PRESENTATION OF THE SECRETARY-GENERAL OF AALCO PROF. DR. KENNEDY GASTORN AT THE PANEL DISCUSSION ON *"THE SIGNIFICANCE OF MODES OF SETTLEMENT IN CONTEMPORARY INTERNATIONAL LAW"* TO BE HELD AT THE INDIAN SOCIETY OF INTERNATIONAL LAW ON 30TH DECEMBER 2016

Introduction

At the outset, I profusely thank the Indian Society of International Law (ISIL) and its President for inviting me in my capacity as the Secretary-General of Asian-African Legal Consultative Organization (AALCO) to share some of my legal thoughts at this Panel Discussion. The topic that has been selected for this Panel Discussion, namely, *the Significance of Modes of Settlement in Contemporary International Law*- has been a matter of substantial concern among both academics and legal practitioners. I feel privileged to be a part of this exercise as a Panelist.

Since the topic is of vast compass, I will try to deal with one of the most important aspects of it, namely, the proliferation of international courts and tribunals in recent times. The proliferation of international courts and tribunals in the last two decades has been an important new development in international law.[1] The judicial settlement of international disputes, previously confined to certain specified fields and limited only to a small subset of actors, has spread into virtually all areas of common concern. Whether the inevitable by-product of an increasingly globalized form of governance or perhaps the very midwife of this phenomenon, the emergence of international courts and tribunals as influential normative

[1] See, eg, Judge Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 *Leiden Journal of International Law* 267; Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Problem?' (1999) 31 *New York University Journal of International Law and Politics* 679.

actors in the development of international law is now firmly embedded in the global legal landscape. Indeed, 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.

Perhaps the most important consequence of this proliferation phenomenon is, what has been called "fragmentation of international law". Fragmentation, which denotes both a process and the result of that process namely, a (relatively) fragmented state of the law, presupposes some basic unity and integrity to the structure of international law that governs international or transnational relations. The diagnosis refers to the dynamic growth of new and specialized sub-fields of international law in the last two decades or so, to the rise of new actors besides States (IGOs, NGOs and MNCs) and to new types of international norms outside the recognized sources of international law.

Within this background, in the remaining time, I would like to explore two things.

First, the reasons for the proliferation of international judicial courts and tribunals in recent decades;

Second, the problems posed by the proliferation phenomena to the field of international law by way of illustration.

Finally, I would offer my concluding remarks.

Reasons for the Proliferation of Courts and Tribunals

The expansion and transformation of international judicial bodies has not taken place in a vacuum. Rather, it is the consequence of an equally tumultuous amplification of the number and ambit of institutions consecrated to ensure compliance with international legal obligations and settlement of disputes arising therefrom. The rapid quantitative increase in the number of international judicial fora experienced during last decade can be ascribed, with varying degrees of relevance, to several factors. The proliferation of international jurisdictions can be attributed largely to the expansion of international law into domains that once were either solely within states' domestic jurisdiction (e.g., criminal justice) or were not the object of multi lateral discipline (e.g., international trade of services), or were simply vacua legis (e.g., natural resources of the high seas or common heritage of mankind). When conceived in this manner, the multiplication of international judicial fora becomes the precipitate of the accrued

normative density of the international legal system. As states increasingly vest specialized international organizations with the power to create international legal standards, the transfer of the power to interpret and uphold those standards naturally follows.

The impact of the end of the Cold War on the international judicial sector hardly can be overemphasized. The transition from a strictly bi-polar world into a different, more fluid arrangement (or, as some might argue, no arrangement at all) has triggered the need to rejuvenate several international organizations (and with them their judicial bodies) and opened the way to the establishment of new ones.

No less than ten international judicial bodies can be considered, to varying degrees, to have precipitated the end of the Cold War. In the wake of the post-Cold-War "new world order" (to use the words of US President George Bush), a host of multilateral treaties were concluded; the *Rio Conventions* and the numerous hard and soft environmental instruments were adopted in 1992, the membership of the ICSID Convention[2] and the number of bilateral investment treaties (BITS) exploded. New Organizations and other permanent international bodies were founded such as the World Trade Organization (WTO) in 1995. New international courts and tribunals were established. Indeed, the establishment in 1993 of an international jurisdiction to prosecute international crimes committed in the territory of the former Yugoslavia (ICTY) could take place only because of the existence of a consensus within the U.N. Security Council, admittedly a rare circumstance in the Cold War era.[3] Moreover, it can be argued that the successful establishment of the ICTY spurred the immediate replication of this exercise with respect to the Rwandan civil war[4] (in the form of the creation of the International Criminal Tribunal for Rwanda) and even gave impetus to the subsequent institutionalization of international criminal justice in the form of the adoption of the Rome Statute creating the International Criminal Court (ICC).[5]

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[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted in 1965 and entered into force in 1966).

