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System Values and Understanding Legal Language

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Abstract

This paper argues that the concerns and methodology of the recently completed Report of the International Law Commission (ILC) over the fragmentation of international law presuppose a particular way of understanding legal language which tends to separate the understanding of rules from their factual adaptability to certain recurring social problems faced within specific institutional contexts. The paper argues that separating rules from their factual adaptability focuses the analysis on surface coherence – coherence at the level of abstract terms and phrases. It is the argument of this paper that this presupposition is not warranted, and that the understanding of rules cannot be thus separated. An alternative model of the understanding of legal language is developed on the basis of the work of Bernard Jackson and Geoffrey Samuel. This is further supplemented by the approach to the study of institutional contexts in the recent work of Robert Summers and John Bell. Together, these resources can lead to the analysis of the deep coherence of the international legal order, that being one that prioritizes not the unity of that order, but its responsiveness. The ideal of responsive law is elaborated upon by reference to the work of Philip Selznick and Philippe Nonet. Finally, a different agenda for the ILC is offered on the basis of the methodology of deep coherence. The upshot is that the paper calls for a reorientation of international legal theory, away from concerns about 'the law itself' and towards an engagement with the responsiveness of legal work performed in international legal institutions.

Key words

fragmentation; international law; legal epistemology; system values

1. Introduction

The time is ripe for an account of the contemporary international legal order that integrates an epistemologically and socially rich picture of legal work performed in international legal institutions with a theory of the system values of the international legal order taken as a whole. It is vital that such an account does not fall prey to a concern with the law itself – that is, to a concern over the nature of law or the mode of law's existence.[1] More often than not, such concerns result in socially and

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1. I elaborate on the methodological dangers involved in positing the mode of law's existence in other work. The point, in short, is that legal theory has for some time now been dominated by the following analytical

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epistemologically reductive pictures of legal work. They tend, for example, to over-emphasize the role that legal language plays in determining the outcome of a legal dispute – whether that be under the guise of a defence of formalism (where syllogistic reasoning is said to exhaust the process of legal work), or via an exclusively purposive account of legal interpretation (ascertaining, for example, policy objectives), with no other option offered outside this battle between formalism and purposiveness. Put another way, where legal systems are imagined as consisting exclusively or even dominantly of rules or norms that float in an analytical atmosphere, they make invisible, or at the very least de-emphasize, the inevitable and necessary judgement that real human beings, situated in specific institutional contexts, exercise when they engage in legal work. Furthermore, concern over positing the mode of existence of law, and the consequent over-emphasis on legal language, tends to result in the prioritization of overly formalistic system values of legal order, for example the logical coherence (unity) of rule-complexes.

No picture of legal work – no matter how socially and epistemologically rich – is ever purely descriptive. On the contrary, such a picture is always informed by what the theorist understands and promotes as the functions of legal work. What is required, then, is an integration of the normative emphasis of a theory (its account of the overall functions of legal work) with its descriptive emphasis (its picture of legal work). To achieve this, we need a vocabulary, a set of tools, with which to observe and evaluate legal work. This paper is but a step in that direction.

The background to this paper, and indeed the major motivating factor for writing it, is the recently completed Report of the International Law Commission (ILC) on the alleged fragmentation of international law.[2] The Report is set against an old debate: should we be aiming at a legal system, whether international or domestic, whose rules cohere in a sufficiently unified manner? The argument of this paper is that

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procedure: first, one posits the existence of objects (e.g. abstract objects, such as laws); second, one attributes properties to those objects, such that those properties function as criteria under which the existence of those objects can be ascertained (e.g. laws must conform to certain principles of reasonableness, or they must be part of the objective validity of norms, etc.); third, one considers what access we have to those objects, such that that access is reliable (this is the traditional realm of epistemology); and fourth – this being a step undertaken in the social sciences rather than the sciences – one considers the role of those objects, with their properties, and given our access to them, in the lives of human beings (this is known as the problem of normativity). The problem is that once one has proceeded through the first three steps, the last step results in the utilization of a mode of explanation of behaviour that suits the mode of existence (and our access to it) that has been enunciated in the first three steps. The resulting mode of explanation of behaviour, more often than not in contemporary legal theory, is that of largely conscious, deliberative, and atomized individuals said to be involved in short-term reasoning, where the principal analytical problem becomes where to locate the motivational force of the object in relation to that reasoning process (this is known as the debate between internalism and externalism). Undertaking this procedure in legal theory results in putting the cart before the horse: the picture of behaviour is determined by the prioritization of the ontological ambition. Instead, what we need to consider first is what picture of behaviour we wish to use. The picture I offer in this paper is an epistemologically rich account of legal work located in specific institutional contexts.

2. I focus on M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, adopted by the International Law Commission at its 58th session (2006) (hereinafter Report, or ILC Report); but 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', adopted by the International Law Commission at its 85th session (2006) (hereinafter Conclusions), and submitted to the UN General Assembly as a part of the Commission's report covering the work of that session, 2006. Both were last accessed by the author at http://www.un.org/law/ilc/ on 24 May 2007.

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the viability of that very debate presupposes a particular way of understanding legal language (and thus, also, a particular model of legal reasoning). That understanding is one which tends to separate the understanding of rules from their operation within specific institutional contexts and from their instantiation in specific cases, and thus from the set of analogical patterns, or patterns of facts or narratives, from which those rules are, I argue, inseparable. Separating rules from their institutionally located factual adaptability focuses the analysis on surface coherence – coherence at the level of abstract terms and phrases. It is the argument of this paper that this presupposition is not warranted, and that the understanding of rules cannot be thus separated. The language of law cannot be understood in isolation from its institutionalized history of application (i.e. the factual adaptability legal language accrues in specific institutional environments). Indeed, arguing for unity or coherence as between the rules of a legal system places at risk the responsiveness of specialized institutions to the changing nature of the peculiar social problems that those institutions deal with. What is required is a methodology – referred to, in this paper, as the methodology of deep (rather than surface) coherence – that will allow us to evaluate the responsiveness of specialized legal institutions.

The second part of this paper sets up the issue by describing the basic parameters of the ILC Report on the fragmentation of international law, thereby introducing the debate on the system values of a legal order. The third part of the paper explores the particular way of understanding legal language that a focus on fragmentation tends to presuppose – thereby leading to analysis at the level of surface coherence – although, as will become clear, the Report is by no means silent on the problems and weaknesses of this approach. Indeed, the first two parts of this paper present a clearly discernible shift in the Report, beginning with the initially optimistic positing of the method, and ending up, in the conclusions to the Report, with the expression of certain worries and misgivings and the necessity for future revisions. One way of reading this paper is to think of it as an exploration of those worries and misgivings, providing further resources for that revision.

The fourth and fifth parts of the paper, then, sketch a number of such resources. The fourth part offers an alternative way of understanding legal language, namely one which focuses on the factual mapping of rules based on their use in the resolution of problems in sets or patterns of analogies, narratives, and facts. It does so primarily by reference to the work of two theorists: Bernard Jackson and Geoffrey Samuel. The fifth part shows how this alternative way of understanding legal language can lead to an analysis of the deep coherence of a legal system. There are three components of the method of deep coherence: first, the factual mapping of rules; second, the analysis of specific institutional contexts; and third, the exposition and pursuit of responsiveness, that being the system value that is invoked by the method of deep coherence. All three are discussed in the fifth part of this paper. Finally, the fifth part also recommends, modestly, an alternative agenda for the ILC on the basis of an analysis of the deep coherence of the international legal order – although not without, as in keeping with the spirit of the paper, a comment on the specific institutional context of the ILC. Taken together, these resources offer a basic methodological framework for an integrated account of an epistemologically and

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socially rich picture of legal work performed in international legal institutions, with a theory of the system values which the international legal order can and should strive to attain.

2. The fragmentation of international law

The ILC's interest in researching the alleged fragmentation of international law began on the occasion of the 52nd session of the ILC in 2000.[3] Thereafter, the work proceeded relatively quickly, culminating in the above mentioned Report and adopted conclusions in 2006.[4] At first entitled 'Risks Ensuing from the Fragmentation of International Law', the title and direction was softened to 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'.[5] As will become clear, the shift in the title is but an instance of the increasing modesty and self-criticism that characterizes the narrative of the Report. Of course, I have very limited scope in this paper to consider the Report in detail. At over 250 pages, the scope of the Report is very considerable. My focus here is primarily on the philosophical discussion and explication of the phenomenon of fragmentation in international law.

In introducing the phenomenon of fragmentation in international law, the Report makes a distinction between two forms of fragmentation: institutional and legal – the latter to be 'found within the law itself'.[6] The Report notes the growth of treaty activity in the past fifty years,[7] and surmises that this forms part of a more general feature 'of late international modernity' in which we have witnessed 'what sociologists have called "functional differentiation", the increasing specialisation of parts of society and the related autonomisation of those parts'.[8] The Report acknowledges this to be a phenomenon found in both international and national domains, and calls it the 'well-known paradox of globalization', namely that 'while [globalization] has led to increasing uniformalization of social life around the world, it has also lead to its increasing fragmentation – that is, to the emergence of specialised and relatively autonomous spheres of social action and structure'.[9] Irrespective of what we may think of such a sociology of globalization, what is important for my purposes is the extension of that thesis to changes 'within the law itself'. The following passage illustrates this extension well:

3. The Report, *supra* note 2, at 1. I focus on the Report, rather than the Conclusions (*supra* note 2), because it assists me in revealing in more detail the philosophical foundations, and the qualifications expressed thereto, of the methodology adopted by the ILC.
4. *Supra* note 2.
5. Report, *supra* note 2, at 1.
6. Ibid., at 6. Indeed, elsewhere, the Report notes that 'the issue of institutional competencies is best dealt with by the institutions themselves' and that the ILC 'has instead wished to focus on the substantive question – the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and the general law': ibid., at 13. I shall return to this endorsement of the severability of the institutional and the epistemological dimension of law in the fifth part of this paper. It is important, however, in the light of the narrative of the Report, to note that the decision to sever the institutional and legal dimension of fragmentation is made self-consciously and confidently at the outset of the Report.
7. Ibid., at 7.
8. Ibid.
9. Ibid.

