

# REGIME-COLLISIONS: THE VAIN SEARCH FOR LEGAL UNITY IN THE FRAGMENTATION OF GLOBAL LAW

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I.	FRAGMENTATION OF GLOBAL LAW: TWO REDUCTIONISMS.....	999
II.	LEGAL COLLISIONS FROM THE PERSPECTIVE OF SOCIAL THEORY .....	1004
	A. <i>Rationality Conflicts in a Polycentric Global Society</i> .....	1005
	B. <i>The Global Legal System and Inter-Legality</i> .....	1007
	C. <i>Co-evolutionary Internal Differentiation of Global Law</i> .....	1008
	D. <i>Autonomous 'Private' Legal Regimes</i> .....	1009
	E. <i>Center and Periphery</i> .....	1012
	F. <i>Auto-Constitutional Regimes</i> .....	1014
III.	SELECTIVE NETWORKING OF COLLIDING REGIMES.....	1017
	A. <i>From International Conflicts to Inter-Regime Conflicts</i> .....	1018
	First Example: Transnational Copyright .....	1019
	B. <i>From Policy Conflicts to Rationality Collisions</i> .....	1023
	Second Example: Patent Protection for Medicines .....	1024
	C. <i>From a Common Ius Cogens to Regime Specific Ordres Publics</i> .....	1032
	Third Example: Lex Constructionis .....	1034
	D. <i>From Stare Decisis to Default Deference</i> .....	1039
	Fourth Example: Desaparición.....	1040
IV.	FROM LEGAL UNITY TO NORMATIVE REGIMES COMPATIBILITY .....	1045

## I. FRAGMENTATION OF GLOBAL LAW: TWO REDUCTIONISMS

Predictions of future events tend to be a rarity within the social sciences. It is an even more rare occurrence when predicted events come to pass. Niklas Luhmann's prediction on the future of global law is a

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memorable exception. In 1971, while theorizing on the concept of world society, Luhmann allowed himself the “speculative hypothesis” that global law would experience a radical fragmentation, not along territorial, but along social sectoral lines. The reason for this would be a transformation from normative (politics, morality, law) to cognitive expectations (economy, science, technology); a transformation that would be effected during the transition from nationally organized societies to a global society.

At the level of global society, this means that norms (in the form of values, stipulations, goals) will no longer pre-programme recognition patterns; rather, and in stark contrast, the problem of learning adaptation will gain structural primacy, so that the structural conditions for learning within each social system must be supported through normatisation.<sup>1</sup>

Subsequent analyses added a complementary prediction: should the law of a global society become entangled within sectoral interdependences, a wholly new form of conflicts law will emerge; an ‘inter-systemic conflicts law,’ derived not from collisions between the distinct nations of private international law, but from collisions between distinct global social sectors.<sup>2</sup>

And indeed, a quarter of a century later, an almost explosive expansion of independent and globally active, yet sectorally limited, courts, quasi-courts and other forms of conflict-resolving bodies did occur.<sup>3</sup> The project on “International Courts and Tribunals”<sup>4</sup> has identified the astonishing figure of around 125 international institutions, in which independent authorities reach final legal decisions. Amongst others, this international jurisdiction comprises the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea,

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1. Niklas Luhmann, *Die Weltgesellschaft*, 57 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 21 (1971), reprinted in SOZIOLOGISCHE AUFKLÄRUNG VOL. 2: AUFSÄTZE ZUR THEORIE DER GESELLSCHAFT 51, 63 (Niklas Luhmann ed., 3d ed. 1986) (our translation).

2. GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 100 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., Blackwell 1993).

3. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 923 (1999); for proposals of categorisation, see Thomas Buergeth, *Proliferation of International Courts and Tribunals: Is it Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); for documentation of collisions, see Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction—Problems and Possible Solutions*, 5 MAX PLANCK U.N.Y.B. 67 (2001); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003).

4. The “Project on International Courts and Tribunals” [hereinafter PICT] was founded in 1997 by the Center on International Cooperation [hereinafter CIC], New York University, and the Foundation for International Environmental Law and Development [hereinafter FIELD]. From 2002 onwards, PICT has been a common project of the CIC and of the Center for International Courts and Tribunals, University College London. See PICT, at <http://www.pict-pecti.org> (last visited May 14, 2004).

various tribunals for reparations, international criminal courts and tribunals, hybrid international-national tribunal instances, trade and investment judicial bodies, regional human rights tribunals and convention-derived institutions, as well as other regional courts, such as the European Court of Justice, the EFTA Court, and the Benelux Court.<sup>5</sup> Most recently, the inauguration of the WTO Appellate Body, the ICTY, the ICTR and the ICC unveiled this long-standing trend and immediately provoked a lively discussion on the risks posed by a proliferation of international courts and the fragmentation of international law. The issue of how to combat what traditional international lawyers view as a “pathological” *relativité normative*,<sup>6</sup> as well as all the problems of contradictions between individual decisions, rule collisions, doctrinal inconsistency and conflict between different legal principles is increasingly concerning case law,<sup>7</sup> expert committees,<sup>8</sup> ICJ presidents<sup>9</sup> and

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5. PICT, *supra* note 4, has gathered good documentation on legal frameworks and explicatory literature. For Dinah Shelton’s instructive presentation on the area of human rights, see DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 137–182 (Oxford U. Press 1999). See also CARSTEN LUTZ, *KOMPETENZKONFLIKTE UND AUFGABENVERTEILUNG ZWISCHEN NATIONALEN UND INTERNATIONALEN GERICHTEN: ERSTE BAUSTEINE EINER WELTGERICHTSORDNUNG* 19 (2003); regarding “Hybrid Courts,” see Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003).

6. Along these lines is the early critique made by Prosper Weil. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 440 (1983); for the original French text, see Prosper Weil, *Vers une normativité relative en droit international?*, 86 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 5 (1982).

7. On the question of State responsibility *loci classici*, see, e.g., *Prosecutor v. Tadic*, Judgements Int’l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-A, at paras. 115–145 (July 15, 1999) [hereinafter *Prosecutor v. Tadic*]; *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 62, paras. 109–116 (June 27) [hereinafter *Nicar. v. U.S.*].

8. See *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. GAOR, 55th Sess., Supp. No. 10, at 237, U.N. Doc. A/CN.4/L.628 (2002) [hereinafter *Report on Fragmentation*]; see also ILC Reports, U.N. GAOR, U.N. Doc. No. A/Cn.4/L.644 (2003); *Study on the Function and Scope of the lex specialis Rule and the Question of “Self-Contained Regimes,” Preliminary Report by Martti Koskenniemi*, Chairman of the Study Group of the ILC, at ILC(LVI)/SG/FIL/CRD.1 (May 4, 2004) [hereinafter *Koskenniemi Preliminary Report*]; see further Martti Koskenniemi, *Outline of the Chairman of the ILC Study Group on Fragmentation of International Law: The Function and Scope of the lex specialis Rule and the Question of “Self-Contained Regimes,”* at [http://www.un.org/law/ilc/sessions/55/fragmentation\\_outline.pdf](http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf), at 2–10 (2003) [hereinafter *Koskenniemi Outline*].

9. *Report of Stephen M. Schwebel, President of the International Court of Justice*, U.N. GAOR, 54th Sess., Agenda Item 13, at 3–4, U.N. Doc. A/54/PV.39 (1999) [hereinafter *Schwebel*]; see also *Report of Gilbert Guillaume, President of the International Court of Justice*, U.N. GAOR, 55th Sess., Agenda Item 13, at 7, U.N. Doc. A/55/PV.42 (2000) [hereinafter *Guillaume Report*], which warns of an ‘unwanted confusion’ and a ‘risk of conflicting judgments’, and accordingly supports Schwebel’s suggestion that the ICJ should be given the jurisdiction to provide advisory opinions at the request of international tribunals. See also

academic controversies.<sup>10</sup> The open question remaining is whether traditional, nation-state informed modes of tackling collisions of law will suffice, or whether a radical rethinking of conflicts law is necessary.

A characteristic legal reductionism, however, may also be observed here; a reductionism which both oversimplifies the manner in which norm conflicts are understood, and which narrows the possible range of their solution. In principle, lawyers register only a confusing variety of autonomous legal fields, self-contained regimes and highly specialized tribunals. By this token, they identify a danger to the unity of international law because the conceptual-doctrinal consistency, the clear hierarchy of norms and the effective judicial hierarchy that was developed within the nation-states, is lacking.<sup>11</sup> Accordingly, they direct themselves to a hierarchical solution to the problem, which, whilst not wholly reproducing the ideal of legal hierarchies of the nation-state, at least comes somewhere close to it. One far-reaching suggestion argues that as soon as a new tribunal is established, the ICJ should be given jurisdiction as an appeals instance.<sup>12</sup> Alternatively the ICJ, whose “advisory opinions” would preserve the unity of international law, should be invoked in the case of conflicts between jurisdictions.<sup>13</sup> One even more far-reaching suggestion not only entails the establishment of an international convention under the auspices of Article 17 of the ILC Statute Procedure,<sup>14</sup> but also promotes a certification procedure:

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Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 861–862 (1995).

10. See Jonathan Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791 (1999); Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL. 753 (1999); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Tullio Treves, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 809 (1999); see also Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 1998 HAGUE RECUEIL DES COURS 101; Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002); Mohamed Shahabuddeen, *Consistency in Holdings by International Tribunals*, in LIBER AMICORUM JUDGE SHIGERU ODA 633 (Nisuke Ando et al. eds., 2002); Abi-Saab, *supra* note 3.

11. See Study by Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, U.N. GAOR, 55th Sess., Supp. Nr. 10, at 326, U.N. Doc. A/55/10 (2002) (Hafner's study provided the impetus for the creation of the ILC Study Group).

12. Oellers-Frahm, *supra* note 3, at 67.

13. Schwebel, *supra* note 9, at 4; Guillaume Report, *supra* note 9; Hafner, *supra* note 11, at 335; Dupuy, *supra* note 10, at 801.

14. Hafner, *supra* note 11, at 335–39.

The ILC could be asked to devise a general 'check-list' to assist States in preventing conflicts of norms, negative effects for individuals and overlapping competences with regard to existing subsystems that could be affected by the new regime. In the course of reviewing on-going negotiations, the ILC could even issue 'no-hazard'-certificates indicating that the creation of a specific new subsystem has no negative effects on existing regimes.<sup>15</sup>

Quite apart from the fact that such hierarchical schemes have a minimal chance of success, views oriented toward the logics of politics readily reveal that the problem of norm collision is under-evaluated.<sup>16</sup> They locate the cause for fragmentation not within the lack of jurisdictional hierarchy, but see norm collisions educing from the underlying conflicts between the "policies" pursued by different international organizations and regulatory regimes. In this political perspective, collisions between legal norms are merely a mirror of the strategies followed by new collective actors within international relations, who pursue power-driven "special interests" without reference to a common interest and give rise to drastic "policy conflicts." Neither doctrinal formulas of legal unity, nor the theoretical ideal of a norm hierarchy, nor the institutionalization of jurisdictional hierarchy provide an adequate means to avoid such conflicts. Instead, the only possible perspective for dealing with such policy conflicts is the explicit politicization of legal norm collisions through power mechanisms, negotiations between relevant collective actors, public debate and collective decisions.

This observation is certainly correct. Its dramatic nature should likewise not be underestimated.<sup>17</sup> Yet, even this political foundation for legal norm collision is not deep enough and is in its turn a political reductionism. Both legal and political approaches offer only a one-dimensional explanation for collisions and, as a consequence, seek

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15. *Id.* at 399.

16. Koskenniemi & Leino, *supra* note 10.

17. Martti Koskenniemi makes a subtle attempt to lessen post-modern anxieties, Koskenniemi & Leino, *supra* note 10, and has meanwhile taken the opportunity during his leadership of the ILC Study Group to change its self-description from, "Risks ensuing from fragmentation of international law" to the more soothing formula, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law," U.N. GAOR ILC, 55th Sess., at 1, U.N. Doc. A/CN.4/L.644 (2003). This view, however, underestimates the problematic issue of consistency, resulting from the fragmentation phenomenon for legitimacy, efficiency and credibility of law; similar are the deficiencies of postmodern theories, even if they describe the legal fragmentation in its social context. *See, e.g.*, Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. Soc'y 279 (1987); Peter Fitzpatrick, *Law and Societies*, 22 OSGOOD HALL L.J. 115 (1984).

similarly one-dimensional solutions either at the legal or the political meta-level.<sup>18</sup> Global legal pluralism, however, is not simply a result of political pluralism, but is instead the expression of deep contradictions between colliding sectors of a global society. At core, the fragmentation of global law is not simply about legal norm collisions or policy-conflicts, but rather has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve, but which demand a new legal approach to colliding norms. This thesis will be evolved with three arguments:

1. The fragmentation of global law is more radical than any single reductionist perspective—legal, political, economic or cultural—can comprehend. Legal fragmentation is merely an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself.
2. Any aspirations to a normative unity of global law are thus doomed from the outset. A meta-level at which conflicts might be solved is wholly elusive both in global law and in global society. Instead, we might expect intensified legal fragmentation.
3. Legal fragmentation cannot itself be combated. At the best, a weak normative compatibility of the fragments might be achieved. However, this is dependent upon the ability of conflicts law to establish a specific network logic, which can effect a loose coupling of colliding units.

## II. LEGAL COLLISIONS FROM THE PERSPECTIVE OF SOCIAL THEORY

Various social theories on legal globalization allow us to draw a clearer picture of how legal fragmentation depends upon more fundamental processes of fragmentation within global society. The Stanford School's institutionalist theory of "global culture," post-modern concepts of global legal pluralism, discourse analysis of the global nature of law and politics, various models of a "global civil society," and, in particular, systemic concepts of a differentiated global society, have all propagated an understanding of a polycentric form of globalization, which places legal fragmentation in a different light.<sup>19</sup> One arrives at such an under-

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18. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 371 (2002), makes a similar critique of legal and political (and economic) reductionism, but then falls, for his part, into the trap of cultural reductionism.

