Fragmentation in International Human Rights Law – Beyond Conflict of International Courts in a State of Nature

Foreword

> all princes and rulers of independent governments all
> through the world, are in a state of nature (John Locke
> 1690: *Two Treaties on Government*, section 14)

The subject of this fascinating volume is the fragmentation of international and regional human rights courts and treaty bodies (ICs), that is, tensions *among* courts which all address the same functional area, often bringing apparently similar norms to bear. The rights of concern here are widely regarded as belonging to the core of human rights: freedom of expression [Ajevski II, 32-53], right to privacy [Lixinski, 13-31], freedom of assembly [Salat, 54-70] and freedom of association [Tyulkina, 71-89].

What are we to make of the conflicts that occur not only among such rights and other norms of international law – ranging from trade to the environment – but conflicts among the various human rights courts empower to adjudicate such rights – which courts and rights often conflict? The recent proliferation of international courts suggest that such intra-issue fragmentation will become more frequent, and solutions to the tensions more urgent. What exactly are the problems of fragmentation worth our concern? How are we to diagnose them, and what might count as fruitful paths toward their resolution?

1 What is the problem with conflicts among human rights ICs?

Is there reason to be concerned if several institutions which adjudicate the same norms come to different conclusions – as long as they seldom apply to the same cases? Indeed, some apparent fragmentation of this kind may be positive, for instance insofar as it reflects the diversity of values and alternatives within differing local circumstances (Lixinski 25-26).

However, there are some such conflicts that may give rise to worry, insofar as they challenge the legitimacy of human rights ICs. At least three kinds of problems may arise.

Legitimacy of the international human rights judiciary. One important usage of the term 'legitimacy' concerns the reasons various agents have to defer to the decisions of particular authorities, in the face of other countervailing reasons. In our case: why should states heed judgements by international or regional human rights ICs? This is not only an abstract academic issue: several contributions in this volume mention states who refuse to engage with human rights ICs, or who consider withdrawing from the Inter-American Court of Human Rights (IACHR). So this is not a purely theoretical exercise. Insofar as the human rights ICs actually do engender conflicting judgements on the same or similar cases, the issue of legitimacy of course becomes crucial: what reasons do agents have to defer to one IC which claims authority rather than to another? Tyulkina describes one such case, where the freedom of association protected by Article 22 of the ICCPR, and by the ECtHR. This freedom is limited by Article 4(b) of the Convention on Elimination of Racial Discrimination, which requires

> States Parties to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and,… (b) shall declare illegal and prohibit [such] organizations

Conflicts among the treaty bodies as to how states should regulate freedom of expression and association are thus to be expected. This may require us to look at the reasons each of these authorities can claim that other actors defer, in various ways. Several approaches in legal theory address the reasons to defer to one institution rather than to another. Some approaches to resolve the tensions are canvassed in later sections of this introduction.

Stabilize expectations. In addition to the resolution of particular disputes, an important function of many ICs is to reduce their incidence in the future. They do so by increasing predictability about what international law requires, hence stabilizing parties' expectations about the behaviour of others. Such predictability is impossible insofar as there are conflicting judgments from different ICs about what the law requires. Thus the International Law Commission on fragmentation of international law notes,

> Fragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security. Moreover, only a coherent legal system treats legal subjects equally. (Koskenniemi 2006)

Confirm the universality of human rights. Many authors hold that human rights are universal, in that their normative grounds entail that they should be protected uniformly globally, across jurisdictions [Lixinski explores this on p. 13-14]. On this line of reasoning, the various human rights ICs should uphold similar norms, and arguably adhere to similar practices regarding the interpretation of and 'balancing' among rights. Discrepancies among ICs with different jurisdictions may thus challenge the normative standing of international human rights, even though these differences do not create proper legal conflicts.

How are we to understand, assess and alleviate such cases of fragmentation? To a philosopher, these concerns are reminiscent of Locke's argument for why individuals in the state of nature should agree to establish a state.

