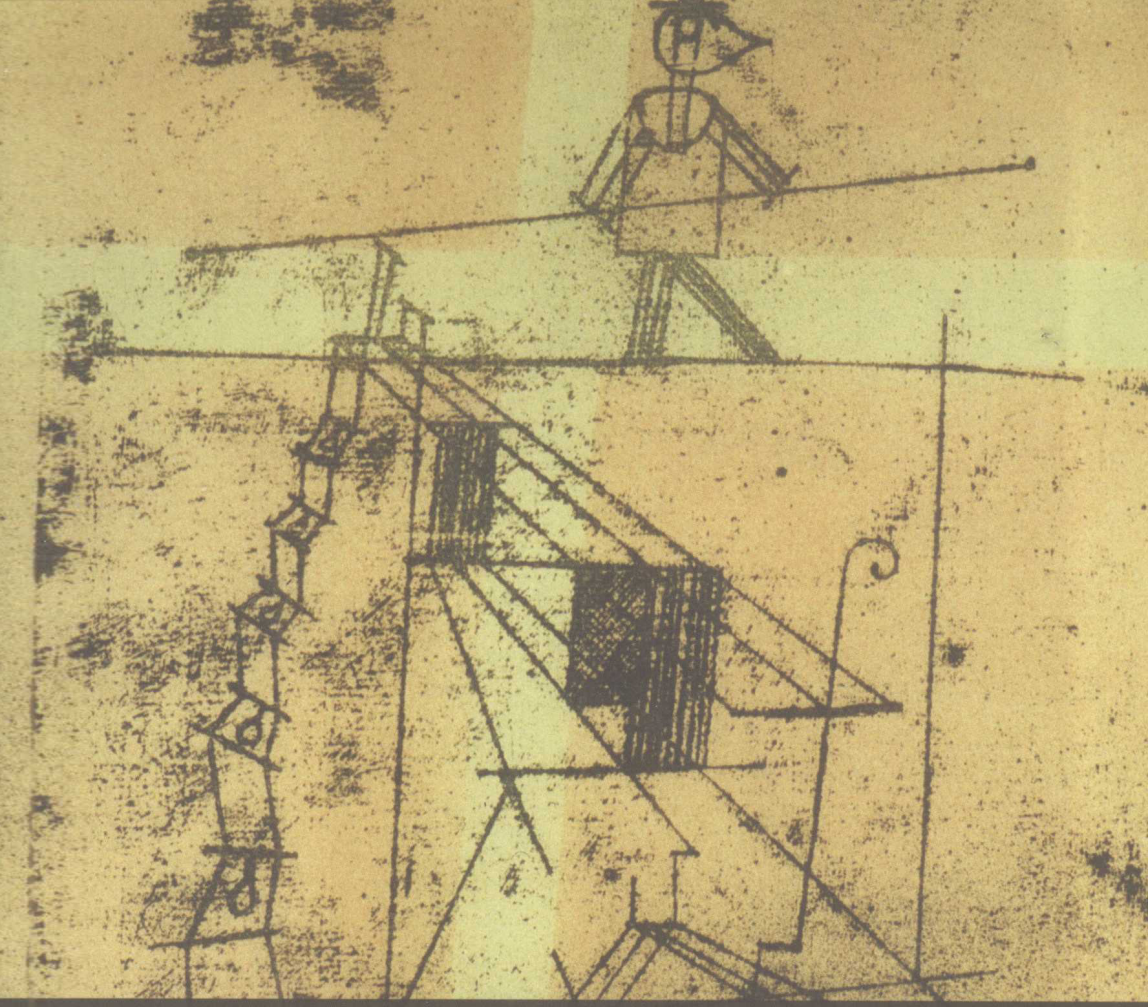


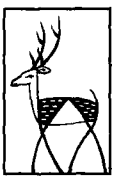
The Concept of Unity in Public International Law

