The refinement of international law: From fragmentation to regime interaction and politicization

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The new posture of international courts and tribunals is the "spirit of systemic harmonization," to use the words of the European Court of Human Rights Grand Chamber in Al-Dulimi. *Fifteen years after the "proliferation" speech given by former President of the International Court of Justice, Gilbert Guillaume, before the UN General Assembly and ten years after publication of the International Law Commission's "fragmentation" report, it is time to bury the f-word. Along that line, this article concentrates on the positive contribution of the new techniques which courts, tribunals, and other actors have developed in order to coordinate the various subfields of international law. If these are accompanied by a proper politicization of international law and governance, they are apt to strengthen both the effectiveness and the legitimacy of international law. Ironically, the ongoing "harmonization" and "integration" within international law could also be conceptualized as a form of procedural constitutionalization.*

1. Statement of the argument

The new posture of international courts and tribunals is the "spirit of systemic harmonization," to use the words of the European Court of Human Rights Grand Chamber in *Al Dulimi*.[1] More than fifteen years after the "proliferation"-speech given by the then President of the International Court of Justice (ICJ), Gilbert Guillaume, before the UN

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[1] Al-Dulimi and Montana Management Inc. v. Switzerland, 2016 Eur. Ct. H.R. ¶ 140 (App. No. 5809/08).

General Assembly[2] and more than ten years after the publication of the International Law Commission's "fragmentation"-report,[3] it is time to bury the f-word. Along that line, this paper bids "farewell to fragmentation"[4] and concentrates on the positive contribution of the new techniques which courts, tribunals, and other actors have developed in order to coordinate the various subfields of international law. "Techniques" are understood here as a form of *techné*, as a political and legal art (as opposed to mechanics or managerialism).

When recapitulating and evaluating the currently employed *techniques de réglage* (Mireille Delmas-Marty),[5] we note that many of them have been invented with a view to integrating or harmonizing EU law with member state law, and ("horizontally") the member states' law among each other, and international law with domestic law. Now these techniques are being applied *within* international law proper to coordinate its subfields. Overall, the productive uses of the multiplicity of international regimes by the law-developing bodies, notably courts and tribunals, seem to gain ground.

Importantly, these procedural phenomena have created a space for pluralism, and contestation, and for the politicization of international law and of the jurisgenerative processes. And this can, then, be conceptualized as a form of procedural constitutionalization which is apt to strengthen both the effectiveness and the legitimacy of international law.[6]

2. The so-called fragmentation of international law

2.1. The course of the debate

The term "fragmentation (of international law)" denotes both a process and its result, namely a (relatively) fragmented state of the law. The term has a predominantly negative connotation; it is a pejorative term (rather than diversity, specialization,

[2] H.E. Judge Gilbert Guillaume, President of the International Court of Justice, Speech to the General Assembly of the United Nations (Oct. 30, 2001), http://www.icj-cij.org/files/press-releases/5/2995.pdf [hereinafter Guillaume, Speech to the UNGA].

[3] Study Group of the Int'l Law Comm'n, Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter Study Group of the Int'l Law Comm'n, Rep. of Apr. 2006], with app.: Draft conclusion of the work of the Study Group, U.N. Doc. A/CN.4/L.682/Add.1 (May 2, 2006) [hereinafter Study Group of the Int'l Law Comm'n, Rep. of May 2006]; Study Group of the Int'l Law Comm'n, Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

[4] A Farewell to Fragmentation: Reassertion and Convergence in International Law (Mads Adenas & Eirik Bjorge eds., 2015) [hereinafter A Farewell to Fragmentation].

[5] Mireille Delmas-Marty, Le Pluralisme Ordonné 267, 272 (2006).

[6] The debate on constitutionalization has often been belittled as a naive reaction to fragmentation in search for unity and harmony. Indeed, constitutionalization and fragmentation are to some extent antagonistic trends, but the relationship between both processes is more complex. *See* Anne Peters, *Chapter 48: Fragmentation and Constitutionalization*, *in* The Oxford Handbook of the Theory of International Law 1011 (Anne Orford & Florian Hoffmann eds., 2016); Fragmentation vs the Constitutionalisation of International Law (Andrzej Jakubowski & Karolina Wierczyńska eds., 2016).

or pluralism). The diagnosis of fragmentation refers to the dynamic growth of new and specialized subfields of international law after 1989, to the rise of new actors beside states (international organizations, non-governmental organizations (NGOs), and businesses), and to new types of international norms outside the acknowledged sources.[7] That evolution was triggered by the break-down of the communist bloc in 1989 which brought to an end the stable bi-polar world order. In the wake of the post-cold war "new world order" (US President George H.W. Bush), a host of multilateral treaties were concluded: the Rio Conventions and numerous hard and soft environmental instruments were adopted in 1992, the membership of the International Convention on Settlement of Investment Disputes (ICSID Convention) 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 1994. New international courts and tribunals were established (especially the Yugoslavia and other criminal tribunals since 1992, the WTO dispute settlement body (1994), the International Criminal Court (ICC) (Statute of 1998, functional since 2003), the International Tribunal for the Law of the Sea (ITLOS) (operational since 1996)). Investment arbitration increased dramatically, and the European Court of Human Rights (ECtHR) was transformed into a permanent court with direct access for individuals in 1998.

That "proliferation"[8] of these international dispute settlement institutions gave rise, at the end of the 1990s, to a fear that those specialized courts and tribunals would "develop greater variations in their determinations of general international law," which would "damage the coherence of the international legal system."[9] This concern was most prominently voiced, as already mentioned, by the then-President of the ICJ, Judge Gilbert Guillaume.[10] The articulation of such a "problem" by that office-holder was later criticized as a hegemonic attempt of a professional to preserve the power of the World Court.[11]

Against this background, the International Law Commission (ILC) tackled the topic in 2000,[12] and a study group issued successive interim reports, with the end report based on a draft finalized by Martti Koskenniemi in 2006.[13] The heydays of

[7] *See* Anne-Charlotte Martineau, Le débat sur la fragmentation du droit international (2016), deconstructing the fragmentation debate by distinguishing four argumentative positions: constitutionalism, pluralism, differentialism, and pragmatism. Its starting point is that the incapacity of resolving the debate is not an epistemic problem but results from the argumentative structure of international law conceived of as language (*cf. id.* at 3).

[8] 31(4) N.Y.U. J. Int'l L. & Pol. (Special Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle) (1999).

[9] Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 Recueil des cours 101, 347 (1998).

[10] *See Guillaume, Speech to the UNGA, supra* note 2.

[11] *See, e.g.*, Mario Prost, The Concept of Unity in International Law 202–209 (2012).

[12] As a first text the study by Gerhard Hafner, *Risks ensuing from fragmentation of international law*, 2-2 Y.B. Int'l L. Comm'n 143 (2000), also in Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), ¶¶ 726–728 and 729(5), study in the Annex.

[13] *See* Koskenniemi, *supra* note 3.

the academic fragmentation debate were the first decade of the millennium. Pierre-Marie Dupuy devoted his 2000 General Course in the Hague Summer Academy to the issue.[14] An important symposium on "diversity or cacophony" was held at Michigan Law School (with contributions, *inter alia*, by Hafner, Teubner, and Simma) which resulted in a 500-page journal issue in 2004.[15] While the debate initially sought to understand, conceptualize, and evaluate fragmentation, it later concentrated more on developing principles and procedures for coordinating and harmonizing the pieces, and for solving conflicts.[16] And while in 2007, fragmentation was feared to possibly break apart the international order,[17] in 2017, the "integrationist forces" of fragmentation have been duly praised.[18]

2.2. Causes of fragmentation

The causes of fragmentation seem to be both functional and political. First of all, fragmentation is built into the decentralized structure of international law which results from the absence of a central world legislator. Second, and connected to the former, fragmentation originates in the domestic sphere: different issue-areas are handled by different departments of government which negotiate different treaties, and different administrative authorities then apply them. Third, fragmentation is a response to globalization. Global problems (ranging from climate deterioration over migration and terrorism to the financial crisis) have triggered a demand for more international, and also more special regulation.[19]

The political causes may be more interesting. States negotiating treaties normally have different views about policy priorities which translate into relationships between different regimes, for example trade agreements and treaties on cultural or biological diversity. When the states are unable to reach a political solution through treaty design, they leave texts deliberately open-ended, for example, the non-economic exceptions in the General Agreement on Tariffs and Trade (GATT), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), or Agreement on Technical Barriers to Trade (TBT-Agreement). The buck is thus passed to the law-appliers, including arbitrators, to possibly "integrate" the regimes, at the occasion of a concrete legal dispute.

Moreover, realist analyses have depicted fragmentation as the result of a deliberate agenda of powerful states.[20] Benvenisti and Downs have argued that fragmentation serves the latters' interests because it limits the bargaining power of weaker

[14] Pierre-Marie Dupuy, *L'unité de l'ordre juridique international*, 297 Recueil des cours 9 (2002).

[15] 25(4) Mich. J. of Int'l L. (Special Issue: Symposium, Diversity or Cacophony: New Sources of Norms in International Law) (2003–2004).

[16] *See* Prost, *supra* note 11, at 9.

[17] Benedetto Conforti, *L'Unité et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!," in* 111 Revue générale de droit international public 5, 5 (2007). The title alludes to a thin and possibly deceiving "surface" of international law.

[18] Tamar Megiddo, Reports of its Death have been Greatly Exaggerated (Part I): On Fragmentation and International Law's Integrationist Forces (forthcoming 2017).

[19] *See also infra* note 46 and accompanying text.

[20] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stanford L. Rev. 595 (2007).

states (which cannot group up within one forum but are isolated in a multitude of settings) and because only those states with a greater "agenda-setting power"[21] can easily create alternative regimes which suit their interests better. The authors identify four fragmentation strategies: avoiding broad regulatory regimes, one-time negotiations (no mechanisms to update agreements), avoiding the creation of authoritative institutions (courts, administrations). The fourth strategy is "regime shifting," that is creating a new regime as soon as the original regime becomes too responsive to the interests of weaker states (the latter are protected by rules which constrain the actors and through the principle of legal equality).[22] While it is not clear whether Benvenisti and Downs have—beyond the anecdotal examples given—revealed a behavioral pattern that is strategically motivated and in fact has hegemonic effects,[23] their analysis has the merit of politicizing the facially technical fragmentation debate. It draws attention to the loss of overall legitimacy connected to fragmentation.

2.3. Types of fragmentation

Taxonomies of fragmentation differ. For example, we might distinguish "functional" fragmentation from regional ("geographic"/"territorial") fragmentation.[24] Two relevant facets seem to be the *institutional* fragmentation (different treaties, organizations, bodies, courts) and the *ideational* fragmentation (different objectives and values). These two facets flow into each other, assuming that each institution (Conference of the Parties (COP), dispute settlement body, etc.) tends to favor the values and objective of its own regime, be it only because the lawmakers and law-appliers know that regime better than competing ones (the expertise-based bias).

