International Legal Pluralism

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INTERNATIONAL LEGAL PLURALISM

William W. Burke-White*

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This symposium has sought to examine the fragmentation of the international legal system.¹ Such a task presupposes that international law is, in fact, undergoing some form of fragmentation. A range of recent scholarship has described this so-called fragmentation in various ways and generally considered it a negative development, a threat to the legal system as we know it.² This commentary challenges both these assumptions by suggesting that international law is not fragmenting, but rather is being transformed into a pluralist system. Instead of being undermined by fragmentation, the rules, the institutions, and practices of the international legal order can be strengthened by the emergence of an international legal pluralism.

The metaphors employed in the opening plenary to this symposium are indicative of the diversity of views on the fragmentation of international law. Professor Hafner described international law as

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1. The symposium was specifically intended to “examine one of the defining problems for the future of international law: the interplay between the current fragmentation of the international legal system and the simultaneous move of that system away from its traditional status as the exclusive realm of states.”

consisting "mostly of erratic blocks and elements as well as different partial systems." For Professor Pauwelyn, international law is "a universe of inter-connected islands." These two statements describing some degree of fragmentation contrast with Professor Rao's observation of an "emergence of an international legal community." Likewise, Professor Koch noted a "judicial dialogue" with prospects for "legal multiculturalism." While most observers agree that there is not a unified international legal system, many still witness a significant degree of interconnection within the system.

None of these various characterizations of the international legal system is wrong, but each focuses on a particular aspect of the development of international law. A more complete analysis of the supposed fragmentation of international law requires an exploration of a number of trends and the ways in which they interact. While such a broad consideration will by its nature be far less detailed than many of the more specific inquiries of other papers in this volume, it provides a more holistic picture of the changes presently affecting the international legal system—a picture that looks much less like fragmentation.

In asking whether international law is undergoing a fragmentation, at least seven important trends merit consideration:

(1) the diversification of tribunals applying international law;
(2) the growth and potential conflict of legal norms;
(3) the increased access by non-state-actors to international legal adjudication fora;
(4) the distinction between jurisdiction and applicable law in international tribunals;
(5) the rapid expansion of inter-judicial dialogue;
(6) the merging of procedure and tradition across courts and legal systems; and
(7) the development of hybrid courts incorporating national and international elements.

This commentary considers the interaction among these trends to suggest both that the phenomenon of fragmentation and its dangers have been overstated and that an emerging international legal pluralism can be highly beneficial.

I. FRAGMENTATION OR UNITY: WHITHER INTERNATIONAL LAW?

Over the past two decades international law has grown, shifted and expanded in numerous ways. Today, international law regulates a far wider range of substantive issues, is generated by an ever-increasing range of legal sources, and is enforced in far more courts and tribunals than ever before. Though this system is considerably more complex than it was a decade ago, these changes do not necessarily result in a fragmented legal system. Of the seven trends listed above, the first three suggest fragmentation; in contrast, the last four point toward new forms of interaction between national and international actors and the development of an international legal pluralism.

A. The Diversification of International Tribunals

The past fifteen years have witnessed an exponential increase in the number of courts applying international law. New international tribunals have arisen largely in response to functional needs. New problems have emerged that require transnational solutions by international institutions such as courts. P.S. Rao, writing in this volume, discusses the “functional need for the establishment of new international tribunals for a new age,” citing the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY, ICTR), the International Criminal Court (ICC) and the World Trade Organization (WTO) as prime examples. Other tribunals have been created by particular groups of states in response to challenges of a particularly regional nature. Again in this volume, Gerhard Hafner notes the growth of “regional fora [that] engage in the formulation of international regulations.” Such regional courts include the European Court of Justice (ECJ), the African Court of Human and People’s Rights and the Inter-American Court of Human Rights.

