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**May paper: The fragmentation of
International Law. Framing the debate**

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1 Introduction.

The purpose of this paper is to analyse and structure the debate on the fragmentation of International Law. As will be discussed in part 1, this debate has become increasingly fragmented itself. In order to find a way through the maze of opinions and research data that are provided, this paper will provide a framework in part 2. This is especially relevant as the positions that the authors take are often largely the result of their implicit assumptions on the international legal project. For instance, an author who is in favour of creating a strongly unified system with an enforcement hierarchy is more likely to see examples of fragmentation and call for immediate action, than an author who feels that international law should not be seen as more than a collection of contracts between states. They, therefore, seem to be disagreeing on the state of international law as it is and the facts of fragmentation, however, they could be in total agreement on the facts, and just disagree on whether these facts are in conformity with their world view. By exposing the underlying assumptions, it becomes possible to compare the contributions on their merits.

Following the framework, part 3 will be an analysis of the current contributions to the fragmentation debate by other authors.

2 Part 1

2.1 *The debate*

In recent years, the concept of fragmentation of international law has gotten increasing attention.. The field of international law is not new to challenges to its composition or legitimacy. For many years the whole concept of International Law was contested by many, and its existence as a system has been a point of debate for decades. The debate on fragmentation of international law is not a new occurrence. At least for one and a half centuries, authors have been utilising this term in order to get the attention of their peers.¹ The meaning has however changed, for instance, in the 1850's there was no fragmentation through the proliferation of courts. But the negative connotation that the term fragmentation carries, has ensured its use by those who wish to challenge the direction that international law is taking.² Indeed, the term diversification can often be used to describe the same process, and provide it with a very positive connotation, as we will see later.

Even the most recent incarnation of the debate, which focuses on the rapid expansion of both norms and institutions of international law, has been on the minds of scholars for over 25 years. The first significant article on this subject was presented in the Dutch Yearbook of International Law by Bruno Simma, who tried to establish whether there were any 'self-contained regimes' in international law.³ His definition of a self contained regime was however so far reaching that there was little chance of any regime falling within its ambit. Indeed, it was unlikely that such a regime would ever be created, as the secondary rules of customary international law were always going to be needed to allow the regime to function efficiently. This reasoning relies on two points: firstly, that a regime set up under international law would never be able to completely create an alternative set of secondary norms in its treaties; and secondly, that the enforcement mechanisms in the regime would, therefore, rely on the secondary rules of customary law

¹ Anne-Charlotte Martineau, *The Rhetoric of Fragmentation*, LEIDEN JOURNAL OF INTERNATIONAL LAW 1-28 (2009).

² *Id.*

³ B. Simma, *Self-contained regimes*, NETHERLANDS YEARBOOK OF INTERNATIONAL LAW .112-136 (1985).

to be able to adjudicate a dispute. Although the first part of that reasoning seems to be rather undisputable, it is very unlikely that a new treaty regime would be able to find consensus on a whole new set of norms that would deviate from the customary ones. However, the second part of the assumption is perhaps no longer so clear, for this relies on courts to, not only seek out these rules when confronted with a lacuna in their treaty regime, but also apply those norms correctly to the dispute. Although Simma's assessment that there are no truly self contained regimes in international law is still valid today, the implication that there is therefore no threat to the international legal regime can no longer be maintained with such certainty.

The danger that a self contained regime would create is twofold. In theory, the regime could be unpredictable because its rules would be unclear; but more importantly, the existence of such regimes would chip away at the validity of the foundations of international law as one regime. Today, we have many independent regimes, which are not self contained in terms of the strict definition used by Simma. However, if some of these regimes are inclined to deviate from the established secondary rules, then the cumulative effect of all of these deviations would still be that the legitimacy of international law is affected. As such, a large group of regimes that do not abide by all rules of customary law could have a greater effect on its legitimacy than one isolated regime that is entirely self-contained.

Simma's article was however unable to settle all debate on the matter as, only a few years later, Brownlie wrote:⁴

A related problem is 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 (...)
A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned.

⁴ Brownlie, *The Rights of Peoples in Modern International Law* in Crawford (ed) (Clarendon Press Oxford 1988) 1 at 15; in *THE RIGHTS OF PEOPLES* (1988).

The debate however lay dormant for some time. However, after the fall of the USSR and the increased impetus that international law had as a result, as well as the increased expectations of one unified international legal system, the interest started to increase again. This led to the International Law Commission (ILC) adding the question of fragmentation to their workload in 2002, and this in turn seems to have resulted in an ever increasing amount of academic literature on the topic.

2.1.1 ILC report

The ILC report itself was published in 2006, and had taken a rather different approach than was perhaps first envisaged by Hafner in his feasibility study.⁵ The name of the report was changed along the way, so as to reduce the negative connotations of the word fragmentation, the substance of the report reflecting this shift from the negative aspects of fragmentation to a rather more positive view which showed that fragmentation could be contained by existing measures, and as such there was no real threat by fragmentation.

The ILC report has however not been received without criticism.⁶ Even its final author, Koskenniemi, admitted therein that the report had 'bought' its acceptance by its substantive emptiness.⁷ This admission is quite accurate, seeing as it provides hardly any empirical evidence of either the existence or non-existence of the fragmentation problem. In fact, the report is basically a summation of the possible ways that such a problem could be tackled, using ideas and theories that already existed within international law, without investigating fully if such measures would indeed be sufficient, or whether there would be other, more effective, approaches available.

The lack of further investigation by the ILC into other options was probably disappointing to those calling for a stronger international legal framework to enhance unity and legitimacy. However, the bigger lacuna may have been the commission's

⁵ G. Hafner, *Risks ensuing from fragmentation of international law*, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, FIFTY-FIFTH SESSION, SUPPLEMENT NO 10 (A/55/10) (2000).

⁶ See among others: Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law*, 40 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 259-306, 271 (2007).

⁷ INTERNATIONAL LAW COMMISSION, REPORT OF THE STUDY GROUP, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW U.N. DOC. A/CN.4/L.682 para 487 (2006).

decision to exclude, what they call, institutional fragmentation from the report.⁸ This, in effect, means that the proliferation of courts as a problem was avoided, most likely because this would add yet another problematic issue to the agenda of an already difficult (at least diplomatically) report. However, leaving out such a vital aspect of the fragmentation of international law seems to have been a questionable decision. It is also interesting that, although the report states that substantive fragmentation is the real danger, the ILC then goes on to use the judgments by courts to prove the existence of certain rules, or explain how certain norms are to be interpreted, thereby showing an understanding of the significance of the role of courts in the creation or interpretation of norms in international law, but simply choosing to ignore those effects for the purpose of the report.

The choice to exclude the courts can however be understood if one examines the problems the ILC was faced with. It needed to investigate both the substantive and institutional fragmentation, and as such a choice between the two subjects, although not desirable, could be understood in light of efficiency and effectiveness. Unfortunately, the ILC, as we have already discussed above, admits that its final report is substantially empty, at least to some extent. Then what is it that this reports hopes to add to the fragmentation debate?

It seems that the report has largely been a steppingstone for many authors to continue the debate, rather than that it was in itself a very strong contribution to the debate, or one that would lead it in a certain direction. However, some authors have argued that the work of the study group has been very useful in describing the tools that are already available to counter any fragmentation.⁹ The vision of the report seems to reflect that of those authors who still consider the whole debate to be useless, for they argue that even if there was such a thing as fragmentation, that fragmentation was responsible for the rapid development of international law, and as such a force for ‘good’ rather than ‘evil’.

⁸ Leathley, *supra* note 6 at 264.

⁹ Campbell MacLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 279-319, 285 (2005).

2.1.2 Is the threat real?

The larger debate that has evolved can be divided into three main categories of authors: those who consider fragmentation to be a mayor threat to international law; those who see the problem, but are convinced that the benefits of the system outweigh the dangers; and finally those who think that there is no danger of fragmentation of international law, or if there is that this danger is entirely theoretical and has not manifested itself in any real cases. This latter group is obviously significant, as their claim is that fragmentation is a creation of academics and authors who are trying to achieve their own goals. Koskenniemi, who articulates this position to some extent in the ILC study group report, but also in his article on the fragmentation of international law published before he joined the study group in 2002, is part of this category.¹⁰ He repeats this position after the publication of the Fragmentation Report as well.¹¹ This latter article is perhaps the most clear representation of his own opinion, as it was not a report, nor co-authored by others. Koskenniemi does not consider fragmentation a threat to international law, mainly because of his views on the nature of international law. He does not consider it to be a legal system, but rather as a combination between a normative and political system, and as such it looks fragmented in viewed in comparison with national legal systems, but, if seen in its true identity, there is no problem.¹² Indeed, he takes this argument even further:¹³

(...) I would like to suggest that the problems faced by public international law today - marginalization, lack of normative force, a sense that the diplomatic mores that stand at its heart are part of the world's problems – result in large part from that strategy, the effort of becoming technical.

