Fragmentation of International Law? Postmodern Anxieties

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Abstract. Successive ICJ Presidents have expressed concern about the proliferation of international tribunals and substantive fragmentation of international law. This is not a new phenomenon. International law has always lacked a clear normative and institutional hierarchy. The problem is more how new institutions have used international law to further new interests, especially those not predominant in traditional law. The anxiety among ICJ judges should be seen less as a concern for abstract "coherence" than a worry about the demise of traditional principles of diplomatic law and the Court's privileged role as their foremost representative. As jurisdictional conflicts reflect divergent political priorities, it is unclear that administrative co-ordination can eliminate them. This does not, however, warrant excessive worries over fragmentation; it is an institutional expression of political pluralism internationally.

1. "All That Is Solid Melts into Air"[1]

It would seem natural to assume that when the President of the International Court of Justice ('ICJ') chooses to express his concern about a matter in three consecutive speeches before the United Nations General Assembly, this must be an issue of exceptionally great momentum. Therefore, as one reads the addresses by Judges Stephen M. Schwebel and Gilbert Guillaume to the Assembly on proliferation of international tribunals, one may feel puzzled that among all aspects of global transformation, it is *this* they should have enlisted their high office to express anxiety over.

President Schwebel's 1999 speech was a mini-history of international adjudication from the Hague Peace Conference to the "immensely encouraging" recent increase in his Court's workload. He welcomed the creation

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1. All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind,

   K. Marx & F. Engels, The Communist Manifesto 6 (Oxford University Press, 1992).

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of new tribunals but noted that this "might produce substantial conflict among them, and evisceration of the docket of the International Court of Justice." Though he assured his audience that such concerns had not materialized – "at any rate as yet" – the key moment in the address came when he proposed that:

> in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law.

Having briefly dealt with the technical modalities of his proposal, he concluded by observing that "[i]n any event, a certain caution in the creation of new universal courts may be merited in respect of inter-State disputes."[2]

In 2000, Judge Schwebel's successor, Gilbert Guillaume expressed a much more straight-forward concern about the substance of proliferation at speeches given on successive days to the plenary and the Sixth Committee of the General Assembly. To the plenary, Judge Guillaume spoke about the emerging prospect of forum-shopping that may "generate unwanted confusion" and "distort the operation of justice." All this, he felt, "exacerbates the risk of conflicting judgments" and:

> gives rise to a serious risk of conflicting jurisprudence as the same rule of law might be given different interpretations in different cases.

To avert the "serious uncertainty" and "the danger of fragmentation in the law," he repeated the proposal to encourage the use of advisory opinions from his own court.[3]

Judge Guillaume's speech to the Assembly's Sixth (legal) Committee on the following day was completely devoted to proliferation. He noted the expansion of international law and the creation of specialized branches in the discipline – developments that perhaps reflected increased interest

2. Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice, 26 October 1999. The speeches of the Presidents of the ICJ since 1993 can be found on the Court's website http://www.icj-cij.org/icjwww/ipresscom/iprstats/htm.
3. Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000, *in supra* note 2. Like Schwebel, Guillaume proposed enabling international courts or tribunals to request rulings from the ICJ in cases where they "encounter serious difficulties on a question of public international law." *Cf.* G. Guillaume, *The Future of International Judicial Institutions*, 44 ICLQ 862 (1995). *See also* G. Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. Int'l L. & Pol. 928 (1999). *Cf. also* Judge Rosalyn Higgins, who does not agree with the "call of successive Presidents […] for the ICJ to provide advisory opinions to other tribunals on points of international law," because this "seeks to re-establish the old order of things and ignores the very reasons that have occasioned the new decentralisation." R. Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 ICLQ 122 (2001).

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in peaceful settlement but had "certain unfortunate consequences" that had become "of substantial concern among both academics and legal practitioners," namely forum-shopping, overlapping jurisdiction, and the "serious risk of inconsistency within the case-law." He gave two examples: the interpretation by the European Court of Human Rights ('ECHR') in 1995 in *Loizidou*[4] concerning the effect of territorial reservations that differed from the way his Court had dealt with the issue, and the way the Judgement by the International Criminal Tribunal for the former Yugoslavia ('ICTY') in the *Tadić* case[5] in 1999 had deviated from the "effective control" test that the ICJ had used in *Nicaragua* in 1986 to govern the responsibility of a state over acts of military groups.[6] The examples, Judge Guillaume held, showed that proliferation was accompanied by "a serious risk: namely loss of overall control."

In 2001 Judge Guillaume could be confident that his audience already knew the outlines of the problem so that he only summarised it briefly in the closing part of his statement to the Assembly: "The proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations."[7]

Both Judge Guillaume and his predecessor before Stephen Schwebel, Sir Robert Jennings, also used the Court's 50th anniversary to highlight the dangers of proliferation. In an overview of 1996 Judge Guillaume expressed his surprise that while several studies had stressed the risk of divergence of the Court's jurisprudence owing to the creation of special Chambers, little had been said about the more serious danger of diversification through proliferation – "*Le danger est cependant à nos portes*" ("But the danger is at our doorstep"). Special tribunals on human rights, law of the sea, environmental law, he wrote, had given rise to special normative regimes that not only deviated from the general law but also claimed priority in regard to it. International law needed to change – "*Mais il ne doit pas être brisé*."[8]

In the following year, Jennings ended his review of the Court's activity by expressing concern that the "kind of international law that directly concerns individuals" (human rights and environmental law) was being directed to bodies other than his Court. As a result, "the Hague Court finds itself increasingly cut off from a growing and very important part of the

4. Loizidou *v.* Turkey, Preliminary Objections, Decision of 23 March 1995, 1995 ECHR (Ser. A) No. 310.
5. The Prosecutor *v.* Duško Tadić, Judgement, Case No. IT-94-1-A, A.Ch., 15 July 1999.
6. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, 1986 ICJ Rep. 14, 62–63, at paras. 110–112.
7. Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 30 October 2001, *supra* note 2.
8. "But it may not be broken," G. Guillaume, *La cour internationale de justice. Quelques propositions concrètes à l'occasion du Cinquantenaire*, 100 RGDIP 331 (1996) (all translations are by the authors). *Cf. also* G. Guillaume, *The Future of International Judicial Institutions*, *supra* note 3, at 848.

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international law system."[9] Like his colleagues, he refrained from attacking the fact of proliferation itself – in fact, his attitude towards it seemed slightly more positive than that of his French colleague. The problem, he stated, was that proliferation took place "without any overall plan." Because of this "there is still the danger that international law as a whole will become fragmented and unmanageable."[10]

2. Into Postmodernity?

"Loss of overall control" – "without any overall plan" – "fragmented and unmanageable" – standard formulations for the anxiety about the uncertainties, conflicts and paradoxes that riddle the experience of globalisation and the state of social relations sometimes called "postmodernity." International law and institutions are the product of a professional ethos that has since the end of the 19th century sought to explain how an apparently "anarchic" aggregate of self-regarding sovereigns could still be united as "order" at some deeper level of existence, either as philosophical principle or sociological generalisation.[11] In the domestic sphere sovereign power was to be harnessed by the rule of (public) law while the external relations of sovereigns were to be co-ordinated by a (public) international law that sought its legitimacy from rationalist arguments about interdependence and harmony of interests. Even in the worst of times, the idea of a coherent legal order governing the world never left the professional imagination. Here is Sir Hersch Lauterpacht, speaking at Chatham House, London, in 1941:

> The disunity of the modern world is a fact; but so, in a truer sense, is its unity. Th[e] essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the illusions of the sentimentalist or the hypocrisy of those satisfied with the existing *status quo*.[12]

And today, confronted by the experience of fragmentation, international lawyers suggest combating it by the technique of a single, coherent, public law driven system of control:

> l'effectivité des droits, comme l'on a vu, tient d'abord au controle, et la notion de controle suppose l'intervention d'organes à caractère public [...]. Le droit a horreur

9. Sir R. Jennings, *The Role of the International Court of Justice*, 68 BYIL 58 (1997).
10. *Id.*, at 59 and 60.
11. *Cf.* in much more detail, M. Koskenniemi, The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960, 179–352 (Cambridge University Press, 2002).
12. H. Lauterpacht, *The Reality of the Law of Nations*, *in* E. Lauterpacht (Ed.), International Law, Being the Collected Papers of Sir Hersch Lauterpacht, Vol. 2, 26 (Cambridge University Press, 1970–1978).

