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From Fragmentation to Constitutionalization

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From Fragmentation to Constitutionalization

Harlan Grant Cohen*

Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.

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I. HUMAN RIGHTS LAW’S IMPERIAL AMBITIONS?

One of the most compelling storylines of this symposium, *The Global Impact and Implementation of Human Rights Norms*, is that of the meteoric rise of human rights law in importance, relevance, and force. In under a century, human rights law has expanded its reach to labor, the environment, intellectual property, corporate governance, and armed conflict. Appeals to human rights law, human rights frameworks, and human rights language now seem ubiquitous.

* Associate Professor of Law, University of Georgia School of Law. Thank you to Linda Carter for organizing the Symposium on *The Global Impact and Implementation of Human Rights Norms*, to Omar Dajani for including me on “The Impact of a Wider Dissemination of Human Rights Norms: Fragmentation or Unity?” panel, and to everyone at the University of the Pacific, McGeorge School of Law who helped make the symposium so successful. Thank you also to Ryan Tuck and Jennifer Pridgeon for their invaluable research assistance.

What should we make of this rapid expansion? To some, human rights law's rise is a source of optimism.¹ They see its spread into other areas of law as the "humanization" of international law.² Human rights law can provide a meta-narrative, a set of unifying rules and principles that can stitch together a fragmenting international legal system.³ Others, though, are less sanguine.⁴ To them, human rights law's imperial ambitions are a potential threat to international law.⁵ Many areas into which human rights law has expanded are already governed by longstanding, complex legal regimes, which may have already developed their own frameworks for balancing various rights and responsibilities.⁶ Human rights law is seen as an unnecessary, unwelcome intruder into these areas; it seeds confusion into established law and threatens even greater fragmentation of the legal order.⁷

Is human rights law a source of fragmentation in international law? Can human rights law be a source of unity? Although it may initially seem paradoxical, I will suggest that the answer to both of these questions is yes. In this short essay, I will make two broad arguments. First, the bad news: I will argue that there are real tensions between human rights law and other areas of international law, and that these tensions both contribute to and are reflective of a broader fragmentation taking place within the international legal system. Moreover, I will argue that the conflicts between human rights and other areas suggest that the fragmentation runs much deeper and presents more serious challenges for international law than is normally assumed. What human rights law demonstrates is that it is not only the law that is fragmenting, but the legal community itself. There is good news, however: my second argument is that even as it contributes to international law's fragmentation, human rights law may actually hold the key to constitutionalization. Although human rights law may not be able to undo fragmentation or will it away, it can nonetheless provide a menu of techniques—a blueprint—for a constitutional conflicts regime that might at least manage an already fragmented international law world.

1. See Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959, 964 (2009).

2. *Id.*

3. See *id.* at 964-65 (citing Ernst-Ulrich Petersmann); see also Ruti Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 FORDHAM L. REV. 667, 670 (2008).

4. See Teitel & Howse, *supra* note 1, at 964, 966.

5. See *id.* at 966.

6. See *id.* at 667; Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 52, 53 (2010).

7. See Corn, *supra* note 6, at 54.

II. THE FACES OF FRAGMENTATION

Before getting too deep into human rights law's role in the fragmentation of international law, a fuller discussion of the meaning of fragmentation is in order. What is fragmentation? What is it that is fragmenting?

The basic account of fragmentation is by now familiar to international lawyers. As international law has expanded, specialized bodies of law—international environmental law, international human rights law, international investment law, international criminal law—and specialized courts, tribunals, and expert bodies have emerged. Almost inevitably, there have been areas of overlap, and these specialized areas have come into conflict over what international law means or requires. Human rights law has played a major role in this discussion. Many of the most prominent conflicts over international law have pitted human rights law against other areas of international law. Examples include human rights law being pitted against the international trade regime in conflicts over the availability of affordable medicines,⁸ against international investment law in conflicts over development and indigenous rights,⁹ and against the law of armed conflict (“LOAC”) in conflicts over the legality of targeted killings and proper treatment of detained suspected terrorists.¹⁰ Further, human rights law seems itself in constant danger of fragmenting, with multiple broad regional regimes interpreting similar treaties,¹¹ state courts interpreting their obligations under both international law and state constitutions,¹² and a variety of treaty bodies and rapporteurs with overlapping mandates.¹³

8. See Carmen Otero García-Castrillón, *An Approach to the WTO Ministerial Declaration on the TRIPS Agreement and Public Health*, 5 J. INT'L. ECON. L. 212, 212-13 (2002) (“Essentially, developing countries aimed at a recognition of freedom to adopt measures on public health grounds, particularly on access to medicines, while developed countries instead pursued assurances that the rights and duties under the [TRIPS] Agreement were not devalued.”).