The ILC-works on the law of international (state) responsibility, mostly in the 1970s and 1980s, ventilated the idea of regimes which prescribe and control all reactions to breaches of their norms. Any recourse to the general law of international responsibility, notably to counter-measures, would then be precluded (self-contained régimes). The ICJ applied this concept once and qualified the "rules of diplomatic law" as a "self-contained régime."[25] That term is obsolete. For reasons of structural coherence and policy results, there are and should be no sealed-off regimes.[26] General international law always constitutes the normative environment, and is applicable to fill gaps or when the rules of a given regime cannot in themselves fulfill the regime's stated objectives. The ILC study of 2006 therefore suggested the label "special treaty-regimes" instead.[27]

[21] *Id.* at 615.

[22] *Id.* at 599, in detail at 610–619.

[23] Critically Michael Zürn & Benjamin Faude, *On Fragmentation, Differentiation and Coordination*, *in* 13 Glob. Env'l Pol. 119, 125–126 (2013).

[24] In trade law, investment law, and human rights law, we find both universal and regional agreements.

[25] Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v. Iran), 1980 ICJ Rep. 3, ¶ 86 (May 24, 1980).

[26] Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 Eur. J. Int'l L. 483 (2006).

[27] Study Group of the Int'l Law Comm'n, Rep. of May 2006 *supra* note 3, ¶ 492.

More importantly, we can distinguish between fragmentation in lawmaking and fragmentation in law-application. As just mentioned, the political process of developing international (treaty) law results in fragmented law, either for lack of political agreement on inter-regime relations, or due to the hegemonic interest of powerful lawmaking states (see Section 2.2). But even if fragmentation were avoided in lawmaking, the law could be (further) fragmented by the autonomous law-appliers. The adoption of overarching, multi-issue treaties (in the form of "linkages" of different subject matters, e.g., trade and labor) would not necessarily eliminate conflicts in law-application, because there are often no strict incompatibilities of different broad objectives (such as promoting free trade and promoting laborers' welfare), but rather merely tensions arising from the prioritization of different objectives. Actual conflicts normally only arise in the concrete case at hand, i.e. in law-application and dispute resolution.

Typical issue-areas among which strains may arise are free trade in tension with environmental and species protection,[28] or with human rights/labor rights.[29] These antagonisms can—somewhat simplistically—be framed as conflicts between "private" interests (property, contract) and the (global) public interest, even if—at least in the theory and experience of free market economy/capitalism—the protection of those private rights has trickle down benefits for (some) other market participants and society at large.

As far as the protection of property and other rights or interests of foreign investors are concerned, the necessity that the law-appliers (including courts and tribunals) reconcile the private (property) rights and public interests now arises in international law just as it is familiar from domestic law. The identification of public purposes which would allow, e.g., an expropriation, normally falls within the *domaine réservé* of the host state. But these public purposes can be, and indeed are, informed and shaped by international law. This means that norms of other specific branches of international law which embody public interests such as environmental law[30] and cultural

[28] *See, e.g.*, Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generating Sector; Canada—Measures Relating to the Feed-in Tariff Program*, WTO Doc. WT/DS412/AB/R; WTO Doc. WT/DS426/AB/R (adopted May 6, 2013). The Canadian province of Ontario sought to encourage the use of renewable energy through a pricing scheme. The measures were held to be inconsistent with the Agreement on Trade-Related Investment Measures Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186, art. 2(1) [hereinafter TRIMS] and General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153, art. III(4) (1994) [hereinafter GATT]. Or, a state's entitlement or even obligation to restrict imports based on an environmental treaty or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) may conflict with that same state's obligation to open up its markets for products under trade agreements.

[29] For example, there are tensions between the prescription of plain packaging for cigarettes, sought by the World Health Organization (WHO) Framework Convention on Tobacco Control May 21, 2003, 2302 U.N.T.S. 166 [hereinafter WHO FCTC] and WTO rules on free trade (*supra* note 28).

[30] The *Vattenfall I* case illustrates the friction between investment protection and (international) environmental law. German authorities here denied or delayed water and emission permits for a Swedish power plant project in order to comply (at least so it was argued) with commitments under international environmental law such as the EU Water Framework Directive and the United Nations Framework Convention on Climate Change (UNFCCC). This stood in tension with the state's obligations under the Energy Charter

heritage law[31] might come into play for the definition of the public interest, and will flow into the exercise of balancing and reconciling private investor interests with the host state's policy goals. The area and subfield most discussed thus far is international human rights law. It seems to collide with international investment protection in the following typical constellation: the privatization of infrastructure (*service public*), notably water services, partly required by the World Bank from developing states, has often attracted foreign investors. Measures taken by host states, such as repudiation of lease contracts, failure to improve facilities, negative propaganda, or lowering of water prices have been attacked by investors before arbitral tribunals with the argument that the host state violated the investment contracts and international investment law. It has therefore been suggested that "human rights and sustainable development issues are factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations as between the investor and the host State."[32]

In *Urbaser v. Argentina*,[33] an International Center for Settlement of Investment Disputes (ICSID) tribunal for the first time examined a human rights-based counter-claim filed by a host state on its merits. The case arose out of water privatization in Argentina in the province of Buenos Aires. The Spanish consortium Urbaser had in 2000 been entrusted with water and sewage services. After six years, the province of Buenos Aires terminated the concession. Urbaser requested arbitration on the basis of the Spanish–Argentinean BIT and claimed a breach of fair and equitable treatment

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Treaty Dec. 17, 1994, 2080 U.N.T.S. 95, 34 I.L.M. 360 (1995) not to expropriate foreign investors and to accord them fair and equitable treatment. After Vattenfall had requested arbitration, the parties quite quickly concluded an agreement on a final and binding resolution of their dispute and discontinuance of the proceedings; thereupon the ICSID proceeding were suspended for an infinite period and Germany issued the necessary permits. *See* Vattenfall v. Germany, ICSID Case No. Arb/09/06, Award (Mar. 11, 2011) [hereinafter *Vattenfall I*]. *See also* Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB 96/1, Final Award (Feb. 17, 2000).

[31] Glamis Gold v. United States of America, NAFTA Chapter 11, Arbitration, Counter-memorial of the United States 33–35 (Sep. 19, 2006): The defendant state justified its regulations requiring backfilling and grading for mining operations in the vicinity of Native American sacred sites by relying, *inter alia*, on the principles of the UNESCO World Heritage Convention concerning the preservation of historic and cultural property which arguably limit investor's rights under the North American Free Trade Agreement (NAFTA). The state relied on "principles of cultural preservation . . . that reflect the "policy" of the international community." (*Glamis Gold*, counter-memorial, at 35). The award of June 8, 2009 mentioned the UNESCO Convention only in the statement of the relevant legal instruments (Glamis Gold v. United States of America, NAFTA Chapter 11, Arbitration, award, at 46–47). *See* also Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award (May 20, 1992), 19 Y.B. Comm. Arbitration 51, ¶ 158 (1994): expropriation through cancellation of a tourist development project for the public purpose to protect antiquities.

[32] This would mean that "foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development . . ., have the highest level of responsibility to meet their duties and obligations as foreign investors, before seeking the protection of international law. This is precisely because such investments necessarily carry with them very serious risks to the population at large." Biwater Gauff (Tanzania) Ltd. (Claimant) v. United Republic of Tanzania (Respondent), Award, ICSID, Case No. ARB/05/22, ¶ 380 (amici submission, summarized by the Tribunal) (July 24, 2008). *See also id.* ¶ 723 (host state's defense).

[33] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

and expropriation which was ultimately unsuccessful. Argentina had filed a counterclaim for damages alleging Urbaser's "failure to provide the necessary investment into the Concession, thereby violating its commitments and its obligations under international law based on the human right to water."[34] The tribunal rejected this counterclaim but it made some important statements on the corporation's human rights obligations. According to the tribunal, a private company does not have a positive obligation to fulfill the human right to water directly, flowing from international human rights law.[35]

> [Such an obligation] cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law.[36]

This proceeding is an example of how a respondent state brought an investment tribunal to integrate two different subfields of international law. The tribunal, composed of investment law experts under the presidency of a Swiss private law scholar who had before published *inter alia* on human rights exceptions to immunity, did not shy away from examining international human rights law. It even went over the top in its *obiter dictum* affirming direct (horizontal) negative human rights obligations of private actors[37] which probably goes beyond the current state of general human rights law.

It is doubtful whether the fragmentation—i.e., the dispersal of the relevant rules among the different branches of international law—changes anything in the outcomes of such balancing decisions. Using the example of investment protection, the balancing of property rights versus human rights (be it in the technical guise of addressing a counterclaim of a host state or within the principal claim of the investor) would also have to be made by law-appliers if all relevant norms were united in one single treaty.

3. Fragmentation as a problem

The institutional, procedural, and substantive diversification called "fragmentation" bears risks. First of all, fragmentation may create conflicts and incompatibilities of legal obligations. 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.

[34] *Id.* ¶. 36.

[35] "The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service." (*Id.* ¶ 1207).

[36] *Id.* ¶ 1210.

[37] "[T]he situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties." (*Id.* ¶ 1210).

Beyond this, one treaty (or soft regime) may frustrate the goals of another one without there being strict 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 behavior mutes the ultimate goals of the UNFCCC even if no legal rule has been breached. Similar incompatibilities short of outright conflicts exist between investment protection and immunity of enforcement. When a foreign investor may not enforce a favorable arbitral award, for example through the attachment of state property in governmental non-commercial 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.[38] The diverging and possibly conflicting legal norms in substance that are available to those bodies reduce the predictability and reliability of law application. The resulting insecurity is both procedural (e.g., relating to jurisdiction and admissibility of complaints) and substantive. 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.

More generally speaking, a potentially pernicious consequence is the loss of the unity[39] and coherence of international law. Granted, international lawyers should not fetishize coherence. Coherence is, as the ILC study points out, only "a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so."[40] On the other hand, a loss of coherence implies the loss of international law's quality as a legal order (or system). An agglomeration of isolated and diverse norms does not amount to a legal order. Recall that Herbert L. A. Hart had notoriously dubbed international law as "rules which constitute not a system but a simple set."[41]

A legal order is present only when norms refer to each other (ordered norms). But legal order means not only ordered law but also order through law. These two dimensions are mutually reinforcing: The normative pull of international law is fortified by its stringency and consistency.[42] Understanding this interrelationship means

[38] Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals (2003); Jasper Finke, Die Parallelität internationaler Streitbeilegungsmechanismen: Untersuchung der aus der Stärkung der internationalen Gerichtsbarkeit resultierenden Konflikte (2004); James Crawford & Penelope Nevill, *Relations between International Courts and Tribunals: The "Regime Problem"*, *in* Regime Interaction in International Law: Facing Fragmentation 235 (Margaret A. Young ed., 2012) [hereinafter Regime Interaction in International Law].

[39] Prost, *supra* note 11.

[40] Study Group of the Int'l Law Comm'n, Rep. of May 2006, *supra* note 3, at ¶ 491.

[41] Herbert L. A. Hart, The Concept of Law 234 (2d ed. 1994).

[42] Jacques Chevallier, *L'ordre juridique*, *in* Le droit en procès 7, 8 (Centre universitaire de recherches administratives et politiques de Picardie ed., 1983).

understanding why consistency is particularly important for international law (more than for domestic law): because its normative power is more precarious.

