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Introduction

THERE IS SOMETHING peculiar about international law. Ever since its emergence as an autonomous professional discipline, international law has been a contested object. For how can law exist – let alone rule – among sovereign nations that recognise no authority beyond their own? What can be the significance of a legal system in which juridical subjects themselves, and most notably powerful ones, control the meaning and enforcement of legal rules? In any case, should one really speak of 'international' law when, historically, this law has been created by and for European nations? Although at the turn of the twentieth century international law has consolidated its position within the academy, through the creation of new chairs, learned societies and scientific publications, scepticism remains high. International law is too different from the familiar forms and techniques of municipal law. It seems primitive, weak and under-elaborated. Above all, international law is accused of being either too philosophical or too political.[1]

Faced with scepticism, early international lawyers have had to spend considerable energy defending their project and proving the autonomy and positivity of their law. The strategies and arguments used to legitimise international law in this foundational period were diverse. Some were merely rhetorical ('international law is not primitive, it is simply different'). Others were more pragmatic ('international law exists: states speak its language and use its processes in their dealing with one another'). Most arguments, however, were analogical or comparative. Despite appearances, it was claimed, international law is not so different from domestic law. States can be construed as legal subjects possessing property (territory) and negotiating contracts (treaties). More importantly, international law was defended as being just as complex, technical and sophisticated as municipal law. Hersch Lauterpacht, who was typical of this way of thinking about international law, considered for example that the whole of international law could be read as the rough equivalent on the international plane of rules, categories and institutions of private law (contract law, tort law, property law, law of succession, rules of evidence and procedure and so on).[2]

[1] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 1ff.

[2] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longman, 1927).

Whilst these strategies were quite successful in the inter-war period, the Second World War prompted a new cycle of existential angst and questioning. International law's failure to prevent the war and the Holocaust plunged the discipline into a period of metaphysical turmoil. International lawyers, yet again, had to face criticism, not only from within the legal discipline, but this time also from without, most notably from the discipline of international relations, where realists depicted international law as utopian, irrelevant or at best peripheral, a mere continuation of politics through other means.[3] Post-war international lawyers were therefore compelled to resume the self-justificatory enterprise started by their predecessors. Though the tone and vocabulary were different – for one does not speak about international law in the same way before and after the Holocaust – the themes and strategies remained essentially the same. Whilst admitting that international law had its limits and specificities, international lawyers continued to fight to prove its reality, its positivity and its materiality.[4]

Two decades after the War, however, these various strategies seemed to bear fruit – if only internally – and international law entered a period of relative self-confidence. The discipline, it seemed, no longer felt compelled to prove the existence and relevance of its object. In 1966, Ian Brownlie published the first edition of his *Principles of Public International Law*.[5] The book, which quickly became a standard text, marked a significant change of style. The tone was resolutely anti-apologetic. Brownlie wanted to write a textbook on the substance, the methods and the techniques of international law in very much the same way one would write a textbook on domestic law subjects like contract or criminal law. Brownlie saw international law as an established field of law and saw no need to venture into ontological questions about the basis of obligation or the legal nature of international law.[6] The book thus featured 12 chapters on 12 substantive areas of positive law, but no introduction on definitional and foundational issues. These questions, the author wrote in his preface, 'belong to books on legal theory'.[7]

Brownlie, of course, was a product of his time. From 1958 to 1969, international law underwent a series of decisive developments, including the adoption of the four Geneva Conventions on the law of the sea, the Convention on diplomatic and consular relations, and the two Vienna Conventions on the law of treaties. This 'golden decade of codification' bred new confidence in interna-

[3] See especially Hans Morgenthau, *Politics Among Nations* (New York, Knopf, 1947).

[4] See, eg, Richard Falk, 'The Reality of International Law' (1962) 14 *World Politics* 353; Wolfgang Friedman, 'The Reality of International Law – A Reappraisal' (1971) 10 *Columbia Journal of Transnational Law* 46; Anthony D'Amato, 'Is International Law Really Law' (1984) 79 *Northwestern University Law Review* 1293.