9. See generally *Amazon Defense Coalition: Ecuador Plaintiffs Appeal U.S. Court Decision on Arbitration*, BUS. WIRE (Mar. 18, 2010, 11:45 AM), <http://www.businesswire.com/news/home/20100318006007/en/Amazon-Defense-Coalition-Ecuador-Plaintiffs-Appeal-U.S.>

10. Marko Milanovi, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69 (2009); Corn, *supra* note 6, at 70; Ruth Wedgwood, *Combatants or Criminals?: How Washington Should Handle Terrorists*, 83 FOREIGN AFF., May-June 2004, at 126; see also Inter-Am. Comm'n H.R., *Decision on Request for Precautionary Measures (Detainees in Guantanamo Bay, Cuba)*, Mar. 12, 2002, 41 I.L.M. 532, 532-33 (2002). See generally Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. (forthcoming 2012).

11. Compare Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, with International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 1976.

12. See, e.g., generally *United States v. Burns*, [2001] S.C.R. 283 (Can.) (on extradition to death penalty state); *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC) (S. Afr.) (on right to housing).

13. See, e.g., Secretariat, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, 8, U.N. Doc. HRI/MC/2006/2, (Mar. 22, 2006), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=HRI/MC/2006/2>.

The recognition of this reality, and the confusion over what to do about it, has led to a lot of handwringing. Over the past ten years, the fragmentation of international law gathered significant attention. Reams of articles have been written,¹⁴ a myriad of conferences have been organized,¹⁵ and the International Law Commission (“ILC”) has even studied the problem and produced a report.¹⁶ This attention has not necessarily made the problem clearer. In fact, the more we talk about it, the more instances of fragmentation we find all around us, the less clear it gets what we’re actually talking about.

Figuring out what to do about fragmentation, however, requires greater clarity. We need a more precise account of the various phenomena that may be going on. What exactly are we talking about when we discuss the fragmentation of international law? What is it that is fragmenting? In fact, there are at least three different types of fragmentation discussed in the fragmentation literature: (1) Fragmentation of Interpretation or Jurisdiction, (2) Fragmentation of Regulation, and (3) Fragmentation of the Legal Community.

A. *Fragmentation of Interpretation or Jurisdiction*

“Fragmentation of Interpretation” or “Fragmentation of Jurisdiction” is perhaps the most straightforward version of the conflicts arising from the expansion of international law into new areas. In this type of fragmentation, a single body of law is interpreted differently by different bodies, tribunals, or courts.¹⁷ Problems arise when each entity has or can claim jurisdiction over the

14. See, e.g., generally Sahib Singh, *The Potential of International Law: Fragmentation and Ethics*, 24 LEIDEN J. INT’L L. 23 (2011); REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION, (Margaret A. Young ed., 2012); Margaret A. Young, *Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law*, 8 WORLD TRADE REV. 477 (2009); Teitel & Howse, *supra* note 1; Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law*, 1 EUR. J. LEGAL STUD. 1 (2007); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT’L ECON. L. 273, 366 (2006); Mario Prost, *All Shouting the Same Slogans: International Law’s Unities and the Politics of Fragmentation*, 17 FIN. Y.B. INT’L L. 131 (2006); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 970 (2004); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2004); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 449-53 (2003); Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 809 (1999).

15. See, e.g., Symposium, *The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems*, 41 N.Y.U. J. INT’L L. & POL. 755 (2009); Symposium, *Diversity or Cacophony?: New Sources of Norms in International Law*, 25 MICH. J. INT’L L. 845 (2004); Symposium, *The Proliferation of International Tribunals: Piecing Together The Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 679 (1999).

