

# Cross-judging: Tribunalization in a Fragmented but Interconnected Global Order

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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.<sup>2</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 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 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 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” 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 de-escalation 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

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<sup>2</sup> 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).

regimes<sup>3</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 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 explore a number of possible interpretations. One hypothesis is that tribunalization in these regimes reflects a common trajectory or tendency in international order. Alternately, it could be the case that tribunalization operates in a parallel manner but largely unconnected as between the regimes. Finally, it is possible that tribunalization in these regimes is acting in such a way as 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- to a rules-based international system. Tribunalization means depoliticization.<sup>4</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>5</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, are such 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, communities and 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 decentralized 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 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.

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<sup>3</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 3-4 (2003).

## I. 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 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).<sup>6</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 in fidelity to the commitment to legality itself. The question is whether such a commitment can be defined in simply “proceduralist” terms-judicial independence, impartiality of decisionmaking, 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>7</sup> or at least “fairness.”<sup>8</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 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. 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 the domestic high or constitutional court.

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<sup>6</sup> Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Oct. 2, 1995).

<sup>7</sup> 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).

<sup>8</sup> See generally THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) (exploring the relationship between fairness and legitimacy).

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 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, whether natural or divine law), to humanity and its protection.<sup>9</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, albeit, 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>10</sup>

## II. Tribunalization and Fragmentation: Optimistic and Pessimistic Prognoses

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 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 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.<sup>11</sup> Nevertheless, the problem

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<sup>9</sup> This shift and its implications are developed in extenso by one of us in Ruti Teitel, *Humanity's Law*, (unpublished manuscript, on file with the Journal of International Law and Politics). The first part of this paper is derived from the argument in that manuscript.

<sup>10</sup> *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).

<sup>11</sup> Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and Constitutional Justice*, 19 EUR. J. INT'L L. 769 (2008).

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>12</sup>

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 as 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*.<sup>13</sup> 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. 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.<sup>14</sup>

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,<sup>15</sup> 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 conflicting 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 legal system, undermining

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<sup>12</sup> Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EUR. J. INT'L L. 945 (2008).

<sup>13</sup> CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL INTEGRATION* (2007).

<sup>14</sup> 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)).

<sup>15</sup> For an attempt to treat international jurist 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).

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.<sup>16</sup>

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.<sup>17</sup> 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. 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 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,<sup>18</sup> and on the relationship of these changes to developments in international economic law (investment and trade).<sup>19</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 challenge the purity of the particular legal order. But, as we shall illustrate, tribunals have found themselves always

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<sup>16</sup> See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) .

<sup>17</sup> 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>.

<sup>18</sup> See e.g., 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).

<sup>19</sup> See e.g., 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).

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 in each case, little evidence of “self-containment.” What we do however notice is a sense of non-subordination or assimilation 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 does not require stable agreement or harmonization on the one hand nor delegitimizing incoherence—nihilistic or radical indeterminacy—on the other.