An even more significant development is the ever-increasing number of national courts applying international law. As early as 1900, the United States Supreme Court found that international law was a part of

8. See, e.g., Ernst B. Haas, Beyond the Nation-State—Functionalism and International Organization 6–7 (1964).
the law of the United States. However, for most of the past century, there were few international legal cases in the national courts of any country. Today, international law is becoming a more central part of many domestic legal proceedings and a growing number of national constitutions incorporate international law. The new constitution of South Africa, for example, goes so far as to require courts to interpret domestic law so as to be consistent with international law, dramatically increasing the potential for international legal claims in domestic courts. Similarly, the legislation of numerous countries now includes domestic causes of action dependent on international legal rights. The Alien Tort Claims Act and NAFTA Chapter XI actions are but two obvious examples in U.S. law. Whether prosecuting international crimes under the principle of universal jurisdiction, examining the legality of trade restrictions, applying international human rights norms, or adjudicating international environmental claims, the number of national legal cases in national courts relying on international treaties is far too numerous to list. See, e.g., Soobramoney v. Minister of Health (Kwazulu-Natal), 1998 (1) SA 765 (CC) (examining legal rights to medical and health care); Case of the Indigenous Organization of Antioquia (O.I.A.), Judgment No. T-380/93, Constitutional Court of Colombia, September 13, 1993 (considering the rights of an indigenous community under the International Labor Organization Convention). For additional human rights cases in national courts, see The International Dimension of Human Rights: A Guide for Application in Domestic Law, Inter-American Development Bank (2001).

See, e.g., Case 2176, Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735. The case is a request for a preliminary ruling by the Appeal Court of The Hague to interpret Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters based on an underlying national suit in a Dutch court for environmental damage.
courts and arbitral tribunals actively applying international law is far greater than it has ever been.

Some have viewed this expansion of international tribunals and the increasing frequency of international claims in national courts as indicative of the fragmentation of the international legal system. As Rao observes in this volume, the proliferation of such tribunals increases the possibility of conflicting judgments—that two tribunals will "hold differently on the same subject matter." Charles Koch's discussion of the conflicting holdings of the European Court to Human Rights (ECtHR) and ECJ in the cases of Vermeulen and Emesa Sugar provides a useful example of how two international courts can reach alternate holdings on similar issues.

An alternate perspective on the increasing number of fora for international legal adjudication is that international law is today more relevant than it has ever been in the past. Most of these new transnational tribunals and domestic invocations of international law have arisen based on functional challenges—international trade, international crime, or transborder pollution, to name a few. New courts are created to address these emergent issues because an enforceable system of international law offers an efficient and politically acceptable means of conflict resolution within these functional areas. Admittedly, the rise of international courts does increase the possibility of conflicting judgments, but it does so within the context of a more, rather than less, important role for international law.

B. The Growing Density of International Law

A rapid expansion in the sheer number of international rules is reshaping the international legal system as we know it. For most of the past four hundred years, international law provided a very thin set of rules, regulating, for example, the conduct of diplomats, the law of the high seas, or the territorial integrity of states. While the number of such rules expanded slowly throughout the twentieth century, since the end of WWII and particularly in the last two decades, the number of international legal rules has increased sharply. A wealth of new bilateral and multilateral treaties, often in very specific substantive areas ranging from the environment and trade to human rights and international crime,

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16. Rao, supra note 5, at 931.
19. Koch, supra note 6, at 880.
20. See generally HUGO GROTIIUS, THE LAW OF WAR AND PEACE (1625); EMMERICH DE VATTEL, THE LAW OF NATIONS BOOK II (1760).
21. Hafner, supra note 3, at 849–51 (noting an "increase of international regulations").
places States under an ever-larger number of obligations. In effect, the international legal system is "thicker" than it has ever been before. There are far more diads (to use a term from political science) of legal obligation than there have ever been in the past.

This increasing density of legal rules has likewise been interpreted by some as indicative of fragmentation. After all, as new diads of obligation are added to the system, the potential for conflict among legal rules increases. As the number of obligations State A owes to States B and C increases, so too do the chances that an obligation A owes to B will be incompatible with an obligation A owes to C. In his article in this volume, Joost Pauwelyn provides powerful examples of such conflicts in the context of the WTO. International law does not presently provide a sufficient set of rules for resolving such conflicts when they do arise. Though such potential conflict is real, the increasing density of international law is again indicative of the growing importance of international legal regimes. The creation of so many new legal obligations suggests that areas previously within the exclusive purview of national politics are becoming legalized.


23. "Diads of obligation" refers to the number of pairs of legal obligations in the international system. Thus the obligation state A owes to state B and vice versa is a single diad of obligation. For example, in a system with three states entering into a multilateral treaty there are three diads of obligation: between A and B, A and C, and B and C. With six states as parties to this same treaty, there would be fifteen diads of obligation. Concluding a second treaty between these same six states, with respect to a different legal issue, would add another fifteen diads of obligation. It is easy to see how the numbers of diads of obligation can quickly escalate as international law becomes increasingly dense.

