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Fragmentation

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FRAGMENTATION

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I. Fragmentation Fever

International lawyers can be a nervous bunch. To loosely paraphrase Martti Koskenniemi, international lawyers often seem torn between starry-eyed optimism over the good international law can accomplish and hand-wringing anxiety over the existential threats it faces.[1] Listening to international lawyers, one might hear a story of international law's powerful potential under constant threat from rogue, recalcitrant, or opportunistic states, from realism and cynicism, from ambivalence and apathy. Whether or not international law can overcome those forces seems to depend on the mood of the lawyer and the moment.

For a brief moment around the turn of the twenty-first century, the source of that anxiety, the existential threat to international law, was not a state, an actor, even an idea—it was a concept: "Fragmentation."[2] The proliferation of new international tribunals and regulatory regimes seemed to put pressure on international law's unity, threatening its backers' united front against doubters and opportunists. International Court of Justice judges launched into jeremiads. Conferences were convened. The International Law Commission began a study. And then, by the end of the first decade of the twentieth-first century, the panic seemed over. The forces producing fragmentation had not gone away, but fragmentation fear seems to have.[3]

This chapter chronicles the rise and fall of the millennial Fragmentation scare and how it has impacted international legal thought. It examines how the concept and

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[1] *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Univ. Press 2005). *See also* MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 272 (2011) (describing the struggle between "commitment" and "cynicism").

[2] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

[3] *See, e.g.,* Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMPLE INT'L & COMP. L. J. 279, 280-83 (2013).

responses to it structured the millennial field of international law, how fears of fragmentation were repurposed along the way, where, speculatively, the fear may have gone, and how and to what extent faith in international law was restored.

II. More judges, more problems

Perhaps ironically, anxiety over Fragmentation was a product of international law's success. Threats to the unity of international law are not a new phenomenon.[4] Modern international law (as opposed, for example, to various earlier conceptions of the Law of Nations) has a largely non-hierarchical structure and has mostly lacked a single body or authority able to resolve disputes over the law with finality. International tribunals, to the extent they existed at all, were ad hoc and limited in their mandates. Enforcement of international law has been largely horizontal, with participants (e.g., states and national courts) judging each other's actions and choosing how to respond. And much of modern international law has been transactional, built on negotiated obligations between states. Any and all of these realities could threaten the unity of international law, leading to both inconsistent interpretations of common obligations and inconsistent "special" obligations between different groups of states. Concerns about international law's fragmentation, whether using that term or not, were from time to time, raised.[5] The advent of the Permanent Court of International Justice (PCIJ) in 1922, and its successor, the International Court of Justice (ICJ) held out the possibility of some greater unification of law and doctrine, but through much of their history, those courts' dockets remained small and their jurisdiction limited.

All of that started to change in the mid-1990s. The Cold War was over. International legal regimes that had been frozen as East and West stared each other down began to heat up, leading to new international agreements, new international organizations, and most notably, new international tribunals, some with considerable power over their respective regimes. The Security Council created two new international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, each with substantial coercive power, specifically, the mandate to authoritatively apply international criminal law and to try, convict, and punish individuals for its violation. In 1998, the Rome Statute of the International Criminal Court was adopted. The Uruguay Rounds of negotiations over the

[4] *See generally* Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT'L L., 1-28 (2009).
[5] *Id.*

General Agreement on Tariffs and Trade led to the creation of the World Trade Organization (WTO) and a new Dispute Settlement Understanding (DSU) that created compulsory, exclusive jurisdiction over trade disputes between WTO members and a new permanent Appellate Body (AB). A new International Tribunal for the Law of the Sea (ITLOS) began work. And these global tribunals were joined by a series of regional ones and a growing number of ad hoc investment tribunals. All of a sudden, there were more than a hundred courts and tribunals operating within different corners of international law.

