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Finding International Law, Part II: Our Fragmenting Legal Community

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FINDING INTERNATIONAL LAW, PART II: OUR FRAGMENTING LEGAL COMMUNITY

HARLAN GRANT COHEN*

Is there an “International Community”? This Article suggests that there is not, that the oft-discussed fragmentation of international law reveals that there are in fact multiple overlapping and competing international law communities, each with differing views on law and legitimacy.

This Article reaches this conclusion by taking a fresh look not only at the sources of fragmentation, but at the sources of international law itself. Building on earlier work rethinking international law’s sources and drawing insights from legal philosophy, compliance theory, and international relations, this Article takes a closer look at three areas that have challenged traditional interpretations of international law: (1) human rights, (2) global administrative law, and (3) the law applied by international tribunals. What it finds is that the challenges posed by each area run much deeper than doctrine; in fact, in each area a new legal community has formed that no longer shares traditional international law’s understanding of legitimate lawmaking. These legal communities no longer recognize a single, unifying doctrine of sources.

Such a realization puts conflicts over international law in a new light. To the extent that debates between human rights and international humanitarian law or trade law and the environment represent debates over the standards for legitimate lawmaking rather than conflicts over interpretation, doctrinal fixes will never fully resolve them. Instead, they must be viewed as true conflicts of law; resolutions must mediate between the overlapping demands of different legal communities.

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I. INTRODUCTION

The potential fragmentation of international law has garnered a great deal of attention over the past ten years. International law's rapid expansion into almost every area of human affairs paired with the seemingly sudden proliferation of international tribunals, courts, and interpretative bodies has led to increased disagreement over international rules and increasingly divergent decisions on international law obligations. The absence of obvious or agreed-upon mechanisms for resolving these disputes has threatened to tear international law apart at the seams. Finding a way to keep the fabric of international law whole or to mend the tears once they have formed has become a practical and scholarly obsession,¹ resulting most notably in a report from the International Law Commission.²

1. See, e.g., Symposium, *The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems*, 41 N.Y.U. J. INT'L L. & POL. 755–1012 (2009); Symposium, *Diversity or Cacophony: New Sources of Norms in International Law*, 25 MICH. J. INT'L L. 845 (2004); Symposium, *The Proliferation of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

2. U.N. Int'l Law Comm'n, *Report of the Study Group on the 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) (finalized by Martti Koskenniemi) [hereinafter, U.N. Int'l Law Comm'n, *Fragmentation Report*].

Most of these responses have cast the fragmentation of international law in doctrinal or technical terms.³ Human rights bodies, trade and investment tribunals, regional courts, and a myriad of other international actors disagree on the meaning of particular treaties or international law rules, the relationship between them, and who should have the authority to interpret them. Some of these disagreements, like those over the detention and targeting of alleged terrorists or the availability of generic drugs in poor countries, have become quite bitter. But the assumption has always been that these actors agree on more than they disagree, that they are part of a single international law community, that they are following the same set of rules (even as they disagree on their exact interpretation). Whatever disagreements they may have over interpretation, it is assumed that they agree on the basic doctrine of sources. These assumptions are shared by both those concerned about fragmentation, who suggest doctrinal tweaks designed to reconcile opposing views,⁴ and those who embrace fragmentation, who suggest that the best rules for all will emerge from competition between fora.⁵ Moreover, despite

3. See, e.g., Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law*, 1 EUR. J. LEGAL STUD. 1 (2007) (analyzing "fragmentation" in doctrinal terms). There are exceptions, most notably, Gunther Teubner, who has argued that fragmentation reflects debates between normative communities, a conceptualization that this paper echoes. See Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 5 MICH. J. INT'L L. 999 (2004); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 449–53 (2003) (describing the role of domestic judge-made doctrines as contributing to fragmentation).

4. See, e.g., Jörg Kammerhofer, *Systemic Integration, Legal Theory and the ILC*, 19 FINNISH Y.B. INT'L L. 157 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534086 (discussing the technical approach of the International Law Commission); Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. INT'L L. 1159 (2004) (suggesting a broader role for the International Court of Justice). Many approaches to fragmentation are primarily concerned with how different adjudicatory bodies should treat the decisions of other bodies and deal less with the substantive disagreement between those bodies than with the types of deference or comity they should show each other. These approaches arguably remain agnostic about the nature of the disputes in question.

5. See, e.g., William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 970 (2004) ("On the positive side, however, the inter-

their differences, international actors portray themselves in much this way, as all beholden to the same traditional rules of international law. Human rights bodies and advocates describe new rules in traditional terms; “instant custom” is explained in terms of state practice and *opinio juris*.⁶ International courts hew closely to the structure of the doctrine of sources in their opinions, even when the rules they identify seem difficult to defend in those terms. And scholars of Global Administrative Law are careful to note that under the traditional doctrine of sources, many of the private rule-making systems they study are not international law at all.⁷

But what if these assumptions are wrong? What if fragmentation reflects disagreements that run far deeper than even the actors themselves are ready to admit? This Article argues that rote statements of fealty to the doctrine of sources actually mask inherent disagreements over the nature and source of legal obligations. In an earlier article,⁸ I argued that

national legal system is denser, more active, and arguably more important than ever before.”); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411, 448 (2008) (“It is entirely possible that, after an initial period of competition in a particular substantive area, coherent rules will emerge.”); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT’L ECON. L. 273, 366 (2006) (“Competing jurisdictions among courts, as well as academic criticism of introverted domestic judgments disregarding the international obligations of the country concerned, may contribute to improving the quality and overall consistency of judicial reasoning.”); Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT’L L. & POL. 959, 967–68 (2009) (discussing the benefits of cross-interpretation).

6. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 762 (2001) (describing the problem of instant custom and suggesting a way to reconcile it with international law doctrine).

7. Sabino Cassese, *The Globalization of Law*, 37 N.Y.U. J. INT’L L. & POL. 973 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L. 187 (2006); Benedict Kingsbury et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1 (2005) [hereinafter Kingsbury et al., *Global Governance as Administration*]; Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (2005).

8. Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65 (2007).

the traditional doctrine of sources had become outdated, that a better description of the rules treated as law in the international system would strip away the formal categories of treaty, custom, and general principles, and ask instead how and why particular rules come to be treated as law. Drawing on compliance theory, I argued that rules come to be treated as international law in one of two ways: Either (1) the rule itself can be internalized, or (2) the rule can be legitimated by agreed-upon, internalized, law-making or process rules. The goals of a revised doctrine of sources should be to identify the internalized legitimacy rules of the system and test suggested “laws” against them.

Refocused through this lens, fragmentation begins to look different. Instead of debates over doctrine, many of these debates look instead like debates over the very processes and principles necessary for law creation. This Article looks at three areas that have challenged traditional interpretations of international law: (1) human rights, (2) global administrative law, and (3) the law applied by international tribunals. It argues that in each, new views of legitimate rulemaking appear to be emerging. A single international law community is being replaced by separate, overlapping legal communities with significantly different views of law and legitimacy. In H.L.A. Hart’s terms,⁹ these diverging communities no longer share the same secondary rules. This Article tries to identify the emerging legitimacy rules in each of these diverging communities.

Recognizing that these debates are debates between legal communities rather than within one transforms attempts to resolve them. To the extent that debates between human rights and international humanitarian law or trade law and the environment represent debates over legitimacy rather than conflicts over interpretation, doctrinal fixes will never fully resolve them. Such debates must instead be viewed as true conflicts of law; resolutions must mediate between the overlapping demands of different legal communities. In a sense, viewing conflicts over international law this way recasts the fragmentation within international law as part of much larger problems in transnational governance. Alongside the problem of fragmen-

9. H.L.A. HART, *THE CONCEPT OF LAW* 79–92 (2d ed. 1994) (discussing the distinction between “primary” and “secondary” rules).

tation within international law, scholars have also struggled to reconcile international law with a range of competing transnational and national legal systems, transnational regulatory networks, and private international organizations.¹⁰ Methods used to describe and resolve those conflicts, for example, legal pluralism,¹¹ may be used on conflicts within international law as well.

The Article will proceed in three parts. Part II argues for a fresh look at the doctrine of sources of international law. Its approach is multi-theoretical, finding the ingredients of this new account already present in a series of theories aimed at how international law works, when and why states and other actors comply, and the nature of law. Each suggests an account of international law doctrine that does not completely comport with the traditional doctrine of sources. Tying

10. Perhaps confusingly, conflicts between these different regimes, of which *Medellín* between the United States and the ICJ, *Yahoo!* between France and the United States, and possibly *Kadi* between Europe and the UN, are all high-profile examples, are also sometimes referred to as fragmentation. See, e.g., Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1151, 1183 (2008) (discussing fragmentation in the context of *Medellín*); Carmen Draghici, *Suspected Terrorists' Rights Between the Fragmentation and Merger of Legal Orders: Reflections in the Margin of the Kadi ECJ Appeal Judgment*, 8 WASH. U. GLOBAL STUD. L. REV. 627, 629 (2009) ("The significant shift in jurisprudence signaled by the *Kadi* judgment is the starting point for new reflections on the fragmentation and merger of the legal phenomena in the post-modern world, and on the place of human rights and the rule of law principle in the value system of the international community."); Andreas L. Paulus, *The Legitimacy of International Law and the Role of the States*, 25 MICH. J. INT'L L. 1047, 1052, 1054–55 (2004) (reflecting on *Yahoo!* and fragmentation); see also Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159–60 (2007) [hereinafter Berman, *Global Legal Pluralism*] (discussing the three cases); Ruti Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 FORDHAM L. REV. 667 (2008) (same). These conflicts, however, arise from self-consciously different legal regimes, and although they may reflect the "fragmentation" of regulation, they do not undermine the uniformity of international law itself. Such conflicts are probably better termed "competition" rather than "fragmentation." *Kadi* is the one exception, straddling the line between a traditional conflict between two regimes, the E.U. and international law, and one within international law itself.

11. See, e.g., Berman, *Global Legal Pluralism*, *supra* note 10; Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007) [hereinafter Berman, *Pluralist Approach*]; Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1105 (2005) [hereinafter Berman, *Conflict of Laws*].

threads together from these various theories, this Part suggests that international law should best be seen as a combination of two sets of rules. The first set includes rules, both substantive and procedural, that are directly internalized by international actors. Among other things, these internalized rules define the standards of legitimacy against which future rules are to be judged. The second set includes rules adopted and legitimated through processes laid out in the first set of rules.

Part III describes three areas of international law that pose problems for the traditional doctrine of sources: (1) Human rights law, where actors seem to have coalesced around rules regarding customary international law, treaty interpretation, and reservations that appear to be in tension with more traditional doctrine, (2) tribunal-centered law, in particular, international criminal law and trade/investment law, where despite protestations to the contrary, precedent seems to be taking a central role, and (3) global administrative law, where public law principles seem to be taking hold in the absence of any traditionally binding international law. Part III then looks at each through the lens of a revised doctrine of sources, asking what appear to be the legitimate lawmaking rules that undergird each area. Part III concludes that in each area, a specific normative-legal community has refashioned the legitimacy rules of the system, in essence seceding¹² from the unified vision of the traditional doctrine of sources.

Part IV explores the ramifications of taking this approach. Many prior approaches to fragmentation have assumed that the problem was primarily a jurisdictional one—with so many bodies interpreting the rules and no appellate review, differences in interpretation were inevitable. Based on that assumption, those approaches sought doctrinal tie-breaker rules,¹³ doctrinal tweaks that could reconcile opposing rules, or jurisdictional management rules that suggest how courts should react to each other's rulings.¹⁴ To the extent, however, that de-

12. Although in truth, they may not see it that way. Arguably, at least in the human rights context, the goal is to apply those new norms of legitimacy to international law as a whole.

13. See Kammerhofer, *supra* note 4; Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 98 (2009) (using U.N. Charter as trump in disputes).

14. See, e.g., Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands*, 25 MICH. J. INT'L L. 903, 904 (2004)

bates over international law rules can be traced to deeper conflicts over legitimate rule making, these solutions miss the point. A doctrinal tweak may be able to paper over the differences, but given the depth of the underlying disagreements, they are unlikely to stay long under wraps. A more lasting solution would have to recognize the different communities involved in disputes and the trade-offs between community interests at stake. This Part ends by suggesting and evaluating some of the conflict rules that might be used.

II. A FRESH LOOK AT THE SOURCES OF INTERNATIONAL LAW

Most discussions of fragmentation start by looking at its results, working from there to try to discover ways to lessen its impact or to mediate disputes. They describe the symptoms and manage their relief. This Article takes a different tack. It starts by exploring the concept and the sources of international law in an effort to find the root causes of fragmentation. The hope is that in finding the root cause we will better be able to diagnose the disease.

A. *Rethinking the Doctrine of Sources*

Given the constant conflicts over almost every aspect of international law, the doctrine of sources' stability over the past hundred years is nothing short of remarkable. The list of sources—treaties, custom, and general principles—catalogued by Lassa Oppenheim in his 1905 treatise¹⁵ and eventually codified in the statutes of the Permanent Court of International Justice¹⁶ and its successor the International Court of Justice

(arguing that “the specialized institutions should continue to make and enforce their specialized law, but in doing so they should also take account of general international law and the law made in other institutions,” and concluding that “[i]f all fora were to follow this approach, fragmentation and unity of international law could go hand in hand and, when it comes to law-enforcement, conflicting rulings could largely be avoided”); Martinez, *supra* note 3, at 449–53; cf. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791 (1999) (considering a more robust role for the ICJ in resolving disputes over international law).

15. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 20–25 (2d ed. 1912).