24. Pauwelyn, supra note 4, at 905.

25. See generally id.

26. See generally Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, in LEGALIZATION AND WORLD
C. Expanding Access to International Fora by Non-State Actors

A third important trend in international law is the expanding access to international legal fora by non-state actors.27 Today, individuals, nongovernmental organizations, and even corporations have unprecedented access to the international legal system, often without the traditional requirement of diplomatic protection whereby states would espouse the claims of their citizens in international courts. Citizens of European Union member states can bring claims directly to the ECtHR; citizens of the Americas can petition the Inter-American Human Rights Committee. Likewise the U.S. Alien Tort Claims Act opens the U.S. legal system for individuals to bring international claims for money damages rooted in international law.28 Individuals and nongovernmental organizations have indirect access to the International Criminal Court through the submission of communications to the Office of the Prosecutor.29 While corporations have long had access to the international system when their claims were espoused by states, today they play an ever more direct role in advising governments in WTO dispute settlement and can sometimes bring claims directly under NAFTA Chapter XI. Individual access to such fora is unprecedented and seems set to grow.30

Again, some commentators have interpreted this trend as movement toward fragmentation, claiming that more individual access means more cases, more courts, and a denser web of rights and obligations ripe for potential conflict. True enough, but individual access to international adjudication also greatly strengthens the international legal system. Whereas political considerations often drastically limit the incentives of states to bring international claims against other states, individuals are

27. See Keohane, Moravcsik & Slaughter, supra note 26, at 80 (discussing the importance of “access” as a variable in determining the effectiveness of a court or tribunal).
far more willing to act to ensure that international law is enforced wherever possible. As Anne-Marie Slaughter has argued, "it is possible to imagine individuals as monitors of government compliance with agreed rules, whether arrived at through a domestic or an international legislative process." Individuals are thus becoming the "muscle" of the international law, helping develop and strengthen that system.

Taken collectively, the above three trends have both positive and negative implications. Ever-growing numbers of cases relying on international law are being brought to an expanding range of courts. The potential for fragmentation with differing lines of jurisprudence, over-specialization, irreconcilable holdings and conflicting obligations is real. On the positive side, however, the international legal system is denser, more active, and arguably more important than ever before. The growing density and activity of international law presents the potential for fragmentation, but it need not lead there. Four other important trends suggest the system may not be fragmenting at all.

D. A Common Body of Applicable Law

Most international tribunals—despite their functional differentiation—share a common body of law which tends to preserve a unified international legal system. In this volume, Pauwelyn draws a significant distinction between the jurisdiction and the applicable law of the ever-growing number of international tribunals. As he observes, most of the functionally distinct tribunals continue to apply the same body of law—general international law—despite their differing jurisdictional mandates or treaty foundations. Many specialized courts include "general international law" as well as their own particular treaty regime as part of the law applicable before the tribunal. This is important, for it means that

31. See, e.g., Helfer, supra note 30, at 289.
33. Pauwelyn, supra note 4, at 911.
34. For example, the Chapter XI dispute settlement mechanism of NAFTA allows tribunals to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." NAFTA, supra note 13, at art. 1131. Similarly, the International Tribunal on the Law of the Sea must "apply" the International Convention on the Law of the Sea "and other rules of international law not incompatible" with the convention. International Convention on the Law of the Sea, supra note 22, at art. 293. For a detailed discussion of the relationship between WTO rules and public international law, see generally Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (2003); Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go?, 95 Am. J. INT'L L. 535 (2001). The recently established African Court of Human and Peoples' Rights applies the African Charter of Human and Peoples' Rights as well as "any other relevant human rights instruments ratified by the States concerned." Protocol to the African Charter on Human and Peoples' Rights on the Establish-
even functionally specialized tribunals remain part of an integrated and interconnected system and have recourse to the same basic sources of international law. Hence, when conflicts do arise among legal rules, they tend to occur within the context of shared legal norms.

This common body of applicable law highlights a possible solution to the danger of conflicting obligations or judgments. Many of the other papers in this volume have observed that the growing number of legal rules and adjudicatory fora significantly increases the chances that a state will owe incompatible obligations to two other states. Admittedly, international law as it operates today has only limited means for resolving such conflicts. The rules of lex posterior and lex specialis are generally insufficient to resolve the range of potential conflicts that may arise. A shared set of background legal rules means that these courts will look to the same body of law to resolve conflicts when they do arise. Moreover, this common body of applicable law means that modifications to these background conflicts rules within international law can provide most international tribunals with new ways to reconcile conflicts, without the need to amend the foundational treaties of each particular court.

