsibility is perhaps to be doubted.

Needless to say, such a conclusion is not particularly favorable to supporting unilateral sanctions by the US and other States against Iran, within the context of the NPT.

Property Obligations Of A Nation State For Government Occupation Of Private Property

- Allen E. Shoenberger*

Terrorists attack the Taj Hotel in the center of Bombay, India causing destruction, loss of life, and closure of the hotel for a considerable period of time. Other terrorists attack the compound of an oil company in Nigeria doing substantial damage. Yet other terrorists launch missles at a private housing complex in Israel. In each case, private property was damaged due to the activity of terrorists. Do such acts give rise to governmental responsibility to the private property owners in International Law on the part of the nation state of the owners of the private property?.

The traditional answer under International Law was an emphatic no, no such right exists. In customary International Law private citizens had no rights against either their own nation state or other nation states. Citizens were objects not subjects of international law. If a citizen was injured by another nation state, that citizen's own nation state had the ability to seek compensation for the harm done to its citizens from another nation state, but then had no obligation to compensate the citizens with any award received. As a matter of grace, a nation state might convey all or part of the compensation received from another nation state to its own injured citizens.

The harsh realities of customary international law have given way to new regiemes of international treaties and rights. One such treaty is the European Convention on Human Rights adopted by the Council of Europe in 1951. Now more than 800 million citizens are covered by the rights contained in that treaty, and citizens have a right to seek review of their own nation state's alleged misconduct in the European Court of Human Rights, a court that sits in Strasbourg, France.

In the 2007 decision of Kamidov v. Russia.[1] the European Court of Human Rights found that the nation state owed compensation to its own citizens for harm attributable to terrorist activity. That liability was found even though the owners abandoned their property to flee constant threats from rebel fighters. Counter-terrorist police units occupied abandoned houses as a result of Chechen rebels.

Between October 1999 and January 2001 the courts in Chechnya were closed.[2] In early October 1999 the Russian Government launched a counter-terrorist operation in the Chechen Republic and the applicant and his relatives left the village.[3] When they tried to return later in October, police units denied them access to their estate.[4] Complaints to

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1 [2007] ECHR 72118/01.

2 Id. ¶¶ 13-27.

3 Id. ¶ 13.

4 Id. ¶ 15.

officials were ineffective; they were advised to file compensation claims with a court.[5] They brought suit for an eviction when the courts reopened in January 2001.[6] That court confirmed ownership in the applicant and his brother, and ordered eviction of the police units.[7] Initially the police units refused to comply with the writ of execution, but then according to the Government in April 2001 the Tambov police units vacated the buildings but remained on the plot of land of the applicant.[8] However, a bailiff reported that the judgment remained unenforced, for although the Tambov police units had left, the Tula police units had moved into the property.[9] In February of 2002 the bailiff reported that the police units had vacated the houses, but remained in quarters that they had built on the applicant's land, with the Tula police units now replaced by Kalua police units.[10] On June 14, 2002, the bailiff closed the enforcement proceedings as the police units had now vacated the applicant's estate.[11]

On July 30, 2001 the applicant and on behalf of his brother brought an action against the Russian Ministry of the Interior in the Zamoskvoretskiy District Court of Moscow for compensation for damage to his real property, for losses attributed to the occupation, and possession of movables as well as for non-pecuniary damages because he had been forced to live in a refugee camp in appalling conditions that resulted in the death of his nephew.[12] That court rejected all claims for monetary damages, partly because of failure to present sufficient proof that the damages were through the fault of the Ministry of the Interior.[13]

The ECHR determined that since the applicant had lodged the application solely in his own name, he may rely upon Article 1 of Protocol No. 1 [14] only with regard to his own possessions, which includes the land and industrial property which had been formally assigned to the Nedra company.[15] For purposes of Article 8 of the Convention, however, the home of the applicant was construed as both the houses belonging to the applicant and to his brother, but not including the land and industrial property.[16]

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5 Id. ¶17.
6 Id. ¶ 27. The applicant on his own behalf and on behalf of his brother asked for the eviction of police units.
7 Id. ¶ 28. Judgment of 14 February, 2001.
8 Id. ¶ 32.
9 Id. ¶ 37. Letter dated June 26, 2001.
10 Id. ¶ 46.
11 Id. ¶ 47.
12 Id. ¶ 48.
13 Id. ¶ 50.
14 Article 1 of Protocol No. 1 provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a States to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
15 [2007] ECHR 72118/01. ¶¶ 121–126. Nedra company jointly belonged to the applicant and his brother.
16 Id. ¶¶ 117–131.

The ECHR rejected the determination by the domestic court that there was inadequate demonstration that the damage had been caused by state agents.[17] In particular the court found the state had an obligation to take appropriate steps to certify the state and condition of property prior to the occupation, and to account for it afterwards.[18] Therefore, the court found violations of both Article 1 of Protocol 1 and article 8 of the the Convention.[19]

The ECHR then turned to allegations that Articles 6 and 13 of the Convention had also been violated. (Article 6 relates to a fair hearing by a tribunal established by law, and Article 13 provides that an effective remedy should be available for violations of the Convention.)[20]

The applicant alleged that there were no effective remedies available partly because the Chechnya courts had been closed from October 1999 until January 2001, and partly because of the unreasonable length of the enforcement proceedings for eviction in 2001, and the unfairness of proceedings in 2002 that allegedly contained arbitrary findings, failure to examine properly evidence submitted by the applicant, and failure to address claims for compensation for the occupation and non-pecuniary damages.[21]

The ECHR rejected the government's assertion that the eviction claim could have been filed elsewhere in Russia since the Russian Code of Civil Procedure then in force established a rule of exclusive jurisdiction for disputes determining rights over immovable property, thus the only place where an eviction suit could have been filed was Chechnya.[22] The court noted that the Russian authorities could have specifically authorized the filing of a claim in another region of Russia.[23]