16. Statute of the Permanent Court of International Justice art. 38, Dec. 16, 1920, 6 L.N.T.S. 379.

(ICJ),¹⁷ continues to serve as the focal point for discussions of international law. Students are taught to apply it,¹⁸ practicing lawyers build their arguments around it, and scholars debate its meaning. Together with a series of other traditional rules like *pacta sunt servanda* or rules regarding treaty interpretation, these rules form the generally agreed upon core of international law doctrine.

The doctrine of sources plays a complex role in international law. It is at one time a purported description of the rules followed by states, a rule of decision for international courts, a catalogue of legitimate forms of international law-making, and a theory of international legal legitimacy. To some, the doctrine of sources represents international law's "rule of recognition"¹⁹ or its "secondary rules"²⁰ more generally. To be sure, debates abound over the meaning of almost every aspect of the doctrine—how much practice must one see to find a rule of customary international law, what counts as practice, whose practice matters, what are "general principles"—but even in those debates the overall authoritativeness of the doctrine goes unquestioned.

Given the centrality of the doctrine, it might seem strange or presumptuous to question it here. But in reality, the doctrine's authority rests on very thin ice. There are serious rea-

17. Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

18. See, e.g., LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 56–57 (4th ed. 2001) (presenting the statute as a starting point of instruction in an International Law casebook); MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 20–21 (2d ed. 2001) ("An ordinary starting point for international lawyers from most any part of the globe when thinking about the formal sources of international law is Article 38 of the International Court of Justice."); HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* 232 (4th ed. 1994) (quoting the statute and commenting that "[t]his list has significance not only for tribunals but also for officials or scholars pursuing the inquiries described above").

19. Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1072 n.208 (1999) ("Article 38 contains the functional equivalent of rules of recognition recognized by Hart to be indispensable to any legal system.").

20. See, e.g., Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT'L L. REV. 275, 299 (2008) ("The secondary rules of the international legal order would thus be the sources doctrine.").

sons to doubt the continued accuracy of the traditional doctrine. Unlike a constitution, which might reflect an initial commitment to certain lawmaking rules and serve as the authority for later laws in a particular system, the doctrine of sources did not predate international law and is not the authority on which international lawmaking rests. Instead it is a description, a snapshot of how international law appeared to function at a particular moment in time, in this case, the turn of the twentieth century. Much about both the world and international law has changed since then, and the continued accuracy of that picture cannot be assumed.

Of course, all of this is academic if contemporary international law actually looks like the description in article 38 of the ICJ Statute. Supporters of traditional doctrine would likely argue that international practice has coalesced around the sources, processes, and theories implicit or explicit in the doctrine of sources. Right or wrong at its inception, they might argue, the doctrine has created reasonable expectations of what the law is and imbued the international laws made through its processes with a high degree of legitimacy. But this does not appear to be the case.²¹ Changes in the international system and international legal theory have put enormous pressure on the doctrine. The massive influx of new states into the system has put enormous pressure on the generalized consent envisioned by the doctrine's description of customary international law. Retaining the doctrine has required watering down notions of "general practice" and implied consent almost to a nullity.²² While one might reasonably have looked for the state practice of the handful of European and other "civilized" states listed by Oppenheim, looking at the practice of two hundred seems impractical if not impossible. Similarly, consent of the new states to the already existing rules has had to be assumed or imagined, lest those rules immediately be called into doubt.

Scholars and practitioners have similarly struggled to reconcile the individual rights orientation of human rights law

21. I make a fuller case in favor of rethinking the doctrine of sources in Cohen, *supra* note 8.

22. Cf. Curtis A. Bradley & G. Mitu Gulati, *Withdrawing from International Custom*, 120 *YALE L.J.* 202 (2010) (arguing that a fuller notion of unilateral intent and disregard of custom can be found in the history).

with the state-centric list of sources and to explain how customary human rights law prohibiting practices like torture can be reconciled with significant state practice to the contrary.²³ Rapidly developing norms in human rights,²⁴ environmental law,²⁵ and international criminal law²⁶ put pressure on a description of custom that seems to require slow development.²⁷ New phenomena—non-binding but authoritative statements of international organizations, agreements between sub-state units or actors, and the increasingly law-like nature of rules adopted within corporate and NGO communities—are stuffed into old doctrinal boxes; when they simply can't fit, they are defined out of international law. And it is difficult to locate well-accepted notions of *jus cogens* and non-derogable norms in the doctrine or to reconcile their existence with the doctrine's model of laws made through state consent.²⁸

All these pressures on the doctrinal strength of the doctrine of sources have been mounting at a time when international legal theory seems to be moving away from the state-consent-centric explanations of international law and away from formal, top-down sources like treaty and custom. Increasingly trying to understand when and how states come to comply with international law, theorists have increasingly eschewed analysis of formal legal rules, instead looking at dynamic processes of norm transfer or behavior shaping. Ignoring questions about state consent, these theorists and researchers instead look to other mechanisms—how embeddedness in international regimes can encourage cooperation between

23. Roberts, *supra* note 6, at 764.

24. *Id.* at 762.

25. DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 191–204 (2010).

26. Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 *IND. L. J.* 1063 (2011).

27. Andrew T. Guzman, *Saving Customary International Law*, 27 *MICH. J. INT'L L.* 115, 157–59 (2005); Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 513 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983).

28. See Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE J. INT'L L.* 331, 340 (2009) (“When pressed, however, positivists struggle to reconcile this custom-based theory of jus cogens with actual state practice.”).

states,²⁹ how states and state officials come to be socialized into a world community that emphasizes certain types of behavior,³⁰ how transnational activist communities build cross-state networks to push states to agree to and follow certain rules,³¹ how international law rules come to be internalized, shaped, and enforced by domestic actors,³² or how international rules are transferred between international networks of officials, bureaucrats, and judges.³³ Rather than focusing solely on states, these theorists increasingly look at the juris-generative activities of other actors—bureaucrats, judges, activists, interest groups, NGOs, corporations, and civilians.³⁴

Thus from both a practical and theoretical standpoint, it seems that a fresh look at the sources of international law is in order. But what would such a fresh look comprise? A good place to start is to look at various theories that have arisen to answer other questions about international law, including theories regarding compliance, theories designed to explain non-technically legal phenomena like “soft law,” and theories designed to explain norm conflict across regimes like global legal pluralism. Each holds hints at what actually counts as law in the international system—ingredients for a new doctrine of sources. There are, of course, dangers in transplanting observations from these theories to a theory of sources. One, for example, should not equate when states comply with what rules count as law. But looked at carefully, these alternative theories can begin to illuminate the mechanisms through which rules come to be seen as law at all.

Many of these theories focus on the ways in which norms are transferred across the international system and internalized by states and other actors. Others of these theories focus on when particular rules will be seen as more legitimate. In a

29. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

30. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004).

31. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

32. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998).

33. ANNE-MARIE SLAUGHTER, *NEW WORLD ORDER* (2004).

34. *See supra* notes 29–33.

prior article,³⁵ I looked specifically at two such theories, Harold Koh's Transnational Legal Process³⁶ and Thomas Franck's Law as Legitimacy.³⁷ I argued that read together, the two theories suggested that international rules come to be treated as law in one of two ways. First, some rules will be directly internalized by international actors. Although some of these rules will be substantive—states may internalize a prohibition on genocide or slavery, others which we might term “legitimacy rules,” will focus more on process—they may explain what counts as a binding agreement, what evidence is needed to legitimate a customary practice as law, or dictate when such an agreement must be followed. Such legitimacy rules would include a combination of “process rules”—rules articulating the process that must be followed to enact or change rules, and “process values”—qualities rules must meet in order to be legitimate law.³⁸ Essentially these internalized legitimacy rules provide standards against which purported rules of international law will be judged.

A second category of rules treated as international law, “legitimated rules,” builds on this first one. Rules in this category are treated as law because they meet the standard of internalized legitimacy rules. Thus, as an example, some human rights may be treated as international law because those rights have simply been internalized, while others may be treated as

35. Cohen, *supra* note 8.

36. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Koh, *supra* note 32.

37. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988).

38. In my prior article, I argued that these process values might include qualities like determinacy, pedigree, coherence, and adherence that Franck has identified as factors leading to “legitimacy pull.” Cohen, *supra* note 8, at 112–13. Such process values may also include factors associated with Lon Fuller's internal morality of the law. See JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 25–26 (2010); Benedict Kingsbury, *International Law as Inter-Public Law*, in NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 167, 176 (Henry S. Richardson & Melissa S. Williams eds., 2009) [hereinafter Kingsbury, *International Law as Inter-Public Law*].

international law because they're embodied in a document that meets internalized standards of legitimacy.³⁹

Under the traditional doctrine of sources, the test applied to any purported international law rule is a formal one—is it a treaty, a custom, or a general principle of law? A revised doctrine of sources suggests a much more functional test. For any given purported international law rule, the question will be two-fold. First, has the rule itself been internalized/do actors treat the rule as in itself legally binding?⁴⁰ Second, if not, has the rule been adopted through legitimate processes?

As I have explained in much greater depth elsewhere,⁴¹ such a reconceptualization has the advantages of more accurately capturing international practice, better capturing the ways theory tells us rules come to be accepted as law, eliminating clumsy boundaries between treaty, custom, and other potential sources, and recognizing the dynamic nature of legal rules, i.e., that the legal status of rules can change over time, regardless of the form (treaty, custom, or something else) they take. Even legitimacy rules can change over time. This reconceptualization also dovetails well with various broader theories of law, in particular, that of H.L.A Hart.⁴² By looking beyond the formal sources of Article 38, it echoes Hart's sociological approach to law. The question both here and for Hart is which rules are treated as law as a matter of social fact.⁴³ By focusing on the internalization of norms, both substantive and procedural, this revised doctrine echoes Hart's emphasis on the internal point of view—the requirement of law that it be accepted as an obligation, not merely imposed by coercion.⁴⁴

39. Importantly, these need not be one-or-the-other choices: Some states may treat a rule (e.g., prohibiting certain acts in war) as law because the rule itself has been internalized while other states (which have not yet internalized the rule) may treat the rule as law because it is embodied in a treaty adopted through a legitimate process (e.g., the Geneva Conventions). The two categories are fluid: A rule not yet fully internalized might be given extra legitimacy by process, and a rule initially treated as law because it was created through a legitimate process, may over time be internalized.

40. Or, in other words, is there *opinio juris*?

41. Cohen, *supra* note 8.

42. HART, *supra* note 9.

43. *Id.* at 225–26.

44. *Id.* at 79–99. This also echoes observations of legal pluralists, see Berman, *Pluralist Approach*, *supra* note 11, at 323, and socio-legal positivism, see generally Brian Z. Tamanaha, *Socio-Legal Positivism and a General Jurispru-*

But most of all, the relationship described in the revised doctrine between legitimacy rules and the rules adopted in accordance with them comes very close to Hart's description of primary and secondary rules.⁴⁵ Legitimacy rules play a similar role to Hart's secondary rules, defining when a rule will be treated as law in the system. The main difference is that legitimacy rules capture not only the processes to be followed or the sources to be looked at, but the normative justifications for those choices as well.⁴⁶

B. *Rethinking the International Community*

A full discussion and defense of how such revised doctrine would be applied is beyond the scope of this Article and something I have written about at length in a previous article.⁴⁷ The question here is whether such a revised doctrine can shed light on the problem of normative conflict between subject areas of international law—a problem often attributed to the fragmentation of international law.

dence, 21 OXFORD J. LEGAL STUD. 1 (2001) (adapting legal positivism to incorporate a wider variety of social practices into the concept of law).

45. This might appear ironic as Hart describes international law as primitive law on the basis of his perception that it lacked secondary rules. HART, *supra* note 9, at 214.

46. Despite the surface similarity between the concept of secondary rules as used by Hart and legitimacy rules used here, I have specifically chosen not to use the former term. Secondary rules only refer to the function the rules play in the system, not to the normative account underlying them—something legitimacy rules are meant to capture. Further, the two concepts do not completely overlap: some procedural or adjudicatory rules which would count as secondary rules under Hart's formulation might not be internalized legitimacy rules, but instead rules adopted through a legitimate process themselves—take, for example, treaty provisions on dispute resolution under that treaty regime. (Similarly, some rules that might be seen as primary rules under Hart's formulation may actually be directly internalized and not dependent on any other rule for their treatment as law.) Finally, the term “secondary rules” is already in use in international law, often to describe rules laid out in the traditional doctrine of sources. See, e.g., DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW 9–10 (L.A.N.M. Barnhoorn and K.C. Wellens eds., 1995) (associating Hart's “rules of recognition” with Art. 38 and associated international law doctrines); Petersen, *supra* note 20, at 299 (“The secondary rules of the international legal order would thus be the sources doctrine.”). Avoiding confusion seems to require a different term.

47. Cohen, *supra* note 8.

One of the questions raised but not answered in my earlier discussion of sources is *who* needs to internalize the rules upon which international law is based. I did suggest that the *who* could change over time and that the current legal community of international law may include actors other than just states and their agents.⁴⁸ This question is not unique to a revised doctrine of sources; similar questions have come up, for example in the context of whose *opinio juris* should count in looking for customary international law.⁴⁹ Much of the time, the answer is a bit fudged.⁵⁰ But the question takes on added importance under a revised doctrine of sources. To the extent we need to look for the legitimacy rules of the system, we need to know who has a say in what counts as legitimate, who gets to judge the legitimacy of a particular rule.

Moreover, we have so far assumed that there is a single international law community with a single set of legitimacy rules. However, once the focus shifts away from form and to a search for shared internalized rules, it becomes completely plausible that one might find different communities with different internalized rules.⁵¹ As legal pluralists have long observed, “people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups.”⁵² Legal communities can often overlap, as they did in colonial societies where colonial and indigenous law often lived side-by-side, vying for control. These observations have been applied to a wide range of normative communities—the state, religion, business communi-

48. *Id.* at 113–14.