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> du multiple. Sa vocation c'est l'ordre unifié et hierarchisé, unifié parce que hierarchisé.[13]

But today, domestic sovereignty has been tamed and split so as to no longer express any *Gesamtplan des menschlichen Kulturlebens*, as German conservative lawyers fantasised at the beginning of the 20th century.[14] The situation may seem equally bleak if described from the perspective of the democratic left:

> la performance attendue du couple Etat et Loi est de transformer de manière convaicant la violence latente dans le corps social en droit. Dans les sociétés contemporaines, l'échec de ce projet se faisant patent, la violence s'installe de manière plus ou moins insidieuse.[15]

The crisis of domestic sovereignty is paralleled by the collapse of the image of the international world as a single, hierarchical structure at the top of which the United Nations governs a world of tamed sovereigns through public law and diplomacy. The new global configuration builds on informal relationships between different types of units and actors while the role of the state has been transformed from legislator to a facilitator of self-regulating systems.[16] The economy is, of course, global. But the "international" and "national" may no longer be usefully separated even as distinct realms of politics and government. Without attempting yet another sociology of globalisation,[17] it may be accepted that political communities have become more heterogeneous, their boundaries much more porous, than assumed by the received images of sovereignty and the international order, and that the norms they express are fragmentary, discon-

13. > [T]he effectivity of laws, as we have seen, presupposes first of all control, and control presumes intervention by organs of public character […]. The law shuns multiplicity. Its vocation is to a unified and hierarchical order, one that is unified precisely because it is hierarchical.

    M. Delmas-Marty, Trois défis pour un droit mondial 95, 104 (Paris: Seuil, 1998).
14. E. Kaufmann, Das Wesen des Völkerrechts und die Clausula rebus sic stantibus 138 (Tübingen: Mohr, 1911).
15. > [T]he expected achievement of the combination of State and Law is to transform in a convincing manner the latent violence in society into law. In contemporary societies, the failure of this project is obvious, with the more or less deceptive omnipresence of violence.

    M. Chemillier-Gendreau, *Affaiblissement des États, confusion des normes*, *in* M. Chemillier-Gendreau & Y. Moulier-Boutang (Eds.), Le droit dans la mondialisation 164 (Paris: PUF, 2001).
16. *Cf.*, *e.g.*, J. Verhoeven, *Souveraineté et mondialisation: Libres propos*, *in* E. Loquin & C. Kessedjian (Eds.), La mondialisation du droit 53 (Paris: Litec, 2000).
17. The most incisive remains B. de Sousa Santos, Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition (New York: Routledge, 1995).

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tinuous, often *ad hoc* and without definite hierarchical relationship – that we now live in a "global Bukowina."[18]

In the domestic context, legal pluralism has sought to articulate what is left after the demise of the (Austinian) image of law as the command of a single, coherent sovereign. While international lawyers have always had to cope with the absence of a single source of normative validity, it may seem paradoxical that *they* should now feel anxiety about competing normative orders. Perhaps this anxiety reflects their past strategy to defend international law by a domestic analogy: the assumption that treaties were a kind of legislation, peaceful settlement of disputes a type of adjudication and war and counter-measures a primitive form of enforcement.[19] H.L.A. Hart's famous description of international law in terms of "rules that constitute not a system but a simple set" prompted generations of international lawyers to argue that a position which associated international law with "primitive law," denied its *grandeur* and was thus mistaken.[20] But the argument that in due course a mature law would come to govern the international society in the same way European domestic law governed European society created frustrated expectations.

For attempts to introduce order into international law were no more successful in the 20th century than they had been in the 19th, when the notions of "science" and "system" coalesced and when, at a watershed moment in the discipline, the conservative realist Carl Baron Kaltenborn von Stachau attacked all previous writing in the field precisely for its absence of a systemic consciousness.[21] Either they led into counter-intuitive descriptions of the diplomatic world as if it had to do with administration of a well-developed rule-system (arguments about the League Covenant or the UN Charter as "constitutions," for example) or into excessive generalities about *jus cogens*, *erga omnes* or other coded expressions for the need to take seriously what, in fact, was serious, but could not be expressed in a legal rule with a determined content. A constitutionally oriented *Völkerrechtsgemeinschaft* was never far from the minds of international lawyers.[22] But the more "coherent" academic law became, the less

18. *Cf.* G. Teubner, *"Global Bukowina": Legal Pluralism in the World Society*, *in* G. Teubner (Ed.), Global Law without a State 3–30 (Aldershot: Dartmouth, 1997).
19. For a discussion, *cf.* M. Koskenniemi, From Apology to Utopia. The Structure of International Legal Argument 144–153 (Helsinki: Finnish Lawyers' Publishing Co., 1989). For the domestic analogy generally, *cf.* H. Suganami, The Domestic Analogy and World Order Proposals (Cambridge University Press, 1980).
20. H.L.A. Hart, The Concept of Law 229 (Oxford: Clarendon, 1961). For a recent attempt to prove international law's seriousness by its quality as a "system" (instead of a "mere" set of rules), *cf.* G. Abi-Saab, *Cours général de droit international public*, 207 RdC 122–126 (1987-VII); T.M. Franck, The Power of Legitimacy among States 183–194 (Oxford University Press, 1990).
21. C. Baron Kaltenborn von Stachau, Kritik des Völkerrechts (Leipzig: Meyer, 1847).
22. For a restatement, *cf.* B. Simma, *From Bilateralism to Community Interest*, 250 RdC 217, at 261-262 (1994-VI). *Cf. also* A.L. Paulus, Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchhung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung (Munich: Beck, 2001).

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it conveyed any understanding of political reality: if the UN Charter *really* was a constitution of mankind, its character as such could be derived neither from popular legitimacy nor sociological effectiveness. Even as Article 103 may seem like a constitutional provision,[23] few would confidently use it to uphold the primacy of Security Council decisions over, for example, human rights treaties.[24]

Systemic thinking has always been a preserve of academics, especially German academics, often performed at general courses at the Hague Academy of International Law that conceived the system's imperfections in terms of "gaps" in the law – with all that this assumed concerning the existence of a normative background against which something can be identified as a "gap" in the first place.[25] The Cold War pragmatic consensus was that if international law had not become the "complete system" as it had been imagined by the profession's great names – Kelsen, Scelle and Lauterpacht in particular – this was due to a hostile political environment. Concern over fragmentation, conflicts and special regimes could only arise after 1989, once it could be assumed that the project of a coherent system could be revived. But liberalism and globalisation did not bring about coherence, to the contrary. The structure provided by the East-West confrontation was replaced by a kaleidoscopic reality in which competing actors struggled to create competing normative systems often expressly to escape from the strictures of diplomatic law – though perhaps more often in blissful ignorance about it.[26]

Prosper Weil's anxiety about graduated and diluted normativity through *jus cogens* and soft law in the early 1980s was already an analysis of "the pathology of the international normative system."[27] But it did nothing to curb human rights lawyers and activists, trade lawyers, law of the sea specialists or advocates of *lex mercatoria*, from developing novel normative practices in order to advance their special causes: deregulation did not diminish normativity but replaced formal legislation by informal "nor-

23. R. Bernhardt, *Article 103*, *in* B. Simma (Ed.), The Charter of the United Nations. A Commentary 1116–1125 (Oxford University Press, 1995).
24. And most would immediately deny that it could be so used. *Cf.*, *e.g.*, K. Zemanek, *The Legal Foundations of the International System. General Course on Public International Law*, 266 RdC 231–232 (1997).
25. For one recent description of that literature and *problematique*, *cf.* U. Fastenrath, Lücken im Völkerrecht. Zu Rechtscharacter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts (Berlin: Duncker & Humblot, 1991).
26. The latter is certainly true of most World Trade Organization ('WTO') negotiators and experts, as pointed out in J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AJIL 538 (2001). The replacement of formally legislated state law at the international level by a contractual law created by international actors themselves, is usefully discussed in E. Loquin & L. Ravillon, *La volonté des opérateurs vecteur d'un droit mondialisé*, *in* Loquin & Kessedjian, *supra* note 16, at 91–132.
27. P. Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

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mative practices."[28] To signal a sound of warning in the name of systemic purity – as one of the authors of the present article did in 1993 in response to the development of "non-compliance mechanisms" in recent environmental treaties – was perhaps pointless.[29] 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. If an environmental activist thinks her objective is better achieved through a "soft" enforcement regime than by state responsibility, or if a post-conflict manager prefers a truth commission to a criminal process – one can only wonder what weight the lawyer's systemic anxiety has against their pressing concerns.