The applicant further complained about the lack of enforcement of the judgment of eviction. The government's defense that they were engaged in a counter-terrorist operation in the Chechen Republic was rejected, since the courts had reopened and no persuasive argument had been advanced that the government was objectively precluded from speedy compliance with the judgment.[24]

The applicant complained of the failure of the domestic courts to examine his claims for compensation.[25] The Government's position was that there had been a failure to prove a right to compensation because of a lack of evidence that the Government's agents were at fault for causing harm to the property.[26] The court found that three separate claims had

17 Id. ¶ ¶ 137-138.
18 Id. ¶ 136.
19 Id.
20 Id. ¶ 149 et seq.
21 Id. ¶ 149.
22 Id. ¶ 153.
23 Id. ¶ 156.
24 Id. ¶ 161.
25 Id. ¶ 163.
26 Id. ¶ 164.

been advanced; a claim for adverse occupation, a claim for resulting damage, and a claim for nonpecuniary damage.[27] Nothing in the two court decisions rejecting the applicant's claim for compensation addressed either his claim for adverse possession or his claim for nonpecuniary damage.[28] With regards to the damage claim, the ECHR reviewed the numerous documents that had been provided to the domestic courts, including documents confirming title in the applicant and his brother, confirming adverse possession of the property, and evaluation reports documenting the extent of the damages, as well as a certificate issued by the head of local administration of Bratskoye stating that federal interior troops had been stationed on the property from October 13, 1999 until May 26, 2000 and that they had damaged the property.[29] All of these documents, but one, had been admitted by the firstinstance domestic court.[30] The exception was a document supposedly not admitted because it was undated; however, the document in question had been duly signed and sealed by the head of the Bratskoye council and the military commander of the Nadterechny District, and made a direct reference to the evaluation reports dated May 26, 2000.[31] None of the documents, however, had been questioned or rebutted by the Government, nor had the Government expressed doubt as the accuracy of the applicant's allegations.[32] In this context the ECHR expressed the view that "the unreasonableness of this conclusion is so striking and palpable on the face of it that the decisions of the domestic courts … can be regarded as grossly arbitrary… the domestic courts in fact set an extreme and unattainable standard of proof for the applicant so that his claim could not… have had even the slightest prospect of success."[33]

The ECHR then turned to determining damage under Article 41 of the Convention. The claim was for a total of 625,000 euro for pecuniary damage loss. The court made the following awards: 112,000 euro for the temporary occupation of the property; 41,000 euro for damage inflicted upon the applicant's estate, nothing for damage to mill and bakery equipment because of a failure to document the damage; and 4,000 euro for rent for housing for the period from June 14, 2002 until March 31, 2006, for a total of 157,000 euro.[34]

The applicant claimed on his own behalf and on behalf of family members 65,000 euro in non-pecuniary damages for the psychological suffering, anguish and distress as a result of the numerous violations of their rights.[35] Among other things he pointed out that his family spent the winter of 1999 – 2000 in a refugee camp, and his 1 year 7 months old nephew

27 Id. ¶ 166.
28 Id. ¶ 168. Hence there had been a violation of article 6(1) of the Convention, the right to a judicial determination.
29 Id.
30 Id. ¶ 172.
31 Id.
32 Id.
33 Id. ¶ 174.
34 Id. ¶¶ 191-198.
35 Id. ¶ 199.

died there of pneumonia while the health of the other family members also deteriorated.[36] The court awarded on an equitable basis 15,000 euro for the anguish and distress.[37]

What is most interesting about the decision is that the ECHR rejected the attempt by the Government to interpose a blanket objection to liability under the Convention based upon the Chechen disturbance. Instead, the ECHR held that the Government had affirmative obligations to both see that civil court judgments (such as eviction) be enforced, and take responsibility for documenting, or failing to document, the physical condition of property that its military had occupied both at the point of occupation and when the property was vacated. Even in times of extremis, the obligation was upon the Government to take appropriate steps to preserve both the legal system and its remedies and the property rights of its citizens.

Property Rights Against a Nation State for Terrorist Acts when International Law does Not Provide an Applicable Rule

In contrast, in the United States, a country that has not ratified an international treaty such as the European Convention on Human Rights, no compensation would be due to U.S. citizens. During riots in the Canal Zone of Panama, United States troops occupied buildings which were seriously damaged by the rioters.[38] The Supreme Court held that the owners were not entitled to compensation even if the damage occurred because of the presence of the United States Troops in the buildings.[39] The claims were not made under international law, but under the Fifth Amendment of the United States Constitution which requires just compensation for a taking of property by the federal government.[40] The court found that the mission of the troops was protection of the buildings being occupied, not protection of the Canal Zone generally.[41] Incidental benefit to the public as a whole does not justify compensation.[42] "[T]emporary, unplanned occupation of petitioners' buildings in the course of battle doews not consittute direct and substantial enough government involvement to warrant compensation…."[43] Two Justices dissented, asserting, "[T]he guiding principle should be this: Whenever the government determines that one person's property – whatever it may be – is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual should bear the loss."[44]

Under United States law the only other possible basis for a suit agains the federal government in such situtions would be based upon the Federal Tort Claims Act (FTCA)

36 Id.
37 Id. ¶ 201. The court also awarded costs and expenses of 4,100 euro less 715 euro received as legal aid from the Council of Europe. Id. ¶ 207. The court was unanimous in all of its holdings.
38 National Board of Young Men's Christian Associations v. United States, 395 U.S. 85 (1969).
39 Id, 93-94.
40 Id. 86.
41 Id. 87.
42 Id. 92.
43 Id. 93.
44 Id. 99.