MARIO PROST

HART MONOGRAPHS IN
TRANSNATIONAL & INTERNATIONAL LAW

The Concept of Unity in Public International Law

Mario Prost



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Introduction

THERE IS SOMETHING peculiar about international law. Ever since its emergence as an autonomous professional discipline, international law has been a contested object. For how can law exist – let alone rule – among sovereign nations that recognise no authority beyond their own? What can be the significance of a legal system in which juridical subjects themselves, and most notably powerful ones, control the meaning and enforcement of legal rules? In any case, should one really speak of 'international' law when, historically, this law has been created by and for European nations? Although at the turn of the twentieth century international law has consolidated its position within the academy, through the creation of new chairs, learned societies and scientific publications, scepticism remains high. International law is too different from the familiar forms and techniques of municipal law. It seems primitive, weak and under-elaborated. Above all, international law is accused of being either too philosophical or too political.[1]

Faced with scepticism, early international lawyers have had to spend considerable energy defending their project and proving the autonomy and positivity of their law. The strategies and arguments used to legitimise international law in this foundational period were diverse. Some were merely rhetorical ('international law is not primitive, it is simply different'). Others were more pragmatic ('international law exists: states speak its language and use its processes in their dealing with one another'). Most arguments, however, were analogical or comparative. Despite appearances, it was claimed, international law is not so different from domestic law. States can be construed as legal subjects possessing property (territory) and negotiating contracts (treaties). More importantly, international law was defended as being just as complex, technical and sophisticated as municipal law. Hersch Lauterpacht, who was typical of this way of thinking about international law, considered for example that the whole of international law could be read as the rough equivalent on the international plane of rules, categories and institutions of private law (contract law, tort law, property law, law of succession, rules of evidence and procedure and so on).[2]

[1] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 1ff.

[2] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longman, 1927).

Whilst these strategies were quite successful in the inter-war period, the Second World War prompted a new cycle of existential angst and questioning. International law's failure to prevent the war and the Holocaust plunged the discipline into a period of metaphysical turmoil. International lawyers, yet again, had to face criticism, not only from within the legal discipline, but this time also from without, most notably from the discipline of international relations, where realists depicted international law as utopian, irrelevant or at best peripheral, a mere continuation of politics through other means.[3] Post-war international lawyers were therefore compelled to resume the self-justificatory enterprise started by their predecessors. Though the tone and vocabulary were different – for one does not speak about international law in the same way before and after the Holocaust – the themes and strategies remained essentially the same. Whilst admitting that international law had its limits and specificities, international lawyers continued to fight to prove its reality, its positivity and its materiality.[4]

Two decades after the War, however, these various strategies seemed to bear fruit – if only internally – and international law entered a period of relative self-confidence. The discipline, it seemed, no longer felt compelled to prove the existence and relevance of its object. In 1966, Ian Brownlie published the first edition of his *Principles of Public International Law*.[5] The book, which quickly became a standard text, marked a significant change of style. The tone was resolutely anti-apologetic. Brownlie wanted to write a textbook on the substance, the methods and the techniques of international law in very much the same way one would write a textbook on domestic law subjects like contract or criminal law. Brownlie saw international law as an established field of law and saw no need to venture into ontological questions about the basis of obligation or the legal nature of international law.[6] The book thus featured 12 chapters on 12 substantive areas of positive law, but no introduction on definitional and foundational issues. These questions, the author wrote in his preface, 'belong to books on legal theory'.[7]

Brownlie, of course, was a product of his time. From 1958 to 1969, international law underwent a series of decisive developments, including the adoption of the four Geneva Conventions on the law of the sea, the Convention on diplomatic and consular relations, and the two Vienna Conventions on the law of treaties. This 'golden decade of codification' bred new confidence in interna-

[3] See especially Hans Morgenthau, *Politics Among Nations* (New York, Knopf, 1947).

[4] See, eg, Richard Falk, 'The Reality of International Law' (1962) 14 *World Politics* 353; Wolfgang Friedman, 'The Reality of International Law – A Reappraisal' (1971) 10 *Columbia Journal of Transnational Law* 46; Anthony D'Amato, 'Is International Law Really Law' (1984) 79 *Northwestern University Law Review* 1293.