From the perspective of classical public international lawyers, conflicts between normative systems are, however, pathological. Hence it is not surprising that one of the topics on which the International Law Commission ('ILC') conducted a preliminary survey in 2000 in preparation of its future work programme was on the risks caused by the fragmentation of international law, which "could endanger [international law's] stability as well as the consistency of international law and its comprehensive nature."[30] The background study identified a number of conflicts between legal regimes and enforcement machineries: between Charter rules and other rules, between immunity and human rights, environment and trade, law of the sea and new fisheries treaties, and so on. The absence of hierarchy, the study suggested, posed a threat to the "credibility, reliability and, consequently, authority of international law" and should be further studied by the ILC, perhaps so as to agree to submit proposed conventions to the Commission in order to clear conflicts and overlaps.[31]

Yet this is not new. Since mid-1980s, international lawyers have paid attention to the development of special normative regimes in various fields of technical co-operation, described as "self-contained" in order to high-

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28. Nous serions ainsi passés d'un droit moderne, venu d'en haut, à une nouvelle forme de droit, un droit post-moderne, pluraliste, pragmatique – les opérateurs recherchant l'effectivité –, relatif, et produit horizontalement, qui essaie de s'arranger de la nouvelle dynamique de droit sous l'effet de la mondialisation […].

    We would thus have come beyond modern law, come from above, to a new form of law that is postmodern, pluralist, pragmatic – the actors seeking effectivity –, relative and a horizontal product, which tries to organise itself according to the new dynamics of law under the influence of globalisation.

    Loquin & Ravillon, *supra* note 26, at 112. *Cf. also* V. Lowe, *The Politics of Law-Making: Are the Method and Character of Norm-Making Changing?*, *in* M. Byers (Ed.), The Role of Law in International Politics. Essays in International Relations and International Law 207–226 (Oxford University Press, 2000); and P.T. Muchlinski, *"Global Bukowina" Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community*, *in* Teubner, *supra* note 18, at 79–108.
29. *Cf.* M. Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Yearbook of International Environmental Law 123–162 (1992).
30. G. Hafner, *Risks Ensuing from the Fragmentation of International Law*, *in* International Law Commission, Report of the Working Group on Long-term Programme of Work, ILC (LII)/WG/LT/L.1/Add. 1 (25 July 2000), at 26.
31. *Id.*, at 35 and 42–43.

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light their operation outside general international law.[32] A study conducted in 1995 by the Netherlands Yearbook of International Law reviewed several such fields, including diplomatic law, the law of war, human rights law, environmental law, GATT/WTO law, space law and European Community law. The study focused on the "secondary rules" (concerning rule-creation, amendment and interpretation) within special regimes and sought to find out "whether they would become a potential risk, constituting a threat to the global unity and efficacy of the international legal order."[33] Although the study highlighted many ways in which regime-specific rules deviated from general rules, the conclusion was not too negative:

> [O]n balance, the relative autonomy of special fields has been used by different actors involved, as far as the secondary rules are concerned, in a way which, at the same time, promoted and guaranteed the growing effectiveness of their own particular set of primary rules, without putting in jeopardy the unity or coherence of the international legal order.[34]

On the other hand, if the authors emphasised that developments in the special regimes "should never lead to isolation from the trends and developments in general international law," this manifested their commitment to the idea of a more or less coherent, single legal system which, although it may tolerate variations, might still not survive the presence of conflicting (political) "trends and developments." In this regard, fully self-contained regimes may seem to pose less of a threat than semi-autonomous ones that apply concepts of general law but do this from a special perspective. Here, perhaps, is the core of the problem: not so much in the emergence of new sub-systems but in the use of general law by new bodies representing interests or views that are not identical with those represented in old ones.

For the fact is that proliferating tribunals, overlapping jurisdictions and "fragmenting" normative orders – like the "pathology" analysed by Prof. Weil in the 1980s[35] – arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic. If a human rights treaty body or a WTO panel interprets the 1969 Vienna Convention on the Law of Treaties ('VCT') so as to reinforce that body's jurisdiction or the special nature of the relevant treaty, and in so doing deviates from the standard interpretation, then this is bound to weaken the authority of that

32. *Cf.* B. Simma, *Self-Contained Regimes*, 15 NYIL 111–136 (1985). Simma argued, however, that such regimes remained "anchored in" general international law. In 1997, he still maintained that view, although he admitted that the general law – for instance on state responsibility – remained often insufficient to regulate the new areas, Simma, *supra* note 22, at 253–254.
33. *Preface*, *in* L.A.N.M. Barnhoorn & K.C. Wellens, Diversity in Secondary Rules and the Unity of International Law v (The Hague: Nijhoff, 1995).
34. K.C. Wellens, *Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends*, *in* Barnhoorn & Wellens, *id.*, at 28.
35. Weil, *supra* note 27.

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standard interpretation and to buttress the interests or objectives represented by the human rights body or the WTO panel. The interpretations express institutional moves to advance human rights or free trade under the guise of legal technique. In the language of political theory, the organs are engaged in a *hegemonic* struggle in which each hopes to have its special interests identified with the general interest.

Likewise, statements by the Presidents of the ICJ are to be seen as defensive moves in a changing political environment. "[S]pecialized courts [...] are inclined to favour their own disciplines" Judge Guillaume stated in 2000.[36] This is true – but it applies equally to his own Court. If the Presidents argue that other tribunals should request advisory opinions from their Court, then surely this should be read as an effort to ensure position at the top of the institutional hierarchy. But if the conflict has to do with preferences for future development, then it is unsurprising that not one body has expressed interest in submitting its jurisdiction to scrutiny by the ICJ.[37] For the same reasons, no prophetic insight is needed to conclude that the proposal concerning prior submission of draft conventions for quality control to the ILC will never be transformed into reality. Today's institutional struggles do not favour the interests of sovereign equality represented by "generalist" lawyer-diplomats.

3. International Court of Justice – International Criminal Tribunal for the Former Yugoslavia

These struggles have been most visible in the way the ICTY has taken positions that diverge from those taken by the ICJ. For example, just a few months separated the Advisory Opinion delivered by the ICJ in 1996 in which it considered that armed reprisals in the course of an armed conflict should be "governed by the principle of proportionality,"[38] and the *Martić* case in which the ICTY held that armed reprisals were altogether prohibited, prompting at least one commentator to reproach the Tribunal for a

36. Address by Judge Guillaume, *supra* note 3.
37. This is strikingly illustrated by the fact that although the International Labour Organization ('ILO') Constitution has since 1946 enabled the Organisation to refer any disputes about its interpretation and application to the ICJ, not once has a reference been made. Why? Because of the political context:

> the inhibition of tripartite constituencies to allow a purely judicial organ to have the last word as regards the meaning of a text which has been the object of tripartite negotiations,

F. Maupain, *The Settlement of Disputes within the International Labour Office*, 2 JIEL 291 (1999).
38. *The Legality of Threat or Use of Nuclear Weapons*, 1996 ICJ Rep. 246, at para. 46.

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conclusion that was both "unfounded" and "unnecessary."[39] The two tribunals have also differed in their approach to their power to review Security Council acts. In *Lockerbie*, as is well-known, the ICJ found that both Libya and the US were obliged to accept and carry out the decisions of the Council, and that by virtue of Article 103 of the Charter this obligation overrode whatever rights they may otherwise possess.[40] An indication of provisional measures as requested by Libya would have been "likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council resolution 748 (1992)."[41] No review of the legality of that resolution was carried out at this stage – and it is far from certain whether the case will ever reach the merits.