[5] Ian Brownlie, *Principles of International Law* (Oxford, Oxford University Press, 1966).

[6] Although he did write on these issues on other occasions. See, eg, Ian Brownlie, 'The Reality and Efficacy of International Law' (1981) *52 British Yearbook of International Law* 1.

[7] Brownlie, *Principles*, above n 5 at v.

tional law. The momentum was largely confirmed in the 1970s and 1980s, both on the diplomatic plane – with the adoption of treaties like the Law of the Sea Convention – and on the judicial plane – with a succession of seminal decisions such as the *Nicaragua* judgment which marked the victory, in a court of law, of a small nation against the great superpower of the day. Following the fall of the Berlin wall, the General Assembly even proclaimed the period 1990–99 as the 'United Nations Decade of International Law'.[8]

In the early 1990s, the mood was resolutely optimistic. International lawyers were well aware that the post-Cold War era offered as many challenges as opportunities. But the discipline seemed to have rid itself of its existential predicament. International law, some said, had entered a 'post-ontological era' in which lawyers had become emancipated from the constraints of defensive ontology and were free to end the cycle of doubt and introspection that had for so long inhibited their discipline.[9] Around the same time, some scholars even started speaking of the 'constitutionalisation' of international law, a term that seems to suggest that international law may have reached a degree of maturity and complexity comparable to that of domestic legal systems.[10]

Despite this renewed confidence and the post-Cold War optimism, however, the 1990s were a rather paradoxical period for international law. Just as the discipline seemed to be overcoming its metaphysical malaise, growing numbers of international lawyers started expressing concerns over a new peril: the so-called fragmentation phenomenon. International law, it was said, was developing too fast and in too many directions. There were too many rules and too many regimes, and too little normative and institutional glue to hold the system together. International law's unity may be in danger and, without reform, the system may slowly descend into chaos. Between 1998 and 2000, three successive Presidents of the International Court of Justice spoke publicly against the dangers of fragmentation, most notably before the UN General Assembly.[11] The latter, convinced of the seriousness of the situation, even decided to put the matter to the International Law Commission which, in 2006, issued a 'toolbox'

[8] GA Res 44/23 17 November 1989.

[9] Thomas Franck, *Fairness in International Law and Institutions* (New York, Oxford University Press, 1995) 6.

[10] See, eg, Richard Falk et al (eds), *The Constitutional Foundations of World Peace* (Albany, SUNY Press, 1993); Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Collected Courses* 217, 256–84; Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 529 *Columbia Journal of Transnational Law* 558.

[11] Robert Jennings, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 1; Address to the Plenary session of the General Assembly of the United Nations by Judge Stephen M Schebel, 26 October 1999: www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1; Address by HE Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 October 2000: www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1; Gilbert Guillaume, 'La Cour international de Justice – Quelques propositions concrètes à l'occasion du cinquantenaire' (1996) 100 *Revue Générale de Droit International Public* 323.

to deal with issues of fragmentation.[12] Everything happened as if international lawyers, busy as they had long been with dealing with ontological questions, were suddenly caught up in an acceleration of historical time and were seized by a sort of 'postmodern anxiety'.[13] But what, exactly, are the causes of this new anxiety?

I. THE ROOTS OF A POSTMODERN ANXIETY

The fragmentation anxiety stems, first of all, from the material expansion and densification of international law, that is, the spreading of international legal activity into new fields and the diversification of its objects and techniques. Traditionally, the ambit of international law was rather limited. In fact, until the end of the nineteenth century, international law was primarily concerned with two questions: the limits to state jurisdiction and the conduct of diplomatic relations. Since the end of the Second World War, however, and more so since the end of the Cold War, international law has spread far and wide into virtually all areas of human activity – from trade, transport, telecommunications and finance to health, human rights, the environment, terrorism, culture and so on.[14] Even in the discipline of international relations – where the mainstream has long played down the importance of international law – this transformation has been recognised, with some scholars now speaking of the 'legalisation' of world politics.[15]

At a different level, the fragmentation anxiety can be explained by the broadening of the international legal community. Historically, international law has been an instrument of domination of a handful of European nations over the rest of the world. The international legal community has long remained an exclusive 'club' of Western powers, in which non-Western societies were not admitted.[16] International law, however, has progressively abandoned the degree

[12] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission* (finalised by Martti Koskenniemi), UN Doc A/CN.4/L.682 (2006) (ILC Fragmentation Report). See also *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/61/10 (2006) (ILC Fragmentation Conclusions). The final conclusions were adopted collectively by the study group as a whole and represent a condensed version – or 'executive summary' – of the larger analytical study.

