

# A SYSTEMS THEORY OF FRAGMENTATION AND HARMONIZATION

ANTHONY J. COLANGELO\*

*International law's accelerating "fragmentation" presents the international legal system with what looks like a multilayered existential threat. Theoretically, how can we conceive of international law as a unitary system if its rules are becoming progressively frayed and pixilated to the point of incoherence? Doctrinally, what is "the law" if different, purportedly authoritative, bodies interpret it so differently? And practically, how are actors increasingly subject to the ever-expanding universe of international law supposed to behave when the law itself is so splintered that it may point them in many, perhaps contradictory, directions at once?*

*The prevailing view so far among international legal scholars, institutions, and decision-makers is to "abandon every hope" of a coherent, unitary legal system and instead settle for managing (as opposed to resolving) conflicting rules and interpretations thereof through conflict of laws methodologies.*

*This Article fights against that view; that is, it fights for the international legal system's coherence. The Article first argues that the conflict of laws view promises only to entrench the evils supposedly spawned by fragmentation that threaten to take down the system; namely, compromises in core justice principles of equality (or the ideal that like cases be treated alike) and predictability of the law. The Article next draws from systems theory and its fulcrum concept of autopoiesis to defend international law as a unitary system striving for its own survival. And it argues that, rather than posing an existential threat, fragmentation may paradoxically be a growing pain in the system's long-term maturation. In this connection, the Article proposes two methodological tools for decision-makers seeking to advance the project of a unitary international legal system: a presumption of coherence and a presumption of catholicity. In combination, these tools aim to promote legal coherence and correctness without the compromises in justice that invariably attend true conflict of laws disputes—compromises that conflict of laws methods institutionalize but that this Article's coherence methods seek to avoid.*

*The result is to answer the threat posed by fragmentation with a novel alternative account of how fragmentation may: (1) fit into international law's long-term evolution as an ultimately coherent and robust system; (2) eventually, if counterintuitively, lead to broader and deeper harmonization*

---

\* Gerald J. Ford Research Fellow and Professor of Law, SMU Dedman School of Law. I thank Harlan Cohen, Nathan Cortez, Greg Crespi, Anthony D'Amato, Milan Markovic, Ralf Michaels, Jens Ohlin, Robert D. Sloane, Joseph William Singer, David Stewart, Jenia I. Turner, and Chris Whytock for helpful comments. Tori Spickler and Jamison Joiner provided excellent research assistance. Special thanks go to Carrie Rief.

of the law regulating international disputes, and; (3) in turn, furnish more predictable and acceptable rules for actors involved in those disputes. Indeed, this Article argues that its theory not only provides an alternative description of fragmentation, but also that its account leads to a more just international legal system.

I. INTRODUCTION . . . . .	2
II. FRAGMENTATION DYNAMICS . . . . .	10
III. COHERENCE, COORDINATION, AND CONFLICT OF LAWS . . . . .	15
IV. JUSTICE ACROSS THREE REALMS . . . . .	19
V. SYSTEMS THEORY AND FRAGMENTATION . . . . .	25
VI. COHERENCE ACROSS COURTS . . . . .	33
A. <i>Presumption of Coherence</i> . . . . .	35
B. <i>Presumption of Catholicity</i> . . . . .	46
C. <i>As Applied to International Decision-makers</i> . . . . .	50
VII. LIMITATIONS AND CRITICISMS . . . . .	56
VIII. CONCLUSION . . . . .	60

## I. INTRODUCTION

One of the great threats international law supposedly faces today is what's popularly called the "fragmentation" of its rules.<sup>1</sup> The proliferation of international legal subject areas as well as administrative and judicial bodies—both national and international—purporting to create and apply international law makes its norms look like rays of sunlight fractured by tree branches. This fragmentation in turn renders the rules of international law less coherent and undermines the broader coherence of the international legal system itself, at least so the argument goes.<sup>2</sup>

I challenge this prevailing view and argue that fragmentation actually represents a step toward, not away from, the coherence of the international legal system in crucial respects. My main analytical tools in crafting this challenge are heuris-

---

1. See generally Study Group of the Int'l Law Comm'n, Rep. on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected, U.N. Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) [hereinafter *ILC Report*].

2. *Id.* ¶ 491; see also Barbara Stark, *International Law from the Bottom Up: Fragmentation and Transformation*, 34 U. PA. J. INT'L L. 687, 694 (2013) (citing *ILC Report*, *supra* note 1, ¶¶ 7–10).

tics offered by systems theory.<sup>3</sup> Recent years have seen systems theory migrate from cybernetics to evolutionary biology to law<sup>4</sup>—and to international law in particular.<sup>5</sup> For international law scholars, the reason is plain: we are in search of a theory.<sup>6</sup> The basic idea offered by systems theory is that systems evolve so as to perpetuate themselves, or what is called *autopoiesis*—they evolve so as to secure their own survival.<sup>7</sup> Viewed through this lens, rules of international law habitually tilt toward fostering trade and peace,<sup>8</sup> which makes perfect sense given that the absence of those characteristics would mean unconnected

---

3. See generally JOHN H. MILLER & SCOTT E. PAGE, *COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE* (2007).

4. See generally GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993). For a helpful analysis of how systems theory, and more specifically its notion of autopoiesis, may apply to thinking about U.S. domestic law, see Hugh Baxter, *Autopoiesis and the “Relative Autonomy” of Law*, 19 *CARDOZO L. REV.* 1987 (1998).

5. See Anthony D’Amato, *Groundwork for International Law*, 108 *AM. J. INT’L L.* 650 (2014) [hereinafter D’Amato, *Groundwork*]; Anthony D’Amato, *International Law as an Autopoietic System*, in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 335 (Volker Röben & Rüdiger Wolfrum eds., 2005) [hereinafter D’Amato, *International Law*].

6. The absence of a coherent theory of international law backfoots international lawyers and scholars right out of the gate. In very rough strokes, ontologically and phenomenologically virtually every other legal system in the world can claim legitimate existence by pointing to some definitive law-making authority. International law, by contrast, is a singular exception to all other top-down lawmaking systems in the world. It is, instead, a uniquely bottom-up composite system of multiple coequal constituent autonomous or semiautonomous legal systems with no overarching rulemaking or enforcement authority. As such, it is perennially under attack as not really “law.” These attacks come in various flavors. Law and economics critics are fond of game theoretic models and, more specifically, crude prisoners’ dilemmas that leave observers thinking the international legal system is nothing more than set of default suggestions that properly should be disregarded when cost-benefit analysis favors breaking the rule in question. There is, in other words, no independent obligation to obey law as such, and law therefore loses its moral imperative. Hard-nosed foreign relations critics take a somewhat similar tack but use different language. Fundamentally, these criticisms rightly ask *why* nations *should* obey international law if all that is meant by that term is the empirically observable and shifting practices of states. Systems theory may supply an answer.

7. See Gunther Teubner, *Introduction to Autopoietic Law*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 1, 3 (Gunther Teubner ed., 1987).

8. See D’Amato, *Groundwork*, *supra* note 5, at 652–53.

groups of people always either on the verge of, or at, total war; that is to say, chaos<sup>9</sup>—the complete absence of an international legal system.

Integral, and almost predicate, to the system's sustained development is the encouragement of coherent rules. Here it will be necessary to smuggle in some preliminary concepts that will be elaborated throughout the remainder of the article. Coherence is vital because it promotes two foundational features of any successful legal system, often captured by the term "justice;"<sup>10</sup> namely, predictability and equality, or the ideal that like cases should be treated alike. The more states and other international actors can predict how law will treat their activity, the more comfortable they will be engaging in that activity<sup>11</sup>—activity that, again, sustains the system itself.<sup>12</sup> And a principal way to predict how law will treat behavior is to see how law previously treated that behavior. From the actor's perspective, if law does not treat your behavior the same way, not only is predictability and thus law's efficacy damaged (why comply with law if one has no idea how law will treat one's behavior?), but law also tarnishes its own legitimacy since a law that is unjust is unstable and "ultimately unacceptable."<sup>13</sup> In short, the more a law internally fights itself through different interpretations and applications, the less predictable and evenhanded it becomes and, consequently, the less facilitative of self-preservation the system becomes.<sup>14</sup> A systemic failure to realize justice

---

9. Cf. MICHAEL KING & CHRIS THORNHILL, *NIKLAS LUHMANN'S THEORY OF POLITICS AND LAW* 9 (2003) (explaining that "in very general terms, *function[al] systems* create order out of chaos").

10. See *infra* Part III.

11. See generally Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 *IND. L.J.* 720 (2016) [hereinafter Colangelo, *Conflict of Laws*]; Anthony J. Colangelo, *Spatial Legality*, 107 *Nw. U. L. REV.* 69, 71–72 (2012) [hereinafter Colangelo, *Spatial Legality*]. For this point as regards fragmentation specifically in the investment arbitration context, see Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 *N.Y.U. J. INT'L L. & POL.* 1049, 1083 (2012) (observing that "[b]oth investors and states (along with the lawyers who advise them) also crave certainty and predictability. Contracts become much easier for both sides to negotiate when they have a clearer idea of the law that will apply.").

12. D'Amato, *Groundwork*, *supra* note 5, at 652–55.

13. Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 *LAW & CONTEMP. PROBS.* 27, 27–28 (1977).

14. See KING & THORNHILL, *supra* note 9, at 41 (explaining that an incoherent legal system that pulls eclectically from various sources to decide dis-

is therefore not merely an abstract philosophical defect; rather, an unjust legal system that fails to productively guide behavior cannibalizes itself from the inside out.

A major contribution the systems theory heuristic offers international law, then, is a coherent account of not only what international law is, but also where it comes from and where it is going. And, perhaps most importantly of all, the account is not just descriptive and predictive; it is also *prescriptive* in that it supplies the moral imperative behind international law as “law”<sup>15</sup> that has thus far been lacking in most other accounts<sup>16</sup> (except for natural law accounts that have fallen largely into desuetude). While systems theory is ordinarily used as a descriptive tool for explaining how systems function without regard to whether that functioning is good or bad,<sup>17</sup> a systems account of international law that preferences justice adds a distinct normative ingredient. Because the international legal system’s rules tilt toward trade and peace in the interest of self-preservation and perpetuation,<sup>18</sup> systems theory offers a convex lens that promises to converge international law’s fragmented rules upon a common, if distant, horizon. This approach colors what otherwise look like predominantly proce-

---

putes “will have ceased to be autopoietic and will therefore function in extremely erratic ways. It will no longer be able to produce the expectation-stabilizing communications on which other systems in society depend.”); *id.* at 52–53 (“law’s unique social function is, therefore, to stabilize normative expectations *over time*” and “[l]aw allows at least for the possibility of expectations being based on established norms so that it is possible to anticipate whether conduct will be legal or illegal, subject to the law or not subject to the law”).

15. I do not mean to suggest that, substantively speaking, morality and law are the same or that law incorporates morality; rather, I mean only that bestowing the label “law” on something tends to carry for society an added imprimatur or weight that promotes obedience. While one might question the practical value of even examining this question in domestic systems, it is of immediate and far-reaching consequence for an international law that is perennially under attack as not really law and the logical real-world corollary that it therefore can, and should, be disregarded at will. See, e.g., PHILIP SOOPER, *A THEORY OF LAW* 3 (1984).

16. See *supra* note 6.

17. See *infra* Part V.

18. See Teubner, *supra* note 7, at 1–11; D’Amato, *Groundwork*, *supra* note 5 at 652–53.

dural or “rule of law”<sup>19</sup> justice principles, like equality and predictability, with a subtle, but suffused, substantive hue.<sup>20</sup>

Yet at the same time, a systems account of international law appears to trigger an immediate and intractable dilemma with fragmentation—now safely a feature, not a bug, of the modern international legal system.<sup>21</sup> Namely, autopoiesis insists that any major systemic development is born of self-preservation. Again, in the international legal context this means fostering trade and peace through just rules predicated on law’s coherence.

Hence the intractable dilemma: systems theory preferences coherence while fragmentation destroys it. Accordingly the two most salient ways of thinking about international law today seem to be on a direct and inevitable collision course. The task at hand is to try to reconcile them. As Dwight Eisenhower famously observed, “If a problem cannot be solved, enlarge it.”<sup>22</sup> And that’s precisely what I aim to do by enlarging analysis of fragmentation to include the counterfactual; that is, what the world would look like absent not just fragmentation, but also the key developments precipitating that fragmenta-

---

19. See *infra* Part III.

20. Of course an internally “just” system of predictable and evenhanded rules may nonetheless be comprised of substantively odious rules. But again, that is empirically not true of the international legal system presently comprised of rules that tend to promote trade and peace. (As an aside, this seems quite natural. It is hard to imagine, for instance, that an exceptionally bottom-up legal system like international law, dependent as it is upon broad acceptance among its subjects and with no overarching top-down lawmaking or enforcing authority, would propagate—let alone sustain—a system of intolerable rules.) As such, the normative point also does not succumb to the naturalistic fallacy, or the argument that what is, should be. See STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 150 (Penguin Books 2003) (2002) (describing the “naturalistic fallacy” as “the belief that what happens in nature is good”).

21. Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 *TEMP. INT’L & COMP. L.J.* 279, 280–81 (2013) (“Fragmentation in international law is now the norm, not the exception.”).

22. See, e.g., Bonnie Brennan & Margaret Duffy, “If a Problem Cannot Be Solved, Enlarge It”: An Ideological Critique of the “Other” in Pearl Harbor and September 11 *New York Times* Coverage, in 4 *JOURNALISM STUDIES* 3, 9 (2003). That Eisenhower actually said this may be apocryphal. See E-mail from Valoise Armstrong, Archivist, Dwight D. Eisenhower Presidential Library, to author (January 11, 2016, EST) (on file with author).

tion. When one builds out the analysis in this way, I believe systems theory can reveal fragmentation as a step in the evolution of the international legal system toward greater coherence.

Boiled down, the argument is as follows. Fragmentation is a product of the substantive expansion of international law into new areas and the administrative and judicial expansion of bodies purporting to make and apply it.<sup>23</sup> The alternative is for international law to remain frozen—capable of regulating only what it traditionally regulated—and with only a limited number of bodies to administer it. This alternative world would necessarily leave everything else not covered by international law to the opaque domestic jurisdictions of individual states. But that would only *raise* the possibilities for disharmony and conflict within the system because the variances among different states' domestic laws promise to be greater than if states and international regimes purported to apply the same international law, albeit with slight (and maybe even significant) variations. To put the point in colloquial but biological terms, fragmentation may be a necessary and important growing pain that attends the international legal system's maturation.