By contrast, after a disclaimer about not acting as a "constitutional tribunal," the Appeals Chamber of the ICTY expressly reviewed the legality of its own establishment.[42] While the Chamber accepted that the Charter left the Security Council much discretion as to its choice of measures, the power of the Tribunal did not disappear, especially "in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter." Having concluded that it did have jurisdiction to examine the plea founded on the invalidity of its establishment, the conclusion followed almost as a matter of course that "the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter."[43]

It is not difficult to understand where such divergence might come from. One could hardly expect the ICTY to abstain from taking a stand on the legality of its own establishment, thus leaving the basis of its numerous convictions as well as the fate of its 1,100 employees in the dark. By contrast, the balance between the principal organs of the UN leaves little room for ICJ review of the acts of its peers. The divergence reflects a difference in the political context in which the two bodies work. A suggestion to submit one to the other would immediately seem an unwelcome intrusion in its institutional environment.

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39. The Prosecutor *v.* Milan Martić, Case No. IT-95-11-R61, T.Ch. I, Decision of 8 March 1996, reprinted *in* 108 ILR 39, para. 17 (1998). The comment appears in Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, *in* H. Fischer, C. Kreß & S.R. Lüder, International and National Prosecution of Crimes Under International Law – Current Developments 539–558 (Berlin, 2001). *Cf. also* T. Christakis, *Les relations entre la CIJ et le Tribunal pénal international pour l'ex-Yugoslavie: les premières fissures à l'unité du droit?*, 1 l'Observateur des nations Unies 62–67 (1996).
40. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United States of America), Request for the Indication of Provisional Measures, Order of 14 April 1992, 1992 ICJ Rep. 16, para. 39.
41. *Id.*, at 16, para. 41.
42. The Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A.Ch., 2 October 1995, para. 20.
43. *Id.*, at paras. 21–22 and 40.

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Above all, however, concern over "fragmentation" has arisen owing to the ability of the ICTY to characterise the conflicts in the former Yugoslavia so as to pre-empt or deviate from determinations to be made by the ICJ. In the *Bosnian Genocide* case in 1993 the ICJ had prudently stated that for the application of the 1948 Genocide Convention, whether the conflicts were internal or international was immaterial.[44] In the early phase of the *Tadić* case in 1995 at the ICTY, the Appeals Chamber had affirmed jurisdiction by diplomatically concluding that the "conflicts in the former Yugoslavia had both internal and international aspects."[45] In the merits phase, however, it could no longer get off that easily. Now it had to decide whether or not the grave breaches regime of the 1949 Geneva Convention – and thus Article 2 of its Statute – was applicable. As that required showing that the conflict was international in character, the Tribunal needed to conclude that the acts by Tadić (and more generally by the agents of the *Republika Srpska*) could be imputed to the Federal Republic of Yugoslavia ('FRY').

Meanwhile, in its *Rajić* decision, the Second Trial Chamber had come to the conclusion that the conflict in Bosnia-Herzegovina was "an international armed conflict" not only because of the direct participation of Croatian military but also owing to the fact that the Bosnian Croat forces had such close relationship to Croatia that they could be seen as its agents.[46] In its final decision in *Tadić* in 1999, the Appeals Chamber analysed in detail the jurisprudence of the ICJ in *Nicaragua* in which the United States had not been held responsible for the breaches of humanitarian law committed by "contras" merely on account of organising, financing, training and equipping them.[47] To create responsibility, the ICJ had held, the United States should have exercised "effective control […] with respect to the specific operation in the course of which the alleged violations were committed."[48]

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44. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina *v.* Yugoslavia), 1996 ICJ Rep. 615–616, at para. 31.
45. Tadić case, *supra* note 42, at para. 77. According to the Appeals Chamber, it was clear that the Security Council had both aspects of the conflict in mind when it adopted the Statute of the Court and therefore it should be "construed to give effect to that purpose."
46. The Prosecutor *v.* Ivica Rajić ('Stupni Do'), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12, T.Ch., 13 September 1996, paras. 17–32. The Trial Chamber pointed out that for various reasons the ICJ considered the issue of agency in the Nicaragua case in a very different context. In addition, the Trial Chamber was not that much concerned with operational control but focused instead on the "general political and military control exercised by Croatia over the Bosnian Croats" (para. 25).
47. The Nicaragua case, *supra* note 6, at paras. 114–115; Tadić case, *supra* note 5, at 40–62, paras. 99–145.
48. Responsibility would have been entailed only had it been demonstrated that the US would have issued "specific instructions concerning the commission of the unlawful acts in question," *cf.* the Nicaragua case, *supra* note 6, at para. 115.

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The Appeals Chamber found this reasoning unpersuasive. It stressed the "degree to which the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities."[49] It distinguished between the imputation of the acts of unorganised individuals to a state and the imputation of those of an organised military group. The *Nicaragua* requirement of "acting under specific instructions" could be reasonably applied to the former, but not to the latter. An organised military group acts in a relatively autonomous way. To create accountability it is sufficient that the group is under the overall control of a state irrespective of whether each of its activities was done under specific instructions.[50] On this basis, the Appeals Chamber overruled *Nicaragua*. What needed demonstrating was only that the state had a "role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."[51]

This decision was challenged in *Čelebići*,[52] where the appellants argued that the ICTY was bound by the decisions of the ICJ because of the latter's position as the "principal judicial organ" of the UN. The Appeals Chamber accepted that the Tribunal could not ignore the need for consistency with the general state of the law. But it stressed that the Tribunal was an "autonomous judicial body" and that there was no "hierarchical relationship" between it and the ICJ. Accordingly, it dismissed the appellant's arguments and upheld the "overall control" test set up in *Tadić*.[53] The same questions were also discussed in yet another case in October 2000, when one of the accused (Zigić) made a motion appealing to suspend the procedure at the Trial Chamber while the *Bosnian Genocide* case was still pending before the ICJ. The argument was that the two tribunals

49. Tadić case, *supra* note 47, at 49, para. 121.
50. *Id.*, at 50, para. 122. The Appeals Chamber held that this was confirmed by international practice and referred to decisions by Mixed Arbitration tribunals, national courts as well as the decision by the ECHR in Loizidou in which Turkey had been held responsible for acts by the authorities of the Turkish Republic of Northern Cyprus ('TRNC') as they had been under its "effective overall control," Tadić case, *id.*, at 51–62, paras. 124–145; Loizidou *v.* Turkey, Merits and Just Satisfaction, 18 December 1996, 1996(VI) ECHR Reports, at para. 56.
51. Tadić case, *supra* note 47, at 59, para. 137.
52. The Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo ('Čelebići Case'), Decision, Case No. IT-96-21-A, A.Ch., 20 February 2001.
53. *Id.*, at 9–10, paras. 24 and 26. The Chamber quoted at length Judge Shahabuddeen's Separate Opinion at the International Criminal Tribunal for Rwanda to the effect that

> the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal [and that] the Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern.

Cf. Separate Opinion of Judge Shahabuddeen in the case Laurent Semanza *v.* The Prosecutor, Decision, Case No. ICTR-97-23-A, 31 May 2000, at para. 25.

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> should not hold opposing views on the same factual or legal questions and that the Tribunal should follow the decisions of the ICJ because the ICJ is the principal judiciary organ of the United Nations while the tribunal is a subsidiary organ.[54]

The Trial Chamber dismissed the motion as in its view, the ICJ dealt with state responsibility while the ICTY dealt with individual responsibility. In addition, the ICTY had anyway already pronounced on many issues involving considerations of the same kind and moreover the possibility of a contradiction was based "purely on speculation."[55]

The *Tadić* decision expressly set aside not only one but two rulings of the ICJ, thus prompting the question whether it was appropriate for the ICTY to do so.[56] Some commentators have argued that its "innovative and imaginative solutions" were unnecessary and strengthened the impression that the

> ICTY often rushes ahead to clarify every legal issue that it *can*, whereas other courts decide only the issues that they *must*, thereby building up their jurisprudence step by step and producing more careful and reliable results.[57]

Such points, however, underestimate the degree to which ICJ jurisprudence itself may be controversial and provoke efforts to develop the law in new directions. The ICTY might have distinguished *Tadić* from *Nicaragua* so as to avoid open conflict. But that would have left the effective control standard intact and protected the "cat's paw" strategies of *de facto* participation in conflicts without formal accountability. No doubt the sensibilities of humanitarian law experts differ from those prevalent among

54. *Cf.* The Prosecutor *v.* Kvočka, Kos, Radfić, Zigić, Pscac, "Omarska, Keraterm and Trnopolje Camps", Decision on the Defence "Motion regarding Concurrent Procedures before International Criminal Tribunal for the Former Yugoslavia and International Court of Justice on the Same Questions", Case No. IT-98-30/1, T.Ch., 5 December 2000 on the Defense "Motion regarding concurrent Procedures before the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice on the same Questions."
55. *Id.*
56. M. Sassòli & L.M. Olson, Prosecutor *v.* Tadić, 94 AJIL 575 (2000). *Cf. also* the Separate Opinion of Judge Shahabuddeen in the Tadić case, Decision, Case No. IT-94-1-A, A.Ch., 15 July 1999, at para. 5:

    > I agree with the Appeals Chamber and with Judge McDonald, that there was an international armed conflict in this case. I also appreciate the general direction taken by the judgment of the Appeals Chamber, but, so far as this case is concerned, I am unclear about the necessity to challenge *Nicaragua*. I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and on this point it was both right and adequate.