49. See Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 172–73 (2007) (analyzing whether individuals have a role to play in providing evidence of customary international law).

50. *Id.* at 150 (“Missing throughout this foundational literature is both a theoretical underpinning for the proposition that individuals should be recognized in CIL formation doctrine and a thorough consideration of how this might be accomplished, both doctrinally and in practice.”).

51. See Berman, *Pluralist Approach*, *supra* note 11, at 323 (“Such differentiations are less consequential in a pluralism context because the relevant question is the normative commitments of communities, not the formal status of those commitments. If, after all, a statement of norms is slowly internalized by a population, that statement will have important binding force, often even more so than a formal law backed by state sanction.”).

52. Berman, *Global Legal Pluralism*, *supra* note 10, at 1169.

ties, and even transnational regulation.⁵³ There is no reason to think that these observations could not be applied to international law as well.⁵⁴ In that context, it could mean different overlapping communities of states, e.g., European states or maritime states, but it could also mean subject-specific communities that include actors other than states, e.g., regulators, NGOs, individuals, and corporations. Depending on where we look, depending on the actors we focus on, we may find different internalized legitimacy rules. As a result, we must ask not only what the internalized legitimacy rules are but also who makes up the relevant community.⁵⁵

This is no easy task. For one thing, we need a better understanding of what it is we look for when we talk about “community” in this context. The term community is vague and over-used; it seems deeply weighted with meaning yet utterly abstract. What do we actually mean when we talk about relevant legal communities in this context? One helpful conceptualization can be found in the constructivist international relations literature, in particular, Emanuel Adler’s “communities of practice.”⁵⁶ As Adler explains, “[c]ommunities of practice ‘consist of people who are informally as well as contextually bound by a shared interest in learning and applying a common practice.’”⁵⁷ Such a common practice, “in turn, [is] sustained by a *repertoire of communal resources*, such as routines, words, tools, ways of doing things, stories, symbols, and dis-

53. See generally *id.*

54. At times, Berman seems to suggest as such, but most of the examples he looks at are between international law and other competitors, such as state law, regional law, and transnational regulatory regimes.

55. Cf. Berman, *Pluralist Approach*, *supra* note 11, at 323 (“As a result, instead of focusing solely on who has the formal authority to articulate norms or the coercive power to enforce them, we can turn the gaze to an empirical study of which statements of authority tend to be treated as binding in actual practice and by whom.”) (emphasis removed).

56. EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS (2005). Thank you to Jutta Brunée for pointing me to Adler’s work.

57. *Id.* at 15 (quoting William M. Snyder, *Communities of Practice: Combining Organizational Learning and Strategy Insights to Create a Bridge to the 21st Century*, COMMUNITY INTELLIGENCE LABS (Aug. 1997), <http://www.co-i-l.com/coil/knowledge-garden/cop/cols.shtml>). Adler himself borrows the idea of communities of practice from the work of Jean Lave and Etienne Wenger on education and learning theory. *Id.* at 15 n.116.

course.”⁵⁸ One key in this description of community is that it does not require members to agree on everything—members may disagree sharply on substance and desired outcomes; instead, it requires only that members accept a set of common ground-rules for negotiation and contestation. Communities of practice can come in various shapes and sizes; their boundaries “are determined by people’s knowledge and identity and the discourse associated with a specific practice.”⁵⁹ Some communities will be tightly organized, with small groups of practitioners who know each other well and engage with each other regularly on a defined set of issues.⁶⁰ Others will be much more diffuse, with members who never meet and are connected only by their shared practices—practices they apply to a broad range of activities.⁶¹ Members may also have different relations to these communities. Some may be core members who actively work to develop its rules and norms, while others, farther from the core of the community of practice, may simply adopt, accept, or apply the results of that work.⁶²

58. *Id.* at 15.

59. *Id.* at 24.

60. Adler gives the example of U.N. weapons inspectors. *Id.* at 25.

61. Here, Adler uses the collective security community as an example. *Id.* at 24–25.

62. “Communities of practice may be viewed as being composed of three concentric circles.” *Id.* at 24. As Adler explains:

Practices are brought into existence in the first or inner circle. For example, a look at cooperative security and the role of the Conference on Security and Cooperation in Europe (CSCE) in the evolution of this practice shows that the Helsinki Final Act and subsequent normative injunctions and practices, such as CBMs, were developed in the inner circle of CSCE practitioners. In an intermediate circle we find people, who, due to expertise or normative commitment, help diffuse the practice. This would include CSCE experts, the Helsinki Human Rights groups, and European political leaders, who assimilated cooperative practices, diffused them more widely, and brought them to their respective domestic systems. The outer circle is made up of those experts, practitioners, and activists who adopt and help implement such practices beyond their original functional or geographic boundaries. In our case, that includes people from the North Atlantic Treaty Organization (NATO), the Association of Southeast Asian Nations (ASEAN), and the Euro-Mediterranean Partnership (EMP) or Barcelona Process.

Id. at 24–25.

Adler's description of common practice seems to capture law and legal discourse well, and legal communities, as Jutta Brunnée and Stephen Toope have observed,⁶³ look like particularly good examples of communities of practice. Law provides a medium for debate and agreement, requiring actors to engage with each other in very specific fora using very specific language and procedures. The legal community, in turn, is constituted by its members' shared acceptance of certain ground rules and their shared expectations about good and bad arguments. As Adler observes, "[i]t is as members of communities of practice that people exercise one of the highest forms of power: determining the meanings and discourses that produce social practices."⁶⁴ The proposed structure of communities of practice, with concentric circles of core experts/practitioners and more peripheral adopters, helps conceptualize the relationship in a legal community between the expert lawyers who practice the law and the broader community of stakeholders whose influence and involvement are weaker, but whose broad acquiescence is still necessary.

Applied at the international level, such insights can begin to explain international actors, and in turn, the practice of international law. "The closer we get to the level of practice, in fact, the more we can take the international system as a collection of communities of practice; for example communities of diplomats, of traders, of environmentalists, and of human-rights activists."⁶⁵ Conceptualizing community this way also fits well with the process orientation of the alternative doctrine of sources described above, capturing the way rules come to be internalized by legal actors through legal practice.

Still, even if this helps in describing the sorts of communities in which law and legitimacy rules form, the exact shape of such communities seems nearly impossible to discover.⁶⁶

63. See generally JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 13–16, 28 (2010).

64. ADLER, *supra* note 56, at 25; cf. Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 349 (2009) (discussing "communities of interpretation and authority").

65. ADLER, *supra* note 56, at 15.

66. Cf. Berman, *Global Legal Pluralism*, *supra* note 10, at 1171 ("Of course, finding non-state forms of normative ordering is sometimes more difficult outside the colonial context because there is no obvious indigenous system,

Their overlapping nature, their ever-evolving membership, and the fact that actors can be members of multiple (even conflicting) communities at the same time, makes drawing boundaries around them a hopeless task. What is important to focus on here though are the very limited purposes for which the term is being used. Drawing certain empirical observations about the nature of rules in the system may not require a perfect description of the community.⁶⁷ Even a rough approximation may still allow us to see developing norms of legitimacy. And in this case, the link between communities and legitimacy rules may provide the key.

Legitimacy rules might be seen as the most basic of common practices necessary for a legal community of practice. Just as the membership of a particular community might suggest certain legitimacy rules, so too might the presence of certain legitimacy rules suggest in a very rough way the outlines of the community that shares them.⁶⁸ We might adopt a functional definition of the legal community as that group of actors whose judgment of a rule's legitimacy is necessary for the rule to act effectively as law.⁶⁹ In other words, the community is that set of actors who can effectively assert claims regarding the legitimacy rules of the system.⁷⁰ This very specific notion

and the less formal ordering structures tend to 'blend more readily into the landscape.'") (citing Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y REV. 869, 873 (1988)).

67. We might not need to know, for example, an exact list of members, clear criteria for membership, or who patrols the communities' boundaries, all problematic questions on which other discussions of community often founder. Of course, if we were to transform the legitimacy communities into a legal category or give them doctrinal significance, such question would take on new importance. See *infra* Part IV.B.

68. As Adler explains, "The negotiations about meaning that occur within and between communities of practice eventually define the communities' boundaries." ADLER, *supra* note 56, at 27.

69. This dovetails well with Hart, who identified "efficacy" as a key element of law, and Fuller, who lists "congruence" among his factors of law's internal morality. HART, *supra* note 9, at 103-04; LON L. FULLER, *THE MORALITY OF LAW* 81 (1961). On both accounts, it makes sense to link effectiveness with other indicia of legitimacy. This is not so much circular as it is a demonstration of how the legal system works: Rules will be effective among the group that judges them legitimate. Importantly, as an aside, effectiveness is not the same as compliance. See Franck, *supra* note 37, at 706-12; Cohen, *supra* note 8, at 106-07.

70. Cf. *supra* text accompanying note 68.

of a “legitimacy community” dovetails well with the functional doctrine of sources described above, which focuses on internalized legitimacy rules and rules adopted pursuant to them.

The traditional doctrine of sources provides a good example of how such an analysis would work. The list of sources in Article 38 arguably describes the processes of legitimate lawmaking and the standards of legitimacy in a community of sovereign states (the paradigmatic international law community of the early twentieth century). States (or really, their agents) would recognize law made through explicit treaties or practices sufficiently widespread and longstanding to be thought of as obligatory.⁷¹ The standard against which the legitimacy of laws appears to be measured in this community is state consent—either explicit in the case of treaties, or implicit in the case of custom. Additional rules like the persistent objector exception further emphasize the importance of state consent. The question remains whether these legitimacy rules can best describe contemporary international law and its specific sub-fields, a question that will be taken up by the next part.

III. NO LONGER UGLY DUCKLINGS: APPLYING THE REVISED DOCTRINE OF SOURCES

Under the revised doctrine set out above, what counts as law internationally is a function of what a particular international community accepts as legitimate lawmaking. The corollary to that observation is that an international legal community is defined by the rules of legitimate lawmaking that it shares. This suggests two somewhat radical possibilities: First, that in various areas of international law the legitimate sources of law may no longer be those listed in article 38 of the ICJ statute, and second, that disagreements over the legitimacy of particular sources may mean that international law is no longer defined by a single legal community.

71. General principles are harder to describe because they are harder to define. General principles might simply have been gap-filling rules for international tribunals, which states had accepted as legitimate for those purposes. Or they could be sources of legal obligation in their own right, in which case the argument would be that states accepted the legitimacy of rules derived from municipal practice when those practices were sufficiently common to states in the community.

This section applies these lessons to three areas that have put pressure on traditional sources doctrine: (1) international human rights law, (2) tribunal law (i.e., the law applied in areas of international law dominated by adjudication or arbitration), and (3) Global Administrative Law. It takes a fresh look at some of the doctrinal difficulties these areas have produced and explores whether evolving communities and changing legitimacy rules may be able to explain them. It asks whether a revised doctrine of sources can bring clarity to practices in those areas that the traditional doctrine only obscured.

Finding the hidden legitimacy rules in an area of law is an undoubtedly difficult task. Because the traditional doctrine of sources is still perceived to be at the core of international practice and adjudication, actors strain to make their arguments in the language of the doctrine of sources. Figuring out what is really going on is thus probably impossible. The point here is not to catalogue the hidden legitimacy rules in each area, but instead merely to show that something appears hidden, that traditional arguments may be mere masks disguising the real concerns within a particular community.

A. *Human Rights*

Human rights might be thought of as international law's problem child. Human rights law constantly challenges traditional international law doctrine. Many of the most persistent challenges to the traditional doctrine of sources have come from human rights bodies, experts, advocates, and scholars. Three particular challenges stand out: (1) the possibility of "instant custom," or custom based on little or no state practice, (2) the relevance of various non-traditional sources to the search for custom, and (3) the treatment of reservations and other attempts to limit the effects of treaties.

The question of how much state practice, practiced for how long, is necessary before a rule can properly be called customary international law is a well-worn one in international law. Claims that little or no state practice may suffice are not exclusive to human rights; in fact, they had their origins in other areas.⁷² But these questions have become central with

72. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 ¶¶ 186–202 (June 27) (minimizing the importance of instances of state practice and focusing almost entirely on tradi-

regard to human rights. In human rights law, it is common to find arguments, as well as decisions by international bodies, suggesting rules of customary international law even in the face of widespread state practice to the contrary. Torture is the most widely cited example. It is also common to see arguments that custom can emerge very quickly, almost instantaneously, following the widespread ratification of multilateral human rights treaties or a series of declarations from the United Nations General Assembly or other international bodies. Scholars, advocates, and judges have all argued explicitly or implicitly that what matters most with regard to human rights law is what states say their obligations are—traditional evidence of *opinio juris*.⁷³ It is through this change in emphasis that human rights law has recognized a broad range of rights and rules that states continue to violate and which other states do little to stop.

Such views seem to be in tension with traditional international law doctrine. As Onuma Yasuaki has observed, “The term [instant custom] itself is, of course, a contradiction.”⁷⁴ Custom by its nature implies some reasonably widespread, reasonably longstanding state practice. As Anthea Roberts has explained, traditional custom “focuses primarily on state practice in the form of interstate interaction and acquiescence. *Opinio juris* is a secondary consideration invoked to distinguish between legal and nonlegal obligations.”⁷⁵

But the conflicts over custom do not end there. Another major point of disagreement is over the proper sources of either state practice or *opinio juris*. Scholars, advocates, and judges operating on the field of human rights have expanded the notion of state practice to include state statements, includ-

tional sources of *opinio juris* to find customary international law); North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) (recognizing the possibility that even rare state practice may support finding customary international law); Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 INDIAN J. INT’L L. 23 (1965) (arguing that state practice simply serves as evidence of *opinio juris* in identifying customary international law).