Analogically, international law's development in this regard is not unlike what happens in the U.S. system when different courts or circuits must interpret the same law. Even without an ultimate arbiter of competing interpretations, for various reasons the law naturally moves toward coherence. Looking to the U.S. system may also address handwringing that fragmentation irredeemably injures international law's status as law. Just because different courts apply the same law differently cannot in itself delegitimize that law, since this happens to be an inevitable feature of any legal system in which law is administered by more than one institution. Again, even within the highly interconnected and formalized judicial systems in the United States there are still all sorts of splits up and down the judiciary on the same law. And while it is true that there is a Supreme Court to resolve the most severe splits, there are nonetheless many that go unresolved for long periods of time or even forever. Yet nobody would say that just because a law is the subject of a circuit split it does not count,

---

23. *ILC Report*, *supra* note 1, ¶14.

and function, as law. This dissonance among different courts also does not disrupt the overall thesis. As explicated more below, the argument is one of degrees, not absolutes: if law were *absolutely* predictable and *absolutely* treated like cases alike, it might never change or adapt to new circumstances. That instantly contradicts autopoiesis, so it's not what I have in mind. Rather, I have in mind coherence, which insists that law follows some consistent methodological path that may be predicted by actors. That different courts may interpret law differently may be an uneasy part of that progression—but if the result is that the law, over time, both congeals *and* expands to cover new ground, then what may seem like dissonance in the moment may be greater coherence in the long run.

In sum, precisely because the world is becoming increasingly interconnected, and different regulatory regimes increasingly overlap, the potential for international conflicts of law is large and only growing larger. Systems theory suggests that when juxtaposed against the alternative of states retaining parochial regulatory authority over transnational activity under their domestic laws, fragmentation may actually—if counterintuitively—be an important step on the evolutionary path toward the broader coherence and justness of the international legal system.<sup>24</sup>

\* \* \*

This Article begins by examining the phenomenon of fragmentation and the consensus of resignation among scholars that it has dashed all hopes of a coherent, unitary international legal system. Next, the Article turns to the prevailing view that the most attractive alternative for international law going forward is some species of conflict of laws methodology for managing (instead of resolving) international conflicts of law.<sup>25</sup> The Article then pushes against this trend. It explains that conflict methodologies invariably involve tradeoffs in justice, and—more problematically—that while conflict methodologies may achieve a degree of coordination (as opposed to coherence), they also entrench and institutionalize the very justice tradeoffs they generate. Most seriously compromised are elementary justice principles of equality and predictability.

---

24. See *infra* Part III.

25. See *infra* Part III.



As to equality, almost by definition conflict methodologies cannot treat like cases alike because they contemplate choosing among multiple conflicting rules. More concretely, and as will be elaborated,<sup>26</sup> any decision-maker that chooses among competing rules either fails to advance community preferences behind the rule not chosen or fails to treat like cases alike. It should also come as no surprise that the more laws that potentially may apply to one's conduct, the less predictable "the law," broadly conceived, becomes. These justice compromises are not just academic; they erode both a legal system's legitimacy and its real-world efficacy at shaping behavior.<sup>27</sup> Practically speaking, how are transnational actors supposed to conform their behavior to the law when their conduct is potentially governed by multiple conflicting rules?

Indeed, all three perspectives that this Article seeks to synthesize and extract productive synergies from—fragmentation, conflict of laws, and systems theory—acknowledge these same basic justice problems. In fact, all three perspectives use the same exact language to describe the justice problems. It is moreover clear upon inspection that the terminological correspondence is not just semantic coincidence: all three perspectives also conceptualize and analyze justice the same way.<sup>28</sup> The only difference is that fragmentation sparks the justice problems, conflict of laws settles for them, and systems theory seeks to solve them.

In that connection, this Article's discussion of systems theory introduces key concepts and applies them to the international legal system. It then suggests that systems theory may offer a way past what has so far been an intransigent ideational impasse blocking the ability to simultaneously conceive of international law as a unitary system on the one hand, and the firmly lodged and accelerating phenomenon of fragmentation on the other. Viewing fragmentation as a transitional step toward broader and deeper systemic coherence and robustness sets it off from the alternative world in which international law is paralyzed and the expanding universe of disputes it presently purports to cover are instead relegated to the domestic jurisdictions of states.

---

26. See *infra* Part IV.

27. See *infra* Part IV.

28. See *infra* Part IV.

Finally, and in service of the goal of coherence and the justice principles it promotes, this Article proposes two methodological tools for international legal decision-makers going forward.<sup>29</sup> Drawing from methods U.S. circuits use to foster the coherence of federal law, it advances and illustrates through case examples: (1) a presumption of coherence, and (2) a presumption of catholicity. The presumption of coherence's function is self-explanatory. The presumption of catholicity urges decision-makers to use all international legal sources available to resolve disputes and acts as a bulwark against parochial or idiosyncratic interpretations unmoored from, and unguided by, the full spectrum of international legal materials. The presumptions are mutually reinforcing in that each presses decision-makers to consider both the reasoning and the results reached by other decision-makers on the same or substantially similar legal issues.

This Article then tries to anticipate and explore critiques its approach may provoke, with an emphasis on conflict methods' tested ability to manage multiple overlapping normative commitments of different legal communities. The Article's coherence desideratum should not be misinterpreted as some broadside on conflicts law or legal pluralism per se, which obviously hold tremendous potential to handle conflicting legal preferences. Rather, the argument more humbly wants to acknowledge pluralism's cost to the consistency and predictability of a law striving for uniformity and overall regulatory efficacy. More precisely: When it comes to areas that have risen to the level of international concern so as to qualify for regulation by international law, coherence—not coordination—best upholds the justice pillars central to international law's development as a unitary system. And, ultimately, it is worth fighting for. Systems theory supplies innovative conceptual and analytical grounds on which the international legal system's defenders can stand in that fight.

## II. FRAGMENTATION DYNAMICS

Fragmentation manifests along diverse relational axes among legal systems along which law's splintering may be plotted and studied. For instance, it can be analyzed along hori-

---

29. See *infra* Part VI.

zontal or vertical axes. Horizontal fragmentation presupposes formally level legal power dynamics among coequal systems—say, the several states in the U.S. legal system, or the world’s nation states in the international legal system. Vertical fragmentation, on the other hand, presupposes hierarchical legal power dynamics between superordinate and subordinate systems—say, the U.S. federal government and a U.S. state, or, one might even posit, international law and a nation state. I resist automatically pairing the nation state with an international *institution* (instead sticking with term international law) because determining if and when such institutions are authoritative expounders of international law is difficult and complex.

This last observation raises what is almost certainly the most hotly-discussed type of fragmentation right now: fragmentation among different international legal bodies—in their most acute form called “regime collisions”<sup>30</sup>—resulting from “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>31</sup> An emblematic example—held out by the International Law Commission Report on Fragmentation (ILC Report) to introduce the fragmentation phenomenon—involves precisely this type of collision between an arbitral tribunal set up under the U.N. Convention on the Law of the Sea, another dispute settlement body tasked under the Convention on the Protection of the Marine Environment of the North-East Atlantic, and the European Court of Justice.<sup>32</sup> Because these regimes tend to “claim a global validity for themselves”<sup>33</sup> at least within a particular jurisdictional sliver of international law, fragmentation runs along a horizontal, not a vertical, dynamic.

Take the conflicting views of the International Court of Justice (ICJ) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) on the question of what degree of control a state must exercise over actions by its armed forces

---

30. Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1000–01 (2004).

31. *Id.* at 1009.

32. *ILC Report*, *supra* note 1, ¶¶ 10–12.

33. Fischer-Lescano & Teubner, *supra* note 30, at 1009.

inside another state for it to incur legal responsibility for its forces' activities. The ICJ articulated an "effective control" test, under which "even the general control by [one state] over a force with a high degree of dependency on it, would not . . . mean, without further evidence, that the [state] directed or enforced the perpetration of the acts contrary to human rights and humanitarian law" in another state so as to trigger legal responsibility.<sup>34</sup> In the context of the case originating the test, the ICJ found that "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself" to impute to the United States responsibility for the *contras*' acts in Nicaragua since "[s]uch acts could well be committed by members of the *contras* without the control of the United States."<sup>35</sup>

By contrast, in evaluating the responsibility of Serbia-Montenegro for acts by the Bosnian-Serb militia in the former Yugoslavia, the ICTY explicitly rejected the ICJ's "effective control" test and adopted a far less demanding "overall control" test.<sup>36</sup> The ICTY disposed of the need to show "instructions for the specific acts contrary to international law" and instead provided that "equipping and financing" along with "coordinating or helping in the general planning" of a military or paramilitary group is enough to trigger liability.<sup>37</sup> As the ILC Report noted, the ICTY did "not suggest 'overall control' to exist alongside 'effective control' either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to *replace* that standard altogether."<sup>38</sup> In response, the ICJ rejected the ICTY test in ruling on a dispute that, coincidentally, grew directly out of the very events that impelled the ICTY's existence in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime*

---

34. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27).

35. *Id.*

36. *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

37. *Id.*

38. *ILC Report*, *supra* note 1, ¶ 50.

of *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*<sup>39</sup> and sought to reassert the hegemony of the ICJ “effective control” test in international law.<sup>40</sup>

Because neither of these bodies is formally superior to the other, the dynamic between them is horizontal, not vertical, as is the fragmentation of law their dynamic produces. It is also symptomatic of a deeper fracturing of international law’s edifice; for here we have not just competing tests from different courts, but also the possibility that the tests themselves may be influenced by the different structures of the courts and the different goals those structures address.<sup>41</sup> On the one hand is the ICJ’s jealous guardianship of state sovereignty, the court being dependent as it is on the voluntary consent and funding of states for its creation and continuity, as well as its “competence,” or jurisdiction, being limited to disputes involving only state parties.<sup>42</sup> On the other hand is the ICTY’s chief focus on promoting individual responsibility and redress for crimes against international law and the court’s relative freedom from the need for state approval since it was created and is funded by the United Nations acting through the Security Council.<sup>43</sup>

Thus horizontal fragmentation is not limited to second-order questions of interpretation by different interpretive bodies. It may also extend to first-order questions about which area of law prescribes the relevant rule to begin with when different areas create different competing standards, both of

---

39. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 47, ¶¶ 396–401 (Feb. 26).

40. *Id.*

41. I discuss these different levels of fragmentation in more detail, *infra* Part V, but thought it useful to introduce them here.

42. See Statute of the International Court of Justice, arts. 1, 34, June 26, 1945, 59 Stat. 1031, U.N.T.S. 993 [hereinafter Statute of the ICJ]; John R. Crook, *The International Court of Justice and Human Rights*, 1 Nw. U. J. INT’L HUM. RTS. 2, 2 (2004) (“The only contentious cases the ICJ can hear are cases between States. Individuals have no right of direct access. This is an important difference between the ICJ and other human rights institutions that allow some type of direct access. This limitation reflects the State-centered view of international law prevailing when the statute of the ICJ’s predecessor was drawn up after World War I.”).

43. See S.C. Res. 827, annex, Statute of the International Criminal Tribunal for the Former Yugoslavia art. 10 (May 25, 1993) [hereinafter Statute of the ICTY].

which purport to represent the same governing rule. In the *Legality of the Threat or Use of Nuclear Weapons* case, for example, the ICJ concluded that two areas of law containing the right not to be arbitrarily deprived of life—each providing a different standard—applied to the same set of facts.<sup>44</sup> The Court found that both international human rights law, set out in the International Covenant on Civil and Political Rights, and international humanitarian law, or the laws of war, applied “in times of war.”<sup>45</sup> As with different interpretations of the law by different bodies, this fragmentation dynamic between different areas of law is horizontal<sup>46</sup> and its resolution, if any, does not cleanly admit of a predetermined answer based on the superiority of one area over the other.

Implicit in horizontal fragmentation is the absence of a hierarchy among international legal institutions capable of resolving conflicts of international law(s)—that is, capable of harmonizing international law itself. The apparently terminal affliction for international law is that it simply cannot survive as a coherent and unitary system.<sup>47</sup> It is instead doomed to an increasingly fragmented existence characterized by the progressive pixilation of its norms as they are hijacked by an ever more autarkic cadre of special interests.<sup>48</sup> Indeed, so dire is the condition that Andreas Fischer-Lescano and Gunther Teubner invoke Dante’s admonition to those who enter the

---

44. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8).

45. *Id.* I evaluate the ICJ’s attempt at reconciling these different areas of law *infra* note 245.

46. With the caveat that it would not be horizontal if one of the rules was regular customary or treaty-based international law and the other was a peremptory norm of international law or *jus cogens*. Interestingly, the question in the *Nuclear Weapons* case, which involved what constitutes an “arbitrary deprivation of life,” arguably might be seen as a conflict of two peremptory norms.

47. See generally Fischer-Lescano & Teubner, *supra* note 30.

48. *Id.* at 1017 (describing “autonomous legal regimes”); *id.* at, 1032 (describing an increasingly “heterarchical order of diverse autonomous regimes”); *ILC Report*, *supra* note 1, ¶ 13 (describing the Commission’s “focus on the substantive question – the splitting up of the law into highly specialized ‘boxes’ that claim relative autonomy from each other and the general law”); see also Martti Koskeniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today’s International Law*, 4 NO FOUND. 7, 11 (2007).

gates of Hell to “*lasciate ogni speranza*,”<sup>49</sup> or abandon every hope.<sup>50</sup>

### III. COHERENCE, COORDINATION, AND CONFLICT OF LAWS

Nonetheless, even among the most pessimistic of prophets,<sup>51</sup> there seems to be consensus that at least some methodological promise resides in the intellectual traditions of conflict of laws.<sup>52</sup> The analogy is as straightforward as it is imprecise: (1) horizontal conflicts among regimes correspond to horizontal conflicts among states; (2) there is a venerable and vigorous field of international law devoted to the latter;

49. Fischer-Lescano & Teubner, *supra* note 31, at 1017.

50. Although the spelling in Fischer-Lescano and Teubner’s discussion is correct in modern Italian usage, their quotation is actually a little off from the original text, which reads “*Lasciate ogne speranza, voi ch’intrate*.” Or, “Abandon every hope, you who enter.” DANTE ALIGHIERI, *LA COMMEDIA: INFERNO* canto 3 l.9 (Bompiani 2000) (translated from the original by the author).

51. See Fischer-Lescano & Teubner, *supra* note 30, at 1018 (describing as a “guiding principle” for the way forward “[d]ecentralized modes of coping with conflicts of laws as a legal method”); *id.* at 1021 (describing the need for “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”); Broude, *supra* note 21, at 284 (noting that “[o]ne might contest . . . [a conflict of laws framework’s] specific applications, like any legal interpretation, but the remedial value of utilizing this framework to address the issues raised by fragmentation will not be contested”).

52. *ILC Report*, *supra* note 1, ¶ 6 (observing “the need for a close analogy with conflict of laws to deal with this type of fragmentation. This would be a law regulating not conflicts between territorial legal systems, but conflicts between treaty regimes.”); Harlan Grant Cohen, *From Fragmentation to Constitutionalization*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 381, 389 (2012) (“To the extent . . . that we’re talking about different legal communities, to the extent these disputes go to questions about legitimate rulemaking—the who and how of international law—the relationship between California law and Jewish law is the better analogy. In such cases, there is no shared doctrine that might authoritatively resolve disputes between them. The governing framework in such situations is conflicts of law; resolving disputes requires finding ways to mediate between the demands of different legal communities.”) (citations omitted); Cohen, *supra* note 11, at 1091; Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMP. & INT’L L. 349, 351, 367, 375–76 (2012).