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> The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialised and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialised knowledges as 'investment law' or 'international refugee law' etc. – each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialised law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles in practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[10]

According to the Report, the perils cited by scholars of such an alleged loss of unity include 'the erosion of general international law, emergence of conflicting jurisprudence, forum shopping and loss of legal security'.[11] Although, even in these initial pages, the Report acknowledges split scholarly opinion on the phenomenon, it does not point to any potential benefits, but rather notes that 'others have seen here a merely technical problem that has emerged naturally with the increase of international legal activity that may be controlled by the use of technical streamlining and co-ordination'.[12] Shortly thereafter, the Report is more circumspect, noting that the ILC 'has understood the subject to have both positive and negative sides', but it then restricts the positives to a statement that fragmentation 'reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques'.[13] In this context, the Report cites the work of Sally Engel Merry[14] as representative of theories of legal pluralism which are more positively disposed to the phenomenon, but is quick to follow with work said to be critical of that movement.[15]

As it proceeds, however, the Report begins to accumulate worries and qualifications about its approach. For example, in its introductory illustration of the phenomenon of fragmentation, it offers an example of the apparent applicability of three different 'rule-complexes' to what appears to be the same legal problem (in the case at hand, of 'the possible environment effects of the operation of the "MOX Plant" nuclear facility at Sellafield').[16] The Report notes that in dealing with the above problem 'the UNCLOS Arbitral tribunal recognised that the meaning of legal rules and

10. Ibid., at 8.
11. Ibid., at 9.
12. Ibid.
13. Ibid., at 14.
14. S. E. Merry, 'Legal Pluralism', (1988) 22 *Law & Society Review* 869. Elsewhere, the report also cites B. Santos, *Toward a New Common Sense. Law, Science and Politics in the Age of the Paradigmatic Transition* (1995), but this work is also not discussed in any detail.
15. S. Roberts, 'After Government? On Representing Law without the State', (2005) 68 *Modern Law Review* 1–24. Of course, the Report cites many other references, many of which are discussed in an early paper in this journal: see M. Koskenniemi and P. Leino, 'Fragmentation of International Law: Postmodern Anxieties?', (2002) 15 LJIL 553. I shall return to this paper, as well as to legal pluralism more generally, in section 5 and the conclusion to my paper.
16. The three different rule-complexes are 'the (universal) rules of the UNCLOS, the (regional) rules of the OSPAR Convention, and the (regional) rules of EC-EURATOM': Report, *supra* note 2, at 10.

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principles is dependent on the context in which they are applied'.[17] However, at least in this introductory outline of its method, the Report is more concerned with what it characterizes as dangerous implications for 'the objectives of legal certainty and the equality of legal subjects',[18] caused, allegedly, by 'the splitting up of the law into highly specialised "boxes" that claim relative autonomy from each other and the general law'.[19] Similarly, although the Report acknowledges that 'new types of specialised law do not emerge accidentally but seek to respond to new technical and functional requirements', listing numerous examples, it goes on to argue that 'when such deviations or [specializations] become general and frequent, the unity of the law suffers'.[20]

How is 'unity' characterized in these early stages of the Report? We receive a hint, but also, once again, an important qualification, when the Report notes that 'In conditions of social complexity, it is pointless to insist on *formal unity*'.[21] The Report continues by saying that 'a law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and authoritarian simultaneously'.[22] This qualification marks the Report's somewhat anxious awareness that the project it is introducing – an elaborate conceptual structure said to be capable of 'dealing with tensions or conflicts between legal principles'[23] – comes dangerously close to presupposing an ideal of formal unity. In other words, the Report's anxiety is created by the tension between its recognition of the undesirability and impossibility of formal unity, and the formalism of its method for understanding legal rules that is invoked by its focus on normative conflicts. It is a tension that, as I shall try to show, can be defused by co-ordinating the pursuit of system values – as I shall argue later, primarily that of responsiveness – with an understanding of legal rules that recognizes the inextricability of rules from their factual adaptability in specific institutional contexts. Put another way: the Report suffers from taking 'the law itself' as an object. The focus, instead, should be on legal work performed in specific institutional contexts, that being a focus that is at least partly enabled by considering the factual adaptability of rules. However, it is time, first, to consider the understanding of legal language presupposed by the Report's conceptual structure for dealing with normative conflicts.

3. Fragmentation and legal language: surface coherence

The conceptual structure that the Report outlines, and then works within, focuses on various kinds of normative conflicts. It presents these various kinds of normative conflicts as techniques that 'seek to establish meaningful relationships between such

17. Ibid., at 12.
18. Ibid.
19. Ibid., at 13.
20. Ibid., at 15.
21. Ibid., at 16 (emphasis added).
22. Ibid.
23. Ibid., at 18.

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rules and principles so as to determine how they should be used in any particular dispute or conflict'.[24] The Report appropriately characterizes these techniques as falling within the realm of 'legal reasoning'[25] and, as we shall see, it is exactly the very narrow image of legal reasoning that is adopted that is the problem. The Report outlines four principal normative conflicts: (i) relations between special and general law; (ii) relations between prior and subsequent law; (iii) relations between laws at different hierarchical levels; and (iv) relations of law to its 'normative environment' more generally.[26] These conflicts may manifest themselves in the form of horizontal relations where one law invalidates another (e.g. *jus cogens* norms), or relative relations, where one law 'is set aside only temporarily and may often be allowed to influence "from the background" the interpretation and application of the prioritised law'.[27]

A conflict, more generally, says the Report, can be approached in two different ways: first, it can relate to the 'subject-matter of the relevant rules or the legal subjects bound by it';[28] second, it can relate to 'different interests or different policy objectives'.[29] Again, having made this distinction, the Report acknowledges the difficulties inherent in it. To the extent, for example, that the approach dictated by 'subject-matters' implies a 'pre-existing classification scheme of different subjects', it runs into the reality of there being no such classification schemes.[30] Further, one cannot hope to pigeonhole interests and policy objectives, for the argument as to which policy objective is relevant can be 'wholly arbitrary', leading to a '*reductio ad absurdum*'.[31] Nevertheless, despite these difficulties, the Report says that the 'same subject-matter' can be invoked:

> The criterion of 'same subject-matter' seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party.[32]

24. Ibid.
25. Ibid., at 20.
26. Ibid., at 18.
27. Ibid., at 19. The Report mentions a number of works it considers of relevance to the question of conflicts between norms: see ibid., 24, at n. 21. Although I do not discuss it here, one further relevant reference, particularly in the context of a conceptual structure of conflicts between norms, is a forthcoming book by L. Zucca, *Constitutional Dilemmas – Conflicts of Fundamental Legal Rights in Europe and the US* (2007). From what I have seen of that work, however, it nevertheless also operates within a particular understanding of legal language that considers it possible to separate the understanding of rules from their factual adaptability. For a recent dissection of the concept of conflict, see S. Besson, *The Morality of Conflict: A Study on Reasonable Disagreement in the Law* (2005).
28. Report, *supra* note 2, at 21.
29. Ibid.
30. Ibid., at 22.
31. Ibid.
32. Ibid., at 23. The invocation of the 'same subject matter' appears often enough in the literature on fragmentation of international law. Consider the following statement from Enzo Cannizzaro: 'In situations in which the two courts are called on to qualify legally the *same or analogous conduct* under rules which are formally different, although of *identical content* . . . an analysis of the scope of their respective jurisdictions might serve to avoid overlapping judicial findings'. E. Cannizzaro, 'Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ', (2007) 4 *European Journal of Legal Studies*, accessed by the author at www.ejls.eu on 11 October 2007 (emphasis added).

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Although the 'pointing in different directions' (where, for example, the different objectives of trade law and environmental law may 'have an effect on how the relevant rules are interpreted or applied') may not lead to 'logical incompatibilities between obligations upon a single party, they may nevertheless also be relevant for fragmentation'.[33] Logical incompatibilities are not, the Report says, its focus. To have such a focus, it continues, is to mischaracterize 'legal reasoning as logical subsumption'.[34] Instead, the Report seeks to focus on situations 'where two rules or principles suggest different ways of dealing with a problem' and in this way to avoid a model of logical reasoning which deems it possible for decisions to bypass the role of 'interpretation and choice between alternative rule-formulations'.[35] In effect, this qualification is another instance of the tension referred to above. On the one hand, the Report seeks to identify normative conflicts between two or more sets of rules or principles said to relate to the same subject matter and, on the other, it acknowledges that the process of 'conflict-ascertainment and conflict-resolution' is part of the 'pragmatic process through which lawyers go about interpreting and applying formal law'.[36] However, is a proper explication of the 'pragmatic process' – what I have referred to above as legal work – really compatible with the Report's characterization of normative conflict? As we shall see, it is not on the basis of a mix of Hartian, MacCormickian, and Dworkinian insights into legal reasoning that the Report endorses[37] – all of which are said to lead to the view that it is a task of legal reasoning to establish how the 'systematic relationship between the various decisions, rules and principles should be conceived'[38] – that the epistemological details of that pragmatic process can be revealed. The Report is wrong to insist, as it does in its introductory remarks, that the only alternative to the Hartian, MacCormickian, and Dworkinian understanding of legal reasoning is to conceive of 'the various decisions, rules and principles of which the law consists' as being 'randomly related to each other'.[39] It will be my task to show in the fourth part of this paper that there is another account of legal reasoning – and thus, also, of understanding legal language – that is available, and that comes closer to providing a more accurate picture of the pragmatic process that the Report says it wants to appeal to.

It is important to mention another element of the Report's introductory account of legal reasoning, namely that it is primarily a 'purposive activity'. Legal reasoning is not, says the Report, the 'mechanical application of apparently random rules, decisions or behavioural patterns' but 'the operation of a whole that is directed toward some human objective'.[40] There are, of course, disagreements over objectives, and it is the task of legal interpretation to link 'an unclear rule to a purpose and thus,

33. Report, *supra* note 2, at 24.
34. Ibid., at 25.
35. Ibid.
36. Ibid., at 27.
37. Ibid., at 28. It is partial because there is an acknowledgement of the 'many understandings of the nature of the difference between "rules" and "principles"'. Ibid.
38. Ibid., at 33.
39. Ibid., at 33.
40. Ibid., at 34.

