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Cross-judging: tribunalization in a fragmented but interconnected global order

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Abstract

This paper explores connections, parallels, contact points and dissonances between increasing adjudication in international criminal law/human rights and international trade/investment.

Cross-judging: tribunalization in a fragmented but interconnected global order

By Ruti Teitel and Robert Howse¹

Prepared for presentation at the *NYU Journal of International Law and Politics* and International Institute for Law and Justice symposium, "The Routinization of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems," NYU Law School, October 28-29 2008.

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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 resolve disputes between states and other actors in the international system. 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 even of domestic systems. While this skeptical viewpoint may exaggerate or distort the extent to 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 is 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 long existed as a method of third party dispute settlement in international law and there were periods and particular regimes where resort

to arbitration was frequent, and indeed more the norm rather than the exception. But arbitration as it classically is understood neither in itself yields 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" have increasingly 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 compromise-building and conflict-avoidance or deescalation in international politics, and more 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 (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). 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 analysis—while also overcoming the limits of studies of tribunalization within a single specialized or functional regime to yield any generalizable conclusions 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 pose the question, preliminary to any more general or comprehensive judgment about the overall meaning of tribunalization, of whether its instantiation in these regimes reflects a common trajectory or tendency in international order, whether tribunalization operates in a parallel manner but largely unconnected as between regimes, or whether it actually introduces new dissonances and points in different and perhaps conflicting normative and institutional directions.

A common narrative of tribunalization is that it signifies a shift from a power- to a rules-based international system. Tribunalization means depoliticization. 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." 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, are such that the depoliticization hypothesis is much too simplistic. In fact, the dynamic relationship between tribunalization and shifts in normative substance has led to moments where tribunals rather than operating in isolation from or above the politics on the ground have become deeply entangled with 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, communities and not just states.

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² Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals* (Oxford: Oxford University Press, 2003), pp. 3-4.

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 decentralized international legal order will undermine the integrity and coherence (and implicitly the legitimacy) of international legal order. Here we seek to illustrate how studying specific regimes and how tribunalization operates within them will yield more nuanced conclusions, given, above all, the possibility of sustained attention to the interpretative sensibilities and practices of these regimes.

An obvious and dramatic flashpoint for the "fragmentation" anxiety concerning tribunalization was the pronouncement of the ICTY Appeals Chamber in the *Tadic* case, where the Court rejected the ICJ's interpretation of certain of the 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 labour 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)."

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 phenonomenon 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

³ Prosecutor v. Tadic (Jurisdiction), (1996) 35 ILM 32, 39.

theory. It is that, in the case of adjudication, the commitment to legality itself (of course this is a long argument—the Hart/Fuller debate—but we shall just reveal for now our preference for one side of it) entails a requirement to fidelity to certain values (a concept of justice, as Kojeve put it,⁴ or *grundnorm*, in Kelsenian terms) that cross-cut 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 and 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 have imagined that the equivalent would be structural norms concerning responsibility, personality, sovereignty, territory, jurisdiction etc. as reflected in custom, the "codification" work of the ILC in 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 the domestic high or constitutional court.

It was precisely in shattering this last element of the analogy that the *Tadic*Appeals Chamber ruling represents 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 must 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,

⁴ A. Kojeve, Outline of a Phenomenology of Right (2000)

from sovereign state equality, where states are not subject to any higher authority, whether natural or divine law), to humanity and its protection. 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, albeit, dim or belated recognition of the new *grundnorm* by the ICJ in decisions such as *LeGrand, Bosnia v. Serbia*, and the *Security Fence* advisory opinion, which are shaped more or less adequately, by "Humanity Law."

The problem of fragmentation as exemplified or intensified by the proliferation of uncoordinated and apparently unintegrated tribunals, has given rise to what one might loosely describe as pessimistic or optimistic hypotheses concerning the possibilities for making international legal order more coherent. One kind of optimistic hypothesis 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

⁵ This shift and its implications are developed in extenso by one of us in Teitel, *Humanity's Law*, forthcoming, Oxford University Press. The first part of this paper is derived from the argument in that manuscript.

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 Charter) regimes. This does not require an institutional integration of judgment in a single higher court but rather the recognition of a common normative substance or core to these apparently disparate specialized regimes paves the way for comity and coordination among courts.⁶ 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.)⁷

A more modest hypothesis concerning the overcoming of judicial fragmentation in international order reposes on the notion that international law offers enough of a common idiom or vocabulary on what might be called procedural or generic questions (such a remedies) to allow positive conversation, interaction, and mutual influence as between different tribunals. This is the argument that is made in extenso by Chester Brown in *A Common Law of International Integration*. One can have rapprochement without agreement on a *grundnorm* or general concept of justice underlying international legality as such. 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, engaging with each others approaches.