A national example is useful here. In the U.S., choice of law and conflict of law rules provide litigants and adjudicatory bodies with guidance as to which body of law to apply and how to resolve conflicting obligations. Through alterations in the background rules of international law, either through treaty or customary developments, it is not inconceivable that a parallel set of conflict rules can be developed at the international level. Though clearly lacking the biding authority of the U.S. Congress, the International Law Commission has begun to consider such a set of rules for the international system, as further detailed in Gerhard Hafner’s contribution to this volume.

E. A Robust Interjudicial Dialogue

Counterbalancing the danger of fragmentation is an increasingly loud interjudicial dialogue. This dialogue has important implications for the unity of the international legal order as it provides actors at all levels with means to communicate, share information, and possibly resolve potential conflicts before they even occur. This interjudicial dialogue has been relatively well documented and occurs at three distinct levels. Supranational courts are engaged in dialogue with one another, national courts are citing
to supranational courts, and national courts are in direct conversation with one another.

Supranational tribunals are now regularly conversing with other supranational courts when similar legal issues arise. Charles Koch's discussion of Vermeulen and Emesa Sugar in this volume is indicative of how two international courts can think collectively on similar questions, even when they disagree. When such disagreements do arise, cognizance of one another's jurisprudence and even direct conversation can help mitigate conflicting outcomes and ensure coherent rulings. Through such a judicial dialogue many international courts have collectively decided to give deference to the International Court of Justice. In his Hague Lectures, Jonathan Charney demonstrated that the views of the ICJ are "given considerable weight" by other tribunals. Similarly, the author has suggested an even more robust interjudicial dialogue in the international criminal field, including the physical exchange of judges amongst courts and a powerful deference to decisions of the ICTY and, in the future, presumably the ICC.

Such an interjudicial dialogue is also occurring between national and supranational tribunals. Many national high courts—ranging from South Africa to the United Kingdom—frequently cite to the jurisprudence of supranational tribunals in their decisions. Even the United States—the last bastion of national exceptionalism—last year, for the first time, cited to a decision of the ECtHR in a majority opinion by Justice Kennedy relating to the international standard for the protection of homosexual rights.

A third level of this interjudicial dialogue occurs among national courts in direct conversation with the courts of other countries, often on issues of international legal concern. In one recent U.S. case, for exam-

38. Koch, supra note 6, at 880-84, 884-86 (noting that this can be "seen as a judicial dialogue on fundamental principles between two supranational tribunals").
41. Lawrence v. Texas, 539 U.S. 558, 573 (2003). Note, however, that some justices have strongly criticized the citation to foreign legal sources. See id. at 598 (Scalia, J., dissenting). For an elaboration of Scalia's view, see Anne Gearan, Foreign Rulings Not Relevant to High Court, Scalia Says, Wash. Post., Apr. 3, 2004, at A7 (quoting Scalia: "It is my view that modern foreign legal material can never be relevant to any interpretation of, that is to say, to the meaning of the U.S. Constitution.").
42. See, e.g., State v. Makwanyane, 1995 BCLR 665, para. 16 (CC), available at http://www.concourt.gov.za/files/deaths/makwanyane.pdf (last visited Oct. 10, 2004) (citing to the U.S. Supreme Court, the Canadian Constitutional Court, the German Constitutional Court, the Indian Supreme Court, the Hungarian Constitutional Court and the Tanzanian Court of
ple, Justice Breyer cited to cases from Zimbabwe, India, South Africa and Canada, most of which in turn cite to one another. National judges are more frequently than ever before citing to one another across borders, meeting in person, or participating in email conversations. Even the often-reluctant U.S. Supreme Court has engaged in two summits with the European Court of Justice.