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by showing its position within some system, to [provide] a justification for applying it in one way rather than in another'.[41] Legal interpretation, then, 'builds systemic relationships between rules and principles by envisaging them as part of some human effort or purpose', and such 'systematic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators'.[42] It is important to say that nothing that I argue in this paper is a criticism of the purposive element of legal reasoning per se. However, what I do argue is that the purposive element does not by itself capture the inseparability of rules from their factual adaptability, and thus does not take seriously enough the pragmatic process of fact construction, and the role of typical narratives and images that necessarily accompany the understanding of legal language. Put another way: positing and maintaining a distinction between deductive reasoning and purposive interpretation is not conducive to providing an epistemologically rich and socially complex enough account of legal work performed in international legal institutions.

Characteristically, as we have seen, having provided the above account, the Report introduces qualifications. It notes, for example, that it is a 'preliminary step to any act of applying the law that a prima facie view of the matter is formed'. That preliminary view, it says, will involve 'an initial assessment of what might be the applicable rules and principles', so that 'a choice is needed, and a justification for having recourse to one instead of the other'.[43] The problem, however, is that in formulating the process in this way the Report neglects to conceive of the relationship between justification and application as only a way of speaking, as an artificial distinction that has limited explanatory power in what I argue to be a richer account of the pragmatic process of legal practice. The process of application is not merely preliminary: it is, instead, integral and pervasive, and no less so at the level of justification. The fact that the Report separates application and justification in this way leads it to promote the possibility of harmonization between conflicting standards such that 'definite relationships of priority between them'[44] can be established. It is against this dream of harmonization – what we may call surface coherence – that this article is directed. It is not that there is no utility in such an analysis. But it is potentially very misleading, taking us away from a more accurate picture of how, in this age of diversification and specialization, legal work in international legal institutions operates.

Before proceeding to the fourth and fifth parts of the paper, in which I hope to outline an alternative approach to understanding legal language, and one that, I hope, may convince us of the need for an analysis of what I call deep coherence, it will be useful and appropriate to outline some of the conclusions of the Report. It will be useful and appropriate also because the conclusion, as I have foreshadowed in my portrayal of the narrative of the Report, softens the aims and qualifies even further the method as introduced by the Report, and provides suggestions for future

41. Ibid.
42. Ibid., at 35.
43. Ibid., at 36.
44. Ibid., at 36.

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improvements that prefigure, at least partly, the need for the resources I offer in this paper.

In contradistinction to the aim with which the Report began – that is, to offer an account of purposive harmonization based on establishing definite relationships of priority between normative conflicts – the conclusion notes that 'relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise'.[45] It notes that the 'formalist agenda' of addressing conflicts by way of legal techniques establishing defeasible priorities between normative conflicts has its limitations.[46] 'The world', says the conclusion, 'is irreducibly pluralistic', and it would be a mistake to think that law can 'resolve in an abstract way any possible conflict that may arise', for each area of the law, institutionally organized, 'has its experts and its ethos, its priorities and preferences, its structural bias'.[47] Indeed, as it acknowledges, the entire debate over fragmentation raises the issue of the 'viability of traditional international law – including the techniques of legal reasoning that it imports – in the conditions of specialization'.[48] These are very significant concessions and, indeed, it is the aim of this paper to show that there is an alternative picture of our understanding of legal language, and of the system values that correlate to that understanding, that can assist the further and more accurate elaboration of those conditions of specialization.

But it is noteworthy that the conclusion goes yet further. Unlike the introduction, it specifically endorses the 'constitutive value' of legal pluralism. Coherence, it says, is 'a formal and abstract virtue', traditionally connected with the aims of 'predictability and legal security'.[49] More importantly for my purposes, the Report says that 'even as international law's diversification may threaten its coherence, it does this by increasing its responsiveness to the regulatory context'.[50] Identifying lapses of coherence, it seems to suggest, points us in the direction of identifying problems of co-ordination, but this, it notes, is 'counterbalanced by the contextual responsiveness and functionality of the emerging (moderate) pluralism'.[51] Indeed, the Report acknowledges that there is 'no homogenous, hierarchical meta-system' that 'is realistically available to do away with such problems'.[52] These conclusions, as the Report also acknowledges, go to the very heart of the methodology of the ILC. They go, in other words, into the very heart of how it has approached and understood the nature and operation of general international law. What are the prospects, in an irreducibly pluralistic world, of the codification of the content of general international law? Can the ILC speak of a universally recognized and understood language of general international law outside, as it were, the epistemological and

45. Ibid., at 485. I note that at 484 the Report notes that it 'has not aimed to set up definite relationships of priority between international law's different rules or rule-systems', but, as I have noted, this is difficult to reconcile with the position taken in the introduction as to the possibility of such a systematic view.
46. Ibid., at 487.
47. Ibid., at 488.
48. Ibid.
49. Ibid., at 491.
50. Ibid., at 492.
51. Ibid., at 493.
52. Ibid.

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institutional realities of international legal practice on the ground? Indeed, it may be, at least partly, the ILC's interest in positing the existence of international law as a system of rules that renders it difficult, as we have seen, to develop an account of legal work faithful to the reality of specialization. Modestly, the Report places a limit on 'what can be attained in terms of codification and progressive development of universal rules'.[53] It does not give it up, but it offers a few 'supplementary' techniques for the restatement of general international law. It suggests that such work of restatement might focus on the following:

(a) What sources are covered by reference to 'general international law'?

(b) How does 'general international law' appear in international treaty law, and in the practice of international and domestic courts and tribunals as well as in other internal law applying bodies?

(c) To what extent successful 'codification and progressive development' today might in fact necessitate studies – properly carried out by the ILC – on the emergence and spontaneous operation of general international law?[54]

Of course, we shall have to wait and see what the ILC meant by 'the practice of international and domestic courts and tribunals' et cetera and 'the emergence and spontaneous operation of general international law'. In the meantime, however, I modestly offer an alternative approach to the understanding of legal language and thus, also, an alternative model of legal reasoning, all of which can contribute to an epistemologically and socially rich account of legal work performed in international legal institutions. That account can then lead us to posit an analysis of deep coherence – and one, furthermore, that hopefully avoids some of the limitations that the Report itself acknowledged that its methodology displayed. In the next part, then, I offer a different approach to the understanding of legal language and then go on, in the fifth part, to develop in more detail the methodology of deep coherence. I offer, also, a different set of questions for future work of the ILC, while also considering, ever so briefly, the viability of the ILC's pursuit of these questions in the context of its own institutional arrangements.

4. The factual adaptability of legal language

In this part of the paper I focus on the work of two legal theorists, Bernard Jackson[55] and Geoffrey Samuel.[56] Although they take on different kinds of problems – generally speaking, the first considers the problem of the meaning of legal language, while the second confronts the deficiencies of propositionally based theories of legal knowledge – they have a great deal in common. Both, as we shall see, offer a way of understanding legal language that can lead us to posit not only the viability of, but

53. Ibid., at, page 255.
54. Ibid., at, page 256.
55. B. Jackson, 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence', (2000) 13 (4) *International Journal for the Semiotics of Law* 433; and B. Jackson, *Law, Fact and Narrative Coherence* (1988).
56. I focus on G. Samuel, *Epistemology and Method in Law* (2003).

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also the urgent preference we should show to, the analysis of the deep coherence of a legal system. This part is divided into three sections. The first discusses the work of Bernard Jackson and the second the work of Geoffrey Samuel, while the third pools the insights. My discussion of both theorists is inevitably brief and descriptive, but I hope, at the risk of sounding encyclopaedic, nevertheless useful for revealing the alternative picture of understanding legal language that is crucial for the method of deep coherence, while, simultaneously, retaining something of the distinctiveness (style, problem, terminology) of the work of these two theorists.

4.1. Typical narrative images

Bernard Jackson's target in a relatively recent paper, entitled 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence',[57] is what he characterizes as the liberal modern law model of language-based rules. In this model, he says, 'people can rely ultimately on their disputes being resolved by court adjudication', which 'involves the application of linguistic rules', where the meaning of those linguistic rules, in turn, 'is normally available in advance, the assumption being that the "literal" meaning is that both intended by the legislator and to be applied by the court'.[58] Jackson argues that a very different model is discernible in the Bible. The features of this model include a view of 'dispute settlement as essentially private' which does not 'necessarily involve the application of linguistic rules', and where, significantly for my purposes, if 'linguistic rules are used, their application is not to be identified with the notion of "literal meaning", but rather with their narrative, contextual sense'.[59] Jackson's dissatisfaction is with a view of language that suggests that words – whether in rules or otherwise – have a 'literal' or a 'core' meaning; that is, there are 'situations that the words "cover"'.[60] It would be too crude to suggest that the Hartian, MacCormickian, and Dworkinian model of legal reasoning to which the ILC Report acknowledged its debt is fairly characterized in this fashion, but it cannot be doubted that the complex family of ideas invoked by those theorists broadly falls under the canopy of the liberal modern law model. Jackson urges and offers a different approach to the liberal model, namely one that does not ask 'what situations do the words of this rule cover?', but inquires in the following way: 'what typical situations do the words of this rule evoke?'[61] Formulating the question in this way, he says, signifies looking 'to the narrative images – of situations within known social contexts – evoked by the words'.[62]

Jackson provides some examples of passages from biblical law where an approach bent on discovering the literal meaning necessarily fails: it captures neither the complexity of the language of the rule nor the social context in which such rules were used (i.e. in largely private settlements of disputes). The role of courts in such a context, and within such a model of understanding the language of rules,

57. Jackson, 'Literal Meaning', *supra* note 55.
58. Ibid., at 434.
59. Ibid.
60. Ibid., at 437.
61. Ibid.
62. Ibid.

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'was restricted to cases perceived as too far distant from the typical narrative images evoked' such that judges were 'expected to deploy their intuitions of justice'.[63] In such a context, Jackson continues, 'communication is characterised by the availability of common deployment of unspoken social knowledge, knowledge of what are the typical narrative images deployed within the group'.[64] Where that 'social knowledge is sufficiently internalised within each of the members of a particular social group', the rules may be said to operate as a 'semiotic code, based on the internalization of images and feelings'.[65]