[5] Ian Brownlie, *Principles of International Law* (Oxford, Oxford University Press, 1966).

[6] Although he did write on these issues on other occasions. See, eg, Ian Brownlie, 'The Reality and Efficacy of International Law' (1981) 52 *British Yearbook of International Law* 1.

[7] Brownlie, *Principles*, above n 5 at v.

tional law. The momentum was largely confirmed in the 1970s and 1980s, both on the diplomatic plane – with the adoption of treaties like the Law of the Sea Convention – and on the judicial plane – with a succession of seminal decisions such as the *Nicaragua* judgment which marked the victory, in a court of law, of a small nation against the great superpower of the day. Following the fall of the Berlin wall, the General Assembly even proclaimed the period 1990–99 as the 'United Nations Decade of International Law'.[8]

In the early 1990s, the mood was resolutely optimistic. International lawyers were well aware that the post-Cold War era offered as many challenges as opportunities. But the discipline seemed to have rid itself of its existential predicament. International law, some said, had entered a 'post-ontological era' in which lawyers had become emancipated from the constraints of defensive ontology and were free to end the cycle of doubt and introspection that had for so long inhibited their discipline.[9] Around the same time, some scholars even started speaking of the 'constitutionalisation' of international law, a term that seems to suggest that international law may have reached a degree of maturity and complexity comparable to that of domestic legal systems.[10]

Despite this renewed confidence and the post-Cold War optimism, however, the 1990s were a rather paradoxical period for international law. Just as the discipline seemed to be overcoming its metaphysical malaise, growing numbers of international lawyers started expressing concerns over a new peril: the so-called fragmentation phenomenon. International law, it was said, was developing too fast and in too many directions. There were too many rules and too many regimes, and too little normative and institutional glue to hold the system together. International law's unity may be in danger and, without reform, the system may slowly descend into chaos. Between 1998 and 2000, three successive Presidents of the International Court of Justice spoke publicly against the dangers of fragmentation, most notably before the UN General Assembly.[11] The latter, convinced of the seriousness of the situation, even decided to put the matter to the International Law Commission which, in 2006, issued a 'toolbox'

[8] GA Res 44/23 17 November 1989.

[9] Thomas Franck, *Fairness in International Law and Institutions* (New York, Oxford University Press, 1995) 6.

[10] See, eg, Richard Falk et al (eds), *The Constitutional Foundations of World Peace* (Albany, SUNY Press, 1993); Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Collected Courses* 217, 256–84; Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 529 *Columbia Journal of Transnational Law* 558.

[11] Robert Jennings, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 1; Address to the Plenary session of the General Assembly of the United Nations by Judge Stephen M Schebel, 26 October 1999: www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1; Address by HE Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 October 2000: www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1; Gilbert Guillaume, 'La Cour internationale de Justice – Quelques propositions concrètes à l'occasion du cinquantenaire' (1996) 100 *Revue Générale de Droit International Public* 323.

to deal with issues of fragmentation.[12] Everything happened as if international lawyers, busy as they had long been with dealing with ontological questions, were suddenly caught up in an acceleration of historical time and were seized by a sort of 'postmodern anxiety'.[13] But what, exactly, are the causes of this new anxiety?

I. THE ROOTS OF A POSTMODERN ANXIETY

The fragmentation anxiety stems, first of all, from the material expansion and densification of international law, that is, the spreading of international legal activity into new fields and the diversification of its objects and techniques. Traditionally, the ambit of international law was rather limited. In fact, until the end of the nineteenth century, international law was primarily concerned with two questions: the limits to state jurisdiction and the conduct of diplomatic relations. Since the end of the Second World War, however, and more so since the end of the Cold War, international law has spread far and wide into virtually all areas of human activity – from trade, transport, telecommunications and finance to health, human rights, the environment, terrorism, culture and so on.[14] Even in the discipline of international relations – where the mainstream has long played down the importance of international law – this transformation has been recognised, with some scholars now speaking of the 'legalisation' of world politics.[15]

