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ARTICLES

The Rhetoric of Fragmentation: Fear and Faith in International Law

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Abstract
Over the last decade international lawyers have been increasingly concerned with the 'fragmentation' of international law. However, given that this expression has been repeatedly used by the profession since the mid-nineteenth century to depict the state of international law, one may wonder about its recent revival in the international legal discourse. Why has it re-emerged? What can we learn from previous invocations? An answer may be sought by contextualizing the fragmentation debate in a historical perspective. This brings out the repetitive and relatively stylized modes in which the profession has narrated legal developments. This essay suggests a correlation between periods of crisis in general and a critical view of fragmentation on the one hand, and periods of scholarly enthusiasm and the prevalence of positive views about fragmentation on the other. This analysis sheds critical light on both the implicit assumptions and political implications of the current debate on fragmentation.

Key words
argumentative patterns; fragmentation; history; international law; legal discourse

> Modernity . . . is a paradoxical unity, a unity of disunity: it pours us all into a maelstrom of perpetual disintegration and renewal, of struggle and contradiction, of ambiguity and anguish. M. Berman, *All That is Solid Melts Into Air* (1988), 15

'It has become a platitude to say that international law is changing', said Maurice Bourquin at The Hague Academy of International Law in 1931.[1] Some seventy-five years later, it is still commonplace to address international law in terms of its evolution. One issue that has generated scholarly attention is the 'fragmentation' of international law due to the emergence of specialized or functional regimes such as trade law, human rights law, European law, and so on. The debate has focused on the repercussions of those closely integrated sets of rules, institutions, and practices on the global system, given that they pursue special objectives and build on specific modes of interpretation of both general law and other specialized regimes.

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1 M. Bourquin, 'Règles générales du droit de la paix (cours général)', (1931-I) 35 RCADI 1, at 5.

This issue was considered to be serious enough by the International Law Commission to include it in its long-term programme in 2000, and to establish a special Study Group in 2002. Four years later the Study Group's final report explained that the emergence of functional regimes reflected the pursuit of preferences that were unrepresented in the past, and offered reassurance that conflicts arising from fragmentation could be dealt with through existing techniques used to resolve normative conflicts.[2] This conclusion resonated well with the prevailing view among scholars, for whom anxiety over fragmentation had been overstated, since it had both negative and positive aspects – the disagreement being over which of the two aspects is predominant.[3] Disparities found in the abundant literature on the topic could also be read as representative of European (formalist) and American (realist) approaches to international law.[4] More generally, international lawyers tend to perceive fragmentation through the lens of their specialized field (human rights, trade law, etc.), leaving out other specialities as well as other disciplines (international relations, sociology, etc.). From this perspective the history of fragmentation is also a story of professional specialization.

Other scholars have addressed the issue of fragmentation more critically in at least one of two ways: either by looking at the voices that 'globalization' enables and those that it leaves out,[5] or by unveiling the political motives and institutional struggle behind the calls by presidents of the International Court of Justice (ICJ) for unity and jurisdictional hierarchy.[6] In a similar vein, this article aims to foreground the current debate's assumptions and political implications by placing the language of fragmentation in the larger semantics of diversity and unity, and by examining its use by the discipline since the mid-nineteenth century. The impetus for such an analysis emerged from the finding that over the last 150 years, international lawyers have had recourse to the language of fragmentation as an argument for criticism and contestation. Indeed, the development of international law through specialized mechanisms is seen sometimes as healthy pluralism ('diversification'), sometimes as perilous division ('fragmentation'). The puzzling questions are, then, to explain how the mainstream discourse moves from one image to the other and why certain members in the field constantly privilege the fragmented image over the other. We shall see that the play between integration and disintegration, and more generally

2 And in particular those favouring systemic interpretation. Report of the ILC Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Doc. A/CN.4/L.702, 18 July 2006.

3 See, e.g., G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', (2004) 25 *Michigan Journal of International Law* 849; B. Simma, 'Fragmentation in a Positive Light', (2004) 25 *Michigan Journal of International Law* 845.

4 One only needs to think about the opposing approaches taken by the European Society for International Law (examining the role of formal sources) and by scholars at US colloquia (focusing on institutional actors). Compare R. Huesa Vinaixa and K. Wellens, *L'influence des sources sur l'unité et la fragmentation du droit international* (2006), with the various contributions of NYU School of Law's 1998 symposium, 'The Proliferation of International Tribunals: Piecing Together the Puzzle'.

5 B. Stark, 'Women and Globalization: The Failure and Postmodern Possibilities of International Law', (2000) 33 *Vanderbilt Journal of Transnational Law* 503.

6 M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2003) 15 LJIL 553.

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between unity and diversity, is one of the discursive patterns used by the discipline to deploy criticism and propose reform projects.

In other words, this article shows that in a rather recurrent and cyclic fashion, international lawyers have described the development of specialized norms and/or institutions as trustworthy or as to be feared, depending on their perception of the international legal project as a whole. Faith in those phenomena is generally expressed in times of confidence, whereas fear of fragmentation dominates the field in times of anxiety. Yet there is a close relationship between confidence and anxiety: to raise fear over fragmentation is often a critical address to previous confidence and, conversely, to express faith in specialization emerges from and responds to previous anxiety.

The striking ambivalence – even indeterminacy – of the nexus between sociological changes and their impact on international law was traced owing notably to the work of David Kennedy, who has identified 'broad waves of critical anxiety and enthusiastic reform' in international law from 1870 onwards, and has analysed their impact on legal thinking.[7] The periodization method was privileged herein so as to emphasize the cyclic recourse by international lawyers to the language of fragmentation. It also contextualizes (and thus possibly explains) the profession's ambivalent perception of the significance of normative specialization and institution-building. It is, however, obvious that there are no periods during which international law was homogeneously conceived either one way or another. Each period's 'mainstream' has what Kennedy calls a 'counterpoint'. Moreover, scholars in a given period are generally interested in the same phenomena but treat them from a variety of standpoints depending on the political and personal contexts in which they evolve and which need to be taken into account.

Hence, in order to offer a full account of the politics of fragmentation, the historical perspective will need to be complemented with an analytical or structural one. Only then will it become clear that if individual lawyers have repeatedly expressed fear over fragmentation, it is because fragmentation is a powerful rhetoric with which to contest someone else's project. In each period we find disagreements among lawyers who assess international law differently. Say that a mainstream expressing confidence is accompanied by a counterpoint criticizing that confidence. In such a case, the counterpoint may use the rhetoric of fragmentation to challenge – and

7 Although his analysis focuses on scholars in the United States, it can very well be expanded to include Continental doctrine, given the dynamics of production and the reception of international legal thinking. Accordingly, the last half of the nineteenth century saw a self-confident period of invention and renewal among international lawyers, which took place from roughly 1871 to the First World War. It was followed by a period of confusion and rethinking, which lasted from 1914 to the mid-1920s. This phase was replaced by another period of confidence and consolidation which persisted until the outbreak of the Second World War. But again, the war initiated a period of confusion and rethinking which continued through the early Cold War years. In the 1960s a period of self-confident renewal succeeded, repeating much of the previous enthusiastic periods. It lasted until the end of the Cold War, which gave rise to the current period of confusion and rethinking. D. Kennedy, 'When Renewal Repeats: Thinking against the Box', (2000) 32 *New York University Journal of International Law and Politics* 347. See also D. Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', (1994) 4 *Transnational Law and Contemporary Problems* 329; D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (1994) 17 *Quarterly Law Review* 99; D. Kennedy, 'Move to Institutions', (1986–7) 8 *Cardozo Law Review* 845.

eventually reverse – the equilibrium between them. At that moment, the language of fragmentation is a well-articulated rhetoric for those international lawyers who are self-conscious defenders of special interests. A contestant of the (old) unity will tend to work *for* fragmentation, whereas a supporter of the (old) unity will work *against* fragmentation.

In short, this essay should be read as an attempt to re-create contextually situated narratives in which international lawyers seize the language of fragmentation to support or challenge particular political projects – projects of law reform and law creation. This analysis aims to shed light on the politics of fragmentation, thereby providing a better understanding of where we stand today.

1. The structure of the fragmentation debate: the play between unity and diversity

Nowadays the term 'fragmentation' is commonly used to refer to the slicing up of international law 'into regional or functional regimes that cater for special audiences with special interests and special ethos'.[8] Yet this is not the only possible meaning: in addition to fragmentation as a process ('international law is being sliced up'), the term has been used to refer to the so-called primitive character of international law ('international law is still fragmented').[9] While both meanings have been extensively conveyed by international lawyers, this article focuses on the use of the term in its first sense, namely fragmentation as the threatening consequence of excessive or kaleidoscopic normative and institutional specialization. This is the meaning underlying today's debate; the prevalent view suggests that we are facing a new and somewhat paradoxical situation in which world disorder is that of an anarchical society whose progress is impaired not by an underdevelopment of law but rather by its overdevelopment.[10]

Understood as such, the notion of fragmentation has appeared in the international legal discourse at regular intervals since the mid-nineteenth century. Although its connotation has certainly changed over time (technically speaking, fragmentation has referred to the elaboration of highly detailed treaties, to the establishment of regional institutions, to the setting up of specialized jurisdictions, etc.), its denotation has remained the same: to invoke fragmentation is to evoke an image of chaos, explosion. As performatives, all such references raise a particular sensibility – that

8 M. Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *European Journal of Legal Studies* 1, at 2. The notion of functional differentiation has been developed notably by Niklas Luhmann to explain the evolution of late modern societies. For his view on law, see *Law as a Social System* (2004). Andreas Fischer-Lescano and Gunther Teubner were among the first to transpose this conceptual framework to international law. See their article 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal of International Law* 999.

