

Narratives of Fragmentation

International Law between Unity and Multiplicity

Dirk Pulkowski*

1. Introduction

In a contribution for the 1953 *British Yearbook*, W. Jenks observed that “the conflict of law-making treaties [...] must be accepted as being in certain circumstances an inevitable incident of growth” of international law. Jenks urged the international lawyer “to formulate principles for resolving such conflict when it arises.”¹ In the five decades following Jenks’ visionary article, international law has witnessed an even more radical process of functional specialization leading to a debate on the alleged ‘fragmentation’ of international law.

Nowadays, ‘fragmentation’ is a hot topic for international lawyers, fashionable even in the established circles of the *International Court of Justice*² and the *International Law Commission*.³ All too often, however, academic conversation about fragmentation gets stranded in a kind of babylonian confusion of theoretical approaches. The common theme of fragmentation opens up a multiplicity of perspectives. This paper explores some major strands in the study of fragmentation.

Approaches to fragmentation studies can be grouped in four broad categories:

- (1) First, jurists may approach fragmentation as an ontological problem: Is there such thing as an international legal order? And what is its structure? Some jurists assume that the norms of international law necessarily mirror the divisions and disparities of the international society. Others argue that the amalgam of a uniform international law could help to patch up such disparities.
- (2) Others assert that such a conversation on the structure of world order is not helpful. Instead, a strictly norm-based discourse is proposed. Irrespective of what the international order may look like from a sociological point of view, lawyers are tasked to determine the relationship between individual norms. Sociology speak may be discreetly faded in to determine the ‘object and purpose’ in whose light the norm should be interpreted.⁴
- (3) To a third category of lawyers, such an approach is too formal, not to say: formalistic. To their mind, the question of separateness or integration of different regimes of international

* Doctoral candidate in international law, Ludwig-Maximilians-Universität München. E-mail: dirk@pulkowski.de. This paper partly builds upon an article by Bruno Simma and myself, which will be published in J. Crawford, A. Pellet, *Le droit de la responsabilité des États* (Paris: Pedone, 2005). In line with the ESIL Agora’s objective, the present paper is to a certain extent experimental, attempting to leave the trodden paths of the debate on the ‘fragmentation of international law’. Any comments will be highly appreciated.

¹ W. Jenks, ‘Conflict of Law-Making Treaties’, 30 *BYIL* (1953) 401 at 405.

² Address of Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 October 2000, http://www.icj-cij.org/cijwww/cpresscom/cpresscom2000/cpresscom2000-36_SpeechPresidentGA_20001026.htm.

³ Cf. most recently, *Report on the work of its fifty-sixth session*, General Assembly, Official Records, Fifty-ninth Session, Supplement No. 10 (A/59/10), at 281.

⁴ Article 31(1) of the Vienna Convention on the Law of Treaties.

law cannot be reduced to a logical operation of the Vienna Convention machinery. Instead, normative criteria – perhaps an emerging *ordre public global* – must ultimately guide legal decision making.

- (4) A last group of jurists is less concerned with the question of how different regimes are related to each other, than with the question how lawyers *argue* they are related. They identify discursive patterns commonly employed to argue that one regime should be considered separate from – or imbedded into – another one. Often, the goal of this approach (which can be termed the critical approach) is to demonstrate the inconclusiveness or indeterminacy of legal reasoning.

2. Conceptualizing International Law in Terms of Rules

To avoid excessive abstraction, my analysis of these ‘narratives of fragmentation’ will proceed from a well-known case study: the scholarly debate on so-called ‘self-contained regimes’. Both international relations theorists and lawyers have been attracted to the idea of autonomous subsystems, a debate culminating in the claim of self-containment. Since the International Court’s famous pronouncement in *Tehran Hostages*,⁵ this debate has narrowed down to the specific question of the completeness of a subsystem’s secondary rules. Hence, self-contained regimes designate a particular category of subsystems, namely those that embrace a full, exhaustive and definitive set of secondary rules. The principal characteristic of a self-contained regime is its intention to totally exclude the application of the general legal consequences of wrongful acts, in particular the application of countermeasures by an injured State.⁶

The International Law Commission’s stand with regard to the existence of so-called self-contained regimes concerning State responsibility varied with each Special Rapporteur taking up the subject of legal consequences of internationally wrongful acts. In a nutshell, the ILC first appeared to embrace the concept of self-contained subsystems (Riphagen⁷), then became highly

⁵ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, 40: “The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to the diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious.”