2 Human Rights institutions in a Lockean state of nature

It may be helpful to place these concerns within the larger more familiar frame of the fragmentation of international courts and tribunals adjudicating different functional areas (Young 2012). Both forms of fragmentation leave us, our states and our international courts in a Lockean state of nature. Actors – for John Locke, first and foremost individuals - face complex challenges of dispute resolution. Each enjoys legislative, executive and judicial authority, which create conflicts in the absence of authoritative dispute resolution bodies. To be sure, circumstances are less dire than in Thomas Hobbes' state of nature, where fear of unprovoked attack predominates, and the need for protection against such misdeeds is paramount. Lockean circumstances are less brutish and nasty: The presumption is that even absent institutions, "no one ought to harm another in his life, health, liberty, or possessions." (Locke 1963 (1690), sec 6). The prime problems are disagreements among actors of such good will, where "[t]here is no superiority or jurisdiction of one over another." Disagreements among them can not be settled in such a state of nature, hence the rationale for dispute resolution institutions such as a state – and beyond. The relevance for international relations was clear to Locke:

> … all princes and rulers of independent governments all
> through the world, are in a state of nature

(Locke 1963 (1690), section 14)

Several contributions to the study of international relations can be read as reassessing and addressing Locke's problem, often challenging the necessity of his solution – subjecting all parties to a shared supreme dispute resolution authority. Parallels and differences are legio to current discussions of the fragmentation of international law and international courts – including human rights courts. A brief, incomplete taxonomy may be in order

3 If it ain't broke…

How severe a problem is Locke's concern about the lack of dispute resolution mechanisms among autonomous actors? Conflicts among states aside, what about inter-issue conflicts among international courts in general, and conflicts among human rights courts in particular?

The literature on the problems of fragmentation of international law is overwhelming, further fuelled by the Study Group on Fragmentation of the International Law Commission, (Koskenniemi 2006). Some authors have argued that while such conflicts are interesting in theory, they seldom occur in practice. Ajevski's contribution in this volume addresses this claim. The possible problems may be of at least two kinds. Two or more international courts may have overlapping jurisdiction for the resolution of disputes. They may decide the same or similar cases differently, without an arbiter among them. While conflicts among the norms upheld by different international courts in general may be few, they do arise in the human rights area. Such cases might arise between the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR). The increase in human rights conventions and treaty bodies, combined with 'dynamic interpretation' of the former by the latter, have inter alia led to frequent needs to 'balance' international human rights against each other.

A second, more theoretical issue is more salient for human rights courts than many others. Insofar as the normative grounds for certain norms are claimed to be universal, they are challenged insofar as different international or regional courts adjudicate them differently. To illustrate: actors in Locke's state of nature are all normatively bound to do no harm. Presumably, such 'negative' human rights duties hold universally, and alleged breaches should not be adjudicated differently depending on jurisdiction – say, whether afflicted individuals and their state are subject to the ECtHR or the Inter-American Court of Human Rights. Different 'balancing' of rights to privacy versus rights to freedom of expression may lead 'compliance constituencies' to question the value of these rights, or the legitimate authority of either of the courts – or all three.

4 How to assess solutions

Before moving to some of the paths proposed in response to the challenges of fragmentation, some criteria for acceptable solutions merits mention. First of all, more coherence and consistency is clearly a desiderata given the concern to secure finality and to stabilize expectations and predictability. However, coherence does not suffice for legitimacy or the sort of predictability of law worth securing. The International Law Commission on fragmentation of international law noted, correctly, that

> Coherence is, however, a formal and abstract virtue. For a
> legal system that is regarded in some respects as unjust or

unworkable, no added value is brought by the fact of its
being coherently so.

(Koskenniemi 2006)

What substantive requirements should be put on a more coherent and normatively justifiable system of international courts and tribunals? I submit three interrelated standards which have been widely circulated in the history of international law: **Legitimacy.** We need an account of why other institutions, authorities and individuals should defer to the judgements of these human rights ICs: what reasons are there to regard such judgments as reasons to act which displace the other reasons actors may have? In the spirit of Raz' 'service conception', we should expect these ICs to resolve disputes brought to them, in accordance with standards of legality. Their norms and interpretive practice should also be predictable and thus foster parties' future expectations.