Concerns about the potential for fragmentation suddenly picked up steam. Leading the way were ICJ Judges. Judge Shingeru Oda famously questioned the wisdom of a separate International Tribunal for the Law of the Sea.[6] In 1997, former ICJ Judge and President Robert Jennings worried that the proliferation of courts raised "the danger that international law as a whole will become fragmented and unmanageable."[7] In 1999, then ICJ Judge and President Stephen M. Schwebel worried aloud in his annual address to the United Nations that the proliferation of new international tribunals "might produce substantial conflict among them, and evisceration of the docket of the International Court of Justice."[8] The following year, his successor, Gilbert Guillaume, invoking "the danger of fragmentation in the law," cautioned the United Nations that the proliferation of tribunals might lead to "forum shopping," "distort the operation of justice," "give rise to serious uncertainty as to the content of the law in the minds of players on the international stage," and "ultimately restrict the role of international law in inter-State relations."[9] Guillaume repeated his concerns a year later, telling the General Assembly, that "[t]he proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-state relations."[10]

A few key early cases suggested these judges might be right to be concerned. The ICTY, in its first case, *Tadic*, had arguably split with the ICJ on its ability to review the Security Council's decisions,[11] holding that it could judge the

[6] Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 ICLQ 863, 864 (1995).
[7] Robert Jennings, *The Role of the International Court of Justice*, 68 BYIL 58 (1997).
[8] Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice, 26 October 1999.
[9] Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000.
[10] Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 30 October 2001.
[11] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Request for the Indication of Provisional Measures, Order of 14 April 1992, 1992 ICJ Rep. 16, para. 39. *See* Kosenniemi & Leino, *supra* note 2, at 562-63 (discussing).

legitimacy of its own jurisdiction,[12] and rejected the ICJ's test for state attribution, adopting a test of overall control[13] rather than effective control.[14] The European Court of Human Rights (ECtHR) had split with the ICJ on the validity of treaty reservations, holding *in Belilos v. Switzerland* that the ECtHR could not only judge the validity of state reservations, something the ICJ had left to the other state parties, but also that invalid state reservations were severable, leaving the state bound to the whole treaty, including the portion it had attempted to reserve, in apparent disagreement with the ICJ.[15] The Human Rights Committee supervising the International Covenant on Civil and Political Rights eventually adopted the ECtHR's view.[16] Others cited the ECtHR's rejection of territorial limitations Turkey had placed on that court's jurisdiction,[17] a type of limitation the ICJ had previously accepted.

Both Schwebel and Guillaume suggested the same solution; other international courts should refer difficult questions of international law to the ICJ, rather than decide them themselves. Addressing a conference at New York University School of Law on the proliferation of international courts and tribunals in 1998, Georges Abi-Saab, a former ad hoc judge on the ICJ, ICTY and ICTR and a soon to be judge on the WTO AB, while striking a somewhat less worried tone, suggested a similar mechanism—using the ICJ as a sort of court of appeals.[18]

Others outside the international judiciary began to notice the possible implications of the proliferation of regimes and tribunals as well. A second more neutral strand of fragmentation discourse focused on proliferation's systemic effects[19] began to converge with the fragmentation concerns voiced by ICJ Judges. The Netherlands Yearbook of International Law began a project to explore whether the increasingly complex regimes of international represented a threat to the unity

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[12] The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A.Ch., 2 October 1995, para. 20.

[13] *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment in the Appeals Chamber, ¶¶ 115–45 (July 15, 1999).

[14] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 109–115.

[15] Case of Belilos v. Switzerland, Decision of 29 April 1988, 1988 ECHR (Ser. A) No. 132. *See also* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 24-30 (1995).

[16] CCPR General Comment 24(52) of 2 November 1994, 52nd session, UN Doc. CCPR/C/21/Rev.1/Add. 6, paras. 17 and 18.

[17] *See* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 24-30 (1995).

[18] Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & P. 919, 929-30 (1999) (noting that "only the ICJ can play this role").