In other words, he thinks that legalism is responsible for the loss of international law's legitimacy more than anything else.

¹⁰ Martti Koskenniemi & Päivi Leino, *Fragmentation of international law? Postmodern Anxieties*, LEIDEN JOURNAL OF INTERNATIONAL LAW 553-579 (2002).

¹¹ M. Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN LAW REVIEW 1 (2007).

¹² *Id.* at 1.

¹³ *Id.* at 2.

Another prominent member of this group is Bruno Simma. Despite his recognition that the rapid development of the law, and the growth of regimes, has led to the possibility of fragmentation, he feels there is no reason to fear that these cases will multiply. His reasoning seems to stem from his positive view on the actors involved in the process of international law, in which both the states and the international organisations, including international courts, have the intent to uphold the unity of the international legal system, and as such fragmentation will not be able to take hold.

However, in his analysis, he takes for granted that this is not subject to change, which is debatable considering the expansion of the international legal system, and the fight by courts to gain 'institutional hegemony'.¹⁴ Additionally, his theory is based on the courts lack of willingness to openly contradict other courts that have a considerable standing in international law. This however does allow courts to either differentiate the case thus not publicly contradicting the other courts; or simply make no reference to earlier case law and use a different vocabulary, in the hope that no comparison will be made at a later date. Indeed, this theory itself contradicts his other statement that courts are likely to engage in dialog through their jurisprudence, and as such develop the law. Either courts do not publicly defer to each other; or they do, but this develops international law. Both these arguments are valid in their own right, but putting the two together is 'having your cake and eating it too'.

Dupuy seems to be in between this category and the next,¹⁵ in that he agrees with the others that fragmentation is at this time only a theoretical threat, yet he does not want to wait for the threat to appear before action is taken against it. This position may be largely based on his preferred form of unity, as we will see later, than on his belief that fragmentation is likely to ever become a great threat. However, by tackling the possible threat, he can simultaneously take a step towards achieving his vision on international law, and as such the debate on fragmentation is a useful tool. Indeed, this is a prime example of what Martineau refers to as using the terminology of fragmentation to achieve

¹⁴ Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, EUROPEAN JOURNAL OF INTERNATIONAL LAW 265-297, 290 (2009).

¹⁵ P. M Dupuy, *The Unity of Application of International Law at the Global Level and the Responsibility of Judges*, 2 EUR. J. LEGAL STUD. 1-20 (2007).

your own project.¹⁶ Nonetheless, it would be unwise to simply discount Dupuy's contribution on the theory that he is only using the fragmentation debate to achieve his own goals, because what Martineau seems to forget in her contribution is that, when dealing with any politicised issue, authors are always trying to achieve their ambitions or promote their version of the international legal project. Martineau tries to show that this is no more than rhetoric, however, if Dupuy does consider that fragmentation may become a threat to unity, a unity that he already believes is underdeveloped, then his support for controlling fragmentation in order to create stronger unity is not purely rhetoric. Instead, it is simply a way of formulating what the author believes to be the best approach to achieving a legitimate legal system that will benefit mankind.

The mainstream within the legal scholarship, contrary to those above, believe that fragmentation does exist, even beyond the theoretical plain. It is not, however, seen as a big threat to the international legal system.¹⁷ Different authors have differing views on why this is the case. Some consider it a negative side effect of otherwise positive developments, and as such not something worth challenging. Advocates of this position state that the nature of international law has always been fragmented, and that the recent developments are due to this fragmented nature. Had the international legal system not allowed for the creation of separate regimes, then the explosion of norms and obligations would not have taken place.¹⁸ A rigid system that fights fragmentation destroys all that is good about the system as well. As we shall see below, however, there are many different levels of unity that can be achieved without going straight for a rigid system that could have negative effects on progressive development. It is unfortunate that most authors do not investigate the middle ground, but limit themselves to saying that because diversity is good, fragmentation must be accepted.

Others think that the actors involved in the maintenance of international law will not allow the situation to get out of hand, because the legitimacy of the entire system is

¹⁶ Martineau, *supra* note 1.

¹⁷ See among others: Chester Brown, *The Proliferation of International Courts and Tribunals*, MELBOURNE JOURNAL OF INTERNATIONAL LAW 453-475 (2002); Karin Oellers-Frahm, *Multiplication of international courts and tribunals and conflicting jurisdiction*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 67-104 (2001).

¹⁸ See among others: Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 849-863 (2004).

also in their interest.¹⁹ This view is clearly related to the idea that judicial dialog is a mechanism that will be able to tackle any problems created by fragmentation.

Oellers-Frahm has a somewhat contradictory stand on the problem of fragmentation, for she both believes that fragmentation is more than a theoretical problem, indeed, it is a problem that is likely to grow,²⁰ and yet she also dismisses the cases that she studies as not being examples of fragmentation, and further refers to Charney to support her claim that currently there is in fact only seemingly fragmentation, but this can all be explained by the differences between the regimes that apply the rules.²¹

Fisher-Lescano and Teubner do consider there to be a significant danger of fragmentation, but still they belong to the middle ground for the simple reason that they do not believe that this significant fragmentation will result in a negative effect on international law. Rather, they believe that this is the normal result of the structure of the international community, and as such the law is only correctly reflecting reality, not creating it.²²

Higgins is aware of the danger of fragmentation, and although it is not common, in reality she sees one example, *Tadic*, and there is a real possibility that the proliferation of courts would lead to an increase in these kinds of cases.²³ She therefore concludes that there is no real danger at present, as courts do on the whole consider their position within general international law, but nonetheless there is no guarantee that this will stay the same and therefore action should be taken to prevent fragmentation.

Abi-Saab considers the history of international law, and as such the reasons for the current situation. However, he does concede that the project has brought us to a stage where there is a threat of fragmentation due to the increasing number of treaties and

¹⁹ Charles H. Jr Koch, *Judicial Dialogue for Legal Multiculturalism*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 879 (2003).

²⁰ Oellers-Frahm, *supra* note 17 at 73.

²¹ *Id.* at 80-83.

²² Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions*, MICHIGAN JOURNAL OF INTERNATIONAL LAW 999-1046, 1007 (2004).

²³ Rosalyn Higgins, *The ICJ, the ECJ, and the integrity of international law*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1-20, 18 (2003).

courts,²⁴ although this threat is limited by the consciousness of the actors within the legal system that they are part of a system.²⁵

Also, there are those who are flirting with the ideas of Critical Legal Studies, thinking that the cases will never be similar enough to force a real deviation, and the courts will usually be able to explain the deviation through a difference in the case, or the continued development of the law over time.²⁶ These methods are often used to explain away examples of possible fragmentation, and reclassify them as differentiation. As such, the potential threat can be limited to very few cases, or even none, and as a result no steps would need to be taken to tackle the problem.

The last group considers the problem of fragmentation to be a real, and serious, threat to international law. The existence of fragmentation within a legal system, they believe, could cripple it as its legitimacy wanes, and as a result all the progress that has been made by the newly established regimes will be lost.²⁷ Therefore, there is a need for action to tackle this problem, before the system is given the opportunity to destroy itself. Although such action could be as far reaching as creating a strict form of unity within international law, most authors would support a more nuanced approach that leaves as much of the diversity in place as is possible, while protecting the unity, and therefore legitimacy, of the system.

Many advocates of the international legal project have, for a long time, been fighting for an expansion of the rule of law to new areas, so as to be able to hold states, and other actors, accountable for their actions. This drive has, until recently, been conducted without taking into account the effects of such expansion on the unity of international law, however, those who fear the effects of fragmentation are now starting to weigh the positives of expansion against the loss of coherence within the larger system.²⁸

²⁴ Georges Abi-Saab, *Fragmentation or unification*, NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 919-933 (1999).

²⁵ *Id.* at 921.

²⁶ See among others: Brown, *supra* note 17.

²⁷ See among others: Leathley, *supra* note 6 at 271.

²⁸ *Id.* at 264.

The proliferation of courts is often seen as a significant reason for this evolving threat, international law is in effect becoming the victim of its own success.²⁹ Nevertheless, the problem and the solution may lie with the same organs, as Leathley has pointed out, the proliferation is a large part the problem, however may be those very same judges who have the power to ensure that international law will maintain its unity. The danger lies in those judges and courts that are so concentrated on their own little sub-field that they ignore the bigger picture of international law,³⁰ in those cases, the judges are the problem. However, if those same judges could be made to see the relevance of their work for the greater unity, then they may well be the driving force to create more, and not less, unity.