57. Sassòli & Olson, *supra* note 56, 578 (emphasis in original). Or, as argued by Karin Oellers-Frahm, the Tadić case was "not one of conflicting jurisdiction, but one of *ultra vires* jurisdiction which is plainly unacceptable and hopefully will remain an exception." K. Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions*, 5 Max Planck Yearbook of United Nations Law 80 (2001).

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the judges of the ICJ on the propriety of international judicial involvement in civil wars where important interests of powerful states are concerned.[58] If ICTY judges manifest a striking *Missionsbewusstsein*, it is futile to struggle against it by arguments about consistency or the privileged role of the ICJ: the point is precisely to challenge *that* consistency, and *those* preferences.

4. Institutional Ambitions in Human Rights

Another example of the politics of fragmentation is provided by the move by human rights organs away from the logic of reciprocity in treaty relations towards a more purpose-oriented and collectivist understanding. The move had long been prepared in doctrine and in general statements by the European Court of Human Rights ('ECHR'), but turned into a formal challenge to general treaty law in the treatment of reservations to human rights treaties by their implementation organs. As is well-known, the general regime of reservations always had a subjective bias. Even if Article 19(c) of the VCT holds reservations going against the object and purpose test as inadmissible, Article 20 recapitulates the ICJ's *Reservations* jurisprudence to the effect of leaving the conduct of that test to the state parties each of which is to conduct it "individually and from its own standpoint."[59]

In the 1988 *Belilos* case, however, the ECHR struck down an interpretative declaration concerning Article 6(1) on fair trial that the Swiss Government had made when depositing its ratification instrument.[60] The Court first interpreted the declaration as in fact a reservation and then went on to discard its legal validity as it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning or scope."[61] The invalidity, however, affected only the reservation but not Switzerland's becoming party to the Convention. To its surprise, then, Switzerland found itself "bound by the Convention irrespective of the validity of the declaration."[62]

Belilos was a much-debated departure from the law concerning the effect and severability of reservations. Seven years later, discussing the effect of certain territorial restrictions in Turkey's declarations, the ECHR made it express that its role differed from that of the ICJ. Article 36 of the ICJ Statute permitted "the attachment of substantive, territorial and

58. The argument about the bias of ICJ judges for sovereignty and voluntarism is made, *e.g.*, in M. Chemillier-Gendreau, *Le droit international entre voluntarisme et contrainte*, *in* Mélanges Thierry: L'évolution du droit international 98 (Paris, 1998).
59. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 26.
60. Case of Belilos *v.* Switzerland, Decision of 29 April 1988, 1988 ECHR (Ser. A) No. 132.
61. *Id.*, at paras. 54–55. *See* Art. 64 of the 1950 European Convention on Human Rights.
62. Belilos, *supra* note 60, at para. 60.

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temporal restrictions to the optional recognition of the Court's jurisdictional competence" and had served as a model for the corresponding provision in the European Convention.[63] Nevertheless, unlike the Strasbourg Court, the ICJ was not tasked with "direct supervisory functions in respect of a law-making treaty such as the Convention." In the Strasbourg Court's view:

> [s]uch a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance [...] provides a compelling basis for distinguishing Convention practice from that of the International Court.[64]

The Court thus dismissed Turkey's territorial delimitation:

> [the] object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.[65]

Following the Strasbourg line of argumentation, the Human Rights Committee set aside the *Reservations* jurisprudence of the ICJ, as well as the relevant provisions of the VCT. They were:

> inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights [...]. Because of the special character of human rights treaty law, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.[66]

None of this is politically innocent, of course.[67] Where the parties to the European Convention have by and large had to reckon with the European

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63. Case of Loizidou *v.* Turkey, *supra* note 4, at para. 67.
64. *Id.*, at paras. 83–85.
65. *Id.*, at para. 72.
66. CCPR General Comment 24(52) of 2 November 1994, 52nd session, UN Doc. CCPR/C/21/Rev.1/Add. 6, paras. 17 and 18. In general, however, as Mónica Pinto points out, the "so-called cross-fertilisation" between different human rights bodies is valid only on certain limited conditions, as also these bodies (Pinto refers specifically to the Human Rights Committee and the Inter-American Commission on Human Rights) have "developed independently of one another, with little consideration for their common enterprise." *See* M. Pinto, *Fragmentation or Unification among International Institutions: Human Rights Tribunals*, 31 N.Y.U. J. Int'l L. & Pol. 833, at 840-841 (1999). *Cf. also* E. Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. Int'l L. & Pol. 843 (1999).
67. For a useful discussion of the "layers of conflict" between states, states and institutions, different institutions, and approaches to policy, administration, and even globalisation, implicated in the controversy, *cf.* Y. Tyagi, *The Conflict of Law and Policy on Reservations to Human Rights Treaties*, 71 BYIL 244–255 (2000).

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Convention as a "constitutional instrument of the European public order,"[68] the united opposition of the Great Powers has prevented a similar development in the United Nations. The fact that the stakes may sometimes be quite high is evident in the cases concerning the 1999 bombing of Serbia by the North Atlantic Alliance, which were brought before the ECHR at the same time as cases covering identical facts were pending before the ICJ. What if the ECHR had, as argued by the applicants, determined that the NATO bombing of the Radio-Television Serbia ('RTS') headquarters in Belgrade in April 1999 violated Articles 2 (right to life), 10 (freedom of expression) and 13 (right to an effective remedy) of the European Convention?[69] Could the ICJ have decided differently? And how might that have reflected upon the decision of the Prosecutor of the ICTY in the fall of 1999 not to pursue her investigation of the bombings? The conflict was avoided only as the Grand Chamber of the ECHR prudently declared the case inadmissible because of the non-applicability of the European Convention in a regional context not covering the legal space of the contracting states.[70]

Human rights law comes with a political ethos – what Alain Pellet has labelled "*droit de l'hommisme*" – that not only deviates from but rejects aspects of general international law: "*la logique des droits de l'homme, c'est sa raison d'être, dépasse le jeu et le droit des relations purement interétatiques.*"[71] Or, to quote Michael Reisman:

> The international human rights program is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law [...] it works qualitative changes in virtually every component.[72]

This search for change is at work also within the treaty organs. While the ICJ has never identified any human rights treaty in constitutional terms, and has usually dealt with them only in passing, treaty bodies quite regularly highlight their special – and in case of the European organs, also

68. Loizidou, *supra* note 63, at para. 75.
69. Case of Bankovic and Others *v.* Belgium and 16 Other Contracting States, Application no. 52207/99. *See* Press Releases issued by the Registrar, No. 760 of 24 July 2001 and No. 967 of 17 December 2001.
70. *See* Press Release issued by the Registrar, No. 970 of 19 December 2001, *Bankovic and Other v. Belgium and 16 other Contracting States Declared Inadmissible.*
71. "[T]he logic of human rights, *i.e.*, their reason for existence, goes beyond the game and law of purely inter-state relations," G. Cohen-Jonathan, *La protection des droits de l'homme et l'évolution du droit international*, *in* Société française de droit international, La protection des droits de l'homme et l'évolution du droit international. Colloque de Strasbourg 321 (Paris: Pedone, 1998). Pellet's critique may be found in, *e.g.*, A. Pellet, *Comments*, *in id.*, at 294–298 and A. Pellet, 'Droits de l'Hommisme' et Droit International ('Human Rightism' and International Law), Gilberto Amado Memorial Lecture, held on 18 July 2000, International Law Commission (United Nations, 2000).
72. M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866, at 872 (1990).