[19] In the International Relations literature, recognition of these phenomena fed scholarship examining regime complexes, in which multiple regulatory regimes interacted over particular substantive issues. *See generally* Kal Raustiala and David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 207 (2004).

of international law's secondary rules.[20] The Project on International Court and Tribunals (PICT) was established in 1997. Partly under its aegis, an influential conference on the proliferation of international courts and tribunals was held at the New York University School of Law in 1998.[21] Of the articles the conference produced, four referenced fragmentation in their titles themselves.[22] And of course most notably, following a feasibility study by Gerhard Hafner, "Risks Ensuing From Fragmentation of International Law,"[23] the International Law Commission (ILC) voted to study the topic, with working groups chaired first by Bruno Simma and then Martti Koskenniemi considering international law's fragmentation.[24]

III. School's Out Forever!

Commentators hardly waited for the ILC to complete its work. Over the next few years, the question of fragmentation exploded, launching myriad articles, projects, and conferences. What had started as an apparent obsession of ICJ Judges had become an obsession of the college of international lawyers. As Martti Koskenniemi suggested, it was hardly surprising that ICJ judges were concerned; it was their position as arbiters of international legal meaning that was threatened by the new courts and specialized regimes.[25] But fragmentation anxiety spread. Specialists in trade, investment, human rights, international humanitarian law, and environmental law worried about the increasing distance between their deepening fields. Some of this was essentially political. Disagreements over international

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[20] L.A.N.M. BARNHOORN & K.C. WELLENS, DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW (THE HAGUE: NIJHOFF, 1995).

[21] Benedict Kingsbury , *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?* , 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

[22] *See* Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice* , 31 N.Y.U. J. INT'L L. & POL. 791 (1999); John H. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization* , 31 N.Y.U. J. INT'L L. & POL. 823 (1999); Monica Pinto, *Fragmentation or Unification Among International Institutions: Human Rights Tribunals* , 31 N.Y.U. J. INT'L L. & POL. 833 (1999); Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks* , 31 N.Y.U. J. INT'L L. & POL. 919 (1999).

[23] Gerhard Hafner, Risks Ensuing From Fragmentation of International Law, Report of the International Law Commission, U.N. GAOR, 52nd Sess., Suppl. No.10, at 321, U.N. Doc. A/55/10 (2000).

[24] It has been noted that fragmentation was on an odd topic of study for the ILC, which usually devotes its efforts to more concrete projects, like codifying customary international law or preparing draft treaties. *See, e.g.,* Robert Rosenstock & Benjamin K. Grimes, *The Fifty-Fourth Session of the International Law Commission*, 97 AM. J. INT'L L. 162, 167 (2003) (explaining that the "topic of study is an unusual one--a mélange of issues with no obvious solution")

[25] Koskenniemi & Leino, *supra* note 2.

law's obligations were popping up all over the place, between trade and the environment,[26] between trade and the law of the sea, between human rights law and international humanitarian law,[27] between international humanitarian law and international criminal law,[28] between international investment law and international human rights; concerns about fragmentation were concerns about who would win in the competition between regimes.

But for some, fragmentation raised the specter long-haunting international lawyers: the question whether international law was law at all. Observers worried that disagreements over what international law requires would threaten international law's authority and embolden its critics. Dissensus threatened all of international law. And finally, it was hard to ignore the false nostalgia in discussions of fragmentation; a sense that the days of the invisible college of international lawyers were coming to a close, that its members were going their separate ways, and that while there would be reunions, it would never be the same.[29] (After all, if all that held the invisible college together were shared norms, what's left when those are gone?) Fragmentation anxiety was the anxiety of the postmodern, as Martti Koskenniemi famously explained—the realization that the carefully ordered world international lawyers had been building was actually complicated, cluttered, and contested.[30]