16. Rep. of the Study Group of the Int’l L. Comm’n, 58th sess, May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 [hereinafter ILC Report].

17. Martti Koskeniemi, *Fragmentation of International Law*, INT’L L. COMMISSION, http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf (last visited Mar. 8, 2012).

same dispute and no legal body has effective authority to overrule the others.¹⁸ Examples might include the disagreements between the International Court of Justice (“ICJ”) and the Israeli Supreme Court over the legality of Israel’s West Bank wall/barrier/fence,¹⁹ between the ICJ and the United States (“U.S.”) Supreme Court over the proper interpretation of the Vienna Convention on Consular Relations in *Avena*²⁰ and *Sanchez-Llamas*,²¹ and between the ICJ and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) over the proper rules for attribution of acts to a state in an armed conflict.²²

B. Fragmentation of Regulation

A second type of fragmentation, “Fragmentation of Regulation,” occurs when different legal regimes, each with their own bodies of rules, seem to govern the same conduct.²³ Sometimes these regimes are quite similar, as might be the case with two regimes regulating food safety.²⁴ Sometimes the regimes might use similar sounding concepts but with somewhat different meanings.²⁵ Examples include the concept of proportionality in human rights law and international humanitarian law,²⁶ and the concepts of due process in human rights law and denial of justice in international investment law.²⁷ Sometimes these regimes may have completely conflicting philosophies. This is arguably the problem underlying disputes between international trade and human rights law over the production of generic drugs. Trade law, via the Trade-Related Aspects of

18. *Id.*

19. *Compare* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 201-03 (July 9), *with* HCJ 2056/04 Beit Sourik Village Council v. Government of Israel 58(5) PD 807 [2004] (Isr.), *and* HCJ 7957/04 Mara’abe v. Prime Minister of Israel 58(2) PD 393 [2005] (Isr.).

20. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 71-73 (Mar. 31).

21. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347-50 (2006).

22. *Compare* Prosecutor v. Tadić, Case No. IT-94-I-T, Judgment, ¶ 131 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (setting out the “overall control” test), *with* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, 64-65 (June 27) (setting out an “effective control” test), *and* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43 (Feb. 26) (reasserting “effective control test after Tadić”).

23. *See, e.g.*, Koskeniemi, *supra* note 17.

24. *Compare* Jacob Færgemand, International Organization for Standardization [ISO], *The ISO 22000 Series: Global Standards for Safe Food Supply Chains*, 4 (May–June 2008), available at http://www.iso.org/iso/iso22000_ims_08-3.pdf (standards set by the ISO on food safety), *with* Welcome, CODEX ALIMENTARIUS COMMISSION, http://www.codexalimentarius.net/web/index_en.jsp (last visited Mar. 9, 2011) (standards set by the Alimentarius Commission on food safety).

25. *See, e.g.*, Koskeniemi, *supra* note 17.

26. *See generally* Criddle, *supra* note 10.

27. *See* Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation* 18 (U.C. Davis Legal Studies Research Paper Series, Research Paper No. 243, 2011).

Intellectual Property Rights (“TRIPs”) Agreement,²⁸ focuses on protecting intellectual property and the incentive to innovate, while human rights law focuses on the health of individuals in developing states.²⁹ This may also be the case with disagreements between investment law and human rights law or environmental law. The former focuses on protecting investors’ rights against expropriation, whereas the latter focus on protecting citizens against unregulated or under-regulated corporate actions.³⁰ The problem in these examples is that regulated actors may face conflicting demands from these different regimes. Without some clear relationship between them, it may be impossible to determine which rules to follow.

These first two types of fragmentation suggest that conflicts could be solved through doctrine. The right jurisdictional rules,³¹ rules of treaty interpretation,³² or doctrinal tweaks³³ might resolve any conflicts over the meaning or application of the rules. This was, in fact, the approach adopted by the ILC in its eventual report on fragmentation.³⁴ The battles between human rights law and other areas, however, suggest the possibility of a third, deeper version of fragmentation.

28. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 at pmb1. (1994); G.A. Res. 60/251, ¶¶ 3-5, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

29. See Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT’L L. & POL. (forthcoming 2012) (manuscript at 38) [hereinafter *Finding, Part II*]. See generally García-Castrillón, *supra* note 8, at 212 (describing debates over balance of interests in key trade documents); Steve Charnovitz, *The Legal Status of the Doha Declarations*, 5 J. INT’L ECON. L. 207, 207 (2002); James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J.L. & TECH. 291, 291 (2002).

30. See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1591-92 (2005) (“Investment treaties do not prevent Sovereigns from passing legislation related to health, safety, and welfare. Rather, these treaties provide incentives for Sovereigns to act in a manner that does not violate public international law and is free from inappropriate expropriation, discrimination, and the like. Should they violate the obligations they have undertaken, Sovereigns pay compensation for the resulting harm.”). See generally United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev/1, reprinted in 11 I.L.M. 1416 (1973); United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/5/Rev.1 (June 13, 1992), reprinted in 31 I.L.M. 874 (1992).

31. See, e.g., Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. INT’L L. 1159, 1167 (2004) (suggesting a broader role for the ICJ); see also Franck, *supra* note 30, at 1617-25 (arguing for investment arbitration court of appeals to establish clear precedents that arbitral tribunals can then follow).

32. See, e.g., Jörg Kammerhofer, *Systemic Integration, Legal Theory and the ILC*, 19 FINNISH Y.B. INT’L L. 157 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534086 (discussing the technical approach of the international law commission).

33. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 762 (2001) (describing the problem of instant custom and suggesting a way to reconcile it with international law doctrine).

34. ILC Report, *supra* note 16, at 244.

C. Fragmentation of Legal Community and “Legitimacy Rules”

As I have developed in other articles,³⁵ legal systems can be seen as a function of two types of rules. The first type, legitimacy rules, are deeply internalized rules, often focused on process, that provide standards against which other purported rules in the system will be judged.³⁶ In international law, the legitimacy rules might explain what counts as a binding agreement, what evidence is needed to legitimate a customary practice as law, or dictate when such an agreement must be followed.³⁷ A second type of rules, legitimated rules, are rules built on the foundation of these legitimacy rules.³⁸ Such rules are treated as law because they meet the standards set forth by legitimacy rules.³⁹ In international law, agreements that meet internalized standards of formality, determinacy, assent—traditionally, treaties and custom—are legitimated rules.⁴⁰ Seen through this lens, a legal community can be seen as a group that shares a set of legitimacy rules. It is that shared understanding of what counts as law that allows it to cohere and to have a shared sense of what is lawful and what is unlawful.

At first glance, conflicts between human rights and other areas may look like conflicts over interpretation—debates over production of generic drugs might turn on the proper reading of the TRIPs Agreement and the Doha Declaration,⁴¹ or conflicts over regulation—whether human rights standards or international humanitarian law standards govern counterinsurgencies and counterterrorism actions.⁴² However, if we look more closely at what’s really being debated, it seems that the arguments are over something deeper and more fundamental.

35. See generally *Finding, Part II*, *supra* note 29; Harlan Grant Cohen, *Can International Law Work? A Constructivist Expansion*, 27 BERKELEY J. INT’L L. 636 (2009) [hereinafter Cohen, *Can International Law Work?*]; Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65 (2007) [hereinafter *Finding International Law*].

36. *Finding International Law*, *supra* note 35, at 71.

37. *Finding, Part II*, *supra* note 29, at 12; *Finding International Law*, *supra* note 35, at 71.

38. *Can International Law Work?*, *supra* note 35, at 669; *Finding International Law*, *supra* note 35, at 71.

39. There may also be some substantive rules that are themselves directly internalized by actors in the legal system and thus, do not rely on legitimacy rules to be treated as law. In international law, prohibitions on slavery and genocide might fall into such a category. See *Finding, Part II*, *supra* note 29, at 11; *Can International Law Work?*, *supra* note 35, at 669.

40. As I explain elsewhere, there is fluidity between these two categories. A rule of international humanitarian law, e.g., the prohibition on wanton destruction, might be treated as law by some actors in the international system because they have directly internalized that norm. Others though may not have internalized that rule but still treat it as law because it is embodied in an agreement, the Geneva Convention, that meets their internalized standards of legitimacy. For a deeper discussion of the relationship between these types of rules, see *Finding, Part II*, *supra* note 29, at 12.