9 As is often the case with words with the same suffix, fragmenta-*tion* refers both to a result (international law is fragmented) and to a process (it is fragmenting). The two meanings are mutually exclusive: if the law is fragmented or primitive, then it cannot be disintegrating (we assume that it is already so); if the law is disintegrating, then it cannot yet be fragmented (we fear that it might become so). See more generally R. Guastini, *Estudios sobre la interpretación jurídica* (2003), at 71.

10 This is explained well in V. Kanwar, 'International Emergency Governance: Fragments of a Driverless System', (2004) *Interdisciplinary Journal of Political Theory* 41.

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is, a fear of anarchy, a feeling of lack of direction, a worry over the end of an international 'order'.

The language of fragmentation is thus a powerful metaphor as it articulates the play between diversity and unity in a specific way. Once there was unity, it tells, but there are only fragments left. Consider today's debate: some worry that the international legal order might turn into a bewildering assemblage of specialized regimes, each pushing for its own interpretation and preferences.[11] From unity to fragmentation. At the same time, this vision is contested by those who see the emergence of a new and generous form of global legal pluralism that does not 'lead to relativism, nor [is] based on legal imperialism'.[12] From monotony to diversification. It may be that the language of pluralism does not soothe the anxiety over fragmentation – for that purpose, the constitutionalist vocabulary might have a stronger pull. Indeed, according to several European authors, an international constitutional order is emerging 'in which the different national, regional and functional regimes form the building blocks of the international community'.[13] From (trivial) unity to (constitutional) unity. Finally, there are those who say that the fragmentation debate does not tackle the most pressing issues and that we should stop searching for unity: any understanding of the world needs 'to have room for . . . disorder – there is no use denying or overlooking it, pretending coherence'.[14] From (repressed) diversity to (open) fragmentation.

These four positions are exhaustive and logically exclusive; they count as a complete description of the argumentative structure of the fragmentation debate.[15] One may be tempted to ask how it is possible to choose and to endorse one of these positions – which one offers the 'truer' picture of international law? In fact, none of them offers a pure description of the state of international law; to choose between them depends on one's point of view and ideal of social organization. To explain this, we need to take a step back and examine two traditional narratives through which the play between unity and diversity has been conveyed. The crucial point will be that international law has tried to incorporate both narratives so as to be impervious to the criticism of being apologetic or utopian: it wants to be universal (but not totalitarian) and particular (but not anarchist). However, both narratives threaten each other as they criticize each other. The four positions try precisely to get rid of the threat, by preferring unity or diversity, renouncing both or explaining them as compatible.

First, there is a cosmopolitan narrative, under which modernity moves from diversity to unity. It presents international law as the 'antithesis of fragmentation',[16]

11 P.-M. Dupuy, 'L'unité de l'ordre juridique international: Cours de droit international public', (2002) 297 RCADI 432.

12 M. Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', (2003) 1 *Journal of International Criminal Justice* 13.

13 E. De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 LJIL 612.

14 D. Kennedy, 'The Mystery of Global Governance', Kormendy Lecture, Ohio Northern University, 25 January 2008, at 16.

15 This is largely inspired by Martti Koskenniemi's analysis of the structure of modern doctrines in his *From Apology to Utopia: The Structure of International Legal Argument* (1989).

16 M. Koskenniemi, 'Global Legal Pluralism', Conference at Harvard University, 5 March 2005.

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leading a chaotic world of power to an integrated legal community. Every development of international law is good insofar as it is teleologically directed towards the greater fulfilment of mankind. Perceptions of breakdown or fragmentation emerge when this objective is blurred, when international lawyers experience a world that has failed them and has malignantly stopped striving for unity. They respond to perceptions of chaos by further reliance on the universal teleology – which, ultimately, allows them to transform fragmentation into unity or, better, to understand fragmentation *as* unity. This is Lauterpacht's discourse in the aftermath of the Second World War. The horrors perpetrated during the war and the failure of the League of Nations did not put an end to but rather intensified his call for unity: what looked like a fragmented world, he said, revealed deeper unity.[17]

The play between unity ('good') and diversity ('bad') is not the only possibility, for there is a counter-narrative which sees progress in diversity rather than in unity. This counter-narrative impregnates the fields of economics and sociology, where evolutionary patterns are thought about in terms of differentiation and individualization. According to liberal economic thought, the division of labour and specialization are the keys to increasing productivity – and thus to the betterment of the whole society. For the inter-war sociologists, the division of labour led to a higher form of solidarity as individuals became more and more indispensable to each other. That this counter-narrative offers another way out of perceptions of fragmentation has been seized upon by several international lawyers as a means of criticizing the dominant narrative. What may have looked like division and chaos, they said, was in fact mere complexity. Under the counter-narrative, fragmentation is *enlightened* diversity. It has also been used by realists to argue for a radically 'new' international project reflective of 'real' social transformations.[18]

There is an obvious – and irresolvable – tension between the two narratives.[19] Each of them claims superiority and exclusiveness: their identity, or point, seems indeed to lie in the way in which each claims priority over and negates the other. The cosmopolitan narrative rejects the existence of fragmentation: to be united requires that the world is not fragmented. The counter-narrative rejects the existence of a universal teleology: diversity makes sense only as a negation of absolutism. The two narratives oppose each other as each regards the other as unacceptable. The teleological view of society (says the counter-narrative) leaves very little room for human autonomy and diversity. To think of diversity as the pursuit of one's interests (responds the first narrative) is to enslave it in the law of determinism.

In order to respond to those criticisms, both narratives have no choice but to refer back to each other. On the one hand, unless there is agreement on the character of

17 '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*'. H. Lauterpacht, 'The Reality of the Law of Nations', in H. Lauterpacht, *Collected Papers*, ed. E. Lauterpacht (1970), II at 26.

18 The connection between economics, liberalism, and political realism has been forcefully made by A. Hirschman, *The Passions and the Interests* (1977).

19 The insoluble character of the tension between community and individuality is developed by Duncan Kennedy in 'Form and Substance in Private Law Adjudication', (1976) 89 *Harvard Law Review* 1685.

the desirable unity, attempts to impose it amount to totalitarianism. But because such an agreement must be capable of verification, the first narrative has to find its own justification or legitimacy in the practice of states or regimes – that is, in diversity. On the other hand, unless there is an overarching principle that ensures the 'enlightened' character of specialization, it is an open door for absolutist claims by the most powerful. At that moment, the counter-narrative has no choice but to admit that any principle whose function is to explain how fragmentation is in fact beneficial is not realist (i.e., sociologically grounded) but universalist – and thus idealist. As a result, it becomes impossible to privilege the cosmopolitan narrative (unity) or the counter-narrative (diversity) because each contains both terms. In order to prefer one over the other, we first need to know what kind of unity and diversity are aimed at.

From the point of view of international lawyers, these two progressivist understandings of modernity do not have the same appeal. To be a modern international lawyer is to feel closer to the first narrative.[20] Our field is bound together by a cosmopolitan reading of international law as moving from diversity towards unity, through the gradual replacement of statehood by some kind of international-hood. That the international legal project generally favours the international over the national, the universal over the particular, explains why the rhetoric of human rights triumphs easily against that of sovereignty. But such a preference cannot be systematically maintained, because it is sometimes necessary to defend sovereignty as an indispensable tool to protect and implement human rights, for instance. Hence our international legal culture implies a strong commitment to cosmopolitanism together with a desire to provide space for enlightened diversity.

This attempted reconciliation between unity and diversity is well conveyed by the presentation of international law as a 'system' of rules and institutions. Obviously, the sense that international law is a system is deeply embedded in our legal thinking. At the same time it is also clear that the international legal system was not established on the basis of factual observation; international law's systemic nature could not have been arrived at by observation because it conditions observation.[21] Hence the systemic approach rests on a prior normative decision. If this is correct, the question becomes: why have we chosen to portray international law as such? The portraying of international law as a system offers the considerable advantage of suggesting that there is one systemic logic or meta-principle that both confines and gives sense to diversity.[22] To say that international law is a system is to provide some space for diversity while holding on to an objectified teleology. To say that international law is a system is to imply that unity and diversity may be reconciled in an apolitical,

20 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002).

21 We cannot simply ask whether international law forms a system, because our response depends precisely on how we have defined the 'system'. M. Troper, *Pour une théorie juridique de l'Etat* (1994).

22 This draws on the suggestion that the systematization of international law has two advantages, namely to promote legal (and not political) relations between states and to ensure the primacy of international (and not national) law. See Kennedy, 'When Renewal Repeats', *supra* note 7; J.-L. Halpérin, 'L'apparition et la portée de la notion d'ordre juridique dans la doctrine internationaliste du XIXe siècle', (2001) 33 *Droits* 41, at 48.

objective, or at least formal, way. In short, the systemic presentation goes hand in hand with the liberal attempt to neutralize the tension between unity and diversity.

But the systemic presentation cannot uphold a neutral or depoliticized play between unity and diversity for very long: a totalitarian system may be fully unified and coherent, and yet many of us would gladly inject some 'anarchy' into it. The type of unity the discipline is striving for is a cosmopolitan one – and not a monotonous, uniform, or authoritarian unity that allows no space for individuality, for diversity. International lawyers will see unity in a system that they consider both coherent *and* good. International lawyers will see unity going hand in hand with diversity in a world they approve and in which they can manoeuvre. In a world that constantly disappoints them, in which they cannot predict things and act upon these predictions, it is more likely that they see anarchy and fragmentation.