Of course, not everyone agreed that fragmentation was a problem. Jonathan Charney, one of the first to consider the issue, found more agreement than disagreement between the proliferating courts and praised what differences there were as a creative force in international law.[31] Rosalyn Higgins, criticized her predecessors as Presidents of the ICJ for "seek[ing] to re-establish the old order of things and ignor[ing] the very reasons that have occasioned the new decentralization."[32] And as part of an influential *Michigan Journal of International Law* symposium, Bruno Simma sought to put "Fragmentation in a

[26] Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶¶ 180–184, WT/DS58/AB/R (Oct. 8, 1998).
[27] Marko Milanovic, Norm Conflict in International Law: Whither Human Rights?, 20 DUKE J. COMP. & INT'L L. 69 (2009).
[28] Kenneth Anderson, The Rise of Interna- R tional Criminal Law: Intended and Unintended Consequences, 20 EUR. J. INT'L L. 331, 349 (2009).
[29] *Cf.* Mario Prost, *All shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation*, 27 FINNISH Y. INT'L L 24-29 (2006).
[30] Koskenniemi and Leino, *supra* note 2.
[31] Jonathan I. Charney, Is International Law Threatened by Multiple International Tribunals?, 271 RECUEIL DES COURS 101 (1998).
[32] Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 ICLQ 122 (2001).

Positive Light."[33] Simma had already softened the tone of the ILC project by changing the title to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" to avoid the implication that fragmentation necessarily meant "risk."[34]

IV. Fragmentation of What?

One issue that was never fully answered during this period was what exactly was fragmenting. In fact, commentators, both positive and negative, seemed to bundle together a range of different phenomena related to the expansion of international law. This could only have served to deepen the anxiety as it must have seemed for some as though everything was spiraling apart into the vacuum.

One might collect the fragmentation concerns raised during the period into three broad groups: (1) jurisdictional or interpretative fragmentation, (2) regulatory fragmentation, or (3) normative fragmentation.[35] The three bleed into one another—the presence of one might encourage or reinforce the others—but it is useful to tease them apart as each raises distinct concerns and solutions.

Jurisdictional or interpretative fragmentation is what primarily worried ICJ Judges. The proliferation of courts, tribunals, and other interpretative bodies raised the possibility that each might interpret a single rule or body of law differently. The ICJ and ICTY might disagree over the attribution of non-state actor actions to states,[36] the ECHR and the ICJ might disagree over rules regarding reservations to treaties, the ICJ and ITLOS might disagree on the rules governing maritime delimitation, individual investment tribunals might disagree with each other over the meaning of common investment treaty terms. Those international courts and tribunals are in turn competing with governments, international organizations, and national courts, who each might have their own interpretations. Examples might include the disagreements between the International Court of Justice (ICJ) and Israeli Supreme Court over the legality of

[33] Bruno Simma, Fragmentation in a Positive Light, 25 Mich. J. Int'l L. 845 (2004).
[34] *Id*.
[35] *See* Harlan Grant Cohen, *From Fragmentation to Constitutionalization*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 381 (2012); Prost, *supra* note 29.
[36] Compare Prosecutor v. Tadic, Case No. IT-94-1-T, *204-08 Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 14, 1997) (setting out the "overall control" test) with Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. REP. 14, 64-65 (June 27) (setting out an "effective control" test) and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro) 2007 I.C.J. General List No. 19, *208 (Feb. 26) (reasserting "effective control test after Tadic).

Israel's West Bank wall/barrier/fence,[37] between the ICJ and the U.S. Supreme Court over the proper interpretation of the Vienna Convention Consular Relations in *Avena*[38] and *Sanchez-Llamas*,[39] or between the ICJ and national courts over sovereign immunity for *jus cogens* violations. In any given case, multiple of these interpreters may have a claim to jurisdiction. International actors could be expected to forum-shop for favorable interpretations, and without a hierarchy of courts, there may be no definitive way to choose between interpretations. For the anxious, actors' ability to choose legal interpretations that suit them could only lead to disrespect for international law in general. Giving one body the power to ultimately decide between conflicting interpretations, as suggested by Schwebel, Guillaume, and others, might appear a natural solution.