[3] Had Russia enjoyed the same political leverage that it had during the apogee of the Soviet Union, it most likely would not have allowed any interference in a Slavic country.

[4] Yet, unlike the case of the ICTY, the ICTR was not established by consensus, but rather by 13 votes in favor, China abstaining and Rwanda against.

[5] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998).

The fall of the "iron curtain" opened the way for the expansion of the Council of Europe to the East and the rejuvenation of the European Court of Human Rights. Since 1950, the European Convention on Human Rights and Fundamental Freedoms had been the linchpin of the organization, and for over forty years its member states developed what is rightly regarded as the most accomplished and successful international system for the protection of human rights. Yet, such a refined system hardly could withstand a wave of new members, almost all with dubious human rights records. Thus, partly because of the expansion of the Council of Europe's membership and partly because of the Convention system's perceived effectiveness, in 1994 the European Court of Human Rights was radically restructured so as to allow direct access to individuals.

Again, it could be argued that the end of the Cold War was one of the factors that roused United Nations Convention on the Law of the Sea (UNCLOS) from its twelve years of dormancy, and hence to the launch of International Tribunal for the Law of the Sea (ITLOS). Indeed, prior to January 1, 1990, only forty-one states, out of sixty required for its entry into force, had ratified the Convention. Yet, more significantly, they were all developing, nonaligned countries. None of the countries (with the exception of Iceland) was a member of either NATO or the Soviet bloc. With the end of the Cold War, the loosening of allegiances rapidly brought UNCLOS to a critical threshold for entry into force.[6]

By the end of 1990s, the proliferation of these international dispute settlement institutions gave rise to a fear that specialized courts and tribunals bodies would 'develop greater variations in their determinations of general international law' and thereby 'damage the coherence of the international legal system'. This concern was most prominently voiced by the then President of the International Court of Justice (ICJ) Judge Gilbert Guillaume in his speech to the UN General Assembly in 2001. So what is at stake in fragmentation is: *unity, harmony, cohesion, order* and concomitantly-the *quality* of international law as law. This takes me to my next theme which is the problems posed by the proliferation phenomenon.

[6] Finally, the end of the East-West rivalry likely has played a fundamental role in the successful effort of Central American States to revive long-forgotten aspirations towards political integration. After having been engulfed by decade-long civil wars and after often having been used as the pawns of the "superpowers," on December 13, 1991, Costa Rica, El Salvador, Guatemala, Honduras, Panama, and Nicaragua launched the Sistema de la Integracion Centroamericana (SICA) in an effort to bring peace and stability to the region. The Central American Court of Justice (Corte Centroamericana de Justicia) is one of the pivotal institutions of the new regional regime, and its jurisdiction extends over the entire spectrum of possible judicial powers. It includes contentious, advisory, preliminary, arbitral, appellate, constitutional, and administrative jurisdictions. It can be accessed for different purposes by: member states of SICA; states which are not members of SICA, when they have a dispute with member states and agree to the Court's jurisdiction; the organs of SICA; the Supreme Courts of the members of SICA; national courts; and natural and legal persons.

Problems Posed by Proliferation Phenomenon:

The proliferation of international courts and tribunals, which, at least superficially, should be regarded as a positive development as it evidences a trend towards judicial settlement of international disputes, does not come without complications. The main concern with this almost frenetic creation of new international courts and tribunals is that it has occurred in the absence of an overarching framework within which the international judicial bodies operate. This absence of a formalised system can create potential problems.[7]

First, different courts and tribunals might develop different answers to the same question of international law, thus causing international law to become 'fragmented'. The absence of a court of final appeal in international law, as is found in most domestic legal systems, makes this a distinct possibility.

Second, having more than one forum available to hear a dispute can lead to 'forum shopping' in international law, and also to the prospect of parallel proceedings, whereby more than one forum is seized of the same dispute, and even worse, to give out conflicting conclusions.

A conflict in a narrow sense is present when mutually incompatible obligations arise from diverging rules. These are often treaty conflicts, but also conflicts with or among new types of norms such as codes of conducts, memoranda, and so on. Beyond this, one treaty (or soft regime) may frustrate the goals of another one without there being a direct conflict. For example, a more liberalized trade increases greenhouse gas emission levels due to the scale effect. Greenhouse gas-emitting states saddled with the legal obligation to maintain low tariffs under trade regimes may be tempted to avoid assuming significant commitments under climate change regimes because this may affect their competitiveness. Such strategic behaviour mutes the ultimate goals of the (United Nations Framework Convention on Climate Change (UNFCCC) even if no legal rule has been breached. Similar incompatibilities short of outright

[7] Hence it is not surprising that one of the topics on which the International Law Commission ('ILC') conducted a preliminary survey in 2000 in preparation of its future work programme was 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 identified a number of conflicts between legal regimes and enforcement machineries: between Charter rules and other rules, between immunity and human rights, environment and trade, law of the sea and new fisheries treaties, and so on. The absence of hierarchy, the study suggested, posed a threat to the "credibility, reliability and, consequently, authority of international law" and should be further studied by the ILC, perhaps so as to agree to submit proposed conventions to the Commission in order to clear conflicts and overlaps.

conflicts exist between investment protection and immunity of enforcement: When a foreign investor may not enforce a favourable arbitral award, e.g. through the attachment of State property in governmental noncommercial use, due to the international law of immunity, this frustrates the objectives of international investment law.