Some authors refer to the danger of fragmentation in a less explicit manner, but create solutions for it nonetheless, implying that the problem is great enough to need alterations to challenge it.³¹

Fischer-Lescano and Teubner see the fragmentation of international law as practically inevitable.³² However, due to their idea that this is caused by a fragmented society, it is unclear if they also consider this to be a threat to international law, or merely a reflection of the global society, and as such not a threat to the legitimacy of the international legal system.

Spelliscy views the consequences of fragmentation as very severe, and indeed a great threat to international law. Even more, he feels that the current faith of international lawyers that fragmentation will be avoided by courts can no longer be upheld after the Tadic case.³³ Therefore, the threat to international law is real and if left to its own devices the system will suffer greatly from this reduced unity.

²⁹ *Id.* at 265.

³⁰ *Id.* at 272.

³¹ See among others: MacLachlan, *supra* note 9.

³² Fischer-Lescano and Teubner, *supra* note 22 at 1004.

³³ Shane Spelliscy, *The proliferation of international tribunals*, COLUMBIA JOURNAL OF TRANSNATIONAL LAW 143-175, 145 (2001).

2.2 Terminology

2.2.1 Fragmentation of international law

The term fragmentation has seen increasing use over the last years within the international legal scholarship. However, it seems that the term is not always clearly defined. Different authors tend to use differing definitions of the term in their articles, without actually providing a definition of their interpretation of fragmentation, or indeed their view on unity, which will be discussed later. Usually, fragmentation is used in a substantive manner, in other words, it is used to describe what is going on in the substance of international law. As we will see below, this substantive approach is still very diversified, and depends greatly on the authors perception of unity. The one aspect that all these substantive definitions of fragmentation seem to have in common is that the actions, either by states or other actors, are not intended to create unity, nor do the actors have the unity of the international legal system in mind when acting.

Besides the different substantive aspects to the term fragmentation, it is also used in different ways altogether. It has been used to describe the institutional developments in international law.³⁴ In this case, international law is fragmenting simply because of the proliferation of courts and tribunals, without necessarily perceiving this as a negative trend, or even as a threat to the substantive unity. If the different courts apply the same law, then there will be no substantive fragmentation as a result of institutional fragmentation, a view that the ILC report seems to be based on.

Moreover, many writers use the term fragmentation to make a normative statement on the current state of international law. Stating that the legal sphere is fragmented has a negative connotation, despite the fact that no actual comparison is being made. The only message that the author wants to portray in that situation is that he or she does not agree with the current situation in international law.

³⁴ Tomer Broude, *Fragmentation(s) of International Law*, THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW : CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY : ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH / ED. BY TOMER BROUDE AND SHANY YUVAL, ISBN 1841137979 P. 99-120, 100 (2008).

2.2.2 Development of international law

Some authors feel the use of the term fragmentation is misplaced in the current context.³⁵ Those authors believe that there is no such thing as fragmentation, and that the process that some describe using that term is in fact, most – if not all – of the time, the development of international law. This argument relies on the fact that international law as a whole is not developed to the same level as national systems, and therefore it could be argued that the disagreements within international law are all part of the debate that is developing the system further. This argument is used to maintain that there is no need to take any action against possible fragmentation as that would negatively effect the development of international law, and therefore in the long run be detrimental to the international legal system.

Using the term development in this manner seems to be a semantic ploy to give a positive, rather than negative, association to this phenomenon. As we are not yet discussing the consequences and possible forms of combating fragmentation, it seems this notion needs to be taken into account. There is one comment that is relevant at this time with regard to this notion of development. It seems that the positive connotation frees the user from the obligation to show that development as such is a good thing, and more particularly, that uncontrolled development is. International law has been developing for many hundreds of years, and can we truly state that all that development has always been for the better? Are there no examples of international law developing into something that many considered to be normatively worse than the previous state? Additionally, this development approach is only valid if it can be established that development would be stopped by unity, and thrive under fragmentation. It is very likely that a system of norms can develop more rapidly and maintain its momentum better if it were a structured form of development rather than a chaotic one. Whether this applies to the complex situation of international law is unclear, however, it should not be discounted out of hand.

Perhaps an even more fundamental problem with the inter-changeability of the terms fragmentation and development is that, although there is some substantial overlap,

³⁵ Jonathan I. Charney, *The impact on the international legal system of the growth of international courts and tribunals*, 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 697-708 (1999).

there are also differences. Development seems to imply that there is a goal which is being pursued, that there is one outcome which is being sought, whereas fragmentation implies that this outcome is not being sought, and will not be achieved. When applying this to practice, if two courts interpret the same rule in differing manners, do they do so because they wish to develop the rules, or could their actions be the result of ignorance or perhaps they perceive their deviation as a necessary evil to achieve another temporary goal? In that case, the court is in fact not participating in the act of development, as it knows full well that the way it applies the norm is not in conformity with the current development.

It is therefore unlikely that these authors do not 'believe' in fragmentation as is sometimes claimed, but only do not believe that the consequences of this process are negative. Development of international law will thus be considered as a form of fragmentation for the purposes of this paper.

3 Part 2

3.1 Unity as a concept

Before continuing with the debate on fragmentation, it is necessary to determine what ‘unity’ is understood to mean. The reasoning behind this claim is twofold. Firstly, fragmentation is an inherently relative term, and therefore it is necessary to provide the correct context within which we view it. The phrase ‘fragmentation of international law’ is meaningless unless we can explicate its opposite: unity.

Secondly, there is an important methodological consideration. Any contribution to the discussion on fragmentation begins from a predetermined position, in other words, all authors who give their views on this matter do so from a preconceived notion of what international law is. The explication of this primary assumption is essential to allow the contribution to be seen in the correct light. Currently, many authors seem engaged in different debates due to the disagreement on the level of (desired) unity in the international legal system, and therefore the presence, or danger, of fragmentation.

It has been noted that international lawyers are unwilling to explicate their views on unity, despite being very happy to engage in the rhetoric of fragmentation.³⁶ A likely reason for this unwillingness is the fact that making the implicit explicit will result in the responses simply disregarding the contribution on the basis of that definition, rather than responding to the relevant content of the article. Nonetheless, it seems that, seeing as the debate touches on the very centre of the structure of the international legal system, this definition should be adequately described.

Additionally, leaving out the definition is a double edged sword. Although the lack of a definition means that it can not directly be attacked, the underlying assumption may well be. This means that a contribution may be ignored or sidelined simply because the reader assumes that the author is coming from a certain perspective, despite the fact that this may not be true. This is already happening, as it has been claimed that those who see fragmentation as a threat are general international lawyers, and those who see it as a

³⁶ Martineau, *supra* note 1.

blessing are those lawyers who represent certain fields, such as human rights or trade law, and we can safely assume that that is a generalisation.³⁷

Therefore, this section of the paper will endeavour to establish a framework within which we can view the contributions that are being made to the debate in the correct light.

3.2 The many faces of unity.

Unity means different things in different conditions. This can range from strong unity, such as between symbiotic life forms, to a much looser form of unity, such as the unity of a team. In the former, the two life forms live together, and indeed could not survive without each other, forming in effect one unit. The latter example simply means that a certain group of people have chosen to work together on one particular endeavour, for instance football, and even then they may have very different approaches to the game.

Usually contextualising the term will provide a clearer answer to the intended definition. However, in International Law there are so many competing visions on what the legal system is, or ought to be, that the unity question varies just as much. Additionally, the term unity can be used in such a way as to make a fragmented system seem more desirable. If unity is defined in such a way as to make development or change next to impossible, then the current fragmented approach would seem far more preferable.³⁸

Below is a selection of definitions of unity that are based on theoretical possibilities defined by the current author, although grounded in views held by the different legal scholars that have contributed to the fragmentation debate. This framework does not try to create groupings of similar strength, the goal is simply to provide definitions that span the whole range from one extreme to the other with sufficient steps in between to allow all contributions to be placed within a group that is suitably close to their vision.

³⁷ Koskenniemi and Leino, *supra* note 10 at 574.

³⁸ Indeed, as Martineau has pointed out, reference to an authoritative unity that could destroy the ‘good work’ of the human rights movement can be an effective – if a little underhanded – tool.

3.2.1 Totalitarian Unity

The first form of unity is an outer marker, it will be the most unified system imaginable. Within this system both national and international law have the same primary and secondary rules and functions as an integrated whole, including a hierarchical court system. In effect, this would be a 'global federal system', thus having international law as the highest form of law, with sovereign states only having the right to enact laws that do not contradict the international ones. National courts would also play a role in the enforcement of international law as this law would penetrate the sovereign borders to ensure its uniform and consistent application.

To create this one set of norms, there would be a need for a central legislative body, which would enact the norms that would form part of international law. It would no longer be possible for states to set up systems outside of this general legislature.

