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# Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order Symposium - The Normalizing of Adjudication In Complex International Governance Regimes: Patterns, Possibilities, and Problems

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# CROSS-JUDGING: TRIBUNALIZATION IN A FRAGMENTED BUT INTERCONNECTED GLOBAL ORDER

BY RUTI TEITEL & ROBERT HOWSE\*

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## I. INTRODUCTION

Among the most remarked trends in international relations is the increase in the number of international courts and tribunals and the greater use of such bodies to interpret and enforce international law, and to resolve disputes between states and other actors in the international system.<sup>1</sup> In general, one expects such a trend to be pleasing to supporters of international law, who have long had to deal with suspicions that international law is not really law, or at least not an effective legal system, because it lacks the routine adjudicative mechanisms characteristic of domestic systems. While this skeptical viewpoint may exaggerate or distort the extent to

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1. See Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 679 (1999) (introducing a collection of scholarship on the implications of the proliferation of international courts and tribunals).

which adjudication relative to other institutions—political, social, and economic—is responsible for the effective realization of *domestic* legal norms, or more generally their impact on behavior broadly understood, it has nevertheless dogged those who would make the case for international law as an important and influential form of legal ordering.

The mere increase in the numbers of tribunals and the frequency of their use would not itself make international law seem more like a domestic legal system, but for *qualitative* changes as well. Arbitration has long existed as a method of third-party dispute settlement in international law and there have been periods and particular regimes where resort to arbitration was frequent, and indeed more the norm than the exception. But arbitration, as it is classically understood, in itself yields neither enforcement nor interpretation with normative weight, beyond settling the dispute at hand. The shift from “dispute settlement” by arbitration as an idiom of diplomacy, a mere instrument of cooperation or coexistence among sovereigns, to a system of adjudication supposes that international “dispute settlement bodies” increasingly have the character of courts and less so that of ad hoc arbitration panels. In other words, the judges understand themselves less as playing the role of fostering compromise-building and conflict-avoidance or de-escalation in international politics, and more as rendering *justice* between the parties and building a genuine jurisprudence. However, as we shall elaborate in this article, these qualitative changes have been uneven across different areas of international law, and have not been linear or unqualified even within specific regimes.<sup>2</sup> In this sense, tribunalization cannot be adequately studied through aggregate quantitative assessment: in-depth consideration of how it has occurred within specific regimes is needed, in order to capture the qualitative dimension.

This article is intended to move the study of tribunalization beyond aggregate analysis—surveying at the surface the entire international legal landscape—while also overcoming the inability of studies of tribunalization within a single specialized or functional regime to yield generalizable conclusions

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2. For example, in the investment law area ad hoc arbitrations remain the norm, and tribunals frequently take different stands on fundamental questions of legal interpretation.

about changes in international order more broadly. The approach adopted is a collaboration between two scholars, specialists in different areas of international law, examining the trajectory of tribunalization in selected regimes, those of war and of commerce—areas that have always been pivotal in the transformation of international law. We explore a number of possible hypotheses. One possibility is that tribunalization in these regimes reflects a common trajectory or tendency in international order. Alternatively, it could be the case that tribunalization operates in a parallel but largely unconnected manner as between the regimes. Finally, it is possible that tribunalization in these regimes is acting to introduce new dissonances between them, pointing in different and perhaps conflicting normative and institutional directions.

A common narrative of tribunalization is that it signifies a shift from a power-based to a rules-based international system. Tribunalization means depoliticization.<sup>3</sup> This goes hand-in-hand with the perception or assumption of qualitative change just described. Yuval Shany has written of a “greater commitment to the rule of law in international relations, at the expense of power-oriented diplomacy.”<sup>4</sup> As we shall illustrate, a concrete examination of how tribunalization has occurred in the different regimes, and particularly its relationship to shifts in the normative substance of the law, suggests that the depoliticization hypothesis is much too simplistic. In fact, the dynamic relationship between tribunalization and shifts in normative substance has led some tribunals to become deeply entangled with politics rather than operate in isolation from or above it. This has led to a new politics of international order, where tribunals become the most evident sites of the new global politics of contestation between diverse actors: NGOs, individuals, corporations, and communities, not just states. Just as the optimistic hypothesis of tribunalization as a shift from power-based to law-based international order is too simplistic and highly misleading, so is the angst that the proliferation of international tribunals in an uncoordinated and decen-

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3. See, e.g., Ibrahim F. I. Shihata, *TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA*, 1 ICSID REV.: FOREIGN INV. L.J. 1 (1986).

4. YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 3-4 (2003).

tralized international legal order will undermine the integrity, coherence, and legitimacy of the international legal order. Here we seek to illustrate how studying specific regimes and the ways in which tribunalization operates within them yields more nuanced conclusions, given, above all, the possibility of sustained attention to the interpretative sensibilities and practices of these regimes.

## II. TRIBUNALIZATION AND THE ANXIETY OVER "FRAGMENTATION"

An obvious and dramatic flashpoint for the "fragmentation" anxiety concerning tribunalization was the pronouncement of the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the *Tadic* case, where the Court rejected the International Court of Justice's (ICJ's) interpretation of certain rules of state responsibility:

International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labor among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).<sup>5</sup>

Of course tribunalization did not *create* what the anxious have labeled "fragmentation." The decentralized and specialized work of diverse, functionally-oriented international legal regimes, run by very different technical and bureaucratic elites with their own cultures, need not be understood in terms of a specific shortfall of *international* legal order. Such a phenomenon could rather be seen as parallel to the increasing specialization and differentiation of governance functions within post-industrial capitalist democracies, for instance, a tendency frequently observed in social theory. Against this purely functionalist account of fragmentation, we urge the view that, in the case of adjudication, legitimacy depends not simply on instrumentalist considerations ("efficient" settlement of disputes) but on the commitment to legality itself. The question is

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5. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Oct. 2, 1995).

whether such a commitment can simply be defined in “proceduralist” terms—judicial independence, impartiality of decision-making, giving of reasons—or whether even these values/desiderata only gain concrete meaning in terms of some ultimate substantive conception of legitimate legality in international affairs, a concept of justice,<sup>6</sup> or at least “fairness.”<sup>7</sup> What we have in mind is the possibility of a *Grundnorm* of the international legal system that cross-cuts the differentiated functions of specialized regimes, each committed to their own form of instrumental reasoning.

In domestic legal systems, these cross-cutting values might be thought of as positivized or entrenched in the rules of the constitution, written or unwritten; these would be confided to the high or highest court for guardianship, assuring a coherent legal order. In international law, by analogy, one might imagine that the equivalent would be structural norms concerning responsibility, personality, sovereignty, territory, and jurisdiction. These norms are reflected in customary law, the “codification” work of the ILC, and the UN Charter; and here one could imagine – and we emphasize the choice of the word “imagine” – the ICJ as the guardian of this “constitution,” analogous to a domestic high or constitutional court.