(3) therefore, we can look to that field for methodological solutions to regime conflicts.<sup>53</sup>

The million-dollar question is *how* conflict of laws methodologies should adapt to handle regime conflicts—with the ILC Report suggesting formal techniques grounded in the rules of the Vienna Convention on the Law of Treaties,<sup>54</sup> others looking to a relatively unorthodox (at least for contemporary approaches<sup>55</sup>) “substantive law approach” that would blend and craft new substantive law out of competing rules or interpretations,<sup>56</sup> and still others proposing that decision-makers assimilate other fora’s decisions and reasoning when addressing the same or substantially similar issues of international law.<sup>57</sup>

Yet before deciding upon a particular conflict of laws methodology, a natural predicate inquiry might be: what are the contours of the conflict of laws analogy in the first place?<sup>58</sup>

---

53. See *ILC Report*, *supra* note 1, ¶6 (noting Wilfried Jenks realization of the need for utilizing this analogy).

54. *Id.* ¶1485; Broude, *supra* note 21, at 284, 287–90.

55. See PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 9 (5th ed. 2010) (explaining that the Roman *praetor peregrinus* charged with resolving choice of law issues “came up with the idea of crafting an ad hoc substantive rule drawn from the laws of the involved states rather than applying the law of one of those states. Thus, for the first time, multistate disputes were resolved not through a *choice of law*, but rather through the creation and application of a special body of substantive law applicable only to those disputes.”).

56. Fischer-Lescano & Teubner, *supra* note 30, at 1021–23.

57. See Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE* 439 (Todd Weiler & Freya Baetens eds., 2011). As Part V elaborates, I too find both purchase and promise in the idea of decisional cross-fertilization. Indeed, I argue that the systems theory advanced in this project provides innovative yet persuasive support for such a view. Moreover, the tools proposed in Part V not only draw for their creation from the systems theory view; they also seek to illustrate for, and supply, real-world decision-makers going forward with precise and concrete “coherence methods” (as opposed to conflict methods), to use in advancing international law’s systemic coherence through decisional cross-fertilization in resolving disputes. See *infra* Part V.

58. To be sure, commentators invariably acknowledge that there are differences. See Fisher-Lescano & Teubner, *supra* note 30, at 1018, 1021; Broude, *supra* note 21, at 284. But extensive exploration of those differences as well as the similarities employed to discern the analogy’s contours tends to be rare. For a notable and very insightful exception, see Michaels & Pauwelyn, *supra* note 52.



Only after carefully investigating the similarities and differences between the systems that conflict of laws approaches address, and the systems that fragmentation purportedly propagates, can we arrive at an adequately sophisticated understanding of how—conceptually and methodologically—to shape responsive solutions.

Addressing this inquiry, Ralf Michaels and Joost Pauwelyn insightfully argue that collisions among international bodies do not cleanly lend themselves to conventional conflict methodologies for a number of reasons.<sup>59</sup> A “traditional approach” to conflict of laws is a poor fit because the traditional connecting factors—geographic territory and domicile—used to determine the applicable law, are lacking.<sup>60</sup> Put another way, because by definition international law applies everywhere and to everyone, if a dispute falls within multiple regimes’ overlapping subject matter jurisdictions, hinging the choice of law (or regime) on where an activity took place or whom it involved is nonsensical.<sup>61</sup> A “governmental interest approach” similarly relies on hallmarks of statehood that do not smoothly translate to regime conflicts because it “assumes the coexistence of two governments whose interests are in question and potentially in conflict,” whereas international lawmaking presupposes “at least in theory, the same government or ‘lawmaker.’”<sup>62</sup> Michaels and Pauwelyn note that a “functional approach” likely carries the best fit for regime conflicts.<sup>63</sup> Yet there are still meaningful differences; most indicative for present purposes is that a functional approach selects one law over another to achieve “coordination” among discrete systems, while a functional approach within a single system selects one law over another to achieve “coherence” within that same sys-

---

59. Michaels & Pauwelyn, *supra* note 52, at 360–62.

60. *Id.* at 361.

61. Cf. Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 883 (2009) (“The prescriptive reach of universal jurisdiction is not really *extraterritorial* at all; but rather comprises a comprehensive territorial jurisdiction, originating in a universally applicable international law that covers the globe. Individual States may apply and enforce that law in domestic courts, to be sure, but its prescriptive scope encompasses all territory subject to international law, i.e., the entire world.”).

62. Michaels & Pauwelyn, *supra* note 52, at 361.

63. *Id.* at 362.

tem.<sup>64</sup> The former more readily disregards the regulatory force of the law not chosen as inapplicable because it pertains to an inapplicable body of law, while the latter more readily acknowledges the residual applicability of the law not chosen because while it is inapplicable on the precise issue before the court, it is still part of the same body of governing law.

This distinction—between striving for coordination on the one hand and for coherence on the other—is vital to whether international law is a unitary system because, if it is, we can expect it to move toward coherence, not just coordination.<sup>65</sup> And this movement is not only predictive; it also furnishes a normative basis on which to assess the nature and development of international law. For their part, Michaels and Pauwelyn eschew the normative or “ontological” question of whether international law is a unitary system and focus instead on “technical” solutions to regime conflicts by carefully borrowing context-specific techniques from inter- and intra-system conflict rules.<sup>66</sup> In so doing, they demonstrate that the

---

64. *Id.*

65. *See id.* at 362. It is not feasible to fully explore all the various conflict methods that have been proposed to address fragmentation—a topic that by itself could easily fill a book. But it is worth noting that to the extent some of them aim also at coherence, and not just coordination, they fit with this Article’s theory. For instance, some of the ILC Report techniques, although arrived at by formal treaty interpretation, nonetheless comport in principle with the more organic common law tools suggested later in this Article. Techniques like *lex specialis*, or that specialized law applies over general law, see, for example, *ILC Report*, *supra* note 1, ¶ 56, and *lex posterior*, or that later law applies over earlier law, *id.* ¶225, can and do work within a single system. An initial difference between these formal techniques and the methods this Article proposes derives from the different traditions the works draw from. While the *ILC Report* draws from a civil law tradition that embraces conflict of laws rules for picking one rule over another, this Article’s approach is more common-law and synthesis oriented. As Parts V and VI set out to show in some detail, I think the common law approach is more in keeping with, and facilitative of, systemic coherence and has certain doctrinal and practical advantages, an almost preliminary one being that it does not threaten to mire decision-makers in unhelpful methodological morasses. Indeed, the *ILC Report* itself notes the difficult questions raised by the *lex specialis*’ actual application in cases, and “[i]n this sense, the *lex specialis* maxim cannot be meaningfully codified,” *id.* ¶ 119, and cites similar problems with *lex posterior*. *Id.* ¶ 241. *See also infra* note 245 (discussing the ICJ’s *Nuclear Weapons* opinion).

66. *See* Michaels & Pauwelyn, *supra* note 52, at 352.

techniques can be used to manage conflicts in a coordinated way even if the techniques do not resolve them.<sup>67</sup>

This Article takes up the question of whether international law is a system and casts its exploration of the question somewhat differently from the existing literature. The Part below starts by expressing hesitancy that conflict of laws methods should be pursued as the best solution to fragmentation—precisely because conflict cases manifest the very same insoluble evils that purportedly haunt fragmentation. For conflict methods endemically enlist compromises in justice to placate those evils, not banish them. Poetically speaking, I am not yet ready to “abandon every hope.”

#### IV. JUSTICE ACROSS THREE REALMS

As the term conflict of laws conveys, the field addresses conflicts among competing legal systems whose laws potentially regulate the same dispute. Although the discipline clearly has prevented descent into anarchy among the world’s legal systems, it also has generated enduring and seemingly incurable dilemmas for the law. Here I do not wish to sound overly critical of the field of conflict of laws. In line with the Article’s overall argument style, what follows is an argument of degrees, not absolutes. So to be clear, I am not saying that conflict of laws methodologies themselves make law incoherent; quite the opposite, their purpose is to foster some degree of coherence in coordinating multiple separate legal systems purporting to regulate the same activity. In that respect, they have undoubtedly been successful, to a degree. Rather, the point is that when compared with the alternative of a single unified legal system, a multistate (or multi-regime) system of conflicting overlapping laws is less coherent because it is less predictable and less able to treat like cases alike.

The chief dilemma conflict methodologies present is the inevitable tradeoff between principles that cut to what Arthur von Mehren called the “primordial” problem of justice.<sup>68</sup> By their very nature, conflict cases are harder to justly resolve, and thereby pose a greater threat to law’s ability to function effectively—precisely because, like fragmentation, they impair

---

67. *Id.* at 362–74.

68. von Mehren, *supra* note 13, at 27–28.

“the coherent functioning of legal systems.”<sup>69</sup> Justice is fundamental to law because, in von Mehren’s words, “[r]ules and institutions perceived as unjust are unstable and ultimately unacceptable. Justice is a complex concept: like cases should be treated alike; the legal consequences that attach to conduct should be understandable and foreseeable. Rules and institutions must also express and advance values and purposes accepted by the community.”<sup>70</sup>

The correspondence to the ILC Report’s recent conclusions on fragmentation is striking: “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 its subjects equally.”<sup>71</sup> Jonathan Charney similarly observed that fragmentation raises “the question . . . whether the proliferation of international tribunals threatens the coherence of the international legal system” because “[n]ot only may a cacophony of views on the norms of international law undermine the perception that an international legal system exists, but if like cases are not treated alike, the very essence of a normative system of law will be lost.”<sup>72</sup> Conflict cases put great pressure on the justice principles—or what some might call “rule of law”<sup>73</sup> principles—of predictability, advancing community values, and equality, treating like cases alike. Indeed, most conflict cases end up invariably sacrificing one principle at the altar of another.

As to predictability, a multiplicity of potentially applicable laws makes it harder to predict both which law will apply to one’s behavior and the legal consequences of that behavior. And to the very likely extent that the applicable law turns on where suit is initiated, it may even catch the defendant by surprise, triggering serious fairness concerns.<sup>74</sup> All of which undermines predictability and therefore threatens both the sta-

---

69. *Id.* at 28.

70. *Id.* at 27–28.

71. *ILC Report*, *supra* note 1, ¶ 491.

72. Jonathan I. 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, 699 (1999).

73. See Colangelo, *Conflict of Laws*, *supra* note 11, at 766–70 (explaining rule of law criteria in relation to conflict of laws issues).

74. Colangelo, *Spatial Legality*, *supra* note 11, at 77–104.

bility and the efficacy of the law.<sup>75</sup> As to advancing community values and equal treatment that “like cases should be treated alike,”<sup>76</sup> one of these two justice principles will always subordinate itself to the other in true conflict cases.<sup>77</sup> Unlike in wholly domestic cases in which a community’s preferences simultaneously can be advanced via application of its law and that law treats like cases alike, in true conflict cases one of these justice goals invariably gives way.<sup>78</sup>

Take for instance a typical conflict case involving parties from different states whose laws conflict. If the forum applies forum law to the foreign party, it advances its own values expressed in its law and treats like cases before it alike; but it subordinates the values of the foreigner’s home community. If, on the other hand, the forum applies foreign law it advances the foreign community’s values as to its own inhabitant, but fails to treat like cases alike (since other cases with similar or identical facts presumably would be decided under forum law). The same tradeoff occurs where one element of the dispute takes place in one state and another element takes place in another state. The only way around this zero-sum game is where there is what’s called a “false conflict” of laws; that is, foreign law and forum law are the same—a situation that would also quell predictability problems.<sup>79</sup> But for cases in which there is an actual conflict of laws, these justice problems are endemic. They are also transferable to conflicts of international law, whether among states or international bodies.<sup>80</sup>

---

75. *Id.* at 71–72 (“[I]f people cannot predict how law will treat their behavior, law in turn loses legitimacy and effectiveness as a tool for shaping behavior. Put another way, the less I am able to predict how the law will treat my behavior, the less incentive I have to conform my behavior to the law. It follows that how the law does end up treating my behavior is going to be arbitrary, chipping away at law’s legitimacy over time.”).

76. von Mehren, *supra* note 13, at 27.

77. “True conflict” cases are distinguished from “false conflict” cases, discussed immediately below.

78. von Mehren, *supra* note 13, at 30.

79. For my analyses of how false conflicts can be used to handle cases involving international law, see Colangelo, *supra* note 61, and Anthony J. Colangelo, *International Law in U.S. State Courts: Extraterritoriality and “False Conflicts” of Law*, 48 INT’L L. 1 (2014).

80. To illustrate, posit the popular example of a conflict between the World Health Organization (WHO) and the World Trade Organization (WTO) on access to pharmaceuticals and intellectual property rights. The conflicting interpretations make less predictable which international law will

Thus importing conflict of laws methodologies for *managing*, instead of *resolving*, fragmentation issues may only further enshrine the evils that fragmentation purportedly generates. It may be that managing the conflicts is all that international law can do at this point; a sort of least-worst option. But I hesitate to think this is a foregone conclusion.

Nonetheless, we appear to be at an ideational impasse. Fragmentation is now the norm, not the exception. And by all accounts it has been doused with strong accelerant.<sup>81</sup> If fragmentation cannot be “solved” in the sense of rolling it back or halting it, then maybe managing it is, in fact, the least-worst option. Here is where systems theory, explicated more below,<sup>82</sup> may energize the legal imagination. As noted, if international law is viewed as a unitary system it can be expected to strive toward coherence over time.<sup>83</sup>

Joining systems theory with fragmentation may be at once paradoxical and auspicious because, in their quest for coherence, autopoietic legal systems promote predictability and equality—exactly the justice principles with which fragmentation and conflict of laws methods seem to struggle so futilely. Moreover, systems theory thinking and terminology about justice correspond neatly to the thinking and terminology about justice in both conflict of laws and fragmentation discussions. In short, across all three ways of thinking—conflict of laws, fragmentation, and systems theory—justice is a critical linchpin to a legal system’s coherence and is defined and conceptualized in the same way.

Pioneering systems theorist Niklas Luhmann included an entire chapter on “Justice” in his seminal work, *Law as a Social System*, emphasizing it as a principle that undergirds “the unity of the system.”<sup>84</sup> As in both conflict of laws thinking and fragmentation thinking, for Luhmann, “[j]ustice . . . in its most general form has traditionally, and still today, been identified with *equality*,”<sup>85</sup> or “the need for *consistent* decision-making” to

---

apply and the differing values of the differing international communities present a variation on the tradeoff between advancing one set of values at the expense of another and treating like cases alike.

81. See Broude, *supra* note 21, at 280–81.

82. *Infra* Part V.

83. See *supra* Part I.

84. NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 213 (2004).

85. *Id.* at 217.

promote “an internal legal norm of justice, that is, the requirement to treat like cases alike.”<sup>86</sup> A justice-enhancing corollary that cuts straight to predictability is that like cases are treated alike according to law’s own recursive process of building up a network of rules and precedent over time so that parties have a reasonable expectation of, and do not have to guess anew each time a case arises, how their behavior will be assessed by the legal system.<sup>87</sup> Thus systems theory predicts that if international law is a unitary system, it will lean toward justice as characterized by equality and predictability, and thereby strive toward coherence over the long run.