At a different level, the fragmentation anxiety can be explained by the broadening of the international legal community. Historically, international law has been an instrument of domination of a handful of European nations over the rest of the world. The international legal community has long remained an exclusive 'club' of Western powers, in which non-Western societies were not admitted.[16] International law, however, has progressively abandoned the degree

[12] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission* (finalised by Martti Koskenniemi), UN Doc A/CN.4/L.682 (2006) (ILC Fragmentation Report). See also *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/61/10 (2006) (ILC Fragmentation Conclusions). The final conclusions were adopted collectively by the study group as a whole and represent a condensed version – or 'executive summary' – of the larger analytical study.

[13] Martti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2005) 15 *Leiden Journal of International Law* 553. The idea that fragmentation is a new concern in international law scholarship is contested by some authors who see in the modern rhetoric of fragmentation a mere revival of past anxieties over the state and direction of international law. See, eg, Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *Leiden Journal of International Law* 1.

[14] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991) 1–3.

[15] See Judith Goldstein et al, 'Legalization and World Politics' (2000) 54 *International Organizations* 385.

[16] On the role of international law as an instrument of Western hegemony, see especially Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2005).

of civilisation (at least in its classical form) as a membership criterion. It has become, if only on the surface, a truly universal law which in theory applies equally to all nations, big and small, rich and poor, old and new. Following decolonisation, the international legal community has grown dramatically from about 40 recognised state actors in 1920 to nearly 200 today.

The change is not only quantitative, however. It is qualitative too. The international community has become an 'outer-less community', that is, a community without 'barbarians'. Without barbarians does not mean without barbarism. The twentieth century has had its share of genocides, committed by civilised and barbaric nations alike. International law, however, has slowly abandoned the civilised/barbarian opposition as a structuring dialectic. International law no longer defines itself in relation to its enemies from without. There remain rogue, undesirable or untouchable subjects (terrorists, unlawful combatants, refugees, etc) within the international community and these continue to be used to construct an image of international law's self as a progressive force in a savage and violent world.[17] But the fantasised figure of the barbarian 'other', which is excluded *ab initio* from the community of civilised nations, has largely disappeared from international law discourse.[18]

Whilst barbarians have formally disappeared as a legal category, new speaking subjects have emerged, however, which also contribute to the perceived loss of coherence in international law. For most of its existence, international law has been the exclusive preserve of states. To international lawyers, the state has been a familiar face, a reassuring voice, a firm ground on which to base their theories of law, obligation and justice. Yet again, this is no longer the case today. It has become practically impossible to understand international legal matters in relation to states alone. Individuals, who were once considered mere objects of international law, are now the holders of international rights that are actionable in court, including against their own state, and can be held personally responsible for violating international criminal law.[19] Multinational corporations have become regular interlocutors in the governance of transnational problems. For example, the *Global Compact* is a strategic partnership between the UN and the business sector aimed at promoting compliance with universally accepted principles in the areas of human rights, labour, environment and anti-corruption.[20] Major cities have even started acting as global players and stakeholders in the areas of trade, finance, human rights or sustainable development.[21]

[17] See Anne Orford (ed), *International Law and Its Others* (Cambridge, Cambridge University Press, 2006).

[18] On this theme, see Mireille Delmas-Marty, *L'adieu aux barbares* (Laval, Presses de L'université Laval, 2007).

[19] See Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21 *European Journal of International Law* 25.

[20] See Andreas Rasche and Georg Kell (eds), *The United Nations Global Compact – Achievements, Trends and Challenges* (Cambridge, Cambridge University Press, 2010).

[21] See Paul Knox and Peter Taylor, *World Cities in a World System* (Cambridge, Cambridge University Press, 1995).

