

**A Doctrinal Debate in the Globalisation Era: On the “Fragmentation”  
of International Law**

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On the 27th October, 2000, the President of the International Court of Justice addressed the General Assembly of the United Nations. He was, like every year, to present the Assembly with the annual report of the principal judicial organ of the United Nations. However, the national delegations gathered that day did not receive a banal administrative plan. Rather, a warning was delivered, if not a cry of alarm. The unity of what President Guillaume spontaneously termed the ‘international legal order’ was at risk of being challenged to give way to ‘fragmentation’. This danger had already been identified in the preceding years by various commentators;<sup>1</sup> however, the remarks of the President of the Court in 2000 placed this increasing preoccupation on an official footing, and served as proof that it was no longer a purely academic concern. Since then, the issue of the ‘fragmentation’ of international law seems to have become one of the questions which have most engaged scholars, particularly in Europe and North America. It has been the subject of innumerable conferences, seminars, books, articles and commentaries. The present author, having himself dedicated a research project at the European University Institute as well as a general course given at the Hague Academy of International Law to the topic,<sup>2</sup> would be misplaced to criticise what, among the admittedly small community of international law scholars, is taking the shape of a social phenomenon: the question of the fragmentation of international law

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<sup>1</sup> Among the most prescient works, see in particular **K. WELLENS**, “Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends”, 25 *N.Y.I.L.*, 1994, p. 3637; among the most prescient studies, see particularly **I. BROWNLIE**, “Problems Concerning the Unity of International Law”, in *Le droit international à l’heure de sa codification, Etudes en l’honneur de Roberto Ago*, Vol. 1, Milan, Giuffrè, 1987, pp. 156-ff; **M. PEREZ GONZALEZ**, “En torno a la tension entre lo general y lo particular en Derecho de gentes”, in *Homenaje al Profesor Alfonso Otero*, Santiago de Compostela, 1981, pp. 665-685; **P.M. DUPUY**, “Sur le maintien ou la disparition de l’unité de l’ordre juridique internationale”, in *Harmonie et contradiction en droit international (Rencontres internationales de la Faculté des sciences juridiques, politiques et sociales de Tunis, Colloque des 11-13 avril 1996)*, Paris, Pedone, 1996, pp. 17-54. See also **O. CASANOVA**, *Unity and Pluralism in Public International Law*, Martinus Nijhoff Publishers, 2001, p. 272; “The Proliferation of International Tribunals: Piecing Together the Puzzle”, *NYJIL*, Vol. 31, 1998-1999, pp. 679-ff; “Diversity or Cacophony: New Sources of Norms in International Law”, *Mich.JIL*, Vol. 2003-2004, pp. 845-ff; of recent works, see in particular **A.GATTINI**, “Un regard procédural sur la fragmentation du droit international”, *RGDIP*, 2006/2, pp. 303-336; **K.WELLENS and R. HUESA-VINAIXA**, *L’influence des sources sur l’unité et la fragmentation du droit international*, Brussels, Bruylant, 2006. Introduction by **P.M. DUPUY**.

<sup>2</sup> **P.M. DUPUY**, *L’unité de l’ordre juridique international*, *RCADI*, 2002, Vol. 297.

constitutes the leading academic debate in the era of globalisation. Faced with what tends to be regarded as commonplace, there is however room to be vigilant. The growing number of participants in a relatively complex debate is not necessarily a measure of how well it has been clarified or understood.

In an attempt to define more precisely the essential contours of this issue, we will examine succinctly (I) the causes of the debate on fragmentation, (II) the core of this debate, (III) the purposes of maintaining the unity of the international legal order, and (IV) reach conclusions on the substantive problem presented.

### **I. The causes of the debate on fragmentation**

There are several reasons why this debate on fragmentation has arisen. Some are technical; others political and cultural. Here we will concentrate on the former; the latter will be discussed in the course of examining the purposes of such a debate. There are mainly two technical causes which have given rise to a fear that international law is in the course of fragmentation. Both causes are linked to the general phenomenon of the ongoing expansion of international law's material scope. The first, *normative*, stems from the tendency towards greater autonomy of special regimes, the second, *organic and institutional*, is based on the growth of methods and procedures of control (not all judicial), which ensure the application of law.

#### **A. The illusion of self-contained regimes**

Here, we see at once the appearance of a spectre long raised by commentators, that of self-contained regimes, a sort of Leibnizian monad transposed into international law, namely entities conceived of as completely autonomous and floating freely in the legal ether.<sup>3</sup> For advocates of the existence of such systems, these entities would indeed maintain no relation with general international law as they no longer have any reasonable need of it. They would themselves provide, using their conventional instruments, for all their needs; *lex specialis* and general international law thus being perceived as standing in a substitutive, rather than a

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<sup>3</sup> See P.M.DUPUY, *o.c.*, pp. 432-438 ; B. SIMMA, "Self-contained Regimes", *NYIL*, Vol. 16, 1985, pp. 111-ff; see also B. SIMMA, D. PULKOWSKI, "Of Planets and the Universe: Self-contained Regimes in International Law", *EJIL*, 2006, pp. 483-ff.

complementary, relationship to one another. These systems are in this way deemed to have their own methods of control to ensure the application of their norms. Frequently, they incorporate their own procedures of revision. Often possessing follow-up mechanisms, they are provided with their own specific regime of sanctions. In this way, freed of all dependence on customary international law concerning primary norms or responsibility as a sanction for their non-execution, they would remain international in their scope of application, but not in the sense of belonging to the pre-existing international legal order.