To put it differently, the play between unity and diversity is a matter of political interpretation – and not of some deeper principle or social evolution. Unity and diversity are matters of normative judgements about the 'good': where one sees peaceful unity, another may experience monotony or suffer oppressive domination; what seems to one like chaos may appear to another as healthy pluralism. There is no meta-level from which one could ascertain whether there is unity or diversity; there are only interpretation narratives. It is normative – and not sociological – disagreement that makes people sometimes prefer diversity (namely when it supports their interests) and sometimes unity (especially if they can impose it on the world).

2. The argumentative structure of the fragmentation debate in a historical perspective

At the same time, it is precisely because international lawyers view international law as leading from political chaos to legal unity while refusing to engage in discussing the substance of that unity (and the extent to which it includes diversity), that they have had recourse to the language of fragmentation as a discursive tool for contestation and criticism. The opposition 'diversification vs. fragmentation' – together with its counterpart opposition 'unity vs. uniformity' – has, so to say, tentatively replaced the opposition 'good vs. bad'; whether legal developments lead to fragmentation depends on one's vision and faith in the international legal project. In periods of confidence, international lawyers apprehend the world from the point of view of legal unity under which the elaboration of special norms and institutions is not to be feared. Diversity is integrated into unity. Regional institutions, for instance, are seen as creative laboratories that will eventually generate progress at the global level. Those who disagree with the mainstream project may challenge its unifying pretension by appealing to the language of fragmentation ('this is not healthy diversity but anarchy'). In periods of anxiety, international lawyers tend to see the world as an anarchic society that could misuse the same special rules and institutions. Diversity becomes a threat to unity. Because specialization threatens the uniting ambition of international law, those who promote special or regional mechanisms are denounced for pushing aside universal mechanisms and thus for

jeopardizing the federating project – they are said to be engaged in fragmenting the system. Yet the counterpoint may respond by criticizing the mainstream project as totalitarian ('this is not cosmopolitan unity but authoritarianism').

In order to escape the criticisms of anarchy and totalitarianism, international lawyers have adopted four different strategies: prefer unity, privilege diversity, present them as compatible, or renounce both. The first period we shall examine (1870–1914) is dominated by an idealist position, according to which universality and particularity do not threaten but rather complement each other. The outbreak of the First World War puts an abrupt end to that harmony, and the discipline takes comfort in a universalist position defending institutionalization and rule-generalization as the sole legitimate tools for achieving world unity (1914–25). This position is strengthened until the eve of the Second World War by theoretical enterprises whose objective is to neutralize fragmentation by incorporating it into larger systems (1925–39). After the war, international lawyers retreat from universalism to some *malgré soi* pluralism. Only such a stance allows them to justify the limited achievements of international law while preserving its unifying promise (1939–60). Gradually, the discipline's resigned pluralism transforms itself into a *bien portant* pluralism under which diversity/fragmentation becomes a privileged instrument for the evolution of international law towards a 'common law of mankind' (1960–89).

Through this analysis it becomes clear that the current debate is not new or unprecedented. It echoes earlier anxieties about codification through regional treaties, law enforcement through specialized institutions, and so on. This is so because the language of fragmentation is powerful when one wants to warn about and express the sense that international law is incapable of imposing limits to diversity and thus unable to achieve world unity. Again, this is not to say that fragmentation today is identical to what it was before – or, to be more precise, that what fragmentation refers to today would be the same as before. Even though 'fragmentation' has been part of the discipline's argumentative repertoire since at least the mid-nineteenth century (and most probably before), it has been used to address different phenomena as the discipline responded to previous critiques and modified the structures of international law. Nevertheless, what links the various moments together is the relatively stylized ways in which the word 'fragmentation' is invoked, either as the prologue to unity or as a menace to unity. One could therefore argue that, far from threatening the coherence of the field of international law, 'fragmentation' has been at its core from the start.

2.1. The period of confidence, 1870–1914: fragmentation as the prologue to unity

From the mid-nineteenth century until the outbreak of the First World War, the discipline evolved in an atmosphere of confidence and innovation. International lawyers did not hesitate to claim that 'considerable progress has been accomplished in international law' and that 'never before has human solidarity been so well

understood'.[23] In this context the specialization of legal rules was seen as a positive and desirable phenomenon that would eventually lead to their universality.

Standard textbooks usually started with a general statement about the rarity of generalized and uniform rules at the international level – so as to introduce an open plea to increase their number and expand their scope. Indeed, it was common for international lawyers to acknowledge the absence of a 'public law recognized by all Nations and applicable throughout the world'[24] while at the same time presenting universality as a 'feasible dream'.[25] This simultaneous affirmation made it possible to portray the fragmented nature of international law – that is, the fact that it was composed of only a few rules regulating specific areas and binding a limited number of states – not as an impediment but as an intermediate step on the road to universality. The preponderance of specialized rules was a temporary and even fortunate stage that would, in due course, generate international law's universality. International lawyers did not bemoan rule-specialization as some sort of regrettable stage but argued that it was desirable, since the future universal rules would be those elaborated by civilized states. Norm-building through specialized mechanisms was to be strengthened and promoted.

Clearly, the preoccupying question for international lawyers was how to transform particular law into universal law. Proclaiming themselves to be 'the juridical conscience of the civilized world',[26] international (European) lawyers were optimistic: international (European) law was meant to become universal through treaty codification. The idea of establishing the primacy of international law through treaties was not new.[27] The specificity here was the strong view that universality would be achieved through the conclusion of *particular* treaties among civilized states. Pasquale Fiore explained that international law would become universal through treaties dealing with particular issues and concluded among restricted circles of states, because such treaties would serve as 'models'[28] for subsequent treaties. Professionals would eventually be able to extract universal principles from the plurality of specialized treaties concluded this way. In similar vein, Henri Bonfils favoured the creation of particular rules as they were compatible with – and indispensable to – attaining international law's universality. He looked up to 'partial codifications through treaties' because state parties accepted 'a certain amount of principles, the number of which will increase as civilization grows'.[29] He openly considered civilized states to be the spokespersons of the universal and the messengers of international law.[30]

23 F. De Holtzendorff, *Eléments de droit international public* (1881), 37–8.
24 A. G. Heffter, *Le droit international de l'Europe* (1873), 2.
25 P. Fiore, *Organisation juridique de la société des Etats. Le droit international codifié et sa sanction juridique* (1890), iv.
26 Referring to the first article of the Statute of Institut de droit international (1873). See Koskenniemi, *supra* note 20.
27 See E. De Vattel, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1820), 105–6.
28 P. Fiore, *Nouveau droit international public* (1868), xxi.
29 H. Bonfils, *Manuel de droit international public (droit des gens)* (1894), 880, 883.
30 This mindset could frequently be found among the discipline but could be articulated more subtly. See, e.g., J. Westlake, *Etudes sur les principes du droit international* (1895), 89.

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Alongside this narrative there was another voice addressing the question of universality. It said that international law would become universal through the conclusion not of specific treaties but of general treaties addressing common state interests. Several international lawyers expressed confidence in the drafting of one general treaty that would fix, once and for all, all legal rules necessary to regulate state behaviour, protect individuals, and impose limits on warfare. The Hague Conventions were cited as guiding examples, so was the setting up of technical organizations such as the Universal Telegraph Union in 1865 and the Universal Postal Union in 1874. Johann Kaspar Bluntschli had appraised the creation of universal congresses on the ground that 'the application of general principles of international law would be better guaranteed if, besides big European states, other Great Powers, in particular from America, participated in the discussion on those principles and agreed to their promulgation'.[31] From this perspective, the law's fragmented nature – its lack of universality – would be overhauled through the elaboration of a general treaty and with the participation of all (and not only European) states.[32]

The discipline incorporated those counterpoints by stating that universality would be achieved through a combination of both the particular and the general, or, as Maxime-Emile Chauveau put it, through the conciliation of the 'particularist' and 'cosmopolitan' tendencies of international law.[33] International law would come about not only by specific treaties between sovereign states but also through the codification by professionals of (civilized) state practices. This is an idealist position which saw no contradiction but rather harmony between diversity and unity.

2.2. The period of confusion, 1914–1925: generalization and institutionalization as tools for achieving world unity

The First World War was narrated as a social breakdown, as a disruptive chaos, against which an enduring peace – through law – had to be constructed. At the same time, however, the war had also undermined the existing legal architecture, sweeping along the discipline's optimism. It became a commonplace for international lawyers to state that international law had failed because it had not ensured peace – before setting forth their own proposal for legal reform. One illustration of this is Cornelius Van Vollenhoven's proposal in his book, popular at the time, to replace 'traditional law' by 'humanist law'.[34] But it is above all Alejandro Álvarez's writings that exemplify the sentiment of anxiety and rethinking in the profession. 'Discredited' by the war, he said, international law was undergoing a 'real crisis' which made 'profound changes' imperative.[35] Although his dramatic tone was not universally adopted, many scholars pointed at rule-specialization as (at least partially) responsible for the war. They believed that the potential misuse of detailed

31 J. K. Bluntschli, *Le droit international codifié* (1870), 101–2.
32 C. Calvo, *Le droit international théorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens* (1870), v.
33 M. E. Chauveau, *Le droit des gens ou le droit international public* (1892), 32–3.
34 C. van Vollenhoven, *Les trois phases du droit des gens* (1919).
35 A. Álvarez, 'Préface', in K. Strupp, *Eléments du droit international public universel, européen et américain* (1927), vii–ix.

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and highly specialized treaties could be neutralized by the setting up of a universal institution, namely the League of Nations.