In the United States, for instance, a vanguard of large cities representing more than 30 million people has taken upon itself to drive the country forward in the fight against climate change, signing up to the Kyoto protocol and committing to its greenhouse gas emissions targets.[22]

The rapid development of international organisations, both intergovernmental (IOs) and non-governmental (NGOs), has also played a major role in the transformation of the familiar state-centred international law landscape. IOs, which were almost non-existent in the early twentieth century, now outnumber states in a three to one ratio.[23] Whether as law-makers, law shapers or dispute settlers, IOs have significantly changed the way in which international laws are made, implemented and enforced, as well as becoming forums in which state sovereignty is regularly defined, exercised and contested.[24] NGOs, for their part, number in the tens of thousands. Though they lack international legal personality in the traditional sense, their influence on the formation and implementation of international norms is now well documented and hardly contested.[25]

A final well-recognised mutation in modern international law concerns the emergence of juridical 'monsters', that is, of unfamiliar forms, objects and processes that do not easily fit into the classical categories of public international law. There are, first of all, new forms of normativity such as 'soft law' or 'unofficial law', a term coined to describe new forms of transnational regulation developed directly by private operators, without the state, in specific economic sectors (*lex mercatoria, lex sportiva, lex electronica* and so on).[26] New kinds of institutions also appear, which are neither strictly national nor strictly international. The European Union is a prime example of this sort of 'unidentified legal object', located somewhere between an international organisation and a pre-federal state.[27] More recently, 'mixed' and 'hybrid' jurisdictions have been established in the field of investment disputes (ICSID) and international criminal justice (special tribunals for Sierra Leone, Cambodia, Lebanon, etc), which are composed of both domestic and international judges and apply a blend of

[22] Paul Brown, 'US Cities Snub Bush and Sign Up to Kyoto' *The Guardian* (London, 17 May 2005).

[23] The number of IOs varies according to the criteria employed. The figure for public international organisations, however, is almost certainly over 500 and probably under 700. See Chittharanjan Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge, Cambridge University Press, 2005) 6. On the multiplication of international organisations, see Mario Prost and Paul Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter? (2006) 5 *Chinese Journal of International Law* 341.

[24] See especially Jose Alvarez, *International Organisations as Law-Makers* (Oxford, Oxford University Press, 2005) and Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford, Oxford University Press, 2005).

[25] See Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *American Journal of International Law* 348 and Gaëlle Breton-Le Goff, *L'influence des organisations non gouvernementales sur la négociation de quelques instruments internationaux* (Brussels, Bruylant, 2001).

[26] See in particular Gunther Teubner, *Global Law Without a State* (Aldershot, Dartmouth, 1997).

[27] On the 'European monster', see Mireille Delmas-Marty, *Les forces imaginantes du droit III – La refondation des pouvoirs* (Paris, Seuil, 2007) 102–10.

local and international law.[28] More unusual still is the Caribbean Court of Justice, a dual-function institution that operates as a regional court of justice, applying rules of international law in respect of the interpretation and application of the Treaty Establishing the Caribbean Community, as well as a final court of appeal for all members of the Community in civil and criminal matters. Unique among its kind, the Caribbean Court of Justice is thus both a municipal supreme court and an international tribunal.[29]

'Material expansion', 'widening international legal community', 'proliferation of speaking subjects', 'diversification of sources' and emergence of 'juridical monsters': these developments, taken together, work to produce in the discipline of international law a feeling of dispersion and dissolution. With the propagation of international law in new spaces, with uncertain boundaries, many international lawyers fear a loss of control and meaning.[30] The old image of the Westphalian legal order, with its clear separation between domestic and international levels of governance, slowly gives way to the image of a complex 'disorder of normative orders',[31] a system where frames and margins are blurred, where legal spaces overlap and conflict with each other, a network with a plurality of voices, lacking a master plan or blueprint.[32]

Needless to say, things do not change from one day to the next in the 1990s. But a succession of important developments precipitates the emergence of this feeling of dispersion and dissolution. First is the deepening and consolidation of a series of special regimes: the establishment of a new European Union, the creation of NAFTA, the joint adoption at the Rio Summit of the Framework Convention on Climate Change and of the Convention to Combat Desertification, the constitution of the World Trade Organization, the entry into force of the UN Convention on the Law of the Sea, the adoption of the Rome Statute on the International Criminal Court and so on. Whilst the 1960s represented the era of 'general' international law (law of treaties, diplomatic and consular relations, etc), the 1990s are clearly the decade of 'special' international law.