However, the FTCA contains an exception for actions conducted by the government that exemplify the exercise of governmental discretion.[45] For example, a federal agency determined in its discretion to ship ammonium nitrate fertilizer in ships when the fertilizer was stored in paper bags. The bags became wet, and an enormous explosion ensued, an explosion that leveled most of Texas City, Texas, killing many people.[46] The fertilizer was being shipped as part of the effort to feed the populations of Germany, Japan and Korea.[47] The court held that the descretionary action exception contained in the FTCA precluded federal liability.[48] The adoption of the plan at a high governmental level from the apex of the Executive Department precluded liability.[49]

Conclusion

These decision of the United States Supreme Court under United States Contitution law and general statutory law are a dramatic contrast to the European Court of Human Rights decision of Kamidov v. Russia. International law may become a significant protector of the rights of property against a citizens own nation state in times of terror.

45 Dalehite v. United States, 346 U.S. 15 (1963).
46 Id. 22.
47 Id. 19
48 Id. 42.
49 Id. 40. According to Melvin Belli in his book Ready for the Plaintiff! (1965), Congress acted to provide some compensation after the courts refused to do so. The Dalehite decision was eventually "appealed" to Congress, where relief was granted by means of legislation (Public Law 378, 69 Stat. 707 (1955)). When the last claim had been processed in 1957, 1,394 awards, totaling nearly $17,000,000, had been made. These claims were paid as a matter of legislative grace, not because of constitutional or other statutory requirements. However, this total is far less than the damages stated in the United States Supreme Court opinion, of $200,000,000.

International Humanitarian Law And The Challenge Of Combatant Status

-Jonathan Crowe*

International humanitarian law faces a range of ongoing challenges. These include the challenges posed by new and emerging types of weapons, the changing face of armed conflict and the political dynamics of the international community. Armed conflicts continue to arise, defying the aspirations of the United Nations Charter. Civil conflicts, in particular, continue to proliferate. Conflicts involving non-state armed groups have always posed a challenge for international humanitarian law. Many contemporary civil conflicts involve a number of different state and non-state parties, some of which may be loosely affiliated or have overlapping command structures. These conflicts may occur wholly within the territory of a single state or spill over national boundaries.

The respect shown for international humanitarian norms in these conflicts is highly variable. Organisations such as the International Committee of the Red Cross and the United Nations continue to work to disseminate humanitarian principles. However, the informal recruitment policies and loose command structures that characterise many contemporary conflicts makes it difficult to disseminate and enforce humanitarian standards. Reprisals against captured combatants and civilian populations, including campaigns of torture and rape, are widespread. The problem is exacerbated in some conflicts by the use of independent contractors outside the military hierarchy.

This article focuses on the challenges these kinds of conflicts can pose for one of the most fundamental principles of international humanitarian law: namely, the principle of distinction. International humanitarian law encourages a clear and reliable division between combatants and non-combatants. The principle of distinction requires combatants to distinguish at all times between military targets and civilian objects and stipulates that only military targets may be the object of attack. This is arguably the most important principle of the whole law of armed conflict. The principle is undermined if attacking forces cannot readily distinguish combatants from other parties.

I. The Significance Of Combatant Status

The classic definition of combatant status under international humanitarian law is found in Article 4 of Geneva Convention III. That provision sets out the categories of people who are entitled to prisoner of war status. The first category comprises members of the regular armed forces of a party to the conflict. The second category covers members of other armed groups, such as militias and volunteer corps, who are under responsible command; bear a fixed, distinctive sign recognisable at a distance; carry arms openly; and respect the requirements of international humanitarian law. A

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broadly similar definition, albeit with some differences, is found in Articles 43 and 44 of Additional Protocol I.

The importance of the distinction between combatants and non-combatants is reflected in Article 43(2) of Additional Protocol I, which provides that '[m]embers of the armed forces of a Party to a conflict […] are combatants, that is to say, they have the right to participate directly in hostilities.' This provision makes it clear that international humanitarian law regards combatants as the primary agents of warfare. Beyond that, however, the provision is open to two different interpretations. The pivotal question here is what Article 43(2) means when it says that combatants 'have the right to participate directly in hostilities'. One way of interpreting this provision would be to infer that only combatants have the right to participate in hostilities. This would make it a violation of international humanitarian law for a noncombatant to engage directly in armed conflict.

The better view, however, is that Article 43(2) of Additional Protocol I does not prohibit noncombatants from directly participating in hostilities.[1] It bears noting that there is no provision in the Geneva Conventions or Additional Protocols expressly stating such a prohibition. Article 43(2) is as close as we get. Other provisions that deal expressly with civilians engaging in hostilities, such as Article 51(3) of Additional Protocol I, merely say they lose their immunity from attack while doing so. It would be dangerous to imply such a strong prohibition from the ambiguous words of Article 43(2) when it does not appear anywhere else in the relevant international treaties.

What, then, is the point of Article 43(2)? I would contend that the provision serves two purposes. The first is to reinforce the importance of the distinction between combatants and non-combatants, by designating combatants as the primary (although not necessarily sole) agents of warfare. The second is to emphasise that combatants may not be tried or punished merely for taking part in hostilities. On this interpretation, the provision states that combatants 'have the right to participate directly in hostilities', not to imply that noncombatants lack that right, but to emphasise that captured combatants cannot be executed or otherwise penalised merely for being on the wrong side of the conflict. Article 43(2) therefore reinforces the prohibition on reprisals against prisoners of war.

Non-combatants who take up arms are bound by the same legal rules as any other fighter. They cannot directly attack civilians or their property; they cannot mount their attacks in a disproportionate way; they cannot mistreat civilians or captured combatants; they cannot use prohibited weapons or tactics. Like recognised combatants, they can lawfully be targeted by opposing forces. They may also be

1 See JONATHAN CROWE AND KYLIE WESTON-SCHEUBER, PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 46–48 (2013); Jonathan Crowe, Combatant Status and the 'War on Terror': Lessons from the Hicks Case, 33 ALTERNATIVE LAW JOURNAL 67 (2008).

liable to prosecution under the law of the detaining power for their hostile actions, since they do not benefit from the combatant immunity recognised in Article 43(2). However, provided that non-combatants abide by the ordinary laws of war, they are not prohibited under international law from engaging in hostilities. There is no firm basis in the conventions for such a prohibition.