⁶ Cf. B. Simma, ‘Self-Contained Regimes’, XVI *Netherlands Ybk* (1985) 111 at 117. International lawyers have, thus, adopted an autonomous ‘international law’ definition, which is not identical with S. Krasner’s classical definition of international regimes as “a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” S.D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, in S.D. Krasner (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983) 2.

⁷ W. Riphagen, *Third Report on State responsibility*, in ILC Yearbook 1982, Vol. II Part One, 24 para 16; cf. also W. Riphagen, ‘State Responsibility: New Theories of Obligation in Interstate Relations’, in R.S.J. Macdonald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Dordrecht: Martinus Nijhoff, 1983) 600.

critical of the systematic feasibility of such isolation from State responsibility (Arangio-Ruiz⁸), and finally adopted the position of a pragmatic ‘maybe’ (Crawford⁹).

A. The Universalistic Concept of the International Legal Order

The final draft articles adopted by the ILC in 2001 envisions that States can ‘contract out’ of the State responsibility regime. The ‘general’ rules codified by the ILC, thus, do not apply

where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.¹⁰

The relationship between the rules on State responsibility and ‘other’ rules of international law is, thus, described as a general–special distinction. Such a distinction, however, is not at all self-evident. It is based on certain assumptions regarding the international legal order: First, reference to the *lex specialis* principle presumes that the nature of international law is more adequately captured by reference to rules than by reference to process; and second, reference to a general–special distinction suggests the existence of a more or less organized international legal order.

Article 55 of the ILC draft is, thus, based on a particular perception of international law common to many ‘general international lawyers’: International law is a unified and, to a certain extent, hierarchical legal order. “L’unité de l’ordre juridique”, as P.-M. Dupuy has titled his General Course,¹¹ is a sociological fact or, at least, a normative postulate.¹² Unity, according to M. Delmas-Marty, is an inherent characteristic of law, since “[l]e droit a l’horreur du multiple. Sa vocation c’est l’ordre unifié et hiérarchisé, unifié parce que hiérarchisé.”¹³ One such hierarchy of the legal order in Delmas-Marty’s sense (though not strictly speaking a relationship of higher and lower rank) is the concept of ‘general’ international law, in which all ‘special’ law is embedded.

If international law is a unified legal order of rules, the flawless integration of the secondary rules of such subsystems into the law of State responsibility is an imperative. Rules contained in subsystems need to remain connected with this universal order. The *lex specialis* principle seems to be a logical candidate for tying special regimes to general international law: State responsibility is considered part of so-called *general* international law and all other regimes are, by definition, *special*.

⁸ G. Arangio-Ruiz, *Fourth Report on State responsibility*, in ILC Yearbook 1992, Vol. II Part One, 35. Cf. also ILC Yearbook 1992, Vol. I, 76.

⁹ International Law Commission, *Report on the work of its fifty-third session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10)* 359 para 5.

¹⁰ Article 55 of the ILC draft, titled *lex specialis*.

¹¹ P.-M. Dupuy, ‘L’unité de l’ordre juridique international’, 297 *RdC* (2002) 1.

¹² One of the most profound discussions of systemic unity as a ‘normative postulate’ can be found in C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz: Entwickelt am Beispiel des deutschen Privatrechts* (Berlin: Duncker & Humblot, 1983) 21 et seq. Canaris stresses that the unity of law is not of a logical kind, but rather mediated by values. Value judgments are not a matter of formal logic. Hence, the inner coherence of values cannot be grasped logically but only in an axiological or teleological manner.

¹³ M. Delmas-Marty, *Trois défis pour un droit mondial* (Paris: Seuil, 1998) 104.

However, a key problem remains for proponents of the universalistic approach, namely a problem of treaty interpretation: How far does the specialty of the special treaty extend? To what extent did the State parties intend to exclude the application of the rules on State responsibility? Formally, the answer can be found in two simple steps. First, the rules of the special regime, ordinarily codified in a treaty instrument, must be interpreted according to Article 31 of the Vienna Convention on the Law of Treaties in order to establish whether the States parties intended the regime's secondary rules to be exhaustive and complete. Second, resort must be made to general international law to verify whether the latter permits such derogation.