The self-contained regime, whose initial invocation arose from an incorrect interpretation (nourished by a manifest ignorance of the legal reasoning of the International Court of Justice in its decision concerning the US hostages in Iran),<sup>4</sup> has itself long formed part of academic debate. This legal ectoplasm has already cast its shadow in diverse fields where the law is moreover in the course of expanding.<sup>5</sup> First spotted on the terrain, though customary, of the law of diplomatic relations, some commentators have identified its arrival on the newly emerging law of international trade; others have perceived it in the field of European Community law; while many, depending on their preferences or their area of research, have signalled it in relation to human rights, environmental law and various branches of international economic law.<sup>6</sup>

However, none of the theoretical justifications advanced by those who identify special regimes wherever it suits them stand up to analysis. Even when a sub-system of law is original in terms of its secondary norms of recognition, enactment and adjudication, to use the terminology of H.L.A. Hart, it does not necessarily become cut off from the body of governing principles. This is particularly true of the interpretation of international obligations, especially those arising from conventions. For example, we have seen in other respects how international trade law, under the aegis of the WTO appeal panel, and also international environmental law, investment law, and even European Community law, have preserved substantial and fundamental links with, and remained connected to, the international legal order.<sup>7</sup> To take human rights as an example (and here one can agree with those who denounce

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<sup>4</sup> See the reports of the Special Rapporteur to the ILC, **W.RIPHAGEN**, *ACDI*, 1982, I, pp. 200-ff and the merited criticisms of the subsequent Special Rapporteur, **G. ARANGIO-RUIZ**, *ACDI*, 1991, II, Chapter VIII, 1992; II, Chapter VII, §§ 97-126.

<sup>5</sup> See **P.M. DUPUY**, "L'unité de l'ordre juridique international", *Cours général de droit international public*, *RCADI*, 2002, Vol. 297, pp. 432-450.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, pp.450-ff.

*droit de l'hommisme*), they do not constitute an autonomous field of law distinct from international law, but remain an evidently integral part of it. None of these bodies of law can be applied and interpreted in a *clinical vacuum*, to borrow the parlance of the WTO appeal panel concerning international trade law.<sup>8</sup> Being part of the international legal order, it is there that these particular norms are interpreted, and the inevitable gaps in their specific regimes of secondary norms are filled in order to ensure their application.

In other words, it is one thing to note the emergence of various sub-systems in international law, each possessing its own institutions and substantive law, according to the provisions of particular agreements. It is another to entertain the illusion that each sub-system is independent from the general normative framework constituted by the international legal order. Contrariwise, these special regimes draw on general international law for responses to certain questions, illustrating the incompleteness of the special body of rules on which they are based.<sup>9</sup> Fragmentation is thus not readily apparent when this is considered. As we will see later, and as the International Law Commission has recognised, the increasing power of the relative autonomy of *leges specialia* instead demands the development of new approaches to resolving conflicts between international norms.<sup>10</sup>

#### **A. The proliferating control mechanisms for the application of law**

The second technical cause which has provided fodder for a theory of fragmentation is not only normative, but also institutional. Moreover, it is in large part connected to the appearance and development of the convention-based sub-systems just described, and was the focus of the President of the International Court of Justice's address in 2000. The warning given that day was essentially linked to an organic phenomenon: the contemporary multiplication of international jurisdictions, and the correlative risk that *contradictory international jurisprudence* would appear. A particular regional human rights court, or a

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<sup>8</sup> See the first report of the **WTO Appeal Panel**, 29 April 1996, p. 9; **G. MARCEAU**, "A Call for Coherence in International Law – Praises for the Prohibition Against 'Clinicum Isolation' ", *WTO Dispute Settlement Journal of World Trade*, 1999, No 5, pp. 87-152.

<sup>9</sup> Put simply, to be able to take into account the existing links between general and special rules of international law, one shouldn't confine one's legal knowledge to a narrow domain of specialisation (trade, health law, intellectual property or crisis prevention) or have a thorough but isolated knowledge of refugee or environmental law, while believing that it is not necessary to also understand international law itself.

<sup>10</sup> **ILC**, 58th Session (2006), "Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law", Report of the Study Group, **Doc. A/CN.4/L.682** (hereinafter cited as Report of the Study Group).

specialised judicial (or quasi-judicial) organ, might thus interpret the growing number of rules of general international law in a different manner to the ICJ itself. Notwithstanding the principle of relative effect of the Court's judgments established by Article 59 of its Statute, everyone accepts that its judicial interpretations are for the most part binding on all the subjects of international law. In this regard, the Court certainly plays a central role in ensuring unity of interpretation in international law; it is this function which therefore appears most threatened. It is thus clear, in effect, why the President of the ICJ has become justifiably concerned by this matter. This preoccupation stems from the quite entrenched (and, it would seem, voluntarily dissident), approach which the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia, then under the presidency of Professor A. Cassese, took in the *Tadic* case to the ICJ's jurisprudence on the conditions of State responsibility for the actions of an armed militia and the criterion of control which must be established.<sup>11</sup>

The continuation of sufficient unity in the international normative system will effectively depend in future on the perception which judges have of the existence and coherence of such a system as well as their actual knowledge of its content. International criminal tribunals (including, henceforth, the International Criminal Court), as well as the Tribunal for the Law of the Sea, courts and supervisory bodies for human rights, the WTO appeal panel, arbitration tribunals (not forgetting those of ICSID and NAFTA) who are now making regular use of international law, and finally, the entire cohort of *follow-up mechanisms*, are embarking on a common legal voyage. They must act cautiously and concertedly if they do not wish to capsize their vessel. To employ another metaphor, they all speak a language in which the common grammar is international law.