To conclude, what is at stake in fragmentation is unity, harmony, cohesion, order, and—concomitantly—the quality of international law as a truly normative order. Worries about this fact have been disparaged as a "postmodern anxiety"[43] in a world which has lost stable values. But is it not a justified concern that international law could "no longer be a singular endeavor, . . . but merely an empty rhetorical device that loosely describes the ambit of the various discourses in question"?[44] Without some glue holding together the "special regimes" and "institutional components," writes Georges Abi-Saab, "the special regime becomes a legal order unto itself—a kind of legal Frankenstein" that "no longer partakes in the same basis of legitimacy and formal standards of pertinence."[45] So ultimately, at the bottom of the fragmentation debate lies a concern for a loss of legitimacy of international law, a loss which will ultimately threaten that law's very existence.

4. Fragmentation as an opportunity

Fragmentation is beneficial, too. First of all, fragmentation is an adequate reaction to modernity and modern complexity of life. It is, to speak with Michael Zürn, "not the dissolution or decomposition of a pre-existing world polity or order, but rather an indicator for the emergence of a differentiated world polity or order."[46] Complexity requires differentiated norms and specialized law-appliers who divide labor.

But specialized treaties are not only about special expertise and the division of labor. Importantly, the creation of antagonistic treaties allows different political preferences (of the political opposition within states, but also of transnational interest groups) to express themselves on the international level.[47] In fact, some treaties have been, in political terms, explicitly designed as "counter-conventions" to others. For example, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 seeks to mitigate the WTO-regime,[48] after the attempt of some negotiating states such as Canada and France to insert into the General Agreement on Trade in Services (GATS) and GATT an *exception culturelle* has failed.[49] In the same

[43] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden J. Int'l L. 533 (2002). Mario Prost speaks of "fragmentation *angst*" (*see* Prost, *supra* note 11, at 192).

[44] Matthew Craven, *Unity, Diversity, and the Fragmentation of International Law*, 14 Finnish Y.B. Int'l L. 3, 5 (2005).

[45] Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. Int'l. L. & Pol. 919, 926 (1999).

[46] Zürn & Faude, *supra* note 23, at 122.

[47] Isabelle Ley, Opposition im Völkerrecht (2014).

[48] The UNESCO Convention on the protection and promotion of the diversity of cultural expressions, Oct. 20, 2005, 2440 U.N.T.S. 311 [hereinafter UNESCO Convention on Diversity].

[49] This antagonism becomes manifest in several provisions; *Id.* preamble no. 18 (cultural activities as non-commodities), art. 2(5) "Principle of the complementarity of economic and cultural aspects of development," and others. *See* Hélène Ruiz Fabri, *Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles*, 111 Revue générale de droit international public 43 (2007).

sense, the Cartagena Protocol on Biosafety of 2000 is a counter-convention to WTO.[50] The resulting "regime collisions"[51] are praiseworthy because they manifest and further promote pluralism, contestation, and politicization—but it remains to be discussed what this means in normative terms (see Section 11).

A related benefit is the competitive pressure exercised by fragmentation: competition between regimes, organizations, courts, and any other institutions may promote productive exploration and experimentation, enhances creativity, allows for correcting mistakes, reduces the risk of failure of one single institution, and thus overall leads to improved performance, notably to better lawmaking and law-application.[52]

The next positive aspect of fragmentation is the protection it furnishes against concentrations of power. While it has been asserted that the existence of multiple institutions tends to favor big states which possess sufficient manpower and expertise to staff those numerous institutions, any institutional dispersal in the first place helps to prevent abuse because it constitutes a separation of powers with the possibility of checks and balances.

Furthermore, accountability is increased by the existence of more and "new opportunities for dissatisfied parties to challenge existing rules."[53] Some forum-shopping may legitimately serve as a "counterinsurgency strategy" of weaker actors. When, for example, access to life-saving medicine is not only debated in the WTO but also in the UN Human Rights Council, fragmentation is employed by less powerful actors as a force for contestation within the system.[54]

Notably, international judges themselves have welcomed the multiplicity of international courts and tribunals.[55] Of course, much depends on how the judges and arbitrators make use of the case-law of other, potentially competing bodies (see further Section 8). But in any case the sheer higher number of international courts and tribunals leads to more pronouncements, and thus simply to more case-law. The number of decision-makers, their multiplicity, and their competition and rivalry will normally lead to a denser body of law, which also includes more sophistication, and a further elucidation of fundamental principles underpinning the order.[56] This produces a (relatively speaking) finetuned international law which is adequate to the situation at hand.

[50] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208 [hereinafter Cartagena Protocol]. *See, e.g., id.* preamble ¶¶ 9–11.

[51] Contested Regime Collisions: Norm Fragmentation in World Society (Kerstin Blome et al. eds., 2016) [hereinafter Contested Regime Collisions].

[52] *See, e.g.*, Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 Perspectives on Pol. 13, 19 (2009); Joel P. Trachtman, The Future of International Law: Global Government 250 (2013).

[53] Christine Overdvest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, 6 Regulation & Governance 1, 3 (2012).

[54] Harlan Grant Cohen, *Fragmentation, in* Fundamental Concepts for International Law: The Construction of a Discipline (Jean d'Aspremont & Sahib Singh eds., forthcoming 2017).

[55] Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 Int'l & Comp. L. Q. 791 (2006); Bruno Simma, *Fragmentation in a Positive Light*, 25 Mich. J. Int'l L. 845 (2004).

[56] Colin Murray & Aoife O'Donoghue, *A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order*, 13 Int'l J.L. Context 1, 4 (2017) (also addressing the example of *Al-Adsani*).

For example, the jurisprudence of the ECtHR mentioning the "overriding importance" of *jus cogens*[57] has presumably pushed the ICJ to at least referencing these norms after a long period of reluctance.[58] The density and sophistication improves predictability which in turn helps realize the rule of law.

To conclude, fragmentation (and the pluralism going with it) may enhance both the effectiveness and the legitimacy of international law and its application—but only when it is channeled by appropriate principles and procedures to which we turn now.

5. Conflict resolution: either–or

This section describes how the fragmentation of international law is being successfully managed with help of principles and procedures dealing with discrepancy, collisions, and conflict. I will first turn to the traditional devices of conflict resolution that are geared at binary ("either–or") solutions, leading to the application of one norm over a potentially conflicting other norm stemming from a different source or regime.

5.1. "Horizontal" techniques

The first set of traditional juridical principles for resolving conflicts among norms are the priority of the *lex specialis* (the treaty that deals more specifically with a matter shall prevail),[59] and the priority of the *lex posterior* (the treaty later in time shall prevail). The priority of the *lex specialis* is mainly justified by gains in legitimacy: special norms are normally better tailored for the regulation of an issue, and special institutions are normally better equipped to apply them.[60] This proximity (in terms of substance and in terms of regional culture) may enhance acceptance and thus increase compliance rates.

However, in the international legal system, in which norms are produced in a decentralized way, both the specialty rule and the later-in-time rule seem less adequate than in a domestic system,[61] for two principal reasons. First, the later rule (the later treaty) may have been created by totally different actors than the earlier one, and therefore its making does not imply a decision to supersede or undo the prior norm (which might still be favored by its actual creators). A second reason is that the different treaties pursue different objectives, and therefore it can hardly be said that they relate to the

[57] Al Adsani v. UK, 2001-XI Eur. Ct. H.R., ¶ 60.

[58] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 ICJ Rep. 6, ¶¶ 64, 125 (Feb. 3, 2006); Case Concerning Jurisdictional Immunities (Federal Republic of Germany v. Italian Republic), Judgment, 2012 ICJ Rep. 99, ¶¶ 95–97 (Feb. 3, 2012).

[59] On the application of this technique to conflicting international treaties, *see* Seyed-Ali Sadat-Akhavi, Methods of Resolving Conflicts between Treaties 244–247 (2003). He gives as one example the Brussels Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, 57 A.J.I.L. 268 (1963) which contains more specific provisions on collisions of nuclear vessels than the Convention for the Unification of Certain Rules of Law with Respect to Collision between Vessels, Sep. 23, 1910, 212 C.T.S. 178.

[60] Oriol Casanovas, Unity and Pluralism in Public International Law 246 (2001).

[61] *Cf.* Trachtman, *supra* note 52, at 229.

same "subject matter"—although this would be a precondition for applying either the *lex specialis* or the *lex posterior* rule.[62]

Also, principles developed in the field of conflict of law (private international law) have been relied on for deciding which treaty to apply over another one.[63] Moreover, the choice-of-law-principles could be used for resolving "diagonal conflicts" between special international law on the one hand, and domestic law of a different field on the other, for example conflicts between WTO procurement law and domestic environmental law.[64] The private international law-model is heterarchical in a double sense: not only are there a plurality of law-appliers (e.g., domestic courts) which do not stand in a hierarchical relationship to each other, but moreover they each apply their own collision rules which do not necessarily coincide.

A similar principle has been developed for dealing with discrepancies between international law and domestic law, namely the principle of the prevalence of any *higher domestic* standard.[65] This principle could be applied *mutatis mutandis* to the relations between different treaty regimes. Its use would result in the application of only one provision and not the other, but this prevalence would not depend on the formal source of the provisions at stake, but on their contents.

All these conflict resolutions maxims constitute a relationship of mutual exclusiveness of treaties. Gunther Teubner writes that this "strictly heterarchical conflict resolution," coming in two forms—either internalizing disputes into the decisions of the regimes or externalizing them to "inter-regime negotiations"—constitutes the only available "meta-constitutionalism" of the international realm.[66]

5.2. Hierarchy

The second traditional conflict resolution is hierarchy. In a system of normative hierarchy, the higher norm is applied, and the other not at all; this device is therefore as "binary" as the ones described in the preceding section.

[62] Dirk Pulkowski, The Law and Politics of International Regime Conflict 329 (2014).

[63] Christian Joerges, Poul F. Kjaer & Tommi Ralli, *A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation*, 2 Transnat'l Legal Theory 153 (2011). According to Joerges, "[t]he normative basis for understanding conflicts law as a constitutional form with democratically grounded validity claims stems from the proposition that states must acknowledge or establish a law that provides a forum for foreign demands and manifests deference through transnational rules." (*Id.* at 153). *See also* Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law*, *in* Multi-Sourced Equivalent Norms in International Law 19 (Tomer Broude & Yuval Shany eds., 2011). For the more sophisticated explanation of the conflict of laws analogies, with further references, *see* Pulkowski *supra* note 62, at 329–335.

[64] Rike U. Krämer, Die Koordinierung zwischen Umweltschutz und Freihandel im Mehrebenenrechtsverbund am Beispiel des Vergaberechts (2014).

[65] Enshrined, e.g., *in* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), art. 5(2) [hereinafter CCPR], European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 53 [hereinafter ECHR]; and in WHO Framework Convention on Tobacco Control, June 22, 2003, in force Feb. 27, 2005, art. 2(1) [hereinafter WHO FCTC].

[66] Gunther Teubner, Constitutional Fragments: Societal Constitutionalism in Globalization 152–153 (2012) (internal references omitted).