Clearly, this extreme version of unity is unrealistic, as it would call for a fundamental change in every aspect of international (and national) law. Additionally, the homogeneity that would be necessary to create such a system is currently lacking. However, that is not to say that this form of unity could not be a destination in the eyes of some authors. Despite this, it is more likely that the role of this form of unity is scaremongering: by using this as an example of what unity could lead to, opponents of unity can show that, compared to this, some fragmentation is preferable and justified.

3.2.2 Absolute unity

Absolute Unity retains some aspect of the Totalitarian Unity, while discarding some of the more drastic unifying elements that were contained in the latter. The main alteration would be the removal of the 'federal' structure. There would no longer be a complete integration of the national and international. This automatically affects the court hierarchy to the extent that the national courts would no longer be considered part of the same system, and therefore not have a formal place within its hierarchy. Still, it is likely that if there were one single international court system, then which ever court sits at its apex would have such normative standing that national courts would not normally deviate from its interpretation.

Additionally, the central legislature would not necessarily be created in the same way as in Totalitarian Unity. Nonetheless, the ideal of a single set of normative rules would remain. As these rules would not be created by an independent legislature, they would consist of an expanded version of the current customary norms. This would also include secondary rules on the conflict of norms, and as such this version of customary international law would have a hierarchical structure consisting of more than the current *ius cogens* and all other norms.

This would mean that the rules in existence would apply to all states, not just a subset of them. To allow for some flexibility, it would of course remain possible for states to have bilateral – or even multilateral – treaties that would allow for differing norms, but only in so far as these do not conflict with the existing norms, and all of these treaties would automatically be subject to the jurisdiction of the international court system. This is because Absolute Unity would still need total legal enforcement to work, in other words, there would be a need for all obligations of states to be judiciable.

The retaining of the hierarchical court structure, as well as the single set of rules, means that there would be no reason to maintain diverse dispute settlement mechanisms, as the courts would need to apply the same rules in all cases; and if they deviated from the normal interpretation of the rules, the case would simply be overturned on appeal. The existence of specialised courts or chambers for certain disputes would however remain possible, just as it is in national systems.

Clearly, this form of unity would create a high level of legal certainty in international law, and achieve a level of unity that has so far never been achieved at an international level. This would be at the cost of development and the ability to adjust to new situations. However, the same can be said for national legal systems, they are slow to respond to new challenges as well, and yet they are still considered legitimate. The main question here would thus be if the international legal system, and political theory at an international level, has developed sufficiently to allow for a more formal approach.

Absolute Unity would be easier to achieve than Totalitarian Unity, but it too can not be considered as a short term possibility. Nonetheless, there have been authors who have called for a unified approach to international law that would include a strong

hierarchy of courts.³⁹ Such a system would quickly develop into a form of Absolute Unity, for a hierarchy of courts only makes sense if the court at the apex of such a system can make statement about the nature of international law, and the rules that are considered to be applicable in general, not just cases before it.

3.2.3 Normative unity

Another view allows for the existing diversified enforcement to continue, however argues that the law itself is in fact one and the same. Therefore, the normative rules that apply are the same for all states, however some may have chosen to submit to a court, while others have not. In this scenario, there would still be one set of rules created from a substantively increased customary international law. This would mean that all actors involved – both states and courts – accept that international law is one system, and only divisible for the purpose of enforcement. To accommodate the issue of state consent, this theory allows for states to define how strong the enforcement of international law is in certain specified areas. For example, a state can chose to be a party to the WTO, but not to human rights treaties. This does not alter the human rights obligations flowing from customary international law that a state is bound by, it only means that there is no strong enforcement mechanism for the victims of the state's violations of those norms.

Additionally, this would mean that all courts must apply customary norms of international law that are relevant to the case, as well as any other norm that is applicable between the states. This would therefore mean that a state would automatically be able to claim protection of human rights as a limitation to certain trade obligations before the WTO, and in reverse could claim that its trade obligations legitimise certain human rights infringements before a human rights courts. The relation between these norms would as such need to be established and respected by the different courts. Naturally, it would be strange if a state that does not allow for its trade obligations to be challenged before a court was allowed to use those same trade obligations to limit human rights, this could lead to indirect application of those norms by other courts.⁴⁰

³⁹ Leathley, *supra* note 6.

⁴⁰ Although this is not the place to work out details of these general forms of unity, some comment is necessary here. A 'clean hands' principle could be applied so that no state may benefit from a defence that is not normally observed by the state in question. As such, a state that does not abide by many trade rules, could not use trade law as a defence.

This form of Unity would still allow for a large level of legal certainty, as well as allowing a little more room for the concept of state consent. All courts would need to apply the same rules to a certain case, although obviously, due to the lack of a hierarchical structure of the courts, there would be some room for slight differences, a margin of appreciation if you will. However, it would not be possible for a human rights court to claim that its special character meant that different rules of treaty interpretation applied to it, or for a trade court to state that although the principle of precaution exists in environmental law, it is not relevant to its judgment as it is not part of trade law.

Although it would be difficult to achieve such a Normative Unity without having a real hierarchy of courts, this could be achieved through either judicial dialog and comity, or through the states ensuring that their legal obligations are in conformity with one another, and all international law would be applicable in all cases brought before a court. We will discuss these forms of achieving unity more extensively below.

3.2.4 Interlinked unity

The term inter-connected has been used by Pauwelyn to describe his vision on the composition of international law.⁴¹ Although the levels of unity discussed here are not intended to represent the visions of particular authors, in this case the concept of Interlinked Unity is indeed does indeed largely follow Pauwelyn's thoughts, although not by design. Because there are some slight differences, we shall refer to Interlinked Unity to avoid any confusion.

While Normative Unity relies on there being only one overall set of norms that apply to all of the states and other international actors, Interconnected Unity allows for a greater variety of norms to be in existence. Therefore, differing regimes, such as exist today, can remain in existence as creators of new norms. Although Normative Unity already allowed for the existence of separate court systems, the norms in existence were created through the entire international legal system as a whole, whereas Interlinked Unity foresees the decentralised creation of norms, that may or may not later become centralised. Due to this decentralisation, there can only be a limited hierarchy of norms. For if there would be mechanisms for creating norms in a decentralised manner, but the

⁴¹ Joost Pauwelyn, *Bridging Fragmentation and Unity: International law as a universe of inter-connected islands*, MICHIGAN JOURNAL OF INTERNATIONAL LAW 903-916 (2004).

customary rules on the hierarchy of norms continued to exist, then whichever regime was the guardian of these higher norms – be it ICJ or HR courts, or the WTO – would in effect be able to overrule the norms created by other regimes, and thus create a system of Normative, rather than Interlinked, Unity. The hierarchy would as a result be limited to that which already exists today, namely the superiority of *ius cogens* norms and the primacy of the UN Charter, without any additional levels.

As a result, every regime will be able to not only create but also apply all of its own rules as it sees fit, as long as these are not in contradiction with norms of *ius cogens*. However, there is one further limitation that exists to the possibility of regimes to create their own rules, and that is the existence of general international law as the basis of all regimes. The precise content of this foundation will be discussed later in the Foundational Unity section, suffice it to say here that there exist a basis of general international law that is considered part of every regime created, unless the regime has explicitly opted-out from those rules. This means that one regime may have different rules on for instance state immunity only if it is explicitly stated in its establishing treaty that these rules are deviated from, and to what extent. For instance, the ICC statute has clearly deviated from the general rules of state immunity, and as such the special rules of the regime apply over the general rules. However, if the ICC had not had these articles in its statute, it could not have made use of the concept of object and purpose, or effectiveness, to override these established rules.

Additionally, the Interlinked nature of this theory means that the rules created by other regimes are applicable in other courts. Therefore, it remains possible to refer to human rights in trade disputes and visa versa, and additionally the interpretation applied by the regimes that have created those norms should be upheld by other regimes. This may be easier said than done, in particular if the outside norm has either not yet been interpreted by a relevant court, or if that norm is in direct collision with a norm within the courts own regime. In those cases, the courts must try to reconcile those differing obligations as much as possible through the interpretation tools provided by the VCLoT. If however those norms can not be united, then it would be reasonable to expect that the court dealing with the conflict would disregard the outside norm, and signal its inconformity, to allow the states party to both norms to rectify the discrepancy.

In short, this theory relies on the international legal system as a whole to work together to create customary international law, such as general international law, but also allows for the creation of regime specific law. These specific rules would be exportable, but only in so far as is reasonable. As such, this regime would open the door to the possibility of norm fragmentation. The flexibility of the theory, and the possibility of development through different regimes, means that state consent retains its central place in international law, however, this comes at the price of a reduction of legal certainty. Such a reduction is not necessarily problematic, unless it reaches levels that would start to affect the perceived legitimacy by the actors. Whether or not this would happen would depend both on the ability of judges to make interpretations in the light of the general system of international law, and of states to avoid and rectify instances of conflicting norms.