⁶ Petersmann,, EJIL.

⁷ Howse, response to Petersmann, EJIL.

⁸ (Oxford: Oxford University Press, 2007).

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 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 ⁹

A third hypothesis, consistent with Brown's and perhaps deepening it at least at the explanatory level, is that international lawyers and judges constitute an epistemic community, ¹⁰ or perhaps 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 conflictual and fragmenting, 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

⁹R Teitel, Comparative Constitutional Law in a Global Age, 117 Harv L Rev. 2570 (2004).

¹⁰ See for an attempt to treat international jurist as a kind of community, at least potentially, *The International Judge: An Inquiry into the Men and Women Who Decide the World's Cases* by Daniel Terris, Cesare P.R. Romano, Leigh Swigart. Oxford University Press, 2007. See also Anne-Marie Slaughter, A *New Global Order*.

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 or harder, laws of power and interest. These critics can say: the more so-called international law there is, the more lawyers and justices there are, even less clear and certain does this purported law become.

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 against 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. 11 We would describe our perspective as hermeneutics- 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 contextless "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 courts institutions and actors that also play interpretive roles, and their decisions in individual cases can give meaning to law without purporting necessarily to give "closure" to normative controversy in politics and morals. Cross-

¹¹ See Howse and Teitel, "Beyond Compliance" draft presented at ILJ Colloquium (2007-2008)......

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 as such, 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 changes implied by an increasing amalgamation of the law of war, human rights and humanitarian law, ¹² and international economic law (investment and trade).

In each of the areas we examine in this article, tribunalization has sometimes been accompanied by an expectation of reinforcement of international law itself as a self-contained system, protected from an "outside"—whether politics or other laws or cultures technocratic power that challenge the purity of the particular legal order. But, as we shall illustrate, tribunals have found themselves always reaching to and entangled with the "outside," resisting collapse into or subordination to the outside, but always 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 in each case, little evidence of "self-containment," only a sense of non-subordination or assimilation other normative orders or institutional actors that matches the non-hierarchical reality. Again, through interpretation, tribunals are always engaging with the supposed "outside," the relevant "other" and address it, but without engaging in a struggle for dominance or supremacy. Interpretation implies normative communication—neither unconstrained

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 $^{^{12}}$ R Teitel, Humanity's Law : Rule of law for a global politics 35, Cornell Intl L J 355 (2002)

conflict nor clinical isolation. This does not require stable agreement or harmonization on the one hand nor delegitimating incoherence—nihilistic or radical indeterminacy—on the other.

The Humanity Law Shift, International Criminal Justice and its Tribunalization

Within the doctrinal structure of international law as such, there is an apparent fusion between human rights and humanitarian law, an anti-fragmentation tendency, at least in relation to these 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 strand, that only dates to more recently is the revival of legal and political discourse concerning 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, 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"¹³ 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 possibility of international law to reflect and realize foundational social morality. From Nuremberg through the ICTY and now the 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 the convening of the ad hoc tribunals regarding the Balkans and Rwanda, ¹⁴ as well as the more recent establishment of other more site specific fora, such as Sierra Leone and East Timor¹⁵, and finally symbolized perhaps by the establishment of the International Criminal Court. ¹⁶

Tribunalization has normative consequences as it expands the aegis of international criminal justice. By extending the concept of "international" jurisdiction

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¹³ See R Teitel "Humanity's Law: Rule of Law for a Global Politics, 35 Cornell, Intl L J.355 (2002), giving rise to Humanity's Law (OUP forthcoming)

¹⁴ See Security Council Resolution 827 (1993) and 955 (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").

¹⁵ See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002; Regulation No. 2000/15 of the United Nations Transitional Administration in East Timor on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, 6 June 2002

¹⁶ See ICC statute. As of June 1, 2008, 106 countries are States Parties to the Rome Statute and 139 are signatories. See http://www.icc-cpi.int/asp/statesparties.html (last visited July 6, 2008).

beyond national borders and situations of conflict, to penetrate within states even during peacetime, the new normativity begins to ambiguate the hitherto recognized differences difference between international and internal conflict, ¹⁷ In some regard, the charters that form the bases of the new international tribunals aim to simplify modern understandings of the law of war, where protections over time had been accorded according to particular status of persons- along the lines of state nationality and citizenship -- moving now instead, to a more globalizing view of rights protection, and related responsibility. ¹⁸ Thus many of the developments in humanity- law aim beyond the categorical framework that has been quintessential 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 are we are contending make up humanity-law. While this tribunal is primarily known for its condemnation of the aggressive war, the 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 display the concern for humanity, for persons, otherwise left unprotected by the state. One might say that these trials perform the paradigm shift. Over time, we see that critical tipping point whereby at some point, Germany's aggression and expansionism begin to pale compared to the trials' vindication of persecuted persons and peoples.