II. Protections For Unprivileged Belligerents

The definitions of combatant status in both Geneva Convention III and Additional Protocol I are framed primarily as prerequisites for prisoner of war status. The benefits of prisoner of war status are extensive and detailed. The fact that unprivileged belligerents do not qualify for prisoner of war status if captured therefore provides a real disincentive for noncombatants to take up arms. Nonetheless, it would be wrong to think that unprivileged belligerents are entirely unprotected by international humanitarian law. In fact, under international humanitarian law, nobody goes entirely unprotected. Those who are not entitled to prisoner of war status benefit from other safeguards.

There are at least two additional layers of protection available to captured belligerents who do not benefit from prisoner of war status under Geneva Convention III. The first is the 'protected persons' regime in Part III of Geneva Convention IV, which extends detailed protections to people who fall into the hands of a party to a conflict of which they are not nationals.[2] However, the 'protected persons' regime will not extend to unprivileged belligerents who find themselves in the hands of their own state or its allies. It is also possible to override some of the protections on security grounds.

The second additional layer of protection is contained in Article 75 of Additional Protocol I, which lists the 'fundamental guarantees' that protect all persons who fall into the hands of a party to an armed conflict. Additional Protocol I, like Geneva Convention IV, only applies in international armed conflicts. The equivalent level of protection in non-international conflicts is expressed in Articles 4-5 of Additional Protocol II, which are less detailed than Article 75, but cover many of the same basic issues. These articles, in turn, elaborate on the guarantees set out in Common Article 3 of the Geneva Conventions. Together, these provisions represent the minimum level of protection to which everyone is entitled in times of armed conflict, even unprivileged fighters.

It has been suggested by some commentators that these basic tenets of international humanitarian law do not apply to people who provide support for terrorism.[3] However, there is no basis for this in the applicable treaties. The closest we get is

2 See CROWE AND WESTON-SCHEUBER, supra note 1, at 80–84.

3 See, e.g., John C. Yoo, Terrorists Have No Geneva Rights, WALL STREET JOURNAL, 26 May 2004, at A16.

the security based exceptions contained in Geneva Convention IV, but even those provisions are subject to express guarantees of humane treatment and procedural justice.[4] Nor is there any scope to argue that the conventions did not anticipate the use of terrorism in warfare. Terrorism in wartime is hardly a recent phenomenon. Indeed, it is explicitly mentioned and condemned in Geneva Convention IV, as well as both Additional Protocols.[5] A strong case can be made that terrorists, like other people caught up in warfare, should be afforded at least the basic level of protection set out in the provisions mentioned above.[6]

III. Combatant Status In Non-International Conflicts

It is sometimes said that there is no such thing as combatant status in non-international armed conflicts.[7] The reasoning behind this claim runs as follows. First, the definition of combatant status is found in Article 4 of Geneva Convention III and Article 43 of Additional Protocol I. Neither of those provisions applies to non-international conflicts. Second, the main benefits associated with being a combatant are entitlement to prisoner of war status if captured and immunity from trial and punishment for taking part in hostilities. Neither of those protections is enjoyed by fighters in non-international conflicts. They are not covered by the protections afforded to prisoners of war under Geneva Convention III[8] and can potentially be prosecuted under domestic law for their hostile actions.

There are, however, some obvious dangers to denying the existence of combatant status in internal conflicts. The most troubling consequence of this claim is perhaps that it risks undermining respect for the principle of distinction. There can be no doubt that the principle of distinction apples in non-international conflicts. Article 13(2) of Additional Protocol II prohibits attacks against individual civilians or the civilian population. This prohibition is recognised as a principle of customary international law applying in conflicts of all kinds.[9] The prohibition implies that a distinction can meaningfully be drawn between combatants and civilians for the purposes of planning military attacks.

The view that combatant status does not exist in non-international conflicts also risks giving the impression that captured fighters in such conflicts are entirely at the mercy of the enemy. This is far from the case, even though Geneva Convention III

4 Geneva Convention IV, art. 5, 43.
5 Geneva Convention IV, art. 33; Additional Protocol I, art. 51(2); Additional Protocol II, art. 4(2)(d).
6 For further discussion, see Jan Klabbers, Rebel with a Cause? Terrorists and Humanitarian Law, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 299 (2003).
7 Gary Solis calls this the 'traditional view'. See GARY SOLIS, THE LAW OF ARMED CONFLICT 191 (2010).
8 Geneva Convention III, art. 2.
9 JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–8 (2005).

and Additional Protocol I do not apply. Captured fighters in internal conflicts are afforded a range of protections under international law, including those in Common Article 3 to the Geneva Conventions and Articles 4, 5 and 6 of Additional Protocol II. It therefore seems best to say that the distinction between combatants and non-combatants applies in all forms of warfare, although its precise significance may differ from context to context.[10]

The circumstances of some internal armed conflicts may of course make it difficult to consistently tell combatants and civilians apart. This is not a problem unique to internal conflicts, but it does pose a challenge for the implementation and enforcement of international humanitarian law. It is hard not to react to world events, such as the recent use of chemical weapons in Syria, by feeling sceptical about the prospects for international law to make a real difference in warfare. Attempts to gauge compliance with international humanitarian law are themselves beset by problems, due to difficulties in gaining access to areas where hostilities are occurring. There is, nonetheless, real cause for optimism.

In many respects, support for humanitarian principles within the international community appears stronger than ever before. The Geneva Conventions of 1949 have now been accepted by every recognised state, while the two Additional Protocols of 1977 have been ratified by the vast bulk of the international community. Leading human rights instruments, such as the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights are also widely recognised, while treaties on specific forms of prohibited weapons, such as the Ottawa Landmines Convention of 1997, have gained significant international support in a relatively short time.

