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Commentary to Professor Hafner

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COMMENT

COMMENTARY TO PROFESSOR HAFNER

This Comment is a response to Professor Hafner's presentation in which he considered fragmentation as an unavoidable consequence of the increasing number of norms and judicial mechanisms, as well as of the regionalization of international law and the weakening of the state system.

Human rights law is frequently identified as potentially increasing the fragmentation of international law.¹ While human rights law is and will remain part of international law, it has some unique characteristics and has been considered to form a distinct sub-discipline.² Furthermore, certain human rights treaties, with their institutionalized complaint mechanisms, constitute self-contained regimes.³

Human rights law is also a prime example of an area of international law where the weakening of the state system is clearly visible. This is evidenced already by the non-reciprocal character of human right norms themselves,⁴ and by the discernable development away from the voluntarist conception of international law, e.g. in the area of reservations to human rights treaties.

Despite this, it is argued in this Comment that, on a conceptual and normative level, human rights can and do contribute to the constitutionalization of international law, reflecting a nucleus of norms essential for assuring co-existence of and co-operation among different international actors, as well as the protection of the fundamental values and interests which are common to the international community as a whole.⁵

1. See Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT'L L. 489, 490 (2000).

2. *Id.*

3. On self-contained regimes, see, e.g., Bruno Simma, *Self-contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985).

4. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1996 I.C.J. 640, 646 (1996) (separate opinion of Judge Weeramantry) (expressing Judge Weeramantry's view that the Genocide Convention, like any "human rights and humanitarian treaties do not represent an exchange of interests and benefits between contracting States in the conventional sense. . . . Human rights and humanitarian treaties represent, rather, a commitment of the participating States to certain norms and values recognized by the international community").

5. See MARLIES GALENKAMP, *INDIVIDUALISM VERSUS COLLECTIVISM; THE CONCEPT OF COLLECTIVE RIGHTS* 97 (1998) (" . . . [T]he international community [is] an entirety whose interests may not necessarily be the same as those of individual states, and has thereby some rights and responsibilities of its own."). The increase of subjects of international law has meant that reference is now made to the "international community as a whole" instead of "the international community of states" known from Article 53 of the Vienna Convention on the Law of Treaties. See, e.g., Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, Ch. IV.E.1, at 54, U.N. Doc.

There is, indeed, a growing appreciation that the development of human rights norms and associated processes must necessarily be reflected in the forms and structures of international law. Recent case law of the European Court of Human Rights stresses the interdependence of human rights norms and other norms of international law.⁶ This has been interpreted as a recognition by the court that international law forms a unified system,⁷ which should, in its entirety, aim at improving the protection of human rights.⁸ In this regard, fragmentation and constitutionalization—two concepts that though seemingly opposite—are not necessarily mutually exclusive.

The notion that the protection of certain norms are the concern of the international community as a whole can be considered a constituent

A/56/10 (2001) (Article 42(b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, referring to obligations owed to “a group of States including that State, or the international community as a whole.”).

6. In the case of *Al Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79 (2001), the Court stated that

[t]he Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account. . . . The Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

Id. at 100. *See also* *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157 (2001) (the relevant paragraph 35 is omitted in the official report but is available at <http://www.echr.coe.int/eng>).

7. It is a debated, and most of all dependent on how one defines a legal system, whether one can consider international law to constitute a system or merely an assortment of independent regimes. Hafner has argued that

[i]t can . . . easily be assumed that, presently, there exists no homogenous system of international law. As it has been noted at several occasions even during recent discussions in the International Law Commission, *inter alia* on State responsibility, existing international law does not consist of one homogenous legal order, but mostly of different partial systems, producing an “unorganized system.”

Gerhard Hafner, *Risks Ensuing From Fragmentation of International Law*, in Report of the International Law Commission on the Work of its Fifty-second Session, U.N. GAOR, 55th Sess., Supp. No. 10, at 321, U.N. Doc. A/55/10 (2000). *But see* YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 87–93 (2003). Shany defines a ‘system’ as: “(1) a set of elements; (2) arranged in an order (characterized by the interaction between the different elements); and (3) possessing a certain degree of unity or cohesion (which facilitates the description of the elements as parts of a bigger whole).” *Id.* at 87. Shany concludes that, as a consequence of the interactions in international law between norms and between norms and institutions (institutions related to each other by a common set of norms), international law as a whole could satisfy the minimum requirements of a legal system and should be regarded as a legal system despite the *ad hoc* nature some legal institutions and the poor levels of coherence between institutions of international law. *See id.* at 94.

8. *See* JUKKA VILJANEN, *THE EUROPEAN COURT OF HUMAN RIGHTS AS A DEVELOPER OF THE GENERAL DOCTRINES OF HUMAN RIGHTS LAW* 81 (2003).

element of the constitutinalization of international law, contributing to the development of a more objective international legal order.⁹ It is also the element that connects human rights to the concepts of *erga omnes* obligations and *jus cogens* norms under international law—two concepts that have been considered not only to contribute to the constitutionalization of international law but also to a hierarchy of norms in international law. While the hierarchy of norms in international law is unsettled, and the idea of a hierarchy among human rights norms would contradict with the prevailing indivisibility and interdependence approach in human rights law, one may argue that, based on the connections among human rights (especially non-derogable rights), *erga omnes* obligations, and *jus cogens* norms, it should be possible to identify a core of fundamental rules and principles based on values that are common to the international community as a whole. The fact that few would deny that a hierarchy of normative values has already crystallized¹⁰ should also inform us of which values are more or less important on the normative hierarchical scale.

While little progress has taken place in the clarification of the concepts of *erga omnes* obligations and *jus cogens* norms in international law, it is argued that progress in this respect could take place through the jurisprudence that has been developed by human rights treaty monitoring bodies, especially concerning non-derogable rights (pertaining only to human rights), most of which qualify as *jus cogens* norms giving rise to *erga omnes* obligations (both pertaining to human rights law and international law). With the increased co-operation, information sharing, and cross-referencing by such international and regional bodies, one would assume that it would be possible to identify the core common values in the area of human rights law. Through the interdependence of norms and through concepts that are common to both human rights and international law, i.e. *jus cogens* norms and *erga omnes* obligations, not only

9. See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 270–71 (July 8) (declaration of President Bedjaoui) (“Despite the still modest breakthrough of ‘supranationalism’, the progress made in terms of the institutionalization, not to say integration and ‘globalisation’, of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional law of co-existence, the emergence of the concept of ‘international community’ and its sometimes successful attempts at subjectivization. A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of *jus cogens*, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century . . . has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective conscience and respond to the social necessities of states organized as a community.”).

10. See Andrea Bianchi, *Ad-hocism and the Rule of Law*, 13 EUR. J. INT’L L. 263, 268–69 (2002).

would human rights law have greater degree of constitutionalization, but that would apply to international law as a whole.

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