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FRAGMENTATION IN INTERNATIONAL HUMAN RIGHTS LAW – BEYOND CONFLICT OF LAWS

1. THE HYDRA THAT IS FRAGMENTATION

Like tackling the mythical hydra, the attempt of defining Fragmentation is fraught with peril. It seems that once one solves one layer of complexity, two more to pop up in its place. The struggle for definition starts with the idea of the existence of a unified legal order, that of international law, which is under the threat of shattering under the pressure of divergent “self-contained” regimes. These regimes, as the story goes, have their own law-making and law application rules and mechanisms as well as “rules concerning the consequences of breaches of their respective primary norms.”¹ However, once we start looking at how much “self-contained” these regimes really are we immediately notice their inter-relatedness in assumptions, sources, methods etc. with both general international law and amongst themselves.² So much “for autonomous systems decoupled from general international law.”³ But that does not cure our anxieties⁴, unfortunately, for while these regimes may not be completely separate from international law, they still somehow threaten its unity by their ability to pronounce on issues relevant to international law and to do so in a way that conflict with each other. In the proverbial state of nature without a hierarchical centre what is to stop a normative conflict from ensuing, or so the fear goes.

Even if “self-contained” regimes do not, as such, exist, regimes certainly do. Of course, pinning down what exactly we mean by a regime – even a special one – as it turns out is not so easy. The International Law Commission found at least three ways in which the term is used:

Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the articles on Responsibility of States for internationally wrongful acts.

Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a treaty on the protection of a particular river) or some substantive matter (e.g. a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law).

Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a “special regime”. Expressions such as “law of the sea”, “humanitarian law”, “human rights law”, “environmental law” and

¹¹ Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ 17 *European Journal of International Law* 483

² Pierre-Marie Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law’ 1 *European Journal of Legal Studies* 1

³ Simma and Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’

⁴ Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ 15 *Leiden Journal of International Law* 553

“trade law”, etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety. (footnotes omitted)⁵

But even this taxonomy does not seem all that clear since the narrowest (first) definition fails the test at international criminal law, for example, for it can fit both the first and the third definition since it has a special set of primary rules for which violation of “is accompanied by a special set of (secondary) rules concerning breach and reactions to breach.”⁶ Just think of the obligation of all states to prevent and punish Genocide if it occurs as part of the primary rules on Genocide found in the Genocide convention, not to mention all the other specificities like individual criminal responsibility, lack of reciprocity in its implementation etc. The invocation of Hart’s primary and secondary rules analogy seems unhelpful for all of these layers of regimes have primary and secondary rules to some extent, the main difference being on whether your particular point of view is from inside or outside of the regime. From inside, the European Union regimes seems quite reified and autonomous, state-like almost, until one is presented with the *Kadi* Court of First Instance⁷ and European Court of Justice⁸ judgments and the outside/inside perspective that they offer.⁹

The discussion on fragmentation seems to be further complicated by the introduction of another kind of fragmentation, institutional fragmentation. So far we have been talking about substantive fragmentation, the separation of “law into highly specialized ‘boxes’ that claim relative autonomy from each other and from general law”¹⁰ – hence the idea of human rights law, humanitarian law, law of the sea, the regime governing the river Danube etc. But the proliferation of different institutions within these “specialized boxes” (especially the box in its widest sense) adds a further twist to the story and another layer of anxiety for order-inclined lawyers since the existence of different institutions pronouncing on the meaning of the norms of those same boxes may, inevitably, lead to further specialization into smaller and smaller boxes trying to occupy the same space. In a sense it increases the problem exponentially since every new institutions has the potential of interacting with every other.

The problem of international human rights and humanitarian law seem to particularly acute in this sense since while they rest on an assumption of normative unity due to their allegiance to the Universal Declaration on Human Rights, this presumption can easily be threatened by increasing the number of institutions that can authoritatively pronounce on the meaning of the regime norms. It seems in international human rights and international criminal law this presumptive unity can not only be shattered from the “outside” – by another regime taken in its widest sense – but, and probably more dangerously, from the “inside” by one of the sibling institutions. The proliferation of the UN system of right protection adds a layer still to the institutional dimension of fragmentation since not only do these human rights

⁵ International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Yearbook of the International Law Commission, 2006) para 12; but also see Margaret A Young, ‘Introduction: The Productive Friction between Regimes’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2011) p. 5.