The sense of international institution-building as the antidote to war is axiomatic to literature following the First World War, the Second World War, and the wars of decolonization.[36] With regard to the period starting with and following the First World War, the establishment of an international organization was portrayed as the appropriate reaction to both war and the pre-war order. Post-1918 international law had to be an integrated system that would exclude tendencies towards fragmentation, both normatively and institutionally.

Global legislation became the antidote to the pre-war Hague system, which had failed not only because of entangled alliances and the absence of compulsory arbitration but also because of the overspecialization of its rules. Several authors located in this excessive specialization one of the causes of the war. In the early 1920s Antoine Pillet deplored 'the way in which rules have been drafted [at The Hague], especially the excessive details that were introduced into the text'.[37] Rules were too detailed, he argued, and thus their underlying objectives could not be achieved. His argument was based on a well-known critique of rules as opposed to standards: the virtues of precision involved the sacrifice of the objectives. Because formal rules were doomed, and because treaties were always subject to denunciation and reciprocity, the future of international law could not be sustained through further development of normative texts. International law needed to be composed of a small number of broad principles, and treaties should be 'reduce[d] to a handful of brief and clear formulas'.[38] His argument illustrates the discipline's insistence on abandoning the codification of rules and returning to a more informal law containing general principles. This anti-formalist stance was part of a larger narrative that labelled pre-war international law as formalistic and individualistic, held it responsible for the war, and argued for its replacement with modern law embodying social interdependence.

But who was to draft these general principles and supervise their application, and thus guarantee peace? There was a strong sense among European and North American authors that only an international institution could do so. For Paul Otlet, the universalization of international law and the maintenance of world unity could no longer be the mission of some (European) states; it entailed the establishment of a universal forum in which all states were to be represented. Only a 'society of nations' could legitimately decide 'what would be the world in the aftermath of the war' and elaborate an 'international constitution'.[39] Hence, with the League of Nations, the constitutionalization of international law was projected as the most appropriate response both to the old system hampered by European imperialism and to the war. International law could achieve its function of ensuring world peace

36 However much this sense could be criticized by both the 'idealist' and 'realist' positions. Kennedy has shown how narratives about the origin of international institutions rest on an ambivalent vision of war, of peace, and of the process by which war gives way to peace. See Kennedy, 'Move to Institutions', *supra* note 7, at 845.

37 A. Pillet, *La guerre et le droit* (1922), 133.

38 Ibid., at 138. The discipline departed from the previous mainstream (1870–1914), which had criticized natural law as being a set of excessively abstract (and therefore arbitrary) maxims.

39 P. Otlet, *Constitution mondiale de la Société des Nations. Le nouveau droit des gens* (1917), 5.

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only if it was endowed with a universal organization. Lassa Oppenheim's writing is illustrative of that sentiment: 'Any kind of an international law and some kind or other of a league of nations are interdependent and correlative.'[40]

At that moment the civilizing mission of Europe was no longer conceivable.[41] But if Europe could no longer speak in the name of the universal, should this voice necessarily be attributed to an international institution? Some disagreed. The League of Nations was denounced by a group of American extremists, wartime pacifists, and feminists, who, having initially advocated international institution-building, rejected the political compromises included in the League Covenant.[42] They denounced the League as reinforcing the old, nineteenth-century diplomatic system, as being grounded in national sovereign interests instead of democratic reform and social progress. On the French side, some right-wing authors shared their disappointment; in the end Paul Otlet and Charles Dupuis disapproved the Covenant, for it was unclear and devoid of an 'international spirit'.[43] Another dissident voice came from Latin American scholars, who argued that the war had moved the 'axis of civilization' from Europe to Latin America.[44] From now on, the task of creating international law belonged to their continent. The Brazilian author Manoel Alvaro de Souza Sa Vianna explained, 'Latin America has the difficult mission of creating a new corpus of international law' and not only of modifying the old system, which proved to be 'flexible, feeble, full of lacunae and contradictions, too often inspired by Roman formulae, unevenly applied and only through the war'.[45] In other words, the 'Pan-American School for the Reconstruction of International Law' did not simply have the task of reorganizing international law but of 'rewriting' it.[46] From their perspective, the fact that Latin America was present at the Paris Conference was a symbol of the new reality. The League of Nations merely ratified the new balance of power.

Besides these counterpoints, the mainstream applauded the creation of the League, for it was the unifying epitome that could keep state power in check. The universalization of international law could no longer be made material through the activities of some privileged states, but only through global legislation and an institution encompassing all states.

2.3. The period of consolidation, 1925–1939: neutralizing fragmentation through systemic approaches

Departing from Victorian tradition, the discipline exerted itself to explain how sovereign entities could be bound by a legal order through scientific or sociological approaches. It is well known that under the systems conceived by Hans Kelsen

40 L. Oppenheim, *The League of Nations and Its Problems: Three Lectures* (1919), 6.
41 M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', (2005) 16 *European Human Rights Law Review* 113.
42 See Kennedy, 'Move to Institutions', *supra* note 7, at 883–93.
43 C. Dupuis, 'Règles générales du droit de la paix', (1930-II) 32 RCADI 1, at 5.
44 M. A. Sa Vianna, *L'Amérique en face de la conflagration Européenne. Leçon inaugurale du cours de droit international public* (1916), 3.
45 Ibid., at 4–5.
46 See Álvarez, *supra* note 35, at x–xi.

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and George Scelle, the unity of all (general and special) norms were guaranteed by a founding element that was either an epistemological premise or sociological reality. Both presentations led to monism, with the primacy of international law over municipal law.[47] Most importantly, both authors systematized international law such that norms were structured in relation to each other. Legal norms and institutions were organized and co-ordinated through a precise and determined scheme.

International law became a coherent and unified system that entrenched sovereign equality between (politically unequal) states. Accordingly, there was no difficulty in admitting the predominance of special or regional norms at the international level; this was not a threat but a mere characteristic of the legal system.[48] Nor was it a problem to recognize the scarcity of international legal rules. Under the systemic vision, international law's normative and institutional pauperism was a technical issue that would vanish with time along the lines that national law had already traced out. This argument was formalized by, among others, Sir Hersch Lauterpacht through the doctrine of a gapless legal order.[49] For our purposes it suffices to stress that the completeness of international law altered the relation between the general and the special. Of course, international law remained 'mostly a particular law', given that general norms were 'quantitatively limited and substantively underdetermined'.[50] But international law's 'particularist character', as it was then called, no longer raised a problem, because general law was always 'there' behind special law. Erich Kaufmann explained that there was no real frontier between general law and special law: the special was part of the general, and the general was part of the special, given that it was 'its normative force, its living energy'.[51] This is why, in case of conflict, special law would prevail over general law as *lex specialis*.[52] In short, the fragmented nature of international law – that is, the scarcity of legal norms and their narrow scope of application – was no longer a problem because it was incorporated into and authorized by the system. Fragmentation could be controlled internally.

Some members of the discipline contested the idea that fragmentation could simply exist 'inside' an otherwise unified legal system. On the contrary, the importance of diversity/fragmentation prevented the establishment of any universal system as such. This counter-narrative was strongly conveyed by Alejandro Álvarez, who advocated the recognition of regionalism – and above all Latin America –

47 This primacy was the result of a political choice for Kelsen, whereas it was presented by Scelle as a natural consequence of the unity of social reality. See H. Kelsen, 'Les rapports de système entre le droit interne et le droit international public', (1926-IV) 14 RCADI 233; G. Scelle, *Précis de droit des gens* (1932–4), 349–64.

48 For Kelsen, 'norms of general international law are inferior in terms of number and importance as compared to local norms [including] norms of particular international law'. H. Kelsen, *Théorie générale du droit et de l'Etat* (1997) 327, at 374. Even the solidarist Scelle acknowledged the existence of 'particular international legal orders', since these orders were 'conditioned and absorbed by larger international legal orders (international regionalism), these larger orders being themselves part of the global international legal order'. G. Scelle, 'Règles générales du droit de la paix', (1933-IV) 46 RCADI 327, at 343.

49 H. Lauterpacht, *The Function of Law in the International Community* (1933), 70–84.

50 D. Anzilotti, *Cours de droit international* (1929), 90.

51 E. Kaufmann, 'Règles générales du droit de la paix', (1935-IV) 54 RCADI 309, at 314.

52 And this without exception. A. Cavaglieri, 'Règles générales du droit de la paix', (1929-I) 26 RCADI 311, at 330.

as the main source of progress for international law. Those who believed in the 'universality of all of the principles of international law', he asserted, did not sufficiently appreciate its evolution.[53] His arguments were said to emanate from a 'realist analysis',[54] which demonstrated that international law was composed of particular law only. Fragmentation was the only social reality. He received the support of other proponents of international law reform such as Karl Strupp, for whom 'the codification of public international law [could] only be done fragmentarily, taking into account the differences that exist between different legal groups'.[55] Thus these authors seized the language of fragmentation to contest the mainstream narrative and to underscore the contributions made by non-European continents to international law, 'away from the decadent forces of Europe'.[56] For them, only if international lawyers took into account regional laws would a universal cosmopolitan international law eventually emerge. Instead of being a simple feature of the legal system, fragmentation was international law itself.