Practically speaking however, reference to treaty interpretation is hardly satisfactory. None of the treaty regimes presented as candidates for self-contained regimes contains an explicit provision regarding the applicability *vel non* of the rules of State responsibility. To cope with this problem, universalists operate with a presumption in favour of the applicability of the 'general' State responsibility regime; a presumption that can be refuted only by contracting out of general international law with sufficient clarity. For example, the ILC's Special Rapporteur J. Crawford speaks of a "presumption against the creation of wholly self-contained regimes in the field of reparation."¹⁴ According to such a presumption, the rules on State responsibility apply unless the treaty clearly provides otherwise. In J. Pauwelyn's words, "[i]t is for the party claiming that a treaty has 'contracted out' of general international law to prove it."¹⁵ Such a presumption is in line with the I.C.J.'s holding in the *ELSI* case:

The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber find itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.¹⁶

B. The Particularistic Concept of the International Legal Order

This was the story of fragmentation based on the assumption of a unified legal order. However, such an approach has had both friends and foes in the International Law Commission. In stark contrast to what turned out to be the majority view, W. Riphagen suggested that international law should be seen as the aggregate of different regimes, co-existing without any pre-defined hierarchy:

A theoretical answer might be that a system was an ordered set of conduct rules, procedural rules and status provisions, which formed a *closed legal circuit* for a particular field of factual relationships. A subsystem, then, was the same as a system, but not closed in as much as it had an interrelationship with other subsystems.¹⁷

¹⁴ J. Crawford, Third Report, A/CN.4/507 (2000) para. 147.

¹⁵ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003) 213.

¹⁶ *Eletronica Sicula (ELSI)*, ICJ Reports 1989, 42, para. 50.

¹⁷ ILC Yearbook 1982, Vol. I at 202, para. 16.

Focusing on the variety of regimes involved in international law (rather than on the international legal system), Riphagen advocated a ‘particularistic’ vision of the international legal order.

The Rapporteur’s theory draws on S. Krasner’s classical definition in international relations theory of a ‘regime’ as “a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”¹⁸ While the modern interest in ‘regimes’¹⁹ is probably inspired by the work of theorists such as Krasner, the idea of a polycentric international law can be traced back (at least) to George Scelle. According to Scelle, “[t]he world community swarms with myriad legal orders (in today’s parlance we would call them ‘sub-systems’)”²⁰.

What is the consequence of shifting attention from the systemic whole to the system’s particular components, from the universe to the planets? Not surprisingly, life on the planet becomes more interesting than the fate of the universe. Such an approach entails emphasizing a regime’s political purposes (rather than the politics of the international community); the tailor-made character of a regime’s legal rules (rather than the claim to universal justice of general international law); and the legal culture corresponding to the politics of the system (rather than the longstanding expertise of international lawyers). Consequently, there is a certain skepticism towards any attempt to ‘smuggle’ alien elements into the regime.

Undoubtedly, even proponents of particularistic approach admit that regimes “do not live by themselves, each in its own area, but intersect and overlap with each other”²¹. Nonetheless, making use of norms outside the regime is more of an ‘emergency operation’ than a desirable practice. Tribunals established under particular regimes tend to apply a presumption in favor of complete and exhaustive regulation in the respective regime.²² Most notably, such a presumption underlies the rulings of the European Court of Justice. Since the Community Treaty has “created its own legal system”²³, *lacunae* are filled up by analogies within the system or by recourse to general principles inherent in the Community legal order instead of falling back on general international law. The *Francovich* principles may be cited as one example for resolving shortcomings within the ‘regime’.²⁴

As a consequence of a presumption in favor of completeness, the threshold for resorting to rules outside the regime is much higher. Applied to our case study, any resort to the regime of State responsibility requires special justification. State responsibility is not a general fallback option, which automatically fills up the gaps (or *lacunae*) of the regime. Rather, the framework on State responsibility is an *aliud* only to apply in exceptional cases. Once a presumption in favour of a regime’s completeness is accepted, tribunals established under the regime may easily conclude (in accordance with the maxim *expressio unius est exclusio alterius*) that no remedies

¹⁸ S.D. Krasner, note 6.