3.2.5 Foundational unity

The last theory of Unity that retains some idea of one legal system, but allows for an increasing amount of flexibility, is the Foundational Unity. This form of Unity probably comes closest to the current system of international law, at least as seen by many international lawyers. Similar to Interlinked Unity, there is no single set of rules that apply to all states, nor is there any form of hierarchy of courts, although the limited form of normative hierarchy discussed above is retained. The difference is however that there is no longer any cross-fertilisation of norms between the regimes. Although the foundations are the same, there is no communication or interplay between the norms that are created by the independent regimes. The foundational norms may be opted-out from, although again this would only be possible through an explicit action, rather than effectiveness or other interpretative methods.

The foundations that are referred to in both the Foundational Unity and the Interlinked Unity are an important part of this concept. Depending on what norms are or are not included would greatly influence the unity of the system. If we accept that only rules of a secondary nature can be part of this foundation, then at least we avoid the trap of ‘self-contained regimes’ as described by Simma.⁴² Therefore, some basic level of

⁴² Simma, *supra* note 3.

Unity would continue to exist. This would be a very limited vision on the foundations of international law, excluding – amongst others – norms that have attained the status of *ius cogens* or obligations *erga omnes*. Expanding the foundations to include primary norms of a customary nature that have not attained that status, however, would be problematic, for it would open up the possibility of introducing norms of other regimes into those regimes set up to exclude them. If a trade regime is set-up without reference to human rights, then it is not designed or intended to take account of those rights, not even if they become customary law. This can be justified by the fact that all norms of customary law that have not reached *ius cogens* status can be deviated from by treaty. If a treaty regime clearly indicates that the court set up to supervise its implementation is only supposed to take account of trade law, then human rights have no place in that court’s jurisdiction.

The above does not exclude the possibility of creating a regime that operates in an Interlinked way within the Foundational Unity. Indeed, there are regimes that have direct reference to ‘other rules of international law’,⁴³ and as such are clearly meant to incorporate the norms that have been created by other international legal regimes.

This form of Unity is somewhere halfway between Unity and fragmentation. The theoretical basis has clearly chosen to promote diversity and development over a strict unity. The remnants of unity that remain are intended to ensure that the individual regimes created can rely on the legitimacy created by the foundation of international law that underpins them. In this way, the system as a whole is developed by the regimes that it supports. It is even possible that approaches first established in one regime may ‘trickle down’, and become part of the foundation that applies to other regimes as well. However, the possibility of contradictory judgments, forum shopping, and multiple judgments on the same subject matter, are clearly present, even more so than under Interlinked Unity. Once again, therefore, the existence of this possibility must be weighed against the positives of diversity. The clear threat is that if the regimes are unable to maintain the perception of belonging to one overarching system, they will gradually chip away not only at the foundation of other regimes, but also at the foundation of their own. Thus, it is possible that if enough conflict exists about the foundation, the foundation itself will lose its legitimising function; and the regimes that have been founded on it will in turn

⁴³ Charter of the African Court of Justice.

collapse. Although this form of unity is closest to the current system of international law, it must be stressed that this collapse is by no means imminent at this point in time, although it can not be excluded that we are heading in that direction.

3.2.6 Opt out unity

This form of unity is largely based on the Foundational Unity theory, with one mayor exception. The ability to opt-out of the rules that form part of its foundation implicitly. This means that there is no need for there to be a specific reference to the norm that is opted-out of, merely an indication that this may have been the intent of parties, or that excluding or modifying the foundational norm will better achieve the objectives of the regime.

As such this form of Unity moves even further into the terrain of diversity and just as with the Foundational Unity, may have consequences for the legitimacy of the entire legal system. It would still – in principle – use the foundational norms, but only if this furthers the goals of the regime; if it does not then the regime can create its own norms to replace them to better achieve its aims. Therefore, even under this form of Unity, there would not necessarily be a self-contained regime as defined by Simma,⁴⁴ because the foundational norms would usually remain in place at least to some extent. However, it would not be contrary to this theory – though unlikely – if a court excluded or reinterpreted all secondary rules of customary law, and as such did create a self contained regime.

The limitation of *ius cogens* is not affected, and as such a regime may never adjust its rules in conflict with such a norm.

3.2.7 Opt-In Unity

This is the other outer marker of the framework, and just as with Totalitarian Unity, this unity is not widely advocated, but is necessary to complete the framework from one end of the spectrum to the other. In this theory, International Law is not a legal system as such, but rather a collection of institutions that are similar only in the sense that they are international in nature, and have some pretence of establishing binding rules. Therefore,

⁴⁴ Simma, *supra* note 3.

there is no longer room for a foundation on which these institutions are built, but rather all institutions must chose their own basis as well as their own norms. Here, the regimes are truly self contained, and reference to other norms outside the regime would only be acceptable if it expressly refers to them.

The logical extreme that is thus created means that the recognition of a norm as *ius cogens* only applies if that regime has expressly chosen to refer to such norms, although a reference to general rules of international law would probably be enough. However, if a lacuna was to be found within the regime it would be up to the regimes own organs to fill that lacuna on the basis of nothing more than what the establishing treaty, and subsequent additions or amendments, refers to.

This clearly is the ‘totally fragmented’ international legal system, and as such it works, much the same as Totalitarian Unity, as an exaggerated warning by those who want to point to the dangers of fragmentation.

3.3 Achieving unity

The above has described a range of unities that span from a very close knit unity to one that can not really be considered to unity at all. These distinctions are very important in analysing the debate on fragmentation, but so are the methods that the authors propose to achieve – or maintain – these levels of unity. For instance, a supporter of normative unity may feel that it is the responsibility of states to achieve this, while someone, who agrees on their view of desirable unity, feels that the courts are better placed to create it. This difference is of a fundamental nature, and must be examined because it affects both the viability of the proposals as well as the desirability of the proposals. One can imagine that a normative unity created by states would have a differing content from one created by courts, as states would be more likely to limit their responsibilities, whereas courts may want to expand their own status, and as such the norms which are applicable. Below, we will briefly discuss the different options of achieving unity in international law. These options do not need to be exclusive, as a combination of two or more forms of achieving unity could be proposed by the same author.

3.3.1 Hierarchical Enforcement

Hierarchical Enforcement would allow a system of hierarchical courts to establish the norms that apply to states, and other international legal personalities. Clearly, this method of achieving unity can only be applied to realise Totalitarian and Absolute Unity. Normative Unity with a court Hierarchy would in effect become Absolute Unity.

A limited form of hierarchy could be used to achieve Interlinked Unity, with certain questions of international law referred to the ICJ. However, this would entail making the ICJ part of the particular regime in question, and as such be nothing more than an interconnected unity in the sense that the ICJ would become part of the judicial mechanisms of some or all of the separate regimes, and thus create an Absolute Unity. A suggested alternative has been to allow the possibility of preliminary questions to the ICJ, so that courts could ensure that they do not affect the foundation by fragmentation. However, if this request could not be followed by an appeal in case the court in question ignored it, it may have limited value, and if an appeal was possible, the ICJ would be able to create a hierarchy of norms, and quickly establish an Absolute Unity. If no such appeal was possible, the advise would be no more than that, and as such fall within the Interlinked Unity as defined above.

A last alternative is a field specific hierarchy, not creating a hierarchy of all courts, but certain courts within a field of international law, such as human rights law, could create their own hierarchy on certain issues.

3.3.2 Judicial Dialog

Judicial dialog, or comity of judges, has been advocated by many as the way to achieve unity in a system that has the possibility of fragmentation. This method builds upon the idea that the judges of the differing courts are aware of the fact that their place within the legal system of international law relies on the legitimacy of the overall system, and as such they must try to avoid confrontation with other courts. The difference with hierarchical enforcement is that there would be no legal basis for judges to take into account other courts, just their professional pride if you will.

Although, in theory, this system could work, there are several aspects that need to be discussed as they could harm the effectiveness. Firstly, there is the fact that judges to

specialised courts are not necessarily up to date on the work of other courts, or may simply not understand the complex subject matter of those courts. Secondly, if courts are unclear about the basis of their judgments or avoid discussing certain assumptions that underlie them, other courts can not be expected to always pick up on them. Thirdly, if a judge of a specialised court is confronted with the choice between following the generally accepted norm as interpreted by other actors, and as such not achieving their own goals as fully as possible, or replacing that interpretation with one that would allow a better achievement of their own goals, they may be persuaded to ignore the other courts in that case. If these cases then become the rule rather than the exception, the system will have failed.