19. On global culture, see John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997). On discourse analysis, see Anton Schütz, *The Twilight of the*

standing, however, only if one gives up a series—six in total—of social and legal theory conceptions and replaces them through somewhat unusual ideas. Much of this has been already dealt with elsewhere in detail, so the following will focus only upon the outcomes,<sup>20</sup> concentrating instead upon the particular consequences for the fragmentation of global law.

### A. Rationality Conflicts in a Polycentric Global Society

A first conception that must be dispensed with is the widespread assumption that global legal fragmentation is primarily a result of the internationalization of the economy. The economic steering mechanisms of the Nation-State have supposedly been unable to keep pace with the creation of distinct global markets; instead, a variety of competing global regulation regimes have been established, each with their own legal decisional instances.<sup>21</sup> The alternative to such an economy-led form of

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*Global Polis: On Losing Paradigms, Envining Systems, and Observing World Society*, in GLOBAL LAW WITHOUT A STATE 257 (Gunther Teubner ed. 1997). On global legal pluralism, see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION *passim* (2002); Boaventura De Sousa Santos, *On Modes of Production of Law and Social Power*, 13 INT'L J. Soc. L. 299 (1985). On global civil society, see DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE *passim* (1995); KLAUS GÜNTHER & SHALINI RANDERIA, RECHT, KULTUR UND GESELLSCHAFT IM PROZESS DER GLOBALISIERUNG 28 (2001); Hauke Brunkhorst, *Ist die Solidarität der Bürgergesellschaft globalisierbar?*, in GLOBALISIERUNG UND DEMOKRATIE: WIRTSCHAFT, RECHT, MEDIEN 274 (Hauke Brunkhorst & Matthias Kettner eds., 2000); Martin Shaw, *Die Repräsentation ferner Konflikte und die globale Zivilgesellschaft*, in PERSPEKTIVEN DER WELTGESELLSCHAFT 221 (Ulrich Beck ed., 1998). On global society, see MATHIAS ALBERT, ZUR POLITIK DER WELTGESELLSCHAFT: IDENTITÄT UND RECHT IM KONTEXT INTERNATIONALER VERGESELLSCHAFTUNG 203 (2002); RUDOLF STICHWEH, DIE WELTGESELLSCHAFT: SOZIOLOGISCHE ANALYSEN *passim* (2000); HELMUT WILLKE, HETEROTOPIA: STUDIEN ZUR KRISIS DER ORDNUNG MODERNER GESELLSCHAFTEN 13 (2003); Niklas Luhmann, *Der Staat des politischen Systems: Geschichte und Stellung in der Weltgesellschaft*, in PERSPEKTIVEN DER WELTGESELLSCHAFT 345, 373 (Ulrich Beck ed., 1998). See also the contributions in OBSERVING INTERNATIONAL RELATIONS: NIKLAS LUHMANN AND WORLD POLITICS (Matthias Albert & Lena Hilkermeier eds., 2004).

20. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997); see also ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG: DIE GELTUNGSBEGRÜNDUNG DER MENSCHENRECHTE IM POSTMODERNEN IUS GENTIUM (forthcoming 2004) (manuscript at ch. 2, on file with authors); Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 717 (2003); Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, in LAW, SOCIETY AND ECONOMY 149 (Richard Rawlings ed., 1997); Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3 (Christian Joerges & Inger-Johanne Sand & Gunther Teubner ed. 2004).

21. For Dahrendorf's argument, see Ralf Dahrendorf, *Anmerkungen zur Globalisierung*, in PERSPEKTIVEN DER WELTGESELLSCHAFT 41 (Ulrich Beck ed., Suhrkamp Verlag 1998).

globalization can, however, be termed “polycentric globalization.”<sup>22</sup> The primary motor for this development is an accelerated differentiation of society into autonomous social systems, each of which springs territorial confines and constitutes itself globally. This process is not confined to markets alone but also encompasses science, culture, technology, health, the military, transport, tourism and sport, as well as, albeit in a clearly somewhat retarded form, politics, law and welfare; each of whose current developmental logic has today carved out an autonomous global system.

Of interest in this current context is the external relations of these global villages; the relationships they maintain with one another and the more general relations with their environment. These are anything but than harmonious. If anywhere, it is here that the notion of a “clash of cultures” is appropriate. Through their own operative closure, global functional systems create a sphere for themselves in which they are free to intensify their own rationality without regard to other social systems or, indeed, regard for their natural or human environment. They do this for as long as they can; that is, for as long as it is tolerated by their environments.<sup>23</sup> Ever since the pioneering analysis of Karl Marx,<sup>24</sup> repeated proof has been furnished for the destructive potential of a globalized economic rationality.<sup>25</sup> Max Weber deployed the concept of modern polytheism in his efforts to identify this potential within other areas of life and to analyze the resulting, and threatening, rationality conflicts which arise.<sup>26</sup> Today one speaks more frequently of discourse collisions.<sup>27</sup> In the meantime, the human and ecological risks posed by other highly specialized global systems, such as science and technology, have also become readily apparent to a far broader public.<sup>28</sup> Similarly, and especially where the position of countries within the Southern Hemisphere is considered, it is clear that real dangers are posed less by the dynamics of international politics and more by economic, scientific and technological

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22. HELD, *supra* note 19, at 62. For further references to this topic, *see generally* all references, *supra* note 19.

23. NIKLAS LUHMANN, *DIE GESELLSCHAFT DER GESELLSCHAFT* 133 (1997).

24. KARL MARX, *DAS KAPITAL: KRITIK DER POLITISCHEN ÖKONOMIE* (1883).

25. Most impressively by KARL POLANYI, *THE GREAT TRANSFORMATION* 3–5 (Farrar & Rinehart 1944).

26. MAX WEBER, *GESAMMELTE AUFSÄTZE ZUR WISSENSCHAFTSLEHRE* 586–97 (1951); on Weber, *see also* WOLFGANG SCHLUCHTER, *RELIGION UND LEBENSFÜHRUNG* 299–302 (1988).

27. *See generally* JEAN-FRANCOIS LYOTARD, *THE DIFFEREND: PHRASES IN DISPUTE* (1987).

28. Literature which is influential in this area include: ULRICH BECK, *RISIKOGESELLSCHAFT: AUF DEM WEG IN EINE ANDERE MODERNE* (1986); Ulrich Beck, *Umweltpolitik in der Risikogesellschaft*, 4 *ZEITSCHRIFT FÜR ANGEWANDTE UMWELTFORSCHUNG* 117 (1991).

rationality spheres that instigate the “clash of rationalities”. According to Niklas Luhmann’s seminal thesis, the underlying cause for post-modern risks is found within the rationality maximization engaged in by different globally active functional systems, which cloaks an enormous potential for endangering people, nature and society.<sup>29</sup> Seen in this light, the problems of global society, namely environmental degradation, spectacular social under-provision and stark discrepancies in life and development potential, have an underlying cause that must be framed in terms of functional differentiation and autonomous systems dynamics; by the same token, it is simply inappropriate to explain the problems raised by global finance markets, hedge funds, financial speculation, pharmaceutical patents, the drug trade and reproductive cloning within a political paradigm, and with a solving faith within the potential of political solutions. Such problems are caused by the fragmented and operationally closed functional systems of a global society, which, in their expansionist fervor, create the real problems of the global society, and who at the same time make use of global law in order normatively to secure their own highly refined sphere logics.<sup>30</sup> It is dubious whether the creation of judicial hierarchies can ever overcome a form of legal fragmentation that derives from structural social contradictions. Reversal or a return to a coordinating form of international law,<sup>31</sup> however, and a resurrection of old myths is equally foreclosed: “[T]he sin of differentiation can never be undone. Paradise is lost.”<sup>32</sup>

### B. *The Global Legal System and Inter-Legality*

In order to better understand the connection between processes of legal evolution and social differentiation, it is also necessary to give up the idea that a legal system in its strict sense exists only at the level of the Nation-State. Instead, one must proceed from the assumption that law has also, and in line with the logic of functional differentiation, established itself globally as a unitary social system. However, the unity of global law is no longer structure-based, as in the case of the Nation-State, within institutionally secured normative consistency; but is rather process-based, deriving simply from the modes of connection between legal operations, which transfer binding legality between even highly

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29. LUHMANN, *supra* note 23, at 1088–96.

30. Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, in *LAW, SOCIETY AND ECONOMY* 149 (Richard Rawlings ed., 1997).

31. See, e.g., ERNST-WOLFGANG BÖCKENFÖRDE, *STAAT, NATION, EUROPA* 123 (1999); Weil, *supra* note 6.

32. NIKLAS LUHMANN, *DIE WIRTSCHAFT DER GESELLSCHAFT* 344 (1994).

heterogeneous legal orders.<sup>33</sup> This is an indirect result of the globalization of societal differentiation. Unity of the legal system has been achieved at global level, but it must also reckon with a multitude of internal contradictions. Legal unity within global law is redirected away from normative consistency towards operative “inter-legality.”<sup>34</sup> What, however, are the unifying features of this inter-legality?

### C. Co-evolutionary Internal Differentiation of Global Law

In order to answer this question, we must correct perceptions about the internal differentiation of law. Here, we are confronted with the first direct impact of social differentiation upon law. For centuries law had followed the political logic of nation-states and was manifest in the multitude of national legal orders, each with their own territorial jurisdiction. Even international law, which viewed itself as the contract law of Nation-States, did not depart from this model. The final break with such conceptions was only signaled in the last century with the rapidly accelerating expansion of international organizations and regulatory regimes, which, in sharp contrast to their genesis within international treaties, established themselves as autonomous legal orders. The national differentiation of law is now overlain by sectoral fragmentation.<sup>35</sup>

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33. For systems-theoretical concepts of a global legal system, see MATHIAS ALBERT, *ZUR POLITIK DER WELTGESELLSCHAFT: IDENTITÄT UND RECHT IM KONTEXT INTERNATIONALER VERGESELLSCHAFTUNG* 203 (2002); FISCHER-LESCANO, *GLOBALVERFASSUNG: DIE GELTUNGSBEGRÜNDUNG DER MENSCHENRECHTE IM POSTMODERNEN IUS GENTIUM*, *supra* note 20; NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 571–86 (1993); Gralf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 24 *ZEITSCHRIFT FÜR RECHTSZOLOGIE* 185 (2002); Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *supra* note 20; Klaus A. Ziegert, *Globalisierung des Rechts aus der Sicht der Rechtssoziologie*, in *GLOBALISIERUNG DES RECHTS* 69 (Rüdiger Voigt ed., 2000); Anthony D’Amato, *International Law as an Autopoietic System* (2003) (unpublished draft of a paper read at the Max Planck Institute for Comparative Public Law and International Law on Nov. 15, 2003, available at <http://anthonydamato.law.northwestern.edu/autoplanck-1.pdf>). For a similar perspective on the global legal system, see Jenny S. Martinez, *Towards an International Judicial System*, 56 *STAN. L. REV.* 429, 443 (2003), invoking SUNNY Y. AU YANG, *FOUNDATIONS OF COMPLEX-SYSTEM THEORIES: IN ECONOMICS, EVOLUTIONARY BIOLOGY, AND STATISTICAL PHYSICS* (1999).

34. See Marc Amstutz, *Vertragskollisionen: Fragmente für eine Lehre von der Vertragsverbindung*, in *AKTUELLE ASPEKTE DES SCHULD- UND SACHENRECHTS: FESTSCHRIFT FÜR HEINZ REY ZUM 60. GEBURTSTAG* 161 (Heinrich Honsell et al. eds., 2003); Boaventura de Sousa Santos, *State Transformation, Legal Pluralism and Community Justice*, 1 *SOCIAL AND LEGAL STUDIES* 131 (1992).

35. For the most recent discussion of regimes, see ANDREAS HASENCLEVER ET AL., *THEORIES OF INTERNATIONAL REGIMES* (1997); Andreas Hasenclever et al., *Integrating Theories of International Regimes*, 26 *REV. INT’L STUD.* 3 (2000); Friedrich Kratochwil & Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 *INT’L ORG.* 753, 759 (1986); Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 *INT’L STUD. Q.* 109 (1998); Ethan Nadelman, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *INT’L ORG.* 479 (1990); Oran

In contrast to the constantly reiterated claims, the appearance of global regimes does not entail the integration, harmonization or, at the very least, the convergence of legal orders; rather, it transforms the internal differentiation of law. Societal fragmentation impacts upon law in a manner such that the political regulation of differentiated societal spheres requires the parceling out of issue-specific policy-arenas, which, for their part, juridify themselves.<sup>36</sup> The traditional differentiation in line with the political principle of territoriality into relatively autonomous national legal orders is thus overlain by a sectoral differentiation principle: the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves.<sup>37</sup>

#### D. Autonomous 'Private' Legal Regimes

This nonetheless is not sufficient to furnish us with a comprehensive understanding of legal fragmentation. Global regulatory regimes certainly give us a picture of the fundamental transformation of global law from territorial to a sectoral differentiation, but only to the degree that it is induced by those forms of legal regimes which derive from international agreements. No light whatsoever is shed upon the equally rapid growth in the numbers of non-statal private legal regimes. It is these regimes that give birth to "global law without the state," which is primarily responsible for the multi-dimensionality of global legal pluralism.<sup>38</sup> A

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Young, *International Regimes: Toward a New Theory of Institutions*, 39 *WORLD POL.* 104 (1986).

36. On the juridification of international organizations, see Kenneth Abbott et al., *The Concept of Legalization*, 54 *INT'L ORG.* 401 (2000).

37. With specific reference to ICANN as a "Global Regulatory Regime," see MILTON MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* 211-26 (2002); Dirk Lehmkuhl, *The Resolution of Domain Names vs. Trademark Conflicts: A Case Study on Regulation Beyond the Nation-State, and Related Problems*, 23 *ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE* 61, 71 (2002); Christian Walter, *Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law*, 44 *GERMAN Y.B. INT'L L.* 170, 186 (2001). On different aspects of the internet regime, see Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 *U. PA. J. INT'L ECON. L.* 563 (2000); David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 *J. ONLINE L.* art. 3, para. 1, at <http://www.wm.edu/law/publications/jol/articles/post.shtml>; David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 *IND. J. GLOBAL LEGAL STUD.* 521 (1998); David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 *VAND. J. ENT. L. & PRAC.* 70 (2000).