¹⁹ Cf. for example, G.R. Winham, 'International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO', 2 *WTR* (2003) 131.

²⁰ Scelle’s concept was thus summarized by A. Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law’, 2 *EJIL* (1990) 210.

²¹ *Id.*

²² Cf. in the context of WTO law, D.M. McRae, 'The WTO in International Law: Tradition Continued or New Frontier?', *JIEL* (2000) 27. Similarly, J. L. Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence', 33 *Geo Wash Int'l L Rev* (2001) 979 at 1009.

²³ *Costa v. ENEL*, 6/64, EC Reports 1964, 585 at 593.

²⁴ *Francovich and Bonifaci v. Italy*, joined cases C-6/90 and C-9/90, EC Reports 1991, I-5357.

other than the ones specified may be resorted to. Hence, from the particularistic perspective, regimes are likely to appear as ‘self-contained’.

C. Planets and the Universe: The Level-of-Analysis Problem

It is time to briefly review the course of this case study. At the beginning, there was a fairly straightforward question: Does a special regime intend to exclude the residual application of the rules on State responsibility?²⁵ I concluded that treaty interpretation in accordance with the Vienna Convention does not produce any conclusive answer. The wording of the special treaties (WTO, EC, human rights...) can simply be read both ways: as permitting or as precluding the application of the rules on State responsibility. In such a situation, indeterminacy can only be avoided by recourse to presumptions. A presumption in favor of general international law is widely shared among public international lawyers. The contrary presumption prevails among Community lawyers and many WTO specialists. Both presumptions reflect a certain perspective on the international legal order (universalistic view / particularistic view).

Neither presumption can be solidly grounded in theory. As D.V. Sandifer observes, “[b]y its very nature the law of presumptions belongs primarily to the realm of municipal law, rather than to international law. It is dependent upon a superior authority with power to define the presumptions and the inferences to be drawn from them...”²⁶ The international legal system, largely dependent on ‘horizontal’ processes of law making, lacks such authority.

In the absence of a reliable presumption in favor of the universal or the particular, the universe or the planet, the analysis is somehow left in limbo. Depending on whether we choose a universalistic or a particularistic perspective, the analysis yields different results. If we focus on the universe, the law of the universe (general international law) governs the planets. If we focus on the planets, planetary rules leave little room for universal law. As the ILC’s Special Rapporteur Arangio-Ruiz has observed with regard to the EC:

Generally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties...²⁷

This problem – identified in the realm of legal method – is linked to a related problem in the realm of theory. Ultimately, the disparity of the conclusions is a consequence of what has been called the ‘level-of-analysis problem’. In international relations theory, J.D. Singer warned

²⁵ A related issue, which currently receives a lot of attention in the course of the ‘trade law vs. environmental law’ controversy, is the question whether norm emanating from one regime (e.g., a MEA) can be said to be more special than a norm contained in another regime (e.g., the WTO covered agreements). Much of the discussion presented in this case study would apply by analogy.

²⁶ D.V. Sandifer, *Evidence Before International Tribunals* (Charlottesville: University Press of Virginia, 1975), 141 et seq.

²⁷ G. Arangio-Ruiz, Summary records of the meetings of the forty-fourth session, ILC Yearbook 1992, Vol. I, 76.

that analytical results of one and the same political issue varied depending on whether an analysis was carried out at the level of the international system or at the level of the national State.²⁸

By analogy, Singer's observations are relevant for the present level-of-analysis problem. The "system-oriented model" (i.e. the universal approach) tends to lead the observer into a position which exaggerates the impact of the system upon the particular regimes and, conversely, discounts the impact of the regimes on the system.²⁹ The regime model, on the other hand, avoids the inaccurate homogenization which may flow from the systemic focus. However, it may also lead us to the opposite type of distortion – a marked exaggeration of the differences among our sub-systemic actors.³⁰

D. 'Rules Plus': Compensating Shortcomings of the Rules Approach?

Since presumptions in favour of either the general norm or the special norm cannot be grounded convincingly in legal doctrine, we may well be confronted with what H.L.A. Hart and R. Dworkin call a 'hard case'. According to H.L.A. Hart's theory, the judge has discretion to decide such hard cases of *non liquet* either way (that is, ultimately, according to personal morality or subjective policy choices), provided that the law does not require her "to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide".³¹ From R. Dworkin's perspective, one could argue that the role of principles in adjudicating such hard cases has yet to be explored.³² If rules of international law fail to provide a clear answer, Dworkin's Hercules would be guided by the preferences and expectations of the community whose law he administers. But what principles, and whose expectations would guide the interpreter in the present case study?