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constitutional – character. Though "automatic succession" to human rights treaties may still not be formal law, it is striking to what extent the Human Rights Committee as well as the Commission of Human Rights, among other organs, took it for granted that the new states in the territories of former Yugoslavia and the Soviet Union would be bound by them from the moment of their emergence as independent states.[73]

The institutional struggles over the human rights field extend wider than the relationship between human rights organs and the general law. The terms of globalisation have poised human rights against economic values so that much of the normative debate is conducted under the two competing universalist logics, which correspond two proposals for institutional hierarchy.[74] Should economic institutions – the WTO, the World Bank or International Monetary Fund ('IMF') – orient their activities by human rights standards; or should human rights organs stay clear from assuming jurisdiction over matters that seem predominantly "economic"? Of course, economic activity has been conventionally categorised to belong to the sphere of the private, the unpolitical, a kind of natural background, so as to exclude public intervention.[75] If human rights bodies slowly have succeeded in intruding into economic questions, the predictable move on the part of economic institutions such as the EU or the World Bank has been to start speaking human rights language as well – thus assuming the power to define and delimit them so as to become compatible with the economic ethos of those institutions.[76] But as human rights spread wider, their distinctiveness diminishes. The ability to speak a human rights language becomes a coveted *carte blanche*, an unsurpassed marker of legitimacy. If all institutions administer some kinds of benefits, and if all benefits may be characterised as the rights of those to whom the benefits are due, then fragmentation reaches its apogee as the institutional counterpart of human rights law's complete indeterminacy.

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73. *Cf.* I. Poupart, *Succession aux traités et droits de l'homme: vers la reconnaissance d'une protection ininterrompue des individus*, *in* P.M. Eisemann & M. Koskenniemi (Eds.), State Succession: Codification Tested Against the Facts 465–490 (The Hague: Nijhoff, 2000); and B. Stern, *La succession d'États*, 262 RdC 295–310 (1996).
74. On this subject, *see* in particular M. Delmas-Marty, Trois défis pour un droit mondial (Paris: Seuil, 1998).
75. D. Kennedy, *Putting the Politics back in International Politics*, IX The Finnish Yearbook of International Law 17–27 (1998).
76. Since its 1997 World Development Report, the Bank has stressed participation, accountability and good governance as aspects of prioritised economic development and in order to respond to criticisms, redescribed its development goals in terms of attainment of social and economic rights. *Cf.*, *e.g.*, the introduction to Development and Human Rights: The Role of the World Bank (The World Bank, 1998). For discussion of the EU human rights discourse, which is conditioned by economic rights and values, *cf. e.g.*, I. Ward, The Margins of European Law 142–151 (London: Macmillan Press, 1996).

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5. Institutional Ambitions in Trade Law

The establishment of a permanent Dispute Settlement Body ('DSB') within the WTO in 1995 has, in the view of some, not only constitutionalised international trade but also set up a model for the constitutionalisation of the international system.[77] This may be doubtful, but the data are still impressive. In seven years, some 250 cases have been filed under the Dispute Settlement Understanding ('DSU') that may be seen to constitute a special regime, as it requires members to resort exclusively to the WTO organs to seek redress for violations of the covered agreements.[78] The panels and the Appeals Body ('AB') are only entitled to apply "WTO law" consisting of the covered agreements plus the practice of the WTO bodies. The question they are empowered to answer is "Has WTO law been violated"?[79]

The system is not closed from general international law, however. Article 3(2) of the DSU mandates the panels and the AB to interpret the agreements by reference to "customary rules of interpretation of public international law." It has become regular practice with the panels and the AB to refer to Articles 31 and 32 of the VCT as well as to the relevant jurisprudence of the ICJ.[80] When the AB stated that the agreements should not be read "in clinical isolation from public international law,"[81] it meant that public international law enters into the WTO system through the channel of treaty interpretation as the relevant normative context.[82] It follows that WTO panels and the AB are called upon to apply general international law to the extent that the agreements themselves have not expressly excluded that option (as they have in regard to rules of state responsibility).[83] Despite initial doubts, the DSB has established itself as a real international jurisdiction with binding powers over the members of the WTO.[84]

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77. *Cf.* E.-U. Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalise the UN Dispute Settlement System*, 31 N.Y.U. J. Int'l L. & Pol. 753–790 (1999).
78. DSU, Art. 23.
79. *Cf.*, *e.g.*, G. Marceau, *Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAS and other Treaties*, 35 JWT 1082 (2001).
80. For a review, *cf.* J.I. Charney, *International Law and Multiple International Tribunals*, 271 RdC 145–153 (1998). For a general analysis of fragmentation in international trade law, *cf.* J.H. Jackson, *Fragmentation or a Unification among International Institutions: The World Trade Organization*, 31 N.Y.U. J. Int'l L. & Pol. 823 *et seq.* (1999).
81. *United States – Standards for Reformulated and Conventional Gasoline*, 35 ILM 605, at 621 (1996).
82. H. Ruiz Fabri, *La prise en compte du principe de précaution par l'OMC*, RJ-E Special Supplement, at 57; Marceau, *supra* note 79, at 1103.
83. Korea – Measures Affecting Government Procurement, WT/DS163/R (19 June 2000), at para. 7.96. For a review, *cf.* Pauwelyn, *supra* note 26, especially at 540–543 and 560 *et seq*.
84. For a discussion, *cf.* H. Ruiz Fabri, *Le règlement des différends au sein de l'OMC: Naissance d'une juridiction, consolidation d'un droit*, *in* Souveraineté étatique et marchés internationaux à la fin du 20ème siècle, Travaux du CREDIMI, Vol. 20, 305–313 (2001).

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But even as they have recourse to general law, the DSB organs do this from the perspective of the WTO mission to advance free trade. This, of course, is what enraged environmentalists in the *Tuna/Dolphin* cases of 1991 and 1994 (both unadopted) in which the US measures to prohibit entry into the US market of tuna caught by a method that destroyed Dolphins were interpreted as discriminatory.[85] In the latter, the panel rejected non-incorporated environmental treaties as irrelevant to the GATT regime.[86] The DSB is vulnerable to the same criticisms that are directed to the WTO: lack of sensitivity to non-trade preferences and absence of democratic legitimacy. In fact, the dispute-settlement system may seem to be particularly invidious inasmuch as it "offers [the WTO] an element of legitimacy attached to the rule-of-law concept."[87] But this follows less from any malevolent bias in the panellists than from the function of the DSB to seek only a response to the question about possible violation of WTO agreements (Article 7(1) DSU). The panels or the AB are not empowered to act so as to increase or diminish the members' WTO rights or obligations. In case of conflict between, say, an unincorporated human rights or environmental treaty and a WTO agreement, WTO bodies are constitutionally prevented from concluding that the WTO standard has to be set aside. At best, in a case involving members that have between themselves contracted this other obligation, WTO bodies may conclude that there are no WTO rights or obligations at all and thus to declare a "WTO *non liquet*."[88]

In the *Beef Hormones* case the AB considered the status of the precautionary principle as a treaty rule contained in the (covered) agreement on Sanitary and Phytosanitary products ('SPS's') as well as an "autonomous" principle of customary international law. In the end, it concluded that whatever might have been the status of the principle "under international environmental law," it had not become binding under international customary law – suggesting that had it become customary, it would have been WTO-relevant.[89] Interestingly, that position also cantons the validity of a rule by reference to a special regime – "international environmental law" – thus opening the way for WTO bodies to free themselves from applying them by defining the WTO as not part of that regime. Would this mean that rules of international humanitarian law, law of the sea or, for instance, space law, remain equally irrelevant for the WTO? Surely not. But inasmuch as the boundaries of such regimes are based on informal

85. *US – Restriction of Import of Tuna*, 30 ILM 1594 (1991) and *US – Restriction of Import of Tuna*, 33 ILM 839 (1994).
86. *Id.*, at 892, para. 5.19.
87. E. Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 502, and *generally* 499–508 (2001).
88. Marceau, *supra* note 79, at 1082 and 1103–1105.
89. WT/DS26/AB/R (13 February 1998), at para. 125.