Other causes, of a strategic, ideological and even cultural character, should also be recognised, even if they fit less easily within a legal analysis. They are in reality linked to the stakes of the debate, which expand beyond the restricted domain of specialists of international law.

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<sup>11</sup> Compare, in particular, §§ 108, 109 and 115 of the decision of the ICJ of 27 June 1986 between Nicaragua and the United States (*Rec.*, 1986) and the second decision of the Appeal Chamber of the ICTY in the *Tadic Case*, IT-94-1-T, 15 July 1999, §§ 112-114. On this divergence in jurisprudence, see especially C. KRESS, "L'organe de facto en droit international public", *RGDIP*, 2001/1, pp. 93-144.

## **I. The core of the debate on fragmentation**

Everyone speaks of the fragmentation of international law, but this expression only has meaning if it encompasses not only the body of rules, but the actual legal order, which is independent of that of States and which asserts itself in an objective fashion with respect to the domestic legal systems. Identifying the phenomenon of fragmentation, or verifying whether this is in fact occurring, is only possible by having regard to the notion of a legal order. What is meant by legal order here, and do all authors speak of the same thing when they suggest (and some would prefer not to have to do so) that this order is threatened by fragmentation? In formulating a response, we will return briefly to the genesis of the concept of a *legal order* and then its application to international law.

### **A. The genesis of the concept of a legal order**

Here too we should note certain differences, of which we should neither exaggerate the importance nor underestimate the scope, between legal cultures on each side of the Atlantic. To establish and draw upon a system, in an effort to explain the interaction of its constituent elements, is a representation coloured by a particular cultural tradition, and is a way of seeking to explain its functioning by reference to the whole. However, it is also a means of assigning certain objectives to it. In this way, the use of the term legal order appears to be *a priori* very technical: however, it also plays an evidently metaphorical role.<sup>12</sup> As a consequence, the term legal order is an explanatory device, but probably at the same time reflects a certain *Weltanschauung*, simultaneously mixing the ideology of the beholder and the methodological choices inherent to his or her alleged tradition.

Historically speaking, the appearance of the idea of a *legal order* is a fairly recent one, more particularly so in the sphere of international law.<sup>13</sup> The first commentators to invoke this idea emerged in the study of German public law in the first half of the 19<sup>th</sup> century. They can be found among the successors of the political philosophy of Kant, and later Hegel and

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<sup>12</sup> See G. TIMSIT, "L'ordre juridique comme métaphore", *Droits*, Oct. 2001, pp. 3-18.

<sup>13</sup> In this regard, see the stimulating article of D. ALLAND, "De l'ordre juridique international", *Droits*, Oct. 2002, pp. 79-101.

Schelling.<sup>14</sup> In tandem with the theory of *Rechtsstaat* with which it is frequently associated, the concept of *Rechtsordnung*, referring to the idea of an organic and structural normative whole, first appeared, according to Jean-Louis Halperin, in Julius Stahl's writings from 1830.<sup>15</sup>

### **B. Application of the concept to international law**

After jurists of internal legal systems, the idea of a legal order first attracted German specialists in private international law, such as Windscheid.<sup>16</sup> However, even if previously encountered in the work of Jellinek, the concept of legal order did not really gain ground in the public international legal community until the celebrated work of Triepel<sup>17</sup> *Droit international et droit interne* (1899) at the very end of the 19<sup>th</sup> century.<sup>18</sup> It is true that the application of this expression to legal relations between States was until then very limited, due to the stringent opposition of several commentators.<sup>19</sup> However, in the same period, the young Anzilotti, having an excellent knowledge of German legal theory, introduced the concept of *legal order* in his writings on private international law.<sup>20</sup> He later appeared to have no hesitation in describing international law as such a system, for example in his academic course, translated into French in 1929 by Gilbert Gidel.<sup>21</sup> In Italy, it was, however, Santi Romano who applied this concept to international law in his influential book *l'Ordinamento*

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<sup>14</sup> See J.L. HALPERIN, "L'apparition et la portée de la notion d'ordre juridique dans la doctrine internationaliste du XIX<sup>ème</sup> siècle", *Droits*, Oct. 2001, pp. 41-51; see also N. LUHMANN, "L'unité du système juridique", *Archives de philosophie du droit*, 1986, pp. 163-188. For a historical overview of German public law theory, the indispensable work is that of M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, München, 1992, particularly Vol. 2. See also J.F. KERGEVAN, "L'Etat après Hegel: Le dépassement social et politique", in S.GOYARD-FABRE, *L'Etat moderne, 1715-1848*, Paris, Vrin, 2000, pp. 294-ff.

<sup>15</sup> J.L. HALPERIN, *o. c.*, p.43.

<sup>16</sup> Windscheid, *Recht und Rechtswissenschaft*, 1854. See M. STOLLEIS, *o.c.*, Vol. 2, pp. 156-ff.

<sup>17</sup> This work was not translated into French until 1920: H. TRIEPEL, *Droit international et droit interne*, French translation, Paris, Brunet, 1920. In any case, it is hardly surprising that this concept won acceptance in public international law, coming from private international law. The objective of the latter was to examine the conditions of engagement between different domestic legal orders, in order to analyse the rules applicable to conflicts of law. From there, the concept of a legal order became of significance to public international law in examining the relationship between internal rules and international law, and was thus recognised as a singular concept as well as a normative system.