But other observers seemed less concerned with interpretive fragmentation than with the potentially conflicting demands of a growing number of deeper, more powerful international regulatory regimes. Increasingly, the same conduct might be governed by different legal regimes, each with their own bodies of rules and/or logics. Human rights law and international humanitarian law might require different standards for detentions or lethal targeting. Obligations to comply with UN Security Council financial sanctions might conflict with European treaty obligations guaranteeing due process.[40] WTO rules protecting patents might conflict with human rights law requirements to provide access to medicine.[41] Trade and investment treaties might block actions required by environmental or human rights ones. The International Energy Agency might enact policies in conflict with obligations to decrease emissions under international environmental law.[42] This type of fragmentation requires tools to reconcile inconsistent obligations—priority rules between different treaties, rules regarding *lex specialis* and *lex generalis*, rules about systemic integration. It is those types of rules,

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[37] *Compare* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 201-03 (July 9) with HCJ 2056/04, *16 Beit Sourik Village Council v. Government of Israel 58(5) PD 807 [2004] (Isr.) and HCJ 7957/04, *13-14 Mara'abe v. Prime Minister of Israel 58(2) PD 393 [2005].

[38] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 71 (March 31).

[39] Sanchez-Llamas v. Oregon, 548 U.S. 331, 347-50 (2006).

[40] *See* Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 E.C.R. ¶ 327.

[41] *See generally* Carmen Otero Garcia-Castrillon, *An Approach to the WTO Ministerial Declaration on the Trips Agreement and Public Health*, 5 J. INTL. ECON. L. 212, 212 (2002) (describing debates over balance of interests in key trade documents); Steve Charnovitz, *The Legal Status of the Doha Declarations*, 5 J. INT'L ECON. L. 207, 207 (2002) (same); James Thuo Gathii, *The Legal Status of the Doha Declaration on Trips and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J. LAW & TECH. 291, 291 (2002) (same).

[42] *See* Timothy L. Meyer, *The Architecture of International Energy Governance*, 106 AM. SOC. INT'L L. PROC. 389 (2012).

rather than rules about the priority of particular courts or tribunals, that the ILC eventually chose to focus on in its final recommendations.

Some observers honed in on a third, deeper type of fragmentation, a fragmentation of norms or legal community. Prosper Weill's influential essay worrying about rise of new sources of international law, in particular soft law, presented an early version of this concern.[43] The rapid proliferation and deepening of varied fields of international law—international human rights law, humanitarian law, criminal law, investment law, trade law, environmental law—each with their own institutions was producing a range of new potential sources of international authority—international judicial decisions, recommendations from expert bodies, resolutions of international organizations, etc. Did everyone agree on their relative status as sources of international law? The Netherlands Yearbook of International Law commissioned a project to investigate whether the growth of specialized, siloed fields of international law had in fact fragmented international's "secondary rules."[44] The authors of that project concluded that they had not. But others, like Andreas Fischer-Lescano, Gunther Teubner,[45] and Harlan Cohen,[46] were less sure, seeing in the growing conflicts between tribunals and regimes not a disagreement over interpretation or substantive rules, but instead the growth of alternative subject-specific legal and legitimacy communities each with their own measuring sticks of international authority. Human rights law, international criminal law, international investment law, and international environment law, among others, were becoming distinct legal communities with differing, perhaps irreconcilable, approaches and priors. Neither doctrinal tweaks nor resort to secondary rules of international law could really resolve these conflicts. Generalist international lawyers wishing to hold the old international law community together are forced from the center to the preriphery. Once insiders responsible for maintaining the workings of international law, these generalist international lawyers become outsiders to the new more specific legal and legitimacy communities they seek to rein in.