38. On the discussion of legal pluralism, see CAROL WEISBROD, *EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE* (2002); Harold Berman, *World Law*, 18 *FORDHAM INT'L L.J.* 1617 (1995); Berman, *supra* note 18, at 325-71; Sally Engel Merry,

full understanding of this legal pluralism is only possible if one abandons the assumption that global law exclusively derives its validity from processes of State law-making and from state sanctions, whether these derive from State internal sources of law or from officially sanctioned international sources of law.<sup>39</sup> This leads to a further impact of societal fragmentation upon law, which requires us both to extend our concept of law to encompass norms lying beyond the legal sources of Nation-State and international law, and, at the same time, to reformulate our concept of the regime. As Berman's formulation indicates, one of the central and as yet unsolved future tasks of international law will be:

recognizing and evaluating non-state jurisdictional assertions that bind sub-, supra-, or transnational communities. Such non-state jurisdictional assertions include a wide range of entities, from official transnational and international regulatory and adjudicative bodies, to non-governmental quasi-legal tribunals, to private standard-setting or regulatory organizations.<sup>40</sup>

"Transnational communities," or autonomous fragments of society, such as, the globalized economy, science, technology, the mass media, medicine, education and transportation, are developing an enormous demand for regulating norms which cannot, however, be satisfied by national or international institutions. Instead, such autonomous societal fragments satisfy their own demands through a direct recourse to law. Increasingly, global private regimes are creating their own substantive law.<sup>41</sup> They have recourse to their own sources of law, which lie outside spheres of national law-making and international treaties.<sup>42</sup>

The most prominent contemporary private legal regimes are the *lex mercatoria* of the international economy and the *lex digitalis* of the

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*Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988); LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW (Hanne Petersen and Henrik Zahle eds., 1995).

39. Dieter Reuter, *Das selbstgeschaffene Recht des internationalen Sports im Konflikt mit dem Geltungsanspruch des nationalen Rechts*, 6 DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1 (1996), is trapped in this statal perspective.

40. Berman, *supra* note 18, at 235. See also T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197, 201-02 (2000).

41. THOMAS PRINCEN & MATHIAS FINGER, ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL 10 (1994); MARTIN SHAW, GLOBAL SOCIETY AND INTERNATIONAL RELATIONS: SOCIOLOGICAL CONCEPTS AND POLITICAL PERSPECTIVES 5-9 (1995); Miguel Darcy de Oliveira & Rajesh Tandon, *An Emerging Global Civil Society, in* CITIZENS: STRENGTHENING GLOBAL CIVIL SOCIETY 1 (Miguel Darcy de Oliveira & Rajesh Tandon eds., 1994); Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311, 312-13 (1995).

42. ORAN YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 184-211 (1994); Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *supra* note 20, at 3.

Internet.<sup>43</sup> To these, we must, however, also add numerous private or private-public instances of regulation and conflict resolution, which are making autonomous law with a claim to global validity.<sup>44</sup> In their character as “private” regimes, such institutions are starkly to be distinguished from the “common international relations theory” understanding of “regimes,” which defines them as “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.”<sup>45</sup> The definition necessarily entails an extraordinary collapsing of both political and legal elements. The politically-centered perspective, which this reflects, however, is not adequate relative to autonomous private regimes. Nor can it yet be substituted for by an economically-centered perspective, as is often the case within a theory of “private ordering,” which achieves its goals with the aid of the simple equation of private law with the economy.<sup>46</sup> An alternative is offered by

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43. For the most recent sources on the *lex mercatoria*, see Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 356–59 (2001); Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 672–74 (1999); Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA J. INT'L L. 427, 471–77 (2001); . On the *lex digitalis*, see Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 691–92 (2000).

44. Berman notes:

Elsewhere, we see the widespread use of international non-governmental regulatory frameworks. For example, the Apparel Industry Partnership, a joint undertaking of non-governmental organizations, international clothing manufacturers, and American universities, has established its own quasi-governmental (but non-state) regulatory regime to help safeguard public values concerning international labor standards. The partnership has adopted a code of conduct on issues such as child labor, hours of work, and health and safety conditions, along with a detailed structure for monitoring compliance (including a third-party complaint procedure). In the Internet context, the “TRUSTe” coalition of service providers, software companies, privacy advocates, and other actors has developed (and monitors) widely adopted privacy standards for websites. Similarly, the Global Business Dialogue on Electronic Commerce has formed a series of working groups to develop uniform policies and standards regarding a variety of e-commerce issues. And, of course, the Internet Corporation for Assigned Names and Numbers, discussed previously, is a non-state governmental body administering the domain name system.

Berman, *supra* note 18, at 369–70 (citations omitted).

45. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1 (Stephen D. Krasner ed., 1983); For a position critical towards Krasner's approach, see ANDREAS HASENCLEVER ET AL., *supra* note 35; Andreas Hasenclever et al., *Integrating Theories of International Regimes*, *supra* note 35; Kratochwil & Ruggie, *supra* note 35, at 759–61; Young, *supra* note 35, at 104–08.

46. See Edward A. Bernstein, *Law & Economics and the Structure of Value Adding Contracts: A Contract Lawyer's View of the Law & Economics Literature*, 74 OR. L. REV. 189 (1995); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Gillian K. Hadfield,

the notion of “post-national formations” that evolve in divergent social spheres:

[T]hese formations are now organized around principles of finance, recruitment, coordination, communication, and reproduction that are fundamentally post-national and not just multinational or international.<sup>47</sup>

The *differentia specifica* separating post-national formations from the classical regime is the fact that so-called private regimes result from the self-juridification of highly diverse societal fragments. The notion of post-national formations allows for the generalization of a regime concept, which obsesses far too much about political processes, such that it might capture the manner in which quite different apolitical autonomous social spheres produce conflicting legal norms.

#### E. Center and Periphery

This, however, at once pre-programs the breakdown of the classical legal hierarchy of norms. Even if it were possible, albeit with great effort, for political regulatory regimes to subordinate themselves to a State hierarchy of legal norms, constituted in line with Kelsen’s and Merkel’s stratified methodology,<sup>48</sup> and in which national legal acts, national legislation, national constitutional law and international law would be capped by a law that could be construed as an international constitutional law, the emergence of autonomous non-statal regimes necessarily collapses the hierarchy.<sup>49</sup>

What, however, will take the place of hierarchy of legal norms? The center-periphery divide.<sup>50</sup> While courts occupy the center of law, the periphery of the diverse autonomous legal regimes is populated by political, economic, religious etc. organizational or spontaneous, collective or individual subjects of law, which, at the very borders of law,

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*Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987).

47. Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, in MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 27, 267 (Arjun Appadurai ed., 1996).

48. See HANS KELSEN, REINE RECHTSLEHRE (2d ed. 1969); see also the collected articles of Hans Kelsen and Julius Merkl in DIE WIENER RECHTSTHEORETISCHE SCHULE: AUSGEWÄHLTE SCHRIFTEN VON HANS KELSEN, ADOLF JULIUS MERKL UND ALFRED VERDROSS (Hans Klecatsky et al. eds., 1968).

49. Gunther Teubner, *Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?*, in GLOBALIZATION AND PUBLIC GOVERNANCE (Karl-Heinz Ladeur ed., forthcoming 2004).

50. LUHMANN, *supra* note 33, at 321–25; TEUBNER, *supra* note 2, at 36–42; Fischer-Lescano, *Die Emergenz der Globalverfassung*, *supra* note 20, at 737.

establish themselves in close contact to autonomous social sectors. Once again, it is the fragmentation of global society that establishes the new schisms between the legal center, the legal periphery and the social environments of law. In the zones of contact between the legal periphery and autonomous social sectors, an arena for a plurality of law-making mechanisms is established: standardized contracts, agreements of professional associations, routines of formal organizations, technical and scientific standardization, normalizations of behavior, and informal consensus between NGOs, the media and social public spheres. By virtue of their independent secondary norms that differ fundamentally from those of national or international law, genuinely self-contained regimes can establish themselves in line with the following technical definition:

A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches. When such a regime seeks precedence in regard to the general law, we have a 'self-contained regime,' a special case of *lex specialis*.<sup>51</sup>

Since such regimes are structurally coupled with the independent logic of the social sectors, they inevitably reproduce, albeit in a different form, the structural conflicts existing between the various functional systems within the law. Standard contracts within the *lex mercatoria* reflecting the economic rationality of global markets collide with WHO norms that derive from fundamental principles of the health system.<sup>52</sup> The *lex constructionis*, the worldwide professional code of construction engineers, collides with international environmental law.<sup>53</sup> The WTO Appellate Panel is confronted with cases encompassing collisions between human rights regimes, environment protection regimes and economic regimes.<sup>54</sup>

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51. Koskenniemi Outline, *supra* note 8, at 9; see also Preliminary Report by Martti Koskenniemi, Chairman of the Study Group of the ILC, at ILC(LVI)/SG/FIL/CRD.1/Add.1, at para. 105 (May 4, 2004).

52. See discussion *infra* Part III.2.

53. See discussion *infra* Part III.3.

54. A mass of literature dedicates itself to this collision constellation. For an especially pointed review, see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001); Markus Böckenförde, *Zwischen Sein und Wollen—Über den Einfluss umweltvölkerrechtlicher Verträge im Rahmen eines WTO-Streitbeilegungsverfahrens*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 971 (2003). On the collision of TRIPS and CBD, see Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights, and Benefit Sharing*, 11 CARDOZO J. INT'L & COMP. L. 785 (2003); see also Consultative Opinion on the Compatibility Between Certain Provisions of the Convention on Biological Diversity and the Agreement on Trade Related Aspects of Intellectual Property Rights as to the Protection of Traditional Knowledge, International Court of Environmental Arbitration and Conciliation, EAS—OC 8/2003 (Nov.

International law dedicated to the maintenance of peace, more particularly its normative ban on the use of force, has a highly uneasy relationship with international human rights law.<sup>55</sup> Meanwhile, the same is true of international humanitarian law and environmental protection regimes,<sup>56</sup> general human rights law and environmental law,<sup>57</sup> etc. Indeed, the tempestuous rationality conflicts have even fragmented the very center of global law, where courts and arbitration tribunals are located. In this core, they act as a barrier to the hierarchical integration of diverse regime tribunals, and foreclose a conceptual doctrinal consistency within global law.

In contrast to the courts of developed Nation-States that guarantee legal unity, globally dispersed courts, tribunals, arbitration panels and alternative dispute resolution bodies are so closely coupled, both in terms of organization and self-perception, with their own specialized regimes in the legal periphery that they necessarily contribute to a global legal fragmentation. These conflicts are a result of the “poly-contextualization” of law. They are created by the different internal environments of the legal system, which, for their part, are dependent upon multiple paradigms of social ordering.<sup>58</sup>

#### F. Auto-Constitutional Regimes

Legal collisions are lent a final increased intensity by virtue of their constitutional anchoring. The fragmentation of global society has ramifications for constitutional theory as well. At a global level, the locus of constitutionalization is shifting away from the system of international relations to different social sectors, which are establishing civil constitu-

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19, 2003), at <http://iceac.sarenet.es> [hereinafter International Court of Environmental Arbitration and Conciliation].

55. See Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995); see also Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999).

56. See SILJA VÖNEKY, *DIE FORTGELTUNG DES UMWELTVÖLKERRECHTS IN INTERNATIONALEN BEWAFFNETEN KONFLIKTEN* (2001). For further instruction on regime-pluralisms in human rights law, see Michael Bothe, *The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law*, in *KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION—FESTSCHRIFT FÜR DIETER FLECK 37* (Horst Fischer et al. eds., 2004).

57. See DIRK HANSCHER, *ENVIRONMENT AND HUMAN RIGHTS—COOPERATIVE MEANS OF REGIME IMPLEMENTATION* (Working Papers—Mannheimer Zentrum für Europäische Sozialforschung No. 29, 2000).

58. KARL-HEINZ LADEUR, *POSTMODERNE RECHTSSTHEORIE: SELBSTREFERENZ—SELBSTORGANISATION—PROZEDURALISIERUNG* 159–67 (1992).

tions of their own.<sup>59</sup> According to the concept of constitutional pluralism, it is appropriate to speak of the “constitution” of collective bodies outside the confines of the nation-states when the following pre-conditions have been fulfilled:

- (i) the development of an explicit constitutional discourse and constitutional self-consciousness; (ii) a claim to foundational legal authority, or sovereignty, whereas sovereignty is not viewed as absolute; (iii) the delineation of a sphere of competences; (iv) the existence of an organ internal to the polity with interpretative autonomy as regards the meaning and the scope of the competences; (v) the existence of an institutional structure to govern the polity; (vi) rights and obligations of citizenship, understood in a broad sense; (vii) specification of the terms of representation of the citizens in the polity.<sup>60</sup>

“Polity” in this context should not be understood in the narrow sense of institutionalized politics; it refers as well to non-political configurations of civil society, in the economy, in science, education, health, art or sports, in all those social sites where constitutionalizing takes place.<sup>61</sup> Thus, self-contained regimes fortify themselves as auto-constitutional regimes. As noted before, the defining feature of self-contained regimes is not simply that they create highly specialized primary norms (substantive rules in special fields of law), but they also produce, in contrast to the generalized secondary norms of international law, their own procedural norms on law-making, law-recognition and legal sanctions.<sup>62</sup> Such

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59. On the concept of “societal constitutionalism” from a social theory perspective, see DAVID SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM* (1992); DAVID SCIULLI, *CORPORATE POWER IN CIVIL SOCIETY: AN APPLICATION OF SOCIETAL CONSTITUTIONALISM* (2001). For plural constitutionalism, see HAUKE BRUNKHORST, *SOLIDARITÄT. VON DER BÜRGERFREUNDSCHAFT ZUR GLOBALEN RECHTSGENOSSENSCHAFT* 203–17 (2002); Calliess, *supra* note 33; Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 *MAX PLANCK Y.B. OF UNITED NATIONS L.* 261 (2003); Andreas Fischer-Lescano, *Luhmanns Staat und der transnationale Konstitutionalismus*, in *LUHMANNS STAATSTHEORIE* (Marcelo Neves & Rüdiger Voigt eds., forthcoming 2004); Teubner, *Societal Constitutionalism*, *supra* note 20; Neil Walker, *The Idea of Constitutional Pluralism*, 65 *MOD. L. REV.* 317 (2002); Walter, *supra* note 37. Only in relation to the global economic constitutions, see *LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW*, *supra* note 38.

60. Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 31, 33 (Grainne de Burca & Joanne Scott eds., 2001).

61. This is accented by SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM*, *supra* note 59; BRUNKHORST, *supra* note 59, at 203–17; Fischer-Lescano, *supra* note 59; Teubner, *Societal Constitutionalism*, *supra* note 20.

62. Bruno Simma, *Self-Contained Regimes*, 16 *NETHERLANDS Y.B. INT'L L.* 111 (1985); see generally Koskenniemi Preliminary Report, *supra* note 8, Koskenniemi Outline, *supra* note 8.

a reflexive norm-building is not yet, however, constitutional norm-building in the strict sense. They become constitutional only when they establish a closer parallel to political constitutions, which are not simply to be seen as higher legal norms, and must instead be understood as structural coupling of the reflexive mechanisms of law with those of politics.<sup>63</sup> The characteristics of auto-constitutional regimes is their linkage of legal reflexive processes with reflexive processes of other societal spheres.<sup>64</sup> Reflexive in this context means the application of specific processes to themselves, the “norming” of norms, the application of political principles to the political process itself, epistemology as theorizing theories, etc. Auto-constitutional regimes are defined by their duplication of reflexivity. Secondary rule-making in law is combined with defining fundamental rationality principles in an autonomous social sphere. Making the distinction between such societal constitutions and simple regimes even clearer: regimes dispose of a union of primary and secondary legal norms, and their *primary rule-making* is structurally coupled with the creation of substantive social norms in a specific societal sector.

Societal constitutions, in addition, establish a structural coupling between *secondary rule-making* in law and reflexive mechanisms in the other social sector. A non-statal, non-political, civil society-led constitutionalization thus occurs to the degree that reflexive social processes, which determine social rationalities through their self-application, are juridified in such a way that they are linked with reflexive legal processes. Under these conditions it makes sense to speak of the existence of constitutional elements—in the strictest sense of the term—within economic regimes, within the academic system and within digital regimes of the Internet. In such diverse contexts we find typical elements of a constitution: provisions on the establishment and exercise of decision-making (organizational and procedural rules) on the one hand, the definition of individual freedoms and societal autonomies (fundamental rights) on the other.<sup>65</sup> Clearly, societal constitution-making at the same time intensifies conflicts between legal regimes, since it fortifies the independence of the legal regime from other distinct legal regimes through reflexive mechanisms.

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63. Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 RECHTSHISTORISCHES JOURNAL 176 (1990).

64. Toward a system theoretical concept of regimes, see Gunther Teubner, *Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes*, 9 SOC. AND LEGAL STUD. 399 (2000); Gunther Teubner, *Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism*, in THE EVOLUTION OF CULTURAL ENTITIES: PROCEEDINGS OF THE BRITISH ACADEMY 161 (John Ziman ed., 2002); see also ALBERT, *supra* note 19, at 292–306.

65. See Andreas Fischer-Lescano, *Globalverfassung: Verfassung der Weltgesellschaft*, 88 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 349 (2002).

Only when these various conceptual changes are taken to their logical conclusion, does one gain an adequate understanding of legal fragmentation; an understanding which differs starkly from the day-to-day perspective of lawyers who locate the genesis of legal fragmentation in the lack of a judicial hierarchy and characterize fragmentation as mere jurisdictional conflicts. Summarizing within a single formula: *the fragmentation of law is the epiphenomenon of real-world constitutional conflicts, as legal fragmentation is—mediated via autonomous legal regimes—a legal reproduction of collisions between the diverse rationalities within global society.*

### III. SELECTIVE NETWORKING OF COLLIDING REGIMES

Our interim result: *lasciate ogni speranza*. Any aspiration to the organizational and doctrinal unity of law is surely a chimera. The reason is that global society is a “society without an apex or a center.”<sup>66</sup> Following the de-centering of politics, there is no authority in sight in a position to undertake the coordination of societal fragments. Law is even less appropriately placed to fulfill this role, even indirectly through the integration of its global fragments.

Following the collapse of legal hierarchies, the only realistic option is to develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law. This might be achieved through a selective process of networking that normatively strengthens already existing factual networks between the legal regimes: law-externally, the linkage of legal regimes with autonomous social sectors; and, law-internally, the linkage of legal regimes with one another. Recent developments of network theory may be relevant for international law. Network theory has identified the paradoxical logic of action in networks, the *unitas* multiplex of hierarchical configurations.<sup>67</sup> As “highly

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66. NIKLAS LUHMANN, *POLITISCHE THEORIE IM WOHLFAHRTSSTAAT* 22 (1981).

67. On “network society,” see MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 67–150 (Blackwell 1996); DIRK MESSNER, *DIE NETZWERKGESELLSCHAFT: WIRTSCHAFTLICHE ENTWICKLUNG UND INTERNATIONALE WETTBEWERBSFÄHIGKEIT ALS PROBLEME GESELLSCHAFTLICHER STEUERUNG* (1995); KARL-HEINZ LADEUR, *NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION* 204–250 (2000); Karl-Heinz Ladeur, *Die Regulierung von Selbstregulierung und die Herausbildung einer „Logik der Netzwerke,”* 4 *DIE VERWALTUNG* 59, 62–77 (2001); Renate Mayntz, *Interessenverbände und Gemeinwohl: Die Verbändestudie der Bertelsmann Stiftung, in VERBÄNDE ZWISCHEN MITGLIEDERINTERESSEN UND GEMEINWOHL* 11 (Renate Mayntz ed., 1992); Walter Powell, *Weder Markt noch Hierarchie: Netzwerkartige Organisationsformen, in ORGANISATION UND NETZWERK: INSTITUTIONELLE STEUERUNG IN WIRTSCHAFT UND POLITIK* 213 (Patrick Kenis & Volker Schneider eds., 1996).

improbable contexts of reproduction of heterogeneous elements,"<sup>68</sup> networks are counter-institutions of autonomous systems. Combining different logics of actions, they mediate between autonomous function systems,<sup>69</sup> formal organizations,<sup>70</sup> and, as in our case, between autonomous regimes. Three guiding principles for the decentralized networking of legal regimes may be identified in the abstract:

1. Simple normative compatibility instead of hierarchical unity of law
2. Law-making through mutual irritation, observation and reflexivity of autonomous legal orders.
3. Decentralized modes of coping with conflicts of laws as a legal method.<sup>71</sup>

If hierarchical thinking is abandoned, a normative concept of networks of legal regimes needs to be included within the law's self-description. Such a normative re-orientation can build on various tentative efforts within legal practice and doctrine, certain of which will be discussed in the following.

#### A. *From International Conflicts to Inter-Regime Conflicts*

Two questions are typically posed in this context. First, how should we react in the absence of legal hierarchy; that is, in the absence of collectively binding decisions, centralized competences and hierarchically ordered legal principles? In the abstract, the answer is: strengthen mutual observation between network nodes.<sup>72</sup> The final binding decision is replaced by a sequence of decisions within a variety of observational positions in a network; a process in which network nodes mutually reconstruct, influence, limit, control, and provoke one another, but which never leads to one final collective decision on substantive norms. In this

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68. DIRK BAECKER, ORGANISATION UND GESELLSCHAFT 14 (2002).

69. HELMUT WILLKE, IRONIE DES STAATES: GRUNDLINIEN EINER STAATSTHEORIE POLYZENTRISCHER GESELLSCHAFT 183–210 (1992); LUHMANN, *supra* note 23, at 788; André Brodocz, *Strukturelle Kopplung durch Verbände*, 2 SOZIALE SYSTEME 361, 366 (1996).

70. Eckard Kämper & Johannes Schmidt, *Netzwerke als strukturelle Kopplung: Systemtheoretische Überlegungen zum Netzwerkbezug*, in SOZIALE NETZWERKE: KONZEPTE UND METHODEN DER SOZIALWISSENSCHAFTLICHEN NETZWERKFORSCHUNG 211, 227 (Johannes Weyer ed., 1999).

71. For the European context, see Marc Amstutz, *Zwischenwelten: Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht*, in RECHTSVERFASSUNGSRECHT: RECHT-FERTIGUNG ZWISCHEN PRIVATRECHTSDOGMIK UND GESELLSCHAFTSTHEORIE 213, 216 (Gunther Teubner & Christian Joerges eds., 2003); Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, 3 EUR. L.J. 378 (1997).

72. LADEUR, *supra* note 58, at 82.

context, transparency and mutual accessibility are the primary commandment; participation and deliberation are imbued with a new significance. The second question is how decisions are to be taken when due to the absence of a most significant relationship—transnational conflicts cannot be attributed to one national law in areas like copyright, cyberlaw, human rights and environmental law. Once again in the abstract, the answer is to attempt no longer the most authentic possible reconstruction of national norms. Rather, the choice of national law must be superseded by an orientation to transnational but sectoral regimes which lead to different principles of conflicts law. Both reactions are highlighted through the example of copyright law.

#### First Example: Transnational Copyright

Conflicts decisions within international copyright law have traditionally been taken in line with the territoriality principle. The definitive expression of this principle is found in the Berne Convention of 1886 (Convention).<sup>73</sup> However, the Convention is no match for the cyber-revolution, for technical innovations in transmission media and for the trans-nationalization of science and art. Even though there were contemporary attempts to do so, the Convention did not establish a harmonized copyright law, but instead focused upon the mutual recognition of differing territorial systems. Article 5 of the Convention furnishes the primary norm:

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.<sup>74</sup>

Certainly, states have attempted to match the transnational law-making process by founding the World Intellectual Property Organization (WIPO), which has long administered almost all multi-national agreements on intellectual property, by means of the Agreement on Trade Related Aspects of International Property Rights (TRIPS) concluded during the GATT Uruguay Round in April 1994,<sup>75</sup> through

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73. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1980 U.N.T.S. 31 [hereinafter Berne Convention].

74. Berne Convention, *supra* note 73, at art. 5(1).

75. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

various cooperation efforts between the WTO and WIPO,<sup>76</sup> through the European Convention relating to questions on copyright law,<sup>77</sup> through “WIPO Internet Treaties,”<sup>78</sup> and by means of European measures,<sup>79</sup> as well as related law-making acts.<sup>80</sup> There is, however, still no harmonized international copyright. Territorially bound and nationally divergent copyright guarantees remain determinative. International agreements simply mediate between different protection standards and establish reciprocal national entitlements to the implementation of minimum levels of protection. As Dinwoodie and Berman have indicated, the new situation would require that the “facade of copyright rules based upon territoriality needs to be stripped away, and a new approach constructed. Some uncertainty is an inevitable, but worthwhile, short-term cost.”<sup>81</sup>

What might this “new approach” look like? At core, this entails an effort to avoid a “race to the bottom,” not by assuming that the full range of relevant norms is exclusively to be found within national partial legal orders, but instead through a consideration of the possible spill-over effects within other territorial legal orders. It follows that further transnational law-making mechanisms, over and above national legal norms, are also included within the equation. In substance this would include reorienting the traditional conflicts law away from conflicts between national legal orders, and refocusing them upon conflicts between sectoral regimes, such as is the case in the context of collisions between ICANN and national courts, ICTY and ICJ, WTO and WHO.<sup>82</sup> As Din-

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76. Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754, 756–57 (1996).

77. European Convention of 5 May 1994 Relating to Questions on Copyright Law and Neighboring Rights in the Framework of Transfrontier Broadcasting by Satellite, *opened for signature* Nov. 5, 1994, Eur. T.S. No. 153, available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

78. WIPO Diplomatic Conference of 20 December 1996 on Certain Copyright and Neighboring Rights Questions: WIPO Copyright Treaty, available at <http://www.wipo.int/documents/en/diplconf/distrib/pdf/94dc.pdf>; Diplomatic Conference of 20 December 1996 on Certain Copyright and Neighboring Rights Questions: WIPO Performances and Phonograms Treaty, available at <http://www.wipo.int/documents/en/diplconf/distrib/pdf/95dc.pdf>.

79. Council Regulation 40/94 of 20 December 1994 on the Community Trademark, 1994 O.J. (L 11) 1; Proposal for a European Parliament and Council Regulation on the Community Design, COM(93)342; Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 36,1; Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 34,1.

80. See generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 63 OHIO ST. L.J. 733, 748 (2001).

81. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 573 (2000); Berman, *supra* note 18.

82. See International Court of Environmental Arbitration and Conciliation, *supra* note 54.

woodie and Berman have suggested, a shift from territoriality to “functional regime affiliation” would mean that the division of jurisdictional competences and the normative preconditions for substantive decisions could no longer be inferred from each local legal order.<sup>83</sup>

The question of jurisdiction would not be answered by mechanically subsuming the case under the rules of the forum coincidentally addressed; rather, it would be dependent upon the characteristics of the functional regime. The particular jurisdiction would then no longer be dependent upon the issue of whether some form of legal link to the national law of whichever forum might be established, but would rather be determined by the question of whether the forum addressed can be understood as a part of a sectoral legal order. Any “mechanical counting of contacts with a geographically based sovereign entity”<sup>84</sup> would be dispensed with and replaced with the connecting norms for regime-jurisdiction.

In conflicts law, when it comes to determining the applicable substantive law via collision rules, it is equally important to apply this logic of functional connection to each set of collision rules. The problems that arise out of the judicial reconstruction of the other national legal order in cases of transnational legal questions can be overcome through a form of conflicts law that is not based on the determination of one territorial law which has the closest relation to the conflict, but which seeks instead to identify the functional regime to which the legal issue in question belongs. Therefore one needs to investigate the substantive rules within this regime and other regimes, and to cope with the plurality of substantive national, international and transnational regime law-making.

This results in the creation of new forms of collision rules, whose determination of the applicable law would choose not between nations, but between functional regimes. In their character as collision rules in the technical sense, however, they would still work with the classical methods of conflicts law, and as such would be required to decide between legal orders and to apportion the legal issue in question to one of the orders involved, be they nations or be they regimes. A far more dramatic step, however, is the reorientation from collision rules to substantive rules. Traditional private international law knows such a “substantive law approach” in only a very few exceptional cases, in which the transnational nature of the contested subject matter is so

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83. Dinwoodie, *supra* note 81; Berman, *supra* note 18.