Judicial dialog, as a way of achieving a form of unity, is by no means a guaranteed successful approach. It may work with some judges and courts, but it has the possibility to fail in others. However, depending on the author's trust in the judges and courts, this mechanism may well be suggested as a way of achieving anything up to Normative Unity, higher forms being excluded as they insist on a hierarchy of courts, and as such leave no room for this less strict approach.

Just like in hierarchical enforcement, this method would be able to compensate for the diverse creation of norms. However, unlike in the hierarchical system, where the application of the rules would automatically unify them, in the case of judicial dialog there would be a continued communication between courts about newly created norms in different regimes. Nonetheless, it would mitigate the diverse creation of norms, and allow the courts to limit the substantive conflicts that could arise between the systems. Indeed, if judicial dialog took on the full potential that some think it is capable of, it would be able to create a normative unity from the legislative chaos by consistent application of each other's, as well as the foundational, norms.

In addition to its ability to unify the law, judicial dialog is less constraining than hierarchical enforcement. Due to the voluntary nature of the judges comity, it would be possible for certain regimes to have a developing interpretation where others are still behind. Over time, this new interpretation could become accepted and as a result develop the law. This is the two edged sword of fragmentation and development at work once again.

3.3.3 State created

This approach relies on states to ensure that their legal obligations under all forms of international law are in conformity with one another. As such, the states may avoid signing treaties with contradictory norms, or include clauses on conflict resolution between different regimes. This would mean that states would need to take into account all of their current obligations when entering into any new obligations, and not be inclined to purposefully create obligations that may contradict each other to avoid a strong legal system, as some authors have suggested they do.⁴⁵

Thus, this method places its trust in the states rather than in the judges, in conformity with the concept of state consent, this would allow the states overall control over which norms are accepted in international law.

3.4 Unity as a fact, target or ideal?

The final question that is relevant in the discussion on unity is whether the temporal factor is of any importance, in other words, is it necessary for there to be unity at the current time, or at any time in the past, to be able to differentiate between unity and fragmentation? Literally, the term fragmentation applies only to the falling apart of a unity, and therefore, the presence of unity must have preceded the fragmentation. This argument is used by some who think the dangers of fragmentation are exaggerated, by stating that international law has always been an unconnected series of rules, and therefore fragmentation is nothing more than the maintenance of the status quo.

However, it can also be argued that there is fragmentation if there is a change in direction. If the field of international law as a whole was at some point in the past heading towards (greater) unity, then a change in this development that leads to a less rather than more connected system could be termed to be fragmentation. In this case, there is no need for the existence of a prior unity, only for a path towards that unity to have existed. The fragmentation would then result in a state of less unity, and therefore take the system as a whole further away from the desired unity.⁴⁶ Both these options are

⁴⁵ Eyal Benvenisti, *The Conception of Internal Law as a Legal System*, GERMAN YEARBOOK OF INTERNATIONAL LAW 393-405 (2008).

⁴⁶ For the purpose of this paper, it is assumed that unity, in what ever form, is desirable as the lack of it could result in significant reduction of legal certainty and legitimacy of the system. Considering the

problematic, as they require definitive proof that at some point in the past there was unity, or international law was consistently heading for unity.

Even so, when using fragmentation as a theoretical concept, there need not be a factual unity that was either achieved or was in the process of being achieved. The concept would then be contrary to the concept of unity, which could very well be an unattainable – yet desired – state. This approach is preferable, as it removes the hurdle of proving a form of unity. The whole idea behind the fragmentation debate is to reflect on whether the current course of international law is desirable from a perspective of what we want to achieve, therefore debating whether or not the current state is preferable to the past is not relevant, the question is whether it needs improving.⁴⁷

importance that international law has in the globalised world, a diminishing of its effectiveness can only be seen as undesirable.

⁴⁷ This does not mean that the benefits that some claim are part of a fragmented system could not be substantiated with evidence from the past, however, the focus must be on the effects of the system for the future.

4 Part 3

4.1 What form of unity is generally accepted?

4.1.1 Totalitarian Unity

As was already recognised in the framework, there is little support for this far reaching form of unity in the fragmentation debate. Only when reference is made to the possibility of creating a system that resembles that of national legal orders is there any indication that this form of unity could be intended. However, even in those cases authors tend to be quick to state that such a colossal adaptation of the system is not realistic, and then settle on a unity that is at least somewhat attainable.

4.1.2 Absolute Unity

Leathley is a strong supporter of the idea of Absolute Unity,⁴⁸ as his vision includes having a hierarchical court structure, featuring the ICJ at its apex, to ensure the unity of international law throughout all the different regimes.⁴⁹ He does however admit that such a desire is currently unrealistic, and not one that can be actively pursued.⁵⁰ The main problem, in his opinion, seems to be the acceptance of the idea rather than the implementation of it, as he believes there is sufficient legal basis in the UN Charter to allow for it to be seen as a constitution of international law, and as such allow the elevation of the ICJ to a supreme court of international law.⁵¹

Although Leathley does not go into detail with regard to the possibility of the formulation of a single set of norms for states, he does indicate that this need not necessarily be the case. In fact, he maintains that the regimes could continue to exist, but only under the supervision of the ICJ. Such a system seems to be of a temporary nature, because, if there were to be one supreme court of international law, surely that court would define the norms in existence between all states rapidly. The room for the special courts to expand norms would disappear, as the ICJ would be the final judge on the

⁴⁸ Leathley, *supra* note 6.

⁴⁹ *Id.* at 272.

⁵⁰ *Id.* at 305.

⁵¹ *Id.* at 273.

matter. As such, one of the main reasons for creating separate regimes will fall, the courts will no longer be able to create their own identity, different from that of the ICJ, due to the latter's control over the former's actions.

In contributions to the fragmentation debate, there seem to be few other outright supporters of this system.

4.1.3 Normative Unity

Pinto is one of the supporters of the idea of Normative Unity of international law.⁵² While she states that the unification of the international legal system is a 'reasonable goal',⁵³ she goes on to say that this unification must not change the fact that states should have the right to consent to the jurisdiction of a court, and as such different levels of enforcement will continue to exist. However, even within the field of Human Rights Pinto perceives problems with the unification of the different system, due to the fact that the current enforcement mechanisms have created their own identities, and therefore it will be difficult to bring them all together under one set of norms.⁵⁴

Dupuy is also of the opinion, not only that there should be normative unity, but that in effect this already exists. There are two axes of unity in his opinion, the first axis of which is largely similar to what in this article is termed the foundation of international law. As such, there is a system of international law based on these norms that can not be chosen, but are simply an inherent part of the system. Additionally, the second axis is the normative hierarchy that is lead by the *ius cogens* norms.⁵⁵ It would appear however that these norms are, in Dupuy's opinion, only the tip of the iceberg, and that there is indeed a normative unity of international law as well.

⁵² Mónica Pinto, *Fragmentation or unification among international institutions: Human Rights Tribunals*, 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 833-842 (1999).

⁵³ *Id.* at 841.

⁵⁴ *Id.* at 482.

⁵⁵ P. M Dupuy, *A Doctrinal Debate in the Globalisation Era: on the "Fragmentation" of International Law*, 1 EUROPEAN J. LEGAL STUD. 1, 17-18 (2007).

4.1.4 Interlinked Unity

One of the first authors to suggest such a system is Pauwelyn.⁵⁶ His article was an attempt at finding a middle ground between the positives of diversification and development, and the negatives of fragmentation. Although his theory of inter-connected islands is similar to the interlinked unity suggested here, the difference is within the enforcement structure of the unity. Pauwelyn called for a system that had as much communication between the courts as possible, stopping only just short of a hierarchical enforcement system, although he accepted that this may not be achievable, and that the system may have to settle for asking for advisory opinions; even just asking expert advice; or, in the worst case, just taking account of each other's case law. Interlinked Unity, as such, has a less ambitious approach, only hoping for the latter solution, rather than anything more substantial. Additionally, Pauwelyn's Unity also relies on the states to achieve this unity by not entering into contrary obligations, and when they decide to do so, to renegotiate the treaties that are in conflict. Hence, the system includes the mechanisms for achieving it, establishing a two prong approach, whereas the Interlinked Unity does not prejudge the discussion on the means of achieving it, beyond the fact that the rules of outside regimes are to be incorporated in some way, only excluding a hierarchy of courts.

Another example of an author who settles for interlinked unity is MacLachlan.⁵⁷ Although his article contains references to Normative and Foundational Unity, the end result is a call for Interlinked Unity. In his vision, it is essential that regimes are able to refer to what is happening in the others, to be able to create a unified, and thereby legitimate, international legal system. His methodology is based on systemic integration, whereby the rules of other regimes can, and must, be incorporated into judgements by special courts. The idea is based on art 31(3)(c) of the VCLoT, and seeks to allow courts to create a balance between the obligations that a state has entered into, even though the obligations may not necessarily be part of the same regime. As such, this would allow for the reference to norms of environmental law in the case of a trade dispute. However, as

⁵⁶ Pauwelyn, *supra* note 41.