Jackson goes on to consider the applicability of this 'semiotic' model to modern law – an important task, given that that model developed in a context very different, at least at first blush, from the role of modern courts and tribunals. He argues that, contrary to positivistic models, the semiotic model can 'inform the manner in which law actually works'[66] in the contemporary world. Further, he argues that both H. L. A. Hart and Lon Fuller (the latter especially) 'unwittingly acknowledge' that 'narrative images still underlie much of our case law and jurisprudential theorising about it'.[67] He invokes Fuller's famous example of the 'upright sleeper',[68] and argues, convincingly, that the question of whether the upright sleeper can be found to be in violation of the rule against 'sleeping in any railway station' can be best understood not as an obvious instance of the rule but as a case of how close the image of the upright sleeper may be said to be to the typical narrative image invoked by the rule. Similarly with Ronald Dworkin's equally famous discussion of *Riggs* v. *Palmer*:[69] is not the initial classification of this case as a hard case, asks Jackson, best explained by 'the feeling that the case of the grandson was so far distant from the "normal" narrative of testate succession that this could not be a straightforward instance of the rule, notwithstanding the words in which the rule was expressed'?[70] Even if the judgment records a justification using the rhetoric of a literal interpretation, what is really happening, according to Jackson, is that the judge is 'appealing to the values internalised within the "common sense" of a particular community. The literal meaning of the statute is filtered through the aesthetics or values which accompany narrative images at the subconscious level'.[71]

In his earlier book, *Law, Fact and Narrative Coherence*,[72] Jackson urges us to take seriously 'the implications of linguistic scepticism in general, and doubts about the place of "reference" in particular'.[73] His criticism of the use of the concept of 'reference' also leads him to a criticism of a correspondence theory of truth, and in this he is wide-ranging, focusing at first on Galen Strawson, but thereafter

63. Ibid., at 446.
64. Ibid., at 447.
65. Ibid.
66. Ibid., at 450.
67. Ibid.
68. See L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', (1957) 71 *Harvard Law Review* 630, at 664.
69. *Riggs v. Palmer*, 115 NY 506, 22 NE 188 (1889). See R. Dworkin, *Law's Empire* (1986), at 15–20.
70. Jackson, 'Literal Meaning', *supra* note 55, at 453.
71. Ibid.
72. Jackson, *Law, Fact*, *supra* note 55.
73. Ibid., at 1.

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widening his critique to analytical philosophy of language in general. He shows, very convincingly, how the problem of reference and the associated correspondence theory of truth underlie an approach to legal reasoning dominated by the device of the syllogism – a 'formalization of the process of (deductively) applying law to facts'.[74] Chapter 4 of *Law, Fact and Narrative Coherence* offers an alternative; it argues that 'rules are themselves meaningful as socially-constructed narratives, accompanied by particular (and increasingly institutionalised) forms of approval or disapproval'.[75] In doing so, that chapter also argues that 'the fact that legal rules have tended to become, in Western legal systems, increasingly abstract and conceptualised tells us more about the pragmatics of rule-telling (its increasing bureaucratization and specialization) than about the nature of rules themselves'.[76]

Jackson is keen to establish a divide between his approach and that of those who account for the application of law by way of the normative syllogism.[77] Adopting his model, he says, entails seeing 'the relationship between the general rule and the particular case' as 'one of inter-discursivity, not the application of a consequence to one particular referent, which the general rule states ought to be applied to all such referents'.[78] The underlying forms of both rule and fact are, according to Jackson, narrativized, where the relationship between the two is 'one of greater or lesser proximity, in terms of human experience'.[79] Indeed, he argues that the 'further the form of the "rule" moves from the narrative model to a purely abstract, conceptual formulation, the more we are likely to encounter difficulties in both the application of law to fact and the interpretation of general rules, notwithstanding the clarity in which the rule is expressed'.[80]

We must not, he says, mistake the process and expression of justification for the process of 'how legal decisions are arrived at'.[81] If we do so, we make unwarranted distinctions between 'a) determination of fact, b) justification of determination of fact, c) determination of law, d) justification of determination of law, e) application of fact to law, and f) justification of application of fact to law'.[82] Instead, laws should be 'regarded as a particular form of narrative representation of human behaviour' that is then institutionalized as a 'sanction' signifying the community's approval or

74. Ibid., at 2.
75. Ibid., at 3.
76. Ibid.
77. It is important to note here that some endorsements of the syllogism should be understood not as an endorsement of the explanation of the process of legal reasoning as exclusively syllogistic, but as explanations of the structure of rules. However, this distinction is itself not often made by those who insist on the syllogistic structure of rules, suggesting that those writers still think that the process of the application of legal rules is essentially deductive, and best formalized in the syllogistic form. For example, see N. MacCormick, *Institutions of Law* (2007), at 24–8, although, of course, MacCormick's account of legal reasoning cannot be understood without recourse to his *Legal Reasoning and Legal Theory* (1978) and *Rhetoric and the Rule of Law* (2005). It is no surprise, however, to see that a recent volume has explored the tensions between the syllogism arguably best seen at work in the process of justification (appeals to universals), and its limitations, if not its absence, at the level of application (appeals to the particular): see Z. Bańkowski and J. MacLean, *The Universal and the Particular in Legal Reasoning* (2007).
78. Jackson, *Law, Fact*, *supra* note 55, at 89.
79. Ibid.
80. Ibid.
81. Ibid., at 90.
82. Ibid.

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disapproval of that narrative.[83] Further, there are two forms of narrativization: the first relates to the semantics of the telling of stories in court (their content), and the second to the pragmatics of that storytelling – that is, the process of persuading the adjudicator of the truth of those stories.[84] Jackson illustrates the role of the narrative model, tracking in close proximity to human experience, and thus also exemplifying the 'inseparability of law, fact and application' in the now often cited passage of Lord Denning's judgment in *Miller* v. *Jackson*.[85] It is instructive to set this passage out in full and to follow Jackson's analysis of it. Here is the passage first:

> In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.[86]

The image of the intruding outsider is contrasted, negatively, with the overwhelmingly positive cricket-playing community, which is said to exemplify the very best of traditional practices. The newcomer seeks the judicial disapproval of someone in authority who him- or herself, should he make a ruling in favour of the newcomer, would be interfering in a similarly disapproving manner to that of the newcomer. Further, such interference, causing the disappearance of traditional practices, is said to be likely to lead to young men turning to implicitly destructive forms of pleasure-seeking.[87] As Jackson concludes, 'Lord Denning has clothed his opposition to the

83. Ibid., at 91.
84. Ibid., at 92.
85. *Miller v. Jackson* [1977] 3 All ER 338. See also, W. Twining, 'Stories and Arguments', in M. Leskiewicz (ed.), *Law, Memory and Literature* (2004), 72–8. A slightly revised version of the above paper was recently published in W. Twining, *Rethinking Evidence* (2006), chapter 9.
86. *Miller v. Jackson*, *supra* note 85, at 340–1.
87. Jackson, *Law, Fact*, *supra* note 55, at 96.

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application of the legal rule in a vivid, narrative presentation of the facts,'[88] and one, moreover, that already includes within it modes of persuasion. Of course, as he acknowledges, the example is a somewhat extreme one, but, significantly, not because of its use of the narrative mode, but because of its invocation of notions (such as the delights of village cricket) that are not recognized as being capable of being 'used publicly in the process of justification'.[89]

Indeed, the above example sets the scene nicely for Jackson's argument that the ancient forms of expression of rules – for example 'If a thief is found breaking in, and is struck so that he dies, there shall be no blood guilt for him'[90] – and thus also more recognizably narrativized and concrete than the 'modern, abstract legal rule', have not only not completely died out (e.g. there are examples of the use of narrative illustrations in modern criminal codes), but in fact underlie and explain the understanding of rules expressed in that modern, abstract form. Our understanding of rules expressed in such a manner is explicable on the basis of a stock of typical narrative images – narrativized models of behaviour – that contain within them 'some tacit social evaluation: that such behaviour is good, bad, pleasing, unpleasing etc.'.[91] Citing George Fletcher's exposition of the 'subjective criminality' (i.e. that of attributing evil minds to agents when they act in certain ways) that infused the law of theft,[92] Jackson argues that however we analyse it, our understanding of legal language is explicable on the basis of the ever developing stock of 'collective images' which 'appear to be socially-constructed narrative models of human experience'.[93]

The conclusion, in relation to decision-making, is simple, but very powerful: 'decision-making in adjudication consists in comparing a narrative constructed from the facts of the case with the underlying narrative pattern either explicit in or underlying the conceptualised legal rule'.[94] Where, as in modern Western legal systems, the formulation of the rules becomes 'increasingly abstract and conceptualised',[95] the more difficult is the task of adjudication.[96] There is much to be said, he concludes, for the formulation of 'particular rules' that 'build upon social experience of typical behaviour-patterns, accompanied by what are considered appropriate institutional sanctions'.[97]

There is a great deal more that can be gleaned from Jackson's work, but I do not have the space here to elaborate any further. The important point to take is that of the inseparability of normative consequences (expressed in justification), from the process of fact construction in a narrativistic guise, and, equally, the inseparability

88. Ibid., at 97.
89. Ibid. Indeed, and crudely put, it is this requirement of publicly recognized notions that some characterize as the limiting or disciplinary role of the process of justification on the process of application. See *supra* note 77. The problem is that, although informative, this disciplinary role does not exhaust – indeed, may misrepresent – the epistemological work involved in the process of legal reasoning.
90. Cited in Jackson, *Law, Fact*, *supra* note 55, at 100.
91. Ibid., at 99.
92. G. Fletcher, *Rethinking Criminal Law* (1978).
93. Jackson, *Law, Fact*, *supra* note 55, at 101.
94. Ibid., at 101.
95. Ibid., at 106.
96. Ibid., at 101.
97. Ibid., at 107.

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of our understanding of rules – or, more generally, the language of law – from our experience of social life as members of communities in specific times and places, where that experience is at least partly expressed in the institutionalized approval or disapproval of certain recurring behaviour patterns.

4.2. Constructing facts

The leap from Jackson to the work of Geoffrey Samuel, particularly *Epistemology and Method in Law*,[98] is not a great one. Like Jackson, although in different terms and by reference to a different set of problems and contexts, Samuel criticizes the ignorance of the role of images (he calls them 'facts') in legal reasoning. Samuel's specific problematic is legal epistemology. He argues that contemporary theories of legal knowledge suffer from an overdose of the rule-model in which legal knowledge is said to be knowledge of rules, 'that is to say, normative propositions capable of being expressed in symbolic language'.[99] Instead, Samuel says, we should pay more attention to non-symbolic forms of knowledge: that is, the life of facts and fact-construction. Samuel's book is a philosophically thorough inquiry into the relationship between rules and facts, and I cannot, in this brief section, do it proper justice. My focus will be exclusively on chapter 5, in which Samuel criticizes a model of legal reasoning based on the more or less straightforward application (by recourse, for example, to the legal syllogism or a kind of legal hermeneutics) of rules to factual situations.