V. De-fragmentation

[43] *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).
[44] L.A.N.M. BARNHOORN & K.C. WELLENS, DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW (THE HAGUE: NIJHOFF, 1995).
[45] Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 5 MICH. J. INT'L L. 999 (2004).
[46] Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community,* 44 NYU J. INT'L L. & POL. 1049 (2012).

During this period, the prospective fragmentation of international law elicited a wide range of responses. In contrast to those who sought to impose a hierarchy on international law that might authorize some (for example, ICJ Judges) to mandate fragmentation out of existence by decree, others extolled the virtues of fragmentation as a force for contestation within the system, an opening for those traditionally less powerful to have a greater voice in an often elitist field.[47] Individuals had pathways to lawmaking no longer fully blocked by states; developing states could find fora in which their voice might be more powerful. Brazil's ability to broaden the dispute over affordable medicines by eschewing the WTO in favor of the UN Human Rights Council suggested to some that forum shopping might be a force for inclusion and justice. At the very least, the choice of institutions might create the space for a more fulsome international politics in which complex policy tradeoffs could be debated rather than submerged.

Others suggested managerial approaches. While some disagreements would endure, much fragmentation could, and likely would, be dealt with through formal and informal negotiation between regimes.[48] WTO members negotiated a compromise understanding to resolve disputes over intellectual property protection and access to medicine. The WTO AB opened up its jurisprudence to allow more space for environmental regulation. Counterinsurgency strategies would seek to incorporate aspects of both international humanitarian law and human rights law.[49] And greater institutional cooperation would allow some walls between regimes to come down and working relationships to develop.[50]

Other responses to fragmentation became organizing concepts in their own right, including pluralism, conflicts of laws, constitutionalism, and formalism. Pluralists sought to accommodate or even encourage competition within and over international law.[51] They extolled devices like margins of appreciation, subsidiarity, and complementarity as means for managing and coordinating, rather than eliminating, differences in views, and recommended the extension of those devices to fields beyond human rights law and international criminal law in which they had developed.[52] A related set of approaches looked to conflicts of laws as

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[47] Barbara Stark, *International Law from the Bottom Up: Fragmentation and Transformation*, 34 U. PA. J. INT'L L. 687 (2014).
[48] MARGARET A. YOUNG, ED., REGIME INTERACTIONS IN INTERNATIONAL LAW: FACING FRAGMENTATION (2012).
[49] Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073 (2012).
[50] Jeffrey Dunoff, *A New Approach to Regime Interaction*, in REGIME INTERACTIONS IN INTERNATIONAL LAW, *supra* note 48.
[51] William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004).
[52] Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

both a potential analogy and as a source of techniques for managing fragmentation.[53]

While pluralism and conflicts of laws sought to accommodate or manage fragmentation, constitutionalism sought to overcome it. Constitutionalism saw hope where others felt nervous. For constitutionalists, the responses to fragmentation presented the beginning of an international constitution.[54] Substantive and/or procedural norms derived from human rights,[55] public law, and administrative law would unify international law, setting standards and settling disputes.

For its part, the ILC adopted a different approach: Formalism. Over the course of its fragmentation study, the ILC made a conscious decision to shift away from questions about the relationship between different courts and tribunals,[56] deciding it best not to "appoint[] itself as referee 'in the relationships between institutions.'"[57] As the final report explained, "The issue of institutional competencies is best dealt with by the institutions themselves."[58] Instead the focus would be on the relationship between different treaties and obligations. The Final Report submitted by Martti Koskenniemi reflects those decisions, adopting a technical approach to fragmentation that relies heavily on the Vienna Convention on the Law of Treaties. Declaring international law a system, the final report focuses on the work that can be done by formal tools such as *lex specialis*, *lex posterior*, *lex superior*, and systemic integration.[59] While some have criticized the Final Report for failing to grapple with the deep theoretical

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[53] Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law*, in MULTI-SOURCE EQUIVALENT NORMS IN INTERNATIONAL LAW 19 (Tomer Broude & Yuval Shany eds., 2011); Cohen, *Finding, Part II*, *supra* note 46.