Around the same time, a number of important decisions are issued by special courts and tribunals, which either depart from well-established principles of international law or interpret their own body of law in isolation from other branches of international law, that is, in relative ignorance of legislative and institutional activities in adjoining fields. The WTO Appellate Body, in its

[28] Lindsey Raub, 'Positioning Hybrid Tribunals in International Criminal Justice' (2009) 41 *New York University Journal of International Law and Politics* 1013.

[29] David Simmons, 'The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity' (2004) 29 *Nova Law Review* 171.

[30] Slim Laghmani, 'Le phenomène de perte de sens en droit international' in Rafâa Ben Achour and Slim Laghmani (eds) *Harmonie et contradiction en droit international: Rencontres internationales de la Faculté des sciences juridiques, politiques et sociales de Tunis* (Paris, Pedone, 1996).

[31] Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373.

[32] On the paradigmatic shift from the hierarchical 'pyramid' to the heterarchical 'network', see Francois Ost and Michel Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Brussels, Publications des Facultés Universitaires Saint Louis, 2002).

Shrimp-Turtle jurisprudence, struggles to look beyond trade rules and consider their interaction with multilateral environmental agreements.[33] The European Court of Human Rights, in *Belilos* and *Loizidou*, reverses the long tradition of judicial deference towards reservations and holds them inadmissible, *ex hypothesi*, in relation to human rights treaties.[34] The International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Tadic* case, rejects the International Court of Justice's interpretation of certain rules of state responsibility.[35]

For all of these reasons, a shift occurs at some point in the 1990s. For nearly a century, international lawyers have been preoccupied with the underdevelopment of their law. They have sought to shed light on international law's complexities, on its many ramifications and sophistications, to show that international law is not as weak and primitive as many would have it. Then the movement reverses. Norms and regimes multiply. Conflicts emerge between institutions with overlapping jurisdictions, ambiguous boundaries, different worldviews and preferences. The canonical oppositions that have traditionally structured the discipline (civilised/barbarian, public/private, national/international, law/non-law) are contested and challenged. As a result, international lawyers start looking behind the proliferation of forms, norms, regimes and institutions for new theories, but also for principles of coherence and unity. The discipline has moved from an ontological obsession with scarcity (of legitimacy and recognition) to a perplexity with excess.

II. FROM TOO LITTLE TO TOO MUCH LAW: MAPPING THE FRAGMENTATION DEBATE

It is in this context that the debate on the unity/fragmentation of international law has emerged and crystallised. Initially the marginal concern of a closed group of professionals, fragmentation has progressively gone mainstream, becoming the object of countless conferences and a great favourite in the legal literature.[36] No longer the sole concern of generalist international lawyers,

[33] For a recent analysis, see Erich Vranes, *Trade and the Environment – Fundamental Issues in International and WTO Law* (Oxford, Oxford University Press, 2009).

[34] Susan Marks, 'Reservations Unhinged: The Belilos Case Before the European Court of Human Rights' (1990) 39 *International and Comparative Law Quarterly* 300.

[35] See the section on the *Tadic* case in my general conclusion.

[36] See, eg, 'Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle' (1999) 31 *New York University Journal of International Law and Politics*; 'Diversity or Cacophony: New Sources of Norms in International Law Symposium' (2004) 25 *Michigan Journal of International Law* 845; *Fragmentation: Diversification and Expansion of International Law: Proceedings of the 34th Annual Conference of the Canadian Council of International Law*, (Ottawa, Canadian Council of International Law, 2006); Karel Wellens and Rosario Vinaxia (eds), *L'Influence des sources sur l'unité et la fragmentation du droit international: travaux du séminaire tenu à Palma, les 20–21 mai 2005* (Brussels, Bruylant, 2006); Andreas Zimmermann and Rainer Hofmann (eds), *Unity and Diversity in International Law: Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law* (Berlin, Duncker & Humblot, 2006); Matthew Craven, 'Unity, Diversity, and the Fragmentation of International Law'

fragmentation has spread far and wide across the discipline. Each branch of the law, each special regime has started debating its own fragmentation.[37] Fragmentation, as noted by one of its prime theorists, has become the 'doctrinal debate *par excellence* in the globalisation era'.[38]