<sup>18</sup> Denis Alland noted that, in this foundational work, one frequently finds the expressions "legal system" and "legal order", but not yet "international legal order," even if the author comes very close to recognising this. *O.c.*, p. 80.

<sup>19</sup> Notably Puchta and Adolf Lasson, cited by J.L. HALPERIN, *o. c.*, pp. 48-49.

<sup>20</sup> D. ANZILOTTI, *Studi critici di diritto internazionale privato*, 1898, pp. 128-161.

<sup>21</sup> D. ANZILOTTI, *Cours de droit international*, translation by G. GIDEL, Paris, Sirey, 1929, re-edited by P.M. Dupuy and Charles Leben, Paris, Panthéon-Assas, 1999; see, in particular, p. 44.

*giuridico*, published in 1917.<sup>22</sup> We then find a generalised use of the concept in the work of Roberto Ago on public international law, at least following his course on international law given at The Hague Academy in 1939.<sup>23</sup> Hans Kelsen, for his part, built his theory around this concept from the first years of the 20<sup>th</sup> century, and applied it almost instantly in an authoritative fashion to international law.<sup>24</sup>

In France, however, the concept of legal order appeared relatively late in public law theory,<sup>25</sup> in the *Traité de droit constitutionnel* of Léon Deguit, published in 1927.<sup>26</sup> In international law, it remained completely unknown at the end of the 19<sup>th</sup> century in the work of international specialists such as Louis Renault<sup>27</sup> and Henry Bonfils:<sup>28</sup> it finally appeared in the interwar period in the work of Georges Scelle.<sup>29</sup> However, it was not until the publication of Scelle's *Manuel de droit international public*, published in 1948, that its use became widespread.<sup>30</sup> Today in France, the term is generally no longer challenged, not even by commentators who are very dismissive of this last author.<sup>31</sup>

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<sup>22</sup> Of which only the second edition, dating from 1946, would be translated into French in 1975: **S. ROMANO**, *L'ordre juridique*, translated by L. François and P. Gothot, Preface by P. Franceskakis, Paris, Dalloz, 1975, §17; "Le concept d'institution et l'ordre juridique international".

<sup>23</sup> **R. AGO**, "Le délit international", *RCADI*, 1939-II, p. 415.

<sup>24</sup> See, in particular, his academic course for the Hague Academy in 1926, "Les rapports de système entre le droit interne et le droit international public", *RCADI*, 1926-IV, p. 231; see also, his "Théorie générale du droit international public", presented to The Hague Academy of International Law six years later, *RCADI*, 1932-IV, p. 117.

<sup>25</sup> For an analysis of the reasons for this divergence, see the observations of **J.L. HALPERIN**, *o.c.* pp. 45-47. In the work of an author such as **R. CARRE DE MARLBERG**, it is clear that the State in fact conformed to the definition of a legal order, even if he himself didn't ordinarily employ this term. See his *Contribution à la théorie générale de l'Etat*, Paris, Sirey, 1920, reprint C.N.R.S., 1962, Vol. 1, p. 194-ff. See also **J. CHEVALLIER**, "L'ordre juridique", in **CURAPP**, *Le droit en procès*, Paris, PUF, 1983, pp. 7-49.

<sup>26</sup> **L. DUGUIT**, *Traité de droit constitutionnel*, Vol. 1, Ch. III, § 31, p. 326. J.L. Halperin notes however the use of the concept by Fr. Gény, in a text entitled "La notion de droit subjectif à la veille du XXème siècle", *o.c.*, p. 45.

<sup>27</sup> **L. RENAULT**, *Introduction à l'étude du droit international*, Paris, Sirey, 1879.

<sup>28</sup> **H. BONFILS**, *Manuel de droit international public* (Droit des gens), Paris, Rousseau, 1894.

<sup>29</sup> In addition to his *Précis de droit des gens* (Principes et systématique), Vol. 2, Paris, Sirey, 1932-34, reprint C.N.R.S., 1984, one may also consult a relatively unknown article written by **G. SCELLE**, in the *Revue de droit public*, 1944, pp. 85-106, entitled "La notion d'ordre juridique".

<sup>30</sup> **G. SCELLE**, *Manuel de droit international public*, Paris, Montchrestien, 1948, in particular the introductory section dealing with relations between legal orders, pp. 20-ff.

<sup>31</sup> See, in particular, **J. COMBACAU**, "Le droit international: Bric-à-brac ou système ?", in *Archives de philosophie du droit*, Vol. 31, Paris, Sirey, 1986, pp. 85-105. See also the personal and stimulating analysis of **C. SANTULLI**, *Le statut international de l'ordre juridique étatique*, Paris, Pedone, 2001, preface by **J. COMBACAU**, pp. 13-21; **D. ALLAND**, *Droit international public*, PUF, 2000, pp. 17-ff. The same author had already abandoned use of the concept in his thesis, *Justice privée et ordre juridique international*, Paris, Pedone, 1994, particularly pp. 38-ff.