84. Berman, *supra* note 18, at 496.

overwhelming that it is virtually impossible to apportion the legal issue in question to one or another legal order.<sup>85</sup>

In our case of inter regime conflicts, however, the exception becomes the rule. Conflicts whose core content might be exclusively apportioned to one regime are, by contrast, exceptional. It is only a rare exception, that a conflict that has economic and ecological implications, can be said to have the one “most significant relation” to either the economy or the ecology; usually both relations are “most significant.” The rule is over-arching regime conflicts which have relevant effects within both regimes. This leaves only one possible solution: developing substantive rules through the law of inter-regime-conflicts itself. This, however, would take place in the absence of hierarchical instances judging in a neutral distance to the legal orders involved. We face a paradoxical situation, whereby the legal instance within each regime, which is also a party to the legal collision, must create substantive norms which claim validity for both regimes involved. Transnational substantive norms are created, within a form of mixed law approach, with an eye both to one’s own and to the other legal regime, but also with an eye to third party legal orders.<sup>86</sup> In a mirror of the methodology applied by international customary law, different law-making mechanisms are to be included in the determination of the applicable rule.<sup>87</sup> In any case, however, care must be taken to overcome the limitations imposed by political law-making and the related hierarchy established between national and international orders.<sup>88</sup> Instead, the goal would be a strange legal Esperanto of regimes within which national, international and trans-national legal acts clamor for attention. Concerned courts—national courts and transnational instances of conflict resolution—would be required to meet the challenges of creating transnational substantive norms out of this

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85. See GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 65 (8th ed. 2000); ERNST STEINDORFF, SACHNORMEN IM INTERNATIONALEN PRIVATRECHT (1958).

86. Christian Joerges develops a similar approach in EU law. The colliding entities are not identified in autonomous national legal systems, not in hierarchic levels of federal orders, but in semi-autonomous levels of European multi-level-governance. The solution is thus the development of substantial norms at one level with observing the *altera pars* of other levels. See Christian Joerges, *Zur Legitimität der Europäisierung des Privatrechts: Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU*, in RECHTSVERFASSUNGSRECHT 183 (Christian Joerges & Gunther Teubner eds., 2003).

87. See, e.g., Charles Rousseau, *De la compatibilité des norms juridiques contradictoires dans l'ordre international*, 39 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 133, 151 (1932) (speaking of different legal norms “d’égale valeur juridique,” but, of course, referring only to the traditionally non-hierarchical international law existing prior to the Vienna Convention on the Law of Treaties.)

88. This approach is distinguished from Philip Jessup’s “transnational law,” which conceives of a principle of international law primacy. See PHILIP C. JESSUP, MODERNES VÖLKERRECHT 21 (1950).

chaos, seeking for the individual case at hand appropriate legal norms beyond their territorial, organizational and institutional legal spheres and taking responsibility for combining them norms in order to develop a transnational body of law.

### B. From Policy Conflicts to Rationality Collisions

As noted, the collisions arising in such cases cut right across traditional politics that build up power and consensus to produce binding collective decisions. Accordingly, the famous “governmental interest approach” developed within conflicts law, which has successfully overcome the formalistic view of mere norm conflicts through the attention it pays to the substantive policy conflicts existing between the states involved, is not helpful in the case of regime collisions.<sup>89</sup> As intimated above, the colliding units are only in part political regulatory regimes that are constituted by international treaties, and which pursue explicit policies. A large part of them is made up by autonomous private governance regimes—producing global law without the state—that have their roots in a variety of non-political sectors of world society. Then we are no longer confronted with social conflicts translated into institutionalized politics—with power conflicts, ideology debates and policy controversies—but instead with very specific forms of social conflict, that, for their part, provoke the establishment of private governance regimes. Only in some cases the conflicts may invite a reaction from international politics in the form of issue-specific regulatory regimes.

The result is a collision between private governance regimes on the one hand and political-regulatory regimes on the other. All the jurisdiction conflicts that ICJ presidents and international legal experts have warned us about, conflicts between ICANN and national judges, between the ICTY and the ICJ, between the WTO and WHO, between the ICJ and the International Maritime Court, between the *lex mercatoria* and human rights, between the *lex constructionis* and ecological concerns, differ fundamentally in their form from mere policy conflicts. Consequently, it is simply not enough to reduce the conflicts law that must be developed to a matter of reconstructing the different “policies” and political “interests” that are found in conflict constellations and finding accommodation between them.<sup>90</sup> Instead, law must concern itself with the underlying social conflicts themselves.

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89. See Lea Brilmayer, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules*, 252 RECUEIL DES COURS 9 (1995); CHRISTIAN JOERGES, ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHTS: DIE ‘GOVERNMENTAL INTEREST ANALYSIS’ UND DIE ‘KRISE DES INTERNATIONALEN PRIVATRECHTS’ (1971).

90. For this approach, see Martinez, *supra* note 33, at 472.

This means primarily that law needs to understand the legal norm collisions of the regimes involved—that is, political regulatory bodies, or international organizations or, indeed, concerned states—as an expression of the fundamental conflicts between organizational principles of social systems. Conflicts law then would have as its main objective to establish compatibility between colliding rationality principles of global sectors. Normative expectations are established within the global spheres of science, art, technology, economy, education and religion and are juridified within specific legal orders. Transnational law in the form of a specific functional regime is thus anything but a Nation-State enterprise, even though transnational law-making is subject to massive political pressures. Regime expectations are only binding on partial segments of global society, and the substitution of functional regime affiliation for territorial differentiation is dependant upon each decisional forum evolving a sufficiently refined understanding of its own regime logic. If we look again at “transnational copyright law” this would mean that the legal reformulation of collisions between WIPO, WTO, EU and national laws must be redrawn to this degree. Transnational copyright law should concern itself with the underlying collisions between distinct rationalities, i.e. conflicts between the rationales of science, technology, art and the economy. In the final analysis, this involves establishing a measure of compatibility between them and an end to the practice of simply orienting law in line with the policies of organizations and states. This “compatibilization technique” which differs from policy analysis and interest weighing is sketched in the following with reference to the example of patent protection for medicines.

#### Second Example: Patent Protection for Medicines

In 2001, the US requested the establishment of a WTO Panel to investigate the legal situation as regards patents within Brazil. Although Brazil had, under pressure from the US, overhauled its patents law in 1997,<sup>91</sup> it had nonetheless retained its potential competence to grant obligatory licenses should the patent owner not be engaged in local production within Brazil. Beginning with Article 68, the Brazilian Patent Law<sup>92</sup> thus allows for domestic production of so-called “generics,”<sup>93</sup> that is, copies of patent protected medicines; but limits this to cases where the population is threatened by an epidemic and the price

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91. Fernando Braune & Naira Menezes, *The Patentability of Chemical, Biochemical, Pharmaceutical and Biotechnological Inventions in Brazil*, 108 *PATENT WORLD* 46 (1999).

92. Regula direitos e obrigações relativos à propriedade industrial, Decreto No. 9.279 de 14 de maio de 1996, Diário Oficial da União [D.O.U.] [Federal Law] de 15.05.1996 (Br.) (in force since May 1997).

93. See also Decreto No. 9.787 de 11 de fevereiro de 1999, D.O.U. 11.02.1999 (Br.).

of the medicine on the world market is too high. The law refers to “abuse of economic power” (*praticar abuso de poder econômico*) on the part of pharmaceutical concerns. Further, Articles 68 *et seq.* of the Brazilian Patent Law provide for domestic production of patented medicines should a foreign firm have been selling a pharmaceutical within Brazil for longer than three years without having established a local production plant. 150,000 people have died of AIDS within Brazil since 1981. In 1997, the annual number of new infections lay over 20,000, but could be reduced through preventative measures to less than 5,000. The annual cost to the Brazilian Government of treating AIDS infected patients was around \$300 million. The two components, Efavirenz and Nelfinavir, patented by the US concern, Merck, and the Swiss company, Roche, were responsible for over a third of this sum. Since neither company was engaged in local production, the Brazilian Health Minister announced the domestic production of generic copies. The US Government considered Articles 68 *et seq.* of the Brazilian Patent Law to be potentially discriminatory to US patent owners and accordingly requested the commencement of bilateral consultations in May 2000.<sup>94</sup> Once these had, in the opinion of the US, failed, the US requested commencement of panel proceedings on January 9, 2001.<sup>95</sup>

There are three possible ways of reading the conflict. The first would be to regard it as a conflict between *Brazilian national law and the rights of the patent owners* (in international law terms mediated by the US). Being in possession of rights—much in the manner of the thirty-nine pharmaceutical concerns who, represented by the Pharmaceutical Manufacturers’ Association of South Africa (PMASA), have entered into judicial proceedings in the light of a similar constellation within South Africa,<sup>96</sup>—they attempted to protect their property rights against Brazilian assault. This perspective would thus require us to determine the content of, and limits to, international patent protection. This effort is quickly confronted with the provision of Articles 30 of TRIPS:

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not

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94. WTO Dispute Settlement Body, Brazil—Measure Affecting Patent Protection—Request for Consultations by the United States, WTO Doc. WT/DS199/1 (June 8, 2000).

95. WTO Dispute Settlement Body, Brazil—Measure Affecting Patent Protection—Request for Consultations by the United States, WTO Doc. WT/DS199/3 (Jan. 9, 2001). The DSB received this request during its meeting on the 1st February and following representations from the US and Brazil, decided to establish a Panel in accordance with Article 6 DSB. See WTO Settlement Dispute Body, Minutes of the Meeting, WTO Doc. WT/DSB/M/97 (Feb. 27, 2001).

96. Naomi Bass, *Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 34 GEO. WASH. INT’L L. REV. 191, 192–93 (2002).

unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.<sup>97</sup>

Whereby, TRIPS Article 31 allows its members to use a patented material, even without a necessary authorization from the patent owner if:

prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly.<sup>98</sup>

The question would accordingly be one of whether Articles 68 *et seq.* of the Brazilian Patent Law infringed the TRIPS agreement, even though they make explicit recourse to the notion of an “abuse of economic power” and the conflict erupted as the Brazilian regime attempted to give force to its national program to combat AIDS. Concerned parties, however, are united in their critique of the porous nature of TRIPS norms: on the one hand, because TRIPS does not give rise to a sufficient level of protection for intellectual property and does not pay adequate regard to the economic interests of patent holders;<sup>99</sup> and on the other, because it does not pay sufficient attention to the economic interests of the countries of the Southern Hemisphere.<sup>100</sup> To this degree, patent laws share the same fate as copyright laws: in the case of both legal institutions, international law-making is “out of touch with modern times and

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97. TRIPS Agreement, *supra* note 75, at art. 30

98. *Id.* at art. 31.

99. Theresa Beeby Lewis, *Patent Protection for the Pharmaceutical Industry: A Survey of Patent Laws of Various Countries*, 30 INT'L LAW. 835, 841-42 (1996).

100. Bass, *supra* note 96.

the changing norms of an innovative community.”<sup>101</sup> How the Panel itself might have decided remains a hypothetical question since the US and Brazil gave the Chairman of the DSB notice, in line with DSU Article 6, of their having reached a mutually satisfactory solution to the problem on July 5, 2001.<sup>102</sup> What had happened?

This relates to the second reading of the conflict: the Brazilian conflict was a conflict between the WTO and WHO; an institutional *conflict between the policies of two international organizations*.<sup>103</sup> This would not be an unusual constellation and a brief review of the Alston-Petersmann controversy<sup>104</sup> will allow ample information about each perspective, which either entrusts only the UN (Alston) or principally the WTO (Petersmann) with the task of finding an adequate balance between colliding freedoms and rights.<sup>105</sup> The really unusual facet of the case was thus not the regime collision as such, but rather, the fact that the US did not wait for it to unfold. There could not have been a more inopportune moment for WTO proceedings on patent protection for AIDS medicines in view of the scheduling of a UN Special General Assembly on the combating of HIV/AIDS for a few months later.<sup>106</sup> Special General Assemblies are not everyday occurrences, are concerned with portentous questions, are prepared over many years, and encompass both

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101. Frank Romano, *International Conventions and Treaties, Global Trademark and Copyright 1998: Protecting intellectual property rights in the International Marketplace*, 1998 PLI/PAT 536, 539.

102. WTO Dispute Settlement Body, Brazil—Measures Affecting Patent Protection—Notification of Mutually Agreed Solution, WTO Doc. WT/DS199/4 (July 19, 2001).

103. On the political instrumentalization of regimes, see Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. (forthcoming 2004). On the battle against AIDS, see World Health Organization, *Treat 3 Million by 2005 Initiative*, WC 503.2 (2003). Principle responsibility in the battle against aids has been given by the UN institutions to UNAIDS, which acts as a network coordinating node amongst a whole variety of secondary and special UN organizations.

104. On current cases impacting equally upon the UN and WTO, see David P. Fidler, *Global Outbreak of Avian Influenza A (H5N1) and International Law* (January 2004), at <http://www.asil.org/insights/insigh125.htm>; David P. Fidler, *Developments Involving SARS, International Law, and Infectious Disease Control at the Fifty-Sixth Meeting of the World Health Assembly* (June 2003), at <http://www.asil.org/insights/insigh108.htm>; see also WTO Committee on Sanitary and Phytosanitary Measures, *Philippines—Notification of Emergency Measures*, WTO Doc. G/SPS/N/PHL/50 (Jan. 13, 2004).

105. Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002); Ernst-Ulrich Petersmann, *Taking Human Rights, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 EUR. J. INT'L L. 845 (2002).