73. See Roberts, *supra* note 6, at 758.

74. Onuma Yasuaki, *Is the International Court of Justice an Emperor Without Clothes?*, 8 INT’L LEGAL THEORY 1, 22 (2002). Onuma adds that the term “clearly reveals how inappropriate and outdated it is to think of general international law within the framework of Article 38.” *Id.*

75. Roberts, *supra* note 6, at 758.

ing votes for General Assembly resolutions, and have mined new sources of *opinio juris*, in particular, the opinions of national courts.⁷⁶ The use of the latter seems particularly questionable from the perspective of the traditional doctrine of sources. First, states are traditionally the legal actors in the system and it is their opinion on whether a rule is legally binding that matters. It is unclear that domestic courts are really reflective of that view (unless of course, they hinge their decision on the perceived position of their state); they certainly aren't acting as agents of the state.⁷⁷ Second, even if the decisions of national courts evidence a belief by those courts that a particular rule is legally binding, under traditional doctrine, one would have to be very careful that the court was speaking of international obligation—that the rule was binding between states—rather than merely of domestic obligation—that the rule was binding under the state's constitution.

Human rights law also poses challenges to treaty law. Under traditional doctrine, states are only bound by treaty provisions that they agree to.⁷⁸ Accordingly, when a state adds a reservation to a treaty, it will not be bound by the reserved provision. Either its counterparty states fail to object and the reserving state is bound by only those provisions that it has agreed to, or its counterparties object, in which case, if there's no further agreement, there is no treaty at all. This rule follows the general legitimating norm underlying traditional doc-

76. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 230 (2003); Mary Ann Torres, *The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: A Case Study from Venezuela*, 3 CHI. J. INT'L L. 105, 109 (2002); Onuma, *supra* note 74, at 19. ("Actually, most of these 'customary' norms have been posited by leading international lawyers in their treatises or textbooks. These international lawyers relied heavily on the acts and statements of the executive branch of the government, domestic laws, and domestic court decisions as major materials of state practice. Basically, the same materials have been used as evidence of *opinio juris*.")

77. See generally Philip M. Moreman, *National Court Decisions as State Practice: A Transnational Judicial Dialogue*, 32 N.C. J. INT'L L. & COM. REG. 259, 264 (2006) (arguing that national court decisions can be a deceptive indication of state practice given inconsistencies between national court decisions and practice of other state organs).

78. Reservations to the Convention on the Punishment and Prevention of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 21 (May 28) ("It is well established that in its treaty relations a State cannot be bound without its consent . . .").

trine—state consent. Multilateral treaties, however, make things more complex. Questions arise about the effect of reservations where some, but not all parties to the treaty object. In its advisory opinion on Reservations to the Genocide Convention, the ICJ held that the treaty would not be in force between a reserving state and any state that objected to the reservation, but would be in force—minus the reserved provision—between the reserving state and non-objecting states.⁷⁹

But these rules have been challenged with regard to human rights treaties. Arguments have been made that states should simply not be allowed to include reservations that violate the objects and purposes of the treaty. Taking the argument one step further, the Human Rights Committee, a body of experts established under the International Covenant on Civil and Political Rights, has asserted that it is it, and not the other state parties, who should determine whether a reservation invalidly violates the Covenant's objects and purposes. Describing the acceptance or rejection of reservations as an "inappropriate task for States parties in relation to human rights treaties," the Committee explained that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant."⁸⁰ "Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task."⁸¹ In a direct challenge to traditional doctrine's reliance on state consent, the Committee went one step further, announcing that an invalid "reservation will generally be severable" and that accordingly, states who attempt an invalid reservation will be held bound to the entire treaty including the part they sought to reserve."⁸² This

79. *Id.* at 26.

80. U.N. Human Rights Committee, CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenants or the Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994), available at <http://www.unhcr.org/refworld/topic,459d17822,459d17ef2,453883fc11,0.html>.

81. *Id.*

82. *Id.*

assault on state consent is echoed in the Committee's rejection of the right of withdrawal from the Covenant.⁸³

All three of these challenges are serious, raising questions that go to the very core of international law. Nonetheless, they are generally treated as doctrinal or technical challenges. What is the correct interpretation of article 38's requirements of general practice and *opinio juris*? How should reservations work in a multilateral context? The question is who has the doctrinally correct position or whether the two positions can be reconciled in some way.⁸⁴

But the differences between human rights and other areas of international law seem to run deeper than that, and the revised doctrine of sources above suggests a different explanation. Each difference seems to cut to the heart of what makes international law legitimate at all. They suggest that a separate legal subcommunity is forming in human rights, one that has very different understanding of legitimate rulemaking than the traditional state-only community.⁸⁵

There are strong reasons to think that human rights law is no longer judged by a community made up solely of states. First, by creating laws deliberately designed to intercede between states and their populations, to limit what states can do to their own peoples, states have necessarily given up their monopoly over the shape of human rights law. Human rights law limits states; it cannot be that whatever states do is the law. Moreover, human rights law simply isn't state-to-state law. As I have argued elsewhere, human rights treaties are specifically designed to avoid relying on state-to-state enforcement.⁸⁶ In-

83. U.N. Human Rights Committee, CCPR General Comment No. 26: Continuity of Obligations, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997), available at <http://www.unhcr.org/refworld/docid/453883fde.html>.

84. See generally Roberts, *supra* note 6 (proposing a theory that can reconcile "modern" and "traditional" custom and describing prior attempts by other scholars).

85. For a similar argument that disagreements over human rights law actually represent differences regarding governing secondary rules, see Monica Hakimi, *Secondary Human Rights Law*, 34 YALE J. INT'L L. 596 (2009).

86. State-to-state enforcement arguably would not be effective. Harlan Grant Cohen, *Can International Law Work? A Constructivist Expansion*, 27 BERKELEY J. INT'L L. 636, 656 (2009) ("Human rights advocates seem well aware of the weaknesses of state-to-state enforcement in that area. As a result, human rights treaties have increasingly adopted mechanisms specifi-

stead they are consciously designed to reach inside states, to empower individuals and populations, and to provide a focal point for national and transnational advocacy.⁸⁷ In some cases, human rights law goes even farther, giving individuals direct access to international institutions. The result is that states simply cannot control the arguments made about the law and cannot control the law's eventual shape and direction. In essence, in human rights, states have (perhaps reluctantly) invited others into the international legal community.

To put it in community of practice terms, the community of human rights law now seems to include individuals in direct and indirect ways, sometimes as active practitioners and sometimes as passive participants. A small, but increasing, number of individuals who participate directly by pursuing their own human rights claims are joined by NGOs, human rights activists, and experts who claim to represent the interests of individuals. Pressing their claims in various formal and informal fora, both groups have begun to shape broader popular views and expectations on what human rights require and how they work.⁸⁸

The recognition that states are no longer the sole members of the relevant community can be found in both the Human Rights Committee's general comment regarding the right of states to withdraw from the convention⁸⁹ and the Inter-American Commission's discussion of its jurisdiction over

cally directed as transnational advocacy groups, domestic constituencies, and individual claimants.").

87. See generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009) (arguing that human rights are most effective in states with active civil societies and institutions).

88. In discussing related issues regarding the laws of war, Kenneth Anderson lists:

NGOs; the Security Council; other organs of the United Nations such as the Human Rights Council and its dependencies such as certain special *rapporteurs*; the activist-scholars who make up what we may call the 'visible college' of international law; public intellectuals of several fields, through books, journals, and the media; national or regional courts, not specialized as such in law of armed conflict but called upon to interpret it; and international criminal tribunals of all types, their staffs, and the staffs particularly of the prosecutors' offices.

Anderson, *supra* note 64, at 349–50.

89. U.N. Human Rights Committee, CCPR General Comment No. 26: Continuity of Obligations, *supra* note 83.

human rights violations in Cuba.⁹⁰ In both cases, the human rights body explained that once a state ratified a treaty, its provisions belong to the people.⁹¹ It doesn't appear to be a far leap to suggest that those people also have a say in assessing the legitimacy of rules adopted.

As the membership of the community⁹² of human rights law changes, arguments within that community over its basic norms—in particular its legitimacy rules—might be expected. Although each of the doctrinal positions developing with human rights remains controversial, they do suggest a consistent, alternative vision of legal legitimacy within that community. In contrast to the traditional doctrine of sources' focus

90. INTER-AM. COMM' N H.R., 2006 Annual Report, ch. IV, ¶ 54 (Mar. 3, 2007) (“[I]t was not the intention of the Organization of American States to leave the Cuban people without protection. That Government's exclusion from the regional system in no way means that it is no longer bound by its international human rights obligations.”) (citing INTER-AM. COMM' N H.R., 2002 ANNUAL REPORT, ch. IV, ¶ 7.a (Mar. 7, 2003)).

91. *Id.* As the U.N. Human Rights Committee explained:

The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.

U.N. Human Rights Committee, CCPR General Comment No. 26: Continuity of Obligations, *supra* note 83, ¶ 4.

92. As mentioned above, it is notoriously difficult to define the exact membership of these communities, and many of those who talk of juris-generative communities beyond the state choose to leave their membership fuzzy. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PENN. L. REV. 311, 478 (Dec. 2002) (explaining “that space and community affiliation can never be ‘given’ and that the process of their sociopolitical construction must always be considered”); Fischer-Lescano & Teubner, *supra* note 3, at 1006 (“The primary motor for this development is an accelerated differentiation of society into autonomous social systems, each of which springs territorial confines and constitutes itself globally.”). One might define membership by who “makes” the law in an area, but such a definition requires a further definition of what it means to “make” the law. The functional definition of the legal community here, which may or may not be satisfying, is that group of actors whose judgment of a rule's legitimacy is necessary for the rule to act effectively as law.

on state action, this alternative vision seems to focus on state promises. Traditionally, state promises were meaningless if not backed up by state action. Hypocrisy could not create custom. The new legitimacy rule emerging in human rights seems to be that state promises matter and that the state cannot vitiate those promises merely through state action to the contrary.⁹³

Such a rule also seems to cut through distinctions between custom and treaty. The exact form of a state promise is less important than its solemnity and seriousness. Human rights treaties, votes on general assembly resolutions, non-binding declarations like the Universal Declaration of Human Rights or the Helsinki Final Accords are all publicly directed promises to respect certain rights. Such a rule clearly seems to be operating with regard to “instant” custom and helps explain the trend toward emphasizing traditional evidence of *opinio juris* over state practice. States simply cannot promise not to torture and then keep the promise from being binding by breaking their promises and torturing. But it also might explain the Human Rights Committee’s views on reservations and withdrawals. In a sense, ratifying a human rights treaty might be seen as a particularly public promise to respect the rights therein. Reservations, which are often either highly technical or hard to interpret, might be seen as “sneaky” ways that states try to avoid the full effects of those promises. In essence, reservations are like states crossing their fingers behind their backs. The Human Rights Committee seems unwilling to accept such behavior. The same could be said of the Committee’s view of withdrawals. Once a state makes a promise to its people through a human rights treaty, those people become stakeholders in that treaty. As members of the community, they must have some say in whether a state can relieve itself of those obligations.

There are reasons to think that individuals and their advocates, as new members of the community, might demand such

93. A similar argument could be made about the concept of “human dignity” in human rights law. “Human dignity” appears to be replacing “state sovereignty” as the touchstone against which potential rules of international human rights law are judged, suggesting that it too may be emerging as a legitimacy rule within that community. In other words, potential human rights rules are increasingly judged legitimate or not based on how well they uphold human dignity.

rules. For one thing, state promises, whether in the form of resolutions, treaties, or something else, are often made for public consumption and are often directed to the broader public. That individuals would want to hold states to these promises is unsurprising. Moreover, asking individuals to weigh those statements against state actions or against complicated state caveats like reservations may be unrealistic. Individuals, unlike states, do not have the resources or expertise to monitor states in that way. They may demand a level of transparency beyond what states demand amongst themselves. Such concerns may also explain the reliance on new sources of evidence. The public resolutions of international bodies are certainly more accessible to individuals than the specifics of state practice, much of which may be purposely hidden from view. But court opinions can be seen in this way as well. Court opinions are much more transparent than state action. Courts also provide individuals with a forum to make arguments about the law's content, a means of holding states accountable for their promises, and direct access to the law's development.

None of this is meant to suggest that this view is uncontroversial, even within the human rights community. That community is complex and along with scholars, advocates, and experts, it also includes states and their agents. Although many state actors may agree with the cosmopolitan drift in human rights law, others may be quite sensitive and hostile to new legitimacy rules that they cannot control. This sensitivity is, of course, heightened by traditional doctrine's conception of a unitary international legal order. States may be legitimately concerned that if new rules are recognized as valid doctrine in human rights, nothing in traditional doctrine would keep them from being recognized for other areas of international law like international humanitarian law or trade. This hesitation, however, only highlights the tensions between the overlapping communities of international law.

B. *Tribunal Law*

The worst kept secret in international law is that international tribunals rely on precedent. Of course, the reason it's kept a secret at all is that under the traditional doctrine of sources, prior decisions are only a subsidiary source of interna-

tional law.⁹⁴ They are not meant to take the place of other sources, treaties, custom, or general principles, but merely to serve as evidence of them.⁹⁵ While complaints have been lodged against the ICJ and other bodies for using precedent in lieu of other more legitimate sources,⁹⁶ such statements are almost taken for granted in international criminal law and investment arbitration.⁹⁷

94. Statute of the International Court of Justice, *supra* note 17, art. 38(1)(d).

95. *See id.* art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”); *see also* Martinez, *supra* note 3, at 482 (“[E]ven within a single international court there is often no system of binding precedent and no doctrine of stare decisis.”) (emphasis omitted).