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⁸ See Developments in International Criminal Law, 93 Am. J. INT'L L.1 (1999).

¹⁷ On the current challenge to and evolution of the differentiation of international and internal conflicts see ICC Statute, *infra* note at art. 7 (regarding jurisdiction for crimes against humanity); Prosecutor v. <u>Tadic</u>, <u>Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction</u>, Case No. IT-94-1, 2 October 1995, ¶ 128–142; see also Ruti Teitel, note at 184 (arguing that the ICTY expanded the international criminal jurisdiction first established at the Nuremberg Trials to cover "crimes against humanity" even when they occur wholly within the state). The ICTR reflects another instance of expansion of international criminal jurisdiction which while an international tribunal prosecuted solely intrastate crimes committed in the Rwandan genocide. *See* ICTR Statute, at Art. 4.

It would not be till a half-century later, with the 1990's Balkans wars, and the return of atrocities to the heart of Europe after the Cold War, that there is a revisiting of the meaning of international criminal justice in relation the challenge of war and peace... Convened in the Hague in the very midst of a bloody conflict, the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY) was hardly to ratify the gains of a hard won peace; but came in earlier, and convened to hold war criminals to account with the aim that this would advance the peace stating that "the prosecution of persons responsible for serious violations of international humanitarian law...would contribute to the restoration and maintenance of peace." 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 as an attempted apoliticization or depoliticization at the same time the 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 its 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 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," these are characterized by embodying a close nexus between individual and group identities. "Ethnic cleansing" — the purposeful policy by

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¹⁹ United Nations, Security Council, United Nations Security Council Resolution 827 on Establishing An International Military Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, S/Res/827 (May 25, 1993).

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."²⁰ The element of intention, of persecutory policy, ²¹ uniquely mediates individual and group identities where there are systematic mechanisms of state or state-like policy.²² Similarly, to adjudicate the responsibility for humanity means reaching both the public and the private. This entails protecting and accounting for individuals within collectivities, 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.²³ 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 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 within the country's borders, nevertheless, for the first time, it is deemed subject matter appropriately before an international forum.

See Final Report of the Commission of Experts, at Annex 4, "The Policy of Ethnic Cleansing," at 21.

21 See Convention on the Prevention and Punishment of the Crime of Genocide (1948) entered into Force, January 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, Aug. 8, 1945, Art. 6(c), 82 U.N.T.S.

^{279.}See Prosecutor v. <u>Kupreskic</u>, Trial Chamber Judgment, Case No. IT-95-16, 14 January 2000, para. 543. 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 "[s]tate practicing a policy of ideological supremacy," Federation Nationale Des Deportes Et Internes Resistants Et Patriotes And Others v. Barbie, 78 I.L.R. 125, 128 (Fr. Court of Cassation [Criminal Chamber] 1985).

See Agreement for the Prosecution and Punishment of the Major War criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, Art. 69 (c) 2 U.N.T.S. 279.

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 have increasingly have been agreed upon to regulate internal armed conflicts."²⁴ Just as the classical international legal regime premised on state sovereignty and self-determination was inextricably associated with the growth of modern nationalism, ²⁵ conversely, one might see the 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, with endeavors 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.²⁶ Although still highly controversial, increasingly, humanitarian intervention is being justified under the U.N. Charter, Art. 52(1)'s authorization of regional "enforcement action," 27 and within the emergent 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. There we see the increasing turn to the exercise of international

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²⁴ Prosecutor v. Tadic, No. IT-94-I-AR12, Jurisdiction Appeal Case (1995), para. 97; See Prosecutor v. Tadic Appeal Judgment, Case No. IT-94-I-A, Int'l Criminal Tribunal for the Former Yugoslavia, (App. Chamber, 15 July, 1999, 38 I.L.M. 1518 (1999); reprinted in 94 AM. J. INT'L. L. 571 (2000), available at http://www.un.org/icty/ind-e.htm; see also Teitel, WAR CRIMES, supra note 2. what is this cite???