The purpose of this book is to engage critically with this doctrinal debate. Before laying out my main argument, however, I must say a few words about the structure of the fragmentation debate, as well as some of its gaps and silences. Fragmentation, as we shall see in the rest of this book, raises a host of important questions, of a legal, political, technical and ideological nature. The literature on fragmentation is not only abundant: it is also extremely dense, diverse, complex and – in its own way – fragmented. In order to make sense of this broad and multifaceted debate, it may be useful to think of it as having developed in two distinct periods, two waves of doctrinal controversy.

The first generation of fragmentation debates has focused primarily on two questions: the functional autonomisation of special regimes and the multiplication of international tribunals. On both questions, opinions diverge widely.

On the question of special regimes, international lawyers are split into two camps. On the one hand are those who believe that, as soon as a special regime is equipped with a comprehensive system of secondary norms – that is, with its own sources and its own regime of responsibility – it becomes 'self-contained', that is, it is uncoupled – and works independently – from 'general' international law. Advocates of the self-containment thesis argue that, beyond a certain degree of autonomisation, a special regime becomes entirely efficacious and self-sufficient. It is a complete and closed sub-system of international law with its own secondary rules, tailored to its own characteristics, and it need no longer rely on general rules of public international law in order to ascertain, interpret and implement its substantive norms.[39] On the other hand are those who argue

(2005) 14 *Finnish Yearbook of International Law* 3; *Benedetto Conforti*, 'Unité et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!"' (2007) 111 *Revue Générale de Droit International Public* 5; Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 1; Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 *Collected Courses of the Hague Academy of International Law* 9.

[37] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *European Journal of International Law* 161; Anthony Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623; Tim Stephens, 'Multiple International Courts and the "Fragmentation" of International Environmental Law' (2006) 25 *Australian Yearbook of International Law* 227; Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 *International and Comparative Law Quarterly* 37.

[38] Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (2007) 1 *European Journal of Legal Studies* 1.

[39] Willem Riphagen, 'Third Report on the Content, Forms and Degrees of International Responsibility' (1982) II *Yearbook of the International Law Commission* 22; Willem Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations' in Ronald Macdonald and Douglas Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague, Martinus Nijhoff, 1983). See also *United States*

that the autonomisation of special regimes is never absolute. No regime, they claim, is ever fully self-sufficient. The establishment of a genuinely self-contained regime is not a realistic possibility. A regime is always situated, if only minimally, within the parameters of public international law. Even the most tightly integrated and autonomous regime will occasionally need to draw upon general international law, if only as a measure of last resort, whenever secondary rules are inexistent or ineffective.[40] On this issue, the International Law Commission, in its final fragmentation report, sided with the second camp, holding that 'no regime is a closed legal circuit'.[41] Although special regimes may be better suited to deal with specific problems, and states may opt out of certain aspects of general international law, no regime can ever be completely isolated from general law: 'a regime can receive . . . legally binding force ('validity') only be reference to . . . rules and principles *outside it*'.[42] In the Commission's view, even in the case of well-developed or 'thick' regimes, general laws always fulfil, at minimum, a subsidiary function, whether it is that of governing matters not regulated by the special law (gap-filling) or that of stepping in when the special regime fails to function properly (regime failure).