96. *See, e.g.,* Zhu Lanye, *The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Disputes Only or Making Precedent at the Same Time?*, 17 TEMP. INT’L & COMP. L.J. 221, 230 (2003) (“If we regard precedents as decisions furnishing a basis for determining later cases involving similar facts or issues we can say without hesitation that large amounts of such precedents exist in the WTO dispute settlement system.”); Raj Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845, 850 (1999) (“In brief, there is a body of international common law of trade emerging as a result of adjudication by the WTO’s Appellate Body. We have yet to recognize, much less account for, this reality in our doctrinal thinking and discussions.”).

97. *Int’l Thunderbird Gaming Corp. v. Mexico, Award*, ¶ 129 (NAFTA Ch. 11 Arb. Trib. Jan. 26, 2006), *reprinted in* 6 ASPER REV. INT’L BUS. & TRADE L. 419, 571 (2006) (“In international and international economic law—to which investment arbitration properly belongs—there may not be a formal ‘stare decisis’ rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence.”); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1611–12 (2005) (“The fact is that investment awards are not technically precedential As a practical matter, however, private investors, governments, and arbitral tribunals rely on previous awards to interpret similar provisions in investment treaties.”); Matthew Belz, Comment, *Provisional Application of the Energy Charter Treaty: Karassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties*, 22 EMORY INT’L L. REV. 727, 752 (2008) (“Second, there is strong pressure on arbitrators to follow other tribunals’ decisions, even though stare decisis does not govern international arbitration. As stated by one ECT scholar, ‘[t]he reasoning of almost all modern arbitral awards demonstrate [sic] the great care investment arbitral tribunals apply to ensure they are positioned in the mainstream of emerging jurisprudence.’”).

Still, few argue that this development represents a shift in the authoritative sources of international law. Critics, of course, argue that international criminal tribunals have overreached in finding customary international law on the basis of a few post World War II cases. They seem to suggest that judges on those courts are incompetent, lazy, or legislating an agenda from the bench.⁹⁸ At worst, the reliance on precedent threatens the legality principle, finding criminal liability on the basis of a few long-forgotten decisions. Defenders of the tribunals, on the other hand, argue that judges are being true to traditional doctrine. They argue that judges either are careful and responsible in applying customary international law⁹⁹ or that the cases cited are good evidence of state practice and *opinio juris*.¹⁰⁰ They may argue that general practice is a broad enough concept to include judicial practice, e.g., court decisions,¹⁰¹ or that judicial opinions may reflect *opinio juris*.¹⁰²

Looking at these courts and tribunals through the lens of the revised doctrine of sources suggested reveals a different set of explanations. Judges operating in areas of international law that are particularly oriented towards adjudication may have good reasons, beyond laziness, incompetence, or advocacy to rely on precedent. For one, they may simply need precedent

98. Bhala, *supra* note 96, at 914 n.214 (“The judge may refer to a precedent because he is impressed by the authority of the prior court, because he is persuaded by its reasoning, because he is too lazy to think the problem through himself, because he does not want to risk reversal on appeal, or for a variety of other reasons.”).

99. Theodor Meron, Editorial Comment, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 821 (2005) (“[I]nternational criminal tribunals have taken an essentially conservative and traditional approach to the identification and application of customary international law principles.”).

100. *Cf.* Int’l Thunderbird Gaming Corp., *supra* note 97, at 571 (“The role of precedent has been recognised de facto in the reasoning style of tribunals, but can also be formally inferred from Art. 1131 (1) of the NAFTA—which calls for application of the ‘applicable rules of international law’; these include, according to Art. 38 of the statute of the International Court of Justice: ‘International custom, as evidence of general practice accepted as law’ and ‘judicial decisions’ as ‘subsidiary means for the determination of rules of law.’”).

101. *See, e.g.*, Moreman, *supra* note 77 (discussing the role of national court decisions in the formation of state practice).

102. *See, e.g.*, Starr & Brillmayer, *supra* note 76, at 230 (“[T]he *opinio juris* element . . . may be inferred from court decisions.”).

in order to do their jobs.¹⁰³ Judges need (or at least want) neutral sources that they can use to legitimate their decisions. Normally, custom might provide such a source. In both international criminal law and investment arbitration, however, custom's traditional ingredients—state practice and *opinio juris*—seem anything but neutral.¹⁰⁴ Take international criminal law. Although it may be possible to find widespread state practice and *opinio juris* on the broadest questions of international criminal law—e.g., the broad contours of genocide, crimes against humanity, and war crimes—that almost certainly cannot be the case with the more refined liability issues that tribunals are forced to decide. Few states are going to have *state* (as opposed to *judicial*) practice with regard to the mens rea for international crimes, the exact scope of liability for each, etc. In reality, only two types of states are really going to have state practice relevant to the legal issues that tribunals are forced to decide: (1) states that have prosecuted international crimes and (2) states that have committed them. Tribunals are quite obviously going to avoid relying on the latter, but the former are problematic as well. The arguments of prosecuting states can be assumed to be at least as biased as a prosecutor's argument about law in the domestic criminal context—and no one would suggest that the arguments of prosecutors should simply be treated as law. Like domestic prosecutors, such states can be assumed to argue for the interpretations most likely to win conviction, rather than provide a neutral assessment of the legal landscape. In the absence then of any neutral state practice, the tribunals need another source. International or national *judicial* practice, which at least has weighed the arguments of the prosecutor states against the interests of the

103. See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 188–91 (2010) (explaining how the imprecision of investment treaties necessarily shifts interpretive power to investment tribunals).

104. See *id.* at 179–80 (“The Vienna Convention on the Law of Treaties (Vienna Convention) provides that the treaty parties’ subsequent agreements and practice shall be taken into account in interpretation. . . . Yet investor-state tribunals have tended to shun this interpretive approach, apparently because of concerns about ensuring equality of arms between claimant investors and respondent states and protecting against the adoption by states of self-interested interpretations.”).

accused defendants, may seem like a more legitimate, more appropriate source.

Moreover, as in the example of human rights, in international criminal law, states are no longer the only relevant legal actors and stakeholders.¹⁰⁵ For one thing, the relevant legal community of international criminal law includes defendants and victims, the rights of whom must be taken into account. But that legal community, that “community of practice,”¹⁰⁶ also arguably includes both judges and the lawyers who serve as prosecutors and defense attorneys. Courts play a very different role in international criminal law than in other areas of international law. In other areas of the law, courts play a peripheral role; most law is made, followed, interpreted, and hashed out directly between states. Courts are central, however, to international criminal law. The primary paradigm and function of international criminal law is the trial. In this context, the judge is no longer a neutral referee, but instead the ultimate arbiter of international justice. It is the judge, not states, who decides ultimate guilt or innocence. Lawyers too, play a different role in international criminal law. Prosecutors and defenders do not serve merely as extensions of states and do not simply mouth state positions. Instead they play independent roles as officers of the court representing the interests of international justice or the interests of their clients. The legitimacy of international criminal law will be judged not only by states—the traditional community of international law—but by defendants, victims, lawyers, and judges as well.

Including defendants, victims, and judges in the relevant community helps explain the pull of precedent. Neither defendants nor victims can really rely on state practices to protect their interests. Defendants need a neutral source free from the bias of the states who seek to prosecute them, and victims need a neutral source free from the bias of the states who abused them. Moreover, due process and fairness require consistency in treatment from one case to the next—such con-

105. Kenneth Anderson makes a similar point, noting that “[n]ew and different communities of interpretation and authority, as we might call them, have been emerging in the arena of the laws of war.” Anderson, *supra* note 64, at 349.

106. See discussion of Emanuel Adler and “communities of practice,” *supra* notes 56–65.

sistency seems impossible without giving prior decisions precedential weight.¹⁰⁷ The introduction of domestic criminal lawyers into the field has undoubtedly helped bring those concerns to the forefront.

A similar story can be told about international investment arbitration. In that context, states have specifically agreed to give individual investors a seat at the table. Those investors now make up a part of the international investment law community and they along with states will judge the legitimacy of arbitral decisions.¹⁰⁸ In order for investors to take the promises of arbitration seriously (and increase investment accordingly) they must believe that the rules that will apply to those arbitrations will be neutral. To rely on state practice alone to fill gaps in established law might appear biased. States are, of course, one of the parties to these disputes. Both investors and states (along with the lawyers who advise them) also crave certainty and predictability.¹⁰⁹ Contracts become much easier for both sides to negotiate when they have a clearer idea of the law that will apply. Precedent can play a powerful role as a neutral, predictable source of law. It also feeds into a feedback loop. As adjudication/arbitration becomes the norm, state-to-state settlements become less common. A growing body of precedent arguably means a diminishing store of state practice.¹¹⁰ To the extent that state prac-

107. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 757–58 (2003) (suggesting that use of precedent is necessary to avoid unfairly divergent results for defendants and to uphold the universality of international criminal law); Asa W. Markel, *The Future of State Secrets in War Crime Prosecutions*, 16 MICH. ST. J. INT'L L. 411, 427 (2007) (suggesting that the ICTY adopted a policy of stare decisis as result of due process concerns of certainty and predictability).

108. Paul Berman seems to make a similar suggestion, describing international investment arbitration as an area in which “non-sovereign communities” are generating norms, and describing investment treaties as “empower[ing] private actors to develop international norms.” Berman, *Pluralist Approach*, *supra* note 11, at 314–15.

109. For this reason, arguments for reform in investment arbitration often include calls for greater reliance on precedent rather than less. See Franck, *supra* note 97, at 1617–25 (arguing for investment arbitration court of appeals to establish clear precedents that arbitral tribunals can then follow).

110. Moreover, states arguably rely on those precedents. Paradoxically, then, from the standpoint of traditional doctrine, state practice reflects judicial precedent rather than the other way around.

tice becomes increasingly fleeting and marginal, the turn towards adjudication/arbitration may actually make reliance on traditional sources less legitimate.

From the perspective of the revised sources theory suggested here, reliance on precedent thus looks less like an error and more like the emergence of a new set of legitimacy rules within the communities of international criminal law and international investment law. Those communities, which now include stakeholders and actors beyond just states, appear to be grasping for something beyond state practice that can create legitimately neutral and predictable gap-filling rules. What traditional notions of custom seem to lack in legitimacy, precedent seems to provide.

C. *Global Administrative Law*

A different sort of challenge to traditional international law doctrine has emerged from the project of Global Administrative Law.¹¹¹ As part of that project, scholars have begun to document and study the wide variety of international regimes that are increasingly seeking to regulate international commerce, trade, investment, among other areas, with rules that look, and sometimes act, like binding law.¹¹² Some of these

111. See generally Kingsbury et al., *Global Governance as Administration*, *supra* note 7 (setting out core concepts of Global Administrative Law); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (2005) [hereinafter Kingsbury et al., *Emergence*] (surveying major issues and challenges in the field of Global Administrative Law).

112. Kingsbury et al., *Global Governance as Administration*, *supra* note 7, at 2.

The contemporary starting point is thus the rapidly changing pattern of transnational regulation and its administration, a pattern that now ranges from regulation-by-non-regulation (*laissez faire*), through formal self-regulation (such as by some industry associations), hybrid private-private regulation (for example, business-NGO partnerships in the Fair Labor Association), hybrid public-private regulation (for instance, in mutual recognition arrangements where a private agency in one country tests products to certify compliance with governmental standards of another country), network governance by state officials (as in the work of the Organization for Economic Cooperation and Development (OECD) on environmental policies to be followed by national export credit agencies), inter-governmental organizations with significant but indirect regulatory powers (for example, regulation of ozone depleting substances under the Montreal Protocol), and inter-governmental organizations with direct governance powers (as with deter-

regimes, like the World Trade Organization (WTO) and its dispute settlement body, are the formal product of treaties and technically (and doctrinally) international law. Others, however, are more informal, including networks of government officials like the Basel Committee,¹¹³ hybrid public-private organizations like the Codex Alimentarius,¹¹⁴ and private organizations like the International Organization for Standardization (ISO).¹¹⁵ Regardless of the de facto force their rules may exert, those rules are often not technically international law.¹¹⁶

The rules adopted by these regimes are increasingly important and binding, but what has really garnered the attention scholars associated with Global Administrative Law are the increasingly administrative-law-like procedures these regimes have developed to enact these rules. What these scholars have noted is that, in many of these regimes, as the authority and bindingness of their rules has increased, so too has pressure to follow certain rules of process. Moreover, “[t]hese demands, and responses to them, are increasingly framed in terms that have an administrative law character.”¹¹⁷ Among other things, these regimes have been asked to grant stakeholders greater participation in the decision-making processes and to make those processes more transparent, to give reasons for their de-

minations by the Office of the U.N. High Commissioner for Refugees of individuals’ refugee status, or the WTO dispute resolution system for trade conflicts).

Id.

113. See Kingsbury et al., *Emergence*, *supra* note 111, at 21 (“The agreements are non-binding in legal form but can be highly effective.”); see also David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 *TEX. INT’L L.J.* 281, 287–91 (1998) (describing the informal constitution and flexible internal organization of the Basel Committee).

114. See generally Michael A. Livermore, Note, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 *N.Y.U. L. REV.* 766 (2006) (discussing the administrative law procedure of the Codex).