²⁵ See Stephen Krasner, Sovereignty: Organized Hypocrisy 182–83 (1999).

²⁶ See United Nations 2005 World Summit Outcome Document, paras 138-140, U.N. Doc. A/60/L.1(2005).

²⁶See United Nations 2005 World Summit Outcome Document, paras 138-140, U.N. Doc. A/60/L.1(2005). ²⁷See U.N. CHARTER, arts. 51, 52, 53 in light of U.N. CHARTER, art. 2, para. 4. See Louis Henkin, Editorial Comment, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention*," 93 Am. J. INT'L. L. 824, 827–28 (1999) (A "living Charter" would support an interpretation of the law and an adaptation of UN procedures). *Contra see* GRAY, *supra*, at 26–31.

criminal law enforcement is connected up 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, allowing 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 the 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 argument—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 1990's tribunals, today the standing International Criminal Court (ICC) applies it all of the time. 28 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 intended to operate significantly independently of the UN system, notably, independently of both the conditions and nexus of interstate conflict, but also, of the related prevailing supervisory multilateral institutions. Here is a sustained and ongoing role for the enforcement of the law of humanity, which may, as we will see, be overstated, as this enforcement depends, in turn, first and foremost, on a commitment by states and its

²⁸ See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex 11, U.N. Doc. A/CONF. 183/9, reprinted in 37 I.L.M. 999 (1998) available at http://www.un.org/law/icc/statute/romefra.htm [hereinafter ICC Statute].

political actors, and others. Transcending traditional parameters regarding the regulation of post conflict, the new court aims at regulating conflict within the state.

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 resort."²⁹ Indeed, 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, e.g., Uganda, Congo, Darfur, the Central African Republic, and Kenya. One of the farthest along, a situation "referred" to the ICC, against key members of the brutal Ugandan rebel group, the Lord's Resistance Army, have been indicted in particular, its leader Joseph Kony,. 30 While having followed state referral, nevertheless, Ugandan indictments raised a profound dilemma for the Court, illustrating the potential tensions regarding the assumption of jurisdiction over a situation which, at the same time, demanded a political resolution, which some thought might well be jeopardized by the judicial intervention.³¹ Yet despite this typical presentation of a "peace versus justice" dilemma it appears that the resolution that has been reached-bargaining in the shadow of the law-a resolution that built in the justice dimension and though it is a counterfactual may well have not been achievable in a different context. In another more recent illustration, the Security Council's failure to come up with a resolution regarding Darfur led to the matter being put in the hands of the ICC-- a referral which may give an inkling to how the Court will

²⁹ International Criminal Court prosecutor says first Darfur cases are almost ready, UN News Centre, 14 December 2006, available at http://www.un.org/apps/news/story.asp?NewsID=20989&Cr=sudan&Cr1=. ³⁰See "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.

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

operate going forward, as the pattern appeared to emulate the ad hoc's in a number of ways. The exercise of such SC referral points to the contemporary connection between punishment and international security and to 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 has 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, and the crossing of distinctions—between individual and state responsibility, internal and external conflict, etc.—that have served to sustain stylized divisions of labor between the regimes. Tribunalization, rather than isolating judgment of guilt from the actual daily politics of conflict, has resulted in deep entanglement of the tribunals with politics, in various and problematic ways but not *delegitimating* ways (since such entanglement was in a sense required or invited when one considered the implications of their mandates, as we have suggested, which increasingly extended beyond ordinary criminal responsibility to the management and prevention of conflict itself). Faced with the lack of any sort of putatively comprehensive criminal code, and a complex mandate extending beyond "ordinary" criminal justice in many respects, the tribunals to discharge their mandate 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 with or in a sense conversation with the interpretations of other tribunals domestic or international 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 two separate lifeworlds. 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—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 is charged with 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 on the crucial question of identifying and characterizing the targeted group for purposes of determining whether genocide occurred. (see paragraphs 195-201).

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

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 clearly 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, North and South concerning economic ideology and alleged economic imperialism. Tribunalization served a depoliticizing or de-escalating function, removing such claims from the realm of saber-rattling or gunboat diplomacy and placing them within a system apparently more respectful of sovereign equality.

Through the interpretive maneuvers of ICSID and 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 resources for example (see for instance *TOPCO* and *LIAMCO*) became blurred or less sharp. Tribunalization was a technique for managing interstate political/ideological conflict surrounding economic activity and intervention of Northern and/or Western states in the global south and the east bloc. Direct access for investors to

such tribunals served less to empower corporations than to deflate the underlying political tensions through blunting the political/ideological dimensions of the disputes.