[54] JEFFREY L. DUNOFF & JOEL P. TRACHTMAN, RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (2009); JAN KLABBERS, ANNE PETERS, & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009)

[55] Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959 (2009).

[56] Report of the International Law Commission, U.N. GAOR, 57th Sess., Suppl. No. 10, at 237-40, U.N. Doc. A/ 57/10 (2002).

[57] Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT'L L. 929, 936 (2004) (quoting Report of the International Law Commission, id., at 240).

[58] U.N. Int'l Law Comm'n, Report of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682, at 13 (Apr. 13, 2006).

[59] *See generally id*.

problems raised by fragmentation,[60] Koskenniemi has defended a turn towards formalism and technique as the best approach.[61]

VI. All Together Now?

And then the fever broke. Fragmentation, once seemingly on the lips of every international lawyer, was suddenly passé.[62] Not that conflicts between regimes or over international law rules had gone away—on the contrary, they have arguably only increased, but the anxiety and the energy the term fragmentation once produced seems to have dissipated. International law seems to have moved on. What happened?

One interpretation is that, whether or not it succeeded in solving the perceived problems of fragmentation, the ILC's technical approach succeeded in sucking the air out of the fragmentation balloon. Many had been thinking or writing about fragmentation in anticipation of the ILC's report. The ILC decision to normalize fragmentation into a simple matter of interpretation took away an official focal point around which to debate the more theoretical aspects of the issue. The ILC essentially cut off the debate by changing the subject.

But the other interpretation is that we've simply come to terms with fragmentation, for now, finding ways to at least manage the conflicts between norms, rules, and interpretations. International actors have shown an increasing awareness of the conflicts between them and have in many cases sought to overcome them. The WTO AB found room for environmental regulation in the standards of free trade,[63] and the WTO parties negotiated space for affordable

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[60] Jorg Kammerhofer, *Systemic Integration, Legal Theory and the ILC*, 19 FINNISH Y.B. INT'L L. 157 (2010).

[61] Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law*, 4 NO FOUNDATIONS 7, 11 (2007). *See* Sahib Singh, *The Potential of International Law: Fragmentation and Ethics*, 24 LEIDEN J. INT'L L. 23 (2011) (discussing Koskenniemi's "culture of formalism" and its relationship to the formalist prescriptions of the ILC Fragmentation report). For more on Koskenniemi's advocacy of a culture of formalism as a bulwark against unconstrained politics and realism, *see* MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 254-69 (2011); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 494–509 (2002).

[62] *See* Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMPLE INT'L & COMP. L. J. 279, 280 (2013).

[63] Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 8, 1998); United States — Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the Dispute Settlement Understanding by Malaysia, Report of the Appellate Body, October 2001, reprinted in 41 ILM (2002) 149. *See, e.g.,*

medicines.[64] And international courts and tribunals now regularly cite each other in an effort to work towards common ground.[65] Competition between tribunals and regimes has not gone away, but there does seem to be greater acceptance that all are part of a common project. Even the ICJ now cites the opinions of other international courts and tribunals.[66]

Even where the conflicts haven't been resolved, attempts have been made to reconcile them. The Israel Supreme Court has adopted standards for targeting that seems to draw on both international human rights and international humanitarian law. The ILC, studying the question of reservations,[67] adopted a view that arguably reconciles the approaches of the ECtHR and ICJ.[68] Discussions over the relationship between different regimes and rules have also grown deeper and clearer. Questions about International Humanitarian Law's applicability to Non-International Armed Conflicts have arguably been sharpened by the encounter with Human Rights even as the two remain in some tension and competition. Questions about detention and targeting are arguably crisper than they were a decade ago.