⁶ *Ibid.*

⁷ Case T-85/09, *Kadi v. Commission*, [2010] ECR II-5177.

⁸ Case C-402/05 P and C-415/05, P. *Kadi and Al Barakat International Foundation v. Council and Commission*, [2008] ECR I-6351.

⁹ For the unhelpfulness of thinking of deeply embedded regimes like the ECtHR and the European Union in terms of inside and outside see Mitchel de S.-O.-l’E Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press 2009).

¹⁰ Martti Koskenniemi, *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006)

bodies cover normatively quite similar norms and topics with other human rights institutions outside of the UN system but with human rights bodies within the UN system itself.

2. THE CONFLICT BIAS

Similar to survivor bias¹¹ fragmentation talk has its conflict bias or interaction bias. Let me explain. Survivors' bias is a bias that skews results by the mere fact of looking at instances of success. For instance, during WWII what was to become the US Air Force wanted to know where to most effectively place additional armour on its bomber aircraft so it can increase the survivability of both crew and aircraft. The samples that they had to go with as to vulnerable areas of the planes were the bombers that returned from their missions carrying the scars of their ordeal. Naturally, the military wanted to put the additional protection on those areas that showed the most damage. It was not until a very smart mathematician pointed out that the areas that were mostly affected by damage were the least ones to worry about since the planes suffered extensive damage to them but still managed to survive the flight back. It was the areas that were undamaged that needed re-enforcement since logic would dictate that the planes that did not make it back were most likely brought down by damage in those parts.¹² The same can be said with researching success in investment. If one focuses on the calculating and forecasting models of successful investors one runs the risk of finding genius where chance might be the better explanation if the failing investors were not also included in the study.

Similarly with the fragmentation debate, if the fear of fragmentation is that autonomous regimes, thanks to their internal mechanisms of law making and law application would become, well, autonomous then focusing on the visible points of interaction – on the conflict – would skew the perception towards over or under estimating the extent of the fragmentation or to the forces that might operate to mitigate fragmentation in the first place. Not only that, but once we frame the fragmentation debate into a debate about interaction or conflict, then our solution is the familiar conflict of laws rules.¹³ The solution for a nail is a hammer.

This conflict or interaction bias has been pervasive in the literature and it is the default conclusion of the ILC Study Group.¹⁴ The assumption is that the proliferation of regimes leads to some kind of divergence which breeds conflict, the conclusion being to focus on the visible points of interaction whether it is conflict or cross fertilisation. An attempt was made to overcome the focus of conflict and interaction with the study of Multi-Sourced Equivalent Norms (MSEN) performed by Tomer Broude and Yuval Shany.¹⁵ In their study they defined MSEN as

Two or more norms which are (1) binding upon the same international legal subjects; (2) similar or identical in their normative content; and (3) have been

¹¹ <http://www.freakonomics.com/2009/09/17/survivor-bias-on-the-gridiron/> (last visited May 30, 2013).

¹² Example taken from <http://youarenotsosmart.com/2013/05/23/survivorship-bias/> (last visited May 30, 2013).

¹³ James Crawford and Penelope Nevill, 'Relations between International Courts and Tribunals: The 'Regime Problem'' in Margaret Young (ed), *Regime Interaction in International Law* (Cambridge University Press 2012)

¹⁴ Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*.

¹⁵ Tomer Broude and Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (Hart 2011)

established through different international instruments of ‘legislative’ procedures or are applicable in different substantive areas of the law.’¹⁶

This certainly is a novel approach – it tries to play down the conflict and interaction part of fragmentation and does try to emphasise the identical normative content of the norms. However, it is still predicated on the same subject being covered by MSE norms with the background assumption of a latent conflict or interaction ensuing. It is geared toward answering a specific systemic question of points of contact between system entities grouped by the normative equivalence of the norms themselves. It is geared towards answering interaction problems not normative divergence or convergence research.