While the discipline largely dismissed Álvarez's call for fragmentation as 'exaggerated',[57] Louis Le Fur responded at greater length. In the light of what he saw as the 'proliferation of regional (American, Asian, Soviet, Muslim . . .) regimes', he expressed in 1933 a fear of fragmentation in strikingly modern terms:

> If each of these regimes had a distinct international existence, with its own specific rules, wouldn't this give rise to the coexistence of several international laws and thus a rupture of international law's unity . . .? Wouldn't this separatism be worsened if each regime had not only its own rules but also its own organs? Wouldn't there be scission, fragmentation of international law?[58]

Viewed in the broader cultural and historical context, Le Fur's anxiety epitomized the increasingly morose atmosphere in France in the 1930s, fed by a cultural sensitivity to fragmentation.[59] Indeed, the questioning mode and the anxious mood of his writing indicated the urgency of the situation as well as the necessity for an alternative response. Central to his demonstration of international law's unity was a distinction between what he called 'unity principles' and 'application details'. There existed a number of fundamental principles common to all regional laws – and they were the founding principles of international law – whereas divergences only concerned

53 He claimed to be breaking with 'the traditional conception of the universality of legal rules' that he now labelled 'formalism'. In the 1930s he did not speak of a 'civilizing mission' that belonged to Latin America (as he did previously). See, e.g., his *La codification du droit international, ses tendances, ses bases* (1912).

54 See Álvarez, *supra* note 35, at x–xi.

55 Strupp, *supra* note 35, at 21.

56 C. Landauer, 'A Latin American in Paris: Alejandro Álvarez's *Le droit international américain*', (2006) 19 LJIL 957, at 958.

57 See in particular A. Bustamante y Sirven, *Droit international public* (1934), 33; and P. Fauchille, *Traité de droit international public* (1921), at 21.

58 L. Le Fur, *Précis de droit international public* (1933), at 303.

59 Le Fur's anxiety echoed that of his contemporaries such as Paul Valéry, who depicted France in 1932 as subject to 'a number of incompatible forces, none of which [could] either win or lose. Never [had] humanity linked so much power with so much disarray, so much anxiety with so many playthings, so much knowledge with so much uncertainty'. For a thorough analysis see E. Weber, *The Hollow Years: France in the 1930s* (1995). In art, the post-1914 disillusion and sense of chaos were forcefully expressed by Dadaism, using primitivism to represent the fractured world. See C. Sweeney, *From Fetish to Subject: Race, Modernism, and Primitivism, 1919–1935* (2004).

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the actual application of specific rules. Arguably, Le Fur's response fitted into the 'modernist' approach to international law that emerged during the inter-war era, for he saw international law as a juxtaposition of regionalism and universalism.[60] He viewed regionalism and universalism as both opposed and yet crucial to one another – even though, at the end, regionalism had to align itself with universal principles in order to create an effective international law. For the only other 'alternative [was] despair'.[61]

With Germany's withdrawal from both the 1930 codification conference and the 1932 disarmament conference (and hence the failure to produce general treaties), and conversely with the successful conclusion of special treaties on arbitration and mutual assistance between Germany and other states, the issue of 'compatibility between contradictory legal norms'[62] appeared in doctrinal writings. In 1932 Charles Rousseau signed a precursory article in which he addressed what he called the 'most difficult' problem arising at the time: compatibility between collective treaties (the League Covenant) and special treaties.[63] He stressed the lack of any predetermined solution: different legal techniques could resolve a conflict differently, so the *lex specialis* rule could not be systematically privileged. Similarly, Jules Basdevant devoted in his course at The Hague Academy in 1936 an entire section to the relations between the general and the particular. Openly opposed to 'cutting international law into pieces',[64] he went through the practice of identifying general norms binding on all states. He also elaborated a long response to his question, 'can a rule made by a small legal community (whose members are part of a larger community) derogate from a rule pertaining to the larger community?'[65] By answering in the negative, he made the point that the *lex specialis* rule was 'not of great help'[66] in deciding how to resolve a conflict between a general norm and special norm having the same subject matter. His hesitation shows that the prevailing formalist position, according to which the system could contain – and thus confine – fragmentation, seemed less and less self-confident in the face of political events.

On the eve of the war the fear of normative and institutional fragmentation intensified. With the expectation of catastrophe in the air, most scholars continued to address and argue for world unity in formal legal terms.[67] Examining the issue of conflicts between collective treaties and particular treaties, Robert Redslob offered in 1937 an unequivocal solution: 'collective treaties always prevail over particular

60 In the face of Álvarez's strong definition of regionalism, Le Fur's response is marked by a mixture of desire and terror (the latter being prominent) similar to the field's attitude towards nationalism in the inter-war period. See N. Berman, '"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law', (1993) 106 *Harvard Law Review* 1792.

61 Ibid., at 1793, quoting T. S. Woolsey on the rights of minorities under the Treaty with Poland.

62 C. Rousseau, 'De la compatibilité des normes juridiques contradictoires dans l'ordre international', (1932) RGDIP 132, at 132.

63 Ibid., at 151.

64 J. Basdevant, 'Règles du droit de la paix', (1936-IV) 58 RCADI 492.

65 Ibid.

66 Ibid., at 493.

67 There were some, however, like Joseph Barthélemy, who criticized the field's 'excesses in abstract legalism' and its tendency to prefer uniform or general rules over the 'reality'. Nevertheless, these denunciations seem to have remained in the background. J. Barthélemy, 'Politique intérieure et droit international', (1937-I) 59 RCADI 421, at 442.

treaties'.[68] His distrust of *lex specialis* and corresponding faith in *lex generalis* are illustrative of the late 1930s mainstream discourse that condemned the conclusion of particular treaties on the grounds of their negative institutional impact. The greater the number of special treaties that were concluded, the less the League was perceived to be responding to national interests. And as the League became more and more fallible, the plea for further institutional integration became more and more pressing. In a somewhat desperate tone, Redslob pleaded for political unity through further institutionalization and constitutionalization of international law. He denounced the intrusion of ideology and politics into the League, a problem that he attributed to the League's incomplete (legally primitive) character.[69] He also supported the creation of other organizations in order to achieve 'world federalization'.[70] International institutions were the vehicles of federalism and the instruments against fragmentation.

In the end, the formal presentation of international law as an autonomous and constraining system was vulnerable not only to theoretical criticism but also to world events. This 'utopian' structure 'based on the concept of the harmony of interests'[71] collapsed with the outbreak of the Second World War. To think that some unifying teleology or 'the indefatigable repetition of magic formulae'[72] could contain diversity/fragmentation was a chimera.

2.4. The period of confusion, 1939–1960: fragmentation as the mirror of a divided world

The powerlessness of international law in the face of the atrocities committed during the Second World War impeded the simple resuscitation of the League of Nations. But at the same time there was no great movement to reject or rethink international law and organization. The establishment of the United Nations took place as a pragmatic necessity. It was described as a revised version of the League, as a more realistic system. Although the League was treated as having failed, its ideals were considered to have inspired and integrated into the UN system.[73]

Previous arguments about the desirability of an autonomous law were replaced by arguments about the desirability of a law embedded in politics – that is, in diversity. Only in this way would international law be responsive to world events without giving up its ultimate unifying objective. Such a turn to legal pragmatism accompanied by a humanistic ethos is visible in narratives told by the discipline about the UN Charter. Any statement that the Charter was the 'benchmark of the

68 R. Redslob, *Les principes du droit des gens moderne* (1937), 19. This idea was also expressed by Fauchille, *supra* note 57, at 301.

69 At that time, narratives about the League tended to differentiate its early days from its later days, considering the League to be successful until emasculated by power politics. See Kennedy, 'Move to Institutions', *supra* note 7, at 876–7.

70 Redslob, *supra* note 68, at 285, 289.

71 E. H. Carr, *The Twenty Years' Crisis 1919–1939: An Introduction of the Study of International Relations* (1939), 62.

72 H. Morgenthau, 'Positivism, Functionalism, and International Law', (1940) 34 AJIL 260.

73 Hence, the ICJ is as commonly described as the PCIJ's successor, whereas the PCIJ was thought to be related to the Hague system but not to have succeeded it. See Kennedy, 'Move to Institutions', *supra* note 7.

international public order',[74] the 'fundamental constitution . . . of the international community',[75] or the 'source of inspiration for future progress'[76] was immediately followed by another statement emphasizing that the 'crisis' caused by the division of the world into two blocs and the immoderate use of the veto within the Security Council were 'also part of the reality'.[77] The Cold War – conveniently – explained why a full realization of international hopes had not yet materialized. This narrative was strengthened by the language of fragmentation.

Indeed, in this atmosphere of retrenchment, the sense that international law could not fulfil its potential because of politics was frequent among international lawyers. It is well illustrated by Lauterpacht's depiction of the 1948 Universal Declaration of Human Rights as 'deceptive'.[78] In his eyes, the Declaration was a failure because its provisions were too general, no implementing mechanisms were included, and it even lacked a legal character. At the same time, the sense that international law was limited by politics came with a corollary idea, namely that international law would in fact be able to resolve political tensions if it were endowed with more sophisticated mechanisms.[79] Hence the problem was that international law was not developed enough or, as Emile Giraud put it, was still 'incomplete and fragmentary'.[80] Similarly, Paul Reuter considered that 'the international legal order is insufficiently developed to resolve problems facing the international society'.[81] On one hand, they saw the prospect of legal progress jeopardized by the political state of affairs. On the other, the repeated failure to achieve any substantial progress was also blamed on the primitive or fragmented character of international law. Only a simultaneous affirmation of political constraints and legal underdevelopment could maintain the image of a distinctively legal system, together with the constant call for 'more' law.