3. Analyzing the Processes of International Law

A. Process Perspectives on the Operation of Rules

Other jurists place less emphasis on 'international law', than on 'how we use it'.³³ Lawyers make use of various (and sometimes contradictory³⁴) 'tools' of interpretation to reconcile competing rationalities expressed in different rules of law. G. Schwarzenberger, thus, referred to the principles of treaty interpretation as merely "tool[s] in aid of the *jus aequum* rule"³⁵. In that sense, their function may resemble what V. Lowe labeled as 'interstitial norms': "The choice is made by the judge not on the basis of the internal logic of the primary norms, but on the basis of

²⁸ J.D. Singer, 'The Level-of-Analysis Problem in International Relations', in K. Knorr, S. Verba, *The International System: Theoretical Essays* (Princeton: Princeton University Press, 1960) 77.

²⁹ *Id.*, at 80.

³⁰ *Id.*, at 83.

³¹ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) 272.

³² R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) 81 et seq.

³³ R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994).

³⁴ For instance, the notion of effective interpretation (*ut res magis valeat quam pereat*) and the *in dubio mitius* maxim will often result in conflicting interpretations.

³⁵ G. Schwarzenberger, *International Law, Vol. I*, (London: Stevens, 3rd ed. 1957) 496.

extraneous factors.”³⁶ The application of principles of treaty interpretation is not merely an exercise of legal logic. Which tools of interpretation a judge deploys is equally “a matter of harmony with what, for want of a better word, one might term experience and common sense [...] an unsystematized complex of moral, cultural, aesthetic, and other values and experiences.”³⁷

In practice, subsystems appear to operate more autonomously from general international law once they attain a high degree of regulatory ‘thickness’ and institutionalization. The more a system’s operation is autonomous from its international-law environment the less likely it is to fall back on general international law, including the rules on State responsibility.

Against this backdrop, the *lex specialis* principle is no ‘cure-all’, linking with logical precision the general rules and the special rules of international law. The *lex specialis* principle presumes that States act with a unified legislative will when they conclude treaties or install customary rules.³⁸ It is simply inconceivable that a State’s ‘intent’ would be directed to both *X* and *non-X* at the same time. From a process perspective, however, the ‘social reality’ of treaty making may look quite different. As M. Koskenniemi put it in his 2004 Preliminary Report for the International Law Commission, “[t]here is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives – they are ‘bargains’ and ‘package-deals’ and often result from spontaneous reactions to events in the environment.”³⁹

B. N. Luhmann’s Systemtheorie and Fragmentation

Let us briefly focus on a particular process perspective, namely the operation of systems. Recently, G. Teubner has fruitfully deployed (a version of) Niklas Luhmann’s *Systemtheorie* to shed light on the fragmentation of international law. Teubner describes the proliferation of international legal regimes as the epi-phenomenon of the multidimensional fragmentation of the world society.⁴⁰ Global law can be theorized as a system, which is operatively closed vis-à-vis its environment. Similarly, it seems to me that some of the functional sub-divisions that make up the ‘global law system’ can be theorized as systems.⁴¹ Let’s take one such system, the system of WTO law, as an example. The panels and the Appellate Body are key players in the operation of

³⁶ V. Lowe, ‘The Role of Law in International Politics’, in Michael Byers (ed.), *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?* (Oxford: Oxford University Press, 2000) 216.

³⁷ *Id.*, at 220.