It was precisely in shattering this last element of the analogy that the *Tadic* Appeals Chamber ruling represented such a flashpoint for the anxiety of fragmentation. Even structural rules such as those concerning state responsibility take on their authoritative meaning within each self-contained regime. The meaning assigned to them by what many might have imagined or fantasized as international law’s high court, the ICJ, has no special, much less predominant, normative force. Another reading of *Tadic* here is possible, one that relates to a theme that informs the first part of our analysis in this paper: There is a shift in the *Grundnorm*, or ultimate value of international legality, from sovereign state equality, where states are not subject to any higher authority, to humanity and its protec-

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6. See, e.g., ALEXANDRE KOJÈVE, *OUTLINE OF A PHENOMENOLOGY OF RIGHT* (Bryan-Paul Frost & Robert Howse trans., Rowan & Littlefield Publishers 2000) (discussing the origins and evolution of the concept of justice).

7. See generally THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) (exploring the relationship between fairness and legitimacy).

tion.<sup>8</sup> The ICJ, by avoiding humanity in its understanding of the structural rules and privileging the older *Grundnorm* (for a late example see the *Arrest Warrants* case), had conceded the *Marbury v. Madison* moment of the new “humanity law” order to tribunals such as the ICTY. One sees dim or belated recognition of the new *Grundnorm* by the ICJ in decisions such as *LaGrand*, *Bosnia v. Serbia*, and the *Security Fence* advisory opinion, which are shaped more or less adequately, by “Humanity Law.”<sup>9</sup>

### III. TRIBUNALIZATION AND FRAGMENTATION: OPTIMISTIC AND PESSIMISTIC PROGNoses

The problem of fragmentation, as exemplified or intensified by the proliferation of uncoordinated and apparently un-integrated tribunals, has given rise to what one might loosely describe as optimistic and pessimistic hypotheses concerning the possibilities for making international legal order more coherent. Let us first consider the optimistic hypotheses. One such position suggests that fragmentation can be overcome through substantive normative integration of now fragmented international regimes. This view has the advantage of illustrating why, conceptually, it is not correct to assume that the mere increase in numbers of tribunals leads to normative incoherence in international law; if these tribunals are faced with substantive law that is harmonious and complementary across different specialized international regimes, and they practice comity effectively, then fragmentation need not be the result.

Thus, according to Ernst-Ulrich Petersmann, the recognition of a certain view of “human rights” as the core value of international legal normativity—e.g. an extreme neoliberal view—allows the integration of the previously fragmented international economic and perhaps social (labor, refugee, etc.) regimes with the official “human rights” and security (UN

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8. This shift and its implications are developed *in extenso* by one of us in RUTI TEITEL, *HUMANITY'S LAW* (forthcoming 2010). The first part of this paper is derived from the argument in that manuscript.

9. *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 108 (Feb. 26); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

Charter) regimes. This does not require an institutional integration of judgment in a single higher court but rather the recognition that a common normative substance or core to these apparently disparate specialized regimes paves the way for comity and coordination among courts.<sup>10</sup> Nevertheless, the problem with this hypothesis is its radical contestability (and indeed, as one of us has argued elsewhere, the implausibility of this account in normative terms.)<sup>11</sup>

A more modest hypothesis concerning the overcoming of judicial fragmentation in international order rests on the notion that international law offers enough of a common idiom or vocabulary on what might be called procedural or generic questions (such as remedies) to allow positive conversation, interaction, and mutual influence between different tribunals. This is the argument that is made *in extenso* by Chester Brown in *A Common Law of International Integration*.<sup>12</sup> One can have rapprochement without agreement on a *Grundnorm* or general concept of justice underlying international legality. But one can be more impressed by the instances where divergences on procedures and remedies reflect underlying differences about the *Grundnorm* or simply the predominance of the functional cultures of the different regimes as self-contained specialized orders, of which there are many, than by the various examples of convergence or commonality offered by Brown. Yet Brown does establish, usefully, one important limit to the fragmentation angst, at least in its most fraught versions: Diverse courts and tribunals are capable of talking to each other. This does indicate that the *Tadic* court's statement about "self-contained systems" requires careful interpretation. As we will suggest, this statement may best be seen as a reaction to the suggestion that a tribunal must be *bound* by the rulings of another tribunal—obligated to follow those rulings as *authority* rather than to the extent persuasive, or responsive to the underlying *Grundnorm* of legality, or to the extent of the fit with the legal problem that the tribunal is required to solve and the normative structure and interpretative sensibility of the regime that

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

11. Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EUR. J. INT'L L. 945 (2008).

12. CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL INTEGRATION* (2007).



gives rise to that problem. It may not constitute a rejection of cross-judging as cross-*interpretation*. Indeed, here one might analogize to a related debate currently being waged over the parameters of the uses of comparative law in adjudication today.<sup>13</sup>

A third hypothesis, consistent with Brown's argument and perhaps deepening it at least at the explanatory level, is that international lawyers and judges constitute an epistemic community,<sup>14</sup> or that they share an epistemic community with domestic and regional jurists. Such an epistemic community or network is capable of overcoming or mitigating many axes or dimensions of fragmentation. This may not produce formal or facial comity or consistency and reconciliation across tribunals of specialized regimes, yet at the same time the outcomes at some deep level will not be seen as conflicting and fragmented when properly interpreted, reflecting as they do what is common and distinctive in the legalist's way of seeing international problems.

The pessimistic hypothesis is that the expansion of the rule of law through tribunals will simply continue to intensify incoherence and tension in the international legal system, undermining the "majesty of the law" and playing into the hands of those who are international law critics or skeptics—who may see the only clear and concrete order at the global level as the actual relationships between states, determined by the hard laws of power and interest. These critics can say: The more so-called international law there is, and the more lawyers and judges there are, the less clear and certain this purported law becomes.<sup>15</sup>

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13. See Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2590-92 (2004) (reviewing *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (Norman Dorsen et al. eds., 2003)).

14. For an attempt to treat international jurists as a kind of community, see DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* (2007) (study of the international judiciary emphasizing in part the relationship between judges on various international courts). See also ANNE-MARIE SLAUGHTER, *A NEW GLOBAL ORDER* 65-100 (2004) (discussing the significance of networks in the international legal system).

15. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

Our own take on this issue reflects our view that what is considered fragmentation is not a pathology. First of all, we question whether the actuality of international law as “law” should be determined by comparison to a benchmark drawn from a stereotype of a “domestic legal system”—one based on a historically contingent project, that of building the modern state with its monopoly on legitimate coercion, a project which itself is challenged by what we see as the ascendant normativity of international law, among other tendencies.<sup>16</sup>

We would describe our perspective as hermeneutic—a praxis-driven construction and evolution of legal order, whether domestic or international. Interpretation responds to and normalizes the proliferation and fragmentation of legal orders; since there is no original context-less “intended” meaning to the law. One might say we are already and always in the mode of interpretation. Judicial interpretation is well-suited to making sense of diverse normative sources under conditions of political conflict and moral disagreement. Contrary to what might be inferred by the *Tadic* court’s suggestion of “self-contained systems,” courts, whether domestic or international, are inherently in dialogue with other institutions and actors that also play interpretive roles. Decisions in individual cases can give meaning to law without purporting necessarily to give “closure” to normative controversy in politics and morals.