Hierarchy has only an extremely limited scope of application in international law, as shall be briefly recalled. Empirical study of different branches of international law shows that a "trumping" impact of hierarchically superior norms is limited.[67] In practice, notably *ius cogens* plays a much softer, non-hierarchical role, for example as a guideline for the interpretation of other norms.[68] The precedence of the UN-Charter over conflicting obligations of the member states is mitigated by the legal presumption of an absence of conflict,[69] by the intrinsic exception of *ius cogens* to the prevailing effect of the Charter,[70] and by the reluctance to accord precedence to the Charter over contrary customary law (as opposed to countervailing "agreements" which are mentioned in article 103 UN Charter[71]).

A different type of hierarchy is foreseen by "more favorable provision"-clauses. Various human rights treaties and also the Cartagena Protocol on Biosafety explicitly state that if a different treaty in a related matter sets a different standard, the higher standard shall prevail.[72] This type of "relative" priority is laudable because it allows for a race to the top.

An institutional supplement to normative hierarchy would be the establishment of a hierarchical judicial system in international law. Most institutional propositions seeking to counteract fragmentation have favored the ICJ.[73] In fact, the so-called World Court has the broadest subject matter jurisdiction (not limited to a special area of international law), even if it neither has the broadest membership nor the most developed case-law (there is low density due to the small quantity of cases). One proposal was to introduce a reference procedure by granting the ICJ jurisdiction to render advisory opinions requested by other international tribunals, possibly through the UN Security Council or the General Assembly.[74] Not only the rendering of advisory opinions but already the anticipation of them by other courts and tribunals might prompt those to "consider the issues before them not only from within the mindset of their

[67] Hierarchy in International Law: The Place of Human Rights (Erika De Wet & Jure Vidmar eds., 2012).

[68] Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 Eur. J. Int'l L. 491 (2008).

[69] Al-Jedda v. UK, 2011 Eur. Ct H.R. ¶ 102 (App. No. 27021/08). *See also* Nada v. Switzerland, 2012 Eur. Ct H.R. ¶¶ 169–172, 197 (App. No. 10593/08); Al-Dulimi, 2016 Eur. Ct H.R. ¶ 140 (App. No. 5809/08).

[70] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia (Serbia & Montenegro)), Provisional Measures, Separate Opinion Judge Elihu Lauterpacht, 1993 ICJ Rep. 3, ¶ 100 (Sept. 13, 1993). *See also* Bundesgericht [BGer] [Federal Supreme Court], Nov. 14, 2007, 133 BGE II 450, E. 6.2. (Switz.).

[71] Anne Peters, *Art. 25*, *in* The Charter of the United Nations: A Commentary on the U.N. Charter ¶¶ 209–211 (Bruno Simma et al. eds., 2012), with further references. Rain Liivoja, *The Scope of the Supremacy Clause of the United Nations Charter*, 57 Int'l & Comp. L. Q. 583 (2008).

[72] *See* ECHR, *supra* note 65, art 53; European Union Fundamental Rights Charter, art. 53, 2007 O.J. (C 303) 1 [hereinafter EU Charter]; Cartagena Protocol, *supra* note 50, art. 2(4).

[73] *See especially* Charney, *supra* note 9, at 371, suggesting that the ICJ keep its "intellectual leadership role in the field." *See further* Andrew Lang, *The Role of the International Court of Justice in a Context of Fragmentation*, 62 Int'l & Comp. L. Q. 777, 808 (2013). *See also, e.g.*, Casanovas, *supra* note 60, at 246–247.

[74] The inspiration for this institutional proposal is the Court of Justice of the European Union (CJEU) competence to give preliminary rulings under the Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47, art. 267 [hereinafter TFEU], and to which member states' domestic courts of last instance must turn.

particular regime, but also from an external frame of reference."[75] In such "a model of reflexive engagement," the ICJ could play an important role in connecting different regulatory regimes.[76] However, this proposal has attracted much criticism[77] and was a political non-starter.

To conclude, a clear (substantive, procedural, or institutional) hierarchy which could resolve normative conflicts has not really emerged, and a further future maturation seems unlikely.

6. Mutual recognition and the principle of constitutional tolerance

A number of principles or formulas used in treaty provisions and judicial decisions for coordinating different legal (sub-)orders or regimes may be gathered under the heading of "constitutional tolerance."[78] These formulas have originally been developed by (European and domestic) courts and by scholars dealing with the multiplicity of legal orders (national and supranational or regional ones) in Europe.

One source of inspiration is the *marge d'appréciation* left to national authorities by the ECtHR when it scrutinizes whether national measures are in conformity with the ECHR. Such a *marge d'appréciation* can and should also be accorded when assessing the compatibility of different international treaty regimes with one another. Applied to the relationship and interaction of various subfields of international law, granting such a leeway means to let the "other" regime's rule stand, and to tolerate the "other" monitoring body's assessment. Just as the traditional margin of appreciation, this type of tolerance is apt to accommodate fragmentation and pluralism by preserving a space in which cultural, political, and regional differences might play. This technique is not in the least motivated by the insight that the "closer" institutions are better equipped and more legitimated to apply the law (including the norms of a "foreign" regime) than those which are further away from the concrete dispute. The ECtHR expressed this (still with a view to the relationship between the domestic authorities and its own monitoring role) as follows: "The national authorities have a direct *democratic legitimation* and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions."[79]

[75] Lang, *supra* note 73, at 808.

[76] *Id.*

[77] Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 Int'l & Comp. L. Q. 1, 20 (2003); Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction—Problems and Possible Solutions*, 5 Max Planck UN Y.B. 67 (2001); Philippa Webb, International Judicial Integration and Fragmentation 210–213 (2013).

[78] For this term, *see* Joseph H. H. Weiler, *Why Should Europe be a Democracy: The Corruption of Political Culture and the Principle of Tolerance*, *in* The Europeanisation of Law: The Legal Effects of European Integration 213, 217–218 (Francis Snyder ed., 2000). Weiler formulated this principle to characterize the mindset needed for a European polity to function. Such tolerance means that the (diverse) European peoples accept majority decisions taken by other European peoples. For a transfer to the global realm, *see* Jean L. Cohen, Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism 73 (2012).

[79] Hatton v. UK, 2003-VIII Eur. Ct H.R. ¶ 97 (emphasis added).

A related approach is mutual trust or confidence, leading to mutual recognition, based on the acceptance of a functional equivalence of norms originating from different sources. This approach has been developed with a view to the coordination of EU law with member state law, and member state law *inter se.* It has so far been used to tolerate (within limits) diverse human rights standards.[80] The reasoning can be illustrated by the example of the European arrest warrant.[81] The starting point is the premise that the EU is founded on shared values, notably with regard to human rights.[82] Therefore, all member states can (and must) *presume* that other member states are in compliance with those common (shared) standards.[83] Also, they may (and must) have "*mutual confidence*"[84] that the other members will grant if not identical but "equivalent protection"[85] to those values. Therefore, they must recognize other member state's activity relating to a given problem (principle of "*mutual recognition*"),[86] must cooperate in implementing the relevant legal acts of the EU, and are—importantly—prohibited from checking or scrutinizing whether the "other" member state really (fully) complied with the shared standard *or its equivalence*.[87] They are notably normally not allowed to demand a higher level of protection than foreseen by the relevant EU legal act. But under certain conditions, and on the basis of an individual assessment, they may exceptionally do so and refuse implementation or cooperation on this ground. In the field of extradition on the basis of a European arrest warrant, the German Federal Constitutional Court spectacularly held that mutual trust could be shaken and thus the presumption of

[80] *See especially* Bundesverfassungsgericht [German Constitutional Court] [BVerfGE] 73, 339 *et seq.*, Solange II (1986), for conflicts between EU law and national human rights protection.

[81] *See* Case C-399/11, Stefano Melloni v. Ministerio Fiscal, 2013 E.C.R. ¶¶ 37, 63.

[82] The Consolidated Version of the Treaty on European Union, Dec. 13, 2007, 2012 O.J. (C 326) 13, art. 2 [hereinafter TEU].

[83] Opinion pursuant to Article 218(11) on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2014 E.C.R. Opinion 2/13, ¶¶ 168, 191–192 (Dec. 18, 2014) [hereinafter EU Accession Opinion 2/13].

[84] Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States, June 13, 2002, O.J. (L 190) 1, as amended by Council Framework Decision 2009/288/JHA, Feb. 26, 2009, O.J. (L 81) 24, recital (10): "high level of confidence between Member States."

[85] *See, e.g.*, Joined Cases C-404/15 and C-659/15, PPU, Pál Aranyosi and Robert Caldararu (reference for a preliminary ruling), 2016 E.C.R. ¶¶ 76–78, 91–92. "The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the *mutual confidence* between the Member States that their national systems are *capable of providing equivalent and effective protection* of the rights recognized at EU level, particularly in the Charter" (*id.* ¶ 77, emphasis added).

[86] Council Framework Decision 2002/584/JHA, preamble, recital (6): "The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of *mutual recognition* which the European Council referred to as the 'cornerstone' of judicial cooperation." (emphasis added).

[87] EU Accession Opinion 2/13, *supra* note 83, ¶ 192: ". . . when implementing EU law, the Member States may, under EU law, *be required to presume* that fundamental rights have been observed by the other Member States, so that not only may they *not* demand a higher level of national protection of fundamental rights from another Member State than provided by EU law, but, *save in exceptional cases*, they *may not check* whether that other member state has actually, in the specific case, observed the fundamental rights guaranteed by the EU." (emphases added).

equivalent protection (and of compliance by another member state with EU law) rebutted "when there are concrete factual indications that in case of an extradition to another EU Member State, the indispensable requirements for the protection of human dignity are not satisfied."[88]

The ECtHR applied this strategy (presumption of equivalence but prerogative to double-check under certain conditions) to the relationship between the ECHR and the EU fundamental rights schemes. It stated in *Bosphorus* that an international organization (in that case the EU):

> . . . [must] protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered *at least equivalent* to that for which the Convention provides. . . . By "equivalent" the Court means "comparable."[89]

The Court went on: "[But] any such finding of equivalence could not be final and would be susceptible to review [by the Court itself] in the light of any relevant change in fundamental rights protection."[90]

The premise of this approach is the existence of a sufficient set of shared minimum values. The courts in Europe which apply the mutual recognition approach regularly rely on shared *European* values. Although the universal value basis is surely much thinner, I do not see a categorical difference here. In principle, the idea of mutual recognition can be reasonably applied to other inter-regime relations. This means that different standards, for example of fair trial, in different regimes (e.g., in the UN as opposed to in the EU) should be mutually recognized as long as a minimal threshold is not undercut. The idea of mutual recognition on the basis of a presumption of normative equivalence could even be extended beyond the protection of fundamental rights to other standards, such as the standards of democracy and the rule of law.

However, this approach fits only when the norms in question do not point into opposite directions (for example the free importation of animal products versus import restrictions on the basis of animal cruelty concerns), but when they strive towards the same goal but with different nuances (e.g., protection of property, only in different degrees). Importantly, the questions remain what constitutes "normative equivalence," when the presumption of equivalence is rebutted (notably whether the rebuttal hinges on the individual case or on systemic deficiencies), and most of all *who* determines the two former issues.