This is only a prediction, but it breaks through the ideational impasse by offering new theoretical grounds on which to make a hypothesis. Namely, if the international legal system evolves toward coherence propelled by justice principles of equality and predictability, it looks like a unitary system. To round out the hypothesis, all we need to do is rearrange the typical order of argument in legal scholarship, which tends to proceed from the descriptive (this is how things are) to the predictive (this is how things will be) to the normative (this is how things ought to be).<sup>88</sup>

Instead of that order, one could begin with the predictive and reverse course into the descriptive. The analysis would look something like this: as a system, international law will and should evolve toward coherence. This evolution, in turn, demonstrates international law is a system. Here we have an (ad-

---

86. *Id.* at 60.

87. *Id.* at 168, 248–49. This corollary is not necessary or predicate to treating like cases alike. For instance, the norm for deciding cases could simply be that whoever has the best *ad hoc* or *ad hominem* argument wins, in which case while parties may know in advance how the law will assess the dispute, they will have little expectation about how the law will assess their behavior.

88. Mónica García-Salmones Rovira, *Who Is the System? On Commitment, Biology, and Human Beings in the Politics of “Groundwork for International Law,”* 108 AM. J. INT’L L. 689, 695 (2014) (“Indeed, for much of twentieth-century scholarship, taking the view that international law was a unified system initially called for a leap of faith that enabled lawyers—generally speaking, progressive lawyers—to see a single whole where the majority saw mere ‘spots’ of external law of the state subjected to what was thought to be prevalent internal law.”).

mitedly circular<sup>89</sup>) hypothesis, but one that either will be borne out or will not. Another way to analyze the question of systemic coherence is to try to imagine the counterfactual, which would include not just fragmentation of international law itself but also the *reasons* for that fragmentation. If fragmentation is a product of international law spreading into new areas and the proliferation of bodies purporting to apply it,<sup>90</sup> what would the world look like absent those developments? The critical follow-up question being: which world looks more conducive to the success of international law, with “success” meaning fostering robustness that can withstand shocks that threaten to take down the system?<sup>91</sup>

The next two Parts try to flesh out these alternatives. Part V describes systems theory and its justice principles and applies them to international law to show that conflict methodologies may not be the best option in the long run. Part VI explores the counterfactual through a breakdown in the conflict of laws analogy that has largely escaped systematic analysis and that may portend major jurisprudential and methodological implications for confronting fragmentation going forward. Namely, in conflict cases, decision-makers are tasked with choosing among different laws from different legal systems; in fragmentation cases, by contrast, decision-makers are tasked with interpreting what purports to be *the same* law within, broadly speaking, *the same* legal system—albeit a general system composed of multiple discrete constituent systems. Overlooking this analogical breakdown overlooks a wealth of data presently residing in another horizontal fragmentation dynamic: fragmentation of international law among states. This dynamic mingles key characteristics of the systemic structures conventional conflict analysis is designed to manage—a system

---

89. Cf. Teubner, *supra* note 7, at 1 (“Legal autopoiesis breaks a taboo in legal thinking—the taboo of circularity. Legal doctrine, legal theory and legal sociology have all regarded circularity as a subject not to be broached. Circular arguments have been viewed as *petitio principii* forbidden by the iron law of legal logic. Legal autopoiesis now presumes to invalidate this iron law by transferring circularity from the world of ideas to that of hard facts.”). In law, it is like saying that justification according to law is legal justification. This is not only true in international law, but it also true of nations’ municipal laws.

90. See generally *ILC Report*, *supra* note 1, ¶¶ 7–10, 82–101.

91. See *infra* Part V.



of separate coequal states with their own separate laws—with key characteristics of the systemic structures regime conflicts exhibit—a system of separate institutional bodies purporting to interpret and apply the same law. As such, it may represent, and profitably be studied as, an intermediate step between conventional conflicts of law and international conflicts of law. Analyzing the fragmentation of international law among states may also suggest better methodologies for resolving fragmentation issues than the usual outfit of conflict approaches calculated to achieve only coordination, not coherence.

## V. SYSTEMS THEORY AND FRAGMENTATION

A natural way to introduce systems theory is to define at the outset what a system is. We can then move quickly from the abstract to the concrete to arrive at a workable definition of the international legal system and hypothesize what that might mean for the future of fragmentation. A system, generally speaking, is a group of interactive elements distinct from its larger environment that operates according to its own internal logic.<sup>92</sup> The human body, for example, is a system: “[r]ather than reducing an entity (e.g. the human body) to the properties of its parts or elements (e.g. organs or cells), systems theory focuses on the arrangement of and relations between the parts which connect them into a whole (cf. holism).”<sup>93</sup> In this sense, a central characteristic is that “the collective behavior of [the system’s] parts together is more than the sum of their individual behaviors”<sup>94</sup> and thus the system “is different from, and perhaps greater than, the sum of its parts.”<sup>95</sup> And because the body’s system, to continue the example, operates according to its own internal (biological) logic in the reproduction of its cells, and hence itself, over time, it is also *autopoietic*—it strives toward self-perpetuation.<sup>96</sup>

92. See DONELLA H. MEADOWS, *THINKING IN SYSTEMS: A PRIMER 2* (Diana Wright ed., 2009).

93. THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 898 (Robert Audi ed., Cambridge Univ. Press 2nd ed. 1999).

94. Mark E.J. Newman, *Complex Systems: A Survey*, 79 AM. J. OF PHYSICS 800, 800 (2011).

95. D’Amato, *International Law*, *supra* note 5, at 345.

96. MEADOWS, *supra* note 92, at 3 (“We are complex systems—our own bodies are magnificent examples of integrated, interconnected, self-maintaining complexity.”).

This process, again generated by the system's internal logic, is recursive; it is a "circular . . . self-referential mode of operation"<sup>97</sup> of repeat behavior through which the system both self-realizes and "emerges" from its constituent elements.<sup>98</sup> It may be "open" in its performance of this process, taking inputs from, and emitting outputs to, its environment; or it may be "closed," sealed off from its environment.<sup>99</sup> Or, most likely, it may be open or closed depending on the function at issue.<sup>100</sup> (As we will see, whether to think of the international legal system as open or closed also depends on which function of the system one focuses.) To use again the body as an example, it eats and drinks to sustain itself. But that food and drink are processed differently according to that biological system's unique constitution. What I intake may affect me differently than what you intake, not to mention how the same exact intake affects a dog. In very general terms, "[t]he system, to a large extent, causes its own behavior! An outside event may unleash that behavior, but the same outside event applied to a different system is likely to produce a different result."<sup>101</sup>

Before transitioning to legal systems, and the international legal system in particular, intellectual care demands a cautious word on the uses to which the present analysis seeks to put systems theory. As Luhmann observed, "[a] mere analogy . . . would miss the mark, as would a merely metaphorical

---

97. Niklas Luhmann, *Law as a Social System*, 83 Nw. U. L. REV. 136, 137 (1989); see also Baxter, *supra* note 4, at 1994 ("The legal system, as an autopoietic system of communication, is a recursive, self-referential, self-producing, self-reproducing, and self-describing system").

98. See Teubner, *supra* note 7, at 3–4 ("[L]egal autopoiesis is brought about only if an emergent element of the legal system is created"); see also D'Amato, *International Law*, *supra* note 5, at 345 ("'Emergence' is a useful term in the study of systems. An organic system emerges from a collection of live cells."); Newman, *supra* note 94, at 800 ("The collective behaviors are sometimes called 'emergent' behaviors, and a complex system can thus be said to be a system of interacting parts that displays emergent behavior.").

99. Ludwig von Bertalanffy, *The Theory of Open Systems in Physics and Biology*, 111 SCIENCE 23, 23 (1950) ("A system is closed if no material enters or leaves it; it is open if there is import and export and, therefore, change of the components. Living systems are open systems, maintaining themselves in exchange of materials with environment, and in continuous building up and breaking down of their components.").

100. For an in-depth explanation of this "operative closure" in relation to the system's environment, see LUHMANN, *supra* note 84, at 76–141.

101. MEADOWS, *supra* note 92, at 2.

transfer of biological terms to sociology [or law].”<sup>102</sup> Rather, biological metaphors of autopoiesis might be conscientiously used, to quote German legal theorist Hubert Rottleuthner, to “explicate a *concept of law* which would enable hitherto disparate elements of legal theory to be integrated or seen in another light, thereby leading to fruitful questioning,” and to enlarge thinking about “evolutionary theory” of the law in order to reinterpret existing thinking.<sup>103</sup> And that is how this Article seeks to use systems theory metaphors here: as heuristics that may aid thinking about how to conceptualize the seemingly increasingly disparate elements of international law and legal theory and to reinterpret discussions of international law’s evolution.

Thus, the international legal system obviously is not directly analogous to a biological system like the human body.<sup>104</sup> Instead, Anthony D’Amato explains, the international legal system is “an emergent property of an assortment of rules, norms, and principles that, in interacting with those norms, recursively imposes a meaningful organization upon them.”<sup>105</sup> The open nature of the system allows it to shape those norms through various inputs from its environment. When a real world dispute transforms into a claim that the international legal system recognizes as “legal,” it becomes an input that is processed according to the system’s internal logic.<sup>106</sup> The claim’s resolution and its dissemination back into the real world is the resulting output, which the system then incorporates into its body of rules, norms, and principles.<sup>107</sup> The recursive nature of this process adds to the overall body of international law. In the converse, if there were no such thing as law (or if law unambiguously covered everything within a

---

102. Luhmann, *supra* note 97, at 137.

103. Hubert Rottleuthner, *Biological Metaphor in Legal Thought*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY*, *supra* note 7, at 97, 114.

104. Although anthropomorphizing the states that make up the system is of course ubiquitous, if sometimes problematic. See, e.g., Rachel Brewster, *Unpacking the State’s Reputation*, 50 *HARV. INT’L L.J.* 231 (2009).

105. D’Amato, *International Law*, *supra* note 5, at 346–47.

106. *Id.*

107. This process of input, output, and effect on the system has from early on been referred to as a “feedback loop.” See DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 29–32 (1965).

closed system<sup>108</sup>), no longer would there be legal disputes. Precisely because law spawns issues as it resolves them, “[t]he law itself creates the conflicts that it needs for its own evolution, and thereby perfects itself.”<sup>109</sup> Law thus fosters a synergic relationship with its environment to engineer an increasingly robust network of norms that not only resolve real world disputes but also shore up the legal system’s existence.<sup>110</sup>

Embedded in the description above is what systems literature calls coding: the system assigns certain values to the inputs.<sup>111</sup> A legal system generally performs two separate coding operations that ordinarily take binary form.<sup>112</sup> First, an almost preliminary coding assignment is whether a claim is a recognizable legal input to begin with; that is, whether to code it as *legal* at all (the binary being legal/not-legal).<sup>113</sup> It could instead be political, economic, scientific, cultural, religious, or artistic. None of these other fields can tell if a dispute is legal. Only law, through its own identification processes, can make that call. In this way, a legal system defines its own boundaries and mediates the borders between itself and its environment.<sup>114</sup> Thus while the international legal system exhibits an open interaction with its environment, it is also closed in that

---

108. Cf. Niklas Luhmann, *Closure and Openness: On Reality in the World of Law*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY*, *supra* note 7, at 335 (“A system can reproduce itself only in an environment. If it were not continually irritated, stimulated, disturbed and faced with changes in the environment, it would after a short time terminate its operations, cease its autopoiesis.”).

109. Luhmann, *supra* note 97, at 148; Niklas Luhmann, *The Unity of the Legal System*, in *AUTOPOIETIC LAW, A NEW APPROACH TO LAW AND SOCIETY*, *supra* note 7, at 28. It does so by making itself more robust. D’Amato explains that “[r]obustness is defined as the ability to withstand unanticipated shocks or attacks upon the system. International law has become increasingly robust over the centuries so that today it is able to survive numerous violations of its norms and prominent challenges to their validity.” D’Amato, *International Law*, *supra* note 5, at 337–38.

110. D’Amato, *International Law*, *supra* note 5, at 337–38.

111. The process by which this coding occurs is typically referred to as “programming.” See LUHMANN, *supra* note 84, at 17.

112. According to the literature. At least one strong thinker has tried to expand these coding options. See D’Amato, *International Law*, *supra* note 5, at 348.

113. Luhmann, *The Unity of the Legal System*, *supra* note 109, at 20.

114. *Id.*; see also Baxter, *supra* note 4, at 1993, 2067.

it, and only it, can decide what qualifies as a legal claim in the first place.<sup>115</sup>

Next, once the input qualifies as distinctively legal, law's second-order coding kicks in with another binary assignment that goes to the lawfulness of what is being alleged; that is, is it "lawful or "unlawful"? Luhmann explains:

[A]s a closed system, the law is completely autonomous at the level of its own operations. Only the law can say what is lawful and unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations. In each of its own operations it has to reproduce its own operational capacity. It achieves its structural stability through this recursivity and not, as one might suppose, through favorable input or worthy output.<sup>116</sup>

Adapting this coding operation to the international legal system, D'Amato somewhat heretically<sup>117</sup> expands the coding options to better resonate with international law's uniquely decentralized anatomy. In his view, "[w]hen the ILS [International Legal System] outputs a code (makes a decision), the coding does not have to be binary in the sense insisted upon in the literature on systems. It suffices for the ILS to code some inputs as 'illegal' and say nothing about the rest."<sup>118</sup> Instead,

---

115. KING & THORNHILL, *supra* note 9, at 41 ("Law, in short, is the legal system; it is a *system* of communications which identifies itself as law and is able to distinguish between those communications which are part of itself and those which are not.").

116. Luhmann, *supra* note 97, at 139. For a more specific illustration as to courts, Baxter explains: "For example, when a court communicates a judicial decision, it typically relies on past legal communications, such as prior decisions, and in so doing is creates connective possibilities for future legal communications. In this recursive process, the system reproduces itself as a network of system-specific communications." Baxter, *supra* note 4, at 2006.

117. Conventional systems accounts—including as applied to law—uniformly use binary codes. D'Amato's "not-illegal" coding does not look like Luhmann's "third value," or something in addition to law, which he warns would break down the system; but it may approach Luhmann's warning against "degrees (half-legal)," which he also sees as problematic. *See* LUHMANN, *supra* note 84, at 12.

118. D'Amato, *International Law*, *supra* note 5, at 348.

the system “stores [the not-illegal outputs] in memory,” possibly to be recruited later on to help resolve future disputes.<sup>119</sup>

Herein lies a basic constitutional disparity between international law and all other top-down legal systems typified by autarkic hierarchies that definitively may resolve disputes and, by so doing, keep them within law’s distinct universe of legal (as opposed to political, economic, etc.) communications.<sup>120</sup> Unlike these other legal systems, the international legal system “processes real-world controversies directly, taking into account their context and possible settlement.”<sup>121</sup> The short of it is that—more than other legal systems which can be rescued by an external power structure should their operational capacities fail—the international legal system has a hard-wired, dynamic, and indeed existential drive to preserve itself. For this very reason, “international law strives to protect itself by favoring claims that promote systemic order while coding as ‘illegal’ those claims that point toward anarchy and the death of the legal system.”<sup>122</sup> From a systems view at least, a sweet irony is that what many challenge as not really law may actually be the “fittest” and most stable legal system the world has ever known, able to withstand massive shocks to its system, including two World Wars, and still survive—precisely because its existence does not depend on the whim of a top-down governance structure that may fall through revolution, war, or other exigency.