[13] Martti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2005) 15 *Leiden Journal of International Law* 553. The idea that fragmentation is a new concern in international law scholarship is contested by some authors who see in the modern rhetoric of fragmentation a mere revival of past anxieties over the state and direction of international law. See, eg, Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *Leiden Journal of International Law* 1.

[14] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991) 1–3.

[15] See Judith Goldstein et al, 'Legalization and World Politics' (2000) 54 *International Organizations* 385.

[16] On the role of international law as an instrument of Western hegemony, see especially Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2005).

of civilisation (at least in its classical form) as a membership criterion. It has become, if only on the surface, a truly universal law which in theory applies equally to all nations, big and small, rich and poor, old and new. Following decolonisation, the international legal community has grown dramatically from about 40 recognised state actors in 1920 to nearly 200 today.

The change is not only quantitative, however. It is qualitative too. The international community has become an 'outer-less community', that is, a community without 'barbarians'. Without barbarians does not mean without barbarism. The twentieth century has had its share of genocides, committed by civilised and barbaric nations alike. International law, however, has slowly abandoned the civilised/barbarian opposition as a structuring dialectic. International law no longer defines itself in relation to its enemies from without. There remain rogue, undesirable or untouchable subjects (terrorists, unlawful combatants, refugees, etc) within the international community and these continue to be used to construct an image of international law's self as a progressive force in a savage and violent world.[17] But the fantasised figure of the barbarian 'other', which is excluded *ab initio* from the community of civilised nations, has largely disappeared from international law discourse.[18]

Whilst barbarians have formally disappeared as a legal category, new speaking subjects have emerged, however, which also contribute to the perceived loss of coherence in international law. For most of its existence, international law has been the exclusive preserve of states. To international lawyers, the state has been a familiar face, a reassuring voice, a firm ground on which to base their theories of law, obligation and justice. Yet again, this is no longer the case today. It has become practically impossible to understand international legal matters in relation to states alone. Individuals, who were once considered mere objects of international law, are now the holders of international rights that are actionable in court, including against their own state, and can be held personally responsible for violating international criminal law.[19] Multinational corporations have become regular interlocutors in the governance of transnational problems. For example, the *Global Compact* is a strategic partnership between the UN and the business sector aimed at promoting compliance with universally accepted principles in the areas of human rights, labour, environment and anti-corruption.[20] Major cities have even started acting as global players and stakeholders in the areas of trade, finance, human rights or sustainable development.[21]

[17] See Anne Orford (ed), *International Law and Its Others* (Cambridge, Cambridge University Press, 2006).

[18] On this theme, see Mireille Delmas-Marty, *L'adieu aux barbares* (Laval, Presses de L'université Laval, 2007).

[19] See Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21 *European Journal of International Law* 25.

[20] See Andreas Rasche and Georg Kell (eds), *The United Nations Global Compact – Achievements, Trends and Challenges* (Cambridge, Cambridge University Press, 2010).

[21] See Paul Knox and Peter Taylor, *World Cities in a World System* (Cambridge, Cambridge University Press, 1995).