The concept of a legal order is not ignored by commentators in the English-speaking world though it seems to hold little interest for American academics,<sup>32</sup> - at least international scholars. It appears in the legal philosophy of Ronald Dworkin, who is, admittedly, at Oxford and was a colleague of HLA Hart.<sup>33</sup> It is evident in the work of Hersch Lauterpacht and Wolfgang Friedman, who are really jurists from an essentially German legal and philosophical background, but are recognised authorities in the Anglo-Saxon world. In Great Britain, however, in addition to Hart's masterpiece *The Concept of Law*, Joseph Raz dedicated an entire book to the idea of a legal system.<sup>34</sup>

Nevertheless, English international specialists themselves use the term much less frequently<sup>35</sup> than contemporary German international academia, where it is often linked to the idea of a constitution, with particular reference being made to the UN Charter.<sup>36</sup> If conceptions of a legal order vary significantly between authors, all agree that the expression refers to *the organisation of a more or less complex system of norms and institutions intended effectively to apply to the constitutive subjects of a determined community.*<sup>37</sup>

If one remarks on the recently increasing academic recourse to the concept of an *international order*, moreover now intertwined with considerations of its fragmentation, it is necessary to realise that this use of a generic notion of *order* is more than a device of language. More frequently, the use of this term flows from the following observations: firstly, that although some of its initial characteristics survive, the structure of international law is now (and for at least fifty years has been) supported by a growing number of elements: such as an ever thicker tapestry of general multilateral treaties enshrining its rules and basic principles; several hundred international organisations which themselves produce a substantial body of secondary law; an increasing body of case law, whose overlap and accumulation gives a density and complexity to international law, in which commentators must seek to

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<sup>32</sup> See, however, **O. SCHACHTER**, "International Law in Theory and Practice", *RCADI*, 1982-V, p. 9.

<sup>33</sup> **R. DWORKIN**, *Taking Rights Seriously*, London, Duckworth, 1977, pp. 79-ff.

<sup>34</sup> **J. RAZ**, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, Oxford, Clarendon Press, 1970, particularly pp. 224-ff; see also **A. ROSS**, *Directives and Norms*, London, Routledge & Kegan, 1968.

<sup>35</sup> In this regard, Denis Alland points out that it is never encountered in the work of I. Brownlie or Akehurst; *o.c.*, p. 83.

<sup>36</sup> See, in particular, **C. TOMUSCHAT**, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *RCADI*, 1999, Vol. 281, pp. 25-ff. On the idea of the UN Charter as the constitution of an international legal order, see *infra*.

<sup>37</sup> It is precisely in this manner which I myself use the term, in my *Précis* of public international law, **P.M. DUPUY**, *Droit international public*, Paris, Précis Dalloz, 8th ed., 2006, §§ 15-27.

demonstrate an intrinsic coherence, on the one hand apparent and on the other hidden. Caused to panic by the breadth and complexity of this task, some of them prefer to dissemble the whole into pieces and speak of the inexorable *fragmentation of international law*. So what are nonetheless the purposes of maintaining unity?

### **I. The purposes of maintaining the unity of the international legal order**

An international legal order can only exist as long as it guarantees to its subjects a unity which is sufficiently organic and substantial to serve as an effective framework for their international relations. The question of maintaining its unity presents a two-sided issue in which none of the elements are always immediately clear. The first facet is technical and legal. The second facet is political, but that is no reason to disregard it.

#### **A. Technical aspects**

In several leading works,<sup>38</sup> Pierre Legendre showed, in magisterial fashion, how Western legal thought remained branded with the mark of scholastic thought. We have inherited, via Thomism, the Roman conception of law as laid down by the Justinian Code. If one agrees briefly to locate oneself within a critical perspective (as the Critical Legal Studies movement would have you do), one could ask whether, in spite of the triumph of positivism in the 20<sup>th</sup> century, in its voluntarist and normativist forms, a successor of scholastic thought and natural law cannot be found in this irrational fear of losing the centre, the initial source of all legal meaning, a unique origin from which the meaning of the whole would flow; an essential source in which, rather ironically, Kelsen's *Urnorm* would be nostalgically manifest. It is here that legal and theological thought are reunited in our background consciousness, the former having served as a support for the latter throughout fifteen centuries of a Christianity integrated into State religion, before itself having generated a religion *of* the State. The mere passage of several decades cannot erase such a profound mark on legal thought.

How do we respond to this? This influence has in fact remained, but it is testimony of a continuing need, no longer theological, but simply *logical*, for a centre. While Dionisio

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<sup>38</sup> See, in particular, *L'amour du censeur: Essai sur l'ordre dogmatique*, Paris, Seuil, new ed.; *Sur la question dogmatique en Occident*, Paris, Fayard ; *Le désir politique de Dieu*, Leçons VIII, *Etude sur les montages de l'Etat et du droit*, Paris, Fayard, new ed.

Anzilotti, in his course on international law in 1929, described a legal universe totally conditioned by the sole will of sovereign States, he recognised the alterity of an international legal order in relation to sovereigns, although they would be both the authors and subjects of such an order.<sup>39</sup> He also acknowledged, following the example of Kelsen (whose work he was very familiar with), the necessity of a basic norm, which he qualified – in a meaningful way – as *metaphysical*, and thus, as such, escaping from legal analysis. As for Kelsen himself, the role of this same norm in his work is well-known; even if, throughout his existence, he uses different foundations or terminology for this norm.<sup>40</sup> Moreover, Kelsen insisted several times that a legal order could not exist without *unity*. Following on from this, he distinguished two categories of legal system, one static and the other dynamic, a fertile distinction which will not be explored further here.<sup>41</sup>

Firstly, why unity in the technical sense of the term? Above all, unity is required for the *sense*, that is to say both the *direction* and the *meaning*, of a system articulated in terms of norms, subjects and sanctions. To take one of several examples: the expression ‘international responsibility’ should have the same object and meaning, regardless of the obligation whose violation it refers to. This remains the case even if the particular type of international responsibility has different forms, and even different foundations, within the system of application concerned. In this manner, we see how the *dictum* of the I.C.J. in the *Lotus* case on the obligation of reparations for damage caused by the illegal acts of a State is inexorably invoked in the writings of authors, and even more so, in the pleadings of parties before the Court or any arbitration tribunal hearing a case on responsibility, either between States or transnationally. An omnipresent *Leitmotiv*, whatever the field of application, this *Lotus* adage concerning the obligation of reparations thus exemplifies the unity of sense given both to a term, and to the legal institution to which it refers, responsibility.