Fragmentation also engenders losses of legal certainty which is in turn an element of the (global) rule of law. The multiplicity of institutions (especially of courts and tribunals) creates conflicts over potentially overlapping jurisdictions of those courts. The diverging and possibly conflicting legal norms in substance that are available to those bodies reduce the predictability and reliability of application of law. The resulting insecurity is both procedural (e.g. relating to jurisdiction and admissibility of complaints) and substantive.[8]

Here I would like to give two examples of the politics of fragmentation**;**

The Legality of Threat or Use of Nuclear Weapons

In the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,[9] the ICJ considered that armed reprisals in the course of an armed conflict should be "governed by the principle of proportionality". However, ICTY Trial Chamber in the Martic case[10] had held that armed reprisals were altogether prohibited. More importantly, the ICTY held that reprisals are subject to international rejection because they are 'inherently a barbarous means of seeking compliance with international law'.[11]

[8] Also Law-users may exploit the fragmentation (and the diverse institutional outlooks going with it) through forum shopping and regime shifting, based on the strategic consideration which forum and regime will respond best to their claims based on their parochial interest.

[9] The UN General Assembly had asked the ICJ: *"Is the threat or use of nuclear weapons in any circumstance permitted under international law? "* Over the sole objection of Judge Oda, the Court decided to hear the case. There were six specific findings in the Court's Advisory Opinion. The ultimate advice of the Court, approved by seven of fourteen judges, with President Bedjaoui (Algeria) casting the deciding vote, was " ... that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict (...). However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake " See, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

[10] Prosecutor v. Milan Martic, Case No. IT-95-11-A, Judgment, ¶ 263 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008).

[11] And consequently the Trial Chamber came to a conclusion that:
"…while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner."

The two tribunals (ICJ and the ICTY) have also differed in their approach to their power to review acts of Security Council. In the Lockerbie case,[12] 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 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)." No review of the legality of that resolution was carried out. By contrast, after a disclaimer about not acting as a "constitutional tribunal," the Appeals Chamber of the ICTY expressly reviewed the legality of its own establishment.[13] 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." 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.[14]

Another example of the politics of fragmentation is provided by the move by human rights organs away from the logic of reciprocity in treaty relations towards a more purpose-oriented and collectivist understanding. As is well-known, the general regime of reservations stands embodied in the Vienna Convention on the Law of Treaties, 1969 (the VCLT, 1969). Article 19 (c) of the VCLT provides that reservations going against the object and purpose of a treaty are inadmissible. Article 20 of VCLT recapitulates the ICJ's Reservations jurisprudence to the

[12] In 1988, an airliner passing over Lockerbie, Scotland was bombed, killing nearly 300 people. The United States and the United Kingdom demanded that Libya extradite two men suspected of participating in the bombing. Libya refused, citing the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The Montreal Convention required a state to either extradite suspects or prosecute them; Libya offered to do the latter, and indeed initiated criminal prosecution of the suspects domestically, but refused to extradite the suspects. In response, the Security Council, at the behest of the United States and Britain, imposed sanctions on Libya via its Resolution 782 of 1992. Libya then brought an action against the United States and Britain before the ICJ, asserting that the Security Council had no right to punish a country (by way of sanctions) that was in full compliance with its international obligations. This created a precedent since never before had the ICJ engaged in what can be called a "judicial review" — that is, a deliberation on the legality of SC decisions. The court deferred to the Council on the grounds that under Article 103 of the Charter, the Council's decision overrode any international treaties. See, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US), Application Instituting Proceedings* (AIP), 1998 ICJ 115, § II.i (Mar 3, 1992) (Ljya v US AIP).

[13] The Prosecutor v. Duko Tadi´c, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A.Ch., 2 October 1995, para. 20.

[14] Id., at paras. 21–22 and 40.

effect of leaving the conduct of that test to the state parties each of which is to conduct it "individually and from its own standpoint."[15]

In the 1988 Belilos case[16], however, the European Court of Human Rights (ECHR) struck down an interpretative declaration concerning Article 6(1) on fair trial that the Swiss Government had made when depositing its ratification instrument. The Court first interpreted the declaration as in fact a reservation and then went on to discard its legal validity as it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning or scope." The invalidity, however, affected only the reservation but not Switzerland's becoming party to the Convention. To its surprise, then, Switzerland found itself "bound by the Convention irrespective of the validity of the declaration." Belilos was a much-debated departure from the law concerning the effect and severability of reservations.