Responsiveness. The institutions and authorities must be sufficiently responsive to the best interests of citizens, and they must be trusted to remain so over time. In Locke's parlance, and typical of contract theories of justice since, this is expressed as a requirement that the institutions as a whole must be justifiable to each, e.g. by respecting and promoting their interests at least as well as any alternative institutional arrangement likewise acceptable to each.

Human rights. One implication of such responsiveness is human rights protection. In the history of political thought, human rights norms – moral or legal – are defended as constraints on legitimate state authority, against standard threats that arise within a state system. Many argue that a less fragmented international legal order must at least not jeopardise such human rights protections domestically, and may possibly also uphold similar constraints on international organizations which now pose similar threats to the best interests of those subject to their authority. Some hold that human rights norms should enjoy primacy in cases of norm conflict (Grossman 2013) – which is not to say that this is currently the case (de Wet and Vidmar 2012).

5 Three approaches

Among the many proposed responses to such fragmentation of international law as there is, it is possible to discern at least three strands of relevance to the particular challenges of international human rights courts. Each of them have strengths and weaknesses.

a) Formal Hierarchy

Locke's solution to the anarchy of the state of nature is famously to establish a formal hierarchy. All formerly independent agents will find it in their interest to transfer parts of their authority to a common authority – on certain conditions to protect against human rights abuses, as we would say today (Locke 1963 (1690), sec 89).

Against this response at least three challenges are obvious. Firstly, we may now point to other alternatives which may provide sufficiently authoritative dispute resolution, rendering the hierarchy less obvious as the sole solution.

A second concern is the risks of creating a new source of domination and imperialism. How can we prevent abuse of such a supreme authority, especially if conjoined with centralized enforcement powers?

The third worry is that even if such a supreme authoritative international court could work in theory, it cannot work in practice. The International Law Commission Study group thus insisted that

> *no homogenous, hierarchical meta-system is realistically available to do away with such problems.* International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions. (Koskenniemi 2006, section 491)

b) Federalism

Another family of responses to fragmentation explores non-unitary political and legal arrangements, in the form of confederal or federal orders. In such arrangements authority is constitutionally dispersed between a centre and member units, often on a territorial basis. This can prevent conflicting jurisdictions, protect against domination by central authorities - and still secure sufficient joint action where required e.g. according to a Principle of Subsidiarity. Thus Kant favoured a confederation of liberal republics; optimists look to the EU as the embryo of such a complex order.

For our purposes, to reduce fragmentation human rights courts can be placed and circumscribed at three levels:

- International, e.g. UN norms and treaty bodies such as the Human Rights Committee.

- Regional – including the IACHR and the ECtHR.

- Domestic authorities which may judge human rights compliance, and enjoy some discretion in this regard in the form of a 'margin of appreciation' concerning whether norms are violated.

Among the crucial challenges to these strategies is firstly how to divide competences among the various units. Considerations of subsidiarity may structure some such debates about how to distribute and redistribute authority, but this is still difficult for issue areas which overlap – such as when trade agreements appear to conflict with human rights. Secondly, who is to perform such assessments and readjustments concerning the comparative benefits of central and local action - including decisions about which are the objectives to be promoted?

c) Informal Network – 'judicial dialogue'

A third category of responses to reduce fragmentation is various forms of more informal means whereby actors come to agreement, take steps to avoid conflicts, or

agree to be guided by principles of interpretation that seek to promote consistency. Anne Marie Slaughter's work on networks of judges is one of several interesting contributions in this broad category (Slaughter 2004). As a result, when arguing and judging about a case, the judges may come to regard themselves as members of a global – or regional - judiciary, rather than delegates or trustees of the national legal systems.

Another range of means to reduce fragmentation which international - and national - courts resort are several less formal principles and techniques in response to such negative effects of fragmentation as there may be (Nollkaemper and Fauchald 2012). One partial solution is shared standards and practices of interpretation (cf Koskenniemi 2006, Alvarez 2013). Some such self-imposed principles of interpretation are those maintained by the IACHR as quoted by Lixinski (pp 18-19):

> the provision of its instruments, including the American declaration, should be interpreted and applied within the context of the inter-American and international human rights systems and, in the broader sense, in the light of the evolution of international human rights law.