Some US and Soviet authors went a step further and questioned the existence of a single unified system. For one sceptical American writer, the antagonism between the great powers cast doubt on the idea of international law as a 'single, universally valid legal system': being confronted with 'German Nazis and Communist Soviets, the universal validity of international law appears no longer as an existing phenomenon . . . but as a debatable assumption'.[82] Early Marxist conceptions also challenged the unifying ambition of international law, arguing that there were 'three systems of international law: one for the capitalist system, one for the socialist system, and finally one for the relations between the two systems'.[83] In comparison, the European

74 H. Rolin, 'Les principes de droit international public', (1950-II) 77 RCADI, at 434.
75 H. Waldock, 'General Course on Public International Law', (1962-II) 106 RCADI 1, at 28.
76 C. de Visscher, 'Cours général de principes de droit international public ', (1954-II) 88 RCADI 445, at 454.
77 Ibid., at 469.
78 H. Lauterpacht, *International Law and Human Rights* (1950), 421.
79 For a particularly dramatic tone, see J. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision', (1951) 45 AJIL 37. The fact that international law was marginal to power proved the urgency of its renewal.
80 E. Giraud, 'Le droit international public et la politique', (1963-III) 110 RCADI 419, at 580.
81 P. Reuter, 'Principes de droit international public', (1961-II) 103 RCADI 425, at 491.
82 K. Wilk, 'International and Global Ideological Conflict: Reflections on the Universality of International Law', (1951) 45 AJIL 648.
83 K. Grzybowski, *Soviet Public International Law: Doctrines and Diplomatic Practice* (1970), 15. Similarly, shortly after the creation of the United Nations, Serge Krylov made it clear that the Soviet Union rejected the idea of a global law or the presentation of the United Nations as a super-state, for it let the control of the world to

scholars adopted a more formalist position by recasting the debate about universality into the classical (systemic) dichotomy 'general/particular'. If Gerald Fitzmaurice emphasized the threat posed by regionalism and derogatory rules to the 'unity and uniformity of international law', this was only to make a better case for strengthening the latter.[84] Even Charles de Visscher framed the question in such limited terms as 'can superpowers agree on common rules and categories?' He did not question the existence of a unified system; he blamed world politics for having led to an increased number of specialized rules and individualized solutions, at the expense of general rules and procedures. Hence his condemnation was limited to saying that political instability 'ma[de] it difficult to create general rules'.[85] Similarly, for him the main problem for the ICJ was its incapacity to establish 'a clear typology of international situations from which to derive general rules, such rules being necessary to create legal security and to ensure states' confidence in the administration of justice by the judge'.[86] Unity through generality.

The discipline was preoccupied with the following question: in the light of ongoing political tensions and the limited role played by international courts, how could we have an effective international law? The answer lay neither in codification by professionals (as in 1870), nor in multilateral treaty-making (as in 1919), but in the elaboration of broad principles based on majority consensus. The administrative branch received more attention through the development of UN specialized agencies.[87] For Quincy Wright, these agencies could address the law's main problem, namely the absence of adequate procedures for it to transform itself in a rapidly changing world. International lawyers, he said, should give more weight to UN General Assembly resolutions and give more importance to general principles. International law needed 'a firm but flexible framework'.[88]

The sense that administrative agencies (with the help of anti-formal standards and soft law) could contribute to the unity of international law was built on the perceived impasse at both legislative and adjudicative levels. In the early 1950s Clarence Wilfred Jenks explained that, given the lack of a general legislative body, 'law-making treaties [were] tending to develop in a number of historical, functional and regional groups, which are separate from each other and whose mutual relationships are in some respect analogous to those of separate systems of municipal law'.[89] But whereas the political state of affairs had led to an increasing number of integrated treaty regimes (fragmented legislation), its impact on the judiciary was more disturbing. Because of world politics, courts had rarely been used. Humphrey Waldock stressed that states still preferred to resolve their problems through political means

capitalist states and was contrary to the notion of sovereignty. S. B. Krylov, 'Les notions principales du droit des gens (La doctrine soviétique du droit international)', (1947-I) 70 RCADI 435.

84 G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', (1957-II) 92 RCADI 95.

85 See de Visscher, *supra* note 76, at 271.

86 R. Kolb, *Les cours généraux de droit international public de l'Académie de La Haye* (2006), 286.

87 See, e.g., the study of J. Sulkowski, 'The Competence of the International Labor Organization under the United Nations System', (1951) 48 AJIL 286.

88 Q. Wright, 'The Strengthening of International Law', (1959-III) 98 RCADI 1, at 289.

89 C. W. Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 *British Yearbook of International Law* 401, at 403.

rather than judicial techniques. 'In general', he concluded, 'the judicial process has stood still . . . The regular and effective functioning of the judicial process in any community is the result rather than the cause of stable political conditions.'[90] The mainstream argued in favour of administrative agencies precisely on the grounds of the judiciary's limited role in the case of sensitive 'political' issues that fell outside the Court's jurisdiction.[91] Because this was seen as a major issue defining adjudication, it became frequent for lawyers teaching at The Hague to distinguish 'political' questions from 'legal' ones.[92]

Such distinction seemed vain for an eclectic group of authors composed of Kelsen,[93] Lauterpacht,[94] and Hans Morgenthau. This last rejected the distinction between the 'legal' and the 'political' on the ground that it was impossible to predetermine what constituted a political question.[95] Hence he would agree with Kelsen and Lauterpacht that the bipolar world did not lead to the splitting up of international law – but, of course, for a different reason. That is, not because international law was formally or materially complete, but because it was merely an instrument available to decision-makers (and not some sort of autonomous system binding upon them). International law is 'a primitive type of law' precisely because 'where there is neither community of interest nor balance of power, there is no international law'.[96] This is the sceptical position, for which the problem is neither the unity nor the coherence of international law (or the lack thereof), but international law itself. For the realists, fragmentation was synonymous with explosion – clearing the ground for international relations.

2.5. The period of confidence, 1960–1989: fragmentation as an instrument for the 'common law of mankind'

Besides and in response to the realist critique, many scholars called for a new social morality to constrain decision-makers. They did so by stressing the unprecedented dynamism of international law, which evolved towards what Jenks termed a 'common law of mankind'.[97] Repeating much from previous periods of confidence and renewal, the discipline saw (once again) the role of international law 'as building a bridge between a past and present of sovereign autonomy on the one hand, and a

90 H. Waldock, 'General Course on Public International Law', (1962-II) 106 RCADI 1, at 120.
91 R. Lawson, 'The Problem of the Compulsory Jurisdiction of the World Court', (1952) 46 AJIL 219.
92 See, e.g., Wright, *supra* note 88, at 223–59; and W. W. Bishop, 'General Course of Public International Law', (1965-II) 115 RCADI 151, at 172.
93 Kelsen's outright rejection of legal gaps was based on the presumption of states' residual liberty. Any dispute could be resolved by international law if state parties so desired. H. Kelsen, 'Théorie du droit international public', (1953-III) 84 RCADI 175.
94 Lauterpacht refuted the distinction between legal and political disputes, considering the legal system to be materially (and not formally) complete. International judges could always resort to contextual standards or other considerations to resolve a case. Because he believed (his) judicial practice to be a privileged instrument for order and justice, he argued that the law's unity would be ensured not so much by UN administrative bodies as by the judicial profession. H. Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law', in *Symbolae Verzijl* (1958), 196. He had already formulated this argument in *The Function of Law in the International Community* (1933), 245–345.
95 See O. Jütersonke, 'Hans J. Morgenthau on the Limits of Justiciability in International Law', (2006) 8 *Journal of the History of International Law* 181.
96 H. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (1948), 295–6.
97 C. W. Jenks, *The Common Law of Mankind* (1958). See also Bishop, *supra* note 92.

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present and future of international community on the other'.[98] In achieving world unity, diversity/fragmentation returned to being a positive phenomenon.

Indeed, the mainstream worked to develop an international legal order that would reconcile East and West, and North and South, and build a global community that would address issues of development, decolonization, and human rights. Their agenda was best summarized by Wolfgang Friedmann's formula about the move from a 'law of coexistence' to a 'law of co-operation'.[99] By focusing on the diversification of rules, procedures, and institutions, they hoped to make law a technically sophisticated tool managing the tension between sovereignty and community in favour of the latter. This project, which largely recalled those of Chauveau in 1892 and Van Vollenhoven in 1919, was endorsed by internationalists in the United States and elsewhere.[100]

Unlike their post-war predecessors, the mainstream applauded fragmentation (now described as diversification), as it was serving the transition from traditional law to community law. In the late 1960s Friedmann explained that international law could no longer be regarded as 'one body of principles': it was composed of 'various patterns and levels of international legal relations, which are only to a limited extent governed by the same principles'.[101] That those principles could be contradictory only showed the law's dependence on social facts and its sensitivity to political disputes; they nevertheless contributed to the same movement towards cosmopolitan unity. In other words, normative and institutional specialization did not jeopardize but rather buttressed the transformation of international law. Friedmann spoke highly of specialized and regional institutions because he saw them playing a central part in that process; they were 'the world's most important laboratory in the gradual transition from multinational arrangements to a common constitutional order'.[102] Closely knit regional groupings such as the European Community could act as 'pioneers' in changing international law.[103]

What was the best mechanism to achieve co-operative law – that is to say, world unity? Echoing the 1870 mainstream narrative, the Columbia school and its supporters rehabilitated treaties as the most suitable source. For Friedmann as well as for Paul de Visscher, it was 'obvious that, in the fast-moving, articulate and complex international society of today, treaties increasingly replace customs as the principal source of international law'.[104] But treaties were also imperfect because of the sovereignty principle: the wider their scope or the more universal their objective, the greater the difficulty in securing everyone's consent. As a result, they said, 'universal international legal standards' would mainly be set through the conclusion of bilateral treaties.[105]

98 See Kennedy, 'When Renewal Repeats: Thinking against the Box', *supra* note 7, at 365.
99 W. Friedmann, *The Changing Structure of International Law* (1964).
100 C. Leben, 'The Changing Structure of International Law Revisited: By Way of Introduction', (1997) 8 EJIL 399.
101 See Friedmann, *supra* note 99, at 367.
102 Ibid., at 114.
103 Ibid., at 367.
104 Ibid., at 122. Also P. de Visscher, 'Cours général de droit international public', (1972-II) 165 RCADI 79.
105 Friedmann, *supra* note 99, at 125. Here again, universality would be achieved through speciality.