'In order to relate to factual situations', says Samuel, 'rules must contain within them the means by which one can move from pure norm . . . to the world of social fact'.[100] Rules, he says, 'delimit facts. They describe areas and boundaries'.[101] But acknowledging this requires us to consider what this world 'beyond rules' is like. Consider, he says, the development of the law of negligence from *Donoghue* v. *Stevenson*[102] to *Grant* v. *Australian Knitting Mills*.[103] In the first case, as is well known, Mrs Donoghue was said to have suffered nervous shock on account of discovering a snail in her ginger beer (manufactured by the defendant). In the second, Mr Grant suffered acute dermatitis as a result of wearing underpants (also manufactured by the defendant), which contained an excess of a chemical harmful to human skin. There is nothing inherent – even if trained lawyers by habit may think so – in the neighbour principle – that is, nothing within the proposition itself which may indicate that the two cases are related. Instead, there are relationships between images (once again, Samuel calls them 'facts'): between the harm (nervous shock and acute dermatitis), the means (ginger beer and underwear) and the subjects (consumers and manufacturers). Where the relationships between them are sufficiently close, such that the latter situation can be imagined as an instance of the former, then the cases are sufficiently similar to warrant the use of the same justification for the decision

98. Samuel, *supra* note 56.
99. Ibid., at 1.
100. Ibid., at 180.
101. Ibid., at 181.
102. *Donoghue v. Stevenson* [1932] AC 562.
103. *Grant v. Australian Knitting Mills* [1936] AC 85.

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(i.e. the applicability of the neighbour principle). The point is, says Samuel, that it matters how facts themselves and the relationships between them are imagined.[104] He offers the following illustration:

> A ship heavily laden with a cargo of crude oil founders on a sandbank and in order to protect the lives of the crew the captain orders that the oil be discharged into the sea. The oil some time later is washed up on the beaches of a local holiday resort and the council spend much time, energy and money in clearing up the mess. Imagine that an employee of the council is looking through the facts of old cases to find an analogy with what has happened. The employee finds some old cases involving, not ships, but horse-drawn transport and, in the first case, he discovers a situation where the owner of a house has had his front wall, adjoining the roadway, severely damaged by a coach and horses crashing into it. In another case, he discovers that the owner of a café has suffered loss of business, plus increased gas light bills, as a result of a neighbouring transport firm having left its horses on the road outside the café, where they blocked the daylight, and the smell from their droppings and urine overpowered the customers. Which situation, the council employee asks herself, is the closer analogy to the problem of the stricken ship and dirty beach? Is it helpful to think in terms of 'pollution'? What kind of image does pollution conjure up? Or should one be thinking more in terms of damage to an adjoining beach?[105]

But it is no mere, though of course also no small, matter of how one envisages facts and relationships between them – a matter, as he calls it, of analogy or analogical thinking. What matters also is how one categorizes facts. In the case of Mrs Donoghue, for example, one needs to classify the harm, the persons, and the things.[106] What kind of injury or damage is nervous shock? Does it matter that Mrs Donoghue is an elderly woman? What kind of product is ginger beer? The very asking of these questions, says Samuel, is evidence enough of the dynamic relationship between facts (as in the *Donoghue* case) and certain categories taken to be fundamental for the purpose of classification (e.g. persons, things, actions, and damages). The explanation of such a cognitive process is, as Samuel acknowledges, by no means an easy feat. But the difficulties, at the very least, should point us to the insight that 'the linguistic proposition cannot in itself ever contain information about the imagery which surrounds the actual application process to the facts'.[107] Rules, for Samuel, are by no means useless; they help us, in a limited way, to orient ourselves. But what explains the orientation – what drives it – is the work of images, of analogies between sets of images, and that of the framing of the image in the first place. Framing, for example, involves the scale of time within which some event is delineated as a stand-alone event. For instance, in the above case of the oil tanker, 'one can look at the act of the captain *vis-à-vis* the discharged oil and the distressed ship or at the wider picture of a proprietor sending out his ships and cargoes'.[108] Adopting the latter, for example, is more likely to lead to the imposition of a normative

104. It is instructive, although outside the scope of this paper, to compare this analysis to that of Jackson's discussion of two contract cases in *Law, Fact*, *supra* note 55, at 101–6, where he talks of the comparison of narrative frameworks.
105. Samuel, *supra* note 56, at 190.
106. Ibid., at 197–8.
107. Ibid., at 200.
108. Ibid., at 207.

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structure that focuses on 'the activity of the control of things'.[109] Another feature of the work of images is the relatively common device of an imaginary bystander, or the reasonable person: this is not a device explicable solely or even persuasively by the alleged priority given to 'ordinary meaning'. It is better explained as another way of constructing the facts: of making the images appear in a certain way, of using them to delimit the availability of normative structures.

As I have noted above, Samuel's picture of the work of images, or fact construction, in legal reasoning is more complex than I can afford to explicate here. He spends, for example, a lengthy chapter on the role of taxonomies – allowing for the categorization of facts under certain identifiable clusters of rules (e.g. family law or consumer law) – where those taxonomies are themselves subjected to thorough historical analysis (dating back to the *Institutions* of Gaius). Perhaps even more importantly, he presents six schemes through which the social sciences have traditionally constructed facts: the causal scheme, the functional scheme, the structural scheme, the hermeneutical scheme, the actional scheme, and the dialectical scheme – all of which interrelate in complex ways, and all of which also may be seen as tools for an understanding of how different methods for fact construction may perhaps better serve certain purposes rather than others.[110] What is important for my purposes is the model of legal reasoning endorsed by Samuel on the back of his analysis. Ultimately, Samuel thinks of legal reasoning as 'a question of comparing isomorphies: that is to say, of comparing formal patterns'.[111] Legal reasoning, then, for Samuel, is a complex instance of constructing, categorizing, and comparing factual patterns in the context of certain traditionally accepted terms (e.g. injury, damage, consumer, manufacturer, etc.) and connectors (e.g. cause, intent, motive, etc.), the operation (and thus also our understanding) of which is fundamentally inseparable from that complex process of fact construction. Foreshadowing, for a moment, the importance of specific institutional contexts (discussed in part 5 of this paper), we can supplement Samuel's account by suggesting that the function of the above-mentioned traditionally accepted terms and connectors changes with respect to their institutionalized history within particular communities – that is, the factual patterns accompanying terms will differ as between specialized communities of practitioners (e.g. different factual patterns accompany the concept of intention in the practice of criminal law and tort law).

4.3. Pooling the threads

Where Samuel offers a more sustained epistemological argument for the inseparability of our understanding of rules from their factual adaptability, Jackson provides us with an account of the social dimension of our understanding of legal language. In the latter case, it is our ever-changing and ever-developing stock of narrative models of typical behaviour patterns that we share as members of specialized communities,

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109. Ibid. As Samuel notes, this explanation follows the judgement of Lord Denning in *Esso Petroleum v. Southport Corporation* [1953] 3 WLR 773 (QBD).
110. Samuel, *supra* note 56, ch. 8.
111. Ibid., at 201.

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and the approval or disapproval of which is institutionalized in the form of sanctions. In the former, there is a more extensive focus on the relationships between images, and inextricability of the work that goes into the framing of an image, and constructing analogies between sets of images, from the imposition of normative structures on the set of facts in question. In both theorists, however, there is a common thread: a thorough and deep critique of a model of legal reasoning that relies on a chronological account of determining the applicable rules to some facts, applying those rules to those facts, and then justifying that application. Although their work, I believe, is to some extent representative of rule-sceptical trends in the recent debates over the methodology of comparative law,[112] it is also work that deserves to be singled out for its sustained philosophical engagement with this alternative model of legal reasoning. That model, moreover, is not one that relies, exclusively or even dominantly, on appeal to the alleged purposiveness of reasoning about rules. Rather it is a model that brings to light the social epistemological dimension of our understanding of legal language. Ultimately, it is a model that comes closer to a vision of legal theory that concerns itself not with the analysis of the content of rules and their logical (or illogical) interrelationships, but rather with a refocusing of the legal theorist's concern away from 'the law itself' and towards the use of the language of law as a resource in the exercise of judgement. It is now time to consider how this alternative model of understanding legal language may lead us to the invocation and also the pursuit of a different set of system values.

5. The deep coherence of a legal system

What, in a phrase, is an analysis of the deep coherence of a legal system? It is an analysis that consists of the factual mapping of rules in their specific institutional context with a view to evaluating their responsiveness and adaptability to social problems, both those that tend, in various degrees, to repeat themselves in those specific institutional contexts and also those new and emerging social problems that bring to light the gaps between them and our stock of typical normative images that underlie our understanding of legal language. The first step in elaborating on this methodology lies in the explanation of what is meant by the factual mapping of rules. The second lies in what is meant by specific institutional contexts. Finally, the third step is that of an understanding of the values of responsiveness and adaptability – values that were, as I mentioned above, noted as important by the ILC, but that deserve a more elaborate explanation. Having gone through these three steps, necessarily briefly, I shall then, very modestly, suggest a different kind of research agenda for the ILC.

Before I continue, it will be appropriate to indicate why I have chosen to retain the term 'coherence'. After all, what I call for is an evaluation of the responsiveness of legal work: so why does 'coherence' matter at all? The concept of coherence functions here to invoke two things: first, the repetitiveness of typical narrative

112. See, for example, M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (2004).

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images that accompany the use of institutionally located legal language; and second, the regularization of habits of factual construction utilized by those persons who work with that institutionally located legal language. The point is that there is no such thing as coherence as between rules themselves – that is, as between words detached from their use in specific institutional environments. Meaning cannot be universalized, and there is no universal language. Rather, meaning is accumulated in specific environments where language is used for specific purposes. And, as explained in this paper, the accumulation of meaning is best thought of as being produced by habits of factual construction, resulting in legal language acquiring histories of typical narrative images that accompany commonly recurring terms in institutionally located legal language. However, these are after all *habits* of factual construction, and they do result in *typical* narrative images – and we can, I think, not only distil these habits and typicalities, but also consider relationships between them. The question is *where* should we consider those relationships: should we consider them at the level of a detached general international law or in the specific institutional contexts of specialized international legal communities? The answer is that the very focus on habits of factual construction and stocks of typical narrative images makes sense only in those specific institutional contexts.