One could give numerous examples showing the link between the technical and social necessities of ‘maintaining order’, meaning here the unity of the international legal order.

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<sup>39</sup> See **D. ANZILOTTI**, *Cours de droit international*, Translation by **G. GIDEL**, Panthéon-Assas, , Preface by P.M. Dupuy and Ch. Leben, 1999, p. 43.

<sup>40</sup> Its equivalent can be found in Hart’s category of ‘secondary legal rules’, of which the Kelsenian *Urnorm* offers a perfect illustration.

<sup>41</sup> See **N. BOBBIO**, “Struttura et funzione nella teoria del diritto di Kelsen”, in *Rivista internazionale di filosofia del diritto*, 1973, pp. 187-215, republished and translated into French in **N. BOBBIO**, *Essais de théorie du droit*, Paris, Bruylant, LGDJ, 1998, pp. 207-ff; see also **P.M. DUPUY**, *L’unité de l’ordre juridique international*, o.c., pp. 67-ff; and **C. LEBEN**, “Ordre juridique”, in *Dictionnaire de la culture juridique*, Paris, PUF, 2003, pp. 1113-ff.

From this latter viewpoint, if ideas such as the ‘nullity’ of legal acts, ‘recognition’ (of a State, a government or a legal situation), ‘acquiescence’, of ‘territorial sovereignty’, ‘legal title’, ‘nationality’, ‘diplomatic protection’ and the rules encompassed by these terms acquired a different meaning according to their geographical or material scope of application, the *very security* and efficacy of relations governed by international law would be severely challenged. The unity of application of international law is, like the application of Community law in the framework of the European Union, a condition of both its efficacy and its survival, nothing less than that.

Nowadays, as illustrated by the comparative jurisprudence of contemporary international legal (and quasi-legal) tribunals, there is a constant interpenetration between the application of general international law and the rules of special international regimes. As the latter can only be defined by reference to the former, general international law provides the conceptual, linguistic and instrumental framework facilitating the application, even if it is a derogation therefrom, of special rules. Moreover, it is especially striking to note that particular areas, such as the law governing relations between States and foreign private investors (long disputed by competing systems of rules), now have increasing resort to the application of rules and principles of general international law, which provides with both the sense and scope of such laws. In a time when one speaks more and more of fragmentation, here it is rather more appropriate to speak of unification under the banner of international law.<sup>42</sup>

The paradox of all legal systems, which is but a fictitious one, is the following: the very idea of a legal order depends in part on a subjective base provided by the recognition of its existence by the subjects and entities concerned.<sup>43</sup> However, once this ‘contractual’ base (in the wider sense that the subjects and entities are persuaded, by convention and general social assent, of its existence) is constituted, the system acquires a quasi-objective dimension: its existence is obvious to all, provided that it can adapt to the needs of the community governed. This adaptation is the respective task of legislators (here, States acting by way of treaty and also by the progressive accumulation of declarations reiterating the appearance of a new *opinio juris*, as well as judges and arbitrators.

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<sup>42</sup> See C. LEBEN, “La responsabilité internationale de l’Etat sur le fondement des traités de promotion et de protection des investissements”, *A.F.D.I.*, 2004, pp. 683-714.

<sup>43</sup> Once again, this is even truer of international law where the sanction has neither the verticality nor centralisation assured by a State to a domestic legal sanction.

In this regard, one is probably closer to Santi Romano than to Kelsen, as the former made use of the old adage *Ubi societas, ibi jus* as the foundation of his theory of *l'ordinamento giuridico*.<sup>44</sup> However, as stated earlier, the master of Vienna himself did not conceive of a legal order in the absence of unity of principle and structure. In his theory of dynamic systems, what is thus at stake is not only the unity of meaning of key principles and concepts, but the attribution of their validity to norms, and to the legal situations governed by those norms.<sup>45</sup>

This being the case, we understand that the struggle against the fragmentation of the international legal order is not a vain crusade led by an exhausted troop of neo-conservatives. It is simply the result of a realisation, initially empirical, by legal practitioners, judges, State legal advisors and even civil society actors concerned with law, that we cannot have an international community governed effectively by law if there is not a common understanding of its terms.

Academic comment, for its part, mainly arrives after (a little like Offenbach's policemen); and generally a little late, whether it is *mainstreamed*, *critical*, or a *post-modern* version...let us be indulgent with scholars, however. It also has its role to play. Scholarly analysis is useful, not only in terms of interrogating its own legitimacy, as *Critical Legal Studies* sometimes usefully does, but primarily to fulfil a technical function: to contribute to the *intelligibility* of a normative edifice of arborescent complexity, and whose entangled ramifications are in a constant state of development. As it is the coherence, and thus the unity, of the international legal order which gives meaning to norms and institutions, authors should, as a matter of functional exigency, firstly act as *guardians of unity* in the technical analysis of norms and of their interpretation by those who created them.<sup>46</sup> Again, this does not rule out questioning the ideological origins of a particular legal discourse, contrary to what the classical positivist school itself has long believed (even though, as Norberto Bobbio has

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<sup>44</sup> See P.M. DUPUY, *L'unité de l'ordre juridique international, o.c.*, pp. 69-ff.