³⁸ Cf. in general legal theory, K. Engisch, *Die Einheit der Rechtsordnung* (Heidelberg: 1987, reprint of the 1932 edition) 54, stressing that nobody can „zugleich eine Handlung oder konträres Gegenteil prästieren. Deshalb kann auch der Wille eines Befehlenden niemals bewusst darauf gerichtet sein, dass jemand eine Handlung und zugleich ihr Gegenteil vollziehe.“

³⁹ M. Koskenniemi, ‘Study on the ‘Function and Scope of the *lex specialis* Rule and the Question of ‘Self-Contained Regimes’’, Preliminary Report by the Chairman of the Study Group submitted for consideration during the 2004 session of the International Law Commission, para. 28.

⁴⁰ G. Teubner, A. Fischer-Lescano, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, *Mich J Int’l L* (2004), forthcoming.

⁴¹ This proposition of this paper may be controversial among strict followers of Luhmann’s theory.

WTO law.⁴² An analysis of their rulings proves an extremely high degree of self-reference. WTO law is perpetuated by constant reference to the system's previous decisions. It is only through such operative closure that the WTO system is able to maximize the particular rationality of international trade.

However, this is not to suggest that WTO law is isolated from the rest of the world society. Rather, the system is linked with its environment through 'structural coupling'. In Luhmann's words:

If modern society were described merely as a number of autonomous functional systems, which owe each other no consideration but follow the reproductive constraints of their respective own autopoiesis, such description would paint a very one-sided picture. In this case, it would be hard to understand why this society is not exploding or dissolving. [...] As a matter of fact, all functional systems are connected by structural coupling and are thus held within the society.⁴³

Once a system maximizes its rationality in an excessive manner, it inevitably conflicts with competing rationalities prevailing in its environment. Processes in the environment react to such over-maximization. As a response, the environment exercises normative pressure on the system. The environment, in sociology speak, 'irritates' the system. In the WTO example, irritation is caused by competing rationalities such as third-world interests or environmental protection, mediated by a variety of different actors. The WTO legal system is, thus, forced to eventually network with these competing rationalities by incorporating them into its own operation.

Systemtheorie provides a new perspective on the functioning of international law. It does not predetermine a specific methodology. However, one thing is clear: The question whether a subsystem of international law chooses to network with the law of State responsibility cannot be adequately captured by reference to a formal general-special distinction. Rather, the 'entry' of State responsibility will essentially depend on the rationalities of the special system's operation and on the force of the normative pressure exercised by the system's environment.

4. Law as a Discourse Oscillating between 'Unity' and 'Particularity'

A. From Structure to Discourse

If we review the scholarly discourse on fragmentation, one recurring theme catches the eye: The narratives of fragmentation just presented are largely concerned with structures. International law

⁴² The WTO panels and the Appellate Body could be characterized as the 'center' of the system's operation. NGOs, diplomats and other actors would be relevant in its 'periphery'.

⁴³ „Würde man [aber] die moderne Gesellschaft lediglich als eine Menge von autonomen Funktionssystemen beschreiben, die einander keine Rücksicht schulden, sondern den Reproduktionszwängen der eigenen Autopoiesis folgen, ergäbe das ein höchst einseitiges Bild. Es wäre dann schwer zu verstehen, wieso diese Gesellschaft nicht binnen kurzem explodiert oder in sich zerfällt. [...] Faktisch sind alle Funktionssysteme durch strukturelle Kopplung miteinander verbunden und in der Gesellschaft gehalten.“ N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1997) 776 and 779 (English translation by the author).

is depicted as an international legal order, as the accumulation of legal regimes, or as a system that is composed of subsystems. However, all of these structures are highly elusive. They are attempts to better comprehend the phenomenon of law by organizing the often chaotic and disparate legal practice. They attempt to systematize international law by fitting it into certain meta categories.

We can only speculate what lies behind this structure-oriented discourse, what – in J. Derrida’s words – is “played out here beyond the given” and what is “rejected, withheld, taken back, beyond”⁴⁴. ‘Universalists may suggest that the quest for a unified international law is motivated by a concern of authority unleashed, a fear of power structures separated from the imperfect, yet comforting and familiar processes of international law as we know it. The quest for unity is, thus, a quest for the containment of power. ‘Particularists, on the other hand, may object that the erection of meta structures (such as the concept of a unified legal order) risks to blur and conceal the true struggles of interests, power and identities in which international law is situated. Thus, the quest for unity translates into a quest for universality, denying the existence of the particular.