The significance of this interjudicial dialogue cannot be overstated, for it has the potential to preserve the unity of the international legal system in the face of potential fragmentation. Such dialogue, of course, relies heavily upon international judges themselves. If national and supranational judges consider themselves part of a common enterprise of international law enforcement, they can, through informal agreements, dialogue, and respect, avoid conflicts before they occur, help to minimize their effects when they do arise, and ensure the development of a unified system. As judges engage in this dialogue, however, they will be required to develop new understandings of comity that go beyond deference to foreign laws and interests. Slaughter terms this "positive comity," which "mandates a move from deference to dialogue." Such judicial comity would include "respect for foreign courts qua courts, rather than simply as the face of a foreign government." Positive comity will require judges to develop a set of shared understandings and principles regarding when to defer to the adjudicatory mechanisms of other states and international institutions. Some criteria to consider in developing this doctrine may include not only the relative weight of national interests at stake, but also the fairness and independence of the courts concerned, the democratic legitimacy of the foreign government, and the relative competencies of the tribunals in question. Such an expanded doctrine of comity may well hold the key to avoiding the pitfalls of opposing obligations and conflicting judgments.
F. Blending of Procedures and Traditions

A third trend that may prevent fragmentation of the international legal system is a gradual and partial harmonization of previously distinct procedures and traditions within national and international courts and tribunals. Common and civil legal systems have, to date, largely operated under distinct procedural frameworks, and international courts have relied on a range of different procedural models. Recently, however, common threads have emerged between civil and common law systems. Similarly, international courts have been moving toward a hybrid procedure that merges both common and civil law practices. While this harmonization will not—and should not—result in a single procedure in all national or international courts, it has the potential to make different national systems more transparent to outside observers and to promote greater cross-fertilization, dialogue, and comity among national and international courts.

In this volume, Koch observes that the Administrative Procedure Act has created a legal subsystem within the United States that is far closer to European civil law traditions than one might expect. Likewise, he notes how a regular practice in civil-law Belgium (the use of an avocat general) was deemed by the ECtHR a violation of Article 6(1) of the European Convention, requiring Belgium to move in the direction of common law procedures. Koch's two examples highlight how procedures largely deriving from separate traditions can co-exist and how elements of foreign traditions can be incorporated into national practices.

Nowhere is the merging of civil and common law traditions more pronounced than in international criminal law. Take, for example, the ICTY which over the past decade has revised its rules of procedure and evidence countless times, allowing, for example, the use of affidavit testimony to increase the efficiency of the proceedings. In so doing, the ICTY has moved from a primarily adversarial process to one that accepts

"consider and discuss the effect of their assertion of jurisdiction on the international system" when determining whether to exercise jurisdiction. Id. at 507.


50. For a discussion of how human rights law has resulted in some standardization of international procedures in the criminal law field, see CHRISTOPH J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE (2001).

51. Koch, supra note 6, at 895 (noting that "in the bosom of the US common law is an alternative view or rather a plethora of alternative views").

52. Id. at 893.

many practices of the inquisitorial model.\textsuperscript{54} As ICTY Judges Richard May and Marieke Wierda observe, after these changes at the ICTY "the presentation of evidence has followed the 'adversarial' model, whereas the rules governing the admissibility of evidence may be seen as more akin to the 'inquisitorial' model."\textsuperscript{55} Though some view this new procedure as a departure from both civil and common law, at the least it represents a new procedural model that draws on and merges both traditions.\textsuperscript{56}

This coexistence of adversarial and inquisitorial procedures within a single legal system and the emergence of common international procedures can help retain the unity of the international legal system. They suggest the possibility of a global legal culture—a set of shared understandings, if not shared practices—for international tribunals.\textsuperscript{57} The more these different systems have in common, or at least the more they understand one another, the greater likelihood of communication, comity, and complementary rulings.

G. The Hybridization of International Law Enforcement

One of the most significant recent developments in the enforcement of international criminal law—and potentially in international law enforcement more generally—is the proliferation of so-called "hybrid" tribunals adjudicating international crimes in post-conflict states. Although these courts operate only within a subfield of international law, they are indicative of a growing fusion of national and international law enforcement. Moreover, they suggest ways in which the international legal system can accommodate legitimate difference of national choices within a unitary legal order.

The "hybrid" title given to such courts stems from the fact that they explicitly seek to blend domestic and foreign elements, employing both local and global judges and applying a mix of international and national law. Such courts are generally established based on an agreement between a national government and the United Nations that provides for

\textsuperscript{54} See generally Máximo Langer, The Rise of Managerial Judging in International Criminal Law and Binary Thinking About Criminal Procedure (manuscript on file with author) (observing changes in ICTY procedure, many of which find their roots in civil law, and suggesting the emergence of "managerial judging" in international criminal tribunals).