41. See generally García-Castrillón, *supra* note 8; Charnovitz, *supra* note 29; Gathii, *supra* note 29.

42. See Milanović, *supra* note 10, at 125; Corn, *supra* note 6, at 77-78; Comm’n on Human Rights, Rep. on its 60th Sess., Dec. 22, 2003, U.N. Econ. & Soc. Council [ESCOR], ¶ 29, U.N. Doc. E/CN.4/2004/7 (Mar. 24, 2004). See generally Criddle, *supra* note 10.

Traditionally, in international law, the legitimacy rules would have included the list of sources in Article 38 of the International Court of Justice's Statute—specifically, treaties, customs, and general principles⁴³—as well as their underlying basis in state consent.⁴⁴ It is not at all clear, however, that these legitimacy rules are still shared with human rights law. Across human rights doctrine, the role of consent seems minimized. States appear to have less room to calibrate their consent by reserving to or withdrawing from treaties; a *la carte* consent to treaties no longer appears to be an option.⁴⁵ State practice—the theoretical implied consent behind customary international law—seems to be of diminishing relevance; state statements and other traditional elements of *opinio juris* appear to be playing a greater role.⁴⁶ Overall, human dignity, as opposed to state consent, increasingly appears to be the touchstone of human rights law.⁴⁷

Thus, the conflicts between human rights law and traditional international law seem to run much deeper than mere disagreements over interpretation. On the contrary, it appears that the community of human rights law no longer accepts the same legitimacy rules as traditional international law, suggesting that human rights law has emerged as a separate legal community. Nor does human rights law appear to be alone. This observation could be expanded to other areas, including investment law, international criminal law,⁴⁸ and international environmental law.⁴⁹

43. Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Article 38 lays out the set of sources the ICJ should apply in deciding the cases before it but is often treated as a broader authoritative statement of international law's sources. See MARK W. JANIS & JOHN E. NOYES, *CASES AND COMMENTARY ON INTERNATIONAL LAW* 20–21 (2d ed. 2001) (“An ordinary starting point for international lawyers from most any part of the globe when thinking about the formal sources of international law is Article 38 of the Statute of the International Court of Justice.”).

44. See, e.g., Duncan B. Hollis, *Why State Consent Still Matters--Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 141 (2005) (“[M]ost international lawyers continue to explain how these rules constitute law by referring to the notion that ‘the general consent of states creates rules of general application.’” (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4 (6th ed. 1995))).

45. See *Finding, Part II*, *supra* note 29, at 21–23; U.N. Human Rights Comm., *General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenants or the Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, para. 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994), available at <http://www.unhcr.org/refworld/docid/453883fc11.html>; U.N. Human Rights Comm., *CCPR General Comment No. 26: Continuity of Obligations*, para. 5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997), available at <http://www.unhcr.org/refworld/docid/453883fde.html>.

46. *Finding, Part II*, *supra* note 29, at 19.

47. For a deeper discussion of the emerging legitimacy rules of human rights law, see *supra* at Part II.A.

48. *Id.* at 29–31.

49. Daniel Bodansky, *Does One Need to Be an International Lawyer to Be an International Environmental Lawyer?*, 100 AM. SOC'Y INT'L L. PROC. 303, 304 (2006).

III. FACING FRAGMENTATION

If this diagnosis is correct—if human rights law has in fact emerged as a different legal community with different notions of legitimacy and legitimate lawmaking—a different course of treatment is in order. The sorts of doctrinal tweaks and jurisdictional rules suggested by the ILC report assume that conflicting interpretations are arising within a single legal system.⁵⁰ In essence, such suggestions assume that the best analogy for human rights and trade are contracts and tort.⁵¹ Both areas of law arise within a single larger legal system, and that legal system can provide the rules for mediating conflicts between them.