[88] Bundesverfassungsgericht [German Constitutional Court] [BVerfGE], 2 BvR 2735/14, ¶ 74 (2015); *see further id.* ¶¶ 63–74, 83, 85. In this affair, the German Federal Constitutional Court was not satisfied that human dignity was fully protected in Italy due to the possibility of an *in absentia* sentencing with an up to thirty-year prison sentence for drug dealing. Therefore, the Constitutional Court struck down the extradition order of a lower German court for unconstitutionality and remanded the case. The judgment has been dubbed "identity control I," because the Court for the first time actually applied the "identity" of the German constitution (with the protection of human dignity forming part of this identity) as a benchmark.

[89] Bosphorus v. Ireland, 2005-VI Eur. Ct H.R. ¶ 155.

[90] *Id.*

7. Rapprochement: developing common standards

In contrast to all techniques mentioned up to now, another set of techniques and procedures to deal with potential discrepancies or even conflict of international norms stemming from different regimes are those which seek to bring in line, to reconcile, or "integrate" different regimes, thereby avoiding the binary choice to apply one provision and not the other. Put differently, these techniques are geared towards the *cumulative application* of norms arising from different regimes. Unlike the conflict resolution modes (Section 5) and the mutual recognition mode (Section 6), the rapprochement-techniques seek to create compatibility, not only in a "negative" sense, but also in a supportive ("positive") sense for the achievement of the objectives of other treaties.

7.1. Conventional and customary rules of rapprochement

The clearest manifestation of this approach is found in the three principles enounced in article 20 of the UNESCO Convention on Diversity of 2005 whose heading is: "Relationship to other treaties: *mutual supportiveness, complementarity and non-subordination*."[91] These three principles favor the combined application of the UNESCO Convention and other treaties.

"*Notwithstanding-clauses*" in the style of article 2(3) of the Cartagena Protocol[92] may ultimately work in the same direction, namely that of cumulative application and mutual harmonization.[93] Cross-referrals such as articles 6(2) and 22(3) of the ICCPR (mentioning other human rights treaties) have a similar effect. Furthermore, article 44 and 46 ICCPR and article 24 ICESCR seek to prevent that the functions of UN organs and bodies dealing with human rights generally are impaired by the two Human Rights Covenants and their treaty bodies. Another example is article 104 NAFTA, which seeks to promote the reconciliation of potentially conflicting obligations arising out of the free trade agreement on the one hand and environmental and conservation agreements on the other hand, by explicitly prescribing a balancing approach (albeit with a heavy thumb on the scale in favor of trade).[94]

Reconciliatory principles that are applicable across the board smooth out tensions and frictions. For example, the principle of sustainable development is intended to

[91] *See* UNESCO Convention on Diversity, *supra* note 48. *See similarly* Cartagena Protocol, *supra* note 50, preamble indent 9: "recognizing that trade and environment agreements should be mutually supportive."

[92] Cartagena Protocol, *supra* note 50, art. 2(3): "Nothing in this Protocol shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law . . . ."

[93] However, these clauses can also, inversely, be understood as establishing exclusivity.

[94] The North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993), art. 104 [hereinafter NAFTA]: "1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in [Montreal Protocol, Basel Convention, and other agreements] such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement." *See further* Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, 1522 U.N.T.S. 3, 26 I.L.M. 1550 (1987); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57.

reconcile the frictions notably between the international law of development and international environmental law.[95] Or, the antagonist legal concepts of sovereignty/non-intervention on the one hand and human rights/human security on the other hand are synthesized in the soft law concept of responsibility to protect (R2P). However, the application of these reconciliatory principles cannot in itself resolve any concrete normative conflict but can only prevent the total eclipsing of one of the regimes or principles involved.

A related phenomenon is due to the acknowledgment that international human rights matter for basically all issue-areas and subfields of international law. This insight continues to motivate both formal revisions of special norms so as to accommodate human rights concerns, and novel interpretations.[96] Such a *human rights-mainstreaming* also has a mentating effect.[97] Cognate to the employment of human rights as a mainstreaming device is Dirk Pulkowski's idea to understand a small number of basic concepts of international law (such as "sovereignty," the "right to have human rights," or specific provisions of the Vienna Convention on the Law of Treaties (VCLT) or the UN Charter[98]) as "*constitutive* rules" which create the very possibility of meaningful legal discourse. These will engender "communicative compatibility" rather than legal unity.[99]

An important phenomenon are *references* in international treaties (or in the case-law; see on "judicial dialogue" below) to *general* international law (possibly fundamental and thus to some extent "constitutional" principles), and *cross-references* to other (*special*) treaties or regimes. A historical example is article 1 of the Havana Charter for an International Trade Organization of 1948[100] which referred to the UN Charter's objective of attaining economic and social progress and development.[101] In current international law, article 1 of the Cartagena Protocol refers to Principle 15 of the Rio Declaration of 1992[102] which embodies the precautionary approach. Another

[95] Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 ICJ Rep. 7, ¶ 140 (Sep. 25, 1997); M.-C. Cordonier Segger & Ashfaq Khalfan, Sustainable Development Law: Principles, Practices and Prospects (2004).

[96] The Impact of Human Rights Law on General International Law (Menno T. Kamminga & Martin Scheinin eds., 2009).

[97] Aiofe O'Donoghue, Global Constitutionalism in the Constitutionalisation of International Law (2014), at 96: "Human rights often act as a core normative structure within an ever-fragmenting regime."

[98] May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT]; June 26, 1945, 1 U.N.T.S. XVI [hereinafter UN Charter].

[99] Pulkowski, *supra* note 62, at 238–271 (quotation at 239, examples for constitutive rules at 268–269). "[I]nstitutional facts created through international law provide the commonalities of meaning that make continued normative action possible." (*id.* at 270).

[100] The Havana Charter for an International Trade Organization, Mar. 24, 1948, United Nations Conference on Trade and Employment, Final Act and Related Documents, E/CONF.2/78, United Nations publication, Sales No. 1948.II.D.4 [hereinafter Havana Charter].

[101] *Id.* art. 1: "The parties to this Charter undertake in the fields of trade and employment to cooperate with one another and with the United Nations. For the Purpose of realizing the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter."

[102] June 13, 1992, 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

example of a referral to general international law is the United Nations Convention on the Law of the Sea (UNCLOS) preamble affirming "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."[103] An example for cross-referencing is that regulations on sea pollution adopted under the International Convention for the Prevention of Pollution from Ships (MARPOL)[104] and resolutions of the Maritime Safety Committee (MSC) under the International Convention for the Safety of Life at Sea (SOLAS)[105] count as accepted "international rules and standards" in the sense of articles 211 and 217–220 UNCLOS, the provisions dealing with maritime pollution and accidents. A final example of cross-referencing occurs between international labor and international trade conventions. So far, nearly forty bilateral trade law agreements invoke labor provisions of various International Labour Organisation (ILO) conventions, and some of them actually incorporate the labor standards directly.[106]

But in the absence of a central institution which would authoritatively interpret such cross-referenced and "borrowed" clauses, and the reconciliatory and "constitutive" principles, the specter of divergent and thus "fragmented" interpretation arises. This leads us to the interpretative devices.

7.2. Interpretation Maxims

Two principal interpretation maxims are being used by law-applying bodies to avoid conflict by harmonizing the various international rules rooted in different regimes.

(a) Presumption of law-abiding intentions?

The first technique is a presumption of law-abidingness. It has long been employed by the ICJ which stated that "[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[107] In *Al-Jedda*, the ECtHR established a presumption which leads to the avoidance (or negation) of any conflict between an ECHR member state's obligation to carry out a Security Council resolution and that state's obligation to secure the ECHR rights:

> [T]he Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council *does not intend* to impose any obligation on Member States *to breach* fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council

[103] Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982), preamble, ¶ 8 [hereinafter UNCLOS].

[104] Nov. 2, 1973, 1340 U.N.T.S. 184, 12 I.L.M. 1319 (1973) [hereinafter MARPOL].

[105] Nov. 1, 1974, 1184 U.N.T.S. 2, 14 I.L.M. 959 (1975) [hereinafter SOLAS].

[106] *See* Jordi Agustí-Panareda, Franz Christian Ebert & Desirée LeClercq, *Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System*, Background Paper: Social Dimensions of Free Trade Agreements (Mar. 2014), *available at* http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms_237940.pdf (last accessed July 18, 2017).

[107] Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, 1957 ICJ Rep. 125, 142 (Nov. 26, 1957). Here the ICJ interpreted Portugal's declaration on the acceptance of compulsory jurisdiction of the ICJ in conformity with international law.

> Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.[108]

This presumption differs from the *Bosphorus*-presumption[109] mentioned above. In the *Al-Dulimi* case, the Chamber had in 2013 relied on *Bosphorus*,[110] and had argued that states' measures implementing obligations arising out of their UN-membership could be presumed to be in conformity with the ECHR, but only if the organization guarantees an "equivalent protection" to human rights as the Convention itself.[111] That kind of presumption, based on the idea of mutual confidence as explained above (Section 6), will lead to the maintenance of multiple similar ("equivalent") standards without asking for their complete alignment.

In contrast, the ECtHR's Grand Chamber in *Al-Dulimi* presumed law-abiding intentions of the Security Council.[112] The Grand Chamber here stated that:

> [*W*]*here a Security Council resolution does not contain any clear or explicit wording excluding or limiting* respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures *are compatible* with the Convention.[113]

Unlike the *Bosphorus*-presumption, the *Al-Jedda*/*Al-Dulimi*-presumption does not look at the objective features of an "other," colliding regime (which in *Bosphorus* was the EU; in *Al-Dulimi* it would be the UN sanctions scheme), but at the "intention" of the Security Council to allow for implementing action which safeguards human rights. The statement that "the Court must always presume that those measures are compatible with the Convention" means that the ECtHR must presume that the Security Council sanction decision allows the member states to implement the Security Council decision in a way that is compatible with the ECHR.

This presumption of an allowance for member states to go on with a human rights-friendly implementation of Security Council resolutions has two important legal consequences. The first consequence is the inapplicability of article 103 of the UN Charter. As the Grand Chamber in *Al-Dulimi* said, the Court "will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter."[114] The second consequence of the presumption is that it permits the ECtHR to avoid examining whether the UN itself currently offers "equivalent protection" to the ECHR—a question which would obviously have to be answered in the negative for the time being. With help of the strained reconciliation of

[108] Al-Jedda v. UK, 2011 Eur. Ct H.R. ¶ 102 (Appl. No. 27021/08) (emphasis added). *See also supra* note 69.

[109] *See* Case C-399/11, Stefano Melloni v. Ministerio Fiscal, 2013 E.C.R..

[110] *See* Bosphorus v. Ireland, 2005-VI Eur. Ct H.R.

[111] Al-Dulimi v. Switzerland, Chamber Judgment, 2013 Eur. Ct H.R. ¶ 114 (Appl. No. 5809/08).

[112] *See* Al-Jedda v. UK, 2011 Eur. Ct H.R. ¶ 102 (Appl. No. 27021/08) (emphasis added). *See also* Nada v. Switzerland, 2012 Eur. Ct H.R. ¶¶ 169–172, 197 (Appl. No. 10593/08); Al-Dulimi, 2016 Eur. Ct H.R. ¶ 140 (Appl. No. 5809/08).