106. *Declaration of Commitment on HIV/AIDS*, U.N. GAOR, Special Session, June 25–27, 2001, at <http://www.un.org/ga/aids/coverage>. The final declaration of the General Assembly can be accessed on the internet page of the UN-Program UNAIDS: <http://www.unaids.org>.

civil society and state actors. The machinery of civil society mobilization went into immediate action and scandalized AIDS sufferers everywhere with the protectionist orientation of US economic policy.<sup>107</sup> Brazil was not slow in taking advantage of this well of feeling and was able to achieve the acceptance of a Resolution at the next sitting of the UN Commission on Human Rights.<sup>108</sup> The Resolution, accepted by 53 to 52 votes (that is, against the will of the US), sets out, amongst other things, a desire:

- (i) to facilitate access in other countries to essential preventive, curative or palliative pharmaceuticals or medical technologies used to treat pandemics such as HIV/AIDS or the most common opportunistic infections that accompany them wherever possible as well as to extend the necessary cooperation wherever possible, especially in times of emergency;
- (ii) to ensure that their actions as members of international organizations take due account of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>109</sup>

The Resolution was explicitly directed towards the growing conflict and was a diplomatic barometer of the fact that the pressure on the US government was growing ever stronger. It is thus not surprising that, punctually on the first day of the UN General Assembly Special Session on AIDS, the US joined with Brazil to lodge its written intention to set the conflict on patent protection for AIDS cocktails aside.<sup>110</sup>

The third reading of the conflict is neither rights related, nor institutional, but instead conceives of the collision as a *conflict between competing rationalities*. The political compromise between Brazil and the US, which forced patent owners to offer concerned states affordable licenses,<sup>111</sup> was complemented by the so-called Doha Declaration of the WTO:

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107. See, e.g., *Call to Action: Thai AIDS Treatment Activists Invite Allies to Join a March and Protest: Demand Accountability and Action on AIDS*, at <http://www.globaltreatmentaccess.org>.

108. *Specific Groups and Individuals: Other Vulnerable Groups and Individuals*, U.N. Commission on Human Rights, 57th Sess., Agenda Item 14(d), at 169, U.N. Doc. E/CN.4/2001/80 (2000).

109. *Id.*

110. Letter from Peter Allgeier, Executive Office of the President, Deputy United States Trade Representative, to the Chairman of the Dispute Settlement Body of the World Trade Organization WT/DS199/4 (June 25, 2001), available at <http://docsonline.wto.org>.

111. On the connection between the Brazilian and South African cases, see Bass, *supra* note 96, at 206.

We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration.<sup>112</sup>

This separate declaration, the “Declaration on the TRIPS Agreement and Public Health,”<sup>113</sup> provides a needle sharp reconstruction of the problem and refers to a conflict that is deeper than a simple policy conflict between two international organizations. The question of patent protection for AIDS medicines furnishes the arena in which the fundamental principles of two global operational spheres, economy and health, collide. Each conflict constellation can be traced back to this collision: Brazil v. US, WTO v. WHO, US v. UN, Pharmaceutical Manufacturers’ Association of South Africa v. South Africa. Each appearance of the constellation before each legal forum was concerned with the reaching of agreement between the conflicting demands of each system (patent protection versus effective health protection). Any potential WTO panel decision of the DSB would be confronted with three issues:

1. The question is not one of deciding between the reach of opposing territories or between different institutional solutions to the patents problem. Instead, the argument sketched in the first case must be taken to its full conclusion, such that the substantive norms of a global patent law are evolved in a quasi-judicial process.
2. It is not sufficient merely to refer to the contemporary policies pursued by international organizations, such as the WTO or WHO. Instead the conflict-resolving legal instance must, in the final analysis, revisit underlying rationality conflicts and attempt their compatibilization.
3. Since there is no central instance for deciding the conflict in existence, the problem can only be solved from the decentralized perspective of one of the conflicting regimes; in this case, the WTO. The competing rationality principles, however,—in this case, that of global health protection—must be

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112. WTO Ministerial Conference, 4th Sess., *Ministerial Declaration*, WT/MIN(01)/Dec/1, para. 17. (Nov. 20, 2001).

113. WTO Ministerial Conference, *Declaration of the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001); on the implementation of the Declaration, see WTO General Council, *General Council Chairpersons Statement*, WT/GC/M/82 (Nov. 13, 2003).

introduced as a logical limitation within the specific institutional context—in this case the economic context of WTO law.

In addition to reserving a national competence to define emergency situations,<sup>114</sup> the Doha Declaration establishes a deadline for less developed countries until the year 2016: their rules will take precedence only up until that date. Equally, the General Council has now established a detailed regulatory framework for the issuing of compulsory licenses.<sup>115</sup>

In our reading, the economically oriented WTO regime has created an internal limitation on its own logic through the reformulation of a principle of health protection. This compatibilization technique allows to build responsive external linkages within its own perspective of economic rationality. Such a “re-entry” of conflicting law within one’s own legal system allows for the translation of rationality collisions within the *quaestio iuris*; it avoids the unfortunate situation whereby external cognition can only take place on the collapse of a regime.<sup>116</sup> In the example of the WTO, this means that the re-entry of environmental rationalities within the self-organization of this regime should be promoted; that is, a re-entry extending far beyond the very narrow terms of Articles 7, 11 and 3.2 of the DSU.<sup>117</sup> The reconstruction of non-WTO law within the WTO legal system would then not be an external imposition of limits but the internal achievement of the WTO regime itself and would reflect upon a process of mutual constitution.<sup>118</sup>

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114. See WTO Ministerial Conference, *supra* note 113, at para. 5(c):

Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

115. WTO General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 2, 2003); on details, see Haochen Sun, *The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health*, 15 EUR. J. INT’L L. 123 (2004).

116. This, for example, is the understanding given by Marschnik to the meaning of the regime-external environment, which, for example, would see international common law applied upon the failure of an international legal regime. See AXEL MARSCHNIK, *SUBSYSTEME IM VÖLKERRECHT: IST DIE EUROPÄISCHE UNION EIN ‘SELF-CONTAINED REGIME’?* 162 (1997); on the special case of *ius non dispositivum*, see discussion, *infra* Part III.C.

117. See Böckenförde, *supra* note 54, at 979.

118. See Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT’L L. 48, 76 (1949):

It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty, once signed and ratified, is more than the expression of the intention of the parties. It is

The literature is full of controversies on the status and role of general international law within the WTO regime. Such controversy, however, tends to derive from the concepts of direct/indirect effect,<sup>119</sup> prevailing/overriding application<sup>120</sup> and internationally conforming legal interpretation,<sup>121</sup> that have arisen within the conflicts between international and national law, and between EU and national law. It is thus not only too narrow, especially with regard to its fixation upon international public law,<sup>122</sup> but also chooses the wrong starting point for analysis through its over-emphasis on colliding state-derived normative commands.<sup>123</sup> Rather, the re-entry of non-WTO law within WTO-law means: the identification of colliding social realities; the re-entry of alien sectoral regime orders within a legal regime; the reformulation of the conflict within the *questio iuris*; and the internal compatibilization of legally reformulated systemic rationalities. In the concrete case this entails that health protection measures must in certain cases be themselves protected from economic pressures. Respect for this would thus suggest

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part of international law and must be interpreted against the general background of its rules and principles.

*Id.*

119. Böckenförde, *supra* note 54.

120. Pauwelyn, *supra* note 54, at 566 (“prevails,” “overrides” etc.).

121. Gerrit Betlem & André Nollkaemper, *Giving Effect to Public International Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EUR. J. INT’L L. 569 (2003).

122. See Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996):

Transnational legal process describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.

*Id.*

123. Similarly narrow and conflict shy, see Panel Report, Korea—Measures Affecting Government Procurement, WT/DS163/R, para. 7.96 (6/19/2000):

We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

*Id.*

an extensive interpretation of the exceptional provisions of Article 31 of TRIPS in situations in which health measures are necessary “which promote broad access to safe, efficient and affordable preventive, curative or palliative pharmaceuticals and medical technologies.”<sup>124</sup> While patent protection rules may answer economic rationality demands, they nonetheless contradict demands of the health system.<sup>125</sup> Resolution 2001/33 of the UN Human Rights Commission foresees such a conflict solution.<sup>126</sup> Measures such as the Brazilian AIDS program must thus be exempted from economic logic to the degree that the normal standard for patent protection is not to be applied in such cases. The critical conflicts issue would thus be one of identifying collisions between the norms of economic rationality and norms formed within the context of the protection of health.<sup>127</sup> In this concrete case, the matter is one of the evolution of abstract and general incompatibility norms within the context of the economic and health sectors and the priming of WTO law, as well as UN law (seen as part of a transnational patents law), to deal with destructive conflicts between incompatible rationalities.

### C. From a Common *Ius Cogens* to Regime Specific *Ordres Publics*

If one takes the realistic stance that there is no final hierarchical decisional instance within regime conflicts law, the question remains whether or not common legal principles can be assumed within the heterarchical order of diverse autonomous regimes. The existence of *ius cogens* within trans-national law is not merely a problem for political regulatory regimes established by international treaties; instead, it poses particularly acute problems for autonomous private governance regimes, for the *lex mercatoria* or the *lex digitalis*, for example. Here we face a seemingly insoluble dilemma: if the private governance regimes educe from contractual relations between private global players, where is the legal source of a mandatory law which would need to be created and enforced against the wishes of the parties to the contract? Accordingly, the mere existence of mandatory law within private governance regimes has

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124. E.S.C. Res. 2001/33, U.N. ESCOR, 57th Sess., Supp. No. 3, at 171, U.N. Doc. E/2001/23 (2001).

125. For the concept of global societal law used here, see Gunther Teubner, *Global Bukovina: Legal Pluralism in the World Society*, *supra* note 20; Fischer-Lescano, *Die Emergenz der Globalverfassung*, *supra* note 20, at 750.

126 On the implications of the human rights covenants, see Alicia Ely Yamin, *Not Just a Tragedy: Access To Medications as a Right Under International Law*, 21 B.U. INT'L L.J. 101 (2003).

127. Gunther Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgerschaft in der Kollision unverträglicher Handlungslogiken*, in KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 388 (2000); see also Andreas Fischer-Lescano, *Odious Debts und das Weltrecht*, 36 KRITISCHE JUSTIZ 225 (2003).

been doubted. It is important here to avoid two extreme positions. One the one hand, binding norms do not possess a natural law like *a priori* validity; accordingly the non-dispositive cannot simply be created following the logic of a higher *ius cogens* in the sense of Article 53 Vienna Convention,<sup>128</sup> or of the UN constitution in its guise as a global constitution that reaches into all societal regime spheres by means of Article 103 of the UN Charter.<sup>129</sup> On the other hand, however, an interpretation founded in the potential “Hijacking” and “Hayeking”<sup>130</sup> of human and environmental rights by a regime with a highly particularist agenda, which has haunted the debate on the constitutionalization of the WTO, is also inadequate. Neither interpretation has fully plumbed the depths of the problem of *ius cogens* posed by a heterarchical order.

A hierarchical elevation and subordination of legal orders is an equal anathema to a polycentric global law as is the assumption that an emergent functional regime is an autarkical system operating within a global societal vacuum. Beyond the alternative of either central coordination or autarky of closed regimes, we are left with a network logic. It is characterized by combining two conflicting demands with one another. On the one hand one finds in networks the autonomous and decentralized reflections of networks nodes which seek compatibility with their human and natural environments. On the other, in networks linkages exist between these decentralized reflections in the sense that nodes observe each other closely. Thus, in spite of their autonomy, regimes can build on the assumption of common reference points, which is of course nothing but an operative fiction. Building on this fiction, each of them can subordinate themselves to a, necessarily abstract, seemingly common philosophical horizon, to which they orient their own rule-making. This horizon of non-dispositives possesses no common founding text; a common grammar has not been found. The only clear fact is that Article 53 Vienna Convention cannot give clear expression to the *unitas multiplex* of autonomous regimes since its provisions and legal consequences are even subject to debate within the international law regime itself.<sup>131</sup> Even more significantly, Article 53 has its place within international public law and international politics; a semantic that would be without function

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128. Christian Tomuschat, *International Law as the Constitution of Mankind*, in *INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY* 37 (U.N. ed., 1997).

129. Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 *COLUM. J. TRANSNAT'L L.* 529 (1998).

130. Both formulations used by Phillip Alston in the Alston/Petersmann controversy, *see* Alston, *supra* note 105.

131. On the conflict on narrow and wide, and meaningful and less meaningful, interpretation, *see* ANDREAS L. PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT: EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG* 352–58 (2001).

in other societal contexts in which proffered formulations, such as “international *ordre public*,”<sup>132</sup> “mandatory rules,”<sup>133</sup> and “*ordre public transnational*,”<sup>134</sup> are in circulation.

These concepts represent the legal expression of the common good in highly diverse social contexts. Clearly, while a global *ius non dispositum* has no common written philosophical horizon, the unity of the diverse concepts derives from the paradoxical situation that the linguistic diversity of the global Esperanto of non-dispositive law does make subordination to the fiction of a common validity core possible, in a process that the French philosophers, Deleuze and Guattari, might have characterized as being “rhizomorphic” in nature.<sup>135</sup> Nurturing different common good formulas within different regime contexts certainly creates a problem. But the problem is not one of harmonizing these reference points, but is instead one of prompting regime-internal self organization so the different regimes can establish their own grammars for their version of a global *ius non dispositivum*. A large variety of processes assume the prompting role: the scandalizing of sectors of public opinion;<sup>136</sup> pressure from international politics;<sup>137</sup> and co-operation between autonomous regimes.<sup>138</sup>

### Third Example: Lex Constructionis

The *lex constructionis* and its standard contracts on trans-national construction projects is dominated by a small number of well organized private associations: the International Federation of Consulting Engineers (FIDIC), the International European Construction Federation (FIEC), the British Institution of Civil Engineers (ICE), the Engineering Advancement Association of Japan (ENAA), the American Institute of

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132. Walter Kälin, *Menschenrechtsverträge als Gewährleistung einer objektiven Ordnung*, in *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT: AKTUELLE PROBLEME DES MENSCHENRECHTSSCHUTZES* 9 (1994).

133. Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 *AM. REV. INT'L ARB.* 319 (1996).

134. HORACIO A. GRIGERA NAON, *CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION* 65 (1992).

135. GILLES DELEUZE & FÉLIX GUATTARI, *TAUSEND PLATEAUS* 36 (1992); GILLES DELEUZE & FÉLIX GUATTARI, *RHIZOM* (1977).

136. BRUNKHORST, *supra* note 59, at 212.

137. See especially *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Committee for the Promotion and the Protection of Human Rights, 22d Sess., Meeting 55, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

138. See UN Global Compact, at [www.unglobalcompact.org](http://www.unglobalcompact.org); on a preliminary stocktaking, see Lothar Rieth, *Deutsche Unternehmen, soziale Verantwortung und der Global Compact*, at [http://www.uni-tuebingen.de/gk.globale-herausforderungen/papers/rieth/052003\\_Lothar\\_Rieth\\_SV\\_Dt\\_Unt\\_GC.pdf](http://www.uni-tuebingen.de/gk.globale-herausforderungen/papers/rieth/052003_Lothar_Rieth_SV_Dt_Unt_GC.pdf) (2003).