However, the fear of fragmentation is no less mitigated when there are no visible points of conflict or interaction since the lack of interaction might also mean that for some specific regimes there is no meeting point. For example, there is hardly a place where the European Court of Human Rights and the Inter-American Court of Human Rights can meet since both of them cover different regional groups of states, even though they share a normative source in the Universal Declaration of Human Rights. Certainly, if that is the case then no amount of conflict of laws rules solution will mitigate this type of drift. Moreover, if there is close to no divergence between these systems then maybe a better solution to fragmentation may not be conflict of laws rules but rather the copying of forces that drives this convergence (provided that convergence is what we strive towards, a normative question that is not directly part of this study). In short, there is still a lot we do not know, but certainly focusing on interaction alone is not the only way forward. What happens when the only point of contact is the normative equivalence of the norms themselves as is the case with human rights?

3. THE FOCUS OF THE STUDY

The approach of the study is to look at the consequences of institutional fragmentation *within* a specific branch – that of international human rights law (IHR). There is a presumption of normative unity in IHR, to a large extent stemming from their shared commitment to the Universal Declaration on Human Rights.¹⁷ Consequently, the understanding of the rights and the extent of their protection should be, in principle, if not identical then largely overlapping.

The systems that will be under study are the European Court of Human Rights, the Human Rights Committee and the Inter-American Court of Human Rights. The choice of jurisdictions is partly due to the study’s specific approach that goes beyond the conflict of laws and regime interaction but at the same time be mindful of it. The basic idea is to treat each of these systems as separate legal systems and compare how their jurisprudence has developed over time. It presupposes that these institutions serve similar functions – the interpretation and adjudication of human rights treaty norms that are normatively equivalent – and that in the performance of this function are faced with broadly similar issues and

¹⁶ Ibid., p. 5; but also see Filippo Fontanelli, ‘Tomer Broude and Yuval Shany (Eds). Multi-Sourced Equivalent Norms in International Law. Oxford: Hart Publishing, 2011. Pp. 344. \$120. Isbn: 9781849461450’ 23 *European Journal of International Law* 597

¹⁷ See for example the Preambles of the European Convention on Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child, which in different ways credit the Universal Declaration on Human Rights.

problems i.e. that they, in minimum, protect civil and political rights but also issues related to their specific situation of being an international body dealing with sovereign states with different level of institutional and democratic development.

The purpose of the comparison is to see the extent to which fragmentation is an issue in these jurisdictions without focusing on instances of conflict or interaction, but rather on the black letter law developments in each system and comparing the similarities and differences between them. Consequently, the methodology used in the study is comparative law methodology. It assumes that there already is fragmentation – the institutional kind where there is more than one institution without hierarchical relation between them and that can pronounce on the meaning of the normatively equivalent norms that are international human rights – and that the focus is on the question of assessing its extent.

With this approach the focus of the case selection within the specific jurisdictions is not to find those cases that show how the specific regime interacts with its “outside” environment, but on the so called “leading cases” that develop the black letter law. What the focus on leading cases will hopefully reveal is the state of the law in the respective regime as a baseline for comparison of what is understood by, for instance, the right to have private correspondence in these three systems in the hope that it will reveal the overlaps and/or divergence in the systems’ understanding of the substantive rights. By focusing away from regime interaction it should be possible to see the unobserved forces that drive the potential convergence or divergence. While regime interaction is not the primary focus, it is not completely side-lined either. The choice of jurisdictions should allow for both since while there is almost no chance of interaction, of creating overlapping obligations on states in case of the European and the Inter-American Courts, there is a real chance that that might happen in relation to the HRC and the European and Inter-American Courts respectively as with the case of religious education in Norwegian schools in respect to the HRC and the ECtHR.¹⁸

Furthermore, this study tries to table the discussion of fragmentation v. pluralism (even whether there is even actually a choice between the two) and does not strive to answer whether more or less fragmentation/pluralism is normatively desirable or not or whether fragmentation/pluralism is better at staving off hegemonic tendencies or not.¹⁹ What it does try to ascertain is the extent of fragmentation or the extent to which there is convergence or divergence in the understanding of the equivalent norms by these three bodies. This brings us to the issue of at which point can we reasonably say that there is convergence and/or divergence and especially at which point do we say that it is significant and that it matters.