Cross-interpretation does not lead necessarily to harmonization. Even though we consider that the tendency is towards humanity and its protection as the *Grundnorm* or concept of justice underpinning international legality, this norm does not have a fixed meaning that guarantees stability or unity in interpretation across contexts. Rather, the humanity norm is realized through the interpretation of diverse positive legal rules in multivariate contexts, and is inevitably entangled in politics. This understanding is developed in recent work reflecting the changes implied by an increasing amalgamation of the law of war, human rights law, and humanitarian law,<sup>17</sup> and on the

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16. See Robert Howse and Ruti Teitel, *Beyond Compliance: Rethinking Why Law Really Matters* (Mar. 6, 2008) (draft presented at Institute for International Law and Justice Colloquium March), available at <http://iilj.org/courses/documents/2008Colloquium.Session7.Howse.pdf>.

17. See Ruti Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 CORNELL INT’L L.J. 355 (2002) (discussing the paradigm shift in international law and its implications for foreign affairs).

relationship between changes and developments in international economic law, especially regarding investment and trade.<sup>18</sup>

In each of the areas we examine below, tribunalization has sometimes been accompanied by an expectation of reinforcement of international law as a self-contained system, protected from an “outside”—whether politics, other laws or cultures, or technocratic power—that challenges the purity of the particular legal order. But, as we shall illustrate, tribunals have found themselves always reaching to and entangled with the “outside.” At the same time, they have resisted collapse into or subordination to the outside, instead maintaining a dynamic engagement through interpretation. Looking at how tribunalization has unfolded in relation to the evolution of the regimes themselves, within a context of rapidly shifting political, social, and economic realities, we see little evidence of “self-containment” in each case. What we do notice however is a sense of non-subordination to or assimilation of other normative orders or institutional actors that matches the non-hierarchical reality of fragmentation. Interpretation implies normative communication—neither unconstrained conflict nor clinical isolation. This requires neither stable agreement or harmonization on the one hand nor de-legitimizing incoherence—nihilistic or radical indeterminacy—on the other.

#### IV. THE HUMANITY LAW SHIFT, INTERNATIONAL CRIMINAL JUSTICE, AND ITS TRIBUNALIZATION

Within the doctrinal structure of international law, there is an apparent fusion between human rights and humanitarian law, an anti-fragmentation tendency, at least in relation to those broad spheres of international law that address violence and conflict in the largest senses. Some of these tendencies have attracted the attention of scholars. For example, Theodor Meron has written of the humanization of international law while others have noted the humanitarianization or militarization of international human rights law. A third and more recent strand is the revival of legal and political discourse con-

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18. See Robert Howse & Ruti Teitel, *BEYOND THE DIVIDE: THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE WORLD TRADE ORGANIZATION* (2007) (examining the legal interaction between the right contained in the Covenant and WTO agreements).

cerning the justice of war itself. Post-Cold War politics fueled the demand for a more sweeping universal rights regime. While humanitarian norms originated in settings of interstate conflict, contemporary developments challenge inherited categorical distinctions between states of war and peace, international and internal conflict, state and private actors, and combatants and civilians. With today's conspicuous pervasiveness of violent conflict in many parts of the world, the law of war is expanding in tandem with the parameters of contemporary transnational conflict. The emerging legal order is addressed not merely to states and state interests, and perhaps not even primarily so. Persons and peoples are now at the core, and a non-sovereignty-based normativity is manifesting itself, which has an uneasy and uncertain relationship to the inherited discourse of sovereign equality. Teitel calls this new normativity "humanity law"<sup>19</sup> and argues that it might be viewed as the dynamic "unwritten constitution" of today's international legal order—the lens through which many of the key controversies in contemporary law and politics come into focus.

The drive to normalize and generalize international criminal responsibility of individuals reflects a faith in the potential of international law to realize foundational social morality. From Nuremberg through the ICTY and now the International Criminal Court (ICC), this drive has been intimately and indissolubly associated with tribunalization. Largely through tribunalization, criminal justice has become central or paradigmatic in the normative understanding of political conflict, with important implications for international politics. Increasingly, international tribunals and processes are becoming international society's demonstrable response to foreign affairs crises. Instances of this institutional response are evident in the ongoing international adjudication of violations of humanitarian law in ad hoc tribunals regarding the Balkans and Rwanda,<sup>20</sup> as well as in the more recent establishment of

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19. Teitel, *Humanity's Law*, *supra* note 17, at 360.

20. See S.C. Res. 827, at 1, U.N. Doc. S/Res/827 (May 25, 1993) and S.C. Res. 955, at 2, U.N. Doc. S/RES/955 (Nov. 8 1994) (establishing ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, and noting "that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed").

other more site-specific fora, such as in Sierra Leone and East Timor.<sup>21</sup> The high-water mark is arguably the establishment of the International Criminal Court.<sup>22</sup>

Tribunalization has normative consequences as it expands the aegis of international criminal justice. By extending the concept of "international" jurisdiction beyond national borders and situations of conflict, to penetrate within states even during peacetime, the new normativity begins to render ambiguous the hitherto-recognized differences between international and internal conflict.<sup>23</sup> In some regard, the charters that form the bases of the new international tribunals aim to simplify modern understandings of the law of war. Historically, protections under the law of war were accorded to individuals on the basis of particular status – state nationality and citizenship. Today the tendency is to evolve these protections in a more universalist direction, inspired by the idea of international human rights, with corresponding implications for responsibility.<sup>24</sup> Thus many of the developments in humanity law aim beyond the categorical framework that has been quin-

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21. See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, *available at* <http://www.unhcr.org/refworld/docid/3fbdda8e4.html>; U.N. Transitional Admin. in E. Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, UNAET/REG/2000/15 (June 6, 2002).

22. Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of July 17, 1998, *entered into force* 10 April 2002 [hereinafter Rome Statute] (governing the establishment and mandate of the ICC). As of June 1, 2009, 108 countries are State Parties to the Rome Statute and 139 are signatories. Coalition for the International Criminal Court, World Signatures and Ratifications, *available at* <http://www.iccnw.org/?mod=romesignatures>.

23. On the current challenge to and evolution of the differentiation of international and internal conflicts, see Rome Statute art. 7 (regarding jurisdiction for crimes against humanity); Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 128–142 (Oct. 2, 1995); *see also* Teitel, *Humanity's Law*, *supra* note 17, at 373–74 (arguing that the expanded application of international criminal law has blurred previous distinctions between state and non-state actors and those between war and peace time situations). The ICTR reflects another instance of expansion of international criminal jurisdiction as the international tribunal prosecuted solely intrastate crimes committed in the Rwandan genocide. See Statute for the International Criminal Tribunal for Rwanda art. 4.

24. See *Developments in International Criminal Law*, 93 AM. J. INT'L L. 1, 1–2 (1999).

tessential to the humanitarian protections of the last half century.