It is true that international humanitarian law lacks the centralised enforcement mechanisms that characterise domestic legal systems. However, it gains support from other sources. The main methods by which international humanitarian law is enforced are not international courts and tribunals, but rather internal systems of military discipline and the diplomatic pressure exerted on states and non-state groups by organisations like the Red Cross movement and the United Nations. These methods may seem at first to lack bite, but they have been surprisingly successful in ensuring that the fundamental rules of international humanitarian law are generally respected.[11]

IV. Conclusion

This article has examined some of the current challenges facing international humanitarian law in relation to the issue of combatant status. The central place of the principle of distinction within the international law of armed conflict makes combatant status crucial. However, debates continue to arise concerning the legal significance

10 See CROWE AND WESTON-SCHEUBER, supra note 1, at 49–50.
11 See CROWE AND WESTON-SCHEUBER, supra note 1, at 154–159.

of combatant status, the position of unprivileged belligerents and the relevance of combatant status in noninternational armed conflicts. This article has sought to clarify the legal position in each of these areas. I have emphasised that there is no general prohibition on non-combatants taking up arms and even unprivileged belligerents enjoy robust protections under international humanitarian law. Furthermore, I have suggested that there is good reason to recognise a form of combatant status even in non-international conflicts.

International humanitarian law emphasises the basic values that unite human societies. Its continued effectiveness therefore depends not so much upon the formal status of the applicable legal documents, as on the continuation of the international spirit of cooperation that those documents reflect. Should states consistently decide to bypass international institutions in favour of unilateral responses to perceived threats or humanitarian crises – as was narrowly averted in relation to Syria – the cooperation necessary to maintain respect for humanitarian standards could become increasingly tenuous. On the other hand, the universal recognition afforded to the Geneva Conventions shows that the aspirations reflected in this body of law are still very much alive. A robust and consistent interpretation of the principles of international humanitarian law is needed in order to uphold its central goal of placing stable and dependable restrictions on all forms of warfare.

Prosecution Of Non-State Actors Under Municipal Law According To International Maritime Law In The SIDS. Some Legal Implications In A Failed State

- The Somali Piracy Case Study-

- Dr. Rajendra Parsad Gunput*

I. Introduction

There is already an abundant literature on maritime piracy especially Somalian maritime pirates[1]. In this paper, the main issue and interest are whether Somalian pirates, or enemies of mankind, who have perpetrated various atrocities and heinous crimes on the high seas (Indian Ocean) may be tried by domestic courts? The answer is 'yes' but Somali is actually lawless and all its institutions have collapsed in a collapsed State which is under the control of the Somali Transition Federal Government (STFG), which is certainly not a State. By relying on strong precedent cases and relevant sections of the law this paper will probably reflect the importance of UNCLOS, 1982 in domestic law coupled with some strong precedent cases to confirm the jurisdiction of domestic or municipal courts to prosecute pirates from a 'failed' State and where there is no government at all. Therefore, this paper is focused on the prosecution of maritime pirates under municipal law in the light of international maritime law and international humanitarian law. What shall come out of this case study will definitely enlighten some pertinent issues for scholars regarding the UNCLOS, 1982 (sections 100-107) and its implementation into municipal law by Small Islands Developing States (SIDS) of the Indian Ocean to prosecute maritime pirates in a comparative study (Mauritius, UK and Seychelles).

II. The Problem Statement

The gist of the problem is whether Somali is a 'failed State' and can maritime pirates from a 'failed State' be prosecuted, sentenced and deported from another jurisdiction else than Somali? There is no government, non-employment rate is high, socio-economic development is inexistent, clans and lord wars control its capital and religious animosities clash continuously between various ethnic groups and communities have added to this scourge to Somali and its population. Its EEZ has been subject to illegal fishing, maritime poaching form foreign fishing vessels and in the absence of any control on the borders, policing and administration Somalian

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1 Geib, R and Petrig A. (2011) , Piracy and armed robbery at sea. The legal framework for counter-piracy operations in Somalia and the Gulf of Aden, Oxford University Press

pirates are adventuring farer and farer from their coasts to have easy money by plundering and terrorist attacks on vessels and ships disturbing maritime trade, commerce and business in this part of the world affecting countries with their emerging economies (tourism, financial and economic sector) like India, Mauritius and Seychelles. Thus, in a failed State according to Geib[2]:

> ''Contested forms of rudimentary political order, based on traditional structures of communal self-organisation, often re-emerge as central structures fade. In that case, various non-State entities will claim or indeed possess a locally confined monopoly on the use of force and control access to natural resources, the remaining infrastructure and international humanitarian aid.''

III. HOSTIS HUMANI GENERIS

The case of Somalian pirates is relatively more complicated: they are deported back to Somalia where there is no law and order, no security and peace, no public order and all institutions without exception are completely inexistant. The STFG, which is actually in place, is certainly not a government without any capacity to sign and ratify treaties and covenants and it lacks the military capacity to maintain peace and order in a lawless State. Captured, maritime pirates awaiting trials raise a certain number of important legal issues which need to be clarified. Construed as a special kind of mankind or more exactly as 'enemies of mankind' (hostis humani generis) shall they be sentenced without trials prior to their deportation otherwise it would be against the rules of natural justice? Jurisdiction of the court and burden of legitimacy automatically arise.

Accomplices, attempts and Fundamental Rights

The crime of piracy jure gentium is considered to be a contravention of jus cogens (compelling law), a conventional peremptory international norm that States must uphold irrespective they are alone or in band since pirate attacks occurred collectively and not alone involving accomplices. It was held in the case of Re Piracy Jure Gentium 1934 A.C. 586 that ''an actual robbery is not essential element of the crime. A frustrated attempt to commit a piratical robbery wil constitute piracy jure gentium''. The Judicial Committee of the Privy Council in the UK explained in the leading case of Barendra Kumar Ghose v. The Emperor 1925 AIR PC 1:

> ''Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things, they also serve those who only stand and wait''.