[113] ¶ 140 (Appl. No. 5809/08) (emphasis added).

[114] *Id.* ¶ 140.

the obligations flowing from Security Council Resolution 1438[115] (which was at stake in *Al-Dulimi*) on the one hand and the ECHR on the other hand, and by denying any "real conflict" between the States' obligations under both treaty regimes, the Grand Chamber in *Al-Dulimi* sought to render "nugatory the question whether the equivalent protection test should be applied."[116]

This "law-abiding"-presumption had already previously been applied by the ECtHR for managing the tension between the law of immunities and the human right of access to a court under article 6 ECHR. In the *Srebrenica*-case, the ECtHR found that the human right had been restricted in a proportionate manner and not violated. This result was not owed to a normative hierarchy. Rather, the ECtHR reached it through the interpretation of the human rights provision "in harmony" with preexisting "generally recognized rules" of international law, based on the presumption that the state parties of the ECHR did not want to depart from their previous obligations under general international law (namely the obligation to grant immunity to the United Nations).[117] (In contrast, the Dutch Supreme court had taken a hierarchy-based approach and had relied on Art. 103 UN Charter to justify an "absolute" immunity of the United Nations.[118])

The presumption of law-abiding intentions (of the Security Council, or of States) faces the same objection that was raised against the *lex posterior* rule: Without an identity of law-makers, the presumption has no basis in their actual intentions. It is therefore more a legal fiction than a presumption.

(b) Systemic interpretation

The currently most discussed "de-fragmentation" technique is the systemic interpretation of international norms.[119] For treaty interpretation, article 31(3)(c) VCLT prescribes that "[t]here shall be taken into account: . . . c) any relevant rules of international law applicable in the relations between the parties." International law-applying bodies have often practiced harmonious interpretation (that is interpreting "their" body of law in the light of a different regime's special rules, or in conformity with general international law), while not necessarily relying on article 31(3)(c) VCLT. For example, the WTO Appellate Body famously stated that the GATT "is not to be read in clinical isolation from public international law."[120] Further prominent examples are the *Oil Platforms* case, where the ICJ interpreted article XX of a bilateral treaty on friendship between the United States and Iran

[115] S.C. Res. 1438 (Oct. 14, 2002).

[116] Al-Dulimi, 2016 Eur. Ct H.R. ¶ 149 (Appl. No. 5809/08).

[117] Stichting Mothers of Srebrenica and others v. The Netherlands, 2013 Eur. Ct H.R. ¶ 139 (Appl. No. 65542/12).

[118] Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], Mothers of Srebrenica v. the State of the Netherlands and the United Nations, Apr. 13, 2012, NJ 2014, 262, ¶ 4.3.6.

[119] For a monographic treatment, *see, e.g.*, Gabriel Orellana Zabalza, The Principle of Systemic Integration: Towards a Coherent International Legal Order (2012).

[120] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WTO Doc. WT/DS2/9 (May 20, 1996).

in the light of general international law, to the effect that the "measures" there precluded an unlawful use of force by one party against the other.[121] In *Hassan*, a case on deprivation of liberty in armed conflict, the ECtHR "harmonized" the ECHR with the rules of international humanitarian law (IHL). The result of the interpretation of article 5 ECHR "in harmony with other rules of international law of which it forms part"[122] was that, during international armed conflict, a person may be detained even in the absence of a particular ground permitting deprivation of liberty (although such a specific ground is required by the wording of article 5 ECHR), when this would be allowed by rules of IHL.[123]

Since the prominent discussion of that "master-key" to the house of international law[124] in the ILC fragmentation report of 2006, parties to disputes more often rely on that VCLT-provision, and it is now often quoted in decisions. Arguably, article 31 VCLT allows, and even mandates, treaty interpreters to take into account of all kinds of "rules of international law," not only other treaty norms but also customary norms[125] and possibly even soft law.[126] Importantly, reliance on such "outside" norms does not constitute an unlawful extension of the limited jurisdiction of the monitoring bodies,[127] because these norms are not applied "directly" but only "indirectly," as interpretative devices for the proper construction of the regime-specific rules.[128] "Systemic integration" is adequate for the application of customary rules as well, for example for the identification of the scope of state immunity with due consideration for human rights.[129]

The precondition of article 31 VCLT and its underlying principle, namely that the rule be "applicable in the relations between the parties," has infamously been construed narrowly by the WTO *Biotech* panel. That panel noted that the Cartagena Protocol, on which the European Community as a respondent had relied for interpreting the pertinent WTO Agreements, was in fact "not applicable," because the Protocol had not been ratified by a number of WTO members, including the complaining parties to the dispute

[121] Case Concerning Oil Platforms (Islamic Republic Iran v. USA), Judgment, 2003 ICJ Rep. 161, ¶ 41 (Nov. 6, 2003).

[122] Hassan v. UK, 2014 Eur. Ct H.R. ¶ 77 (Appl. No. 29750/09).

[123] *Id.* ¶¶ 104–105.

[124] This term was coined by now ICJ Judge Hanquin Shue when she still was an International Law Commission member in debates in the International Law Commission, quoted in Study Group of the Int'l Law Comm'n, Rep. of May 2006, *supra* note 3, ¶ 420.

[125] *See* for the interpretation of a bilateral treaty under consideration of a norm of customary law (the requirement to conduct an environmental impact assessment): Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 ICJ Rep. 14, ¶ 204 (Apr. 20, 2010).

[126] Jan Klabbers, *Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law*, *in* Time, History, and International Law 141, 159 (Matthew Craven et al. eds., 2007).

[127] But *see* in this sense Judge Buergenthal in his separate opinion to the ICJ *Oil Platforms* judgment, 2003 ICJ Rep. 161, ¶ 22.

[128] *Cf.* Joost Pauwelyn, *Fragmentation of International Law*, *in* Max Planck Encyclopedia of Public International Law ¶ 34 (Rüdiger Wolfrum ed., 2006).

[129] Rosanne van Alebeek, *Jurisdictional Immunities of the State (Germany v. Italy): On Right Outcomes and Wrong Terms*, 55 German Y.B. Int'l L. 281, 301 (2012).

(United States, Argentina, and Canada).[130] The *Biotech* panel's parallelism requirement (finding that a treaty norm can only be taken into account as an interpretative guideline in a WTO-related dispute when *all* parties to that dispute—or even all parties to the WTO Agreement which must be interpreted—have ratified that other treaty) would render article 31(3) VCLT largely meaningless. This approach would make other treaties non-usable for the interpretation of treaties with a broad membership, such as the WTO Agreement (which, moreover, has also non-state members which cannot accede to most other international treaties). The narrow reading would in addition have the paradoxical result that the more universal a treaty is, the smaller the chance that it could "meet" other treaties would be. The *Biotech* decision has largely been appraised as a political decision to "keep out" international environmental law from WTO law and as expressing a political preference for free trade. The better, and meanwhile prevailing, view is that it is not necessary that all states in the organization/treaty are also parties to the other treaty to make the latter usable, if they are not involved in the dispute.[131]

The next question is what "taking into account" actually means. Arguably, this means that the interpreter must engage in balancing.[132] For example, when an investor claims a violation of the "fair and equitable treatment-standard" embodied in a BIT, the tribunals must determine the fairness and equitableness through balancing the legitimate expectations of the investor against other rules and principles of international law, including human rights law.[133]

This observation dovetails with the International Law Commission's overall assessment of the "principle of systemic integration" (manifest in article 31(3)(c) VCLT) as presupposing and implying some sense of a global common good:

> The principle of systemic integration . . . articulates the legal-institutional environment in view of *substantive preferences, distributionary choices and political objectives*. This articulation is . . . important for the critical and constructive development of international institutions . . . . To hold those institutions as fully isolated from each other . . . is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a *general, public interest*. Without the principle of "systemic integration" it would be impossible to give expression to and to keep alive, any *sense of the common good of humankind*, not reducible to the good of any particular institution or "regime."[134]

[130] Panel Report, *EC—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.49–7.95, esp. ¶ 7.75, WTO Doc. WT/DS 291–293/R (June 29, 2006).

[131] The WTO Appellate Body in the *Airbus* case moved away from the *Biotech* approach, possibly under the influence of the International Law Commission Rep. (Appellate Body, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 839–855 WTO Doc. WT/DS316/AB/R (May 18, 2011)). It conceded that a bilateral 1992 agreement between the US and the EC was applicable between the parties, because "the parties" in art. 31(3)(c) VCLT (*supra* note 98) meant parties to the dispute (not necessarily all WTO parties), but that its provision was not "relevant", and therefore did not have to be taken into account for interpreting the term "benefit" in art. 1.1.(b) of the Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14., ¶¶ 839–855 [hereinafter SCM Agreement].

[132] Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 Ind. J. Global Legal Stud. 483, 501–506 (2009).

[133] *See supra* notes 30–32 for references to the case-law.

[134] Study Group of the Int'l Law Comm'n, Rep. of Apr. 2006, *supra* note 3, ¶ 480 (emphasis added).

8. Integration by the judiciary

8.1. The concept of judicial dialogue

The most discussed "procedure" or vessel for promoting the integration of different regimes is judicial dialogue. This is itself informal but could be encouraged and facilitated through institutional formats. Judicial dialogue basically means courts' mutual attentiveness to each other's case-law and cross-citations. Such cross-references and the parallel resort to the surrounding "general" international law have the effect of lining different treaties up with each other and/or to direct them towards respect of shared principles. For example, the principle of national treatment exists both in WTO law and investment law, and cross-citations have the effect of consolidating its meaning in the sense of a shared content. Overall, such an "interjudicial dialogue . . . has the potential to preserve the unity of the international legal system in face of fragmentation."[135] This integrative effect would seem to work even if courts do not necessarily cite one another for the purpose of communicating ("dialoguing") but for quite other reasons (such as gaining acceptance by colleagues on the bench), and even if the citations are, as often, selective.[136]

Importantly, the "global community of courts" would need to encompass not only international courts and tribunals but also domestic ones applying international and foreign law in order to bring about a "global" jurisprudence.[137] Moreover, the dialogue could and should be conducted among other participants of the "international interpretive community," comprising also transnational non state actors.[138]

In judicial practice, the "systemic outlook" has been asked for by some judges.[139] ICJ Judge Greenwood demanded that international courts actively espouse each other's case-law:

> International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others. It is a single unified system of law and each international court *can, and should*, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.[140]

[135] William W. Burke-White, *International Legal Pluralism*, 25 Mich. J. Int'l L. 963, 973 (2003–2004).

[136] *See* for a critique David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 Wash. L. Rev. 523 (2011).

[137] Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191 (2003). For an empirical investigation in the different issue-areas or regimes of international law, *see* The Practice of International and National Courts in the (De-)fragmentation of International Law (Ole Kristian Fauchald & André Nollkaemper eds., 2012). For a normative proposal, *see* Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. Int'l L. & Pol. 1 (2016) with a "presumption of coherence" and a "presumption of catholicity."

[138] Webb, *supra* note 77, at 225–226.

[139] Whaling in the Antarctic (Australia v. Japan), Judgment, 2014 ICJ Rep. 226, ¶ 25 (Mar. 31, 2014) (separate opinion by Judge Cançado Trindade).