<sup>45</sup> *Ibid.*, pp. 67-ff.

<sup>46</sup> See P.M. DUPUY, *L'unité de l'ordre juridique international, o.c.*, particularly pp. 200-ff.

shown, positivism itself is possessed not only of a theory and a method, but also of an ideology).<sup>47</sup>

### **B. Political considerations**

The question of maintaining unity is not only of interest to academics. It is also a practical and *political* question, in the most direct, if not trivial, sense of the term. Save for deliberate exceptions, all treaty regimes and special rules of international law, limited to a specific object, can be rejected by sovereign States. A treaty can be repudiated. However, one cannot reject a legal system of which one is not only the subject but also, among two hundred others, the author. Challenging the unity of the international legal order by spreading the idea of its fragmentation, creates a doubt over both its existence and its survival, caused by the casual affirmations of ‘realists’, who have probably never worked in an international firm or participated in the negotiation of an international convention. In a slightly amended form, fragmentation would paradoxically verify the fact that, having previously existed, the unity of international law has not in reality resisted the proliferation of the overrated ‘free-riding’ self-contained regimes, which inexorably erode the protective envelope of international law!

Without putting all advocates of a thesis of fragmentation into the same basket, or putting words in their mouths, it is possible to establish a *rapprochement* at least between some of them and the growing number of commentators, particularly in the United States, who now challenge either the existence or the legitimacy of public international law, in order to contest its ability to constrain the foreign policy options of the world’s foremost superpower.<sup>48</sup> In each case, why continue to refer to law, since it only serves an *à la carte* function? The basis of the problem is thus to succeed in safeguarding the unity of interpretation of international law in order to ensure its coherent application.

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<sup>47</sup> See in particular this author’s “Sur le positivisme juridique” in *Essais de théorie du droit*, Paris, LGDJ, 1998, pp. 23-38, based on an article published in Italian in 1961. See also P.M. DUPUY, *L’unité de l’ordre juridique*, *o.c.*, especially pp. 26-32 et 207-213.

<sup>48</sup> J. GOLDSMITH and E. A. POSNER, *The Limits of International Law*, Oxford University Press, 2005, pp. 23-43; J. YOO and W. TRACHMAN, “Less than Bargained for: the Use of Force and the Declining Relevance of the United Nations”, *Chi.J.ofIL*, 2005, No 5, p. 384.

## **I. The basis of the problem: Safeguarding the unity of application of international law**

At its 58th session in 2006, the International Law Commission concluded its study on the fragmentation of international law by the adoption of conclusions<sup>49</sup> to its lengthy report. We have not sufficient space to analyse the details of this document here, but the conclusions merit several remarks. They illustrate once more the restrained distance that may separate optimism from pessimism! In an accomplished and pertinent commentary in Issue 1 of 2007 of the *Revue Générale de Droit International Public*, Professor Benedetto Conforti, a former judge of the European Court of Human Rights, highlights the heavy and obvious statements (or affirmations of evidence) made by this text and calls into question its very utility. The conclusions seem for the most part content to summarise the well-known rules of interpretation of international law, and of relations between treaty-based and customary law.<sup>50</sup> Nothing is new in these conclusions: they have the character of a somewhat rigid summary of elementary principles.

Nevertheless, several points of merit can be found in these laborious conclusions. This is particularly so if we consider them in relation to the increased study of this topic in recent years. It is also in keeping with the spirit of what we have just remarked upon concerning the cultural differences in international academia that these conclusions should be of interest: precisely because they place a little order on the discussion by limiting their concentration to the basis of the problem, *i.e.* the interpretation of norms and the relations between *lex specialis* and customary international law. As it constitutes a pedagogical work inviting commentators to return to basics, the International Law Commission report is probably deserving of our gratitude.

1) The heading of these conclusions itself is careful to reset the context of its subject: it does not speak of fragmentation but of the ‘diversification’ and the ‘expansion’ of international law, which necessarily results in a growing complexity of relations between international rules. Under this heading, the conclusions of the Commission concerning the

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<sup>49</sup> ILC, “Report of the Study Group on the fragmentation of international law: Difficulties arising from the diversification and expansion of international law”, AN/CN.4/L.702, 18th July 2006. Available on the United Nations website.

<sup>50</sup> B.CONFORTI, “Unité et fragmentation du droit international: Glissez mortels, n’appuyez pas”, *RGDIP*, 2001, pp. 5-ff.

relationship of self-contained regimes to general international law serve as a useful clarification. Subject to the same conditions as any *lex specialis*, these regimes can certainly derogate from international law, but international law preserves its entire validity. In particular, it is called upon, as noted above, to fill the inevitable lacunas in these regimes. It can also serve as a substitute where these particular normative constructions have demonstrably failed.<sup>51</sup> That is self-evident for any well-informed international specialist, but it is probably as well to state it explicitly!

In this way, the problems, mistakenly discussed using the equivocal term of ‘fragmentation’, are not denied by the ILC’s text. However, they are resituated within their correct dimensions and their appropriate context. Within this re-adjusted framework, interesting observations are made on the use which should be made of the rule established by Article 31.3 (c) of the Vienna Convention on the Law of Treaties, according to which a provision of a convention should be interpreted by taking account of “any relevant rules of international law applicable in relations between the parties.”<sup>52</sup> The increasingly successful reference to this provision in international jurisprudence, including that of the International Court of Justice, is well-known.<sup>53</sup>

2) The second interesting point made by these conclusions is that they affirm, strongly and clearly, that there exists an order or system of international law. In this regard, the first conclusion of the report deserves to be quoted in part:

“International law is a legal system. Its rules and principles (*i.e.* its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms.”