115. Kingsbury et al., *Emergence*, *supra* note 111, at 22.

116. *Id.* at 16 (“[M]uch of the detail and implementation of such regulation is determined by transnational administrative bodies—including international organizations and informal groups of officials—that perform administrative functions but are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty.”).

117. Kingsbury et al., *Global Governance as Administration*, *supra* note 7, at 2.

cisions and allow for meaningful review, and to conform their eventual regulations to standards of means-end proportionality.¹¹⁸

The ISO is a good example.¹¹⁹ The ISO issues “standards and technical specifications for a vast array of products and processes.”¹²⁰ The ISO’s members are national standards bodies, some of which are made up of industry advocacy groups, others are government agencies, while still others are made up of some combination of the two.¹²¹ Technically, the ISO is a voluntary organization, both in the sense that membership is voluntary and that adherence to the ISO’s 15,000 plus standards is voluntary. In fact, though, its standards have become increasingly binding, either because they’re costly not to follow in a globalized world, or because its standards have become safe harbors in both national laws and the Technical Barriers to Trade agreement.¹²² As the force of the ISO’s standards have increased, so too has its reach. The ISO has begun to move into areas beyond its original mandate, enacting standards in environmental management and corporate responsibility.¹²³

Both of these trends have led to pushes for greater accountability, and the ISO has responded with a series of administrative-law-like responses. In addition to adopting considerable notice and comment rule-making, the ISO has broadened participation and transparency by creating a liaison

118. *Id.* (“These evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions, and review mechanisms to promote accountability.”).

119. This discussion of the ISO is largely derived from Eran Shamir-Borer, *The Evolution of Administrative Law-Type Principles, Mechanisms and Practices in the International Organization for Standardization (ISO)* (Oct. 4, 2006) (unpublished manuscript), available at <http://www.iilj.org/courses/documents/EranShamir-Borer.ISOPaperfor100406.pdf>.

120. Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 330 (2008).

121. Shamir-Borer, *supra* note 119, at 12–14.

122. *Id.* at 4–5; David A. Wirth, *Compliance with Non-Binding Norms of Trade and Finance*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 330, 338–41 (Dinah Shelton ed., 2000); Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 120 (1995).

123. Shamir-Borer, *supra* note 119, at 3–4.

membership for NGOs, a new code of ethics that requires greater participation within the national member bodies,¹²⁴ the creation of a fund to help smaller states participate more effectively in standard making,¹²⁵ and pilot programs to publish some of their regulations on the web.¹²⁶

But the ISO is not alone. “The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance.”¹²⁷

Thus the WTO Appellate Body now requires . . . member states to follow certain administrative procedures before excluding imports, the Basel Committee of central bankers now puts out drafts of its proposals for capital adequacy for wide comment before adopting them, the UN Security Council has adopted a limited review mechanism to make it possible for people listed as terrorist financiers to be delisted, the World Bank operates a notice and comment process before adopting policies and has an Inspection Panel to hear complaints that it has breached its policies, and the International Olympic Committee follows an elaborate procedure for athletes suspected of doping and has a review process culminating in arbitration at the International Court of Arbitration for Sport.¹²⁸

The emergence of a global administrative law is difficult to square with the traditional doctrine of sources.¹²⁹ Many of these administrative-law-like rules are emerging in private or public-private organizations and networks as opposed to state-state institutions. To the extent that there are neither states nor treaties or custom involved, such rules are invisible to the traditional doctrine of sources. These rules may be some-

124. *Id.* at 80.

125. *Id.* at 48–49.

126. *Id.* at 59–60.

127. Kingsbury et al., *Global Governance as Administration*, *supra* note 7, at 2.

128. Kingsbury, *International Law as Inter-Public Law*, *supra* note 38, at 190.

129. See Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 26 (2009) [hereinafter Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*] (“If a claim to ‘law’ is made in applying the label GAL in some of these situations, it is a claim that diverges from, and can be sharply in tension with the classical models of consent-based inter-state international law and most models of national law.”).

thing, but they are not international law.¹³⁰ But even where there is a formal treaty, as in the example of the WTO, doctrine may have trouble explaining the emergence of administrative law features. One commonly cited example of administrative process rules at the WTO was the dispute settlement body's requirement in the Shrimp/Turtle case that foreigners be given adequate opportunities to participate in U.S. regulatory decisions.¹³¹ Scholars are quick to note though that such a requirement is hard to find in any treaty or international law.¹³² Moreover, even if emerging administrative law rules in one regime could be traced to a particular treaty or to more general principles of international law, dividing the category between those rules dictated by international law and those outside of it seems less than satisfying. To the extent to which these administrative law rules seem to be emerging as part of a common phenomenon (with different regimes borrowing rules from each other), they seem to call out for a unified explanation or source.¹³³

Viewing these emerging rules through the lens of "communities of practice"¹³⁴ and a revised doctrine of sources makes sense of the Global Administrative Law phenomenon.¹³⁵ It appears that communities of practice are developing within and across particular regulatory regimes. The form

130. Kingsbury et al., *Global Governance as Administration*, *supra* note 7, at 5 ("This field of law is described as 'global' rather than 'international' to reflect both the inclusion in it of a large array of informal institutional arrangements (many involving prominent roles for non-state actors), and its foundation in normative practices, and normative sources, that are not encompassed within standard conceptions of 'international law.'").

131. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 180–184, WT/DS58/AB/R (Oct. 8, 1998); Kingsbury et al., *Emergence*, *supra* note 111, at 36.

132. See also Kingsbury, *International Law as Inter-Public Law*, *supra* note 38, at 190–91 ("It is influenced by treaties and fundamental customary international law rules, but it goes beyond these sources and sometimes moves away from them.").

133. See generally Kingsbury, *The Concept of 'Law' in Global Administrative Law*, *supra* note 129, at 26 (attempting to devise such an explanation).

134. See *supra* text accompanying notes 56–68.

135. Benedict Kingsbury suggests something similar, arguing for a concept of inter-public law that can replace international law and that would recognize various regulatory regimes alongside states as distinct legal communities subject to public law constraints. See generally Kingsbury, *International Law as Inter-Public Law*, *supra* note 38, at 190.

of these regimes—legal, quasi-legal, or non-legal, national, transnational, or international—is irrelevant. Instead, what is relevant is the increasing law-like nature of the rules in the area and the decreasing opportunities for exit. Both have led stakeholders and other members of these communities to demand greater control and access to the decision-making processes in these areas, often in the form of administrative law type rules and procedures. New legitimacy rules seem to be emerging, which requires some combination of participation, transparency, reason-giving, review, and proportionality that can legitimate the rules in the eyes of the relevant community. The project of Global Administrative Law, much like the project of the revised doctrine of sources, can be seen as an attempt to document the internalized legitimacy rules in each of these communities. Moreover, the communities of state officials, lawyers, NGOs, and business interests in each of these regimes overlap, helping to spread a particular toolbox of procedures from one regime to the next. As actors begin to internalize certain administrative law norms in one regime, it becomes increasingly difficult for them to accept unreviewable, unreasoned, closed-door decisions made in other regimes—even if on paper, such decisions are completely legal.

D. *The Diversity of International Legal Communities*

In each of the three areas discussed so far, human rights, tribunal law, and global administrative law, new legal communities with new legitimacy rules seem to be emerging. In some ways, the story behind each seems quite similar. Each area exemplifies the increasing specialization of international law; new specialized bodies of law are increasingly applied by subject area specialists (some of whom may have been educated in legal areas other than traditional public international law) who represent groups and interests only recently affected by international legal regulation. In such situations, we would expect views on substantive law and doctrine to diverge, but it might also seem reasonable to expect the divergence of legitimacy rules that the above discussions suggest. As Adler explains, “[i]t is within communities of practice that collective meanings emerge, discourses become established, identities fixed, learning takes place, new political agendas arise, and the

institutions and practices of global governance grow.”¹³⁶ It is through intense involvement with other participants in a particular regime that community specific understandings of law and legitimacy begin to form. As constructivist international relations scholars have taught, agents and structure, in this case, law and legal actors, are mutually constituting. Deep engagement with human rights, international criminal lawyering, international investment arbitration, or a transnational regulatory regime should be expected to shape the expectations and understandings of its participants in ways different from non-participants.

But these three examples also demonstrate the diversity of the shapes communities can take. In one example, tribunal law, we see a community developing around a small group of expert practitioners in a highly specialized area. The special challenges created by the type of practice and its relative insulation from the rest of international law fuel the shift away from old legitimacy rules toward new ones. In another area, human rights, we see a much more diffuse community, with a wide variety of different members—states, NGOs, experts, individuals—participating in different ways, with different levels of influence, at different times, in different fora. Participants are separated by geography, politics, training, and social circumstance; they are connected only by shared reference to human rights language.¹³⁷ Emerging legitimacy rules are deeply and broadly contested. Finally, in the last area, global administrative law, the legal community cuts across a variety of subfields, as practitioners and advocates reach into other areas in search of principles they can learn and borrow. The “community” is tacit (virtual?) at best—the product of relations, connections, and mutual learning. The existence of the community only becomes apparent (perhaps even to participants) upon academic description.

IV. FROM INTERNATIONAL LAW TO INTERNATIONAL CONFLICTS OF LAW

So far, this Article has sought to better understand the nature of sources within international law. In so doing, it has

136. ADLER, *supra* note 56, at 15.

137. Participants may also be connected through a sense of shared project.

suggested that international law may no longer represent a single community of states with a single set of internalized legitimacy rules, but instead a series of overlapping communities with overlapping members, each of which may be in the process of adopting a new set of internalized legitimacy rules. If this account is at all persuasive, does it provide any lessons about the “fragmentation” of international law or what to do about it?

The problem of fragmentation is often seen as a jurisdictional or doctrinal one. As international law has expanded to regulate a wider and wider array of human activity, specialized bodies of law—international environmental law, international human rights law, international investment law, international trade law, international criminal law—have emerged. These new specialties have been joined by increasingly specialized courts, tribunals, and expert bodies. These new bodies have joined an already large number of state courts capable of hearing international claims and pronouncing judgments on international rules. Almost inevitably, the combination of increasing specialization and choices of law announcing fora has led to divergent views on what international law requires and what international law rules actually mean. Without a single hierarchy of courts that might sort out these differences, fragmentation of international doctrine is the likely result.

Framed this way, it should not be surprising that many of the proposed solutions have focused on either doctrine—reconciling doctrinal differences¹³⁸ or devising doctrinal fixes to resolve disputes¹³⁹—or on jurisdiction—devising rules to manage when disputes should be heard by particular bodies¹⁴⁰ and

138. See, e.g., Milanovic, *supra* note 13, at 92 (relying on Article 103 of the U.N. Charter as rule of norm conflict resolution); Roberts, *supra* note 6, at 758 (explaining the difference between traditional and modern custom); Teitel & Howse, *supra* note 5 (suggesting “law of humanity” *Grundnorm*).

139. U.N. Int’l Law Comm’n, *Fragmentation Report*, *supra* note 2, at 211, ¶ 419; see also Dupuy, *supra* note 14, at 801–02 (considering a more robust role for the ICJ in resolving disputes over international law); Kammerhofer, *supra* note 4 (describing such approaches).

140. See generally Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 INT’L L. & POL. 809 (1999).

rules concerning how much respect certain bodies should give the judgment of others.¹⁴¹

But the discussion of sources here suggests that the problem is not merely interpretative. It is not simply the doctrine or forum choices that are fragmenting; the international community itself appears to be fragmenting. At least some of the disputes described as fragmentation seem to have their origin in disputes over the nature of the legal community and the standards by which legitimate rules will be judged. Debates over the relationship between human rights law and international humanitarian law—the extent to which human rights rules (including the ICCPR) apply to the “global war on terror,”¹⁴² the specific effect of the “Martens clause” of the Hague Conventions,¹⁴³ the jurisdiction of human rights bodies to

141. See, e.g., YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 278 (2003) (suggesting that courts exercise comity towards each other); Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity*, 40 N.Y.U. J. INT’L L. & POL. 259, 261 (2007) (creating “a hierarchy with the ICJ at its apex [and] . . . identifi[ying] a number of ‘foundation stones’ for an institutional framework” that explains the amount of weight to be given to judgments of different courts); Martinez, *supra* note 3, at 449–53 (providing examples of judicial doctrines aimed at creating judicial efficiency in cases of overlapping or concurrent jurisdiction).

142. Compare U.N. Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶¶ 29, 32–34, 42–44, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (affirming applicability of human rights law to targeted killings committed in the territory of foreign states), with U.S. Dep’t of State, *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Annex I* (Oct. 21, 2005) (asserting territorial limits to the ICCPR).

143. The Martens clause declares the view of the High Contracting Parties that “[u]ntil a more complete code of the laws of war is issued, . . . populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” Hague Convention (II) with Respect to the Laws and Customs of War on Land pmbl., July 29, 1899, 32 Stat. 1803. A slightly different version appears in the 1907 Hague Convention. See Hague Convention (IV) Respecting the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2277. Broad readings of the clause are used to support the integration of human rights norms into the law of war. See Inter-Am. Comm’n H.R., *Decision on Request for Precautionary Measures (Detainees in Guantanamo Bay)* (Mar. 12, 2002), reprinted in 41 I.L.M. 532 (2002) [hereinafter Inter-Am. Comm’n H.R., *Decision—Detainees*]; Hans-Joachim Heintze, *On the Relation-*

consider law of war issues like detainee treatment¹⁴⁴—all seem better understood as conflicts between a human rights legitimacy community that prioritizes the interests of the individual and human dignity and state-centered law-of-war community that prioritizes state consent and views diminutions of state sovereignty with suspicion. The conflict in the *Kadi* case, between the Security Council's order to freeze the assets of designated individuals and European law concerns that due process standards be met,¹⁴⁵ might best be seen as a conflict between more traditional state-centered readings of the U.N. Charter and emerging norms of due process legitimacy in both the human rights and global administrative law communities. Debates over the legality of generic drugs under the TRIPS agreement pit the human rights community's expansive reading of the promises in the Doha declaration¹⁴⁶ regarding developing countries and public health against First World trading states' insistence on strict intellectual property protection and the strictures of traditional rules of treaty interpretation.¹⁴⁷

ship Between Human Rights Law Protection and International Humanitarian Law, 86 INT'L REV. RED CROSS 789, 797–98 (2004). States seeking to distinguish the two areas of law more clearly read the clause much more narrowly. See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 85–86 (2000) (describing state positions).