In the United States, for instance, a vanguard of large cities representing more than 30 million people has taken upon itself to drive the country forward in the fight against climate change, signing up to the Kyoto protocol and committing to its greenhouse gas emissions targets.[22]

The rapid development of international organisations, both intergovernmental (IOs) and non-governmental (NGOs), has also played a major role in the transformation of the familiar state-centred international law landscape. IOs, which were almost non-existent in the early twentieth century, now outnumber states in a three to one ratio.[23] Whether as law-makers, law shapers or dispute settlers, IOs have significantly changed the way in which international laws are made, implemented and enforced, as well as becoming forums in which state sovereignty is regularly defined, exercised and contested.[24] NGOs, for their part, number in the tens of thousands. Though they lack international legal personality in the traditional sense, their influence on the formation and implementation of international norms is now well documented and hardly contested.[25]

A final well-recognised mutation in modern international law concerns the emergence of juridical 'monsters', that is, of unfamiliar forms, objects and processes that do not easily fit into the classical categories of public international law. There are, first of all, new forms of normativity such as 'soft law' or 'unofficial law', a term coined to describe new forms of transnational regulation developed directly by private operators, without the state, in specific economic sectors (*lex mercatoria, lex sportiva, lex electronica* and so on).[26] New kinds of institutions also appear, which are neither strictly national nor strictly international. The European Union is a prime example of this sort of 'unidentified legal object', located somewhere between an international organisation and a pre-federal state.[27] More recently, 'mixed' and 'hybrid' jurisdictions have been established in the field of investment disputes (ICSID) and international criminal justice (special tribunals for Sierra Leone, Cambodia, Lebanon, etc), which are composed of both domestic and international judges and apply a blend of

[22] Paul Brown, 'US Cities Snub Bush and Sign Up to Kyoto' *The Guardian* (London, 17 May 2005).

[23] The number of IOs varies according to the criteria employed. The figure for public international organisations, however, is almost certainly over 500 and probably under 700. See Chittharanjan Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge, Cambridge University Press, 2005) 6. On the multiplication of international organisations, see Mario Prost and Paul Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter? (2006) 5 *Chinese Journal of International Law* 341.

[24] See especially Jose Alvarez, *International Organisations as Law-Makers* (Oxford, Oxford University Press, 2005) and Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford, Oxford University Press, 2005).

[25] See Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *American Journal of International Law* 348 and Gaëlle Breton-Le Goff, *L'influence des organisations non gouvernementales sur la négociation de quelques instruments internationaux* (Brussels, Bruylant, 2001).

[26] See in particular Gunther Teubner, *Global Law Without a State* (Aldershot, Dartmouth, 1997).

[27] On the 'European monster', see Mireille Delmas-Marty, *Les forces imaginantes du droit III – La refondation des pouvoirs* (Paris, Seuil, 2007) 102–10.

local and international law.[28] More unusual still is the Caribbean Court of Justice, a dual-function institution that operates as a regional court of justice, applying rules of international law in respect of the interpretation and application of the Treaty Establishing the Caribbean Community, as well as a final court of appeal for all members of the Community in civil and criminal matters. Unique among its kind, the Caribbean Court of Justice is thus both a municipal supreme court and an international tribunal.[29]

'Material expansion', 'widening international legal community', 'proliferation of speaking subjects', 'diversification of sources' and emergence of 'juridical monsters': these developments, taken together, work to produce in the discipline of international law a feeling of dispersion and dissolution. With the propagation of international law in new spaces, with uncertain boundaries, many international lawyers fear a loss of control and meaning.[30] The old image of the Westphalian legal order, with its clear separation between domestic and international levels of governance, slowly gives way to the image of a complex 'disorder of normative orders',[31] a system where frames and margins are blurred, where legal spaces overlap and conflict with each other, a network with a plurality of voices, lacking a master plan or blueprint.[32]

Needless to say, things do not change from one day to the next in the 1990s. But a succession of important developments precipitates the emergence of this feeling of dispersion and dissolution. First is the deepening and consolidation of a series of special regimes: the establishment of a new European Union, the creation of NAFTA, the joint adoption at the Rio Summit of the Framework Convention on Climate Change and of the Convention to Combat Desertification, the constitution of the World Trade Organization, the entry into force of the UN Convention on the Law of the Sea, the adoption of the Rome Statute on the International Criminal Court and so on. Whilst the 1960s represented the era of 'general' international law (law of treaties, diplomatic and consular relations, etc), the 1990s are clearly the decade of 'special' international law.