How did we get here? The international trials at Nuremberg may be understood to represent a unique historical juncture of convergence of the three regimes that we are contending make up humanity law. While this tribunal is primarily known for its condemnation of aggressive war and sanctioning of "unjust war," other humanitarian norms also emerge reflecting the court's extension over other human relationships, rights, protections, and duties. While their avowed purpose was to protect the prevailing interstate system, the trials also displayed the concern for humanity, for persons otherwise left unprotected by the state. One might say that these trials perform the paradigm shift. At a certain point the central focus shifted from punishment of Germany's aggression and expansionism to the vindication of persecuted persons and peoples.

It would not be until a half-century later, with the 1990s Balkan wars and the return of atrocities to the heart of Europe, that the place of international criminal justice in managing and responding to conflict would be reconsidered and reshaped. Convened in the Hague in the very midst of a bloody conflict, the mandate of the ICTY was hardly to ratify the gains of a hard-won peace; the tribunal was formed earlier, and convened to hold war criminals to account with the avowed aim that this would *advance the peace*. It was stated that "the prosecution of persons responsible for serious violations of international humanitarian law. . . would contribute to the restoration and maintenance of peace."<sup>25</sup> With the revelations of massacres in the context of a political impasse, the ICTY's asserted mission was somehow to transform the conflict in the Balkans into a matter of individual crimes answerable to the rule of law. While this appeared to be an attempted apoliticization or depoliticization of the conflict, at the same time its aim was inherently political: peace and reconciliation in the region. Thus, the scene was set for tribunalization to operate in deep engagement with politics, rather than detached and insulated from it.

In a landmark decision asserting its jurisdiction under the U.N. Charter, the ICTY asserted that the crimes at issue "could not be considered political offenses, as they do not harm a

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25. S.C. Res. 827, *supra* note 20, at 1.

political interest of a particular state," and the "norms prohibiting them have a universal character." If one considers the offenses prosecuted, such as "genocide" and "crimes against humanity," they are characterized by a close nexus between individual and group identities. "Ethnic cleansing"—the purposeful policy by one group to purge by terror the civilian population of another ethnic group from defined geographic areas—is prosecuted as a series of "crimes against humanity," as "inhumane acts," "widespread and systematic," "perpetrated on any civilian population, on an ethnic basis."<sup>26</sup> The element of intention, of persecutory policy,<sup>27</sup> uniquely mediates individual and group identities where there are systematic mechanisms of state or state-like policy.<sup>28</sup> Similarly, adjudicating the responsibility for humanity means reaching both the public and the private. This entails protecting and accounting for individuals within the relevant group or community, drawing clear limits on what *is* and *is not* legitimate state or state-like action or policy.

The Nuremberg tribunal's jurisdiction over atrocities was always tied to the conduct of a war conceived of as unjust within the understanding of the prevailing classical interstate system.<sup>29</sup> The ICTY by contrast was to address persecution during an armed conflict that was only partly international, if at all, in the classic sense of *interstate* conflict. Indeed, by the

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26. See FINAL REPORT OF THE UNITED NATIONS COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780, ANNEX IV, THE POLICY OF ETHNIC CLEANSING (1992).

27. See Convention on the Prevention and Punishment of the Crime of Genocide art. 2, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277 (defining "genocide" in terms of acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"). Regarding the recognition of crimes against humanity, see Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal art 6(c), Aug. 8, 1945, 82 U.N.T.S. 279.

28. See Prosecutor v. Kupreskic, Case No. IT-95-16-T, Trial Chamber Judgment, ¶ 543 (Jan. 14, 2000) ("the essence of [crimes against humanity] is a systematic policy of a certain scale and gravity against a civilian population"). In the 1987 prosecution of Klaus Barbie, a Nazi chief in occupied Lyon, France's High Court defined persecution as committed in a systematic manner in the name of the "[s]tate practicing a policy of ideological supremacy," Cass. Crim., Dec. 20, 1985, 78 I.L.R. 125, 128 (Fr.)

29. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 2 U.N.T.S. 279.

time of the Rwandan genocide and the extension of international jurisdiction in that Tribunal's ICTR charter, there is an added change in jurisdictional reach. Although the genocide of approximately one million Tutsis and Hutu moderates in Rwanda was committed entirely within the country's borders, nevertheless, for the first time, it is deemed subject matter appropriately before an international forum.

With the establishment of the International Criminal Court, international criminal justice is increasingly enmeshed in managing regime change and conflict, both internationally and internally. Thus, in jurisprudence relating to recent conflicts, the long-prevailing distinction between *international* and *internal* conflict is "more and more blurred, and international legal rules increasingly have been agreed upon to regulate internal armed conflicts."<sup>30</sup> Just as the classical international legal regime premised on state sovereignty and self-determination was inextricably associated with the growth of modern nationalism,<sup>31</sup> one might conversely see present developments in the emergent humanitarian law regime as bound up with the contemporary loss of political equilibrium, political fragmentation, weak and failed states, and globalization. These political realities have also sparked efforts at UN reform. There is an attempt to reconcile the statist norm of territorial sovereignty with the mounting justifications for greater international humanitarian intervention based on evolving duties of protection to vulnerable persons and peoples.<sup>32</sup> Although still highly controversial, increasingly, humanitarian intervention is defended as justified under U.N. Charter Art. 52(1)'s authorization of regional "enforcement action."<sup>33</sup> There is also an

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30. Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Oct. 2, 1995); see also Ruti Teitel, *Humanity's Law*, *supra* note 17.

31. See STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 182-83 (1999).

32. See United Nations 2005 World Summit Outcome Document, G.A. Res. 60/1, U.N. Doc. ¶¶ 138-140, U.N. Doc. A/60/L.1 (2005) (declaring that both individual states and the international community have the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity).

33. U.N. Charter art 52. *But see id.* art. 2, para. 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"). See



emergent if still controversial norm of “responsibility to protect.” In this rapidly changing political context, the expanded humanitarian legal regime reflects the reframing of the meaning of security and rule of law in global politics. The increasing turn to the exercise of international criminal law enforcement is connected to a number of political projects associated with the present moment, from punishment to peacemaking. The new charters of international criminal tribunals transcend any one aim or value. They allow for expression of dynamic norms that reflect the reconstruction of the relevant understandings of international security in terms of emerging, humanity-based subjects. Tribunalization is not a form of heightened rule of (existing) law but rather deeply entangled with change in the law itself. It does not represent the suppression of political conflict by “rules” but rather is enmeshed in the reordering of normative arguments—both justificatory and constraining—in relation to violence.

The “law of humanity” has clearly moved beyond its association with the politics of specific conflicts, as epitomized by the exceptional 1990s tribunals; today the standing ICC applies it all of the time.<sup>34</sup> The greater normative force and authority of the humanitarian regime is seen in the consensus in the Charter incorporating an understanding of humanity that reflects the dynamic tension between the *universal* and the embedded particularity of the contemporary politics of conflict, in all its contradictions. Indeed, for the first time in history, an international institution has been established which is committed to security and peacemaking and yet is intended to operate significantly independently of the political organs of the UN system.