\textsuperscript{56} See, e.g., Langer, supra note 54, at 5 (arguing that "ICTY criminal procedure is best described today as close to the managerial judging system and as a blend between an originally adversarial system and certain new case-management techniques").

\textsuperscript{57} Koch, supra note 6, at 898 (noting that "there are ideas in these legal cultures that would be valuable to the world. What is needed... are] the methods for tapping the wisdom of all the world’s legal culture, not to find the superior one").
the enforcement of international criminal law, while allowing the national government some discretion with respect to judicial personnel, procedure, and even the applicable law.\footnote{See, e.g., Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, available at http://www.sierra-leone.org/specialcourtagreement.html (last visited Oct. 10, 2004).} For example, the Special Panels, established by the United Nations Transitional Authority in East Timor, are empowered to apply both "the law of East Timor" and "applicable treaties and recognized principles and norms of international law."\footnote{United Nations Transitional Authority of East Timor (UNTAET), June 6, 2000, UNTAET/REG/2000/15.} Similarly, the Special Court for Sierra Leone is competent to prosecute "violations of international humanitarian law and Sierra Leonean law."\footnote{Statute of the Special Court for Sierra Leone, art. 1, available at http://www.sierra-leone.org/specialcourtstatute.html.} These hybrid courts not only bring together national and international law but also employ a mix of local and foreign judges. The Special Panels operating in East Timor have one East Timorese judge and two foreign judges on each panel,\footnote{See UNTAET/REG/2000/15, supra note 59.} while the Special Court for Sierra Leone includes one judge appointed by the Government of Sierra Leone for every two chosen by the U.N. Secretary General.\footnote{See Statute of the Special Court for Sierra Leone, supra note 60, at art. 12.} Similar hybrid tribunals have been proposed for Iraq,\footnote{See Statute of the Iraqi Special Tribunal for Crimes Against Humanity, Dec. 10, 2003, available at http://www.cpa-iraq.org/human_rights/Statute.htm (last visited Oct. 10, 2004).} Cambodia,\footnote{See Sok An, OFFICE OF THE COUNSEL OF MINISTERS, PRESENTATION AND COMMENTS TO THE NATIONAL ASSEMBLY ON THE DRAFT LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS OF THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA (Dec. 29, 2000 & Jan. 2, 2001) (on file with author).} and the Democratic Republic of Congo,\footnote{See Woodrow Wilson School of Public and International Affairs, BALANCING PEACE, JUSTICE, AND STABILITY: A SPECIAL TRIBUNAL IN THE DEMOCRATIC REPUBLIC OF CONGO 24 (2004) (on file with author).} while a variant on this theme is currently in operation in Kosovo.\footnote{See generally Laura A. Dickinson, The Relationship Between Hybrid Courts and International Courts: the Case of Kosovo, 37 NEW ENG. L. REV. 1059 (2003).} 

Such hybrid tribunals are situated precisely at the intersection between the national and international systems, an area likely to be central to the future development of international law. They represent one powerful model through which national and international legal systems are
communicating and influencing one another.67 Similarly, they suggest a means by which the international system can accommodate legitimate difference at the national level by including local judges, prosecutors, and procedures, while still maintaining the fundamental principles of a unified system. Some may deem these hybrid courts as another example of the fragmentation of international criminal law. A more accurate interpretation is to see such hybrid courts as part of a system of multilevel global governance in which the national and international levels are more deeply intertwined than ever before.

These last four trends—a common body of applicable law, a robust interjudicial dialogue, the blending of national legal traditions, and the development of hybrid enforcement mechanisms—go far to ensure the unity of the international legal system, counterbalancing potential fragmentation. By communicating with one another, respecting and even learning from one another’s traditions, and applying the same general international legal rules, international lawyers, judges, and treaty drafters can counter the potential for fragmentation of the international legal system. Preserving the unity of international law will require conscious choices and effort by all participants in the system. But, these four trends suggest common ground upon which such a system can be built.