The answer can be given in several layers. The first layer is that despite the common dedication to the Universal Declaration the three conventions that form a part of this study have noticeably different wordings when it comes to the specific rights in question both in length and in structure. However, despite this difference, there are also striking similarities between them, for instance, all of them have the familiar wording of “no one shall be subjected to torture or inhumane or degrading treatment or punishment”.²⁰ Are these

¹⁸ Human Rights Committee, *Unn and Ben Leirvag and others v. Norway*, Communication No. 1155/2003, UN Doc. CCPR/C/82/D/1155/2003, 23 November 2004; and ECtHR, *Folgero and others v. Norway*, Application No. 15472/02, Judgment of 29 June 2007; but also see Lucas Lixinski, ‘Choice of Forum in International Human Rights Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Forward?’ XVIII Italian Yearbook of International Law 183.

¹⁹ Martti Koskeniemi, ‘Hegemonic Regimes’ in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2011)

²⁰ Article 3 of the European Convention of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the American Convention on Human Rights.

differences or similarities enough to be meaningful or significant when it comes to the severity of fragmentation/pluralism?

The second layer of complexity lays in the issue of the similarity or difference of doctrines, tests and justifications. When deciding a case courts use tests, substantive doctrines and justifications in order to argue and justify why a case was decided one way rather than another. If the presumption of normative equivalence holds then one would expect that the different courts would use the same or similar tests, doctrines and/or justifications to argue and settle similar cases. On the other hand, if the courts use different doctrines, tests or justifications to decide similar cases then it is hard to see where the normative equivalence would be.

A third layer of complexity lays in the outcome of cases. It is conceivable that despite the textual, doctrinal etc. divergence for there to be a significant overlap in the outcomes of cases. The opposite also might be true, that despite the high overlap between doctrines, tests and/or justifications there would be a significant divergence in outcome of cases, one system finding violations where the others would not. In all of these layers the question to be asked is at what point do a divergence or convergence become significant? Does the fact that courts use similar doctrines and justifications but arrive at different outcomes matter when it comes to fragmentation?

For the purposes of this study we can conclude that a significant overlap/convergence has taken place when the courts use the same or similar doctrines, tests and justifications to decide cases and *vice versa* if courts use different doctrines, tests and justifications to handle similar cases then a significant divergence is in place which brings into question the normative unity of human rights norms. There are both theoretical and practical reasons on why this level of similarity/difference matters.

The theoretical stand point has to do with the issue of interpretation and its constraints. As it has been argued, law – and anything else for that matter that is expressed in terms of language – is indeterminate.²¹ Texts – including laws, treaties etc. – have multiple meanings and judges make a “choice”²² of applying one over others when deciding cases. The key insight of the indeterminacy thesis, however, is that indeterminacy is settled by people’s beliefs, convictions in certain substantive worldviews – notions of the good life²³ – shared by interpretative communities (practices)²⁴ through which texts, laws, treaty

²¹ For a key international law proponent of this stream of thought see Martti Koskenniemi, ‘Letter to the Editors of the Symposium’ [American Society of International Law] 93 *The American Journal of International Law* 35; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (Cambridge University Press 2005; Martti Koskenniemi, *The Politics of International Law* (Hart 2011)

²² It is arguable how much “choice” is there really involved in interpreting one way rather than another since some, including myself, who argue the indeterminacy thesis also claim that in the end what settles indeterminacy is the substantive notion – a substantive worldview – in which we are convinced and through which texts, sentences, paintings, utterances make sense. If that is the case then we also have to accept that we do not exactly control which worldviews we are persuaded and convinced in and therefore have no “choice” but to interpret texts one way rather than another; see for instance Stanley Fish, ‘Working on the Chain Gang: Interpretation in the Law and in Literary Criticism’ [The University of Chicago Press] 9 *Critical Inquiry* 20; Stanley Fish, ‘Wrong Again’ 62 *Texas Law Review* 22; Stanley Fish, ‘Still Wrong after All These Years’ [Springer] 6 *Law and Philosophy* 40; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989) and especially the chapter titled *Change* pp. 141-159.