Of even greater significance are the ongoing political and normative implications of a standing international tribunal which is concededly available where all else fails—a court, in the words of Chief Prosecutor Luis Moreno Ocampo, “of last

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Louis Henkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L. L. 824, 827–28 (1999) (suggesting that a “living Charter” would support an interpretation of the law and an adaptation of U.N. procedures). *Contra see* INTERNATIONAL LAW AND THE USE OF FORCE (Christine Gray, ed., 2008).

34. See Rome Statute, *supra* note 22, part II (establishing jurisdiction over humanitarian law crimes that take place in, or otherwise meet the Article 12 requirements of relating to, any state party to the Statute).

resort.”<sup>35</sup> Consider the everyday implications of a Court which, according to its charter and statements of ongoing purpose, is aimed at managing conflict worldwide. So far, the Court has implicated itself in a number of conflict situations involving Africa, including Uganda, Congo, Darfur, the Central African Republic, and Kenya. One of the most advanced situations “referred” to the ICC is the indictment of key members of the brutal Ugandan rebel group, the Lord’s Resistance Army, including its leader, Joseph Kony.<sup>36</sup> While having followed state referral, the Ugandan indictments nevertheless raised a profound dilemma for the Court, illustrating the potential tensions regarding the assumption of jurisdiction over a situation that also demanded a political resolution which some thought might well be jeopardized by the judicial intervention.<sup>37</sup> In another more recent illustration, the Security Council’s (SC’s) failure to come up with a resolution regarding Darfur led to the ICC’s involvement. This referral may give an inkling as to how the Court will operate going forward, as the pattern appeared to emulate the ad hoc model in a number of ways. This points to the contemporary connection between punishment and international security, and how the new institutions of judgment connect up to the prevailing interstate security regime.

The above explorations of the evolution of international criminal justice show the manner in which the emergence of humanity law has shaped and been shaped by tribunalization. Rather than reinforcing or accentuating the law of war, human rights law, and humanitarian law as “self contained systems,” tribunalization has in fact been closely associated with the breakdown of the boundaries between these regimes. There has been a crossing of lines—between individual and state responsibility, internal and external conflict, etc.—that

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35. Cases are only admissible at the ICC when state parties are unwilling or unable to investigate and prosecute crimes. Rome Statute art. 17. *See also International Criminal Court prosecutor says first Darfur cases are almost ready*, UN NEWS CENTRE, Dec. 14, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=20989&Cr=sudan&Cr1=>.

36. *See Uganda Asks Sudan to Arrest Rebel Leader Accused of Atrocities*, N.Y. TIMES, Oct. 8, 2005, at A7; Evelyn Leopold, *Global Court Targets Uganda Cult in First Case*, REUTERS, Oct. 6, 2005.

37. For a current update on the ICC docket, see <http://www.icc-cpi.int/cases.html>.

have served to sustain stylized divisions of labor between the regimes. Tribunalization has not had the effect of isolating judgments of guilt from the actual daily politics of conflict. The tribunals have been deeply entangled with politics in various and problematic ways, but this has not had an overall *delegitimizing* impact. Part of the reason is that there is a broader political aim already embedded in the tribunals' mandates. These mandates extend beyond ordinary criminal responsibility to the management and prevention of conflict itself, as we have pointed out. Faced with the lack of any sort of putatively comprehensive criminal code and a complex mandate extending beyond "ordinary" criminal justice in many respects, to discharge their mandate the tribunals could not but bring in, or confront through *interpretation*, a wide variety of legal material. To the extent that this exercise brought the tribunals into engagement, or in a sense conversation, with the interpretations of other domestic or international tribunals, the terms of such engagement, given the decentralized non-hierarchical system, were those of equality.

Thus, we can perhaps understand the statement of the *Tadic* court concerning "self-contained systems," which has led to so much fragmentation anxiety, as really a statement about the separateness and equality of diverse international tribunals. But engagement through interpretation is consistent with and in some sense depends on separateness and equality, as does a respectful conversation between individuals that crosses over between their separate universes of existence ("lifeworlds" to borrow an expression from the philosophy of Husserl). In other words, what the *Tadic* court was resisting in its reference to "self-contained systems" was the hegemony or binding authority of an external tribunal. It could not accept the notion that the material of that tribunal be treated as *stare decisis* rather than as part of the normative material to be considered in solving the legal problem at hand within the parameters of the regime to which the tribunal solving the problem was charged in its mandate. Here it is useful to balance or integrate the *Tadic* court's remark about "self-contained systems" with the approach of the ICJ in *Bosnia v. Serbia*, which relied extensively on the caselaw of the ICTY regarding the crucial question of identifying and characterizing the targeted

group for purposes of determining whether genocide had occurred.<sup>38</sup>

## V. INTERNATIONAL ECONOMIC LAW AND TRIBUNALIZATION

Let us now consider the relationship of tribunalization to international economic law and its evolution under conditions of globalization and in light also of the human rights revolution. We shall look primarily at international investment law and international trade law as represented by the World Trade Organization (WTO) system of treaties. International investment law evolved out of the tradition of diplomatic espousal of the claims of aliens. Traditionally, the idiom and the remedies represented by this branch of state responsibility derived from a sovereign equality of states *Grundnorm*: The offense or the international wrong was the dignitary harm to a putatively equal sovereign that arose when another sovereign mistreated that sovereign's own nationals. Building on the law of diplomatic espousal, states increasingly viewed diplomatic protection as a mechanism for advancing national commercial interests globally. But this remained in the framework of ad hoc arbitrations or commissions.

With decolonization and the Cold War, the fledgling diplomatic protection-based investment law regime evolved in a different direction, primarily as a way of managing tensions between East and West or North and South concerning economic ideology and alleged economic imperialism. Tribunalization served a depoliticizing or de-escalating function. It removed, or appeared to remove, such claims from the realm of sabre-rattling or gunboat diplomacy and placed them within a system apparently more respectful of sovereign equality. Through the interpretive maneuvers of the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) tribunals and the kinds of compromises and settlements that they elicited, the ideological faultlines that were evident in the contestation over the international law of expropriation and the question of sovereignty over natural

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38. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26), ¶¶ 195-201.

resources, for example, became blurred.<sup>39</sup> Tribunalization was a technique for managing interstate political/ideological conflict surrounding economic activity and intervention by Northern and/or Western states in the global south and the eastern bloc. Direct access for investors to such tribunals served less to empower corporations than to deflate the underlying political tensions by blunting the political and ideological dimensions of the disputes.

With the end of the Cold War and the golden era of globalization à la the Washington Consensus, a new functionality became associated with international investment law, also deeply interconnected with tribunalization. Adhering to international investment treaties became a mechanism that allowed developing countries and former eastern bloc emerging economies to give a credible commitment that they were open to foreign investment, perceived as desirable based on the economic ideology of the Washington consensus, and that liberalization would not be reversed. The commitment was credible because of the enforcement feature offered by tribunalization as reflected in these treaties and regional trade agreements: An investor would have standing as of right against a host country government, and a monetary judgment could be enforced based on, for example, the New York Convention.<sup>40</sup>

Given the manner in which states sought to use investment rules as credible commitments in the economic transitions of the post-Cold War period, the investor-state tribunals would often quite plausibly understand the purpose or *telos* of international investment law not as the management of differences between social and economic systems but rather as the encouragement of investment through guarantees that reduced the political risk of doing business in developing and emerging market economies.