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considerations and preferences – "field constitution"[90] – a large area opens for WTO bodies either to isolate themselves from general law or to give it a special WTO meaning when that seems to be called for.

The debate about the position of environmental, social, cultural, human rights etc. preferences *vis-à-vis* free trade in the WTO remains open. In principle, such preferences are dealt with as exceptions to the general WTO rules. The protective measure should always be "necessary" in the sense of being "the least trade restrictive alternative reasonably available."[91] Under this institutional logic there is no neutral terrain. Either something effectively advances free trade – in which case the interpretation should defer to it. Or it does not – in which case it is to be recognised only in special cases (where an exception has been provided) and then it is to be narrowly construed. If a WTO member is also party to an environmental or a human rights treaty that conflicts with its WTO obligations, then the two should probably be read as coherent – bearing in mind, however, that the result should neither decrease nor increase a member's WTO rights or obligations.[92] The very widespread use of the *effet utile* principle in the interpretation of the covered treaties merely reflects the logic of efficiency that underlies the system. This is of course deeply unsatisfactory from the perspective of the interests or values that present themselves as alternatives to free trade. But, as some have observed, it is quite doubtful if a trade regime – as long as it remains one – is ever able to give effect to them.[93]

From this perspective, the extension of the jurisdiction of WTO bodies to general international law and non-WTO agreements may not contribute towards the goals sought by WTO critics. The interpretations of general law made under the system – with the in-built bias it has – will come to possess value as precedent not only within the WTO but also more generally across the judicial board – not least owing to the genuine enthusiasm with which many experts in the field have greeted the system. If one really believes that the "WTO Agreement has brought citizens all over the world more freedom, non-discrimination and economic welfare gains […] than probably any other international treaty,"[94] then there is no doubt that one will tend to think highly of the particular hierarchies it has stimulated. Indeed, one will argue that in comparison, the general law will

90. *Cf.* M. Koskenniemi, *The Effect of Rights on Political Culture*, *in* P. Alston (Ed.), The EU and Human Rights 99, at 106–107 (Oxford University Press, 1999).
91. J. Trachtman, *Trade and … P2roblems. Cost-Benefit Analysis and Subsidiarity*, 9 EJIL 69–71 (1998). For a discussion of the non-recognition of any cultural exceptions under the GATT/GATS regime, *cf.* J. Paul, *Cultural Resistance to Global Governance*, 22 Mich. J. Int'l L. 30–55 (2000).
92. Marceau, *supra* note 79, at 1104 and 1107.
93. J. Dunoff, *The Death of the Trade Regime*, 10 EJIL 754–762 (1999).
94. E.-U. Petersmann, *Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 JIEL 243 (1999).

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seem "State-centred" and averse to human rights, – problems that have "hamper[ed] the evolution of the ICJ into a superior court."[95]

The more extensive the jurisdiction of WTO bodies, the more other tribunals and implementation organs will overlap with them.[96] The fast and potentially powerful character of the WTO system constitutes a strong incentive for using it, thus firmly expanding the influence of interests represented by WTO organs. On the other hand, the legitimacy deficit of the WTO together with its treatment of non-trade concerns as potential protectionist devises undermines the dispute-settlement system. For example, over the past ten years, GATT/WTO bodies and the European Court of Justice ('ECJ') have clashed over the EC bananas regime as well as the EC hormones interdiction – without that engendering a significant change of positions. As the EC policies have a strong domestic constituency, the WTO remains powerless in face of continued non-compliance – especially as for most domestic courts "WTO rulings are little more than advisory opinions."[97] The fact that non-compliance has even increased in the last few years constitutes a reminder that "it is certainly factually inaccurate to state that the WTO contract corresponds to everyone's idea of justice."[98] The solution will not come by way of expanding WTO competence – a move that would also expand the scope of the economic logic. Only the establishment of sufficiently powerful institutions to represent non-economic concerns – that is to say, a politics of fragmentation – will now create a workable structure of tectonic counterweight.[99]

6. The Contours of Institutional Struggle

What is remarkable about the statements by the Presidents of the International Court of Justice in 1999–2001 is not only their anxiety about what at first sight seems a rather theoretical, even esoteric problem – "proliferation of courts," "unity" of international law – but also the narrow platform from which the critiques have emerged. In reading through the academic debates, the Presidents stand almost alone in expressing such anxiety (in addition to a small number of suspected war criminals waiting for trial at the Hague) – sometimes joined by colleagues such as Judge Oda whose expression of concern over the establishment of the Law of the Sea Tribunal in Hamburg was dressed in now familiar terms:

95. *Id.*, at 246.
96. *Cf.* Marceau, *supra* note 79, at 1115–1128.
97. M.L. Movsesian, *Sovereignty, Compliance and the World Trade Organisation. Lessons from the History of Supreme Court Review*, 20 Mich. J. Int'l L. 815 (1999).
98. P.C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EJIL 810 (2000).
99. For this argument in regard to environmental preferences, *cf.* D. Ahn, *Environmental Disputes in the GATT/WTO: Before and After* US-Shrimps *Case*, 20 Mich. J. Int'l L. 859–861 (1999).

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> The rule of law based upon the uniform development of jurisprudence will be best secured by strengthening the role of the International Court of Justice, not by dispersing the judicial function of dispute settlement in the international community among various scattered organs.[100]

For most commentators, however, proliferation is either an unavoidable minor problem in a rapidly transforming international system, or even a rather positive demonstration of the responsiveness of legal imagination to social change.[101] Even as the analysis of fragmentation is largely held to be correct, most lawyers express confidence in the ability of existing bodies to deal with it. In fact, observes Jonathan Charney – the most prolific academic commentator on this theme – "alternative forums complement the work of the ICJ and strengthen the system of international law, notwithstanding some loss of uniformity." Even different approaches adopted in relation to the same subject may only represent a healthy "level of experimentation in a collective effort to find the best rule to serve the international community as a whole." Therefore, "[b]ased on the information available at this time […] a serious problem does not appear to exist."[102]

"The more the merrier" Charney concluded at a recent panel within the American Society of International Law. None of the other panellists (Bernard Oxman, Richard Bilder, Patricia Wald) disagreed with him.[103] The fact that the anxiety comes almost exclusively from the confines of the ICJ highlights the way in which concern about "loss of control" or absence of "an overall plan" can perhaps be translated into the concrete worry at the Hague about loss of control *by me*, absence of an overall

100. S. Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 ICLQ 863, at 864 (1995); S. Oda, *The International Court of Justice Viewed from the Bench (1976–1993)*, 244 RdC 145 (1993-VII). *See also* P.-M. Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. Int'l L. & Pol. 806 (1999), urging the ICJ to adopt a more "creative judicial policy" in order to resume its role as *the* world court; and Abi-Saab, *supra* note 3 at 930, appealing for boldness on the Court's part "in grappling with difficult problems and not shirking controversial tasks."
101. *Cf.* J.I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. Int'l L. & Pol. 697 (1999); T. Treves, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. Int'l L. & Pol. 809 (1999); H. Thirlway, *The Proliferation of International Judicial Organs and the Formation of International Law*, *in* W.P. Heere (Ed.), International Law and the Hague's 750th Anniversary 434 (T.M.C. Asser Press, 1999); and Oellers-Frahm, *supra* note 57, at 83. An exception in the generally optimistic tone is S. Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 Col. J. Transnat'l L. 143–175 (2001), which makes the point that "incoherence" will erode the "legitimacy of international judicial system" (at 170) but fails to consider whether the critics of the system's politics would be impressed by those politics being applied "coherently."
102. The quotes are from Charney, *supra* note 80, at 351, 352, 354 and 355.
103. American Society of International Law, Annual Meeting 2002, The Proliferation of International Tribunals, Panel on 15 March 2002.