On the issue of the proliferation of international tribunals, the views are perhaps not as clearly demarcated. But international law doctrine oscillates between two extremes. At one end are those who consider that the multiplication of international tribunals is already creating problems of overlapping and conflicting jurisprudence in a way that undermines the coherence, foreseeability and efficacy of the international legal order. To these scholars, the multiplicity of judicial voices – absent an institutional hierarchy – means cacophony, disorder and, *in fine*, the loss of a global perspective on international law.[43] At the other end of the doctrinal spectrum are authors who consider the problem to be largely theoretical. These scholars observe that international tribunals are

Diplomatic and Consular Staff in Tehran (United States of America v Iran) 24 May 1980, ICJ Reports (1980) 3, para 86: 'The rules of diplomatic law constitute a self-contained régime which, on the one hand, lays down obligations regarding the facilities, privileges and immunities [of] diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means to counter such abuses. These means are, by their nature, entirely efficacious'; as well as *Prosecutor v Dusko Tadic (decision on the defence motion for interlocutory appeal on jurisdiction)*, Case No IT-94-1, Appeals Chamber of the ICTY, 2 October 1995, para 11: 'In international law, every tribunal is a self-contained regime (unless otherwise provided)'.

[40] See especially Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483; Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of Self-Contained Regimes: International Law and the WTO' (2005) 16 *European Journal of International Law* 857.

[41] ILC Fragmentation Report, above n 12 at para 152.

[42] Ibid at para 193.

[43] See, eg, Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998) 31 *New York University Journal of International Law & Politics* 791; Shane Spelliscy, 'The Proliferation of International Tribunals' (2001) 40 *Columbia Journal of Transnational Law* 143; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law' (2007) 40 *New York University Journal of International Law & Politics* 259.

engaged in a robust transnational judicial dialogue which – by and large – maintains the integrity of international law and of its general principles.[44] Often, these authors view the proliferation of tribunals as merely reflecting a post-modern social world marked by functional differentiation or, better yet, as healthy pluralism. More tribunals means wider access to justice and more accountability. It also means creative diversity, the potential for cross-fertilisation of ideas, and a chance to see established categories, preferences and hierarchies challenged or revisited.[45]

On this question, the International Law Commission adopted a middle-of-the-road position. Whilst refusing to arbitrate issues of institutional overlap, but instead deciding to focus on the substantive aspects of fragmentation, the Commission took the view that the multiplication of rule-complexes and tribunals has both negative and positive effects. On the one hand, says the Commission, this phenomenon creates the danger of conflicting rules and institutional practices, and the unity of the law may suffer as a consequence. On the other hand, proliferation and fragmentation are responses to new technical and functional requirements in particular problem areas. They are manifestations of a pluralistic society in which different actors pursue different projects using different principles and techniques, each particular field becoming increasingly professionalised, institutionalised and autonomous. In other words, proliferation and fragmentation reflect rather than create the sociological reality of late international modernity.[46]

A second generation of doctrinal debates about fragmentation has recently emerged, which is less interested in empirical or normative questions than technical considerations. In this second period of the fragmentation literature, the question is no longer whether, and to what extent, international law is fragmenting, nor whether this is desirable or undesirable. Rather, starting from the assumption that coherence and unity are legitimate goals, the question becomes that of 'ordering pluralism', that is, finding principles, methods and techniques that can be used to put the pieces of the puzzle together and bring order to multiplicity.[47] This pragmatic and technical turn in the fragmentation debate – which essentially coincides with the publication of the ILC report – has given

[44] See, eg, Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Collected Courses* 101; Rosalyn Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52 *International and Comparative Law Quarterly* 1; William Burke-White, 'International Legal Pluralism' (2004) 25 *Michigan Journal of International Law* 963.

[45] See, eg, Koskenniemi and Leino, 'Postmodern Anxieties', above n 13; Bruno Simma, 'Fragmentation in a Positive Light' (2003) 25 *Michigan Journal of International Law* 845; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

[46] ILC Fragmentation Report, above n 12 at paras 14–16.

[47] Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Oxford, Hart Publishing, 2009). For an argument that ontological or normative questions about fragmentation are 'overrated' and that fragmentation is better understood as a technical problem of conflict of norms or conflict of laws, see Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' (2010) 9 *Duke Law Working Papers* 1.