With the end of the cold war and the golden era of globalization a la Washington Consensus, a new functionality became associated with international investment law, also deeply interconnected with tribunalization. Adhering to international investment treaties became a mechanism which would allow developing countries and former East 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 would be 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. Now the investor-state tribunals, quite plausibly, given the manner in which states sought to use investment rules as credible commitments in the economic transitions of the post-Cold War period, often would 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. 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." (Tecnicas Medioambientales Tecmed S.A. v. Estados Unidos Mexicanos, ICSID Case No. ARB (AF)00/2 (2003),

award dated May 29, 2003.) 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 adhesion to the treaties. 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, would be seen as particular valuable, where the logic of the investment, as was often the case was dependent on (politically fragile) decisions about privatization, deregulation, and other elements of marketization.

When the Washington Consensus formula came into question, and with the messy or simply unsuccessful results of privatization and pro-market reform in some countries, and an increasing sensitivity to their "human" costs in others (or uncertainty as the cost/benefit trade-offs), international investment law entered into a new era where tribunalization acquired further meanings and dimensions. Cases where investors sued governments that backtracked from commitments to privatization etc. 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, which includes the investor) indicated an awareness of broader human interests being 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 challenged a ban on a gasoline additive in California, which was claimed to have an environmental justification. The environmental issues implicated led the tribunal to opening 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....the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive." (Methanex v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae). 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 interpretation discretion where amplest, namely in viewing jurisdiction narrowly and being open to a range of technical or formalistic jurisdictional challenges, in contrast to the expansive view of jurisdiction often seen in such tribunals during the glory years of globalization or more precisely globalization a la Washington Consensus. By drawing dramatic public attention to the limits of globalization a la Washington Consensus tribunalized international investment law has now served-perhaps ironically given its earlier meanings and purposes-to explicitly 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 (see for example, the disparate results and rationales in the litigation surrounding the Argentine

Continental Casualty 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 depegging of the peso and the dollar). At the same time while international investment law has become a focus for the questioning of the justice of global neoliberal economics, some states have managed to go under the radar screen, 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 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 a 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, 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 underlegitimation 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 the 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 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 the 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, "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 certainset of shared normative values (of fre trade) and shared institutional (and personal) ambitions situated in a matrix of long-tem, first-name contacts and friendly personal relationships. GATT operatives became a classical "network"....Within this ethos there wasn institutional goal to prevent trade disputes from spilling over, or indeed, spilling out into the wider circules 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."³²

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³² Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement," in Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millenium, eds. Sauve, Subramanian and Beviglia Zampatti (Washington D. C: Brookings, 2001), p. 334.

With the creation of the WTO in 1995 out of the GATT framework, WTO law now 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 (TRIPs, disciplines on subsidies and related forms of industrial policy, a privatization- and deregulation- friendly architecture for services trade liberalization). Again this was the post-cold war heyday of neo-liberal 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, entailing (in effect) compulsory jurisdiction and enforcement measures, as well as an appellate tribunal, moving away from tribunalization understood as quasilegal, quasi-diplomatic "settlement" of disputes. The system remained, significantly however, inter-state, with no standing for private actors to bring complaints based on WTO law. One might have thought that the effect of the this dual aspect of the WTO project in relationship to the GATT would be to secure or freeze the Washington Consensus through backing in by the rule of law. However, such was to prove not to be the case. For the Washington Consensus became questionable almost as the ink was dry on the WTO treaties in 1995; and in 1998 we had les emeutes de Seattle. These developments were happening just as the new WTO Appellate Body was getting its feet on the ground. Significantly the Appellate Body Members mostly came from a community of jurists not WTO technocrat insiders. They were not beholden to that insider community or club, as described by Weiler. Instead, they looked at least to some extent outward for their legitimacy and sense of identity and mission to a broader sense of international community, legal and political. In the presence of increasing external

dissensus 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 as the interpretation of treaty texts that balance different values and interests; 37 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 engage substantive normative choices all in the context of interpretation. Moreover, although, as mentioned, the WTO dispute settlement system has no formal role for direct representation of diverse human interests, for instance by NGOs, through interpretation the AB has found ways of constructing such space for representation: the ultimate effect is one of opening up more space for political and social contestation, wresting the system away from technocratic management by an insider elite with an ideology disguised as albeit 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 judiciary charged with developing its own practice out of a relatively incomplete code of civil procedure found within the incompletenesses of that code the space to have a basis for submissions—not to give formal rights to have an amicus brief taken into account but a possibility of access at the discretion of the judges has been used from time to time and the existence of which has been affirmed.