144. Inter-Am. Comm'n H.R., *Reiteration and Further Amplification of Precautionary Measures (Detainees in Guantanamo Bay)* (Oct. 28, 2005), reprinted in 45 I.L.M. 673 (2006); Inter-Am. Comm'n H.R., *Reiteration of Precautionary Measures Regarding Detainees in Guantanamo* (July 23, 2002), reprinted in 45 I.L.M. 667 (2006); Inter-Am. Comm'n H.R., *Response of the United States to Request for Precautionary Measures (Detainees in Guantanamo Bay)* (Apr. 15, 2002), reprinted in 41 I.L.M. 1015 (2002); Inter-Am. Comm'n H.R., *Decision—Detainees*, *supra* note 143.

145. See *Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. ¶ 327. *Kadi* involved the Security Council's decisions to freeze assets of individuals accused of financing terrorism and the extent to which European states and the European Community could or should implement those decisions where state and community norms of due process had not been met.

146. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

147. Although regularly invoked by advocates for developing countries and human rights, the exact status of the declaration under international law is in considerable dispute. See generally Carmen Otero Garcia-Castrillon, *An Approach to the WTO Ministerial Declaration on the Trips Agreement and Public*

To be clear, some disagreements about international law are unquestionably interpretative in nature. This Article does not argue that all conflicts over international law doctrine are conflicts over legitimacy rules, but the fact that some may be changes how we might think about resolving them.¹⁴⁸

In a sense, this makes the fragmentation of international law part of a broader problem of transnational regime conflict—the conflicts and competition between international law regimes, regional regimes,¹⁴⁹ domestic regimes,¹⁵⁰ and private regulatory regimes—something the example of Global Administrative Law might already have suggested.¹⁵¹ It thus dovetails well with the observations of pluralists, who have described both these problems, one within international law and one outside of it, as the result of conflict between overlapping juris-generative, normative, legal communities.¹⁵² To the extent that the insights here have been prefigured by legal pluralists,

Health, 5 J. INT'L ECON. L. 212 (2002); Steve Charnovitz, *The Legal Status of the Doha Declarations*, 5 J. INT'L ECON. L. 207 (2002); James Thuo Gathii, *The Legal Status of the Doha Declaration on Trips and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J. LAW & TECH. 291 (2002).

148. Furthermore, we may not be capable of reliably distinguishing between these two types of conflict. The possibility of legitimacy conflicts may be a reality that cannot be avoided.

149. Kadi, 2008 E.C.R. ¶ 327.

150. *Medellín v. Texas*, 552 U.S. 491 (2008); *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction of January 5, 2001, 7 ICSID Rep. 421 (2005); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005) (discussing cases).

151. Cf. Kingsbury, *International Law as Inter-Public Law*, *supra* note 38, at 188–89 (“However, there is no strong reason to limit the category of public law entities—and of participants in inter-public law—to states. As trans-border interactions among all such public law entities increase, situations where they bump up against each other multiply, generating conflicts of law arrangements in the public law sphere.”).

152. See Fischer-Lescano & Teubner, *supra* note 3, at 1003–04. Paul Berman has also looked to the literature on legal pluralism for an answer, but he has primarily focused on conflicts between competing official legal communities, e.g., France and the United States, Europe and France, the ICJ and the United States. He does imply though that legal pluralism's insights might apply to intra-regime conflicts as well, e.g., conflicts between international investment law and international human rights law, as well. See Berman, *Global Legal Pluralism*, *supra* note 10, at 1228–35; Berman, *Pluralist Approach*, *supra* note 11, at 316–20; Berman, *Conflict of Laws*, *supra* note 11, at 1110–12.

the account here grounds those pluralist accounts, which have generally been phrased at a high level of abstraction,¹⁵³ in doctrinal terms and attempts to work through the doctrinal implications of such pluralist views. The account here bridges the gap between doctrinal and theoretical conceptions of international law.

The aspect of this approach likely to cause the most difficulty is the overlapping nature of the legal communities in question. (This is undoubtedly part of the reason that pluralist accounts of disputes within international law remain less clear than pluralist accounts of disputes outside international law.) Easy boundaries cannot be drawn around the community of international criminal law or the community of human rights law or the community of global administrative law in the way that they might be drawn between France and Germany. Of course, even when talking about more traditional conflicts between political entities, lines get blurred, as the conflicts between state law, regional law, and international law in *Kadi* demonstrate.¹⁵⁴ It is arguably the overlapping nature of each of those regimes and the differing requirements they seem to impose that made the case so devilishly difficult. Moreover, one of the key contributions of legal pluralism was the recognition that colonial law never fully displaced the laws of the colonized, that on the contrary, the two became intermeshed as colonial peoples found themselves subject to the laws of overlapping communities. The conflicts caused by fragmentation are as visceral as they are—between international humanitarian and international human rights law, for example—because they force individuals to confront the competing legitimacy of the overlapping communities to which they belong—the rules, values, norms of each they normally keep compartmentalized.

But in their overlapping nature, these legal communities also defy easy analogy to other types of conflicts. The conflicts between these communities are both conflicts between subject areas—which are usually resolved through doctrine—and conflicts between legal communities—which might be dealt with

153. Berman, *Global Legal Pluralism*, *supra* note 10, at 1177 (“Finally, pluralism frees scholars from needing an essentialist definition of ‘law.’”).

154. *Kadi*, 2008 E.C.R. ¶ 327.

through conflicts of law rules.¹⁵⁵ Doctrinal fixes fail to capture the group interests reflected in opposing rules, while conflicts of law rules, traditionally concerned with relationships to territory or government interests, seem inapposite to disputes between substantive areas of law.¹⁵⁶ As Ralf Michaels and Joost Pauwelyn insightfully explain, conflicts between substantive areas, what they refer to as conflicts of norms, often require balancing the interests involved. But “[s]ince balancing is a function of the relative weight of different principles, and this relative weight may be different within different legal systems, balancing between legal systems will often not resolve the conflict between these different balancing results.”¹⁵⁷ Conflicts of law analogies fare no better. As they explain,

even where we can speak of different sub-systems or branches of international law (say, [WTO] law and human rights law), these are not defined by territory or personality, and neither WTO law nor human rights law has its own government with conceivable governmental interests, so the criteria developed in these particular conflict-of-laws approaches are not applicable as such.¹⁵⁸

If international law is spawning new overlapping legal communities, how then should we resolve disputes between them? The goal of this Article is primarily descriptive—to show how a more nuanced, updated approach to sources can reframe the fragmentation problem—and a solution to these disputes is beyond its scope. But recognizing that many of these disputes are between communities and over legitimacy helps to at least frame some of the options. There appear to be at least four broad approaches available: (1) a conservative/common denominator approach, (2) a more radical/inclusive approach, (2) a managerial/pluralist approach, and (4) a competition/

155. In essence, it is as if tort law is provided by Georgia law and contract law by Jewish law. The conflict between subject areas is co-extensive with the conflict between legal regimes.

156. For a very insightful discussion of the problem with these analogies, see Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law*, in MULTI-SOURCE EQUIVALENT NORMS IN INTERNATIONAL LAW 19 (Tomer Broude & Yuval Shany eds., 2011).

157. *Id.* at 26.

158. *Id.* at 14.

politics approach. International tribunals and scholars have already begun experimenting with some of these approaches, perhaps tacit recognition that a choice of community mindset is necessary.

A. *The Conservative/Common Denominator Approach*

One approach to the fragmentation described here is to retain the traditional doctrine of sources as a conflicts rule. Such an approach would recognize that the traditional doctrine may not be an accurate description of international legal sources, but would nonetheless use the traditional doctrine as a rule of decision for resolving international disputes.¹⁵⁹ In a sense, this is how international law currently operates. Communities' views on international legal sources may be evolving, but those communities are still forced to argue in Article 38 terms. A novel legal argument will only succeed before a more generalized international law body or with the more general international law community to the extent that it can plausibly be framed in traditional terms.

There are a number of arguments in favor of such an approach. One argument might simply go to manageability. A likely complaint about the functional/plural approach to sources and fragmentation described here might be that it is simply too complex, too nuanced to be useful. Law needs legal fictions. The traditional doctrine of sources may be wrong, but it remains a reasonably simple, and the only agreed-upon, set of rules for resolving international law disputes.

A second argument goes to the common denominator aspect of this approach. States are necessary members of all these new communities of international law. At the end of the day, enforcing the rules of any of these regimes requires the acquiescence of official state actors. States might not surprisingly want to retain a doctrine of sources that focuses on state consent and official state action. Such rules allow them to control and monitor the rules being developed. To the extent that states demand application of a more traditional set of sources, there may be no other choice. It may also allow states, as relatively organized, relatively representative, relatively re-

159. Of course, that is what Article 38 on its face purports to do—it provides a rule of decision for international courts.

sponsible actors (in democratic states at least, they may represent the interests of other stakeholders) to slow things down, and to make sure that the rules emerging from much less organized communities (which might be much more open to capture) are fully vetted and thought through.

But states might not be alone in favoring such an approach. Although such an approach would certainly diminish the autonomy of new communities,¹⁶⁰ for example, human rights advocates within that community may prefer unity over fragmentation. A fully plural approach that applies the rules of each community to its own affairs decreases the chance that the values of each community can influence each other. Human rights advocates may not want to give up the opportunity to influence the norms of international humanitarian law; members of the global administrative law community may want the opportunity to argue that the norms they are developing should apply to public international law more generally. Members of these communities may not be satisfied with autonomy, but instead have imperial ambitions. A single doctrine of sources can allow them to make arguments that slowly shift the meaning of commonly held sources in the direction they desire.¹⁶¹

The European Court of First Instance's (CFI) approach to the *Kadi* case¹⁶² provides a useful illustration. In that case, the CFI was faced with a conflict between the Security Council's order to freeze the assets of designated individuals and European law concerns that due process standards be met. The CFI approached the case from the standpoint of traditional international law doctrine, under which the UN Charter provides no opportunity to review Security Council decisions and under which the Charter has primacy over other regimes. In line with the Vienna Convention on the Law of Treaties, only

160. Though it should be noted that this approach only affects areas of conflict, communities would retain considerable autonomy over legitimacy rules in the ordinary course of their affairs.

161. Robert Howse and Ruti Teitel suggest that something similar is currently going on, that through cross-interpretation between tribunals, different regimes have incorporated a "law of humanity" *Grundnorm*. See generally Teitel & Howse, *supra* note 5, at 967–68.

162. Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649; Case T-306/01, *Yusuf & Al Barakaat Int'l Found. v. Council & Comm'n*, 2005 E.C.R. II-3533.

where *jus cogens* norms have been violated would there be a possibility of review. The CFI considered the possibility that Human Rights and Global Administrative Law principles (both of which, it was claimed, were not met by the Security Council's decision) could be translated into traditional doctrinal terms, in this case a potential *jus cogens* norm of due process. Had it recognized such a *jus cogens* norm, however, it would have been a major victory for Human Rights and Global Administrative Law, one with implications across international law. In this case, however, the CFI rejected that argument as too novel.¹⁶³

This is the problem, of course, with using the traditional doctrine of sources. More traditional approaches will more often than not prevail. It may not describe the actual life of rules in the system, and it gives states considerable veto power over rules that have been developing. Its focus on state consent is outdated. As a result, such an approach could prove highly unstable and quickly unravel as communities of legitimacy rebel against the conservativeness of traditional doctrine.¹⁶⁴

B. *The Radical/Inclusive Approach*

A more radical approach would seek to hear the voices of all community members. The goal would be to find rules that reflect the interests of as many stakeholders as possible. In some cases, states may be relatively good interest aggregators and a traditional doctrine built around state consent and state negotiation may well represent the interested stakeholders.¹⁶⁵ In the case of a dispute between communities, however, such an approach would suggest using the legitimacy rules of the most inclusive community whose members appear implicated. For example, in a dispute between international humanitarian law (arguably made by a community of states) and international human rights law (a community that now appears to in-

163. See Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 19–22 (2010).

164. Cf. Cohen, *supra* note 8, at 95 (“[I]f the ‘law’ is commonly disregarded and seems to have little impact on action, the meaningfulness of the ‘law’ must be doubted.”).

165. As Benedict Kingsbury explains, states “are accustomed to the operation of the principles of public law.” Kingsbury, *International Law as Inter-Public Law*, *supra* note 38, at 188.

clude individuals), such an approach would suggest judging the particular rule according to emerging legitimacy rules of international human rights law. Similar arguments have been made in support of favoring human rights/environmental litigation brought by indigenous groups over investor-state arbitration of the same dispute.¹⁶⁶ At first glance, such an approach might seem normatively appealing.