Seven years later, discussing the effect of certain territorial restrictions in Turkey's declarations, the ECHR made it explicit that its role differed from that of the ICJ. Article 36 of the ICJ Statute permitted "the attachment of substantive, territorial and temporal restrictions to the optional recognition of the Court's jurisdictional competence" and had served as a model for the corresponding provision in the European Convention. Nevertheless, unlike the Strasbourg Court, the ICJ was not tasked with "direct supervisory functions in respect of a law-making treaty such as the Convention.

In the Strasbourg Court's view:

[s]uch a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance […] provides a compelling basis for distinguishing Convention practice from that of the International Court.[17]

The Court thus dismissed Turkey's territorial delimitation:

[the] object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.[18]

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[15] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 26.
[16] Case of Belilos v. Switzerland, Decision of 29 April 1988, 1988 ECHR (Ser. A) No. 132.

[17] Loizidou v. Turkey, Preliminary Objections, Decision of 23 March 1995, 1995 ECHR (Ser. A) No. 310, at paras.83-85.
[18] Id. Para 72.

Following the Strasbourg line of argumentation, the Human Rights Committee set aside the Reservations jurisprudence of the ICJ, as well as the relevant provisions of the VCLT.

After portraying the problems posed by the phenomenon of fragmentation of international law, let me move on to make my final remarks.

Final Remarks

As they say: *a man with a hammer sees every problem as a nail*. A specialized institution is bound to see every problem from the angle of its specialization. Trade institutions see every policy as a potential trade restriction. Human rights organs see human rights problems everywhere, just like environmental treaty bodies view the political landscape in terms of environmental problems and so on. This is why the European Court of Justice (ECJ) saw in the operation of the British nuclear installation a problem of European law, not a problem in the law of the sea or a problem of the pollution of the North Sea environment. Of course the ECJ would be happy to deal with matters relating to the pollution of the seas, because in so doing, it could make sure that it is treated from the perspective of the interests and preferences – the project – it is called upon to advance.

However we need to bear in mind two important things:

First, it is not always the case that there needs to be conflict in regard to the decisions emanating from various different tribunals specializing in various different branches of international law. For example an analysis of the jurisprudence of the WTO Dispute Settlement System reveals that even though the WTO agreements have been constituted as a self-contained regime, general principles of international law, particularly those pertaining to international treaty interpretation provide a necessary basis for the application and implementation of that regime. The evolving practice thus adds strength to the international legal system without affecting the unity and integrity of international law.[19]

[19] Indeed, it is very difficult not to consider the creation of the DSU of the WTO as anything less than a valuable and positive addition to the family of international tribunals. This can be amply demonstrated by the fact that the work of the Panels and the Appellate Body of the WTO have sufficient depth, content and connectivity to international law. So, the jurisprudence of WTO is of value not only to trade specialists but to public international lawyers as well. For example consider the number of decision of the Appellate Body which deals with the law of treaties, environmental law, human rights, and state responsibility. Indeed there are many members of the WTO that are not parties to the Vienna Convention on Law of Treaties, 1969. However the Appellate Body of the WTO has declared, as the ICJ did, that the VCLT, 1969 represents the codification of the rules of customary international law and is therefore binding on all parties to the WTO (following the jurisprudence of the ICJ). See,

Secondly, we need to remember the big picture: here one is reminded of the words of English poet John Donne: *"No man is an island, entire of itself. Every man is piece of the continent, a part of the main"*. I think this is something that could be applied to the various judicial players on the international stage. Put differently, an awareness of the fact on the part of each and every international judicial body that, it is but one part of a single whole and never an end in itself needs to be instilled. In the same way, every system, every regime is capable of extending to the whole world, covering everything from its own perspective. The important caveat though is-judges of these diverse tribunals, when they apply and interpret rights and obligations under international law, should be conscious of the overarching international judicial system that has emerged, which they should creatively and energetically promote. Judges must show good faith and respect, not only to their own previous jurisprudence on a subject, but should show equal respect to the relevant jurisprudence of other international tribunals on that subject in the interest of judicial harmony, certainty and predictability of law. The importance of this can hardly be exaggerated: for the ultimate justification for the existence of a diversity of international tribunals is to achieve unity of the international legal system.

I thank you for the opportunity.

Japan- Taxes on Alcoholic Beverages (4 October 1996), Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R/Section D, at 10; US-Standards for Reformulated and Conventional Gasoline (29 April 1996), Appellate Body Report, WT/DS2/AB/R, at 16-17.