Around the same time, a number of important decisions are issued by special courts and tribunals, which either depart from well-established principles of international law or interpret their own body of law in isolation from other branches of international law, that is, in relative ignorance of legislative and institutional activities in adjoining fields. The WTO Appellate Body, in its

[28] Lindsey Raub, 'Positioning Hybrid Tribunals in International Criminal Justice' (2009) 41 *New York University Journal of International Law and Politics* 1013.

[29] David Simmons, 'The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity' (2004) 29 *Nova Law Review* 171.

[30] Slim Laghmani, 'Le phenomène de perte de sens en droit international' in Rafâa Ben Achour and Slim Laghmani (eds) *Harmonie et contradiction en droit international: Rencontres internationales de la Faculté des sciences juridiques, politiques et sociales de Tunis* (Paris, Pedone, 1996).

[31] Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373.

[32] On the paradigmatic shift from the hierarchical 'pyramid' to the heterarchical 'network', see Francois Ost and Michel Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Brussels, Publications des Facultés Universitaires Saint Louis, 2002).

Shrimp-Turtle jurisprudence, struggles to look beyond trade rules and consider their interaction with multilateral environmental agreements.[33] The European Court of Human Rights, in *Belilos* and *Loizidou*, reverses the long tradition of judicial deference towards reservations and holds them inadmissible, *ex hypothesi*, in relation to human rights treaties.[34] The International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Tadic* case, rejects the International Court of Justice's interpretation of certain rules of state responsibility.[35]

For all of these reasons, a shift occurs at some point in the 1990s. For nearly a century, international lawyers have been preoccupied with the underdevelopment of their law. They have sought to shed light on international law's complexities, on its many ramifications and sophistications, to show that international law is not as weak and primitive as many would have it. Then the movement reverses. Norms and regimes multiply. Conflicts emerge between institutions with overlapping jurisdictions, ambiguous boundaries, different worldviews and preferences. The canonical oppositions that have traditionally structured the discipline (civilised/barbarian, public/private, national/international, law/non-law) are contested and challenged. As a result, international lawyers start looking behind the proliferation of forms, norms, regimes and institutions for new theories, but also for principles of coherence and unity. The discipline has moved from an ontological obsession with scarcity (of legitimacy and recognition) to a perplexity with excess.

II. FROM TOO LITTLE TO TOO MUCH LAW: MAPPING THE FRAGMENTATION DEBATE

It is in this context that the debate on the unity/fragmentation of international law has emerged and crystallised. Initially the marginal concern of a closed group of professionals, fragmentation has progressively gone mainstream, becoming the object of countless conferences and a great favourite in the legal literature.[36] No longer the sole concern of generalist international lawyers,

[33] For a recent analysis, see Erich Vranes, *Trade and the Environment – Fundamental Issues in International and WTO Law* (Oxford, Oxford University Press, 2009).

[34] Susan Marks, 'Reservations Unhinged: The Belilos Case Before the European Court of Human Rights' (1990) 39 *International and Comparative Law Quarterly* 300.

[35] See the section on the *Tadic* case in my general conclusion.

[36] See, eg, 'Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle' (1999) 31 *New York University Journal of International Law and Politics*; 'Diversity or Cacophony: New Sources of Norms in International Law Symposium' (2004) 25 *Michigan Journal of International Law* 845; *Fragmentation: Diversification and Expansion of International Law: Proceedings of the 34th Annual Conference of the Canadian Council of International Law*, (Ottawa, Canadian Council of International Law, 2006); Karel Wellens and Rosario Vinaxia (eds), *L'Influence des sources sur l'unité et la fragmentation du droit international: travaux du séminaire tenu à Palma, les 20–21 mai 2005* (Brussels, Bruylant, 2006); Andreas Zimmermann and Rainer Hofmann (eds), *Unity and Diversity in International Law: Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law* (Berlin, Duncker & Humblot, 2006); Matthew Craven, 'Unity, Diversity, and the Fragmentation of International Law'

fragmentation has spread far and wide across the discipline. Each branch of the law, each special regime has started debating its own fragmentation.[37] Fragmentation, as noted by one of its prime theorists, has become the 'doctrinal debate *par excellence* in the globalisation era'.[38]