To the extent though that we're talking about different legal communities, to the extent these disputes go to questions about legitimate rulemaking—the who and how of international law—the relationship between California law and Jewish law is the better analogy.⁵² In such cases, there is no shared doctrine that might authoritatively resolve disputes between them. The governing framework in such situations is conflicts of law;⁵³ resolving disputes requires finding ways to mediate between the demands of different legal communities.⁵⁴

IV. TOWARDS A CONSTITUTIONAL CONFLICTS REGIME

So where does this leave us? Interestingly, it is here, in the recognition of international law's dissolution into separate communities, that fragmentation's relationship to another popular topic in international law, constitutionalization, becomes clear. Like fragmentation, the constitutionalization of international law has become something of an academic obsession, with a spate of books and conferences on the topic.⁵⁵ Also like fragmentation, the term means a variety of different things to different people and may describe a variety of different phenomena within international law.⁵⁶ But at least one of the roles constitutions

50. See ILC Report, *supra* note 16, at 30-32.

51. See *generally id.* at 65-101.

52. See *Finding, Part II, supra* note 29, at 44.

53. See *id.* at 40.

54. See *id.*

55. See, e.g., *generally* RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); Symposium, *Global Constitutionalism from an Interdisciplinary Perspective*, 16 IND. J. GLOBAL LEGAL STUD. 385 (2009).

56. Jeff Dunoff and Joel Trachtman's taxonomy of constitutionalization, for example, includes three functions constitutional norms play and seven mechanisms used to implement them. RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 55, at 10-24. See Daniel Bodansky, *Is There an International Environmental Constitution?*, 16 IND. J. GLOBAL LEGAL STUD. 565, 567-73 (2009) (asking what the term means and suggesting that it may confuse more than clarify).

play is as a conflicts regime, articulating how conflicts between actors, norms, or levels of government in a regime are to be decided.⁵⁷

Human rights law may be able to help here. Constitutions resolve these conflicts in a number of ways, and human rights law has experimented with many of them. As mentioned above, human rights law has long faced the potential for fragmentation within its own field and has had to find its own ways to manage its complex community of communities—broad international treaties and treaty bodies, regional regimes, and national courts, to name a few.⁵⁸ Human rights law's experiments may prove useful in constructing a conflicts regime for international law. In fact, many of the techniques developed within human rights law have started to gain traction in other areas of international law.⁵⁹ Three techniques are of particular interest in resolving conflicts between different areas of international law: (1) Constitutional Comity Rules, (2) Constitutional Hierarchy Rules, and (3) Constitutional Abstention Rules.

A. Constitutional Comity Rules

One way constitutions resolve conflicts within a regime is by dictating when certain actors will have to grant comity to the decisions of other actors. The Full Faith and Credit Clause of the U.S. Constitution⁶⁰ is an example of such a rule, one that dictates the comity one state within the federal system must grant to the decisions of another. In human rights law, such constitutional comity rules have taken the form of requirements to exhaust local remedies⁶¹ and doctrines like margins of appreciation,⁶² subsidiarity,⁶³ and complementarity.⁶⁴ Each of these rules is designed to grant a certain amount of space to other actors (usually states) to operate in their own way.⁶⁵

57. See, e.g., generally RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 55; KLABBERS ET AL., *supra* note 55; Symposium, *Global Constitutionalism from an Interdisciplinary Perspective*, *supra* note 55.

58. See *supra* notes 8-13.

59. See *infra* notes 67-69.

60. U.S. CONST. art. IV § 1.

61. See Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1, 7 (2003) ("Consequently, major human rights instruments, both global and regional, have incorporated the general international law rule of exhaustion of local remedies.").

62. See, e.g., Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 450-66 (2001).

63. See, e.g., generally Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 42-43 (2003).

64. See, e.g., Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 870 (2002).

65. See RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 55, at 32-35 (describing the constitutional roles played by such doctrines).

These rules, originally developed by bodies like the European Court of Human Rights,⁶⁶ have started to trickle into other areas of international law. A number of scholars have argued that states should be granted a margin of appreciation on implementing intellectual property rules⁶⁷ or investment obligations,⁶⁸ and Yuval Shany has argued that margins be applied by international courts more generally.⁶⁹ One can imagine bodies responding to the broader problem of fragmentation by adopting such an approach, essentially granting some level of deference to other regimes in their interpretation of specific issues.⁷⁰

B. Constitutional Hierarchy Rules

A second way that constitutions can resolve conflicts is through constitutional hierarchy rules. Such rules operate as trumps, taking the form of supremacy clauses that dictate when certain rules will prevail over others or of fundamental rights that cannot be violated.⁷¹ In human rights law, *jus cogens* and non-derogable rights play this sort of role, establishing basic, impassable boundaries around state discretion.⁷²

Human rights law has also experimented with importing such rules into other systems to create a common baseline across international and national law. The most common way in which this has taken place has been through the human-rights-influenced interpretation of state constitutions⁷³ and other forms of

66. See Donoho, *supra* note 62, at 450-66. See generally *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737 (1976), 24 Eur. Ct. H.R. (ser. A) (1976).