As we have already seen, systemic order preferences justice in the form of equality and predictability. Justice here is not what systems literature would call a “third value,”<sup>123</sup> or an added consideration on top of the codes legal and illegal. Rather, justice is an internal trait of the legal system resulting from its recursive operations (and devoid of particular substantive content). The system’s internal logic by nature fosters

---

119. *Id.* at 352.

120. Luhmann, *supra* note 97, at 139. Indeed, Luhmann seems to assume that the basic organizing principle underlying the unity of law today is the nation state. Luhmann, *The Unity of the Legal System*, *supra* note 109, at 12 (explaining that “the unity of knowledge has now been replaced by the unity of state and nation”).

121. D’Amato, *International Law*, *supra* note 5, at 360.

122. *Id.* at 342.

123. LUHMANN, *supra* note 84, at 212.

predictability and equality through “an internal legal norm of justice, that is, the requirement to treat like cases alike.”<sup>124</sup>

Naturally the system must determine what is alike and what is unlike, and therefore it is more complete to speak of “the unity of the [legal] system requir[ing] that the same be treated the same *and* the different be treated differently, so that the *unity* [is] expressed by the *difference* between the same and different.”<sup>125</sup> In other words, as any first-year law student learns, the system analogizes and differentiates. This furthers the system’s long-term stability “in the sense of dynamic stability, that is, continuation of the autopoietic, structurally determined reproduction”<sup>126</sup> of law as it expands by generating and resolving new disputes. The international legal system’s pursuit of dynamic stability exhibits these same mechanics, albeit in a less centralized form. More to the point, an unprecedented boom of transnational activity has triggered overlapping avalanches of novel disputes that the system has hurried to input. But in its coding haste, the system catalyzed the fragmentation of its norms.<sup>127</sup>

And because fragmentation is largely a product of judicial or quasi-judicial international legal development<sup>128</sup> a fertile example of law’s recursive incorporation and rule adjustment for present purposes is the common law. For the common law also has grown organically and heartily to handle myriad advancements of the modern world and “above all, has developed a careful, theoretically reflected culture of ‘*rationes decidendi*’ as a consequence of its principle of binding precedent.”<sup>129</sup> Argument is by analogy; like cases are treated alike and unlike cases are treated unlike. *Ad hoc* and *ad hominem* arguments are out of bounds<sup>130</sup> since they do not obey law’s recursive constitution in a way that nurtures justice’s criteria. At the level of legal ontogenesis, the common law is accordingly an apt referent for conceptualizing fragmentation’s interaction with systems theory. And it indicates that conflict of laws models may actually endanger the international legal sys-

---

124. *Id.* at 60.

125. *Id.* at 218.

126. *Id.* at 232.

127. *See generally*, *ILC Report*, *supra* note 1.

128. *See e.g.*, the examples discussed *supra* in Part I.

129. LUHMANN, *supra* note 84, at 228.

130. *Id.* at 168, 248–49.

tem's coherence by institutionalizing a degree of inequality and arbitrariness that compromises justice.<sup>131</sup>

In short, systems theory predicts that a unified international legal system will promote coherence through inbuilt justice principles of equality and predictability and will pursue this goal via a process of analogy and differentiation akin to common law decision-making. But prevailing proposals to embrace conflict of laws methods in order to fight fragmentation by nature arrest this project from the outset. The salient question then becomes: is there another approach that does not methodically forfeit justice pillars of equality and predictability so conducive to the unitary system's coherence and long term survival?

The next Part argues that the seeds of such an approach may be found in the horizontal fragmentation dynamic of different courts seeking harmonization of international law through common law adjudication. Just as developments in travel and technology catalyzed the common law's evolution, albeit with some growing pains, developments in transnational travel and technology catalyzed international law's evolution, albeit with some growing pains—most pertinent for our purposes being fragmentation. Yet the alternative for both the common law and international law is a snowballing universe of contentious and perhaps even catastrophic disputes pushed outside the realm of law or, at the very least in the transnational context, left to the opaque domestic jurisdictions of the multiple states implicated. A conflict approach would both promote and entrench this disharmony of law within the system. Moreover, if conflicts models are to be the solution, we would be well advised to recall their true origins: comity,<sup>132</sup> or not *really* law at all. Thus at bottom, conflict approaches promise only to turn the escalating frequency and importance of

---

131. *Supra* Part III.

132. ULRICH HUBER, DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIIS, reproduced in Ernest Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 376 (1919) ("1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond. 2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof. 3. Sovereigns will so act by way of *comity* that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.") (emphasis added).



transnational disputes into battlegrounds for the conflicting overlapping laws of multiple stakeholders—the resolutions of which would be consigned not to law, but instead to a notoriously capricious courtesy.

## VI. COHERENCE ACROSS COURTS

When it comes to different judicial bodies tasked with applying the same law, a potentially instructive phenomenon is the tendency of different U.S. circuits to try to harmonize interpretations of U.S. federal law. An opening observation, material to fears that fragmentation irredeemably hurts international law's status as "law,"<sup>133</sup> is that these courts are, of course, not always successful. But just because different courts may apply the same law differently cannot in itself delegitimize that law, since this happens to be an inevitable feature of any legal system in which law is administered by more than one court. Nobody would say, for example, that a federal law subject to a circuit split does not count, and function, as law.

And yet there exists a strong norm of uniformity that pervades federal court decision-making and that favors fostering the coherence of federal law throughout the United States.<sup>134</sup> Some circuits have even transformed this norm into doctrine in the form of a presumption of uniformity.<sup>135</sup> The rationale is familiar. To quote Supreme Court Justice Sandra Day O'Connor, "a single sovereign's laws should be applied equally

---

133. See, e.g., Charney, *supra* note 72, at 699.

134. I address counterarguments to my use of this analogy, and the desirability of coherence generally, later in the article. See *infra* Part VII.

135. See *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 31 (1st Cir. 2004) ("A court of appeals should always be reluctant to create a circuit split without a compelling reason."); *Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) ("We decline to create a circuit split unless there is a compelling reason to do so."); *Wagner v. Pennwest Farm Credit, ACA*, 109 F.3d 909, 912 (3d Cir. 1997) ("[W]e would require a compelling basis to hold otherwise before effecting a circuit split."); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) ("Each of these circuit courts carefully analyzed the constitutional questions; in our judgment their reasoning is impervious to further attack and needs no further amplification. Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow . . .").

to all—a principle expressed by the phrase, ‘Equal Justice Under Law,’ inscribed over the great doors to the United States Supreme Court.”<sup>136</sup> Or as Evan Caminker put it, “national uniformity of federal law ensures that similarly situated litigants are treated equally; this is considered a hallmark of fairness in a regime committed to the rule of law.”<sup>137</sup> Further, in a “system of multiple potential venues for dispute resolution, uniformity becomes a practical prerequisite to predictability” as well.<sup>138</sup> The rationale behind and judicial practice of promoting uniformity have extended to interpretations of international law too, and naturally so, since it too purports to be the law of a single system.

In what follows, this Article builds through example a couple of what might be considered coherence methods—in contrast to conflict methods—to help guide decision-makers addressing fragmentation. One is a “presumption of coherence.” Another is a “presumption of catholicity,” that is a presumption toward using as much of the universe of international legal sources and materials available as possible to resolve disputes. The first coherence method’s function largely speaks for itself, though it will be elaborated through case examples. The second coherence method functions mainly as a bulwark against parochial or idiosyncratic interpretations of international law unmoored from and unguided by the full spectrum of international legal materials. In this respect, it contributes to coherence through “integrity,” to use Ronald

---

136. Sandra Day O’Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1985); see also *id.* at 5 (“It is no wonder, then, that one of the Supreme Court’s most important functions—and perhaps *the* most important function—is to oversee the systemwide elaboration of federal law, with an eye toward creating and preserving uniformity of interpretation. . . . I breach no confidence in saying that the most commonly enunciated reason for granting review in a case is the need to resolve conflicts among other courts over the interpretation of federal law.”); see also, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (describing “the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution,” and explaining that in the absence of uniform interpretation of federal law, “the public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution”).

137. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994).

138. *Id.*

Dworkin's term—using faithfully all relevant legal materials to “provide the best constructive interpretation of the community's legal practice.”<sup>139</sup> Or, as Jack Balkin writes, “to make sense of a jumbled mass of [legal materials] and to infer from these a coherent scheme of legal regulation that [the judge] can apply to the case before her.”<sup>140</sup> The two presumptions are symbiotic in that they both press decision-makers to consider the reasoning and results reached by other decision-makers on the same or substantially similar legal issues. The Article then addresses how these methods might work in international decision-making among regimes using the conflicts from the beginning of this Article between the ICJ's and ICTY's different tests for state responsibility and the conflict between human rights law and humanitarian law on what standard governs the arbitrary deprivation of life. Finally, I address critiques of the Article's harmonization desideratum, including critiques from the U.S. system that might extend to its analog in the international system.<sup>141</sup>

#### A. *Presumption of Coherence*

A presumption of coherence urges decision-makers to decide international legal issues in a manner consistent with other bodies that have already addressed the issues and to use, and build upon, those other analyses. It is only a presumption, however, and thus a wrong or incomplete analysis ought not lead a later decision-maker down the wrong analytical path or

---

139. RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986).

140. J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *YALE L.J.* 105, 123, 132 (1993).

141. See Amanda Frost's insightful article questioning the values, and the weights of the values, traditionally assigned to uniformity of federal law. Amanda Frost, *Overvaluing Uniformity*, 94 *VA. L. REV.* 1567 (2008). Her arguments address a number of facets of the uniformity issue in U.S. law, some of which—like the Supreme Court's docket, separation of powers, and original understanding—are not implicated by the present discussion. But she also addresses more general normative arguments about federal uniformity that may be potentially implicated by the present discussion, even if they are not exactly transferrable to the international legal system. I would like to use them, or what I see as their international law variants, below as starting points to address some of the concerns or criticisms my approach may elicit. See *infra* Part VI.C.

to the wrong result.<sup>142</sup> To the contrary, the presumption should force later decision-makers to reexamine both the reasoning and the result of the prior decision, even if it is from another jurisdiction. This process of engagement and reengagement with the *rationes decidendi* of prior decisions comports with systems theory's emphasis on recursive, self-referential dispute resolution according to a common internal logic.<sup>143</sup> It effectively unifies legal analysis across jurisdictions on a shared question of law so that the best or fittest rule prevails. To borrow what seems like a reasonable standard from the federal law context, later decision-makers should not depart from previous decisions absent a "compelling" basis to do so.<sup>144</sup> Ignoring other analyses is thus not methodologically viable; indeed, as proposed below, because of international law's unique nature, a presumption of coherence ought to inquire into both earlier decisions *and* the methodologies those decisions employed. Also, because the law at issue is international law, the universe of legal sources extends to encompass decisions of both national and international decision-makers with appropriate jurisdiction—a point that dovetails with the presumption of catholicity discussed in the next section.<sup>145</sup>

A high profile (and highly contentious) example of this sort of presumption is the Southern District of New York's most recent decision in the epic *South African Apartheid Litigation* under the U.S. Alien Tort Statute (ATS).<sup>146</sup> The procedural history is both labyrinthine and pertinent. In a 2009 order, the S.D.N.Y. held that corporations can be liable for violating international law norms under the ATS.<sup>147</sup> The defendant corporations sought a writ of mandamus in the Second Circuit on

---

142. See, e.g., *Mar. Ins. Co. v. Emery Air Freight Corp.*, 983 F.2d 437 (2d Cir. 1993) (atrophying prior Second Circuit decision that judicially amended the treaty at issue); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (explaining that "unless the earlier decision is authoritative, the court that decides the later case does not discharge its judicial responsibilities adequately by merely citing the earlier decision and following it without so much as indicating agreement with it, let alone analyzing its merits").

143. See *supra* Part V.

144. See cases cited *supra* note 135.

145. See *infra* Part VI.B.

146. *In re South African Apartheid Litig.*, 15 F. Supp. 3d 454 (S.D.N.Y. 2014).

147. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 255 (S.D.N.Y. 2009).

the issue. But while that was pending, the Second Circuit decided *Kiobel v. Royal Dutch Petroleum Co.*, which held that corporations could *not* be liable under the ATS.<sup>148</sup> The Supreme Court granted certiorari in *Kiobel*, initially on the corporate liability question,<sup>149</sup> but then switched course after oral argument by requesting additional briefing and holding a second round of argument on whether ATS claims arising abroad could be brought in U.S. courts to begin with.<sup>150</sup> The Court decided *Kiobel* on the latter basis, holding that ATS claims are subject to a presumption against extraterritoriality that the *Kiobel* claims failed to overcome.<sup>151</sup> At the end of the opinion, the Court indicated that to overcome the presumption, claims must “touch and concern the territory of the United States, . . . with sufficient force to displace the presumption against extraterritorial application.”<sup>152</sup> But again, as to the specific claims in *Kiobel*, the Court noted—in language that became pregnant for lower courts—that “[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”<sup>153</sup>

Given this oblique nod to the possibility of corporate liability under the ATS, the question at issue in the most recent district court opinion in the *South African Apartheid Litigation* was whether, after the Supreme Court’s *Kiobel* decision, the Second Circuit’s holding that corporations cannot be liable under the ATS was still good law.<sup>154</sup>

The resulting district court opinion could not have been more deferential to an emerging trend of corporate liability under international law in the United States. It began with two quotations from other circuits—the D.C. Circuit and the Seventh Circuit—both of which held that corporate liability exists under the ATS.<sup>155</sup> It surely did not hurt that all the other ap-

---

148. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

149. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472, 181 (2011).

150. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012).

151. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

152. *Id.* at 1669.

153. *Id.*

154. *In re South African Apartheid Litig.*, 15 F. Supp. 3d at 457.

155. *Id.* at 455. Indeed, instead of just following the quotation with a citation to the other circuit court of appeals, the opinion names the other circuit judge who authored the opinion, almost making it personal for the Second Circuit to disagree.

pellate decisions agreed with the S.D.N.Y.'s initial assessment of corporate liability; but I want to focus more on the methodology of marshaling formally non-binding rationales and decisions to great effect. The S.D.N.Y. decision also did not grapple with the lack of an extant international law of corporate liability. And in this sense, it presents another interesting question of how international law evolves recursively from non-norm to norm.