Citizens are tried by domestic courts for crimes they presumed to have committed until they are found guilty and liable and then convicted. Are there circumstances

2 Geib R, Armed violence in fragile States: low intensity conflicts, spill-over conflicts and sporadic law enforcement operations by third parties (2009) 91:873 International Review of the Red Cross 1127 at 132

where non citizens are tried before a court of law under domestic or municipal law according to international maritime law? Non-State actors are tried before an international criminal court for crimes and other atrocities they have committed on land. However, there are relevant issues as to nationality, jurisdiction of the court, prosecution, evidence and deportation of Somalian pirates which arise in several cases before a court of law for crimes (murder, robbery, drug and human trafficking, gun running, illegal fishing, environmental pollution hijacking and hostage taking, ransom payments, wounds and blows, attempts to murder and financing terrorism[3] given the close connection with each other) they have perpetrated on the high seas. Failed State or not, Somalians or not any person is presumed to be innocent until found guilty by an independent and impartial court of law and they must be provided all the facilities (interpreter, admissibility of evidence, time to prepare their defence) prior to their deportation. The Mauritian Constitution, 1968 in its sections 3-16 provides constitutional rights to all its citizens and aliens or foreigners who have committed any breach of the law (possession of drugs and drug traffickers) in Mauritius or outside Mauritius.

Jurisdiction and burden of legitimacy First, there is the issue of jurisdiction. Enemies of mankind do maritime pirates deserve a special prosecution? Non State actors are private parties affiliated to any government.

According to Halsbury's Law of England (Fourth Edition 1977 Vol. 18 st 787 paragraph 1536) ''English courts have jurisdiction to try all cases of piracy jure gentium in whatever part of the high seas and upon whosesoever's property it may be committed and whether the accused are British subjects or the subjects of any foreign State with whom her majesty is at amity''. It is important to note the UK Piracy Act, 1937 was superseded by the Merchant Shipping and Maritime Security Act 1997 which incorporated into UK law The UNCLOS, 1982.

By customary international law, a pirate is automatically hostis humani generis irrespective they are Somalian pirates or not and is subject to universal jurisdiction and whether they can be tried before domestic courts have always been in dispute. As 'enemy of mankind' they are subject to universal jurisdiction and hence any court has jurisdiction to try maritime pirates irrespective they are nationals or aliens or where the matter is heard and tried. The Judicial Committee of the Privy Council, on

3 Article 2. International Convention for the Suppression of the Financing of Terrorism 2002 provides that: ''1. Any person commits an offense within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully or willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injured to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act''.

the issue of municipal law and international law applicable to maritime piracy, their lordships have this to say in the leading case of In re Piracy Jure Gentium 1934 Ac p. 586 at 600 had this to say on this pertinent issue:

''With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its win ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but ''hostis humani generis'' and as such he is justiciable by any State anywhere: Grotius (1583-1645) ''De Jure Belli ac Pacis,'', vol. 2, cap. 20…'' Second, is there a definition of 'piracy'? Indeed, neither the Mauritian Piracy and Maritime Violence Act 2011 nor the Penal Code of the Republic of Seychelles defines the term 'piracy'. Kennedy LJ in the case of Bolivia Republic v. Indemnity mutual Marine Assurance Co (1909) 1 KB 785 at 802 defines 'piracy' for the: ''purposes of a policy as meaning persons who plunder indiscriminately for their private gain, and not persons who simply operate against the property of a particular State for a public political end''.

However if most local legislations do not construe the term 'piracy' the Convention on the High Sea; Geneva, 29th April 1958; defines piracy in its Articles 15-17. Article 15 (1) of the same covenant provides:

''Piracy consists of any of the following acts: (1) Any illegal acts of violence, detention or any act of deprivation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed…''

IV. Prosecution Under International Law

Maritime piracy is a new scourge in the India Ocean. Facts and figures reveal that there are more and more pirates, more and more ships which are attacked and consequently more victims annually. Once arrested by coast guards they are imprisoned pending trials, prosecuted and sentenced until their final deportation to their homeland. The concept of universal jurisdiction and maritime pirates from a failed State are very often in issue. However, neither the UNCLOS, 1982, nor UN Resolutions (UN Resolution 1851) provide for prosecution but the seizing State ''may decide upon the penalties to be imposed[4]''. Furthermore, the Harvard Draft Convention on Piracy did not assert a definite duty of States to prosecute piracy.

4 Article 105 UNCLOS and Article 19 of the Convention on the High Seas

The concept of universal jurisdiction

It is still undisputed that the UNCLOS, 1982 remains the substantive law and one of the most important international legal instruments and which has inspired domestic legislations worldwide namely the Mauritius Maritimes Zones Act and the Penal Code of the Republic of Seychelles. Similarly, several legislations such as the Mauritian Courts Act, The Criminal Procedure Act, The Deportation Act, The Merchant Shipping Act, The Mutual Assistance in Criminal and Related Matters Act, The National Coast Guard Act, The Police Act contain traces of the UNCLOS, 1982 or have been amended for the purposes of the Mauritian Piracy and Maritime Violence Act 2011 such that there is a good armada of legislations to arrest and prosecute maritime pirates. Here, attention is drawn to 'foreign State' which ''means a State other than Mauritius, and every constituent part of such State, including a territory, dependency, protectorate, which administers its own laws relating to international cooperation; and includes a foreign Government or international organization with which Mauritius has entered into an agreement under The Piracy and Maritime Violence Act 2011''. Anyway, it is important to reflect what ED Dickson[5] wrote on piracy and universal jurisdiction when he stated:

> ''So heinous is the offenses of piracy, so difficult are such offenders to apprehend, and so universal is the interest in their prompt arrest and punishment, that they have long been regarded as outlaws and the enemies of all mankind. They are international criminals. It follows that they may be arrested by the authorized agents of any State and taken in for trial anywhere. The jurisdiction is universal''.