This seems evident to those, including myself, who have been raised in this vision of international law. However, it serves as a highly useful restatement to those who negate both

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<sup>51</sup> Conclusions 15 and 16.

<sup>52</sup> Conclusions 18-22.

<sup>53</sup> “[...] under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account “any relevant rules of international law applicable in the relations between the parties”, Article 31 § 3 (c). The Court cannot accept that Article XX § 1 (d) of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law[...]. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court [...] by the 1955 Treaty”; **ICJ**, *Case Concerning Oil Platforms [Iran v. United States of America]*, 6 Nov. 2003, § 41.

the validity and existence of international law, for whom the theme of ‘fragmentation’ allowed a means of continuing the old refrain of its inexistence. One could hardly have wished for a stronger re-affirmation of the unity of international law. Having personally dedicated almost 500 pages to illustrating this unity several years ago, I can only approve of the clear stance adopted by the UN body for the codification of international law.

3) The third source of satisfaction derived from reading the conclusions reached by the ILC in 2006 stems from the fact that they also directly affirm the existence of peremptory norms of international law, and identify a large part of their content, pointing out that the usual rules for resolving conflicts between norms are not applicable in this instance. In particular, conclusion 32 provides:

“A rule of international law may be superior to other rules on account of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law...”

Here again, we can only regard such an affirmation as the enunciation of a truism. However, we know that the oppositions of principle to the recognition of peremptory norms remain numerous, at least in certain countries, and it was not until February 2006 that the International Court of Justice itself decided to recognise the existence of *jus cogens* norms.<sup>54</sup> This obvious finding of the ILC, although it is but a reference to a convention provision of nearly forty years’ standing (Article 53 VCLT), serves in any case to prove that contemporary international law is not principally threatened by the fragility of its supposed fragmentation. In fact, it is animated by an inherent tension between two competing unitary principles, which are in certain respects contradictory.

Having already explained elsewhere the ‘theory of the two unities’,<sup>55</sup> I will limit myself here to an exposition of its two axes. The first is that of the *formal unity* of international law as a legal order. It refers to the fact that general international law is composed of a certain number of formal rules, all secondary norms pursuant to Hart’s theory:

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<sup>54</sup> “[...] the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute”; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) [Democratic Republic of Congo v. Rwanda]*, Jurisdiction of the Court and Admissibility of the Application, 3 Feb. 2006, §§ 60 and 64.

<sup>55</sup> See P.M. DUPUY, *L’unité de l’ordre juridique international, o.c.*, in which the theory of the two unities is the underlying thesis of the work.

they govern the conditions of production of primary norms, their application, their revision and sanctions for their breach (the rules of State responsibility). These rules are precisely those which are called upon to complete or supplement those of special international law (*lex specialis*), whether the latter crystallise or not into a legal sub-system, misleadingly described as 'self-contained'. Since the adoption of the United Nations Charter, which possesses, in this regard at least, a material constitutional dimension,<sup>56</sup> there exists a second principle of unity: the substantive or material unity, as shown by the existence of peremptory norms, which relates to the content of such norms and not merely their form. However, these two types of unity both obey distinct logics. The first logic, that of formal unity, is found in the principle of identity. Here, for example, a treaty is negotiated and responsibility is established generally in the same way, regardless of the content of the particular norm. The other, characterising substantive unity, corresponds to a hierarchical logic; not the lateral one of identity, but the vertical one of authority. These two logics happen to contradict with one another because the social importance accorded to a norm causes it, even outside any treaty-based framework, to derogate from the rule. The issues of reservations and accession to human rights treaties, State immunity and head-of-State immunity, confronted by the systematic pursuit of those responsible for "crimes of international law"<sup>57</sup> such as genocide, torture or systematic rape, are more than illustrations of these relations in the foundations of international law, tugged between obedience to State sovereignty and the affirmation of fundamental human rights. The character of imperative norms, as the ILC's conclusions point out, is to prevail in all cases over norms which are merely obligatory.

In recognising this phenomenon, the text adopted by the International Law Commission is not a work of progressive development. It limits itself to taking account of positive law, as it has developed pursuant to Article 53 of the Vienna Convention on the Law of Treaties, even though close to eighty States have not ratified this Convention. However, the persistent opposition of these States to the system created by the Convention for the interpretation and application of such norms (Articles 64 and 66) is one thing. It is another to note that the doctrine of *jus cogens*, led by State practice and its increasing recognition in international jurisprudence, has greatly altered the very structure of international law as a legal order, in spite of the fact that the values affirmed by these norms remain so often

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<sup>56</sup> *Ibid.*, pp. 215-245.

<sup>57</sup> To use the terminology of the Statute of the International Criminal Court.

disregarded. The equal necessity of placing order on the manner in which this jurisprudence refers to *jus cogens* is not in doubt, but is another issue, already dealt with elsewhere.<sup>58</sup>

The ILC's conclusions will certainly not close the debate on fragmentation, an academic *leitmotiv* in an era of globalisation. However, they will allow the debate to regain its true dimension, and thus pay a service to an academic discussion where too many of the participants were probably leading themselves astray.

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<sup>58</sup> I address this issue in my article "La convention de Vienne: Un bilan", *Revue belge de droit international*, 2007 (forthcoming).