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At the same time another group of scholars – often lawyers and diplomats coming from Third World countries and trained in Europe – considered that treaty codification was only partly beneficial and that, from a qualitative point of view, UN resolutions were more important. Among the most notable proponents of this stance were Mohammed Bedjaoui and Georges Abi-Saab, who argued that General Assembly resolutions amounted to 'new custom': they might not have formal legislative effect, but they were nonetheless authoritative because of their relevance, ascertainable content, and democratic legitimacy.[106] With this argument, Third World scholars defended the series of proposals that had been put forward by newly independent states through the UN General Assembly, brought together as the call for a 'New International Economic Order' (NIEO).[107]

Third World discourse is better understood as an exception rather than a counterpoint to the mainstream. Not only was the NIEO programme articulated in the mainstream vocabulary of sources, rules, and institutions, but also – and more decisively – Third World scholars did not challenge the Columbia school's vision. On the contrary, they often looked at the writings of legal thinkers such as Friedmann for inspiration. The reason for considering Third World discourse as an exception is this: we know that the NIEO combined a commitment to national autonomy and formal sovereignty (diversity) with a call for more solidarity and resource-sharing (unity).[108] Because of this internal contradiction, it could not easily be subsumed under co-operative law, for the whole purpose of co-operative law was to depart from all that was associated with 'formalism'. Indeed, Friedmann had distinguished between antiformal and social vs. formal and individualist; he had called them the laws of 'co-operation' and 'coexistence', and had consigned them to different spheres.[109]

To put it differently, Third World scholars did not link argumentative patterns (such as unity/diversity) with political positions, but rather played with them in pursuing their specific project. In the environmental debate, for example, R. P. Anand argued simultaneously on the grounds of diversity (with the idea of 'common but differentiated responsibilities') and unity (stating that environmental interdependence proved other forms of interconnectedness – in particular, a shared responsibility to ensure Third World development) in order to advance the Third World cause.[110] Like the Columbia scholars, he defended the idea of a unified international law, but unlike them he advocated a unified law that would openly favour his interests: 'yes'

106 G. Abi-Saab, 'Cours général de droit international public', (1987-VII) 207 RCADI, at 173. M. Koskenniemi, 'Repetition as Reform: Georges Abi-Saab, Cours Général de droit international public', (1998) 9 EJIL 408. M. Bedjaoui, *Towards a New International Economic Order* (1979) 9, at 138.

107 Launched in the 1970s, the NIEO represented 'the culmination of a decade-long process of attempting to articulate an alternative to the mainstream approach to the international economic system'. K. Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', (1998) 16 *Wisconsin International Law Journal* 353, at 365.

108 See, e.g., C. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993), 9.

109 Each had their domain: coexistence between the First and Second Worlds, co-operation in the Third; coexistence for peace and security, co-operation for development and economy, etc. D. Kennedy, 'The "Rule of Law", Political Choices, and Development Common Sense', in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006), 120.

110 R. P. Anand, 'Development and Environment: The Case of the Developing Countries', (1980) 24 *Indian Journal of International Law* 1.

for unity, he might have said, but 'on our terms'! It is striking that, in their protest, Third World scholars did not seize the language of fragmentation. They adopted a more conciliatory position; their aim was to reform international law and not radically to transform it.[111] Yet the deradicalization of their project shifted attention from distribution issues to 'basic needs',[112] and to interminable discussions about the theoretical coherence of the 'right to development'.

Meanwhile, the mainstream incorporated the Third World discourse by celebrating the 'extension of international law to the new areas of economic and social co-operation':[113] the 'new international law' had to go beyond formal diplomacy to cover issues such as welfare and health and to include non-state actors such as individuals and transnational companies. That this expansion was to be achieved through novel and derogatory mechanisms (and not through traditional ones) was an important aspect of the mainstream project. One illustration is, of course, the human rights movement, which emerged as a critique of classical international law's failure to fulfil a desired social objective – to protect individuals.[114] Special mechanisms were seen as positively advancing non-traditional interests and giving effect to communal values.

In the United States, beyond their divergences both the Columbia and Yale schools agreed that there was some sort of emerging law which, contrary to classical law, was facilitative and goal-oriented, expressive of community objectives that could be articulated in principles of some kind.[115] A famous critique of this vision came in the early 1980s from Prosper Weil, who expressed concern about the graduation and dilution of normativity through *jus cogens* and soft law.[116] He was also concerned with developments in the fields of human rights and international trade, which had begun, he said, to institutionalize in something like independent international realms, to be managed in accordance with specific needs. These new vocabularies induced international lawyers, he asserted, 'to replace the vision of a single and unified international law with the image of a constellation of more or less autonomous disciplines, each one possessing specific features that would distinguish it from

111 There were obviously disagreements regarding the appropriate strategy; Third World proponents debated whether the problem was inequality of bargaining power or a more profound structural bias, whether procedural solutions were adequate or not, and so on. Nevertheless, in broad terms the NIEO programme was a compromise between moderate and radical visions – and it was understood as such by both proponents and opponents.

112 In the 1970s the 'basic needs' strategy was endorsed by the World Bank, the ILO and other agencies. See, e.g., Report of the Director General of the ILO, *Employment and Basic Needs: A One-World Problem* (1976).

113 C. Fenwick, 'International Law: The Old and the New', (1966) 60 AJIL 475, at 481.

114 Another example is the law of development promoted by René-Jean Dupuy, whose 'situational logic' differed from the 'universal logic' of traditional international law. Traditionally, he explained, international law did not prescribe derogative rules for Third World countries, although their situation often required it. By contrast, development law was premised on the idea that unequal situations required different treatments, and this could only be done through 'individualized, differentiated and concrete rules'. R.-J. Dupuy, 'Communauté internationale et disparités de développement', (1979-IV) 165 RCADI 9, at 125.

115 For the Yale school's positions on issues related to fragmentation, see especially M. McDougal and H. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order', in M. McDougal (ed.), *Studies in World Public Order* (1960), 13–18.

116 P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 AJIL 413.

an international law called "general" only to dissimulate its residual character'.[117] He rejected the mainstream's vision of the changing nature of international law: international law had no 'identity crisis', as it remained a unified system based on a single logic – state sovereignty. Hence diversification/fragmentation did not exist.

Albeit radical, his critique was the precursor of an emerging literature paying attention to the development of special normative regimes, described in 1985 as 'self-contained' in order to emphasize their operation outside general international law.[118] In 1988 Ian Brownlie denounced

> the tendency to fragmentation of the law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as 'international human rights law' or 'international law and development'. As a consequence the quality and coherence of international law as a whole are threatened.[119]

Some years earlier in France, Louis Dubouis (a future specialist in EC law) had warned his colleagues at the annual meeting of the Société française de droit international that international law was being 'fragmented' through the emergence of regional systems. He expressed scepticism towards the normative faith invested in them, because it was not clear whether those subsystems participated in the founding of a new, progressive law. In the end, as he pragmatically concluded, whether fragmentation was 'positive' depended on the motives 'behind' formal justification.[120]

These critiques had little impact on the bulk of professionals, who wanted to work immediately on creating a new world order and knew how to proceed. As part of their programme, they advocated a more intrusive role for the judiciary: 'international law . . . cries out for judicial creativity to fill the many gaps or clarify the many uncertainties of a patchy and vague system'.[121] Yet this call for judicial activism targeted specific institutions: as Friedmann made clear, the development of co-operative law would be the fruit not of the permanent world court (given the numerous jurisdictional reservations and the court's frustrating 'judicial caution'[122]), but of others, including mixed claim commissions and ad hoc judicial bodies. The proliferation of tribunals, as well as rivalry and politics among judicial institutions, were seen in a positive light because they would challenge embedded biases and advance the cause of co-operative law.

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117 P. Weil, 'Le droit international en quête de son identité. Cours général de droit international public', (1992-VI) 237 RCADI 90.

118 B. Simma, 'Self-contained Regimes', (1985) 15 *Netherlands Yearbook of International Law* 111.

119 I. Brownlie, 'The Rights of People in Modern International Law', in J. Crawford (ed.), *The Rights of Peoples* (1988), 15.

120 At the 1977 annual meeting, he introduced his talk on the 'impact of complex regional systems on the overarching structure' by stating that 'every regional system leads to the fractionalizing of the international legal order'. Thus the question was not whether fragmentation was formally possible but whether 'it served or hindered the progress of international law'. This question could not be answered in the abstract because it depended on state practice: what would they privilege and to what ends? States could very often justify their actions on the basis of both universal law and regional law. L. Dubouis, 'Les rapports du droit régional et du droit universel', in Société Française pour le Droit International (SFDI), *Régionalisme et universalisme dans le droit international contemporain* (1977).

121 See Friedmann, *supra* note 99, at 142.

122 Ibid., at 143–54.

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2.6. The period of confusion: 1989–today: fragmentation as disenchantment

It was precisely this call that was challenged by ICJ presidents at the turn of the millennium, triggering the latest fragmentation debate.[123] As is well known, they expressed anxiety over a fragmented dispute-resolution environment, with different tribunals able to rule on overlapping areas. Although it is striking that, of all aspects of global transformation, it was the jurisdictional issue that became a privileged topic for scholarly discussion, it is also indicative that a seemingly deeper functional differentiation has set in – while it has become extremely hard to take with full seriousness reform proposals.