67. See Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355, 388 (2007); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 404-05 (1998).

68. See William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 333-44 (2010).

69. See generally Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 907 (2005).

70. Though applying such rules would hardly be without problems. See *Finding, Part II*, *supra* note 29, at 45-46.

71. See RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 55, at 19-20.

72. See KLABBERS ET AL. *supra* note 55, at 10-11, 26 (discussing views that attributed constitutional status to *jus cogens* norms).

73. See, e.g., *State v. Makwanyane and Another* 1995 (3) SA 391 (CC) at 22-27 (S. Afr.) (invoking international human rights in interpreting South African constitution); *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) 8-12 (S. Afr.) (same); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (invoking international human rights in interpreting the U.S. Constitution); *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (same); see also KLABBERS ET AL., *supra* note 55, at 10-11 ("A court in, say, Switzerland proclaiming the prohibition of torture is a matter of *jus cogens* may not intend to be, somehow, constitutional; but it could not reach this judgment without the earlier attempts by international lawyers to constitutionalize international law through the creation, promulgation, and endorsement of the concept of *jus cogens*.").

transnational judicial dialogue.⁷⁴ But there are examples of human rights law's influence across a variety of regimes. International investment tribunals, for example, have looked to human rights law to help interpret "denial of justice" guaranties in investment treaties.⁷⁵ Further examples of the importation of human rights baselines can be found in international humanitarian law,⁷⁶ international criminal law,⁷⁷ and international trade.⁷⁸

The key to the success of these trans-substantive forays has been a willingness to accept the imperfect translation from human rights to other areas, to accept that the careful constructions of human rights bodies will be misunderstood, misapplied, and mutated by other bodies, tribunals, and courts. This might seem odd. Why shouldn't human rights law demand fidelity to the specific rules it has developed?

As noted before, when talking about human rights law and other areas of law, we are actually talking about different legal regimes with different notions of legitimate lawmaking. In a sense, the relationship between human rights law and trade law is best analogized to the relationship between U.S. and French law; in either case, arguments for a particular rule developed in one system, based on that system's doctrines and that system's values, are likely to ring hollow in the other system without something more. To be persuasive, arguments that a particular system should adopt a particular rule must be made using that system's logic. To borrow an example from another panel at this symposium, Americans can argue as long as they want for their version of free speech, but it is unlikely to be adopted in France until it can be translated into French. The same holds true across international law—fair trial rights need to be translated into denial of justice terms before they can influence investment law.

This may mean that norms are imperfectly translated from one community to the next. But to the extent that some common consensus can be distilled across different normative communities, that consensus can begin to form the foundation of an international constitution. Paradoxically, it is only by encouraging or accepting fragmentation—here, in terms of different interpretations of particular rules—that broader constitutional rules can emerge. Examples of this process are easy to find. A number of scholars have argued that

74. See generally Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

75. See Bjorklund & Nappert, *supra* note 27; see also Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 861-66 (2005).

76. See generally Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

77. See Cecilia M. Bailliet, *Towards Holistic Transnational Protection: An Overview of International Public Law Approaches to Kidnapping*, 38 DENV. J. INT'L L. & POL'Y 581, 601 (2010) ("The international protection of human rights is occasionally viewed as a legal basis for filing (sic) the gaps which still exist in international criminal law and also to complement international criminal law.").