Before the S.D.N.Y. could reach the corporate liability issue, it had to find that the Supreme Court's *Kiobel* decision had "called into question" the Second Circuit's prior holding.<sup>156</sup> In an interesting twist, the Second Circuit *Kiobel* opinion's author, Judge Jose Cabranes, weighed in on precisely this issue in an intervening 2014 ATS opinion, *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*<sup>157</sup> Although not necessary to that decision's holding (which disposed of the ATS claims on extraterritoriality grounds)<sup>158</sup> Judge Cabranes nonetheless remarked that "[p]laintiff's claims under the ATS . . . encounter a second obstacle [because] the Supreme Court's decision in *Kiobel* did not disturb the precedent of this Circuit that corporate liability is not . . . currently actionable under the ATS."<sup>159</sup> To counter this remark, the S.D.N.Y. in the *South African Apartheid Litigation* latched onto a (correct) statement from a concurring opinion in *Chowdhury* that Judge Cabranes' remark was dicta,<sup>160</sup> and the Ninth Circuit's decision in *Doe I v. Nestle*,<sup>161</sup> reaffirmed corporate liability under the ATS after the Supreme Court's *Kiobel* decision. Thus, even before reaching the corporate liability issue, the S.D.N.Y. had already demonstrated a willingness to reject the Second Circuit's reasoning by relying on decisions from other circuits.

As to the question of corporate liability under international law, the S.D.N.Y. labeled the Second Circuit's *Kiobel* opinion "a stark outlier."<sup>162</sup> More specifically, the district court explained, "[i]t is the only opinion by a federal court of ap-

---

156. *Id.* at 460.

157. *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014).

158. *Id.* at 49–50.

159. *Id.* at 49 n.6.

160. *In re South African Apartheid Litig.*, 15 F. Supp. 3d at 459.

161. *Doe I v. Nestle*, 766 F.3d 1013, 1021–22 (9th Cir. 2014).

162. *In re South African Apartheid Litig.*, 15 F. Supp. 3d at 461.

peals, before and after [the Supreme Court's decision in] *Kiobel II*, to determine that there is no corporate liability under the ATS."<sup>163</sup>

The district court then undertook an analysis that leaned very heavily on the reasoning of other courts of appeal to determine the existence of corporate liability. Employing the longstanding private international law technique of *dépeçage*, the court separated out the international substantive prohibition on the one hand, from its manner of enforcement on the other, and assigned each a different body of law. While the substantive prohibition derived from international law, its manner of enforcement derived from domestic law.<sup>164</sup> Here the court quoted at length the D.C. Circuit's decision in *Doe v. Exxon Mobil Corp.*,<sup>165</sup> and the Seventh Circuit's decision in *Flomo v. Firestone Natural Rubber Co.*,<sup>166</sup> repeating their respective *dépeçage* analyses. The D.C. Circuit explained that, "[b]y way of example, in legal parlance one does not refer to the tort of 'corporate battery' as a cause of action; the cause of action is battery; agency law determines whether a principal will pay damages for the battery committed by the principal's agent."<sup>167</sup> And the Seventh Circuit noted, "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them," including whether, for example, to hold a corporation responsible for the conduct of its agents."<sup>168</sup>

Moreover, the district court borrowed other circuits' *criticisms* of the Second Circuit's *Kiobel* decision, for instance openly adopting the critique of "Judge Richard Posner of the Seventh Circuit" that "'the factual premise of the [Second Circuit] majority opinion in *Kiobel*—that no corporation has ever been held liable in a civil or criminal case for violations of customary law norms—is incorrect."<sup>169</sup> And, that just because

---

163. *Id.*

164. *Id.* at 462 (explaining the "distinction between a principle of law . . . and the means of enforcing it." (quoting *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011)).

165. *Id.* (quoting *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013)).

166. *Id.* (quoting *Flomo*, 643 F.3d at 1013).

167. *Id.* (quoting *Exxon*, 654 F.3d at 41).

168. *Id.* (quoting *Flomo*, 643 F.3d at 1020).

169. *Id.* at 464 (quoting *Flomo*, 643 F.3d at 1017).

historically there has not been much enforcement of international norms of corporate liability, that does not necessarily wipe out the legal possibility of such liability.<sup>170</sup>

In short, the S.D.N.Y. took advantage of a debatable line in the Supreme Court's *Kiobel* decision and then employed the nonbinding weight of other decisions to overcome a decision, and its reasoning, from the district court's own circuit court of appeals. In so doing, it removed a glitch in the system obstructing coherence, at least within the United States.

Whether this was legally correct I will address momentarily. But foremost for present purposes is that the methodology is instructive of how courts can utilize other jurisdictions' international legal analyses and decisions to cultivate coherence. As to whether the corporate liability conclusion was correct as a matter of international law, that too is effectively a methodological question. A classical international lawyer easily might say the holding was not correct due to lack of state practice and *opinio juris*, as well as the fact that in other areas—like financing terrorism—international lawmaking instruments explicitly provide for corporate liability<sup>171</sup> (*expressio unius est exclusio alterius*).<sup>172</sup> At the same time, if one adopts a more expansive view of how international law is enforced, it does not seem *illegal* to apply international law to corporations.<sup>173</sup> Thus methodologically, if other states, their courts, and international tribunals trend in the direction of corporate liability and adopt the international law-deriving techniques of the S.D.N.Y. and the majority of other U.S. courts, the world may witness, not the birth of corporate liability under international

---

170. *Id.* at 465.

171. See G.A. Res. 54/109, annex, International Convention for the Suppression of the Financing of Terrorism art. 5(1) (Dec. 9, 1999) ("Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a *legal entity* located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.") (emphasis added).

172. I alluded to this argument in my article, Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1102 (2011).

173. I alluded to this argument in an amicus brief to the Supreme Court in the *Kiobel* case and in my short article, based on that brief, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329, 1341–43 (2013).



law, but its actualization. None of this analytical ambivalence is new to international law—for it has always been famously tricky to discern in new areas precisely because state practice and *opinio juris* must start somewhere.<sup>174</sup>

Which leads to the international, multisource nature of the presumption of coherence. Because international law purports to govern everywhere, decision-makers must justify the coherence of their reasoning and decisions within not just their own national or discrete regime jurisdictions, but also within all jurisdictions that have addressed the international legal issue in question. Thus notably, the core argument against corporate liability under international law in U.S. courts has been not that other courts and international tribunals around the world have specifically *rejected* corporate liability under international law (that data would have created incoherence), but simply that there was no, or not very much, decisional law one way or the other.<sup>175</sup> This void left open the possibility of developing the law in a way that characterized corporate liability as an issue of remedies delegated to states' municipal law under established private international law principles.<sup>176</sup> Admittedly, the case law and its evolution occurred in the specific microcosm of U.S. courts, but the methods can be extrapolated to international institutions operating both against and within the same background of customary international law. In both scenarios, we have formally independent decision-makers shaping a law that is both internal and external to their competences. Internal in that they have jurisdiction over the dispute and the governing law, which the court is authorized to dispense; and external in that the pronouncements and dispositions are not binding on other decision-makers outside their jurisdictions faced with the same or similar issues under the same law.

When it comes to decision-makers drawing from legal sources outside their domestic or institutional jurisdictions to address and resolve international legal issues, there are a plethora of examples. For instance, faced with questions of in-

---

174. Cf. *Flomo*, 643 F.3d at 1017 (“There is always a first time for litigation to enforce a norm; there has to be.”).

175. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

176. See *supra* notes 162–74 and accompanying text.

ternational law, U.S. courts routinely rely on treaties<sup>177</sup> and other international instruments,<sup>178</sup> as well as the reasoning

---

177. See, e.g., *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 118–20 (2d Cir. 2008) (concluding that the 1907 Hague Regulations, the 1925 Geneva Protocol, and the Fourth Geneva Convention, among other international sources the plaintiffs relied upon, “do not support a universally-accepted norm prohibiting the wartime use of Agent Orange. . . . Inasmuch as Agent Orange was intended for defoliation and for the destruction of crops only, its use did not violate the international norms relied upon here, since those norms would not necessarily prohibit the deployment of materials that are only secondarily, and not intentionally, harmful to humans.”); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 257–59 (2d Cir. 2003) (concluding that the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the United Nations Convention on the Rights of the Child “do not support the existence of a customary international law rule against intranational pollution”); *United States v. Ali*, 718 F.3d 929, 939, 945–47 (D.C. Cir. 2013) (citing the Vienna Convention on the Law of Treaties to support that “[b]asic principles of treaty interpretation—both domestic and international—direct courts to construe treaties based on their text before resorting to extraneous materials” and the International Convention Against the Taking of Hostages to conclude that plaintiff’s due process rights were not violated); see also *M.C. v. Bianchi*, 782 F. Supp. 2d 127, 130 (E.D. Pa. 2011) (explaining that “[t]reaties may constitute evidence of the law of nations”).

178. See, e.g., *Vietnam Ass'n for Victims of Agent Orange*, 517 F.3d at 122 (noting that the Nuremberg Charter’s article 6 proscription of the “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” is “too indefinite” to violate the norm of proportionality); *Flores*, 414 F.3d at 250–51, 263–64 (citing article 38 of the Statute of the International Court of Justice to define “the proper sources of international law,” but ultimately determining that the plaintiffs’ reliance on decisions from the International Court of Justice and the European Court of Human Rights were insufficient to condemn intranational pollution as a violation of international law); *Ford v. Garcia*, 289 F.3d 1283, 1293–94 (11th Cir. 2002) (holding that article 28(a) of the Rome Statute “reinforces [the court’s] holding that there was no plain error” in giving the jury an instruction regarding command responsibility); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 316–17 (D. Mass. 2013) (relying on the Rome Statute on the International Criminal Court articles 7(2)(g) and 7(1)(h) to define persecution as a crime against humanity and citing the Nuremberg Charter’s article 6(c), the Rome Statute’s article 7(1)(h), and the statutes of the ICTY and ICTR for the proposition that “many of the international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people”); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1155–56 (E.D. Cal. 2004) (citing the Nuremberg Charter to give historical background to how crimes against humanity became recog-

and decisions of international tribunals<sup>179</sup> and other bodies tasked with interpreting and applying international law.<sup>180</sup>

---

nized under international law and the Rome Statute for “the most current definition of crimes against humanity”).

179. See, e.g., *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 739–42 (9th Cir. 2008) (citing various decisions from the ICTY and the ICTR to explain that genocide is a specific intent crime and that “[n]o decision from either tribunal supports [plaintiff’s] contention that genocide requires mere knowledge, or general intent”); *Ford*, 289 F.3d at 1290–92, n.8 (citing decisions from the ICTY and ICTR to conclude that “the command responsibility theory of liability is premised on the actual ability of a superior to control his troops” before explaining the distinction between *de jure* and *de facto* authority. These tribunal decisions led the court to hold that no plain error occurred in giving the jury a command responsibility instruction); *Lively*, 960 F. Supp. 2d at 318–19 (citing *Prosecutor v. Naletilic & Martinovic*, No. IT-98–34–T, Judgment, ¶ 636 (Int’l Crim. Trib. for the former Yugoslavia Mar. 31, 2003) and *Prosecutor v. Nahimana*, Case No. ICTR–99–52–A, Judgment, ¶ 1071 (Dec. 3, 2003) for the proposition that “international courts have interpreted the identity of the group requirement [of a crime against humanity] to encompass persecution of a discrete identity”; therefore, plaintiff “stated a claim for persecution that amounts to a crime against humanity, based on a systematic and widespread campaign of persecution against LGBTI people in Uganda.”); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349343, at \*3–11 (N.D. Cal. Aug. 14, 2007) (granting summary judgment in defendants’ favor, finding that the alleged “violent repression of civilian oil protestors during the 1990s” did not rise to the level of a crime against humanity after analyzing and quoting in depth several cases from the ICTY and ICTR to explain what constitutes a widespread or systematic attack directed at a civilian population for the purposes of a crime against humanity); *Rafael Saravia*, 348 F. Supp. 2d at 1155–56 (citing cases from the ICTY and ICTR as “affirm[ing] the status of crimes against humanity under international law” and to clarify that a single act can constitute a crime against humanity if done in the context of a widespread and systematic attack against a civilian population).

180. See, e.g., *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021–23 (7th Cir. 2011) (where a rubber plantation imposes strict quotas that allegedly induce employees to “enlist their children as helpers,” the United Nations Convention on the Rights of the Child, the International Labour Organization Minimum Age Convention, and the International Labour Organization Worst Forms of Child Labour Convention provide no “crisp rule” to determine whether a violation of customary international law has occurred); *Abagninin*, 545 F.3d at 739 (citing and quoting the Genocide Convention for its definition of genocide as a specific intent crime); *Lively*, 960 F. Supp. 2d at 316 (beginning its analysis with the Human Rights Committee of the United Nations’ definition of “discrimination” as the basis of its discussion of persecution as a “harsher subset of discrimination” that sometimes rises to the level of a crime against humanity); *Ali*, 718 F.3d at 936 (relying on the plain language of the United Nations Convention on the Law of the Sea to

The result is to keep U.S. interpretations largely in line with prevailing views on the content of international law, preserving its overall coherence.

But there is a paradox, illustrated by the corporate liability issue discussed above. International law is not static; rather, it evolves with the shifting practices of states accompanied by *opinio juris*. Accordingly, if the effect of a presumption of coherence were to freeze international law, the presumption would clumsily (and counterproductively) arrest a foundational feature of how international law is made and developed. Thus, coherence does not mean stasis. Rather, it means using the same type of reasoning and methodology to substantiate a legal conclusion backed by common, ascertainable principles.

A constructive example would be stretching international law in new—but analytically consistent—ways. In *Sexual Minorities of Uganda v. Lively*,<sup>181</sup> the District of Massachusetts did just that. Including the persecution of gay, lesbian, bisexual, transgender, and intersex people under the rubric of crimes against humanity, the court pulled not only from U.S. law but also from the “variety of sources . . . used to determine the content of international law: treaties, [and] judicial decisions of the ‘courts of justice of appropriate jurisdiction.’”<sup>182</sup> Chief among them were the Rome Statute for the International Criminal Court (ICC) and other international tribunals’ decisions and reasoning.<sup>183</sup>

The *Lively* court reasoned that although “many of the international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people,”<sup>184</sup> significantly, “virtually all of these instruments provide savings clauses,” which (quoting the Rome Statute), specifically afford inclusion of “other grounds that are universally recognized as impermissible under international law.”<sup>185</sup> To round out the definitional extension to persecution based on sexual orientation, the court

---

determine that “international law permits prosecuting acts of aiding and abetting piracy committed while not on the high seas”).

181. *Lively*, 690 F. Supp. 2d 304.

182. *Id.* at 316.

183. *Id.* at 316–20.

184. *Id.* at 318.

185. *Id.* (citing and quoting Rome Statute for the International Criminal Court art. 7(1)(h)).

noted that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) instruct that the jurisdictional boundaries of the international law against persecution be “interpreted broadly.”<sup>186</sup> Here the court quoted the ICTY directive that “[t]here are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments.”<sup>187</sup> Along with the tribunals’ interpretive admonition that “the boundaries of persecution are almost always defined by those carrying out the persecution against a particular group,”<sup>188</sup> and quoting again the ICTY’s rationale that the perpetrator “defines the victim group while the targeted victims have no influence on the definition of their status,”<sup>189</sup> the court recognized a new—but analytically sound—victim class.