Traditionally, and up to the Second World War, international adjudication was understood to be a relatively formal and centralized activity. It is now perceived as a wide range of activities and institutions, some being more politically active than others. Nobody doubts that the proliferation of tribunals has generated new issues such as forum-shopping and conflicting jurisprudences. Nonetheless, the universalist solution framed in terms of coherence and unity – the establishment of a normative and/or institutional hierarchy – seems outdated, if not anachronistic. This is because the spiral-like movement in which periods of enthusiastic reform are followed by periods of disillusionment and retreat, and in which yesterday's counterpoint becomes today's mainstream, does not return to the same starting point. Each period conserves something of the memory of its predecessor, consisting of internalized assumptions and fallback positions.

The same could be said vis-à-vis the pluralist position. The 1960–89 project of a mature law emerging to govern a pluralist society has largely failed. There is no more Cold War to accuse of responsibility for the fact that this new international law has not yet come to full realization. And still, alongside the collapsed image of a unified structure governed by the United Nations, legal differentiation has continued, unshakably. For a moment, international lawyers may have thought that if international criminal law or EC law were doing so well, it was precisely because of their 'special' (and not derogative) character. But this mindset cannot last very long, and it has become increasingly clear that faith in legal differentiation cannot return to its golden years. The point is not only that each regime faces a minority challenge internally, but also that the ways in which regimes relate to each other are not as harmonious as the pluralist position would wish. On the contrary, differentiation works through struggles 'in which every purpose is hegemonic in the sense of seeking to describe the social world through its own vocabulary so that its own expertise would apply and its structural bias would become the rule'.[124]

In the light of the unsatisfactory results of both universalist and pluralist programmes, international lawyers – especially in Europe – have sought to combat the fragmentation of international law through the vocabulary of constitutionalism. They interpret the world as already constituted, so that unity and diversity

123 Address by Judge Gilbert Guillaume, president of the ICJ, to the UN General Assembly, 26 October 2000. See the previous address by Judge Stephen M. Schwebel, president of the ICJ, on 26 October 1999. The speeches of the Presidents of the ICJ can be found on the Court's website at www.icj-cij.org/icjwww/ipresscom/iprstats/htm (last visited 1 May 2008).

124 M. Koskenniemi, 'International Law', *supra* note 8, at 7.

are held together in constitutional terms. The sceptics are right in pointing at the dangerous, slippery slope of constitutionalism, for there is no single political international society nor a world constitution agreed upon: is it the UN Charter, the World Trade Organization (WTO), or the European Convention on Human Rights? Who should decide? Yet the sceptical position is also problematic, as it considers the fragmentation debate to be a red herring. Indeed, if the opposition between unity and diversity, as has been argued here, is part of international law's identity, then the sceptical position amounts to dismissing international law itself. The immediate problem with scepticism is its reliance on an external point of view: it escapes the opposition between unity and diversity only momentarily before it sets out another reconceptualization of it.[125]

So where do we stand today? Given the valid criticisms formulated by each position vis-à-vis the others, it appears more and more difficult for international lawyers to stay firmly grounded in any of them. This explains the disciplinary movement towards a middle position – a position which would manage the tension between unity and diversity without falling into the utopias of those who see the world in terms of unity or into the apologies of those who focus on its diversity. But because the four positions (universalist, pluralist, idealist, and sceptic) are logically exhaustive, there is no space between them and the middle position cannot stop falling back on them. As it tries to avoid staying too long in any of their territories, the middle position is an ad hoc position. It emphasizes the contextuality of each solution while remaining convinced that, somehow, everything will turn out just fine. In the end, this type of unreflective pragmatism leads the scholars to think of fragmentation as being a relatively marginal phenomenon. After all, there have been very few cases of open contestation among international tribunals. So why make it such a big deal?

3. The politics of fragmentation

Let us go back to the two initial narratives for a moment. The cosmopolitan narrative attempts to reconcile unity and diversity by understanding diversity as unity. As we know, this position was criticized by the realists, who attacked the idea of an already united world progressing towards further integration as naïve sociology and as a theory of 'privileged groups'.[126] But the realist vision of the international world and its evolution is also normatively grounded. That the world's condition rests on heterogeneity of interests means that relations between states operate through a complex balance of power – that balance playing a role, in the end, very similar to that of an invisible hand. To no one's surprise, the pretension that the 'eternal laws of power' can explain two millennia of world history has been identified as hidden idealism in orthodox realist theory.[127] This is the criticism the

125 See for instance B. Kingsbury and N. Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', (2006) 17 EJIL 1.
126 See Carr, *supra* note 71.
127 J. Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (1994), ch. 1.

cosmopolitan narrative lodges against the counter-narrative: it aims to reconcile unity and diversity by privileging diversity, but diversity makes sense only under some unifying principle.

The result is that each narrative falls on the other. And because they do so, neither of them can be privileged unless we know or agree on the kind of unity and diversity at which we are aiming. Obviously, there is no such agreement in today's world: the possibility of a debate on fragmentation presupposes that people disagree on how the tension between unity and diversity is and should be managed. And yet the discipline has declined to enter into the discussion since it would require establishing priorities between different political ideals. Instead, it has integrated the two narratives as controlling conditions for any project proposal: an acceptable world order is one which can promote unity without falling into totalitarianism and provide for diversity without degenerating into total anarchy.

However, one could argue that this pragmatic compromise turns out to be even more problematic. It suggests that it is possible to incorporate both narratives in such a way that they would somehow neutralize each other, cancel each other out, and ensure objectivity. In fact, the fundamental political disagreement that opposes them has not disappeared – but has become illegitimate.[128] The reason is this: it has become difficult, due to the realist critique, to defend any project based on material conceptions of unity and diversity. This argumentative pattern is still used, but only in a formal way, without regard to the ethics or ethos defended by either narrative. This is the only way – so the argument goes – that international law does not privilege one's preferred substantive view. The problem with such disincarnated notions of unity and diversity is that they may work well as rhetoric (who isn't in favour of unity? and diversity?) but they cannot be applied without their content being known. Yet their content can only derive from a particular vision of the 'good' that will render the project vulnerable to criticisms of both totalitarianism and anarchy.

This difficulty was glaringly obvious with the NIEO – and fatal to it. We have seen that, for it to be an acceptable legal project in the first place, Third World scholars had to argue on the grounds of both unity and diversity. However, this not only made it possible to support the NIEO from both narratives, it also made the NIEO vulnerable to criticism from both. Take the NIEO proposal for nationalization. Third World scholars could support it with an argument based on either unity (it bridges 'the economic gap between developing and developed countries'[129]) or diversity (it is an exercise in sovereign autonomy). And yet their opponents could criticize it equally in terms of unity (it is a harmful form of economic collectivism) and of diversity (it is a breach of contractual obligations and thus a violation of sovereignty). Hence the disagreement between Third and First World projects could not be settled without taking a stand in the political conflict. In order *not* to do so, one of international law's shunning or exit strategies was to incorporate Third World claims through the

128 This argument is developed by Koskenniemi, *supra* note 15, ch. 7.

129 Charter of Economic Rights and Duties of States, General Assembly Resolution 3281 (XXIX), UN Doc. A/RES/29/3281, 1974, Preamble.

deformalized language of rule or exception, standards, balancing, and so on – thus leaving the ultimate political decision for later, to the implementing actors.

At this point the language of fragmentation may enter as a specific narrative. It is not an innocent description but a powerful intervention in the world. It is a vocabulary for debate that blows up the international law edifice and clears the ground for a reform proposal. It is as much an aesthetic concept as a political project – it draws the line between the desirable and the flawed, legitimate and obsolete voices, centre and periphery. To depict the world as fragmented is often the preliminary to a plea that makes room for the speaker's preferred views and reforms. Striking examples are Le Fur's and Guillaume's discourses in 1933 and 2000 respectively. They seized the language of fragmentation – Guillaume also taking advantage of his authoritative position as ICJ president – to contest someone else's project and promote their own (conservative) vision of international law. Having climbed and reached the top of the disciplinary ladder, they both appealed to the fear of diversity in order to fight alternative visions of the world in which diversity, and thus fragmentation, played a very different role.

Diversity/fragmentation may indeed play other roles. It can for instance be an instrument for (and not an obstacle or a threat to) unity. Both 1870 European lawyers and Friedmann shared this type of functional thinking. They aimed at unity through diversity: fragmentation was projected either as an essential stage for achieving universality or as an enabling tool for the realization of co-operative law. But fragmentation may also be a normative objective, at least when one is not powerful enough to make one's own position the 'universal' one. This corresponds to Álvarez's plea for fragmentation, by which he denounced the orderly and coherent world schematized by Kelsen and Scelle. For him, *that* coherence, *that* order, was the problem. He could only call for a revolutionary movement, which he did through the language of fragmentation. Fragmentation was necessary for regional laws to take the lead and deploy their full potential.

In these examples the rhetoric of fragmentation was used as an internal device, to contest or to support the existing system. However, it can also be deployed as an external device, to put an end to international law. In this case, and contrary to Álvarez's ambition, fragmentation does not amount to legal revolution but to legal disintegration. As an external device, fragmentation is invoked when one does not believe in international law and wants to replace it with another institution. On its ruins, another project takes shape – international relations, global governance.

These are the politics of fragmentation. Fragmentation may be an emancipating device for challenging the distribution of power as much as it can be complicit in maintaining it. As such, fragmentation is a political project and its merits must be assessed in political terms: whom does it seek to empower and whom does it seek to leave behind?