The contributions in this volume bring out several ways that such networks may address intra-sector fragmentation among the human rights courts. However, this general strand of responses raises important questions both as to the legality and the results of such networks (cf Anderson 2005). How can networks avoid the risk that they reach agreement not on the basis of the best reasons but in recognition of power differentials and under the shadow of mutual assured destruction – where the judges of the various courts know that their legitimacy depends on avoiding such blatant conflicts. Why, in short, should citizens regard themselves as morally bound to obey the results? In response, I submit that some of these modes of informal harmonization can reduce rather than increase such risks.

Migration of norm interpretation. Several or all courts may come to borrow definitions or interpretations. Thus the definition of 'terrorism' has been picked up by various ICs (Husabø 2008). Similarly, human rights might be dynamically interpreted to include environmental preconditions for life, physical integrity. However, Lixinski finds little evidence of such migration (Lixinski, p 23, p 26). Limitations of human rights may similarly be borrowed across jurisdictions: The IACHR apparently added as a condition on permissible exemptions that they must be necessary 'in a democratic society' – a condition borrowed from the European Convention on Human Rights (*inter alia* art. 8, 9, 10, 11) – as discussed by Lixinski (p. 19) and Ajevski (II, pp. 41-42).

Migration of 'balancing' of human rights norms.
Among the particularly difficult areas of fragmentation among human rights courts are practices of 'balancing' among human rights norms. The term 'balancing' is

unfortunate (Cali 2007), not least because it conveys an impression of a mechanical and value neutral process. What counts as acceptable restriction on one right for the sake of other rights is a more complex issue, where judges must resort to discretion. Thus Raz holds that

> Often, instead of following one rule rather than the other, practical conflicts should be resolved by finding the option that satisfies the conflicting rules to the highest possible degree. That follows from the nature of practical rationality, which requires that when reasons cannot be completely conformed to, they should be conformed to, to the highest possible degree. This will require courts confronted with conflicts of this kind to find such an optimific outcome, which will involve an understanding of the point of the conflicting rules. …

> Even so, not infrequently in different rules of law conflicts, the law does not contain the resources to resolve the conflict. It is indeterminate regarding the issue, usually leaving such decisions to the discretion of judges, i.e., to their judgment about the real merit of the different rules, a judgment that goes beyond what the law determines.

> (Raz 2006, 1023-25)

This underscores the worry mentioned above: how can we reduce the risk of domination – to be subject to judges' arbitrary discretion in such hard cases? And how reduce the attendant risk of variations in judgments as regards such 'universal' rights?

The first response is of course, that many hold that such discretion should be limited to when other legal rules are exhausted, so that the incidents are infrequent. In addition, several procedural requirements can constrain the discretion of judges – procedures which themselves also can migrate. Thus authors in this volume hold that the *existence of* and *components* of a proportionality test to assess whether a rights violation is permitted, themselves are imported across jurisdictions (cf Lixinski on the case of Cuba, p. 20). Another example is the ECtHR' practice of reducing the margin of appreciation it grants states, when it detects an 'emerging European consensus' on the issue – be it the prohibition of physical punishment in schools (1978, Rasmussen v Denmark 8777/79 (ECtHR 28. nov. 1984), para 40); X v United Kingdom 75/1995/581/667 Eur Ct HR (European Court of Human Rights), 13). Such respect for the member states' expressed values help reduce the risk of domination of judges - insofar as such consensus is not only in the eyes of the beholder (Helfer 1993, 154).

6 Concluding Remarks

The contributions of this volume provide a refreshing stimulus to diagnose some of the fascinating challenges to the system of states by the developments of international law – how to secure unity among multiple international human rights courts, whilst also ensuring appropriate diversity reflecting legitimate variations among states. The precursors of these chapters were first discussed at an authors' workshop convened by Marjan Ajevski at the Central European University in Budapest May 16, 2013. The workshop and this volume is part of the European Research Council Advanced Grant activities MultiRights, concerning the legitimacy of the multi-level human rights regimes. The analyses, suggestions and prescriptions offered by these authors may help render our emerging multi-level legal and political order more comprehensible and legitimate – and thereby somewhat more worthy of our deference.

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