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plan under *my institution*. The concern is less about "hierarchy" than about a particular hierarchical arrangement under which political conflicts are translated into disputes between states, and resolved by rules based on the consent of litigating states or, perhaps increasingly, a process of "transactional justice" half-way between law and diplomacy, geared towards equitable compromises between the relevant state interests.[104]

It is a familiar complaint that the Court has been a far less important player on the international scene than how the internationalist imagination conceived it. Even the recent transformations have failed to buttress its position – perhaps to the contrary. When the "Hague Court" is being referred to today, most people think of the ICTY. If the roster of the ICJ is today full of contentious cases, it is uncertain if this reflects renewed faith in the Peace Palace. The Court's successful work concentrates on a rather narrow field – especially territorial delimitation – where its jurisdiction is based on the consent of the parties and transactional justice is easily applicable. Where this is not the case – as in the many recent cases that have come to the Court by unilateral application as well as in its advisory jurisdiction – the Court's record is distinctly unimpressive.[105] Much of this has to do with the Court's constitutional inability to grapple with the universalist (in contrast to "international") logics of humanitarianism, human rights, trade or the environment. For the Court, access to them is open only through the narrow channel of party consent. As much of its recent jurisprudence (including at least the *East Timor*, *Gabčikovo-Nagymaros*, *Belgian Arrest Warrant* and some aspects of the *Legality of Nuclear Weapons*) seems to testify, the presence of such access cannot be taken for granted.

Judge Guillaume worries about the way special regimes might be breaking up international law "in such a way as to jeopardise its unity."[106] But it is doubtful if any such "unity" ever existed. The ICJ never stood at the apex of some universal judicial hierarchy. Its judgements have been binding only as *res judicata*, and other subjects have remained free to accept or reject them. As the *Breard* and *LaGrand* cases demonstrated,

104. For a discussion of the "arbitralisation" of the Court and its increasing attempt to find a mid-way between the positions of the litigant states, *cf.* Abi-Saab, *supra* note 20, at 261–272. For a general assessment of the turn to deformalised equity in international law *cf.* M. Koskenniemi, *The Limits of International Law: Are There Such*, *in* Might and Right in International Relations, XXVIII Thesaurus Acroasiarum 43–47 (1999) and M. Koskenniemi *"The Lady Doth protest Too Much." Kosovo, and the Turn to Ethics in International Law*, 65 MLR 159–175 (2002).

105. For a study of the Court's record until 1985, *cf.* J.I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation and Non-Performance*, *in* L. Damrosch (Ed.), The International Court at Crossroads 302, and especially the table on 310–391 (1987). For a brief look at the record in 1985–1995, *cf.* M. Koskenniemi, *The Post-Adjudicative Phase*, *in* C. Peck & R.S. Lee (Eds.), Increasing the Effectiveness of the International Court of Justice 348–349, n. 82 (Nijhoff, 1997). For a balanced assessment of the Court's advisory jurisdiction, *cf.* C. Chinkin, *Increasing the Use and Appeal of the Court*, *in* Peck & Lee, *id.*, at 43–56.

106. G. Guillaume, *The Future of International Judicial Institutions*, *supra* note 3, at 862.

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appeals from the Hague do not rank highly even with the United States Supreme Court. But it is unlikely that other supreme courts would be any more willing to consider themselves bound by ICJ judgements.[107] As Charney puts the main view on this matter:

> I do not doubt, however, that a hierarchical system for deciding international legal questions would contribute to a more orderly and coherent legal system. One should understand, nevertheless, that this has not been the case for as long as international law has existed.[108]

"Things should not be dramatized" writes Judge Fleischhauer from the ICJ.[109] The Court's continued influence, as Charney argues, will depend on its ability to maintain a "high level of competence" and express "its views in well-reasoned ways."[110] But it is doubtful whether this official optimism succeeds in responding to the institutional politics of fragmentation. For the new tribunals and implementation bodies represent new forms of bias, dressed in universalist principles, that are not identical with the preferences of public diplomacy that the ICJ was created to administer. To hope with Judge Fleischhauer that the bodies would remain "mindful and respectful of each other's jurisprudence" and that if they disagree, they should do so in a "professional manner" by finding "a sensible division of labour,"[111] is to keep whistling in the dark. It may be true, as Thirlway observes, that judicial bodies do not normally wish to contradict each other and that, with some ingenuity and distinguishing, it is possible to interpret the cases so as to see a "solid body of coherent jurisprudence" emerging.[112] But to believe that this is the way concerned parties would see the matter is to fall back on the idealist principle of the harmony of interests which portrays the world as one in which men are reasonable and can agree as such, and invariably find the basis of their agreement in supporting the *status quo*.

In the new configuration, ICTY and the International Criminal Court represent the primacy of abstract humanitarianism over diplomatic technique, morally oriented retributivism over the subtle techniques of public law. "Ending the culture of impunity" will thus appear an annoying dis-

107. *Cf. also* A.M. Weisburd, *International Courts and American Courts*, 21 Mich. J. Int'l L. 885–891, 931–939 (2000).
108. J.I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AJIL 74 (1996). *Cf. also* Charney, *supra* note 101, at 698; Charney, *supra* note 80, at 363; Spelliscy, *supra* note 101, at 172.
109. C.-A. Fleischhauer, *The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg*, 1 Max Planck Yearbook of United Nations Law 333 (1997).
110. *Cf.*, *e.g.*, Charney, *supra* note 101, at 705. *See also* the contribution of P.-M. Dupuy *in* 31 N.Y.U. J. Int'l L. & Pol. 802 *et seq.* (1999).
111. Fleischhauer, *supra* note 109, at 333.
112. Thirlway, *supra* note 101, at 443.

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turbance to regular diplomatic exchanges.[113] When criminal law and diplomacy meet the result is likely to be either undermining diplomatic freedom of action – or turning criminal justice into show trials. Any middle ground here is both narrow and slippery.

Support for the independence of human rights organs of WTO bodies, too, emerges from an effort to advance beyond the traditional processes concerned with protecting the formal equality between sovereigns. The neo-naturalist technique that looks to the purposes of the relevant instruments, *effect utile* and other dynamic doctrines of treaty interpretation and sees the state always as a potential threat, give human rights and trade institutions a definite political direction outside traditional diplomacy. The interest of the State will remain an "exception," narrowly interpreted and always somehow suspect in view of the attempts to articulate a moral consensus or to protect the freedom of trade. To be sure, the "margin of appreciation" doctrine as well as broad and flexible safeguards provisions within the WTO temper the missionary zeal of human rights or trade bodies by conservative concerns. In this "dialogue," there is no impartial third party: the special organ and the state each have stakes to defend and it is their negotiating skills that determine where solutions will be found and whether they will stick in the long run.

To read the debate about fragmentation as if it had to do only with coherence in the abstract is to be mistaken about what is actually at stake. Special regimes and new organs are parts of an attempt to advance beyond the political present that in one way or another has been revealed unsatisfactory. The jurisdictional tensions express deviating preferences held by influential players in the international arena. Each institution speaks its own professional language and seeks to translate that into a global Esperanto, to have its special interests appear as the natural interests of everybody. Here neither anxiety nor complacency are in place: the conflicts do not go away by relying on "reasonableness" – unless, of course, one falls back on being satisfied with possessing a professional language in the first place that will guarantee that whatever preferences will win at the end, one will always continue to speak.

To avoid cynical professionalism will require facing the institutional tensions on their merits. Here no overall solution – a single hierarchy – is available. The ICJ, a human rights body, a trade regime or a regional exception may each be used for good and for ignoble purposes and it should be a matter of debate and evidence, and not of abstract "consistency," as to which institution should be preferred in a particular situation. The universalist voices of humanitarianism, human rights, trade or the environment should undoubtedly be heard. But they may also echo imperial concerns, and never more so than when they are spoken from high positions in institutions that administer flexible standards that leave the

113. *Cf.* the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), ICJ Judgement of 14 February 2002, at paras. 53–55.

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final decision always to those speakers themselves.[114] At that point, the protective veil of sovereign equality, and the consensual formalism of the ICJ will appear in a new light: as a politics of tolerance and pluralism, not only compatible with institutional fragmentation, but its best justification.

114. For this argument in more detail, *cf. also* M. Koskenniemi, L*egal Universalism: Between Power and Morality in the World of States*, *in* S. Cheng (Ed.), Law, Justice and Power. Between Reason and Will (Stanford University Press, 2002, forthcoming).

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