This Section purposefully introduced cases that pushed the international legal envelope to illustrate the presumption of coherence in line with this Article’s larger project of not only evaluating how international law may be understood within a systems view, but also suggesting tools for addressing the flourishing phenomenon of fragmentation. Using shared methodologies as international law grows in new and conflicting ways helps keep the law analytically interconnected, even if some rules fray and shoot off in different directions. And that interconnectedness—a systemically common way of approaching and reasoning through legal problems—seems crucial to the long-term coherence of law.<sup>190</sup>

Couched within the presumption’s actual operation, decision-makers should therefore strive to determine whether a “compelling”<sup>191</sup> basis exists to depart from earlier decisions,

---

186. *Id.* 318 (citing and quoting Prosecutor *v.* Naletilic & Martinovic, No. IT-98-34-T, Judgment, ¶ 636 (Int’l Crim. Trib. for the former Yugoslavia Mar. 31, 2003) (instructing that the jurisdictional limit to prosecute persecution based on race, politics, and religion must be “interpreted broadly”)); Prosecutor *v.* Nahimana, Case No. ICTR-99-52-A, Judgment, ¶ 1071 (Dec. 3, 2003).

187. *Id.*

188. *Id.*

189. *Id.*

190. Harlan Cohen has superbly explained the alternative; namely, how methodological differences in international legal decision-making lead to deeper fragmentation. See generally Cohen, *supra* note 11.

191. See cases cited *supra* note 135.

not just doctrinally but also methodologically. The promised effect is to promote both coherence and doctrinal correctness. As to the latter, if multiple decision-makers repeatedly employ the same methodology to the same or a similar legal dispute, the hope and expectation is that over time the more “correct” decision prevails for the system.<sup>192</sup>

### B. *Presumption of Catholicity*

Cases illustrating the presumption of catholicity—the idea that courts should consult the whole universe of available international legal materials—are legion.<sup>193</sup> As the previous section noted, U.S. courts faced with questions of international law routinely pull from myriad and varied international legal instruments and tribunal decisions.<sup>194</sup> Rather than re-rehearse those examples and recycle those citations, this Section provides an example of a court *failing* to heed the presumption.<sup>195</sup>

Because the presumption is supposed to be a bulwark against idiosyncratic or incomplete interpretations of international law, it too promises to preserve both coherence and correctness over the long term. If a court fails to heed it, the court not only foregoes contributing to the increasingly pervasive project of international law, it also dilutes that law. International law exists and determines outcomes of a great many cases and controversies, some of them incredibly important. A legal system that fails to genuinely engage international law self-sabotages: it foregoes an opportunity to help shape the law in important areas and risks jurisprudential obsolescence. Of

---

192. Cf. Jonathan I. Charney, *Is International Law Threatened By Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 130 (1999) (observing that courts “taking account of decisions by other tribunals” results in “cross-fertilization [that] promotes uniformity in the law and, more importantly, a collective consideration of the legal issues, thus leading to an improvement in the quality of the law”).

193. See *supra* notes 177-80.

194. See *supra* notes 177-80.

195. As a presumption, it can be overcome. Say, a previous case that is more or less exactly on point comprehensively evaluates the relevant international legal materials and persuasively marshals them in its analysis and disposition of the international legal issue. It would not be inappropriate to forego the same extensive analysis and rely on the previous decision’s reasoning and result. Of course, a later court should carefully assess the merit of the earlier analysis and decision, but it need not replicate it.

course the law itself also suffers because of a missed opportunity to refine itself.

*Mamani v. Berzaín* involved, among other claims, ATS claims by survivors of people killed in Bolivia during the civil unrest in 2003.<sup>196</sup> More specifically, the plaintiffs alleged that high-ranking government officials were liable for extrajudicial killings and crimes against humanity under international law.<sup>197</sup> The case came to the Eleventh Circuit on an interlocutory appeal questioning whether the plaintiffs had adequately pleaded their ATS claims under international law.<sup>198</sup> The Eleventh Circuit concluded that they had not, and remanded with instructions to dismiss.<sup>199</sup> Interestingly, the court appended the complaint to its opinion,<sup>200</sup> presumably for all to see how inadequate the pleadings were. Yet ironically, the one hundred and thirty-two paragraph complaint is extraordinarily detailed and, when juxtaposed against the Federal Rules of Civil Procedure's own model pleading forms,<sup>201</sup> looks easily to allege facts sufficient to make out viable claims. It is hard to see slapping the label "legal conclusion"<sup>202</sup> onto a detailed description of an eight-year old girl being shot through the chest by government sharpshooters and crumpling dead next

---

196. *Mamani v. Berzaín*, 654 F.3d 1148 (11th Cir. 2011).

197. *Id.* at 1150–51.

198. *Id.* at 1151.

199. *Id.* at 1157.

200. *Id.*

201. See FED. R. CIV. P. FORM 11 ("Complaint for Negligence. 1. (Statement of Jurisdiction—See Form 7.) 2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff. 3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$\_\_\_\_\_. Therefore, the plaintiff demands judgment against the defendant for \$\_\_\_\_\_, plus costs."); FED. R. CIV. P. FORM 12 ("Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible. 1. (Statement of Jurisdiction—See Form 7.) 2. On *date*, at *place*, the defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove a motor vehicle against the plaintiff. 3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$\_\_\_\_\_. Therefore, the plaintiff demands judgment against the defendant for \$\_\_\_\_\_, plus costs.").

202. See, e.g., *Mamani*, 654 F.3d at 1153 (characterizing the plaintiffs' claims under the Supreme Court's standard in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), as "legal conclusions rather than true factual allegations").

to her nursing mother as anything other than result-oriented.<sup>203</sup>

Also devastating to the plaintiffs' claims was "the indefinite state of the pertinent international law."<sup>204</sup> According to the Court, the international law against crimes against humanity "is not clearly defined"; indeed, to the extent crimes against humanity are "recognized as violations of international law,"<sup>205</sup> the court elucidated, "[t]he scope of what is, for example, widespread enough to be a crime against humanity is hard to know given the current state of the law."<sup>206</sup> What is so remarkable about the Court's international law analysis is that it *fails to cite a single source of international law*. In this regard, the Court's statement that the scope of crimes against humanity "is hard to know given the current state of the law" makes a certain degree of sense if one does not actually look at the law.<sup>207</sup>

Crimes against humanity have existed in international law since at least the Allied Powers prosecuted the Nazis for these crimes at Nuremberg after World War II.<sup>208</sup> In fact, crimes against humanity have since been included in the jurisdiction of virtually every international criminal tribunal in existence, including the ICTY,<sup>209</sup> the ICTR,<sup>210</sup> the Special Court for Si-

---

203. See Complaint ¶ 40, *Mamani*, 654 F.3d 1148. This is but one of many plainly sufficiently pleaded allegations. I also find incredible, for instance, the court's entirely made up alternative explanation for plaintiffs' allegations that [a]fter about an hour of constant firing on the ground, a helicopter arrived on the scene, firing as it flew overhead. The helicopter carried Defendant Sanchez Berzain, who was directing military personnel in the helicopter to fire their weapons. The helicopter flew over the area, circling twice and firing at civilians on the ground before landing in Uni." *Id.* ¶ 69. The court's response: "That the Defense Minister may have been directing military personnel not to fire at uninvolved civilians is consistent with the pleadings about his helicopter directives." *Mamani*, 654 F.3d at 1153.

204. *Mamani*, 654 F.3d at 1150.

205. *Id.* at 1156.

206. *Id.*

207. Anthony J. Colangelo & Kristina A. Kiik, *Spatial Legality, Due Process, and Choice of Law in Human Rights Litigation Under U.S. State Law*, 3 U.C. IRVINE L. REV. 63, 69 n.38 (2013).

208. At Nuremberg, crimes against humanity were defined in Article 6(c) of the London Charter. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279.0.

209. Statute of the ICTY, *supra* note 43, art. 5.



erra Leone,<sup>211</sup> the Special Panels for East Timor,<sup>212</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>213</sup> and the ICC.<sup>214</sup> Moreover, crimes against humanity have made up large portions, and sometimes even the bulk, of the charges and convictions for these courts.<sup>215</sup> Crimes against humanity are, in short, unquestionably part of international law today and there is a vast and meticulous jurisprudence enforcing the international law against them and defining their contours. And while naturally there are areas of definitional debate (as is true of many definitions of crimes, domestic and international), the content of crimes against humanity is quite settled and clear. As Antonio Cassese observed, “[u]nder customary international law the category of crimes against humanity is sweeping but sufficiently well-defined.”<sup>216</sup> There is no doubt, for instance, that murder falls within the definition of crimes against humanity.<sup>217</sup> To be sure, the *mens rea* is even somewhat reduced: according to case law, “it is sufficient for the perpetrator ‘to cause the victim serious injury with reckless disregard for human life.’”<sup>218</sup>

---

210. S.C. Res. 955, annex, Statute of the International Criminal Tribunal for Rwanda art. 3 (Nov. 6, 1994).

211. Statute of the Special Court for Sierra Leone art. 2, Jan. 16, 2002, 2178 U.N.T.S. 138.

212. U.N. Transitional Administration in East Timor Reg. 2001/25, On the Organization of Courts in East Timor, U.N. Doc. UNTAET/REG/2001/25, sec. 9 (Sept. 14, 2001).

213. G.A. Res. 57/228 B, annex, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 9 (May 22, 2003).

214. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

215. Lelia Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 344, 347, 349 (2013) (providing an extensive empirical assessment of crimes against humanity prosecutions by international tribunals).

216. ANTONIO CASSESE, CASSESE'S INTERNATIONAL CRIMINAL LAW 98 (3d ed. 2013).

217. *Id.* at 94.

218. *Id.* (citing decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda); *see also id.* at 98–99 (explaining that “it is sufficient for [the accused] to be *aware of the risk* that his action must bring about serious consequences for the victim, on account of the violence and arbitrariness of the system to which he delivers the victim. Thus, recklessness (or *dolus eventualis*) may be sufficient.”).

Rather than engage a rich and noble international law and jurisprudence on crimes against humanity—a law and jurisprudence the United States itself played a central role in forming—the court in *Mamani* simply decided in conclusory fashion that the complaint was legally defective because the Court had unstudied doubts about the applicable law’s definitional contours. As a result, the court not only failed to contribute to the ongoing project of international law, it diluted and muddied that law through an impoverished and analytically empty discussion. A presumption of catholicity would have counteracted this intellectual indolence by pushing the court to consult the generous universe of international legal materials that substantiate crimes against humanity. More broadly, it would have helped avert the threat to international law’s coherence posed by incomplete and idiosyncratic analyses.

### C. *As Applied to International Decision-makers*

Examples of these types of techniques in international institutional decision-making already exist, indicating that international legal decision-making already leans toward systemic resolutions of conflicts spawned by fragmentation. Indeed, a good example is the conflict between the ICJ and ICTY discussed at the beginning of the Article. Recall that the ICJ had advanced an “effective control” test for determining state responsibility, which the ICTY rejected and sought to replace with a much less demanding “overall control” test.<sup>219</sup> Although the two international courts are formally independent of each other, understanding that they were both engaged in the same basic international lawmaking and law-applying enterprise, the ICTY thoroughly analyzed the ICJ opinion and holding. In so doing, it effectively employed presumptions of coherence and catholicity. It recognized the “authoritative” test set forth by the ICJ, engaged both the result and the reasoning of the ICJ analysis, pulled from an array of international law materials, and arrived at the functional equivalent of a compelling basis to reject the “effective control” test in favor of a more relaxed standard.<sup>220</sup>

---

219. See *supra* Part II.

220. See *supra* Part II.

Opening with the observation that “a high degree of control has been authoritatively suggested by the International Court of Justice in *Nicaragua*,”<sup>221</sup> the ICTY explained both the ICJ’s test and its application, and found it unpersuasive on two grounds. First, the ICJ test was unconvincing “based on the very logic of the entire system of international law on State responsibility,”<sup>222</sup> and second, the test was “at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the *Nicaragua* test was exercised.”<sup>223</sup>

On the first ground, the ICTY delved into a broad conceptual articulation of why the ICJ’s effective control test was inconsistent with the developing system of international law. Specifically, the ICTY noted the system’s “logic . . . to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility.”<sup>224</sup> To be sure, according to the ICTY’s in depth assessment, “the whole body of international law on State responsibility is based on a realistic concept of accountability, which . . . aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.”<sup>225</sup> To hold otherwise would mean that “States might easily shelter behind, or use as a pretext, the internal legal system or the lack of any specific instructions in order to disclaim international responsibility.”<sup>226</sup>

The second, “determinative” ground was that the ICJ test was mistaken because it was contradicted by “international judicial and State practice.”<sup>227</sup> Here the ICTY marshaled state practice and decisions from, among other sources, the Mexico-

---

221. *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, ¶ 99 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

222. *Id.* ¶¶ 116, 117–123.

223. *Id.* ¶ 124.

224. *Id.* ¶ 118.

225. *Id.* ¶ 121.

226. *Id.* ¶ 123.

227. *Id.* ¶ 124.

United States General Claims Commission,<sup>228</sup> the Iran-United States Claims Tribunal,<sup>229</sup> the European Court of Human Rights,<sup>230</sup> and various national courts.<sup>231</sup> In other words, by rejecting the IJC test, the ICTY sought to make the law more coherent in light of the relevant universe of international legal materials, including state practice and decisions from a variety of other courts and tribunals.

Both the ICTY's recognition of the ICJ's "authoritative" test and its capacious engagement with that test, its rationales, and its practical results, illustrate not only how the methodological tools push horizontally situated international decision-makers toward coherence and catholicity, but also how they can bolster the quality of international legal analysis. Again, a presumption of coherence is only that. Where sound legal reasoning backed by the universe of relevant legal materials points in a different direction, decision-makers should follow and advance not only legal coherence but also correctness. That path may involve selecting one rule over another or it may be a more synthetic blend of different approaches. The broader point is that the system does not simultaneously bless multiple rules purporting to govern the same issue. Or, more concretely, the system's decision-makers and observers do not bless multiple rules purporting to govern the same issue by throwing their hands up in resignation to the intellectually seductive incantation of "fragmentation."

Standing in methodological contrast to the ICTY's approach to the splintered law of state responsibility is the ICJ's subsequent riposte, which commenced with an attempt to denigrate the ICTY's legitimacy,<sup>232</sup> and then proceeded to a half-

---

228. See *Stephens v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 265, 266-67 (1927) (Gen. Claims Comm'n).

229. See *Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92, ¶¶ 23, 37, 39, 45 (1987); see also *William L. Pereira Assoc. v. Iran*, 5 Iran-U.S. Cl. Trib. Rep. 198, 226 (1984); *Arthur Young & Co. v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 245 (1987); *Schott v. Iran*, 24 Iran-U.S. Cl. Trib. Rep. 203, ¶ 59 (1990).

230. *Loizidou v. Turkey*, App. No. 15318/89, 23 Eur. H.R. Rep. 513 (1996).