²³ Koskenniemi, *The Politics of International Law*

²⁴ The idea of “interpretative communities” has been championed by Stanley Fish, his most detailed explication of his concept can be found in Stanley Fish, *Is There a Text in This Class? : The Authority of Interpretive*

provisions etc. gain their meaning. Only mediated through these substantive worldviews do texts make sense. Consequently, the various elements internal to the practice that populate its four corners is what acts as a constraint on interpretation. In practices such as law, these elements, like the understandings of what is a treaty, what is a reservation, margin of appreciation, etc., give outlays of what is possible to argue (and argue it successfully) at any given time – the so called “weak constraints of practice”.²⁵ If certain elements are not part of the argumentation and justifications of a case while others not internal to the practice are then the case itself becomes suspect for no other reason than by simply not falling in the understanding of what it is to “do” law. For instance, Fish has said that

[the] conclusion that might seem to be the one I, myself, was moving toward in the course of presenting these examples, for surely the moral of *Columbia Nitrogen* ... (and countless others that could be adduced) is that the parol evidence rules is wholly ineffective as a stay against interpretative assaults on the express language of contracts and statutes. But the moral I wish to draw goes in quite another direction, one that reaffirms [...] the power both of the parol evidence rule and of the language whose “rights” it would protect, to provide meaningful constraint on public and private conduct.” It is certainly the case that *Masterson v. Sinne*, like *Columbia Nitrogen* and the others, indicates that no matter how carefully a contract is drafted it cannot resist incorporation into a persuasively told story in the course of whose unfolding its significance may be altered from what it had seemed to be. But the same cases also indicate that the story so told cannot be any old story; it must be one that fashions its coherence out of materials that it is required to take into account. The important fact about *Masterson* is not that in it the court succeeds in getting around the parol evidence rule, but that it is the parol evidence rule – and not the first chapter of Genesis or the first law of thermodynamics – that it feels obliged to get around. That is, given the constraints of the institutional setting – constraints that help shape the issue being adjudicated – the court could not proceed on its way without raising and dealing with the parol evidence rule (and this would be true even if the rule had not been invoked by the eager trustee); consequently, the *path* to the result it finally reaches is constrained, in part, by the very doctrine that result will fail to honor.²⁶

It is for this reason that the focus on measuring convergence and divergence should be on tests, doctrines and justifications. It is not the case that if the courts use similar tests, doctrines and justifications then they will decide similar cases with the same outcome in all instances, but it is certainly safe to assume that this will be the situation in most of them. Moreover, the overlap (and *vice versa*) of substantive justifications should give a clear indication of the shared or divergent notions of the “good life” between these courts, increasing the likelihood of convergence or divergence, respectively.

There are also practical reasons for focusing on this level of comparison. For instance, concentrating on textual similarity or difference, due to interpretative dynamics, would miss completely the added value that institutions bring to the human rights regime and would defeat the purpose of this study which is to focus on the issue of institutional fragmentation.

Communities (Harvard University Press 1980; Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*

²⁵ Fish, ‘Working on the Chain Gang: Interpretation in the Law and in Literary Criticism; Fish, ‘Wrong Again; Fish, ‘Still Wrong after All These Years’

²⁶ Stanley Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford University Press 1994) at 151. (footnotes omitted.)

Consequently excluding the interpretative outcomes of the institutions themselves would be highly nonsensical.

More importantly there is also the practical limitation of the sheer volume of cases needed to be researched if one was to focus on outcomes alone. For instance, the ECtHR has 35854 judgments²⁷ which complicates any data collection efforts in terms of quantitative comparison since the cases would have to be coded not by outcome and Article involved but by factual pattern and issues discussed at minimum to control for the similarity of cases. It is not that such research is impossible – some²⁸ have managed to code in certain fashion the majority of cases in the ECtHR although probably not under the criteria listed above²⁹ – but that such an effort is beyond the resources of this study.

²⁷ As of June 7, 2013.

²⁸ Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' FirstView British Journal of Political Science ; Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' 102 American Political Science Review 417

²⁹ For the methodology and coding please visit http://dvn.iq.harvard.edu/dvn/dv/Voeten/faces/study/StudyPage.xhtml?globalId=hdl:1902.1/19324&studyListinGIndex=0_9c0f66c3d256529f67040b4a858d (last visited June 07, 2013).