The purpose of this book is to engage critically with this doctrinal debate. Before laying out my main argument, however, I must say a few words about the structure of the fragmentation debate, as well as some of its gaps and silences. Fragmentation, as we shall see in the rest of this book, raises a host of important questions, of a legal, political, technical and ideological nature. The literature on fragmentation is not only abundant: it is also extremely dense, diverse, complex and – in its own way – fragmented. In order to make sense of this broad and multifaceted debate, it may be useful to think of it as having developed in two distinct periods, two waves of doctrinal controversy.

The first generation of fragmentation debates has focused primarily on two questions: the functional autonomisation of special regimes and the multiplication of international tribunals. On both questions, opinions diverge widely.

On the question of special regimes, international lawyers are split into two camps. On the one hand are those who believe that, as soon as a special regime is equipped with a comprehensive system of secondary norms – that is, with its own sources and its own regime of responsibility – it becomes 'self-contained', that is, it is uncoupled – and works independently – from 'general' international law. Advocates of the self-containment thesis argue that, beyond a certain degree of autonomisation, a special regime becomes entirely efficacious and self-sufficient. It is a complete and closed sub-system of international law with its own secondary rules, tailored to its own characteristics, and it need no longer rely on general rules of public international law in order to ascertain, interpret and implement its substantive norms.[39] On the other hand are those who argue

(2005) 14 *Finnish Yearbook of International Law* 3; *Benedetto Conforti*, 'Unité et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!"' (2007) 111 *Revue Générale de Droit International Public* 5; Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 1; Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 *Collected Courses of the Hague Academy of International Law* 9.

[37] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *European Journal of International Law* 161; Anthony Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623; Tim Stephens, 'Multiple International Courts and the "Fragmentation" of International Environmental Law' (2006) 25 *Australian Yearbook of International Law* 227; Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 *International and Comparative Law Quarterly* 37.

[38] Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (2007) 1 *European Journal of Legal Studies* 1.

[39] Willem Riphagen, 'Third Report on the Content, Forms and Degrees of International Responsibility' (1982) II *Yearbook of the International Law Commission* 22; Willem Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations' in Ronald Macdonald and Douglas Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague, Martinus Nijhoff, 1983). See also *United States*

that the autonomisation of special regimes is never absolute. No regime, they claim, is ever fully self-sufficient. The establishment of a genuinely self-contained regime is not a realistic possibility. A regime is always situated, if only minimally, within the parameters of public international law. Even the most tightly integrated and autonomous regime will occasionally need to draw upon general international law, if only as a measure of last resort, whenever secondary rules are inexistent or ineffective.[40] On this issue, the International Law Commission, in its final fragmentation report, sided with the second camp, holding that 'no regime is a closed legal circuit'.[41] Although special regimes may be better suited to deal with specific problems, and states may opt out of certain aspects of general international law, no regime can ever be completely isolated from general law: 'a regime can receive . . . legally binding force ('validity') only be reference to . . . rules and principles *outside it*'.[42] In the Commission's view, even in the case of well-developed or 'thick' regimes, general laws always fulfil, at minimum, a subsidiary function, whether it is that of governing matters not regulated by the special law (gap-filling) or that of stepping in when the special regime fails to function properly (regime failure).

On the issue of the proliferation of international tribunals, the views are perhaps not as clearly demarcated. But international law doctrine oscillates between two extremes. At one end are those who consider that the multiplication of international tribunals is already creating problems of overlapping and conflicting jurisprudence in a way that undermines the coherence, foreseeability and efficacy of the international legal order. To these scholars, the multiplicity of judicial voices – absent an institutional hierarchy – means cacophony, disorder and, *in fine*, the loss of a global perspective on international law.[43] At the other end of the doctrinal spectrum are authors who consider the problem to be largely theoretical. These scholars observe that international tribunals are

Diplomatic and Consular Staff in Tehran (United States of America v Iran) 24 May 1980, ICJ Reports (1980) 3, para 86. 'The rules of diplomatic law constitute a self-contained régime which, on the one hand, lays down obligations regarding the facilities, privileges and immunities [of] diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means to counter such abuses. These means are, by their nature, entirely efficacious'; as well as *Prosecutor v Dusko Tadic (decision on the defence motion for interlocutory appeal on jurisdiction)*, Case No IT-94-1, Appeals Chamber of the ICTY, 2 October 1995, para 11: 'In international law, every tribunal is a self-contained regime (unless otherwise provided)'.