231. See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, ¶ 129 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

232. The ICJ challenged the ICTY's jurisdiction over the question of state responsibility since the latter's jurisdiction was limited to prosecuting certain crimes against international law, see Statute of the ICJ, *supra* note 42, art. 1, and not, as the ICJ complained, "issues of general international law which do

hearted effort to distinguish the ICTY test.<sup>233</sup> Both moves can be viewed as examples that fail to heed the twin presumptions and lead to unsatisfactory decision-making from the system's perspective.<sup>234</sup>

First, although the ICJ acknowledged the ICTY test, rather than give it a degree of deference that might in turn have compelled a full-throated defense of the ICJ's own test, the ICJ tried to dismiss the ICTY test—or, more specifically, the authority of the body that articulated it. This led to a flimsy defense of the ICJ test, one that upon inspection looks entirely tautological and devoid of analytical content. The ICJ first observed that the ICTY “‘overall control’ test has the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.”<sup>235</sup> Consequently, according to the ICJ, the “‘overall control’ test is unsuitable, for it stretches too far, almost to the breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.”<sup>236</sup>

*Why?* The IJC does not defend this position with legal argument and support. The first part of its analysis—that “‘overall control” is a bad test because it broadens the scope of state responsibility—is not itself a legal argument; indeed, it's not

---

not lie within the specific purview of its jurisdiction,” Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 47, ¶ 403 (Feb. 26). Of course, because the ICTY had to determine whether state responsibility existed in *Tadic* in order to prosecute crimes within its jurisdiction, its jurisdiction did necessarily subsume the question of state responsibility. See *Tadic*, Case No. IT-94-I-A, Judgment, at Part IV; *id.* ¶ 80 (explaining that “the international nature of the conflict [which depended upon a finding of state responsibility] is a prerequisite for the applicability of Article 2.”).

233. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 2007 I.C.J. Rep. 47, ¶ 403.

234. I am certainly not the first to identify the IJC's methodological failures. See, e.g., Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447 (2012) (describing circular invention and reinforcement of international law by the ICJ and the ILC).

235. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 2007 I.C.J. Rep. 47, ¶ 406.

236. *Id.*

really an argument at all as much as it is a statement. And it is a question-begging statement at that, since the very question before the ICJ was which test is correct: the ICJ test that limits state responsibility or the ICTY test that adopts a broader view. The second step of the ICJ's analysis—which simply concludes that because an “overall control” test would mean broader liability for states, such a test “stretches too far, almost to the breaking point,”<sup>237</sup> a state's liability for actors under its control—is even less enlightening. Nowhere does the ICJ seek to bolster its conclusions with outside materials and sources as the ICTY did; in fact, nowhere does the ICJ even attempt to engage the sources the ICTY collected in support of the “overall control” test. Instead, the ICJ effectively ignores everything that the ICJ itself did not say, allowing it to find that “settled jurisprudence” had set forth the “effective control” test, the settled jurisprudence here being only the jurisprudence of the ICJ.

Next, the ICJ suggested that the case before it was distinguishable from the circumstances in which the ICTY applied the “overall control” test.<sup>238</sup> Here again the analysis was feeble. In fact, the entirety of the ICJ's analysis consists of a single (very long) sentence, which reads in pertinent part:

[T]hat logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.<sup>239</sup>

This Article of course strongly favors the common law process of analogizing and distinguishing cases, or the idea that like cases should be treated alike and different cases should be treated differently. But while the ICJ indicated that the case the ICTY addressed (which involved determining state responsibility in order to discern the existence of an in-

---

237. *Id.*

238. *Id.* ¶ 405.

239. *Id.*

ternational armed conflict) and the case before the ICJ (which involved a pure question of state responsibility) were distinguishable, it gave no reason—logical, legal, or otherwise—why this should be so. By contrast, the ICTY went to great lengths to explain why the existence of an international armed conflict necessarily hinged upon a determination of state responsibility.<sup>240</sup> Thus if the ICJ in fact felt that the two cases were distinguishable, it passed up an important opportunity to explain why and contribute to the body of recursive reasoning upon which the international legal system's coherence depends. Instead it interposed an analytically unhelpful bump in the road toward long-term coherence that the system will have to smooth out one way or another if it proceeds down that path.

Finally, apart from the ICTY, other international courts also have embraced what look like approximations of the presumptions outlined above. For example, the European Court of Human Rights has repeatedly observed that when interpreting the European Convention on Human Rights, “[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms a part.”<sup>241</sup> In that connection, the Court relied on the Vienna Convention on the Law of Treaties, widely accepted as codifying the international law governing treaty interpretation,<sup>242</sup> which provides what has come to be called the “principle of systemic integration”<sup>243</sup> in Article 31(3)(c). The article instructs that treaties should be interpreted in light of “any relevant rules of international law applicable in the relations between the parties.”<sup>244</sup> Hence some methodological seeds al-

---

240. See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, at Part IV (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

241. *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37, ¶ 36; see also *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, ¶ 55, (interpretation of the Convention “must also take the relevant rules of international law into account”); *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 57 (“The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part.”).

242. See, e.g., *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/s/1/treaty/faqs/70139.htm> (last visited Jan. 17, 2016) (stating that the Vienna Convention on the Law of Treaties “constitute[s] customary international law on the law of treaties”).

243. See *ILC Report*, *supra* note 1, ¶ 479.

244. Vienna Convention on the Law of Treaties art. 30, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

ready exist from which a unitary international legal system may continue to blossom in common law form.<sup>245</sup>

## VII. LIMITATIONS AND CRITICISMS

This Part tries to anticipate and respond to potential critiques, whether in the form of proposed limitations to, or criticisms of, the Article's approach. As to limitations, because of the data used (cases), the previous Part's coherence methods plainly address on the surface judicial-type decision-making, or what might be referred to as a "fragmentation of interpretation"<sup>246</sup> of international law by different interpretive bodies. But fragmentation may run deeper. It may, for instance, result from different lawmaking regimes propagating different rules

---

245. As to conflicts between different areas of law like that typified by the *Nuclear Weapons* case mentioned earlier in the Article, see *supra* Part II, decision-makers may contribute to systemic coherence via common law methods of analogizing and distinguishing; that is, treating like cases alike and different cases differently. LUHMANN, *supra* note 84, at 218. In the *Nuclear Weapons* case the ICJ found that both international human rights law and international humanitarian law applied in times of war, even though the different laws prescribed different standards governing the arbitrary deprivation of life. See *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25. The ICJ resolved the conflict between them through a formal technique tentatively embraced by the *ILC Report—lex specialis*—or the canon that the more specific law applies over the more general. *ILC Report*, *supra* note 1, ¶ 119. As the ICJ explained, "[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." *Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25. As noted earlier, see *supra* note 65, to the extent these types of formal technique may resolve conflicts within a single system, they are in principle consistent with the overall thesis of this Article. Yet they still pit two equally powerful laws against each other and stimulate a host of on-the-ground methodological problems for actual decision-makers—as the ILC Report itself acknowledges—such as: "How does a particular agreement [treaty] relate to the general law around it? Does it implement or support the latter, or does it perhaps deviate from it? Is the deviation tolerable or not?" *ILC Report*, *supra* note 1, ¶ 119. Rather than wrestle with such difficult top-down interpretive questions of how different laws may or may not fit together in the abstract, an easier and more organic approach would be to simply differentiate a theater of war from peacetime by distinguishing it factually as a "not alike" case via common law reasoning. Such an approach is also more faithful to system theory's affection for the common law's recursive, iterative process of dispute resolution. See LUHMANN, *supra* note 84, at 228.

246. See Cohen, *supra* note 52, at 388.



that nonetheless concurrently purport to regulate the same activity.<sup>247</sup> And these rules may themselves draw deeper still from different conceptions of what types of source materials make up the relevant international law.<sup>248</sup> This Article's use of case illustrations to begin devising tools to assist the coherence of international law in no way intends to ignore these other strains of fragmentation; and neither does it mean to minimize the different complexities and challenges other forms of fragmentation may present for different international law- and decision-makers going forward.

But this Article's primary project is to introduce a new way of thinking about fragmentation, not to comprehensively solve it in one fell swoop. (Indeed, a driving theme of the Article is that resolution of fragmentation will be a recursive, incremental process growing out of the system's cumulative adaptation to an ever-expanding international law administered by a proliferating number of bodies.) Yet while the answer to how international law will resolve varying and complex levels of conflicts in favor of coherence is beyond the prescience of this author, I believe the presumptions outlined in the previous Part offer a fertile starting point—and one that is not necessarily limited to judicial or quasi-judicial decision-makers. That is, stimulating awareness and consideration of how and why other international decision-makers resolve similar or related issues is not only, or does not need only to be, the province of judges but also may occupy principal regulatory and other bodies, whether on a technical, doctrinal, or even jurisprudential level. It may well require some rethinking about how certain regulatory bodies typically function. But that's the point. As is the critical and compulsory duty of determining what is alike and what is unlike; a process that again reifies and refines “the unity of the legal system.”<sup>249</sup>

As to potential criticisms, probably the most obvious is that the approach is simply wrong: it fails effectively to describe the present international legal system and duly offers up

---

247. See, e.g., the discussion of the *Nuclear Weapons* case immediately above at note 245.

248. Cohen, *supra* note 52, at 384–88. Cohen calls these types of fragmentation “Fragmentation of Regulation” and “Fragmentation of the Legal Community,” respectively.

249. LUHMANN, *supra* note 84, at 218.

unsuitable prescriptions for conceptualizing and handling fragmentation going forward. This objection essentially reprises the admonition cited earlier in the Article to “abandon every hope.”<sup>250</sup> And, within the scope of the Article’s argument, there is not much more to say in response. International law either is a unitary system that pursues coherence over the long run, or it is not. For the rule of law and justice reasons already elaborated, this Article argues for the view that the international legal system is, or at least strives to be, a unitary system and should be treated as such by decision-makers tasked with making, interpreting, and applying international law.

Unitary systems seek coherence, and coherence both strengthens the law and makes it more operationally effective. The alternative—a fragmented international law increasingly pulled apart by centrifugal special interest forces—is more likely to trap its subjects in a cobweb of conflicting rules and interpretations. The law not only fights itself on an abstract and doctrinal level, it also fails to guide behavior as successfully as it otherwise might because its dictates point in many, perhaps contradictory, directions at once. A law that becomes both elusive and paralyzing is not much of a law.<sup>251</sup> Which is why the methods proposed in the previous Part promote coherence and not just coordination.<sup>252</sup>

Another species of critique might question the desirability of coherence as opposed to coordination among multiple specialized regimes. In strong form, the argument could comprise a cluster of sub-arguments about specialization and even legitimacy since there may be a more direct and transparent line running from a given rule of international law to the relevant legal community, be it comprised of states or other entities,

---

250. Fischer-Lescano & Teubner, *supra* note 30, at 1017.

251. See, e.g., Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the Rule of Law?*, 22 EUR. J. INT’L L. 315, 338 (2011) (the rule of law “secure[s] individual freedom by providing a predictable environment in which individuals can act freely, plan their affairs, and make their decisions”).

252. At this point, one might object more fundamentally that if international law fails, too bad for international law. It failed, or got “fragmented.” Why defend international law in the first place? The answer is that international law “works” in large part because a great many questions of possible inter-state conflict simply do not arise because they already have been “settled” by international law.

subject to that rule.<sup>253</sup> Take a specialized treaty regime. Suppose its specialty is the law of the sea, or international trade, or nuclear nonproliferation—it doesn't matter. We would expect that each of these regimes would come up with the more thoughtful and relatively optimal rules of international law in that area compared with other international lawmaking apparatuses given the regime's expertise. Moreover, states party to that treaty regime have formally agreed to it, largely extinguishing objections that they unfairly had no hand in the making of the international law at issue or that that law is being imposed on them by external forces masquerading as the international legal community.

These are meritorious points, to be sure. But they tend to ignore that regimes are not operating in a legal vacuum—that there is, in fact, a vast network of international law that the regime's rules interact with. A regime that myopically develops rules with only its own special interests in mind risks encroaching upon or trampling other rules of international law. I certainly wouldn't be the first to suggest that international regimes almost pathologically exhibit jurisdictional creep and harbor imperial ambitions. And, although such rule predation may not always be purposeful, it nonetheless places actors subject to multiple sets of laws in difficult and maybe even impossible positions when it comes to compliance with "the law," broadly conceived.<sup>254</sup> I should also say that we are not talking about *all* law in a diverse and pluralistic world, including domestic laws that may well reach across borders. Rather, we are talking about a particular—indeed, exceptional—law that governs issues that command international, not just parochial, attention. The great bulk of law in the world remains in the hands of individual states or communities. But when it comes to those issues that so interest all states that they've become matters of international lawmaking, coherence should win out. An imperfect but instructive analogy is to state and federal lawmaking in the U.S. system. We are quite content to leave large swaths of law to the local preferences of states, but some areas command federal attention to preserve the union. And while the U.S. system's allocation of these areas is more top-down (a Constitution formally enumerates them) than international

---

253. For the inspiration of these points, see *supra* note 141.

254. See generally Colangelo, *Conflicts of Law*, *supra* note 11.

law's more bottom-up approach, the same principles resonate. Once something has been elevated to the level of federal law, diverse stakeholders must reach a compromise so that the law is uniform across the land to preserve the national system. Similarly, once something has been elevated to the level of international law—and that law “claim[s] a global validity” for itself<sup>255</sup>—diverse stakeholders also should reach a compromise so that the law is uniform across the globe to preserve the international system.

Circling back to specialized regimes, international law is faced with the same justice tradeoff discussed earlier in the Article between equality and advancing community values and preferences. The relevant community is the specialized regime, and if its rule is advanced at the expense of another competing rule of international law, like cases are not treated alike. Alternatively, like cases could be treated alike but the regime's preferred rule is sacrificed as collateral damage. The only way out of this apparent quagmire of injustice is for the law to strive toward coherence so that both community values are advanced *and* like cases are treated alike, fostering more predictability as well. It may involve compromises to conform to the broader schema of international law, but those compromises serve a larger normative commitment: justice.

### VIII. CONCLUSION

Fragmentation presents international lawyers, scholars, and decision-makers with what looks like an existential threat—theoretically, doctrinally, and practically. Do we abandon every hope of a unitary system and settle for managing divergent rules through conflict of laws methodologies, or do we fight for the international legal system's coherence?

This Article draws from systems theory and its fulcrum concept of autopoiesis to defend the view that international law is a unitary system and, rather than posing an existential threat, fragmentation may paradoxically be a growing pain in the system's long-term maturation. The Article then proposes two methodological tools for decision-makers seeking to advance the project of a unitary international legal system: a presumption of coherence and a presumption of catholicity. In

---

255. Fischer-Lescano & Teubner, *supra* note 30, at 1009.

combination, these tools aim to promote both legal coherence and correctness without the compromises in justice that invariably attend true conflict of laws disputes and the methodologies that resolve them. The objectives these tools seek are not just academic. To the contrary, they have major consequences for the increasing number of real world actors brought into the fold of international law's rules as the law itself grows at an amazingly fast rate, catalyzed in large part by unprecedented advances in technology and communication. In the end, the more coherent the system is, the better it will be—both operationally and normatively—at resolving a mounting and complex palette of novel international disputes.