Architects (AIA). In addition, the World Bank, UNCITRAL, UNIDROIT and certain international law firms also contribute to developing legal norms of the *lex constructionis*. Article 4.18 of the FIDC Model Contract, which is fundamentally the same as Construction, Installation and EPC Model Contracts,<sup>139</sup> furnishes us with the typical formula deployed by these contracts—if the issue is considered at all<sup>140</sup>—to give recognition of private construction contracts to environmental issues:

The Contractor shall take all reasonable steps to protect the environment (both on and off the Site) and to limit damage and nuisance to people and property resulting from pollution, noise and other results of his operations. The Contractor shall ensure that emissions, surface discharges and effluent from the Contractor's activities shall not exceed the values indicated in the Employer's Requirements, and shall not exceed the values prescribed by applicable Laws.<sup>141</sup>

A fleeting glance suffices to show that the contractual agreement aims to externalize the environmental costs of the entire project and that contractual duties relate only to the concrete measures that the contractual parties should take to “limit” their own emissions. In general, such contracts do not elaborate human rights or general duties to the environment. Oren Perez notes:

The response of the *lex constructionis* to the construction-environmental dilemma is, then, based primarily on a strategy of deference, which seeks to externalize the responsibility for regulating the environmental aspects of the construction activity to the ‘extra-contractual’ realm of the law of the host-state. This is achieved through the employment of ‘compliance’ provisions, which appear in most of the standard forms. [ . . . ] The notion of ‘efficient risk-allocation’ further illustrates how this logic of externalization operates. In order to maximize its economic value the contract is expected to provide the parties with an efficient risk-allocation scheme. This should be achieved by allocating particular risks to the party best able to manage them.<sup>142</sup>

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139. EPC stands for “engineering, procurement and construction.”

140. The ENAA's Model Form and the Institution of Civil Engineers New Engineering Contract [hereinafter NEC] do not even include such a limited provision.

141. FIDC MODEL CONTRACT art 4.18.

142. OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT (forthcoming 2004) (especially the details on contractual techniques within the *lex constructionis*).

Amongst the large number of legal questions that this example gives rise to, the following concentrates upon the global *ius non dispositivum*. Although the notable case of *Furundzija*<sup>143</sup> saw the ICTY extend the jurisdictional reach of the *ius cogens* principle to the degree that national law contradicting Article 53 Vienna Convention would be invalid—a conclusion that would also seem to suggest itself in relation to the UN<sup>144</sup> and to the WTO<sup>145</sup>—the operational capacities of the principle would surely be overtaxed were it also to be afforded direct effect within private regimes such as the *lex mercatoria*, *lex digitalis* or the *lex sportiva*.

By the same token, the potential for the substantive extension within international law-making processes of the legal goods protected by Article 53 Vienna Convention is also limited. Only segments of the International Bill of Rights have been afforded the international legal quality of the *ius cogens*, while a further clarification of Article 30 Vienna Convention within inter-regime processes is hardly to be reckoned with.<sup>146</sup> The establishment of hierarchies within global law is clearly regime dependent<sup>147</sup> and, as the ICTY has made clear for itself and thus

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143. Prosecutor v. Furundzija, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T, 28 I.L.M. 317, 349 para. 155 (1999) (decided Dec. 10, 1998):

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *ius cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition.

*Id.*

144. See, e.g., Matthias Herdegen, *The "Constitutionalization" of the UN Security System*, 27 VAND. J. TRANSNAT'L L. 135, 156 (1994); Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 59 (1994).

145. See Pauwelyn, *supra* note 54, at 565.

146. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 94–96 (2d ed. 1994); on the WTO, see Böckenförde, *supra* note 54; on the issue within the context of the Hague Convention, see Andrea Schulz, *The Relationship between the Judgments Project and other International Instruments*, Hague Conference On Private International Law, Preliminary Document No. 24 (2003), at [www.hcch.net/doc/jdgm\\_pd24e.pdf](http://www.hcch.net/doc/jdgm_pd24e.pdf).

147. Matthias Ruffert, *Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft*, 38 ARCHIV DES VÖLKERRECHTS 129, 164 (2000); Laurence Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193 (2004).

also for others: “In International Law, every tribunal is a self-contained system (unless otherwise provided).”<sup>148</sup>

Rather than engage in a wholly unrealistic attempt to create a hierarchy within the fragmentation of global law, efforts should thus instead be focused on the intra-regime responsiveness to the immediate human and natural environment; that is, functional regimes must each evolve their own *ius non dispositivum*. In this respect, we should not forget that the UN regime has, to date, had much difficulty establishing its own *ius cogens*.<sup>149</sup> Legal control of Security Council resolutions by the ICJ, the ‘principle judicial organ’ of the UN, is very limited.<sup>150</sup> The dysfunctional separation of powers within the UN disadvantages UN self-organization, forms a barrier to the development of an autonomous *ius non dispositivum*, and in part also contributes to a double “is-should” false conclusion, whereby the room for *manoeuvre* afforded the Security Council under Article 39 of the UN Charter is such that its control seems to follow “through public opinion, but not through law.”<sup>151</sup> This position, however, both underestimates the legal dimension of scandalizing public opinion,<sup>152</sup> and does not recognize the mutual dependency between the regime and its environment; an environment whose normative

148. Prosecutor v. Dusko Tadic, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72, 35 I.L.M. 32, 39 para. 11 (1996) (decided Oct. 2, 1995).

149. Most recently, see Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya vs. U.S.), 1992 I.C.J. 114–217; Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 3–30.

150. On the lacking “Marbury moment” within the UN regime, see Geoffrey Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT’L L.J. 1, 45 (1993); Thomas Franck, *The “Power of Appreciation”: Who is the ultimate Guardian of UN Legality?*, 86 AM. J. INT’L L. 519, 638 (1992); but see Prosecutor v. Dusko Tadic, *supra* note 143, at 41–42, paras. 26–28:

These arguments [of the Security Council concerning the establishment of the ICTY, the authors] raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal . . . It is clear from this text [Art. 39 of the Charter, the authors] that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. . . The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be.

*Id.*

151. BERND MARTENCZUK, RECHTSBINDUNG UND RECHTSKONTROLLE DES WELTSICHERHEITSRATS: DIE ÜBERPRÜFUNG NICHTMILITÄRISCHER ZWANGSMASSNAHMEN DURCH DEN INTERNATIONALEN GERICHTSHOF 275 (1996).

152. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *supra* note 20; Fischer-Lescano, *Die Emergenz der Globalverfassung*, *supra* note 20, at 750–53.

expectations have an impact “if the special regime fails to function properly.”<sup>153</sup> Absent both an autonomous *ius non dispositivum* and a functioning, regime-internal, structural link between law and politics, analysis must proceed from an assumption of the indirect effect of the *ius cogens* of Article 53 Vienna Convention within the UN regime.<sup>154</sup> In the words of Justice Lauterpacht:

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent.<sup>155</sup>

By contrast, economic, scientific, technological, health-based and religious regimes need each establish their own reference points for non-dispositive law. This can also be observed in the *lex mercatoria* and the *lex constructionis*. Quite independent from the choice of laws made by individual contracts within the *lex constructionis*, and all “national interests”—which representatives of the so-called special connection theory would like to see taken into account even outside the contractual structure<sup>156</sup>—notwithstanding, the emergence of a *lex mercatoria* specific *erga omnes* law can be observed that no longer bases itself within national public policy. We could come to the conclusion that arbitration instances must move beyond concrete contractual terms in order to take environmental consequences and human rights complications into account as part of a specific *ius non dispositivum*;<sup>157</sup> equally, courts of arbitration must apply their own *ordre public*:

It is generally recognized that the arbitrator can, in the name of ‘truly international public policy,’ refuse to give effect to certain agreements of the parties. Likewise, if the object of a law is to

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153. Koskenniemi Outline, *supra* note 8, at 10; MARSCHIK, *supra* note 116, at 162–63.

154. Reaching the same conclusion, *see* Herdegen, *supra* note 144, at 156; Scott et al., *supra* note 144, at 58–59; Watson, *supra* note 150.

155. Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), 1993 I.C.J. 4 (April 8) (Separate Opinion of Judge Lauterpacht).

156. Voser, *supra* note 133, at 323–25.

157. Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *ARB. INT'L* 274–87 (1986); ANDREAS BUCHER & PIERRE-YVES TSCHANZ, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 102–05 (1989).

guarantee the respect of principles the arbitral tribunal considers as forming a part of transnational or 'truly' international public policy, it must find that such law prevails over the will of the parties. Because of the transnational character of these norms, a connection between the state that enacted the mandatory rules and the dispute is not necessary.<sup>158</sup>

At the same time, if arbitration courts fail to take into account *ius cogens*, it may well be that national courts will not enforce their decision.<sup>159</sup> Even more significant than these external pressures is the regime-internal juridification of the duty of courts of arbitration to take binding laws into account.<sup>160</sup> The potential of this liability of arbiters for the generation of a *ius non dispositivum* has barely been explored within the *lex mercatoria*. Accordingly, it is very possible to imagine of a situation whereby a failure on the part of courts of arbitration to take note of the norms of the *ius non dispositivum* could result in third parties raising liability claims, modeled in line with national prototypes, against arbiters.

#### D. From *Stare Decisis* to Default Deference

By contrast to the binding nature of the judgments of superior courts, it belongs to the logic of networks that autonomous regimes enter into relations of mutual observation.<sup>161</sup> Legal certainty within this polycentric legal system cannot be furnished by a hierarchically superior decisional instance placed at the center of the law. Rather, what can be realistically expected is uncertainty absorption in a process of iterative

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158. Voser, *supra* note 133, at 349–50.

159. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 42 art. V(1)(c); see also Eric A. Posner, *Arbitration and Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT'L L. 647, 651 (1999).

160. See Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L. J. 1279, 1316–17 (2000):

The use of arbitration can be reconciled with the presence of mandatory rules by recognizing that the arbitrator and the parties to the transaction are bound by contract and by imposing on the arbitrator a duty to apply mandatory laws in the performance of his contractual obligations. Under arbitrator liability, the arbitrator is required to carry out his responsibilities subject to the requirement that he respect mandatory rules, just as he must carry them out subject to a duty of good faith. Like the duty of good faith, the duty to enforce mandatory rules cannot be waived by contract.

*Id.*

161. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002).

connection of legal decision to legal decision that recalls the strict precedent tradition, but that also departs from it in various significant ways.

#### Fourth Example: Desaparición

Around 30,000 people disappeared (the *desaparición*) during the Argentinean military dictatorship of the years 1976–1983. During its transition back to democracy, Argentina first applied amnesty laws freeing wrongdoers from prosecution. In 2003, however, the Argentinian National Congress declared both amnesty laws passed by the Alfonsín regime to be invalid.<sup>162</sup>

What is of interest here is the manner in which the global legal system has dealt with the Argentinian *desaparición*. The case raises important issues, implicating a whole host of non-territorial courts, although many would prefer to see these Gordian knots severed by the sword of politics.<sup>163</sup> The legal challenges can be distilled down to a question of which crimes can be judged under which jurisdictional rules in which systems and under which treatment of the immunity question. The entire discussion has been dealt with elsewhere.<sup>164</sup> The case of the disappeared, however, is also an instructive example of how contingent issues can be transformed into international criminal law under conditions of iteration and the absorption of uncertainty.

The first case that explicitly dedicated itself to the crime of disappearance,<sup>165</sup> was the decision of the United States District Court, in the

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162. Law No. 23,492, Dec. 24, 1986, 1986–B L.A. 100 (Argentina); Law No. 23,521, June 8, 1987, 1987–A L.A. 260 (Argentina). See also Boletín Oficial of the 3rd September 2003.

163. Arguing against universal jurisdiction, see Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFFAIRS 86 (2001); arguing against immunity exceptions, see Paul W. Kahn, *On Pinochet*, 24 BOSTON REVIEW 1 (1999), available at <http://bostonreview.net/BR24.1/kahn.html>.

164. ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG: DIE GELTUNGSBEGRÜNDUNG DER MENSCHENRECHTE IM POSTMODERNEN IUS GENTIUM, *supra* note 20. For an instructive summary of the doctrinal questions of *desaparición* and *desiderata* from a *lex ferenda* perspective, see Manfred Nowak, *Report for the Human Rights Commission*, U.N. Doc E/CN.4/2002/71, at 8, 25 (Jan. 8, 2002).

165. The decision of the Nuremberg Tribunal was not explicitly concerned with disappearances, but saw Hitler's Night and Fog-Order ("Nacht- und Nebel-Erlass"), see "Night and Fog" Decree, Doc. 090-L, 37 IMT-Nuremberg 570–75 (1945), as demonstrating the characteristics of systematic ill-treatment, brutality in the sense of art. 6(b) of the Nuremberg Statute and art. 46 of the Convention on the Laws and Customs of War on Land. See Proceedings of the 218th Day, 1 IMT 485–530, (Oct. 1, 1946). See also Annex XXII, *Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 107/1981*, U.N. Doc. A/38/40/Supp.40, at 216 (1983) (submitted by: Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf); *Maria del Carmen Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2, at 11 (1990) [hereinafter *Quinteros v. Uruguay*].

case of *Forti v. Suarez-Mason*. The court first ascertained that no precedent existed for its decision:

However, plaintiffs do not cite the Court to any case finding that causing the disappearance of an individual constitutes a violation of the law of nations. [. . .] Unfortunately, the Court cannot say, on the basis of the evidence submitted, that there yet exists the requisite degree of international consensus which demonstrates a customary international norm.<sup>166</sup>

Nonetheless, the plaintiffs were not satisfied with this judgment and a few months later the court dared to give a fresh judgment on the basis of academic literature and political resolutions alone:

The legal scholars whose declarations have been submitted in connection with this Motion are in agreement that there is universal consensus as to the two essential elements of a claim for 'disappearance'. . . Plaintiffs cite numerous international legal authorities which support the assertion that 'disappearance' is a universal wrong under the law of nations.<sup>167</sup>

In the following time masses of judgments were handed down on the crime of disappearance. This issue was dealt with for a variety of reasons by very different regimes: national courts, the Inter-American Human Rights Court, the European Court for Human Rights and the Human Rights Commission for Bosnia-Herzegovina.<sup>168</sup> In addition to the emergence of a transnational criminal norm—indeed, even a *ius cogens* norm in the sense of Article 53 of the Vienna Convention, on the “disappeared” and the reception of these decisions by Argentinean

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166. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542–43 (N.D. Cal. 1987).

167. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1987).

168. See Velásquez Rodríguez Case, Inter-Am. Ct. H.R., OAS/ser. C/no. 4, at para. 153 (1988); For later cases, see Godínez Cruz Case, Inter-Am. Ct. H.R., OAS/ser. C/no. 5, at para. 161 (1989); Caballero Delgado and Santana Case, Inter-Am. Ct. H.R., OAS/ser. C/no. 22, at paras. 54, 62 (1995); Blake Case, Inter-Am. Ct. H.R., OAS/ser. C/no. 36, at paras. 26–30 (1998); Villigran Morales et al. Case, Inter-Am. Ct. H.R., OAS/ser. C/no. 63 (1999) (Cançado Trindade & Abreu-Burelli, JJ., concurring); Bámaca Velásquez Case, Inter-Am. Ct. H.R. OAS/ser. C/no. 70, at § XVII (2000); Durand and Ugarte, Inter-Am. Ct. H.R., OAS/ser. C/no. 68 (2000); Trujillo Oroza Case, Inter-Am. Ct. H.R., OAS/ser. C/no. 64, at para. 41 (2000); Kurt v. Turkey, 1998–III Eur. Ct. H.R. (no. 74) 1152, at 1171 (1998); Kaya v. Turkey, 2000–III Eur. Ct. H.R. 149; Cicek v. Turkey, App. No. 25704/94, 934 Eur. Ct. H.R. 56 (2001); Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R. (May 10, 2001), at <http://www.echr.coe.int/Eng/Judgments.htm>; Battista v. Colombia, U.N. CCPR, Hum Rts. Comm'n, Comm. No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993; Palic v. Bosnia and Herzegovina and Republika Srpska, Case No. CH/99/3196, Hum. Rts. Chamber for Bosnia and Herzegovina (2001); Unkovic v. Bosnia and Herzegovina, Case No. CH/99/2150, Hum. Rts. Chamber for Bosnia and Herzegovina (2001).

judges<sup>169</sup>—the process proved remarkable for the manner in which judges from very different regimes entered into mutual observation of other regimes. The networking in this process is not always explicit,<sup>170</sup>

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169. For more about this, see Pablo Parenti, *Nuevas perspectivas en el tratamiento penal de las violaciones de DDHH en Argentina entre 1976 y 1983*, in *ESTADO DE DERECHO Y DELINCUENCIA DE ESTADO EN AMÉRICA LATINA* (Jörg Arnold et al. eds., forthcoming 2004).

170. The first decisions mentioned in *supra* note 168 referred to political declarations and conventions. See, e.g., Velásquez Rodríguez Case, *supra* note 168, at para. 151; Godínez Cruz Case, *supra* note 168, at para. 159. Later the courts used to practice a technique of mutual references. In *Bámaca Velásquez Case*, for example, the Inter-American Court of Human Rights quotes the European Court of Human Rights. *Bámaca Velásquez Case*, *supra* note 168, at para. 162, which cites decisions from these European Court of Human Rights cases: *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997); *Brogan and Others v. United Kingdom*, 11 Eur. H.R. Rep. 17 (1988); *Kurt v. Turkey*, *supra* note 168; *Timurtas v. Turkey*, 33 Eur. H.R. Rep. 6 (2000); *Çakici v. Turkey*, 31 Eur. H.R. Rep. 5 (1999); and the Human Rights Committee of the CCPR: *Quinteros v. Uruguay*, *supra* note 165. The Inter-American Court of Human Rights quotes the European Court of Human Rights' *Kurt* decision, which refers to the Inter-American Court of Human Rights and names the *loci classici* of the legal issues of "disappearance":

The United Nations Human Rights Committee, acting within the framework of the International Covenant on Civil and Political Rights ("ICCPR") has drawn up reports on a number of cases of forced disappearances: *Quinteros v. Uruguay* (107/1981) Report of the Human Rights Committee, GAOR, 38th Session, Supp. no. 40 (1983), Annex XXII, § 14; *Mojica v. Dominican Republic*, decision of 15 July 1994, Committee's views under Article 5 § 4 of the Optional Protocol to the ICCPR concerning communication no. 449/1991: *Human Rights Law Journal* ("HRLJ") vol. 17 nos. 1–2, p.18; *Bautista v. Colombia*, decision of 27 October 1995, Committee's views under Article 5 § 4 of the Optional Protocol to the ICCPR concerning communication no. 563/1993: 17 HRLJ vol. 17 nos. 1–2, p. 19).

[. . .]

The Inter-American Court of Human Rights had considered the question of enforced disappearances in a number of cases under the provisions of the American Convention on Human Rights and prior to the adoption of the Inter-American Convention on Forced Disappearance of Persons: *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988 (Inter-Am. Ct. H. R. (Ser. C) no. 4) (1988)); *Godínez Cruz v. Honduras*, judgment of 20 January 1989 (Inter-Am. Ct. H. R. (Ser. C) no. 5) (1989)); and *Cabellero-Delgado and Santana v. Colombia*, judgment of 8 December 1995 (Inter-Am. Ct. H. R.).

*Kurt v. Turkey*, *supra* note 168, at 1171–72, paras. 65, 67.

Furthermore, the Human Rights Committee for Bosnia and Herzegovina refers in its decision of *Unkovic v. Bosnia and Herzegovina*, *supra* note 168, paras. 91–99, to—among others—the European Court of Human Rights (*Cruz Varas and Others v. Sweden*, 201 Eur. Ct. H.R. (ser. A) at 35 (1991); *Kurt v. Turkey*, *supra* note 168, *Çakici v. Turkey*, 31 Eur. H.R. Rep. 5 (1999); *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. (May 10, 2001), at <http://www.echr.coe.int/Eng/Judgments.htm>) and to the Committee of the CCPR (*Quinteros v. Uruguay*, *supra* note 165).

The Argentine Federal Court refers in *Simón*, *supra* note 169, among other things to decisions in Spain (Sumario 19/97–L, Juzgado Central de Instrucción Nro. 5 de la Audiencia Nacional de Madrid); the United States (citing among others the following cases, listed in the order cited: *Extradition of Carlos Guillermo Suarez–Mason*, 694 F. Supp. 676 (N.D. Cal. 1988); *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993); *Filartiga v. Pena-Irala*, 577 F.

but rather comprises an informal reference to a given processes of transformation, building upon the individual aspects dealt with in past cases. Thus, for example, the ICJ decision in the arrest warrant case—a case which saw the ICJ base itself upon national immunity rules for state functionaries which distinguish between crimes committed in a private or an official function—can only be understood against the backdrop of Argentinean cases and the *Pinochet* case; it can only be explained where the observer is aware that this differentiation owes to a normative concept that refuses to afford human rights crimes an official state character and thus classifies them as private acts. The House of Lords in the *Pinochet* Case, in particular, transformed the question of "when exists a *ratione materiae* exception to immunity for persons who, *ratione personae*, are to be regarded as immune," into one of a public/private differentiation<sup>171</sup> and it was this differentiation with which the ICJ worked,<sup>172</sup> even though in the concrete case before them—the case of an official functionary carrying out his office—the court held the arrest warrant to be contrary to international law.

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Supp. 860 (E.D.N.Y. 1984); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N. D. Cal. 1988); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (D.D.C. 1990)); citing also to the International Criminal Tribunal for the Former Yugoslavia (*Prosecutor v Tadic*, *supra* note 7); to Israel (*Attorney General of Israel v. Eichmann*, 36 I.L.R. 18 (Isr. Dist. Ct.—Jerusalem 1961) (an unofficial translation of the District Court opinion prepared by the Israeli Government is also available at 56 Am. J. Int'l L. 805 (1962)); to the Netherlands (*Public Prosecutor v. Menten*, 75 I.L.R. 351, 362 (Neth. Sup. Ct. 1981)); and by the Committee of the CCPR (Comments on Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995).

171. There are in total four decisions of global remedies in the *Pinochet*-case: (1) For Divisional Court remedies, see *In re Augusto Pinochet Ugarte*, 38 I.L.M. 68 (1999) (Q.B. Div'l Ct. 1998); *Reg. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1998] 3 W.L.R. 1456 (H.L.) [hereinafter *Pinochet 1*]; *Reg. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2)*, [1990] 2 W.L.R. 272 (H.L.) [hereinafter *Pinochet 2*]; *Reg. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 827 (H.L.) [hereinafter *Pinochet 3*]; see Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 869 (2002) (pleading for a transformation of the private/official acts differentiation).

172.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), 2002 I.C.J. 61 (Feb. 14).

Were the fragmentation discussion within international law to concentrate on potential hierarchical solutions it tended to miss the point. Instead, it needs to re-focus on the issue of precedent. Is there a middle way here between the Scylla of legal binding through strict precedent and the Charybdis of a concept of precedent founded in simple persuasion or even the harmonization of methodological approaches?<sup>173</sup> In fact, “default deference” presents one possibility; that is, the rebuttable presumption that the decisions of international regime courts do have the character of precedent for one another.<sup>174</sup> There is a connection to the issue of uncertainty absorption within networks and formal organizations;<sup>175</sup> that is, the acceptance of previous decisions with a continuing potential for variation. The ICTY made clear in the *Celebici* Judgment that:

the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern.<sup>176</sup>

By the same token, however, the ICTY itself was correct, in the *Tadic* case,<sup>177</sup> to expand the ICJ “effective control test”<sup>178</sup> through a new distinction and to declare the ICJ criteria to be non-applicable to the concrete case, since it concerned organized military groups rather than unorganized individuals, as had been the case in the *Nicaragua* judgment. Equally, the judgment also cannot be termed provocative in terms of its treatment of the legal question. The ICTY surely had good reason,<sup>179</sup> within the concrete context of individual responsibility in the realm of humanitarian law, to afford a more extensive interpretation to a restrictive reading of causality that is wholly appropriate for exceptions given for the use of force within the context of Article 51 of the UN

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173. See, Jan Neumann, *Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen: Die Problematik paralleler Streitbeilegungsverfahren am Beispiel des Schwertfisch-Falls*, 61 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 529, 547 (2001).

174. Martinez, *supra* note 33, at 487.

175. NIKLAS LUHMANN, *DIE POLITIK DER GESELLSCHAFT* 189 (2000).

176. Prosecutor v. Zejnir Delalic [hereinafter *Celebici* Case], International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-21-A, at paras. 26 (Feb. 20, 2001), available at <http://www.un.org/icty/indictment/english/cel-ii960321e.htm>. This decision quotes the separate opinion of Judge Shahabuddeen in the case *Laurent Semanza v. Prosecutor*, International Criminal Tribunal for Rwanda, Case No. ICTR-97-23-A, at para. 25 (May 31, 2000).

177. Prosecutor v. Tadic, *supra* note 7, at paras. 115–45.

178. *Id.* at para. 115.

179. That is, good reason in the same manner that national jurisdictions give voice to different causality concepts in civil and criminal law.

Charter.<sup>180</sup> The prominence that a fragmentation discussion affords differences between the ICJ and ICTY is thus unjustifiable in substantive terms,<sup>181</sup> and, indeed, seems to be more concerned with the fact that while the ICTY stated, “with respect” in its *Tadic* decision that, in view of the concrete case matter, it “does not hold the *Nicaragua* test to be persuasive,”<sup>182</sup> the *Celebici* decision saw it insist upon its status as an “autonomous judicial body” without a “hierarchical relationship” to the ICJ.<sup>183</sup> This, however, is neither a provocation, nor a judicial revolution, but rather a form of judicial networking at the global level that is suited to complexity.

#### IV. FROM LEGAL UNITY TO NORMATIVE REGIMES COMPATIBILITY

What impact does all this have upon a self-perception of law in view of the fragmentation of transnational law into autonomous regimes? The immediate consequence is that high expectations of our ability to deal adequately with legal fragmentation must be curbed since its origins lie not in law, but within its social contexts. Rather than secure the unity of international law, future endeavors need to be restricted to achieve weak compatibility between the fragments. In the place of an illusory integration of a differentiated global society, law can only, at the very best, offer a kind of damage limitation. Legal instruments cannot overcome contradictions between different social rationalities. The best law can offer—to use a variation upon an apt description of international law—is to act as a “gentle civilizer of social systems.”<sup>184</sup> In the words of Ladeur, contradictions “cannot be avoided, rather a new form of self-observation and self-description within the legal system must, in fact, take on the task of maintaining compatibility and lines of communication between differing legal arenas.”<sup>185</sup> A realistic option is that legal “formalization” might be able to dampen the self-destructive tendencies apparent within rationality collisions. If all goes well, as our examples show, it might be possible to translate a limited portion of these rationality conflicts into the *quaestio iuris* and thus offer one among several fora for peaceful settlement. Even then, however, law does not act as a superior coordinating instance; much would already have been achieved were it able to furnish forms of

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180. This was the same reason given for departure from the ICJ’s effective control test in the case of *Prosecutor v. Kvocak*, Case No. IT-98-30/1, T.Ch., (Dec. 5, 2000).

181. Koskenniemi & Leino, *supra* note 10, at 566.

182. *Nicar. v. U.S.*, *supra* note 7, at para. 15.

183. *Celebici* Case, *supra* note 176, at paras. 24, 26.

184. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2002).

185. LADEUR, *supra* note 58, at 159–60.

legal guarantees for autonomy in the face of totalizing tendencies and domination by one system. In the context of societal fragmentation, law will be forced to limit itself to its classical role; to furnishing compensation for and curb damage to human and natural environments.