B. Topoi of the Fragmentation Discourse

Whether such a complicated discourse on elusive structures is helpful to better grasp the fragmentation phenomenon is yet another question. A more practical, hands-on approach would be to comprehend ‘unity’ and ‘fragmentation’ as discursive categories (rather than structural characteristics) of international law. Every legal argument, to be convincing, needs to refer to the universal system while, at the same time, taking account of the particularity of the regime. It continuously oscillates from particularity to unity – and back. Particularity and unity are, thus, *topoi* of international legal discourse that mutually depend on each other. Even in the world of legal argument, there is no universe without the planets and no planet without the universe.

Unity and particularity are categories that help jurists negotiate the balance between effectiveness and legitimacy. In strong regimes, the law of the universe serves as a source of legitimacy, while the rules of the planet provide the kind of operational effectiveness that advances the goals of the regime. In weak regimes, the rules of the planet often embody a superior legitimacy. In this case, lawyers reach out for the law of the universe to increase the effectiveness of the planetary rules.

The WTO is generally perceived as a ‘strong’ regime. However, its effectiveness is impeded by its – partial – incompleteness. Particularly in terms of treaty interpretation and burden of proof, in short: with regard to rules that assist the panelists in administering the substantive provisions of WTO law, the regime cannot but refer to rules and principles developed under general international law. The Appellate Body famously confirmed the openness of the regime when it held “that the *General Agreement* is not to be read in clinical isolation from public international law.”⁴⁵ It may be safely concluded that both the parties and the judicial organs of the WTO do not hesitate to invoke the ‘unity’ of international law, when rules outside the regime appear to enhance its effective operation.

⁴⁴ J. Derrida, *The Post Card: From Socrates to Freud and Beyond* (1987) 294.

⁴⁵ *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 17. Cf. generally, J. Pauwelyn, ‘The Role of Public International Law in the WTO: How far Can We Go?’, 95 *AJIL* (2001) 535.

At the level of substantive obligations, WTO dispute settlement presents a different picture. Every non-trade concern is suspicious of giving rise to potential protectionism impeding the regime's effectiveness. Hence, panels (and to a lesser extent the Appellate Body) tend to stress the particularity of WTO law, refraining from unnecessarily cross-linking WTO provisions with other rules of the 'universe'. However, this isolationist discursive strategy can only be pursued up to the point where the effectiveness-legitimacy balance begins to tilt. Once the legitimacy of the decision comes under fire, the invocation of 'unity' rather than 'particularity' becomes an interesting discursive option. By relying on rules outside the WTO regime that – in the view of many – embody legitimate concerns or internationally recognized ethical positions, the WTO's judicial bodies have attempted to import the legitimacy offered by the 'universe' to the 'planet'.

In the *U.S.-Shrimp* case,⁴⁶ the Appellate Body referred to international environmental instruments outside the WTO to counter the image of the WTO as a cold-hearted trade-over-everything institution. Adopting such a unitary discourse did not even require the Appellate Body to reverse the recommendation of the panel in substance. While the Appellate Body reproved the panel for its 'particularistic', trade-focused approach,⁴⁷ it nonetheless concluded that, the U.S. "fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994."⁴⁸ The submissions by the U.S., Canada and the European Communities in the recent *EC-GMO* case reflect a similar discursive pattern: While the complainants (U.S., Canada) suggest an isolationist reading of the relevant WTO provisions,⁴⁹ the EC makes a unitary argument, asking the panel to increase the decision's legitimacy by recourse to non-WTO rules and standards.⁵⁰

Similar discursive patterns can be observed in institutionally weaker regimes, such as human rights. In good times, human rights lawyers tend to stress the particularity of their regime. Human rights obligations follow a logic different from reciprocal, universal international law; they constitute "objective regimes"⁵¹. As the European Court of Human Rights stated in the *Northern Ireland* case:

Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".⁵²

⁴⁶ *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, WT/DS58/AB/R.

⁴⁷ The panel briefly discussed the various international instruments presented by the U.S. However, it was not convinced that such instruments would distract from the parties substantive WTO obligations. The Appellate Body, by contrast, deferred to rules and standards outside the WTO regime to some extent, interpreting the terms of WTO provisions in accordance with such rules and standards.