VII. More Law; More Politics?

Jutta Brunee, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617, 631-32

[64] *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

[65] *See, e.g.,* Research Report, References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights, Council of Europe/European Court of Human Rights (2012), available at http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf; Andrea K Bjorklund & Sophie Nappert, *Beyond Fragmentation*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE (TODD WEILER & FREYA BAETENS, EDS. 2010) (discussing citation to trade and human rights tribunals by investment tribunals).

[66] *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, [2010] ICJ Rep 639 (reprinted in 50 ILM 40) (examining decisions of the Human Rights Committee, the African Commission on Human and Peoples' Rights, European Court of Human Rights, and Inter-American Court of Human Rights); see also Bruno Simma, Mainstreaming Human Rights: The Contribution of the International Court of Justice, 3 J. INT'L DISP. SETTLEMENT 7, 20-21 (2012) (discussing the *Diallo* decisions' references to the jurisprudence of human rights tribuanals),

[67] *See* the International Law Commission Guide to Practice on Reservations to Treaties, the Report of the ILC on the Work of its 63rd session, General Assembly, Official Records, 66th Session, Supplement n° 10, Addendum 1, UN Doc. A/66/10/Add.1.

[68] Marko Milanovic and Linos-Alexander Sicilianos, *Reservations to Treaties: An Introduction*, 24 EUR. J. INT'L L. 1055 (2013).

If this second interpretation is correct, that increased collisions between international law regimes has led to greater awareness of conflicts and greater efforts to work through them, then it suggests a seemingly paradoxical conclusion: the same proliferation of international regimes, organizations, institutions, and rules that produced of the original concerns about fragmentation also succeeded in resolving them. What was arguably most concerning about the proliferation taking place in the late 1990's was its obscure and specialized nature. Lawyers and judges were making sometimes-inconsistent decisions about rules, obligations, and principles in siloed regimes barely visible to lawyers outside of them or the general public. What was missing was not just a single hierarchical institution that could resolve disputes between them, but an effective space for international politics in which the results of these new regimes could be debated, weighed, and balanced.

As these regimes have come of age, the space for robust international politics has grown. As these regimes have deepened and expanded, they have become more visible outside the small cadre who practice there. Dealing regularly with state environmental, health, labor, and fiscal policies, trade and investment law can no longer hide from public view. In some cases, this has forced regimes like trade to internalize other concerns, bringing more actors with diverse interests into the internal debates over the regimes rules. In other cases, the regimes have put up walls to keep out outsiders, but have become focal points for external public debate, as has arguably been the case in investment law. The deepening and expansion of these fields of international law has also increased contact between them. Lawyers and administrators are much more likely to meet both informally or formally than twenty years ago.

In a sense, paradoxically, the problems associated with fragmentation may be most pronounced when the conflicting regimes are modest and contained, their interactions with each other weak and intermittent. Greater power, relevance, and visibility for these proliferating regimes have created more room for contestation. Proliferation solves proliferation. Fragmentation hasn't gone away. Politics have begun to emerge.

Of course, the space for robust international politics remains inconsistent and small. Some areas have too much; others too little. But its emergence seems a natural outgrowth of the same forces generating fragmentation and a potential counterweight.

VIII. A Shattered Mirror

A danger, an opportunity, passé, a cliché, destabilizing, empowering, destructive, creative: Depending on whom you ask, fragmentation has meant any and all of these for international law. The concept of fragmentation has been a mirror reflecting international lawyers' perception of themselves, their field, its prospects for the future. The story of international's law's potential fragmentation is the story of international lawyers. At its best, discussions of fragmentation have been an opportunity for self-awareness and reflection, a chance to think about what the system of international law has become and what it could be; at its worst, they have been a source of lawyerly self-obsession. In a non-hierarchical, dare we say "fragmented," system, in which international law is often as much of function of its participants as it is of any institution, the two may be very hard to disentangle.