5.1. Factual mapping

Much of what I have already said in section 4 of the paper is directly translatable to this section. The factual mapping of rules involves explaining the role of images, analogies between images, and the framing of images, as well as the stocks of typical narrative images, that underlie our understanding of rules and principles, and thus of their factual adaptability. Examples of how effective such work can be may be gleaned from the above cited work of Bernard Jackson, George Fletcher, and Geoffrey Samuel. Given space restrictions, I can only point to those works, and stress the necessity of a review of the normative conflicts identified by the ILC Report from the perspective of factual mapping. One example of how this might be conducted, itself partially acknowledged by the ILC Report,[113] is in the context of the fragmentation that is said to occur through conflicting interpretations of general law. Here, the Report cites an alleged normative conflict between the two different tests for the responsibility of states for domestic unrest, in *Nicaragua* v. *United States of America*[114] and *Prosecutor* v. *Duško Tadić*.[115] In the former case the test was expressed as one involving examination of 'effective control' and in the latter as one involving 'overall control'. As the Report notes, the ICTY considered that 'effective control' was too high a standard, preferring a test which held a power accountable where that power has a 'role in organising, coordinating, or planning the military actions of the military group'.[116] By contrast, the ICJ held that the 'United States had not been held responsible for the acts of the Nicaraguan Contras merely on account of organising,

113. See Report, *supra* note 2, at 49–52.
114. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), [1986] ICJ Rep. (hereinafter *Nicaragua*).
115. *Prosecutor v. Duško Tadić*, Judgement of 15 July 1999, Case No. IT-94–1-A, A.Ch. (hereinafter *Tadić*).
116. See ibid. at 115, 116–45, and Conclusions, *supra* note 2, at 49.

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financing, training and equipping them'[117] – more was required, namely that the United States exercised 'effective control' over those contras.

The Report warns that 'differing views about the content of general international law' can both 'diminish legal security' and entail that 'legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly'.[118] Further, it says, the rights enjoyed by legal subjects will then be unequal as between jurisdictions, and in the absence of an appeal court (as in domestic systems) there is no other way to avoid this conflict than to encourage international tribunals to 'coordinate their jurisprudence'.[119] What such warnings assume is that the two decisions are factually commensurable – that it is possible, in other words, to compare the two tests and thus, also, the two different justifications – from a vantage point of the content of general international law in which that content can be given legal meaning outside its factual adaptability. Significantly, the Report itself acknowledges this shortcoming. It states in a footnote that the identification of this alleged normative conflict 'need not be the only – nor indeed the correct – interpretation of the contrast between the two cases'.[120] It acknowledges that 'some commentators have suggested' that 'the cases can also be distinguished from each other on the basis of their facts' and that 'in this case, there would be no normative conflict'.[121] But it insists that 'the point of principle remains, namely that it cannot be excluded that two tribunals faced with similar facts may interpret the applicable law differently'.[122] The point here is that the Report assumes that it is possible to separate a norm (if you prefer, a legal test or a justification) from its factual instantiation where the work of legal reasoning is implicitly restricted to the application of the content of a norm to some set of facts taken – and this is crucial – to fall under *the same subject matter*. In contrast, what is required is an acknowledgement of the process by which facts are constructed and then connected to the normative justification proffered. Thus, in the above case, it is a matter of considering how the constructed facts in the *Tadić* decision were thought to fall within the typical narrative images evoked by the normative justification used – that is, that of 'overall control' – and, simultaneously, how those constructed facts were thought to be sufficiently dissimilar from the typical narrative images evoked by the normative justification used in the *Nicaragua* decision, namely that of 'effective control'. There is, in other words, no such thing as an identifiable normative conflict that operates in isolation from the manner in which some sets of facts are constructed, all set against, as the Report elsewhere acknowledges, a different set of purposes and the values of two different areas of law with two different stocks of accumulated typical narrative images with which the understanding of the normative justifications used is intertwined. Put another way, the positing of a normative conflict arises only when

117. Report, *supra* note 2, at 49.
118. Ibid., at 52.
119. Ibid.
120. Ibid., at 32, n. 52.
121. Ibid.
122. Ibid.

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we establish the same factual platform, and what the process of factual mapping can reveal is how facts are construed differently in different institutions.

Factual mapping, however, is not enough on its own; what is necessary is that that analysis is conducted by reference to the specific institutional contexts of the relevant bodies. Speaking broadly, what is required is an account of the institutionalization of the factual adaptability of rules and the normative justifications that correlate with that adaptability, within members of a specific legal community (such as those, as in the above cases, that surround the work of the ICJ and ICTY). I turn to a brief exposition of that social theory in the next section.

5.2. Specific institutional contexts

I do not have space in this paper for a full review of the immense literature on institutions and institutional design.[123] My focus is not, in any event, on our understanding of institutions and institutional design per se, but on its inextricability from the operation of legal reasoning and thus, also, from our understanding of legal language. To that effect I shall consider, very briefly, two recent works: Robert Summers's *Form and Function in a Legal System*,[124] and John Bell's *Judiciaries within Europe*.[125]

In *Form and Function in a Legal System*, Summers criticizes theories of law that claim that legal systems are 'essentially a system of rules',[126] identifying H. L. A. Hart and Hans Kelsen as the primary exponents of that theory. His theory of form is applied to what he calls the diverse functional units of a system, including institutions, legal precepts (rules and principles), non-preceptual species of law (such as contracts), interpretative and other methodology, sanctions, and remedies.[127] According to Summers, one cannot reduce the explanation of these functional units into sets of rules. Rather, one must employ a form-oriented analysis that allows one to break down the various elements of functional legal units, which include its purposes, overall form, constituent features thereof, and complementary material.[128] The overall form that comprises all these elements is represented as 'the purposive systematic arrangement of the unit as a whole: its organizational essence'.[129] Identifying and reflecting on the components and their interrelations within a functional unit allows one, among other things, to 'organise further the mode of operation and the instrumental capacity of the unit'.[130]

In the case of the legislature, for instance, 'internal committee structures and operational procedures within a legislature must be designed and internally coordinated

123. A more complete account would, at the very least, have to consider the work of Lon Fuller. See L. Fuller, *The Morality of Law* (1969), e.g. at 177; and L. Fuller, *The Principles of Social Order* (1981). See also W. Witteveen and W. van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (1999). A further important and recent resource is the work of Adrian Vermeule: see A. Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (2007).
124. R. Summers, *Form and Function in a Legal System: A General Study* (2006).
125. J. Bell, *Judiciaries within Europe* (2006).
126. Summers, *supra* note 124, at 3.
127. Ibid., at 3–4.
128. Ibid., at 5.
129. Ibid., at 5.
130. Ibid., at 6.

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to facilitate the study, debate, and adoption or rejection of proposed statutes'.[131] Not only do the various kinds of forms within functional units need to be considered, but also the relationships between functional units themselves; so, he says, there are devices that 'consist of basic operational techniques that integrate and coordinate institutions, precepts, methodologies, sanctions and other functional units', where each of those devices is a 'formal organizational modality of wide-ranging significance'.[132]

Thus, unlike rule-oriented analysis, form-oriented analysis of a legal system does not analyse the 'contents of those reinforcive rules that are taken to prescribe the facets of functional legal units generally'.[133] Instead, it recognizes that there 'can be no legal content without form',[134] placing emphasis on the need for the rational design of the components of functional units in order to fulfil the purposes of those units. Without, for example, a well-designed floor debate, statutes are less likely to beget good laws.

A proper study of Summers's book would need to engage in the dense detail of analysis of the formal components of an enormous range of functional legal units. For my purposes here, the important point is that Summers provides us with a theoretical framework within which we can readily acknowledge that rules themselves, as well as methodologies for making, interpreting, applying, and generally understanding them, cannot be understood outside and in neglect of their institutional life. Further, the set of components with which Summers analyses institutions can, I think, be very profitably applied to enhance and improve the institutional environment in which legal work is performed – but, and this is vital, we can only do so once we provide an account of what that institution should be striving for (an account I sketch in the next section).

John Bell's book, *Judiciaries within Europe*,[135] though primarily involving a comparative study of the judiciary in France, Germany, Spain, Sweden, and England, is significant for my purposes in its enunciation and endorsement of an institutionally oriented methodology for the understanding and explanation of the operation of judicial reasoning. There are, says Bell, three possible ways of approaching the understanding of judicial reasoning: first, the personal perspective, which 'looks at the way individuals perceive their role and career'; second, the institutional perspective, which 'looks at the judiciary as a collective and examines the way in which the structure of the career and the organization of the judges, as well as legal processes, affect the judiciary as a social institution'; and third, the external perspective, which 'looks at the judiciary from the perspective of its impact on the wider world'.[136] Bell's preference for the institutional perspective is not merely pragmatic; it is not, in other words, merely a matter of facilitating what he considers to be an insightful comparison between judicial institutions. The institutional perspective, he says, is

131. Ibid.
132. Ibid., at 8.
133. Ibid., at 10.
134. Ibid., at 14, following Rudolf von Jhering.
135. Bell, *supra* note 125.
136. Ibid., at 2.

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fundamental because 'it relates to the nature of law . . . because this is how one operates as a legal actor . . . and because it is how the law relates to the wider world'.[137] Like Summers, Bell argues that the law 'is something more than simply a system of rules or legal standards . . . [it] is as much about practices, what people do, as about what they think'.[138] 'On the one hand', says Bell, 'legal culture is a pattern of behaviour or an activity' and 'on the other hand, there is a set of ideas and values, which are communicated through language and signs that express attitudes and values towards the activity.'[139] Bell adopts the concept of law as institutional fact, first introduced by Neil MacCormick and Ota Weinberger,[140] and argues that 'law is an interpretive reality' that is preceded and pervaded by institutionally based practices within the legal community.[141]

Thus one can only understand judicial reasoning by way of an 'institutional fact analysis' which focuses 'attention on the judge as an actor whose actions are invested with meaning by the legal community through shared understandings', only 'some of which are expressed in legal norms'.[142] We cannot separate our understanding of instances of judicial reasoning from the expectations placed on those judges in specific institutional contexts in which they act as part of a delimited legal tradition, for to do so would be to disregard their role as institutional legal actors operating within a specific legal community and working within a specific institutional culture. One must first understand the various kinds of institutional pressures on a judge to 'interpret legal texts and perform legal procedures in ways that are considered appropriate not just by her, but by the legal community'.[143] And one must understand how judges come to acquire and internalize, over long periods of time, that sense of appropriateness, embodied in activities and practices that themselves give rise to 'norms and standards for why the activity should be conducted in the future'.[144] As he emphasizes, 'this structure of organizational learning does not deny change, but seeks to understand how deeply change operates'.[145]

All this will not come as a surprise to members of the ILC study group, but it is important to see that its significance does not lie merely in comparative law methodology. For if we are to take the increasing diversification and specialization of international law seriously as a social phenomenon, then we must have a theoretical framework in which we can understand the specific social dimension of the development of distinct legal communities. Further, we must first understand the long-term acquisition of a common sense of appropriateness of certain activities utilized by the actors within those communities, including the peculiar habits of factual construction that result in, and are informed by, stocks of typical narrative images that accompany the factual adaptability of rules used by those actors.