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

the capacity to express views in a number of different ways, not just through the amicus route but by giving expert opinions and advocacy and lobbying and making public statements about litigation in a variety of contexts.

Another respect in which this has happened has really come from an unusual source, trade officials, who are more known for adhering to the "Member-driven" ideology of the WTO. The DSU provides for confidentiality of written and oral proceedings, as a general rule. Increasingly, parties in WTO litigation have been making pubic their pleadings in WTO disputes, often posting them to the Internet. Recently, in the second round of the EC-Hormones dispute, the parties to the dispute agreed to the opening up of the 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 accepting to open up 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 These last developments have occurred at a time when the of the appellate process. capacity of the system to evolve through diplomatic negotiations has been in question 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 it not opposite way: in the presence of political and diplomatic impasse the judiciary has an enhanced role in the preservation of 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 to deal 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 at least 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 the 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 (recently reaffirmed emphatically by the AB in the *Mexico-Stainless Steel* case), both absent from the investment regime.

A different way in which the WTO judiciary has arguably responded to the post-Wesphalian human-centred 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 operators.7.77 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."(paras. 7.76-7.78)

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, emitted last week): "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."(para. 124) 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 or 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- as opposed to state-centred 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 incidents of serious

illness. For purposes of applying the non-discrimination norm in the GATT, here National Treatment, the prohibition on less favourable 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. 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. Now 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- not state-centred 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 through 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, the Appellate Body, in order to

interpret the expression "conservation of exhaustible natural resources" as including living resources, i.e. endangered species (in this case of sea turtles) the Appellate Body had reference to international instruments on biodiversity, the negotiation of which was importantly influenced by environmental NGOs. 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; 2) even though not all WTO Members were signatories to these instruments, and indeed not in all cases even all the parties to the dispute in question. Arguably, the AB did so—of course this 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.

From Fragmentation to Interpretative Dialogue as a Conception of Decentralized but "Coherent" International Legal Order

Have 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 an indeed arguably requires greater openness to various kinds of outside and diverse influences or factors than diplomatic and technocratic cultures of international regimes. And 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 or a ruling of the WTO Appellate Body like *Shrimp/Turtle* is that the judges have little interest in using these formal mechanisms as constrained gateways for the extraregime influences in question, and (by and large, cf. Burgenthal's separate opinion in *Oil Platforms* and to a lesser extent that of Higgins) are comfortable in bringing in the "external" normative material simply through a conception of its relevance to the adjudicative task before them-making sense in context of the legal rules that are engaged in the dispute.

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 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 incident of frequent resort for interpretative purposes to other tribunals' rulings by the Appellate Body for a variety of jurisprudential techniques—including the establishment of relevant customary law. We could add from the investment arbitration sphere the very frequent references to ICJ and PCIJ rulings among others 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 BITs, which frequently directly allude 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.. This commitment, at the same time as it suggests that the multiplication of tribunals is unlikely to intensify or even reinforce some sense of tragic Weberian conflict of warring gods and demons, also in a way guarantees that there will never be a harmonization or synthesis, that international legal order will never create the Platonic utopia on a global scale, where the diverse human interests are ordered in a stable hierarchy of norms and 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 as such. This may still be in a sense fragmentation, 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, but also international relations literature, what shadows as it were the fragmentation angst is ultimately the relationship of tribunalization to politics. Selfcontained or closed legal systems are or tend to be imaginative constructions of jurists who imagine or desire the insulation of international law from politics, not so much other international regimes. Tribunalization can come to sight both in "humanity law" and in international economic law as an attempt to purify international legal regimes from "politics"-a response to the international law skeptics' claim or suspicion that international law is just an epiphenomenon or a justificatory rhetoric for power politics. But despite such depoliticizing hopes tribunalization as it has evolved dynamically in relation to the substance of the legal regimes in interaction with emerging social, political, economic military realities has led to re-entanglement with politics, while politics itself has been 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. And in turn since politics spills over across the understandings of the specialized functions of the particular regimes a la democratic pluralism at the domestic level, the re-emersion in politics in the context of tribunalization further reinforces the openness to diverse normative material in the interpretive exercise, and again, further dissipates the anxieties over fragmentation, which appears to deny international law the integrity required for its legitimacy.