[140] Ahmadou Sadio Diallo (Republic Guinea v. Democratic Republic Congo) (compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment, 2012 ICJ Rep. 324 (June 19, 2012), Declaration of Judge Greenwood, ¶ 8 (emphasis added).

The ILC study on fragmentation put it thus:

> [T]hat conflicts between specialized regimes may be overcome by law, even as the law may not go much further than *require a willingness to listen to others, take their points of view into account and to find a reasoned resolution* at the end.[141]

On a more abstract level, what is happening here, and what should be welcomed and encouraged, is the *internalization of an outside perspective.* Gunther Teubner observes that the differentiation and autonomization of "systems" (which seem to include the various international treaty regimes) has resulted in a "network architecture" of transnational regimes. The important analytical and normative point now is that "each regime needs to combine two contradictory requirements": All regimes spell out their own vision of a global public interest (from their own perspective), while all regimes "at the same time take account of the whole by transcending their individual perspective." "Each regime must create the overarching *ordre public transnational* from its own perspective," a "shared horizon of meaning" needs to be constructed, a "counterfactual assumption of a *common normative core.*"[142]

8.2. The practice

Detailed empirical analyses of judicial and arbitral practice relating to concrete legal questions touching upon various subfields have been undertaken only recently. They point predominantly towards integration rather than to *dis*integration.

There seem to be only few instances where international courts have been uncooperative. And even the notorious example for a jealous protection of own jurisdiction, the *Mox Plant* case, in which the ECJ penalized Ireland for seizing the ITLOS,[143] may have in the end resulted in a further development of the environmental precautionary principle and may thus have refined international law.[144] The only known example of facially irreconcilable interpretations of a cross-cutting norm by different courts, namely the diverging concretizations of the term "control" in article 8 of the ILC Articles on State Responsibility by the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY), has not caused any damage either. While the *Tadić* tribunal had satisfied itself with an "overall control,"[145] the ICJ asked, more exactingly, for "effective control."[146] But because the legal

[141] Study Group of the Int'l Law Comm'n, Rep. of May 2006, *supra* note 3, ¶ 487 (emphasis added).

[142] Teubner, *supra* note 66, at 160–161.

[143] Here the European Court of Justice (ECJ) found that Ireland had not fulfilled its duty to cooperate loyally with the EU (then European Community (EC)) and thereby violated various provisions of the then EC Treaty, by instituting a proceeding concerning maritime pollution arising from an English power plant against the UK under ITLOS without consulting with the EC organs beforehand (Case C-459/03, Commission EC v. Ireland, 2006 E.C.R. I-4635).

[144] This is claimed by Murray & O'Donoghue, *supra* note 56, at 16, referring to Philippe Sands & Jacqueline Peel, Principles of International Environmental Law 225 (3d ed. 2012).

[145] Prosecutor v. Duško Tadić, Appeals Chamber, Case No. IT-94-1-A [Merits], ¶ 117 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[146] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Merits, 1986 ICJ Rep. 14, ¶¶ 109 and 115 (June 27, 1986); Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 ICJ Rep. 43, ¶ 406 (Feb. 26, 2007).

context and purpose for identifying "control" differed in both cases (for establishing state responsibility or individual responsibility) there was no outright contradiction.

On the other hand, cross-citations by international courts are probably increasing. For example, the European Court of Human Rights regularly applies international human rights norms other than the ECHR (the Children's Rights Convention, the Refugee Convention, the CCPR, the Convention against Torture [CAT][147]), the law on state immunity, IHL, and provisions of "general" international law (law of treaties and norms on the ICJ procedure).[148] Inversely, the ICTY relied, in its early decision on torture, on the ECtHR case-law. It then developed its own concept, realizing that the broad concept of torture as used in human rights law was not adequate for a criminal law definition which must satisfy strict standards of legality.[149]

In the area of international economic law, the United Nations Conference on Trade and Development (UNCTAD) global principles on responsible sovereign lending and borrowing practices have been invoked in an arbitration involving sovereign debt.[150] In the WTO dispute settlement body's practice, ideas and norms from other regimes have been "imported" into the trade system.[151] Inversely, an "export" of WTO norms to other regimes has been taking place. Gabrielle Marceau and co-authors have found a strong influence of WTO rules and case-law on regional and international dispute settlement in other areas of international economic law (investment law and non-WTO trade law). The substantive WTO *acquis* has "overwhelmingly" been used by trade and investment courts and tribunals.[152] The reason for referencing the WTO seem to be both "functional closeness" of the issue-areas, the "authority" of the WTO in international economic law, and the judges and arbitrators' "interest in maintaining to normative and inter-regime coherence, which might very well be intrinsic to legal reasoning itself."[153]

With regard to the overlap and friction between international human rights law and international investment protection law, Christina Binder found that the mutual references of the involved conflict-resolving bodies (the ECtHR and arbitral tribunals) are fairly scarce but that both bodies of jurisprudence are solidly embedded in the general part of international law so that there is "no threat to the unity of international law."[154]

[147] Nov. 20, 1989, 1577 U.N.T.S. 3 [Children's Rights Convention]; July 28, 1951, 189 U.N.T.S. 137 [Refugee Convention]; Dec. 10, 1984, 1465 U.N.T.S. 85 [CAT].

[148] Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights (2010).

[149] Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber II, ¶ 181 (Int'l Crim. Trib. for the Former Yugoslavia March 15, 2002)

[150] Ambiente Ufficio S.P.A. & others (case formerly known as Giordano Alpi & others) (claimants) & the Argentine Republic (respondent), ICSID Case No. ARB/08/09, decision on jurisdiction and admissibility (Feb. 8, 2013), dissenting opinion of Santiago Torres Barnardéz, ¶ 330.

[151] For example, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 127–131, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), brings the "objective of sustainable development" to bearing for the interpretation of art. XX GATT (*supra* note 28), *inter alia*, by citing UNCLOS (*supra* note 103).

[152] Gabrielle Marceau, Arnau Izguerri, & Vladyslav Labonnovy, *The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of fragmentation*, 47 J. World Trade 481, 512–530, quote at 529 (2013).

[153] *Id.* at 495, 529, 531.

[154] Christina Binder, *Einheit oder Framentierung des Völkerrechts*, 70 Zeitschrift für öffentliches Recht 737 (2015), quote from the English abstract.

In 2013, Philippa Webb published a solid study of the case-law of four courts (the ICJ, the ICC, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR)), which have been developing the law in three areas: genocide, immunities, and the use of force.[155] Webb diagnosed both divergences and convergence and concluded that "there are few instances of genuine fragmentation in the areas examined. The overall picture is one of genuine integration."[156]

A 2015 across-the-board study with contributions, *inter alia*, by eminent judges from various courts diagnoses a "reassertion and convergence" in international law growing out of the differentiation into substantive subfields and the proliferation of courts and tribunals.[157] The editors claim that public international law "has grown from bilateral relationships, to something that is surely no more fragmented than it once was; international law has only become more diverse."[158]

The overwhelming impression is that, although the lack of a central lawmaker has (inevitably) led to the existence of multiple legal regimes with overlapping but not identical memberships, whose main objectives often stand in tension, the law-appliers (both treaty bodies and courts) are careful not to contradict each other. The empirical findings on the scarcity of conflicts outsized by the prevailing scheme of parallelism and reconciliation of norms from different regimes, and also the observation of migration of norms from one regime to another suggest that the problems of fragmentation have been overstated. But they also show that much depends on the behavior of courts and tribunals.

9. Non-judicial "regime interaction"

Outside concrete disputes, treaty bodies and organizations appear to entertain contacts all the while renouncing on laying down guidelines for the resolution of potential conflicts. The minimal prerequisite for coordination and possible cooperation seems to be information-exchange—potentially with a view to identify possible common goals (or sub-goals) and shared principles. This phenomenon of institutional contact has been called "regime interaction."[159]

A number of "integration rules"[160] envisage this type of interaction.[161] For example, article 3(5) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) foresees that:

[155] Webb, *supra* note 77.

[156] *Id.* at 203. Webb explains the contradictory trends with factors such as the identity of the court, the substance of the law, and the procedures employed.

[157] A Farewell to Fragmentation, *supra* note 4, subtitle of the book.

[158] Mads Adenas & Eirik Bjorge, *Introduction: From Fragmentation to Convergence in International Law*, *in* A Farewell to Fragmentation, *supra* note 4, at 1, 12.

[159] Regime Interaction in International Law, *supra* note 38. Regime interaction relies on the parallel membership of states in different regimes and on "autonomous" institutional interactions.

[160] Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, 6 Loyola U. Chi. Int'l L. Rev. 209, 238 (2008–2009).

[161] *See* further examples in Jeffrey Dunoff, *A new approach to regime interaction*, *in* Regime Interaction in International Law, *supra* note 38, 136, at 160–166 (such as interaction of the ITU with the ICAO and of the WTO with ILO).

> The Committee on Sanitary and Phytosanitary Measures . . . shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.[162]

Another example is the Memorandum of Understanding Between the Secretariat of the Convention on Biological Diversity and the World Intellectual Property Organization (WIPO) of 2002, with the objective to enhance institutional cooperation on indigenous traditional knowledge, an issue which concerns both intellectual property and the conservation of biological diversity.[163]

At the occasion of the signing of the WTO Agreement, the ministers adopted the "Decision on Trade and Environment," with which they established a WTO Committee on Trade and Environment (CTE), on the basis of the consideration that

> there should not be, nor need be, any policy contradiction between upholding and safeguarding a . . . multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other, Desiring to coordinate the policies in the field of trade and environment . . . .[164]

The CTE practices cooperation and information exchange with the United Nations Environment Programme (UNEP) and the bodies of the multilateral environmental agreements (MEAs).[165]

In the field of sustainable development, both the Agenda 21 of 1992 and the 2002 World Summit on Sustainable Development (WSSD)[166] seek to "encourage interaction and cooperation between the United Nations system and other intergovernmental and non-governmental subregional, regional and global institutions and non-governmental organizations in the field of environment and development,"[167] notably with international financial organizations. Or, to give another example, the Food and Agriculture Organization (FAO) and CITES secretariats cooperate with regard to the listing of endangered marine species.[168]

An important observation is that this interaction may shape and develop international norms beyond the consent of member states.[169] That law-developing activity therefore requires an additional basis of legitimacy. That basis can be (and is in fact already) created through *participation* (state parties, stakeholder, and experts) and *information/reason-giving*.[170] This framework for regime interaction is based on *procedural* principles of inclusion and transparency.

[162] Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

[163] WIPO Doc. WO/CC/48/2 (July 24, 2002), Annex I.

[164] Ministerial Decision on Trade and Environment adopted at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh, Apr. 15, 1994, 33 I.L.M. 1267.

[165] Committee on Trade and Environment, *Existing Forms of Cooperation and Information Exchange between UNEP/MEAs and the WTO*, WTO Doc. TN/TE/S/2/Rev.2 (Jan. 16, 2007).

[166] Plan of Implementation of the World Summit on Sustainable Development, p. 6 (69), U.N. Doc. A/CONF. 199/20 (2002), Title XI(F), "Role of International Institutions."