137. Ibid., at 6.
138. Ibid.
139. Ibid., at 6.
140. N. MacCormick and O. Weinberger, *An Institutional Theory of Law* (1986).
141. Bell, *supra* note 125, at 7.
142. Ibid.
143. Ibid., at 8.
144. Ibid., at 11.
145. Ibid.

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The factors shaping the judiciary that Bell outlines in his last chapter can serve as a useful beginning for a social theory of that common sense of appropriateness shared among members of international legal communities divided into the various identifiably distinct clusters of international law. Summers's work, in turn, can serve as a compendium of tools with which to dissect the forms of institutional life. Both works can serve, more generally, to support the argument for the inextricability of the form of rules and the procedure for their making, applying, and justifying within specific institutional contexts – with the proviso, of course, that we remain conscious of the epistemological artificiality of such categories.[146] Combining the more epistemologically minded accounts of legal reasoning provided by Bernard Jackson and Geoffrey Samuel with the attention paid to specific institutional forms by Robert Summers and John Bell can free legal theorists of the international legal order from the prison of 'the law itself', and direct international legal theory towards an epistemologically and socially rich account of legal work performed in international legal institutions.

5.3. Rethinking system values: the priority of responsiveness

As I have already mentioned, the ILC Report, particularly in its conclusion, identified and acknowledged the importance of the systemic value of the responsiveness of a legal system. It made that acknowledgement specifically in the context of the values of legal pluralism. There is, however, another – much less cited – source of important work on the notion of the responsiveness of law, namely the work of Philip Selznick and Philippe Nonet.[147] It is not a mere happy coincidence that I invoke Selznick's work immediately after stressing the importance of a community-oriented understanding of the operation of judicial reasoning. In his own work, most accessible in *The Moral Commonwealth*,[148] he stresses the importance of a conception of community composed of the following elements: historicity, identity, mutuality, plurality, autonomy, participation, and integration. It is a conception, potentially very usefully supplemented by some of the more recent work of Roger Cotterrell,[149] that can assist in developing the social theoretical approach to judicial (but more generally, legal) reasoning that I invoked by reference to Summers and Bell above.

But it is not this aspect of community on which I wish to focus here, but the notion of legal responsiveness. In the above cited work of Selznick and Nonet, the authors argue forcefully that the study of 'the foundations of law' cannot be divorced from 'the place we give law in society', and in that spirit they call for an integration

146. I should note that I am not endorsing the epistemological picture, to the extent that one can witness it, in the work of Summers and Bell. The epistemological picture I endorse is that of Jackson and Samuel, which, as I have indicated, needs to be supplemented by an analysis of the specific institutional context of that epistemological picture – an analysis that is assisted by the work of Summers and Bell.

147. P. Selznick and P. Nonet, *Law and Society in Transition: Toward Responsive Law* (2001). Another potentially useful line of inquiry – that may share some of the conceptual affinities of responsive law – is that of the legal empowerment literature: see, e.g., S. Golub, 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative', (2003) 41 *Rule of Law Series: Democracy and Rule of Law Project*, Carnegie Endowment for International Peace, accessed by the author at www.carnegieendowment.org/files/wp41.pdf on 11 October 2007. My thanks to Francis Cheneval for this point.

148. P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (1992).

149. R. Cotterrell, *Law, Culture and Society* (2006).

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of legal, political, and social theory.[150] In their book they offer their own view for 'assessing the worth of alternative modes of legal ordering',[151] that is, ultimately, for assessing the place of law in society. In setting the scene for responsive law, which they offer as the mode of legal ordering against which the current states of affairs should be evaluated, they criticize two other identifiable modes, namely repressive law and autonomous law. In the case of the former, they argue that 'every legal order has a repressive potential because it is always at some point bound to the status quo and, in offering a mantle of authority, makes power more effective'.[152] Under a repressive form of legal ordering, 'short shrift' is given to 'the interests of those governed', resulting in their position becoming particularly 'precarious and vulnerable'.[153] They acknowledge that to some extent all modes of legal governing are repressive, and that the emergence of that repression depends on many factors, including 'the distribution of power, patterns of consciousness and much else that is historically contingent'.[154] Nevertheless, there are identifiable forms of avoidable repression, particularly where the use of coercion is unrestrained and results in the suppression of deviance and the putting down of protests.[155]

The emergence of autonomous law, the second alternative mode of legal ordering, assists in 'taming repression'.[156] More commonly referred to as the rule of law, such taming is made possible when 'legal institutions acquire enough *independent* authority to impose standards of restraint on the exercise of governmental power'.[157] Such autonomous institutions must themselves have only 'qualified supremacy', and be subjected to 'defined spheres of competence'.[158] But there is a price, ultimately too high according to the authors, for the preservation of this kind of institutional integrity. Sharp lines are drawn between politics and law and thus, also, between the legislative and judicial function.[159] The legal order is understood as a model of legal rules which does 'enforce a measure of official accountability', but also 'limits . . . the creativity of legal institutions'.[160] Regularity and fairness, rather than substantive justice, become 'the first ends and the main competence of the legal order'.[161] Finally, 'fidelity to law' is 'understood as strict obedience to the rules of positive law'.[162]

Thankfully, however, the autonomous mode of legal ordering contains within it the seed for the development of responsive law. Where law is responsive to social needs, it is 'competent as well as fair', it helps to 'define the public interest', and it is 'committed to the achievement of substantive justice'.[163] Such an approach demands, among other things, the enlargement of legal knowledge – an enlargement

150. Selznick and Nonet, *supra* note 147, at 3.
151. Ibid., at 4.
152. Ibid., at 29.
153. Ibid.
154. Ibid., at 30.
155. Ibid., at 31.
156. Ibid., at 53.
157. Ibid. (emphasis in original).
158. Ibid.
159. Ibid., at 54.
160. Ibid.
161. Ibid.
162. Ibid.
163. Ibid., at 74.

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I invoke in this paper via the inextricability of first, normative justification and factual adaptability and, second, both of those and their instantiation in specific institutional contexts. The vision of a responsive legal order is one which takes 'affirmative responsibility for the problems of society'.[164] The ideal of responsive law does not entirely replace the warnings of repressing legal ordering and the aims of autonomous law, for it recognizes that these levels of development may at times be historically necessary. It does, however, move the ideal beyond them, calling, ultimately, for 'larger institutional competencies to the quest for justice'.[165]

The vision of responsive law, then, works in tandem with the understanding of legal language developed in section 3 of this paper. Legal language cannot be analysed for normative inconsistencies outside the utility of the factual adaptability of rules and their correlative normative justification for the resolution of social problems within specific communities and institutional contexts. Indeed, it is perhaps only in the development of specialized communities, imbued with an institutional culture that takes responsibility for social problems falling within its realm, that that responsiveness can be best realized. But that responsiveness will not be achieved as long as we focus unduly on the rule of law, accompanied by the values of legal security and predictability. And, as I have argued throughout this paper, the first step in extricating ourselves from the stifling nature of principles dear to the autonomous mode of legal ordering is to recognize that the language of law cannot be understood to contain a content independent from its factual adaptability – that, on the contrary, its successful use depends on the accumulation, within specialized communities, of stocks of typical narrative images that necessarily accompany the life of the community itself. Understanding legal language in this way helps us to see it as a set of resources used in the exercise of judgement by legal officials, and thus to consider, also, how that judgement – how that institutionally located process of legal work – can be more responsive to the demands placed on the specific institution within which it operates. Understanding the forms of those institutions – as we can, should we learn from the work of John Bell and Robert Summers, as well as the institutional design literature in general – can help us to see what kinds of procedural changes and what sorts of resources we might need to introduce in order to assist those institutions to maximize their responsiveness.

No doubt much work needs to be done on the ideal of responsive law. My primary purpose in this paper has been to show how that ideal goes hand in hand with the understanding of legal language that I provide in section 4 of the paper. My own feeling is that the ideal of responsive law needs to be buttressed by a rich theory of vulnerability – that is, a theory of vulnerability that does not restrict itself to the kinds of harm that individuals may suffer, but also takes seriously the unique forms of harm suffered by communities. Moreover, we need to make more of an effort to pay attention to poor and isolated individuals, as well as poor and isolated communities, both of whom, no less in international law than in domestic law, continue to suffer from a lack (often an absence) of representation and integration. It is only such a rich

164. Ibid., at 115.
165. Ibid., at 116.

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theory of vulnerability that can inform the substance of an account of international social justice – resulting, hopefully, in investigations as to how we can design our institutions so that they are responsive to those forms of vulnerability.

5.4. An agenda for the ILC?

Before proceeding, in the light of the above, to suggest, modestly, an agenda for the ILC, it will be in the spirit of this paper to comment on the specific institutional context of the ILC itself. Of course, this paper is not an occasion for a detailed review of the literature on the institutional form of the ILC,[166] although such a study, particularly in the light of Summers's recent work, would, I wager, be of great value.[167] Nevertheless, to ignore the institutional context of the ILC altogether would be to eschew the bottom-up perspective for which this paper argues.

As Ian Sinclair points out, and as is well-known, although the ILC was established in 1947, the ambition for codification and progressive development of international law began much earlier, with the Hague Peace Conferences of 1899 and 1907, the Council of the League of Nations of the Committee of Experts for the Progressive Codification of International Law (established in 1924), the Hague Codification Conference in 1930, and the Committee of Seventeen, to mention but a few.[168] The historical perspective is important, as a detailed engagement with it would, I believe, reveal that many of the current problems faced by the ILC have roots in the original vision (and early attempts at the institutionalization of that vision) for the codification and progressive development of international law – aims which may have had more purchase in earlier times.