Once Somalian pirates are arrested on the high seas, detained and sentenced an ultimate issue persists: who will prosecute them in Somalia as there is no government, no law and order and all institutions have collapsed since long. If The UNCLOS, 1982 has been implemented in domestic legislations such as The Piracy and Maritime Violence Act, 2011 and/or the Maritimes Zones Act it is crystal clear that sections 100-107 of The UNCLOS, 1982 provide for apprehension of pirates (retention, seizure and liability for seizure) but it does not impose a duty on the apprehending State to prosecute. Similarly, UN Resolution 1851 provides for the capture of Somalian pirates but not for their prosecution, which is a completely different issue. Whatsoever, States are always sovereign irrespective of any international legal instruments they have signed or ratified explaining once more the very 'soft' nature of international covenants. Anyway, as explained, who will look for the arrest and detention after the deported Somalian pirates are once back home as the State of Somalia has disappeared altogether with no separation of powers?

5 ED Dickinson Is the crime of piracy obsolete? 1925 38 Harvard Law Review 334 at 338

Status of a failed State in international law

True is it that pirates are subject to universal jurisdiction (supra) but the issue here is whether they are still subject to universal jurisdiction simply because they are citizens of a failed State? If Somalia is a failed State without a government consequently the STFG is neither a State nor a government and is certainly not a de facto government per se. STFG exists in a non-existent government. Geib (supra) rightly pointed out on the issue whether Somalia or the STFG may be represented at international and intergovernmental levels as:

''There is the functional aspect, namely the absence of bodies capable, on the one hand, of representing the State at the international level and, on the other, of being influenced by the outside world. Either no institution exists which has the authority to negotiate, represent and enforce or, if one does, it is wholly unreliable, typically acting as 'statesman by day and bandits by night'. A key element in this respect is the fact that there is no body which can commit the State in an effective and legally binding way, for example, by concluding an agreement''.

Vinci also remarked that:

> ''The State has failed in that the sovereign government is missing altogether. For example, in Somalia all remnants of a State apparatus had been destroyed by the time of the 1993 UN intervention and no effective government has reappeared since. Rather, there are multiple sub-State groups that control sections of territory or segments of the population''

Prisoners of War Status

STFG is not a recognized State (supra) under international law. Another issue is whether captured Somalian pirates on the high seas shall enjoy prisoners of war status before a court of law? Are they are combatants under The Geneva Conventions, 1949 after all? Is maritime piracy war an international armed conflict or a national armed character (as per the two Additional Protocols I and II, 1977 of the Geneva Conventions, 1949)? Maritime piracy is neither war nor an international armed conflict. In the case of USA v. Marilyn Buck and USA v. Mutula Shakur 6 July 1988 the court found that the defendants could not enjoy prisoners of war status as there is no armed conflict ''between two or more of the High Contracting Parties and which is not the case here as Republic of New Africa (RNA) is not a contracting party and second, the USA is not a High contracting Party to the Geneva Conventions''. When captured, its nationals are fishermen in general, they do not wear uniforms nor do they belong to a State which is recognized by the United Nations (UN) and the UN Security Council. Indeed, In ex parte Quirin et al. USA ex re: Quirin et al. v. Cox, Provost Marshal 1942 the US Supreme Court had this to say:

> ‘‘By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals…’’

In the case of Osman v. The Prosecutor (Malaysia) 1969 AC 430 Judicial Committee of the Privy Council , the two appellants had no uniforms and identification papers when arrested. On March 10, 1965 two bank secretaries died by an explosion caused by the two appellants in Singapore. They were charged under the local Penal Code with murder. The Court held that the killing of peaceful civilians and attacking non-military buildings is contrary to the laws and customs of war and consequently the appeal was dismissed. In the leading case of Military Prosecutor v. Omar Mahmud Kassem and Others, the Israel Military Court, sitting in Ramallah, April 13, 1969 had to decide whether the defendants could benefit from prisoners of war status. The defendants belonged to the Front for the Liberation of Palestine when the attack occurred. The court had this to say:

> ‘‘The Organisation to which the defendants belong does not answer even the most elementary criteria of a levée en masse. We have not to do with the population of an area which an enemy is approaching or invading. In October 1969 we were not approaching an area which an enemy or invading new areas, and there cannot be the least doubt that, in the period from 05 June 1967 to October 1968, that ‘population’ had time to ‘form itself’ into regular armed units. The Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (Geneva Convention III) applies to relations between States and certainly not between a State and bodies which are not States and do not represent States. The Front for the Liberation of Palestine is neither a State nor a Government. We therefore reject the plea of the defendants as to their right to be treated as prisoners of war and hold that we are competent to hear the case in accordance with the charge-sheet…’’.

United Nations and legitimacy of a failed State or government

Mauritius has no international cooperation with the STFG either as there is also a problem linked with sovereignty. The legitimacy of STFG under the auspices of the United Nations is also a hot debate as illustrated by an abundant literature on this issue. As Pham[6] rightly put out on the STFG:

> ''To apply Max Weber's thesis, a government like the STFG that does not even enjoy the monopoly on the legitimate use of force in its capital-much less elsewhere in the territory it claims as its own-is no government at all. Instead of constantly trying to put the best face on a bad situation, … the emphasis should be shifted to local Somali entities which have taken responsibility for governance in their respective regions. The international community needs to formally acknowledge de jure what is already de facto: the desuetude of 'Somalia' as a sovereign subject of international law. Unitary Somalia is no longer dead, but the carcass of that State has been putrefied; reanimation is no longer in the realm of possible …''

The same respected author went to add that:

> ''STFG is not a government; at least not by any common sense definition of the word… One question left largely unaddressed in this discussion is that of the responsibility of the government of Somalia, such as it is, for the acts of pirates operating from its territory. Insofar as the international community maintains the legal fiction that the collapsed State has a government, the principle of responsibility and the so-called 'Condonation Theory' employed by arbitral tribunals come into play. Under these rules, the regime's failure to bring offenders to justice is tantamount to approval of their criminal acts. There appears to be a legal inconsistency here, insofar as the STFG is accorded the benefits of international sovereignty, but has thus far assumed none of the obligations. This state of affairs could come back to haunt the STFG should it, against all expectations, survive and succeed in establishing itself as an effective entity with real assets, however limited, which those who have been victimized will have the ability to target7''.