⁴⁸ Para. 187.

⁴⁹ The U.S.' first submission is available under: http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Pending.html.

⁵⁰ The EC's first submission is available under: <http://trade-info.cec.eu.int/wtodispute/search.cfm?code=2>.

⁵¹ W. Riphagen, Fourth Report, in ILC Yearbook 1983, Vol. II Part One, 17, para 89.

⁵² *Ireland vs. U.K.*, European Court of Human Rights, Ser. A Vol. 25, para. 239.

By contrast, when the effectiveness of human rights regimes faces a severe challenge, lawyers are inclined to stress the unity of international law, arguing that human rights are merely part of the larger international legal order. Such unity is a precondition for enforcing human rights by countermeasures under general international law. For example, in response to the 1998 humanitarian crisis in Kosovo, the European Communities adopted legislation that required the freezing of Yugoslav funds and an immediate flight ban.⁵³ And when, in 1981, the Polish government suppressed demonstrations and interned dissidents, several western countries responded by suspending treaties providing for landing rights.⁵⁴

The examples of legal ‘decision making’ just sketched follow one and the same common pattern. In a first step, lawyers attempt to allocate the proper balance between legitimacy and effectiveness in a given case. In a second step, they resort to the categories of unity and particularity to construe an argument that reflects this balance.

5. Concluding Remarks

This paper purports to have a fresh look at a classical, almost dusty case study: To what extent do the rules on State responsibility apply in special systems of international law?

From a rules perspective, the focal point of the discussion is the *lex specialis* principle. The universalistic school posits the existence of a unified legal order. The distinction between general and special international law mirrors this structure of international law. Consequently, the application of the *lex specialis* principle is a structural necessity. The rules on State responsibility apply to the extent that the special regime fails to specifically contract out.

The particularistic, regime-based approach describes the structure of international law as the sum of interrelated regimes without recognizing a pre-defined hierarchy among these regimes. Since a general–special distinction is not *a priori* recognized, the school is unlikely to make reference to the *lex specialis* principle to liaise with other regimes. Rather, the regime is likely to resolve shortcomings *praeter legem* within the regime itself.

From a process perspective, the question whether a provision of general international law should apply is not in essence a question of conflict of rules. A rules-based perspective focusing on techniques of treaty interpretation cannot capture what is at stake when competing processes of policies, identities or rationalities clash. Only a comprehensive analysis of the communicative processes related to the judicial decision will bring to light the parameters for resorting to the *lex specialis* or the *lex generalis*. From the perspective of N. Luhmann’s *Systemtheorie*, for example, the core of the problem is the compatibility of legal processes. Through structural coupling, a system can incorporate elements of processes of its environment, thus making them part of its own operation. This will only occur if the ‘entry’ of elements of the environment benefits the system or if the normative pressure from the environment on the system is sufficiently powerful.

From a critical-theory perspective, the question of fragmentation *versus* unity of international law is in itself just as interesting as the answers suggested by different schools of legal thought. Are we excessively concerned with structure? And if so, why? What are the ‘political projects’ behind the quest for unity by some international lawyers or the emphasis of the particular by others? As an alternative to this structure-oriented discourse, ‘unity’ and

⁵³ Common positions of 7 May and 29 June 1998, OJ 1998, L 143 and L 190; implemented through EC Regulations 1295/98 (L 178, 33) and 1901/98 (L 248, 1).

⁵⁴ 86 *R.G.D.I.P.* (1982), 607.

'fragmentation' may be comprehended as discursive categories. International legal discourse continuously oscillates between the two extremes – and re-positions itself in each case – in an attempt to make a convincing argument on the relationship between norms from different regimes.

Irrespective of the perspective chosen, the challenge for the international lawyer remains, as Outi Korhonen put it, "how a synthetic order, which is both common enough to produce cohesion and pluralistic enough not to reduce the various cultural differences, can be achieved without succumbing to either hegemony or unmanageable fragmentation."⁵⁵ The debate continues.

⁵⁵ O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (The Hague/London/Boston: Kluwer, 2000) at 42.