In providing an institutional sketch of the ILC, it is important to consider the intimate relationships between the various elements, such as the composition, the selection of topics, and the working methods of the ILC. Anyone involved in the ILC will find it difficult to deny that all three are often highly politicized – no doubt a somewhat inevitable result, at least partly because of the way in which the ILC is overseen by the UN General Assembly. Composed, as it is, of academics, practitioners, politicians, civil servants, and diplomats – in total, 34 members from Africa, Asia, America, and Europe, elected for five years from lists submitted by national governments – the ILC has not always found it easy to co-ordinate the full involvement of all members, given their many pressing commitments at home. Achieving consensus on issues such as the management of international watercourse systems reveals the undeniably stark political nature of the process – not only of topic selection, but also of the manner of achieving consensus, for example, as was noted by Ramcharan,

166. See, for example, J. Morton, *The International Law Commission of the United Nations* (2000); I. Sinclair, *The International Law Commission* (1987); M. R. Anderson et al., *The International Law Commission and the Future of International Law* (1998); B. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977); M. El Baradei, T. Franck, and R. Trachtenberg, *The International Law Commission: The Need for a New Direction* (1981); and A. Pellet, 'Between Codification and Progressive Development of the Law: Some Reflections from the ILC', (2004) 6 (1) *International Law Forum* 15.

167. Such work would take both Summers's and Fuller's work on institutional design (see *supra* notes 123 and 124) and consider whether the ILC is well placed, institutionally speaking, to fulfil its aims and objectives – keeping in mind, of course, the impact of the arguments of this paper on what those aims and objectives should be.

168. Sinclair, *supra* note 166, at 1–6.

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'to push a decision through by a majority vote is a sure way of killing it in the General Assembly or at a subsequent codification conference'.[169] Despite the safeguards in Articles 2 to 8 of the ILC Statute – requiring the election of independent members, and 'in no sense as representatives of governments' – the reality has been that the ILC has included and continues to include foreign-ministry personnel and MPs.[170] The debate over part-time or full-time status mirrors the membership issue – meeting for three months a year in Geneva is likely to result in a conference aimed at political compromise rather than a sustained scholarly exercise of the requisite epistemological and social complexity. Of course, no one would deny the important work achieved by the ILC. The question, in the context of this paper, is whether the ILC is well placed to deal with the peculiar problems thrown up by the increasing specialization of the international legal order – problems, as I have sought to show, that place in some doubt not only the theoretical underpinnings of the aims and objectives of the ILC, but also its institutional arrangements. Crucially, in the light of the defence of the system value of responsiveness in this paper, serious consideration needs to be given to the representation of non-state interests, and, in particular, as I have noted above, to those poor and isolated individuals and communities who not only have little say in topic selection, but who, it would appear, are not generally consulted when it comes to solutions that could otherwise result in an improvement of their legal empowerment.[171]

Furthermore, if the approach to the understanding of legal language that I describe in this paper is accepted, it places the very viability of the codification of a general international law in jeopardy. For why should we attempt to codify general international law if there is no such thing as a universal international legal language? Less controversially, that approach would indicate that the production of general international legal instruments needs to be supplemented by the institutional design of the international legal order, such that the products of codification are given the opportunity to acquire institutional histories.[172] One of the criticisms made of *jus cogens* norms is that they lack sufficiently robust meaning to provide effective constraints on decision making.[173] Against the background of the above approach to legal language, this is not surprising; to be effective, *jus cogens* norms need institutionalization – they need to be internalized by actors within specific institutions, whose habits of factual construction result in typical narrative images that accompany those terms and then inform and direct the process of legal work in that institution. I would not wish to argue that no useful role is played by the influence that attempts at codification of a general international law have on the

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169. Ramcharan, *supra* note 166, at 35.
170. Morton, *supra* note 166, has examined the effect of such composition on the ILC's deliberations: see ch. 5.
171. For examples of solutions that can result in the legal empowerment of poor and isolated individuals and communities, see the various documents available on the website of the Commission on Legal Empowerment of the Poor, http://legalempowerment.undp.org.
172. The need for the institutionalization of general international legal instruments was stressed by Georges Abi-Saab: see, e.g., G. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', (1999) 31 *International Law and Politics* 919.
173. See, e.g., A. Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation', (2005) 74 *Nordic Journal of International Law* 297.

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construction of an international community – clearly, appearances and experiences matter, so that even the thinnest appearance and the merest experience of international togetherness is better than none. However, we cannot hope to control the life of that instrument of codification, for it only acquires a life (i.e. it only acquires meaning) within specific institutions.

Given the above remarks on the institutional context of the ILC – and thus, also, the requisite changes, to be worked out in more detail in later work, that may be required by way of institutional arrangement in order to accommodate these recommendations – I modestly recommend the following agenda for the ILC:

1. review the Report on the fragmentation of international law from the perspective of deep coherence, namely one in which the inextricability of normative justifications from factual adaptability within specific institutional contexts is recognized;
2. initiate a research project that focuses on the understanding of legal work undertaken within the various institutionally distinct clusters of international law – that being an understanding that will require the use of the methodology of deep coherence; and
3. adopt the responsiveness of international legal institutions as the system value of the international legal order, and take steps towards investigating, in partnership with those institutions, the requisite changes in institutional design that may need to be made in order to make those institutions more responsive to the social problems faced by those institutions, and thereby also considering the effect of the resolutions of those problems on the vulnerabilities of poor and isolated individuals and communities.

6. Conclusion

In an article published in this journal in 2002, Martti Koskenniemi and Päivi Leino noted that 'systemic value could not be detached from the value of the system. If the law is unjust, or unworkable, little virtue lies in applying it coherently'.[174] They could not be more correct. The challenge, however, lies in the ability of system values to reflect our understanding of how the system works. I have argued throughout this paper that anxiety over the fragmentation of international law, as revealed by the methodology (which I have called surface coherence) employed by the ILC Report, presupposes an understanding of legal language (clearly, an important element of our understanding of how the international legal system works) that considers it possible to separate normative justifications from the factual adaptability of rules on the one hand, and both of those from that of their instantiation in specific institutional contexts on the other. That understanding of legal language, in turn, leads, first, to the very invocation of system values such as legal security and predictability and, second, to their prioritization. Ultimately, it is a methodological package that

174. Koskenniemi and Leino, *supra* note 15, at 560.

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resembles remarkably closely, despite all the qualifications in the ILC Report, the mode of legal ordering that Selznick and Nonet characterized as autonomous law. Such a characterization is supported by the search for and expression, via codification, of general international law, said to be applicable among the many diverse specializations of international law.

It is a noble dream, but it is plagued by the nightmare of a misleading and misguided understanding of legal language, and an at least partial deafness to the potential benefits of specialized communities willing and able to take on responsibility for the social problems with which they deal and for the effects of their decisions on poor and isolated individuals and communities. As Selznick and Nonet show, however, the ideal of autonomous law contains within it the seeds of development towards responsive law. That seed can only be nourished when we approach the international legal order not by focusing on 'the law itself', but by invoking the notion of legal work: that institutionally located activity of problem solving that occurs within communities whose members develop habits of factual construction that result in a shared sense of the typical narrative images that accompany the terms and phrases contained within normative justifications used within those communities.

Koskenniemi and Leino were right to have brought to our attention the 'the use of general law by new bodies representing interests or views that are not identical with those represented in old ones',[175] but only to the extent that that warning can assist us in calling for both robustness as well as modesty from the jurisprudence of 'sub-systems'. They are right, then, to argue against the phenomenon of 'each institution . . . [seeking] to translate' their own professional language 'into a global Esperanto, to have its special interests appear as the natural interests of everybody'.[176] I agree with them that communities of specialized knowledges must seek to delimit the scope of their problem solving. But we should not let that legitimate worry make us think that there is any such thing as a global Esperanto of international law that, in practice and on the ground, maintains identity of content across those communities of specialized competence. We still do well to bring representatives of states (and, ideally, representatives of non-state-based communities) together under any excuse – even that of an attempt at codifying general international law – because anything that gets states (as between themselves, but also as between themselves and non-state-based communities) talking to each other, communicating despite the many cultural differences, is a good thing. Such communication can contribute to both the appearance and the experience of an international community, and, as I readily acknowledge, appearances and experiences of togetherness do have beneficial effects. In the end, a middle road must be found: one that encourages the specialized communities of international law to take responsibility for social problems within their realm, while discouraging attempts at positing – and, thereafter, seeking to control the content of – any normative justification that is said to be capable of being perched on the non-existent mountain top of the international law

175. Ibid., at 561.
176. Ibid., at 578.

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world. Perhaps, as Enzo Cannizzaro has suggested,[177] we should consider delineating more carefully the jurisdictional competence of international tribunals, but if we do, we had better do so not on the basis of some detached analysis of the content of jurisdictional rules, but on the basis of the factual adaptability of those rules – that is, on an examination – possible only over a long period of time – of the stocks of typical narrative images that accrue as accompaniments to those rules, as cases are dealt with by those tribunals.

Inevitably, the reorientation of international legal theory towards an investigation of institutionally located legal work opens up its own cans of worms. How exactly do we locate stocks of typical narrative images and habits of factual construction within any one particular community of expertise? How porous are the borders of such concepts as 'communities' and 'institutions'? How does one set of typical narrative images operating in one community influence another community? What happens when one set of institutional features is transplanted into another institution? My own view is that we should not become too anxious over the difficulty – more likely, the impossibility – of determining the borders or boundaries of any concept. Should we do so, we would fall prey to the same anxiety that affects those legal theorists who attempt to provide universal criteria under which we can locate law as law – under which we can say we are observing 'the law itself'. Concepts are not ends in themselves. Rather, we should attempt to be as disciplined as possible with the concepts that we use, without ever losing sight of the bigger picture; that is, as presented in this paper, that one of the most important tasks of international legal theorists is to see how we can design institutions, including the resources used by legal officials, such that the judgement necessarily exercised as part of legal work is performed in such a manner that the specialized institutions of the international legal order are as responsive as possible to the social problems that come before them, and are not blind to the effect of their decisions on the specific vulnerabilities of poor and isolated individuals and communities.

177. See Cannizzaro, *supra* note 32.

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