78. See generally Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and 'Constitutional Justice'*, 19 EUR. J. INT'L L. 769 (2008).

human rights law's concept of human dignity has begun to appear as a trans-substantive standard across international law.⁷⁹ Ruti Teitel and Rob Howse have argued that a "humanity" norm has emerged across various areas of international law through a process of "cross-judging."⁸⁰ A similar example might be the concept of due process that has migrated from human rights to global administrative law⁸¹ and other areas. The European Court of First Instance's consideration of due process, as a potential *jus cogens* norm in the *Kadi* case concerning United Nations Security Council sanctions against individuals, is particularly notable in this regard because it shows the way such trans-substantive rules might emerge.⁸²

C. Constitutional Abstention Rules

A final type of constitutional conflicts rule forces normative conflicts into the arena of political debate by drawing strict jurisdictional boundaries between different regimes or actors. Federalism and the political question doctrine (with its basis in separation of powers) play this type of role in the U.S. context. The idea here is that certain normative or policy debates cannot or should not be resolved through legal doctrine, but instead must be resolved politically.

In human rights law, a sort of federalism might be emerging in the form of regional human rights treaties and regimes. The European Convention and Court of Human Rights; the Inter-American Convention, Commission, and Court; and the African Charter, Commission, and Court⁸³ all generally operate within their own ambit, neither reviewing nor being reviewed by each other.⁸⁴ Although each regional regime involves similar, and sometimes identical, rights and duties (though there are also significant differences), their interpretation, jurisprudence, and implementation is tied to a specific treaty with specific parties.⁸⁵ To the extent these regimes diverge over the interpretation of a similar norm,

79. See, e.g., *id.* at 771; Meron, *supra* note 76, at 267.

80. See Teitel & Howse, *supra* note 1, at 968-77.

81. Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 44 (2009) ("Several major human rights treaties specify due process rights that have been important in the review and reform of national administrative procedures affecting individuals. . .").

82. Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 E.C.R. I-6351; see also *Finding, Part II, supra* note 29, at 39-41, 44-46.

83. The African Charter on Human and Peoples' Rights is monitored by the African Commission on Human and Peoples' Rights and by a court, formerly the African Court on Human and Peoples' Rights, now the African Court of Justice and Human Rights.

84. U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS & INT'L BAR ASS'N, NO. 9, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 1 (2003).

85. See Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 522 ("International law lives with much diversity across regimes, most obviously in the willingness of different human rights bodies to interpret identical words in different texts differently, a result that flows from the aims of the regimes and the traits of the institutions.").

convergence will only happen when one regime persuades the others of the wisdom of its rule or its logic.

Outside human rights law itself, we might expect that debates between areas of international law, for example, human rights law and trade law or human rights law and international humanitarian law, will have to be resolved in these ways.⁸⁶ Courts and other interpretive bodies in each area will apply their law to the issues before them. Their success in gaining broader acceptance of their interpretations will rise and fall on the attractiveness of the rule they adopt or the persuasiveness of their reasoning. The Inter-American and European human rights bodies will have to convince the broader international community of the attractiveness of applying a human rights framework to counterinsurgency;⁸⁷ the World Trade Organization (“WTO”) will have to persuade the broader community that its rulings best balance trade and other important interests in health, environment, and human rights.⁸⁸

V. CONCLUSION

These three constitutional conflicts tools begin to point to a post-international law world in which general international law is replaced by global constitutional precepts, and in which fragmentation is not so much resolved as it is managed. Recognizing these tools, however, is only a first step. The hard question is when to choose each one of these types of rules. And while there may be some general principles—the closer the normative agreement, the more room for developing trans-substantive norms or for granting a level of comity, the less agreement, the more things may need to be resolved through politics—much more needs to be done to figure this out.

86. See *Finding, Part II*, *supra* note 29, at 47-49.

87. See generally *Isayeva, Yusupova, & Bazayeva v. Russia*, App. Nos. 57947/00, 57948/00, 57949/00, 41 Eur. H.R. Rep. 39 (2005); *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. H.R. Rep. 38 (2005); *Bámaca Velásquez Case*, Judgment of the Court Inter-Am Ct. H.R. (ser. C) No. 70, ¶ 208 (Nov. 25, 2000); *Las Palmeras Case*, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 33 (Feb. 4, 2000); *Kaya v. Turkey*, App. No. 22535/93, 2000-III Eur. Ct. H.R. 149 (2000); *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., No. 55/97, OEA/Ser.L./V/II.95, doc. 7 (1997).

88. Teitel & Howse, *supra* note 1, at 983-88.