II. Toward a Pluralist International Legal System

The international legal system today appears to be at the center of two opposing sets of forces—one set pushing toward fragmentation, the other toward interconnection and coherence. As these forces interact, a new type of international legal system is emerging—one that is neither fully fragmented nor completely unitary. The emerging system may be best described as pluralist. A pluralist legal system accepts a range of different and equally legitimate normative choices by national governments and international institutions and tribunals, but it does so within the context of a universal system. Anthony Appiah expresses this idea in terms of a system that celebrates “difference [but] remains committed to the existence of universal standards.”68

67. For a more detailed discussion of the operation of these courts, see Burke-White, supra note 39, at 30–76. For a discussion of the relationships between these courts and their implications for the international legal system, see id. at 86–101.

68. K. Anthony Appiah, The American University in an Age of Globalization, Lecture at the Princeton-Oxford Conference on Globalization at Oxford University (June 15, 2002). While “cosmopolitanism” might be a more accurate term than pluralism given the emphasis on diversity within the confines of universal standards, the term pluralism is chosen so as to explicitly avoid association with the debates at the Institut de Droit International in the 1870s and the more recent renewal thereof by Maartii Koskenniemi and others. See, e.g., Maartti
Benedict Kingsbury has traced elements of such international legal pluralism back to Alberico Gentili who, writing in 1598, advocated a kind of "pragmatic pluralism" through "his concept of an international society open to all organized political communities and based upon essential minimal rules for coexistence and the pursuit of common interests." In a more modern form, international legal pluralism recognizes the value of diversity in the choices, traditions, and approaches of international actors when those actors create rules, procedures, and even courts. Yet, this modern form of pluralism operates within what David Held terms "a framework of universal law."

To put it more concretely, the pluralist conception of the international legal system recognizes—and possibly thrives on—the diversity of the system. A wide range of courts will interpret, apply, and develop the corpus of international law. States will face differing sets of obligations that may even be interpreted differently by various tribunals and may at times conflict. Possibly most significantly, national and international legal processes will interact and influence one another, resulting in new hybrid procedures, rules, and courts. Yet, these developments will occur within a common system of international law engaged in a constructive and self-referential dialogue that consciously seeks to maintain the coherence of the overall system.

The respect of legitimate difference inherent in such a pluralist conception may actually enhance the effectiveness of international law by increasing the legitimacy and political acceptability of international legal rules. Take, for example, the hybrid tribunals described above. By allowing differentiation based on local procedures and preferences, hybrid tribunals are far more likely to be deemed legitimate by national populations than the oft-criticized international courts such as the ICTR. Such legitimacy, in turn, may generate greater "compliance


70. David Held, Law of States, Law of Peoples: Three Models of Sovereignty, 8 LEGAL THEORY 1, 38 (2002). In Slaughter’s formulation, such pluralism is termed “legitimate difference” and is described as “a principle that preserves diversity within a framework of a specified degree of convergence.” SLAUGHTER, supra note 43, at 248–49.

71. For a more detailed discussion of the principle of legitimate difference, see SLAUGHTER, supra note 43, at 247–250.

72. For an example of such criticism, see Jose E. Alvarez, Crimes of Hate/Crimes of State: Lessons From Rwanda, 24 YALE J. INT’L L. 365 (1999).
pull,” to use Thomas Franck’s term. After all, the political decision to create and support such a tribunal is far easier when the court can be tailored to the local needs, conditions, and even political constraints of the host state. Such diversity or legitimate difference may then promote compliance, resulting in a more effective, more active, and more robust international legal system.

Whether or not we accept the claim that the international legal system is fragmenting is a critical choice. The international legal system is a constructed system and our views of that system may well become a self-fulfilling prophecy. If international legal actors think of the system as fragmented, it may well become so as new obligations are created and enforced without consideration of the coherence of the overall system. However, if international lawyers, judges, and even politicians conceive of the system as pluralist, they are far more likely to leave room for legitimate difference, while recalling the importance of unity in crafting rules, developing procedures, building institutions, or issuing judgments. From a constructivist perspective, a pluralist system will operate most effectively if it is closely linked to the aforementioned interjudicial dialogue. Through this dialogue the diverse elements of the international legal system can remain part of an interconnected global conversation that recognizes both diversity and unity.

Admittedly, such a pluralist conception of the international legal system is not a cure-all for the dangers of fragmentation. The difficulties of conflicting obligations identified by Hafner and Pauwelyn remain; further efforts at legal development will be needed to resolve them. Nonetheless, this pluralist vision does provide an alternative and potentially powerful means of conceptualizing the future development of international law. By ensuring uniformity while embracing legitimate difference, the international legal system can be made both more legitimate and more effective.

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