[167] Rep. of the U.N. Conference on Environment and Development, ¶ 38.8 of Agenda 21, U.N. Doc. A/CONF.151/26/Rev. 1 (June 14, 1992). *See also id.* ¶ 38.41, Chapter 38 which is entitled "international institutional arrangements."

[168] Margaret A. Young, Trading Fish, Saving Fish: The Interaction Between Regimes in International Law 154–186 (2011) with further references.

[169] *Id.* at 255–56.

[170] *Id.* at 279–80.

Importantly, the interaction of regimes should be conceived of not as a managerial problem but as a political issue. The quest for respect of the mentioned procedural principles has been disparaged as a part of an inevitably hegemonizing strategy employed by the protagonists of one regime (e.g., trade) over another (e.g., species protection) to falsely represent that regimes' objectives as universal, in order to swallow up the competing ones.[171] But this is a one-sided interpretation of the phenomenon. To the contrary, the principles of inclusion and transparency[172] are precisely apt to counteract the dominance of that regime which is in political terms more powerful than the competing one. This leads to the issue of politics.

10. Politicization

An important concern in the fragmentation debate is the ostensible lack of an "international *political* society." "[T]he various regimes or boxes—European law, trade law, human rights law, environmental law, investment law and so on,"—pursue what Martti Koskenniemi has called "managerialism":

> Each regime understood as a purposive association and each institution with the task of realizing it. There would be nothing irregular here if that process were controlled by law emanating from *something like an international political society* determining the jurisdiction of each regime. . . . But there is no global legislative power, no world government under which the WTO could be seen like a global ministry of trade, the Kyoto process as activities of a global environmental ministry or trials of war criminals as something carried out by a global executive arm. . . . *Differentiation does not take place under any single political society*. Instead it works though *a struggle in which every interest is hegemonic*, seeking to describe the social world through its own vocabulary so that its own expertise and its own structural bias will become the rule.[173]

From this perspective, "managerialism" (or "executivism," or "functionalism") seems bad, first, because it does not contemplate the common good of the *whole* society, and second because decisions and reactions are dictated by a putative "logic of functions."

Others have, inversely, highlighted the "political" cause of fragmentation, namely its (again "hegemonic") exploitation by powerful states (see Section 2.2.). Along this line it could be said that the specific lines of fragmentation and unity have "*ideological markings*." Attempts to unify international law would only "alter the terms by which difference is already expressed and articulated and refragment the terrain along different lines"[174] (and thus merely express different politics).

A third variant of the topic of "politics" emerged in correlation to the focus of the debate on international courts and their possibly diverging case-law. Courts are often depicted as "unpolitical" actors or as veiled political actors without the appropriate

[171] Martti Koskenniemi, *Hegenomic Regimes*, *in* Regime Interaction in International Law, *supra* note 38, at 320–321.

[172] Transparency in International Law (Andrea Bianchi & Anne Peters eds. 2013).

[173] Martti Koskenniemi, *International Law: Between Fragmentation and Constitutionalism*, The Australian National University ¶¶ 12–14 (Nov. 27, 2006), http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf (emphasis added).

[174] Craven, *supra* note 44, at 34.

legitimacy for making politics. From that perspective, both the culpability of courts for any fragmentation, and the hopes placed on them for de-fragmentation efforts seem to unduly depoliticize the processes. The argument then would be that deep normative conflicts arising from the fragmentation of international law could and should be resolved "politically" (by the global lawmakers which are still mainly the states) and not "technically" (by international courts and tribunals).[175]

Against the background of these diverse and even contradictory claims about fragmentation and politics which suffer from a lack of specification of what is meant with the ambiguous terms "politics" and "political," I submit that the process of fragmentation has usefully brought politics back in[176]—it has led to a *politicization* of international legal processes. Politicization is here understood as a process through which certain issues become objects of public contention and debate.[177] Politicization in and of the international or transnational realm starts from the perception that choices can and must be made (as opposed to purely "automatic" reactions) about the appropriate collective action, institutions, and procedures to regulate the social condition and shared problems.[178] Because politicization introduces new demands for resources, justice, or recognition, the process is inevitably *contestatory*. Contestation refers to "activities that resist political and theoretical claims to final, universal, or absolute solutions to political dilemmas."[179]

The crucial observation now is that regime collisions typically give rise to processes of political contestation.[180] When, for example, the rules of free trade collide with rules on the protection of natural resources, the proponents of one regime resort to fundamental principles in order to make their case before a broader public.

> "Contested collisions" thus force the actors concerned to refer to fundamental values and basic principles if they want to make an impact on public discourse . . . the implicit logic of regime collisions tends to induce the actors towards "going public."[181]

More even, clever arbitrators and judges will anticipate the risk of public critique and will try—at least in rhetorical terms—to take on board the competing concerns.[182] For this reason, "underdog regimes" which—due to the uneven judicialization of the subfields of international law—cannot compete on an equal footing with others (for example, the international regime of environment protection which is not equipped

[175] Study Group of the Int'l Law Comm'n, Rep. of May 2006, *supra* note 3, ¶ 484. The critique of the (relatively) powerful courts unmatched by a democratic lawmaking or law-correcting process has, though implicitly, reclaimed an international political process that should be *democratic* in a stronger sense than it is now.

[176] *See similarly* Cohen, *supra* note 53.

[177] Craig Calhoun, "Politicization", *in* Dictionary of the Social Sciences 369 (Craig Calhoun ed., 2002).

[178] *Cf.* Michael Zürn, *The Politicization of World Politics and its Effects: Eight Propositions*, 6 Eur. Pol. Sci. Rev. 47–71 (2014).

[179] Lida Maxwell, *Contestation*, *in* 2 The Encyclopedia of Political Thought 738 (Michael T. Gibbons et al. eds., 2015).

[180] Stefan Oeter, *Regime Collisions from a Perspective of Global Constitutionalism*, *in* Contested Regime Collisions, *supra* note 51, 21.

[181] *Id.* at 36.

[182] *Id.* at 36–37.

with a specialized tribunal or court) typically go public. They mobilize sympathetic publics and thereby force also the other side (e.g., the protagonists of free trade) to argue its case on a principled basis.[183] Ironically, such resort to principles and to the common good can be seen as an important source of constitutionalization.[184]

11. Conclusions

As it is typical for the evolution of the law and the accompanying discourse, we have been witnessing a dialectical process: The initial enthusiastic greeting of the explosion of issue-areas and the flowering of new legal instruments and institutions was followed by a fear of fragmentation which is now, in a third phase, tempered by a sober analysis of the risks and opportunities of fragmentation (*recte* refinement)—by its "normalization."[185]

Arguably, the perception of fragmentation as a problem for international law grew out of a misguided assumption that international law must be fully coherent to be effective and legitimate. The subsequent more neutral analysts then spoke of a "widening and thickening of the context of international law,"[186] and of a "more diverse" international law.[187] The resulting state of international law was (appropriately) described as an "ordered pluralism,"[188] as a "*unitas multiplex*,"[189] or as "flexible diversity."[190]

Such diversity should be welcomed as manifesting a determination of law entrepreneurs and the capacity of international law to address global problems. The emergence of special fields within international law has been an adequate response to the complexification of global society. The risk of exploitation by states with huge personal resources to negotiate and manage the multiple regimes seems inevitable and must be tolerated.

We have seen that law-appliers (and to a lesser extent already the lawmakers) are pursuing pragmatic and "harmonizing" approaches. Sections 5–8 surveyed the use of procedures and mechanisms to coordinate the working of specialized international legal bodies, to reconcile diverging rationales of the special branches of international law, and also some maxims for resolving normative conflicts. Overall, "the tools needed to secure the coherence and integration of the diverse international law of today are all at hand."[191] Importantly, traditional mechanisms of ordering (such as hierarchy) have been largely replaced by new mechanisms of stabilization.

[183] *Id.* at 40.

[184] *Id.*

[185] Tomer Broude, *Keep Calm and Carry on: Martti Koskenniemi and the Fragmentation of International Law*, 27 Temple Int'l L. & Comp. L.J. 279, 280 (2013).

[186] Higgins, *supra* note 55, at 792.

[187] James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law*, 365 Hague Academy Int'l L. 228, ¶ 394 (2013).

[188] Delmas-Marty, *supra* note 5.

[189] Prost, *supra* note 11, at 191.

[190] Rainer Hofmann, *Concluding Remarks*, *in* Unity and Diversity in International Law 491 (Andreas Zimmermann & Rainer Hofmann eds., 2006).

[191] A Farewell to Fragmentation, *supra* note 4, at 12.

What is now needed is a continuous improvement of the strategies of coordination of different legal fields and levels of law, a refinement of the techniques for the avoidance of conflict, and clever mechanisms for resolving the unavoidable ones, in the absence of a clear normative hierarchy. Also, the relevant actors must be willing "to justify interpretations of regional, global, or relevant domestic law in general rather than parochial terms,"[192] and to internalize outside perspectives.

Accepting that "[t]here is no God's Eye Point of view that we can know or usefully imagine,"[193] then the plurality of the view-points of actors involved in global governance need not only be seen as inevitable, but may even be appreciated as beneficial. Espousing such a perspectival pluralism in turn suggests qualifying the plurality of institutions and of their legal acts, the policy results, frictions, and conflicts created by the multiplicity of sites, actors, and acts, no longer as "fragmentation" but as a *refinement* of international law. For example, rather than considering the ICTY Appeals Chamber *Tadič* decision on jurisdiction as a hallmark of fragmentation, because the ICTY here asserted that "[i]n international law, every tribunal is a self-contained system,"[194] it should be cherished that this decision has contributed to the amelioration of UN law by subjecting the UN Security Council to legal limits.[195]

Related to the shift of episteme lying in the shift of terminology, and equally important, is the espousal of a pluralism of values. The realization of a stark value diversity among different international institutions had initially given rise to concern for the legitimacy of the international legal order as a whole, once the belief in state sovereignty as the necessary and sufficient basic principle of international law had got lost. The fragmentation debate grew out of this concern over legitimacy deficits arising from internal contradictions and norm conflicts, and the coordinating procedures and devices which are currently developed are at least implicitly addressing this concern, too.

Overall, the debate has turned around international law's legitimacy—in the sense of an external standard of propriety and fairness. At the same time, a broad range of views about the content of that standard, ranging from internal consistency overstate equality to respect for human rights persists. Even democratic principles could and in my view should be taken as a standard of legitimacy of the international legal order, but this standard tends to be neglected as a result of the dominance of international courts in operating the integration of the various regimes. While some strands of the debate have in an unhelpful way glossed over, denied, or depoliticized conflicts over values, principles, and priorities among participants in the global legal discourse, the lasting achievement of the debate

[192] Cohen, *supra* note 78, at 73.

[193] Hilary Putnam, Reason, Truth and History 50 (1997) (1981). Putnam continues: "[T]here are only the various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve." (*id.* at 50).

[194] Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[195] *Id.* ¶¶ 26–28.

has been to exactly pinpoint the politics that are at stake. The lens of "refinement" allows accepting and reassessing diversity, conflict, and even contradiction as a positive condition which manifests and facilitates the realization of the values of critique and contestation within international law.