⁵⁷ MacLachlan, *supra* note 9.

MacLachlan states himself,⁵⁸ this form of integrating the norms of other regimes would not in itself be sufficient to deal with the actual underlying conflict of norms in international law, in other words, this method would not be able to achieve a hierarchy of norms, and as such could never lead to the creation of a Normative Unity. He does however hope that this method will be able to help in some cases where there is no direct unavoidable conflict, and for the other cases other conflict resolution mechanisms must be developed. This shows the authors ambiguity towards this type of unity, he believes on the one hand that systemic integration will be able to help create a Interlinked Unity, however, on the other hand it would be better if other methods would be developed in future to allow for a creation of a normative hierarchy of norms, creating a Normative Unity.

The tendency to be in favour of Interlinked Unity is often born out of the desire to avoid fragmentation while retaining the positive aspects of diversity. This is a odd balance, as both these terms refer to the same process and differ mainly in connotation. However, there are authors, like Hafner, who do find this balance in the aforementioned unity concept.⁵⁹ The thinking is clearly that as there is a threat, although not very serious yet, there must be some action taken to avoid the long term consequences of it, however, the development of different regimes has created some very positive effects, and continues to develop the norms of international law. Therefore, this approach of creating a stable foundation followed by a diverse, yet related, collection of regimes is very appealing. The norms created by the differing regimes are clearly more positive than negative, and while some limitations must be set to how diverse these norms are allowed to become, seeing as real contradictions could bring problems, there should also be more room for them to develop, as they have been able to do in the past. As such, Hafner is a perfect example of a real supporter of Interlined Unity as the ultimate solution for international law, nor merely as a target to be adjusted later, but a true goal in itself.

Oellers-Frahm creates a somewhat different version of Interlinked Unity.⁶⁰ Although, as with so many authors, there is no direct reference to a preferred form of unity, the general comments that are made paint a very clear picture. The norms of other

⁵⁸ *Id.* at 318.

⁵⁹ Hafner, *supra* note 18.

⁶⁰ Oellers-Frahm, *supra* note 17.

regimes must be taken into account,⁶¹ and special regimes must be aware of the foundations on which they are established: the rules of general international law.⁶² Even though there are also hints towards a stronger Normative Unity, these can be discarded as she considers the diversity of rules one of the basic attributes of modern international law, and therefore different regimes must be able to continue to exist.⁶³

As already referred to above, Fisher-Lescano and Teubner would like to see the international legal system evolve in such a way as to create an Interlinked Unity, although their perspective is slightly more bleak from a unity perspective, as they consider that only a loose type of Interlinked Unity can come into existence.⁶⁴ This is based on their assessment that the fragmentation of international law is not in fact an isolated occurrence, but rather the reflection of a diversification of global society.⁶⁵ As such, it will not be possible to create a Normative Unity between the different systems, unless the global society itself becomes unified. However, the individual courts will interact with each other and function as ‘network nodes’, resulting in the law of external systems seeping into the internal mechanism.⁶⁶ Yet, there is no need for the different ‘nodes’ to be working towards creating a real, normative, unity, as this would be attempting to achieve the unrealistic.⁶⁷ Still, for the decisions of courts to have significant weight, they must take account of not only *ius cogens*,⁶⁸ but also the solidity of the foundation on which the decision rests; and not alter that foundation too drastically, at least not at once,⁶⁹ thus, at least to some extent, creating a foundation on which to build the differing systems that then only interact in a ‘weak’ manner.

Although this approach is interesting, it seems to ignore the fact that as international law continues to fragment more and more, the global society seems to be becoming more and more coherent. As such, the fragmentation of law is either caused by a delayed reaction of the law to social realities, or due to at least some other factors as

⁶¹ *Id.* at 73.

⁶² *Id.* at 74.

⁶³ *Id.* at 71.

⁶⁴ Fischer-Lescano and Teubner, *supra* note 22 at 1018.

⁶⁵ *Id.* at 1007.

⁶⁶ *Id.* at 1030.

⁶⁷ *Id.* at 1037.

⁶⁸ *Id.* at 1039.

⁶⁹ *Id.* at 1039.

well. Thus, it is possible that the individual regimes create a different identity to others to ensure their continued existence and importance within the global community, rather than that the global society called for that differentiation itself. If this last hypothesis is accepted, then those regimes could be melded together without needing a change in the society, as there is no clear segment of society that is fighting for the continued existence of that system, but rather the norms that it represents at an abstract level.

4.1.5 Foundational Unity

Higgins uses foundational unity when analysing the effects of fragmentation.⁷⁰ Her investigation into the integration of international law in the European courts relies on their application of the rules of general international law, such as state immunity and rules of interpretation as incorporated in the VCLoT. This is also the basis for her statement that there is little danger in fragmentation, due to the increasing number of courts dealing with questions that were perhaps originally intended to be dealt with by the ICJ.⁷¹ Interestingly, when she moves on to take a cursory look at the WTO record on this matter, there is a reference to other norms from other fields of international law,⁷² something that was clearly not taken into account in the first part of her article. However, this short excursion into Interlinked Unity does not result in a further investigation, and as such is more of an inconsistency within the article than a change of position.

Abi-Saab believes that the international legal system has developed over time to create a non-hierarchical system. Such a system, he claims, is viable due to the cohesive forces that keep it together.⁷³ These forces are exerted by both states and courts when they conceive of international law as one legal system. This system would be based on the ‘overarching principles’ that underlie it, rather than on a deeper unity.⁷⁴ This focus on only the overarching principles is clearly a reflection of the need to allow the special regimes to create their own normative systems.⁷⁵

⁷⁰ Higgins, *supra* note 23.

⁷¹ *Id.* at 16.

⁷² *Id.* at 17.

⁷³ Abi-Saab, *supra* note 24 at 920.

⁷⁴ *Id.* at 926.

⁷⁵ *Id.* at 926.

Simma seems to be a little confused in his writing when it comes to the unity that he supports. Throughout his publications, he always considered the fragmentation to be problematic only if there is a complete loss of an ‘overarching general international law’,⁷⁶ or a residual framework,⁷⁷ clearly indicating a theoretical attraction to the foundational unity, which has been present in his writing even since the 1985 article on self-contained regimes.⁷⁸ Nonetheless, in his most recent contribution to the debate, he attempts to incorporate the use of article 31 (3)(c) as a means of ensuring such a unity.⁷⁹ This follows from his belief that states are unlikely to create new rules of international law that would contradict already existing ones. Here, he clearly crosses the line to Interlinked Unity, as he states that both states and courts should take account of all the obligations that bind the parties, and see these as a whole. Although Simma goes on to state that this method of interpretation has many problems and is unlikely to cure fragmentation, he does accept the basic premise that the obligations of states are to be read in the context of their other obligations. Given this position, it is strange that he does not seem to comment on the role of outside norms within a regime. Also taking into account that there seems to be a change in wording towards the gravity of the problem, although his conclusions do not change, Simma may be starting to slightly shift his position on the issue of fragmentation and what form of unity is needed, although this change in language may also be due to the difference in form of the last article.

4.1.6 Opt-Out unity

Although few authors would consider this to be a desirable solution for the international legal project, it has by some been seen as the current state of affairs, and as such likely to remain so.⁸⁰ Fisher-Lescano and Teubner consider that the ability to unify international law is no longer there, the law has already fragmented too far.⁸¹ The very nature of international law means that it is not in fact a legal system, and as such no real unity can

⁷⁶ Simma, *supra* note 3 at 270.

⁷⁷ *Id.* at 271.

⁷⁸ Simma, *supra* note 3.

⁷⁹ Simma, *supra* note 3 at 276.

⁸⁰ Fischer-Lescano and Teubner, *supra* note 22.

⁸¹ *Id.* at 1007.

be created. However, this is merely the legal situation, and they do see hope for the future, although not for creating unity in the absolute sense. They do clearly feel that the Opt-Out Unity that currently exists can be ‘upgraded’, by taking certain steps, to a politically based form of Interlinked Unity.

4.1.7 Opt-in unity

Just as the other outer marker, there is little support for this type of unity within the fragmentation debate. Possibly, the adherents of the Critical Legal Studies have yet to venture into the fragmentation debate, as they consider the whole debate rather superfluous. If your point of view relies on the theory that all of international law is not really law at all, but rather a result of how well a point is argued by the parties, then there is really no need to contribute to the debate on fragmentation. For this contribution would be no more than stating that, as there is strictly speaking no such thing as international law, there is no way in which it can be undergoing a fragmentation. What other authors consider to be fragmentation is merely the manifestation of the fact that international law is not in fact law, this has come to the forefront in recent years due to the increasing number of courts and tribunals that refer to international law, without knowing what in fact this is.