But this approach could prove difficult and potentially dangerous. One problem is that this approach requires identifying the relevant stakeholders, a notoriously difficult task. (In the modern, globally interconnected world, who isn't a stakeholder in any given issue?) A more dangerous aspect of such an approach is that it assumes that more inclusive communities are actually more representative communities and allows them to trump the judgments of others. But this cannot be assumed. Human rights law may directly involve individuals in lawmaking, arguably making it more inclusive at the international level, but other interests, for example, of corporations, may not be well represented in that community. The views of states may actually reflect a more inclusive deliberative process—various stakeholders may have had their voices heard in the formulation of the states' views and the states' views may

166. See, e.g., Steven Donziger, *The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 HUM. RTS. BRIEF 8 (2010). Donziger makes several references to the arbitral tribunal non-representative nature. "A successful human rights or commercial claim against a foreign entity could be snatched away by a private court of arbitrators in which the party initially bringing suit cannot be heard and has little or no recourse." *Id.* at 12. "The communities, by arbitration rules, would not have access to the proceedings, much less the opportunity to be a party. Chevron's desired result would effectively strip tens of thousands of people of their legal rights to seek a remedy against the perpetrator of what they consider to be an environmental crime on their ancestral lands." *Id.* at 11. "A typical arbitrator may never have visited the country over which he or she will serve as de facto judge and jury and likely will have little appreciation for the policy complexities at stake when the people who are often most impacted are not represented before the panel." *Id.* at 12. "It is virtually impossible, given the arbitral rules that govern appointments, to have a panel where the majority of arbitrators are outside of 'The Club.' Chevron's appointed arbitrator in its hoped-for BIT case is an example of this phenomenon." *Id.*

reflect more balanced assessments of the competing interests.¹⁶⁷

Attempting to apply such an approach to the *Kadi* case mentioned above¹⁶⁸ demonstrates the basic problem. Applied to that case, the question would be whether the European or Security Council regime was more representative of the relevant stakeholders. Arguments can be made in both directions. On the one hand, the European model requires some due process for the affected individual, perhaps allowing greater individual participation. On the other hand, the Security Council represents more interests around the world. Americans, for example, have their interests in being free from terrorism represented on the Security Council but not in the European Union or its machinery. There appears to be no neutral way to make the choice. Each regime is likely to see its legitimacy rules as the most legitimate.

This framework thus raises the same concerns as traditional attempts to weigh the importance of competing regimes' interests in their particular laws. From an external point of view, as someone outside of either regime, there may simply be no reliable metric for making such assessment. In at least the most difficult cases, each regime probably sees its laws as vital. In the same way, a determination of which community is "most-representative" may defy neutral analysis. Each community will claim the mantle for itself. "Most-representative" will be in the eye of the beholder.¹⁶⁹

C. *The Managerial/Pluralist Approach or "Let a thousand flowers bloom"*

Paul Berman, writing from a pluralist perspective, has argued for a series of rules that grant greater autonomy to over-

167. In the *Aguinda v. ChevronTexaco* example, *see id.*, Chevron has argued that it is actually the Ecuadorian litigation rather than the BIT arbitration that is structurally biased and that the company has been denied due process by officials biased in favor of the plaintiffs. *See* Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL. L.J. 241, 272–95 (2010).

168. Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. ¶ 327.

169. An approach that asks which legitimacy rules are most legitimate would, of course, face similar problems.

lapping communities. Examples of such approaches include: subsidiarity, margins of appreciation, and complementarity.¹⁷⁰ These approaches can be very attractive as the European example (margins of appreciation) and the International Criminal Court (complementarity) suggest. They give communities room to develop their own norms. They also provide competing institutions with rules of decision (or really of respect/comity) that allow them to remain agnostic in disputes over which communities' rules are better or worse. Rules granting such limited autonomy are often applied by international regimes to the decisions made by states, but decisions by one international regime to defer to the decisions of another might be examples of such an approach applied between different international law communities. One example might be the ICJ respectful treatment of ICTY findings regarding Genocide in the Former Yugoslavia.¹⁷¹

The problem with these approaches is that their very flexibility makes them largely indeterminate.¹⁷² It can be difficult to choose between them and even more difficult to decide

170. See generally Berman, *Global Legal Pluralism*, *supra* note 10.

171. The Court concluded that

it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 223 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> [hereinafter ICJ, Application of Genocide Convention].

172. Using the *Kadi* case again as an example, under a margin of appreciation model, the ECJ might have asked whether the Security Council's decision sufficiently respected due process. The ECJ itself made some references to a possible margin of appreciation going in the other direction, granting European states room to implement Security Council decisions differently. See Giacinto della Cananea, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council*, 15 COLUM. J. EUR. L. 511, 519 (2009) (The ECJ points out that, once the UN has established a set of goals, it leaves a considerable margin of appreciation for the fulfilment of these objectives."). In either case, however, it is unclear what the standard of review would actually be, nor is there a clear metric for weighing the two regime's concerns.

when their presumptions of autonomy should be overridden.¹⁷³

D. “. . . and the weeds too” or the Competition/Politics Approach

A final approach would be no approach at all. Rather than trying to solve fragmentation, such an approach would encourage communities to do battle over norms. This perspective looks beyond the battle in a given court or tribunal to the broader battle for community acceptance.

Unlike some of the other approaches, a competition approach does not look at fragmentation as a problem. On the contrary, fragmentation, on this view, can be beneficial.¹⁷⁴ One of the problems underlying fragmentation is that any given court, tribunal, or expert body may have a limited mandate and may accordingly lack the perceived legitimacy to speak authoritatively to the interests of different international law communities. A human rights body may be perceived as incompetent to consider international humanitarian law issues; a trade body’s authority to speak to environmental or human rights concerns may be questioned.

One way to solve this legitimacy problem, particularly where the creation of a single authoritative body seems unlikely, is to deny any given body a monopoly over interpreta-

173. Berman, *Global Legal Pluralism*, *supra* note 10, at 1197 (“Thus, each of the mechanisms described in this Part encounter excruciatingly difficult and probably impossible to resolve problems as to how best to determine when norms of one community should give way to norms of another and when, in contrast, pluralism can be maintained.”); *id.* at 1236 (“The messiness of hybridity also means that it is impossible to provide answers *ex ante* regarding occasions when pluralism should be honored and occasions when it should be trumped.”); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 125 (2004) (“For over thirty years the Court has been using the margin of appreciation and trying to explain that use with clarity. It has failed. Today the doctrine remains broad, vague, and largely undefined, leading to unpredictable (and often arbitrary) results.”); Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT’L L. 65, 112 (2007) (“[D]octrines like subsidiarity and the margin of appreciation seem too vague to constrain international courts in the long run. Even in the European context, critics complain about how malleable these doctrines are.”).

174. *See, e.g.*, William Thomas Worster, *Competition and Comity in the Fragmentation of International Law*, 34 BROOKLYN J. INT’L L. 119, 140–49 (2008) (concluding that competition among tribunals can result in constructive diversity).

tion and dispute resolution.¹⁷⁵ Allowing fora to compete allows multiple legal communities to reasonably claim that their view is the correct one. Debates over international law are eventually resolved not through courts, but through public debate and persuasion. This approach has the added benefit of limiting the risks inherent in tribunals applying laws and principles they don't fully understand. Each tribunal would be encouraged to stay within its own competence and expertise. When the interests of other communities do make their way into their decisions, it will be through modes of interpretation that the tribunal's community can find plausibly legitimate.

Returning to the *Kadi* case, the eventual decision of the European Court of Justice (ECJ) may provide an example of such an approach in action. In its decision, the ECJ, like the CFI before it, held that it could not review the Security Council's imposition of sanctions on individuals accused of supporting terrorism. Nonetheless, it held that European regulations implementing the Security Council's decision, which were within the ECJ's jurisdiction to review, must be invalidated to the extent to which they did not meet the due process norms of European law. Perhaps as evidence that this sort of competition approach can work, the decision put European members of the Security Council in an awkward position, forcing them to reengage with the Council on the issue, eventually resulting in reforms to the Security Council process.¹⁷⁶ Another example might be the back-and-forth jockeying between the ICJ and the ICTY over whether "effective control"¹⁷⁷ or "over-

175. See generally Cogan, *supra* note 5 (arguing that increasing competition among international courts will more effectively constrain international judicial power and increase States' willingness to accede to international judicial authority).

176. See C. H. Powell, *The United Nation Security Council, Terrorism and the Rule of Law*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 37–41 (Victor V. Ramraj et al. eds, 2012); see also Mattias Kumm, *How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law*, in POLITICAL THEORY OF THE EUROPEAN UNION 134 (Jurgen Neyer & Antje Wiener eds., 2010); see generally Christopher Michaelsen, *The Security Council's Practice of Blacklisting Alleged Terrorists and Associates: Rule of Law Concerns and Prospects for Reform*, 8 N.Z. J. PUB. & INT'L L. 71 (2010).

177. See ICJ, Application of Genocide Convention, *supra* note 171, ¶ 406 (reasserting the "effective control" test after *Tadic*); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 109–115 (setting out the "effective control" test).

all control”¹⁷⁸ is the proper test for attributing military actions to a state.

The obvious drawback to a competition approach is that it sacrifices the short-term for the future. Short-term losses in various fora may mean real injuries to communities or persons—injuries that may simply be too much for some to bear.¹⁷⁹ Prisoners may be executed in the course of debates over the death penalty,¹⁸⁰ Israel’s security barrier/wall/fence will remain in place as the battle between the ICJ and Israeli Supreme Court plays out,¹⁸¹ prisoners at Guantanamo may have to wait for legal process,¹⁸² Israel will be forced to defend itself internationally against the Goldstone Report while relations between human rights law and international humanitarian law are worked out, and the environment may be damaged or property rights lost in disputes between trade, investment, environmental, and indigenous rights communities.¹⁸³ For those opposed to these results, waiting for more broadly legitimate law may be waiting too long.

There is also no guarantee that better rules will always win the competition. It is just as likely that the victors will be those

178. See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment in the Appeals Chamber, ¶¶ 115–45 (July 15, 1999) (rejecting the ICJ’s “effective control” test).

179. The foregoing listed are not injuries of my concern but would be the injuries anticipated by those concerned about competition.

180. See generally *Medellín v. Texas*, 552 U.S. 491 (2008) (holding in a habeas challenge to a murder conviction that an ICJ decision was not enforceable in U.S. courts); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002) (discussing three Commonwealth Caribbean governments’ denunciation of human rights treaties and petition procedures as a result of a series of rulings, by the Judicial Committee of the Privy Council, restricting the execution of criminal defendants); Manuel Roig-Franzia, *Mexican National Executed in Texas*, WASH. POST, Aug. 6, 2008, at A6 (discussing the execution of Medellín despite a prior ICJ ruling that Medellín deserved to have his case reviewed).

181. See generally HCJ 2056/04 *Beit Sourik Village Council v. Israel* [2004] IsrSC 58(4) 807, *reprinted in* 43 I.L.M. 1099 (2004) (approving the construction of the wall); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) (holding that the construction of the wall is contrary to international law).

182. For examples of cases involving Guantanamo prisoners, see *supra* note 144.

183. For examples of cases involving these issues, see *supra* notes 166–67.

actors and those communities influential enough to impose their will through international politics or strong enough to wait other communities out.

* * * *

Each of these approaches has benefits and drawbacks, and it may not be possible to say with certainty that one approach is superior to another in the abstract. Assessments of each approach seem inescapably tied to, even dominated by, questions about power. Who will control the ultimate shape of the law: the states and tribunals who control traditional doctrine,¹⁸⁴ the actors who control the communities whose views are granted room or respect, the tribunals who decide when to turn a margin of appreciation on or off, or those actors strong enough to outlast their competitors? A completely neutral approach seems impossible. From a legal standpoint, the best we may be able to do is choose one approach, apply it consistently, recognize its weaknesses, and work to mitigate its harms.¹⁸⁵ But the unavoidability of considerations of power perhaps highlights the reality that conflicts between communities over legitimacy rules can only ultimately be resolved through politics.

V. CONCLUSION

The purview of international regimes concerning the environment, trade, human rights, and armed conflict continue to expand. The number of norm articulating bodies continues to multiply. Instances of conflict between them seem destined to rise. And the parade of proposed solutions to interna-

184. See generally Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 *LOY. U. CHI. INT'L L. REV.* 173 (2008).

185. Intriguingly, these four approaches demonstrate that discussions of fragmentation and now-popular discussions of constitutionalization in international law are inextricably intertwined. Each of these approaches might be seen as a set of constitutional conflicts rules, whether in the form of supremacy clauses, dictating a hierarchy of sources, full-faith-and-credit clauses, providing for comity between regimes, or fundamental rights and default rules that serve as constitutional trumps. The more general international law responds to fragmentation by taking on the role of a conflicts regime, the more its rules will look constitutional in form.

tional law's fragmentation seems likely to march on indefinitely.

But in developing their proposed solutions, few scholars or judges have taken the time to ask what the reality of fragmentation tells us about the nature of international law. In fact, the fragmentation of international law, the progressive development of alternative understandings of international law doctrine, has only highlighted a broader problem in international law—that doctrine only marginally resembles international law as practiced, that doctrinal categories have become mere formalities into which current practice must be plugged.

Recognizing this reality and rethinking international law's sources can provide a fresh approach to fragmentation, helping to clarify what's really at stake in conflicts over international law's content and meaning. A revised doctrine of sources can highlight, rather than hide, the deep normative conflicts that may underlie disagreements between human rights and international humanitarian law, international environmental law and international investment. And in place of ineffective doctrinal tweaks that might only exacerbate existing conflicts or raise questions about international law's force, it can suggest forms of dialogue, settlement, and contestation that recognize the depth of these disagreements even as they seek to manage them.