V. Conclusion

Situation is getting worse in Somalia, the STFG and its collapsed government. More and more young Somalians are tempted to piracy. Some will be tried soon for the first time in the Republic of Mauritius and transferred back to Somali. However, there is still a fear of reprisals from their leaders, attacks and other terrorists. The bright side of the picture is that the Republic of Seychelles has tried Somalian pirates before their court of law and until now not a single case of terrorism from Somalian pirates has been reported. The Mauritian government seems a little more optimist in this perspective.

6 Peter J Pham (2008), 'Strategic interests: time to hunt Somali pirates' (October 2008) 23 World Defense Review (September 2008), available at http://www.wordldefensereview.com/pham092308.shtml

7 Pham, anti-piracy adrift (Spring 2008) 18 Journal of international Security Affairs, available at http://www.securityaffairs.org/issues/2010/18/pham.php

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

- Agnieszka Szpak*

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[1]. 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[2]. 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[3]. 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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1 W. Czapliński, 'Multiplikacja sądów międzynarodowych – szansa czy zagrożenie dla jedności prawa międzynarodowego', in J. Kolasa and A. Kozłowski (eds.), Rozwój prawa międzynarodowego – jedność czy fragmentacja? Konferencja Katedr Prawa Międzynarodowego, Karpacz, 10-12 maja 2006, 77 (2007), at 77. On the subject of proliferation of international courts and tribunals see also Polish and slightly different version of this article: Szpak, 'Proliferacja trybunałów międzynarodowych oraz jej pozytywne i negatywne strony (ze szczególnym uwzględnieniem międzynarodowych trybunałów karnych)', 11 Przegląd Prawa Publicznego 44 (2011).

2 Czapliński, supra note 1.

3 Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions', 5 Max Planck UNYB 68 (2001), at 68.

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[4]. 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"[5]. 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[6]. 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"[7]. 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 […]"[8]. This opinion points to the advantages flowing from the proliferation of international tribunals. Moreover, the work of international

4 Ibid., at 69.

5 Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice, 29 October 1999. See: Koskenniemi, Leino, 'Fragmentation of International Law ? Postmodern Anxieties', 15 LJIL 553 (2002), at 554.

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[9]. 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"[10].

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"[11]. In the context of international criminal tribunals judge M. Shahabuddeen emphasized that is it 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[12]. It is the general international law that is indispensable to ensure coherence and unity between different treaty regimes[13].

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[14]. 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"[15]. 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[16].

9 M. Balcerzak, S. Sykuna, (eds.), Leksykon ochrony praw człowieka. 100 podstawowych pojęć (2010), at 457-458.

10 Helfer, Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 California L. Rev. 899 (2005), at 904.

11 Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?', 25 Mich. J. Int' L. 925 (2003-2004), at 930.

12 Ibid., at 956.

13 Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', 25 Mich. J. Int' L. 903 (2003-2004), at 906.

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"[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[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"[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[20]. In 2006 the ILC

17 Pocar, 'The Proliferation of International Criminal Courts and Tribunals', 2 J. Int. Criminal Justice 304 (2004), at 308.
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

21 Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, available at: http://untreaty.un.org/ilc/guide/1_9.htm (19.07.2013). See also: Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', 56 Int'l & Comp. L. Q. 623 (2007).

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

26 Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Request for the Indication of Provisional Measures, Order of 14 April 1992, paras. 39 and 41; available at: http://www.icjcij. org/.

27 The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 20. All ICTY judgments and decisions available at: http://www.icty.org/action/cases/4 (last accessed 2 October 2013).

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

29 The Prosecutor v. Dusko Tadić, Judgement, Appeals Chamber, 15 July 1999, para. 115.

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[31]. 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"[32]. 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[33].

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[34].

M. P. Scharf also pointed to a very different factual state of both cases – Nicaragua and Tadić[35]. 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.
33 The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landzo ('Celebici Case'), Decision, Appeals Chamber, 20 February 2001, paras. 24 and 26. See also: Teitel, Howse, 'Cross-judging: tribunalization in a fragmented but interconnected global order', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334289 (last accessed 2 October 2013).
34 E. la Haye, War Crimes in Internal Armed Conflicts (2008), at 321. See also: Felde, McDonald, Tieger, Wladimiroff, 'The Prosecutor v. Dusko Tadic', 13 A. Univ. Int'l L. Rev. 1441 (1997-1998); Scharf, Epps, 'The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal', 29 Cornell Int' L. J. 635 (1996); Von Sternberg, 'Yugoslavian War Crimes and the Search for a New Humanitarian Order: The Case of Dusko Tadic', 12 St. John's J. of Legal Comm. 351 (1996-1997).
35 Scharf, 'Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal', 30 N.Y.U. J. Int'l L. & Pol. 167 (1997-1998), at 198.

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"[36]. 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[37]. The advantages of proliferation seem to outweigh its disadvantages, including the fragmentation. Furthermore, this process seems unstoppable. According to A. Kozlowski, fragmentation of international law is a natural consequence of the development of international law[38].

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

36 See: Tyner, 'Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in Tadic', 18 Fla. J. Int'l L. 843 (2006), at 870.

37 J. Symonides, 'Wzrost znaczenia sądownictwa międzynarodowego w XXI w.', in R. Łoś, J. Reginia-Zacharski (eds.), Konflikty i spory międzynarodowe. Tom 2 181 (2010), at 202.

38 A. Kozłowski, 'Wpływ sądownictwa międzynarodowego na rozwój prawa międzynarodowego', in J. Kolasa (ed.), Współczesne sądownictwo międzynarodowe. Tom II. Wybrane zagadnienia prawne 49 (2010); W. Kilarski, 'Specjalizacja międzynarodowych organów sądowych', in J. Kolasa (ed.), Współczesne sądownictwo międzynarodowe. Tom II. Wybrane zagadnienia prawne 74 (2010).

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 note5, at 575.