4.2 Achieving Unity

4.2.1 Judicial Dialog

Although Hafner offers very little in the way of methods to counter fragmentation, it can be assumed that his view on the preferred unity, Interlinked, means that at least some method of judicial dialog must exist. Indeed, in his article he points out the dangers of courts being unaware of the jurisprudence of other regimes, thus implying that they should be aware, and take account, of any judgments that affect the case before them.⁸²

Fisher-Lescano and Teubner are clearly great advocates of this form of unity creation. Due to the fact that they see the differences in international law as a result of the differentiations in global society, there is no way that states will be able to create legislation to unify the system. Furthermore, they are staunch adversaries of the idea of a

⁸² Hafner, *supra* note 18 at 858.

hierarchical system to solve the problems, once again from the point of view that each of these systems represents parts of global society, if these were to be merged under one hierarchy, then their relevance would wane.⁸³

Higgins does see the need for courts to be involved with the unification of international law, or at least to limit its fragmentation. However, this should by no means take the form of a Hierarchical Enforcement mechanism, or even of a formal system of reference.⁸⁴ The only way that the courts within the international legal system can be expected to operate is through keeping themselves informed of the case law of other courts.⁸⁵

Abi-Saab also sees a place for the courts, as they can still destroy any unity made by the states by differing interpretations. However, his vision on the nature of international law and the restriction of unity to a foundational level means that this can only be achieved by the judges taking their international responsibility rather than any formal obligations.⁸⁶

Simma does see the judiciary as the main contributor to the unity of international law, and argues that this contribution is achieved through judicial dialog and comity. Importantly, his approach seems to focus on the courts' tendency to avoid contradiction, and to ensure that their case law is based on generally accepted rules so as to ensure its legitimacy. Therefore, the courts do not need to be 'pushed' to ensure this unity, as it would be a natural action for them. This approach disregards the current tendencies of the latter to either 'hide' their contradictions or to claim special status to avoid openly contradicting others. Simma does not provide a convincing theory that incorporates these developments.

Dupuy, although a supporter of Normative Unity, does not consider it possible to ensure a judicial hierarchy to enforce this type of unity. Indeed, he has stated rather bluntly that:⁸⁷

As for the ICJ, its members are delusional in believing that they will succeed in imposing the idea of a preliminary question procedure (...) It will not succeed either in being officially granted a role

⁸³ Fischer-Lescano and Teubner, *supra* note 22 at 1007.

⁸⁴ Higgins, *supra* note 23 at 20.

⁸⁵ *Id.* at 20.

⁸⁶ Abi-Saab, *supra* note 24 at 929.

⁸⁷ Dupuy, *supra* note 15 at 23.

as a referee in situations where there might be a jurisdictional conflict between different international tribunals. The measures to structure international justice and make it coherent can seem appealing on paper. However, they have but a minute link with political realism and diplomacy!

This, after initially claiming that proposals towards a judicial hierarchy of sorts should always be ‘taken seriously’.⁸⁸

4.2.2 Hierarchical Enforcement Unity

Oellers-Frahm supports the creation of a hierarchical enforcement mechanism.⁸⁹ Though it is clear that she considers this to be a rather radical,⁹⁰ and unlikely, step, she nonetheless endorses the idea of having a central judicial organ that could provide authoritative decisions on the correct interpretation of (at least general) international law.⁹¹ The more realistic approach would be the Judicial Dialog approach,⁹² which, even if not mentioned explicitly by Oellers-Frahm, resonates throughout her article. The fact that regimes may need to interpret and apply the rules of other independent regimes is presented as a clear fact.⁹³ Even though she accepts the limits of this approach, as it would demand of courts to look beyond their ‘borders’, despite their inclination not to, and this demand cannot be founded in law, but must for a large part be voluntary.⁹⁴ Additionally, the fact that courts should take each other’s jurisprudence into account could lead to courts de facto reviewing the case law of a different court, which would not be acceptable.⁹⁵ These limitations seem to reinforce her initial idea that some level of hierarchy, however basic, should be introduced to avoid the fragmentation *problematique*, and as such she calls for the hierarchical structuring of the courts within certain fields of international law.⁹⁶ Probably, the idea behind this is that if the different regimes create an internal hierarchy, it will become easier to create an overall hierarchy

⁸⁸ *Id.* at 9.

⁸⁹ Oellers-Frahm, *supra* note 17 at 72.

⁹⁰ *Id.* at 91.

⁹¹ *Id.* at 72.

⁹² *Id.* at 83.

⁹³ *Id.* at 73.

⁹⁴ *Id.* at 74.

⁹⁵ *Id.* at 80.

⁹⁶ *Id.* at 103.

later, when the development of international law has reached a point at which such a suggestion could become viable.

However, such a limited hierarchy would not solve the problems of the application of the norms of other systems, which would not be included in the hierarchical system. Therefore, Judicial Dialog will remain very important, and although the problem of review is real, it remains important that courts make clear the reasoning behind their deviation from other courts case law.⁹⁷

4.2.3 State Created Unity

In *Abi-Saab's* opinion there is a clear role for states in the maintenance of the legal unity of international law. The states must act in such a way as to support the relative unity of international law, always creating new institutions with the wider framework in mind.⁹⁸ This will help to create unity at the first possible step, and then the courts will become responsible to maintain it when a case is brought before them.

Simma also sees some room for states to guarantee that the unity of international law is ensured.⁹⁹ There is however little need to change the current mechanisms, as he believes that this is already happening, and additionally, it would appear that although states do have a role to play, the bigger responsibility lies with the courts, who must ensure the unity in application.

4.3 'Empirical' research

Almost all contributions to the fragmentation debate have been short articles that portray the author's opinion supported by selected cases or theories. The problem of fragmentation, however, is in part a question of fact, and empirical research is therefore needed. There have been several attempts to fill this gap, most notably by *Charney* in 1998, and lately by *Vanneste*.¹⁰⁰ Unfortunately however, these bigger works do not add much to the debate, as they fail to produce that which they promised: an empirical research. Although the number of cases dealt with in these books are more numerous than

⁹⁷ *Id.* at 80.

⁹⁸ *Abi-Saab*, *supra* note 24 at 927.

⁹⁹ *Simma*, *supra* note 3 at 276.

¹⁰⁰ *FREDERIC VANNESTE, GENERAL INTERNATIONAL LAW BEFORE HUMAN RIGHTS COURTS: ASSESSING THE SPECIALTY CLAIMS OF INTERNATIONAL HUMAN RIGHTS LAW* (2009); *Jonathan I. Charney, Is international law threatened by multiple international tribunals?*, 271 *RECUEIL DES COURS* p. 101-382 (1998).

in the shorter articles, the choice for the cases or examples are not justified by the authors. As such, there is no real empirical data that can be used to objectively establish whether or not there is fragmentation, only that there are sufficient independent instances to prove the author's point.

Charneys work has the additional problem of already being partially outdated due to the examples of possible fragmentation that have surfaced after its publication. Additionally, the conclusion of the book is that there is no danger of fragmentation yet, leaving the door open for the possibility that this could happen in future, and perhaps by now already has.

Vanneste attempts to investigate the manner in which Human Rights Courts deal with questions of international law. Specifically, he intends to discover whether the accusation of humanrightism on the part of the courts is correct. Unfortunately, his book does not achieve its objectives for several reasons. Firstly, there is no definition of humanrightism, other than that humanrightism constitutes an act that is unjustly pro human rights. However, there is no way of measuring this, and therefore the conclusions are simply based on whether the author thinks the courts have been 'good' or 'bad'. Although this is a valid exercise in legal writing, it can not be said to be empirical. Indeed, the case selection method of the author remains a mystery, not helped by the lack of a case index in the book.

5 Conclusion

The above review of the literature on the fragmentation of international law shows that the debate has so far been conducted in an unstructured and chaotic manner. Authors seem to have been participating in different debates rather than responding to one another. The framework that was established in this article did provide some guidance in reading these contributions. It would seem that there is a strong correlation between the form of unity that the authors supports, and the level of threat they feel that fragmentation poses. It remains problematic therefore that the authors do not explicate their position on this matter before entering into the debate.

Some unity between the different positions can also be found, namely that most legal scholars believe courts have a large role to play in the maintenance of unity. This means that the actions that courts undertake when delivering judgments are of vital importance.

Although we have seen that the debate is by no means a recent development, it does seem that it has only started to mature in recent years. Many authors have now contributed their view on the international legal project and presented their theories. However, there still seems to be a large information deficit when it comes to the actions of judges and courts. It is therefore necessary to create a research methodology that will allow a proper empirical analysis of the behaviour of international courts and judges, as their input will for a large part determine the eventual outcome of the fragmentation question.