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39. *Libyan American Oil Co. (LIAMCO) v. Libyan Arab Republic*, Award of the Tribunal of 12 April 1977, 6 Y.B. Corn. Arb. 89, 99-101 (1981); *TOPCO v. Libya*, Award of 19 January 1977 I.L.M. 3, 27-31 (1978). In these cases, the tribunals afforded some significance to UN resolutions establishing the principle of sovereignty over natural resources and the legitimacy of nationalization, without at the same time effectively altering the requirement of compensation where a foreign investor was expropriated in consequence of a nationalization program.

40. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 330 U.N.T.S. 38.

A stark example is the *Tecmed* tribunal: “[T]he parties intended to strengthen and increase the security and trust of foreign investors that invest in the member states, thus maximizing the use of each Contracting Party by facilitating the economic contributions of their economic operators.”<sup>41</sup> As is suggested by the tribunal in this passage, the underlying assumption was that such encouragement was in fact in the interest of those countries themselves, and desired by them, given their negotiation of and adherence to the treaties.

In emerging economies, including post-communist market economies, the viability of foreign investment was often dependent on (politically fragile) decisions about privatization, deregulation, and other elements of marketization. This gave particular significance to guarantees against expropriation, including regulatory takings, and protection of the investor’s expectations through clauses such as those requiring “full protection and security” or umbrella clauses rendering contractual commitments of the host state to the investor arbitrable, enforceable treaty obligations.

The Washington Consensus formula came into question. Privatization and pro-market reform had messy or simply unsuccessful results in some countries, and increasingly obvious high “human” costs in others (or uncertainty as to cost/benefit trade-offs). Under these circumstances, international investment law entered into a new era, and tribunalization acquired further meanings and dimensions. Cases where investors sued governments that backtracked from commitments to privatization in the wake of considerable human costs or political and social crisis (the cases concerning water and electrical utility privatization) became flashpoints for NGO criticism of the Washington Consensus and its results.

The increasing openness of the tribunals to the consideration of amicus curiae briefs, and the trend towards open hearings and publically available pleadings as well in certain instances (at the consent of both parties, including the investor), indicated an awareness of the broader human interests implicated in these disputes, even if under many of the treaties there was limited scope for explicitly considering such interests. Thus, in the *Methanex* case, a Canadian investor chal-

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41. *Técnicas Medioambientales Tecmed, S.A. v. Estados Unidos Mexicanos* ¶156, ICSID (W. Bank) Case No. ARB (AF)00/2 (2003).

lenged a ban on a gasoline additive in California, which was claimed to have an environmental justification. The environmental issues implicated led the tribunal to open up the proceeding to NGO amicus participation. The tribunal noted, "There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. . . . [T]he Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive."<sup>42</sup> Some tribunals went beyond such measures, and frustrated perhaps by the bounds of the substantive law they were required to apply, either interpreted the rules in inconsistent fashion to allow deference to the human interests now apparently represented by the host state, or used their interpretational discretion where amplest, namely in viewing jurisdiction narrowly and being open to a range of technical or formalistic jurisdictional challenges. This was done in contrast to the expansive view of jurisdiction often seen in such tribunals during the glory years of globalization, or more precisely globalization à la the Washington Consensus. By drawing dramatic public attention to the limits of globalization à la the Washington Consensus, tribunalized international investment law has now served—perhaps ironically given its earlier meanings and purposes—to *re*-politicize the debate over the just terms of international economic relations. The inconsistent attempts of tribunals to bend or contract the substantive law, especially as it had been developed in the glory days of globalization, have created uncertainty for both investors and host states.<sup>43</sup> At the same time, while international investment law has become a focus for those question-

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42. *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae ¶ 49 (NAFTA Jan. 15, 2001).

43. Compare the disparate results and rationales in the litigation surrounding the Argentine crisis and the divergent approaches of the tribunals in *CMS*, *LGE*, and *Continental Casualty*, as well as the Annulment Committee in *CMS*, concerning the merits of Argentina's necessity defense against the requirement to compensate investors for economic harm from measures it took during and around the financial crisis, which undermined the basis for the investors' profitable operation of their business, e.g. the de-pegging of the peso and the dollar, *Cont'l Cas. v. Argentina*, Final Award, ICSID (W. Bank) Case ARB/03/09 (2008); *CMS Gas Transmission Co. v. Argentina*, Final Award, ICSID (W. Bank) Case ARB/01/8 (2005) *aff'd in part and over-*

ing the justice of global neoliberal economics, some states have managed to fly under the radar, imposing their own terms on investment abroad through political and economic power and leverage (China most notably). Investor-state arbitration arguably has a repoliticizing and “progressive” effect as it becomes more transparent. The terms of the relationship between foreign capital and the state are public, and how they shape particular challenges and crises becomes evident with the arbitration as a visible site of globalization’s struggles.

The overall outcome of tribunalization under these conditions is unclear as yet. One result might be, in the spirit of anti-fragmentation, a global movement for a new international investment law that embodies what is perceived as a just, humanity-oriented balance of rights and obligations. This could be underpinned by the perceived interpretative space of tribunals to take into account the law of human rights in their decisions. Another more pessimistic prognosis would be the general delegitimization or at least further under-legitimation of investment law, as the gulf between its perceived aims and effects and the humanity norm becomes ever more apparent, and as the response of tribunals to this problem makes their jurisprudence increasingly less coherent and predictable.

Let us turn now to the World Trade Organization. Here the inheritance with respect to tribunalization was the dispute settlement practice of the General Agreement on Tariffs and Trade (GATT). The characteristic culture of the GATT in relation to dispute settlement combined a strong sense of the *Grundnorm* of international legality as sovereign equality of states with a functionalist understanding of the system as sustaining and enhancing aggregate economic welfare, as reflected in specific liberalization bargains among the Member states. Thus, dispute settlement in the GATT era, while increasingly “legalistic” in form (longer and longer panel reports, with more and more apparent recourse to precedent and textual legal argument), was in fact controlled by the WTO bureaucracy, an insider expert community with a common ethos and understanding of the functionality of the system.