[40] See especially Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483; Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of Self-Contained Regimes: International Law and the WTO' (2005) 16 *European Journal of International Law* 857.

[41] ILC Fragmentation Report, above n 12 at para 152.

[42] Ibid at para 193.

[43] See, eg, Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998) 31 *New York University Journal of International Law & Politics* 791; Shane Spelliscy, 'The Proliferation of International Tribunals' (2001) 40 *Columbia Journal of Transnational Law* 143; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law' (2007) 40 *New York University Journal of International Law & Politics* 259.

engaged in a robust transnational judicial dialogue which – by and large – maintains the integrity of international law and of its general principles.[44] Often, these authors view the proliferation of tribunals as merely reflecting a post-modern social world marked by functional differentiation or, better yet, as healthy pluralism. More tribunals means wider access to justice and more accountability. It also means creative diversity, the potential for cross-fertilisation of ideas, and a chance to see established categories, preferences and hierarchies challenged or revisited.[45]

On this question, the International Law Commission adopted a middle-of-the-road position. Whilst refusing to arbitrate issues of institutional overlap, but instead deciding to focus on the substantive aspects of fragmentation, the Commission took the view that the multiplication of rule-complexes and tribunals has both negative and positive effects. On the one hand, says the Commission, this phenomenon creates the danger of conflicting rules and institutional practices, and the unity of the law may suffer as a consequence. On the other hand, proliferation and fragmentation are responses to new technical and functional requirements in particular problem areas. They are manifestations of a pluralistic society in which different actors pursue different projects using different principles and techniques, each particular field becoming increasingly professionalised, institutionalised and autonomous. In other words, proliferation and fragmentation reflect rather than create the sociological reality of late international modernity.[46]

A second generation of doctrinal debates about fragmentation has recently emerged, which is less interested in empirical or normative questions than technical considerations. In this second period of the fragmentation literature, the question is no longer whether, and to what extent, international law is fragmenting, nor whether this is desirable or undesirable. Rather, starting from the assumption that coherence and unity are legitimate goals, the question becomes that of 'ordering pluralism', that is, finding principles, methods and techniques that can be used to put the pieces of the puzzle together and bring order to multiplicity.[47] This pragmatic and technical turn in the fragmentation debate – which essentially coincides with the publication of the ILC report – has given

[44] See, eg, Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Collected Courses* 101; Rosalyn Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52 *International and Comparative Law Quarterly* 1; William Burke-White, 'International Legal Pluralism' (2004) 25 *Michigan Journal of International Law* 963.

[45] See, eg, Koskenniemi and Leino, 'Postmodern Anxieties', above n 13; Bruno Simma, 'Fragmentation in a Positive Light' (2003) 25 *Michigan Journal of International Law* 845; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

[46] ILC Fragmentation Report, above n 12 at paras 14–16.

[47] Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Oxford, Hart Publishing, 2009). For an argument that ontological or normative questions about fragmentation are 'overrated' and that fragmentation is better understood as a technical problem of conflict of norms or conflict of laws, see Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' (2010) 9 *Duke Law Working Papers* 1.

birth to a burgeoning literature on the rules of treaty interpretation, and in particular on the so-called principle of 'systemic integration' under article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[48] Similarly, the principles of *lex specialis* and *lex posterior* have attracted much attention as possible tools for resolving tensions between parallel or conflicting treaty obligations.[49] Even the notion of *jus cogens*, which had remained dormant for some time, re-emerged as a possible solution for creating hierarchies and imposing order among competing norms.[50]