As Joseph Weiler writes:

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*ruled in part in Annulment Decision (2008); LG&E Energy Corp. v. Argentina, Decision on Liability, ICSID (W. Bank) Case No. ARB/02/1 (2006).*



A dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the "outside" world of international relations and established among its practitioners a closely knit environment revolving around a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term, first-name contacts and friendly personal relationships. GATT operatives became a classical "network" . . . . Within this ethos there was no institutional goal to prevent trade disputes from spilling over, or indeed, spilling out into the wider circles of international relations: a trade dispute was an "internal" affair which had, as far as possible, to be resolved ("settled") as quickly and smoothly as possible within the organization.<sup>44</sup>

With the creation of the WTO in 1995 out of the GATT framework, WTO law went beyond the Bretton Woods understanding of "free trade" consistent with deep regulatory diversity to reflect instead the Washington Consensus view of sound economic governance, discipline on subsidies and related forms of industrial policy, and a privatization- and deregulation-friendly architecture for services trade liberalization. Again this was the post-Cold War zenith of neoliberal globalization. But the other development that went in tandem with this Washington consensus/neoliberal reorientation of the WTO was the creation of a much more "judicialized" form of dispute settlement. This included (in effect) compulsory jurisdiction and enforcement measures, as well as an appellate tribunal, that moved away from tribunalization understood as quasi-legal, quasi-diplomatic "settlement" of disputes. The system remained, however, significantly inter-state with no standing for private actors to bring complaints based on WTO law. One might have thought that the effect of this dual aspect of the WTO project in relationship to the GATT would be to secure or freeze the Washington Consensus through backing by

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44. Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM 334, 336-37 (Roger B. Porter et al. eds., 2001).

the rule of law. However, the Washington Consensus became questionable almost as soon as the ink was dry on the WTO treaties in 1995 (and in 1998 we had the anti-globalization protests in Seattle).

These developments were happening just as the new WTO Appellate Body (AB) was getting its feet on the ground. Significantly, the Appellate Body Members mostly came from a community of jurists, not WTO technocrat insiders.<sup>45</sup> They were not beholden to that insider community or club, as described by Weiler. Instead, they looked outward, at least to some extent, for their legitimacy and sense of identity and mission to a broader international community, legal and political.<sup>46</sup> In the presence of increasing external discord about the Washington Consensus that inspired the insider trade policy community, the Appellate Body early on understood its mandate not as the backing of the insider perspective by rule of law values at a time when it was under threat from broader social and political contestation (Petersmann-style constitutionalization), but instead in terms of the interpretation of treaty texts that balance different values and interests.<sup>47</sup> It has also not shied away from addressing the relationship of WTO law to other international legal regimes, biodiversity, and the environment, which raises important issues of policy and engages substantive normative choices all in the context of interpretation.<sup>48</sup> Moreover, although the WTO dispute settlement system has no formal role for direct representation of diverse human interests, for instance by NGOs, through interpreta-

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45. *Id.*

46. See Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in EU, WTO AND NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 211 (J.H.H. Weiler ed., 2000) (examining sources of legitimacy for WTO jurisprudence).

47. Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 44, at 227, 229.

48. See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) (discussing these issues extensively); see also Robert Howse, *The Use and Abuse of International Law in WTO Trade and Environment Litigation*, in THE WTO: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES (Merit E. Janow et al. eds., 2007).

tion the AB has found ways of constructing such space for representation. The ultimate effect is one of opening up more chance for political and social contestation, wresting the system away from technocratic management by an insider elite with an ideology disguised as increasingly questionable economic "science," and therefore raising explicitly the complex value choices inherent in trade liberalization through negotiated rules. The Appellate Body, acting in the best traditions of judiciaries charged with developing their own practice out of relatively incomplete codes of civil procedure, was able to find a basis for discretion to admit amicus submissions. Amicus practice has shifted the attitudes of a number of non-governmental actors who see their values as being affected by the system. It has made them more conscious of their capacity to express views in a number of different ways, not just through the amicus route but by giving expert opinions and advocacy and by lobbying and making public statements about litigation in a variety of contexts.

Another respect in which this has happened has come from an unusual source: trade officials, who are more known for adhering to the "member-driven" ideology of the WTO. The Dispute Settlement Understanding (DSU), which sets out the WTO's procedures for resolving trade disputes, provides for confidentiality of written and oral proceedings, as a general rule. Yet increasingly, parties in WTO litigation have been making their pleadings in WTO disputes public, often posting them to the Internet. Recently, in the second round of the *EC-Hormones* dispute, the parties to the dispute agreed to open oral proceedings to the public. In the case of the panel proceedings, the DSU did not provide explicitly for such a possibility—in the case of the Appellate Body, much more dramatically, the DSU appears to require confidential proceedings. Thus, the Appellate Body, in agreeing to open its hearing to the public in *EC-Hormones*, had to read down the meaning of confidentiality in the DSU, i.e. as not applying to every aspect of the appellate process. These last developments have occurred at a time when the capacity of the system to evolve through diplomatic negotiations has been in question—most notably, the impasse of the Doha Round negotiations. It is interesting to reflect on the relationship between judicial inventiveness and this impasse. Some commentators, such as the former Appellate Body Member Claus-Dieter Ehlermann, have

suggested that the difficulty of political adjustment of the WTO bargain makes the legitimacy of judicial activism in the WTO more precarious, but one could look at this in a different if not opposite way: in the presence of political and diplomatic impasse, the judiciary has an enhanced role in preserving the legitimacy of the system through evolving its practices to reflect shifting conceptions of legitimate international order. It is remarkable in this connection that while many WTO Members have responded to the impasse by shifting focus to regional and bilateral negotiations and agreements, the dispute settlement system of the WTO remains vital and, anecdotally, seems to be preferred to regional or bilateral dispute settlement processes as a way of dealing with disputes that could arguably be brought in either forum.

In the case of the investment regime, what we have described as a repoliticization of investor protection has, by contrast, gone hand in hand with some countries threatening to withdraw from treaty commitments requiring arbitration or from arbitration processes altogether. One may ask why the Appellate Body of the WTO has been better able to manage the outbreak of politics—of normative disagreement and contestation about human interests and values—than the investment tribunals. Perhaps here one might consider the value of centralized appellate review and a strong commitment to *de facto stare decisis*,<sup>49</sup> both absent from the investment regime.

A different way in which the WTO judiciary has arguably responded to the post-Westphalian human-centered sensibility of “humanity law” is through what might be called virtual representation of non-governmental stakeholders in its interpretation of WTO law. The conception that these interests are virtually present in WTO dispute settlement is captured most pointedly by the notion of “indirect effect” developed by the panel in the *US-Section 301* case. According to the panel:

The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual

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49. Appellate Body Report, *United States - Final Anti-Dumping Duties on Stainless Steel from Mexico*, ¶¶ 158-162, WT/DS344/AB/R (Apr. 30, 2008) (reaffirming the commitment to *stare decisis* and strong centralized appellate review).

operators. Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it . . . . It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.<sup>50</sup>

Now consider the following statement of the Appellate Body in the *EC-Hormones I* dispute (reiterated in the very recent AB ruling in *EC-Hormones II*):

a panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life terminating, damage to human health are concerned.<sup>51</sup>

Here, the Appellate Body would seem to be according an extra margin of deference, based on the precautionary principle, to the judgment of WTO member states, but only where those states have "responsible, representative governments." We know that not all WTO Members are democracies—one need only think of Burma, China, or Saudi Arabia. So the principle of deference here is not based on state sovereignty and its prerogatives, but rather the responsibility of the state to protect the people, its accountability to citizens, and their interests and needs.

This human-centered, as opposed to state-centered, vision is also apparent in the *EC-Asbestos* case, where the Appellate Body was dealing with a challenge to a French ban on asbestos, a substance responsible for many thousands of deaths and inci-

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50. Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, ¶ 7.76-7.78, WT/DS152/R, (Dec. 22, 1999).

51. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 124, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

dents of serious illness.<sup>52</sup> For purposes of applying the non-discrimination norm in the GATT—here national treatment, or the prohibition on less favorable treatment of imported products in relation to “like” domestic products—the AB considered the health effects of asbestos in determining whether physical differences between asbestos and substitute products not banned by France were sufficiently important for the products not to be considered “like.” The prerogative of governments to regulate for health purposes was shielded in the health exception in Article XX of the GATT, and the panel of first instance for this reason considered that health considerations should be limited to the application of that exception, and had no place in the analysis of National Treatment.<sup>53</sup> But the AB responded that one could take into account such affects, not from the state’s point of view, but from that of the *consumer*. When the Appellate Body did go on to consider the health exception in Article XX it made the further determination that human life and health were interests of the first or highest importance. Article XX of the GATT contains a range of exceptions, and the states who agreed to these did not, in the treaty text, establish any hierarchy between the regulatory fields protected under Article XX. If one views Article XX as a reservation of state sovereignty, it would seem inappropriate for the Appellate Body to tell states which of their sovereign interests is of the highest importance. But if one regards Article XX from a human-centered, not state-centered, perspective, then it makes perfect sense to give the utmost importance to human life and health.

A still further means by which the AB has enfranchised—virtually as it were—non-state actors, is by introducing into WTO dispute settlement international legal and policy instruments that speak to and reflect the activism of those non-governmental stakeholders. Thus in its first *Shrimp/Turtle* ruling, in order to interpret the expression “conservation of exhaustible natural resources” as including living resources, i.e. endangered species (in this case, sea turtles), the Appellate Body had reference to international instruments on biodiversity, the negotiation of which was importantly influenced by environ-

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52. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

53. *Id.* ¶ 60

mental NGOs.<sup>54</sup> The AB did so: 1) even though it could have come to the same conclusion simply by citing as authority old GATT cases that stand for this proposition and 2) even though not all WTO Members were signatories to these instruments, and indeed not in all cases were even all the parties to the dispute in question. Arguably, the AB did so—of course this is speculative—in order to virtually enfranchise environmentalist constituencies. It is perhaps no coincidence that this is the very same case where, for the first time, the AB held that WTO panels and the Appellate Body had the discretion to receive and consider amicus briefs from non-governmental actors.

VI. CONCLUSION: FROM FRAGMENTATION TO INTERPRETIVE  
DIALOGUE AS A CONCEPTION OF DECENTRALIZED BUT  
“COHERENT” INTERNATIONAL  
LEGAL ORDER

Has tribunalization in “humanity law” and in international economic law resulted in greater mutual isolation or more conflicting or dissonant trajectories of these different regimes? The examination above of the meaning of tribunalization in each of these areas of international law does not yield such an impression. Sophisticated legal interpretation, the province of tribunals (ideally), allows for and indeed arguably requires greater openness to various kinds of outside and diverse influences or factors than diplomatic and technocratic cultures of international regimes. This includes the influence of other, relevant international legal regimes. Of course, there is a formal basis for the integration of such influences through interpretation—most notably, Article 31.3.c of the Vienna Convention on the Law of Treaties, and arguably as well the view of sources of law reflected in Article 38 of the Statute of the International Court of Justice. But what is notable, whether one considers a decision of the International Court of Justice like *Oil Platforms*<sup>55</sup> or a ruling of the WTO Appellate

54. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 127-34, WT/DS58/AB/R [hereinafter *U.S. – Shrimp/Turtle*] (citing the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals among others).

55. Case Concerning *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

Body like *Shrimp/Turtle*,<sup>56</sup> is that the judges have little interest in using these formal mechanisms as constrained gateways for the extra-regime influences in question and are comfortable bringing in “external” normative material simply through a conception of its relevance to the adjudicative task before them.

In this sense, there are many examples of cross-judging. In the case of “humanity law” we have already mentioned the extensive interpretive use by the ICJ of rulings by the ICTY (and we could add the International Criminal Tribunal for Rwanda (ICTR) as well) in addressing crucial questions such as defining or categorizing the targeted group for purposes of determining whether “genocide” has occurred within the legal meaning. We have also referred to the use, for example, of international environmental agreements by the WTO Appellate Body in interpreting the conservation exception in the GATT treaty. This is just one example of frequent resort for interpretive purposes to other tribunals’ rulings by the Appellate Body for a variety of jurisprudential purposes—including the establishment of relevant customary law. We could add from the investment arbitration sphere the very frequent references to ICJ and Permanent Court of International Justice (PCIJ) rulings on issues such as state responsibility, as well as to establish standards from customary law in applying, for instance, the “fair and equitable treatment” provisions in bilateral investment treaties (BITs), which frequently allude directly to the standard of treatment in customary law.

What serves to qualify or dissipate the fragmentation angst is not the commonality of lawyers and judges as an elite—a closed epistemic community that crosses the various “self contained systems”—nor a common law of international adjudication, a kind of boilerplate the common elements of which are abstracted from the engagement of the individual regimes with the specific legitimacy challenges of the subject matter that they address, given changes in the balance of human interests and the perception of the success of the system in meeting the relevant demands. Instead, it is the commitment to openness in the project of legal hermeneutics. On the one hand, this commitment is based on the premise that the multiplication of tribunals need not intensify or even rein-

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56. U.S. - *Shrimp/Turtle*, *supra* note 54.



force some tragic Weberian conflict of warring gods and demons. On the other hand, it does not imply either a harmonization or synthesis where the diverse human interests are ordered in a stable hierarchy of norms, institutions, and governing castes. Instead, international legal order will resemble the messy, porous, multiple-value, and constituency politics of democratic pluralism, which is nevertheless underpinned by a more absolutist baseline commitment to the preservation of the human. This may still be fragmentation in a sense, but in mirroring non- or anti-hierarchical democratic pluralism this kind of fragmentation enhances rather than menaces international law's claim to legitimacy.

In a manner that has been underexplored or misperceived in much of the international law and international relations literature, what shadows the fragmentation angst is ultimately the relationship of tribunalization to politics. Self-contained or closed legal systems tend to be constructions of jurists who imagine or desire the insulation of international law from politics, not so much other international regimes. Tribunalization can come to appear both in "humanity law" and in international economic law as an attempt to purify international legal regimes from "politics." This responds to the international law skeptics' claim or suspicion that international law is just an epiphenomenon or justificatory rhetoric for power politics. Tribunalization as it has evolved dynamically in relation to the substance of the legal regimes in interaction with emerging social, political, economic, and military realities has led to re-entanglement with politics, while politics itself has in certain ways been modified or developed by tribunalization. One thinks of the increasing role of tribunals in the midst of conflict in the "humanity law" area, and of the way in which tribunals have been a focus of the new politics of civil society activism both in the area of human rights but also in the case of investor-state arbitration and WTO disputes in areas such as environment and health. Politics spills over across the understandings of the specialized functions of the particular regimes. In turn, the re-emergence of politics in the context of tribunalization further reinforces the openness to diverse normative material in the interpretive exercise, and further dissipates the anxieties over fragmentation, which appears to deny international law the integrity required for its legitimacy.