What all of the above demonstrates is that the interest in issues of fragmentation has not faded away. Fragmentation, it seems, is here to stay. More than simply a term of art, it has become a powerful and defining metaphor of modern international law scholarship. But while fragmentation seems to be on everyone's mind, one thing is missing. For all the talk about fragmentation – its sources, its consequences and its remedies – the concept of unity is hardly ever mentioned, let alone theorised. This is remarkable, since fragmentation necessarily presupposes unity, either as something that once was and has since been lost, or as a programmatic objective. Either way, speaking about fragmentation is meaningless unless we can articulate some notion of unity. It would be like speaking about shadows without reference to light.

This theoretical gap is apparent, first of all, with regard to the *problematique* of unity. We have seen that there are many different views on fragmentation. Some see it as a threat. Others consider the danger overstated and merely theoretical. Yet others insist that its benefits outweigh its costs and potential hazards. But little is said about why unity matters in the first place. Often, law's unity is taken to be a regulative idea that is so evident – some even say tautological[51] –

[48] See, eg, Jan Klabbers, 'Reluctant "Grundnormen": Article 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in Matthew Craven and Malgosia Fitzmaurice (eds), *Time, History and International Law* (Leiden, Martinus Nijhoff, 2007); Panos Merkouris, 'Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)' (2007) 9 *International Community Law Review* 1; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279.

[49] See, eg, Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 *Nordic Journal of International Law* 27; Erich Vranes, 'Lex Superior, Lex Specialis, Lex Posterior: Zur Rechtsnature der "Konfliktlösungsregeln"' (2005) 65 *Heidelberg Journal of International Law* 391; William Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' (2007) 40 *Israel Law Review* 592; Amna Guellali, 'Lex Specialis, droit international humanitaire et droits de l'homme: leur interaction dans les nouveaux conflits armés' (2007) 111 *Revue Générale de Droit International Public* 539.

[50] See, eg, Andreas Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal' (2005) 74 *Nordic Journal of International Law* 297; Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden, Martinus Nijhoff, 2006).

[51] Georges Vedel, 'Aspects généraux et théoriques' in Jean-Bernard Auby et al (eds) *L'unité du droit: Mélanges en hommage à Roland Drago* (Paris, Economica, 1996) 5: 'le droit . . . est justiciable d'unité. Cette affirmation est à peine démontrable car elle est d'abord tautologique' ('law . . . is unitary. This assertion is hardly demonstrable as it is above all a tautology').

that to put it into question is unnecessary, useless and inappropriate.[52] Where the justification of unity is addressed, mention is made – generally in passing – to problems of predictability, security, reliability and consistency.[53] While these considerations are by no means irrelevant, much remains to be said, however, about why the monistic conception of law as a unified and coherent system should be deemed more rational as a theoretical preference than that, say, of legal pluralism. We are thus in a situation where unity, as one legal theorist puts it, is treated by lawyers as a basic assumption, similar to the assumption of causality in the natural sciences.[54]

What is true of the 'ethos' of unity applies equally to the very concept of unity.[55] As a rule, the notion of unity is more assumed than explained. In fact, most discussions about unity/fragmentation provide no definition at all. Often, unity and fragmentation are simply presented as opposite theoretical positions. But their meaning remains rather vague and intuitive. We are thus in a paradoxical situation where the fragmentation rhetoric is omnipresent but where unity – its *sine qua non* condition – remains entirely under-theorised. To be sure, this problem is not exclusive to international legal theory. In reality, the concept of unity remains under-theorised in analytical jurisprudence at large. Niklas Luhmann, writing in 1987 about the unity of legal systems, noted this fact:

> [T]he unity of the system is usually tacitly assumed . . . and no thought is given to the question of how the system acquires this unity. This is an unsatisfactory state of affairs. It seems to lead to a situation where sociologists leave to jurists and jurists leave it to sociologists to formulate theories on the unity of law.[56]

[52] Benedetto Conforti, 'Unité et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!"' (2007) 111 *Revue Générale de Droit International Public* 5, 7: 'mettre en question l'unité ou la nature juridique de l'ordre international est tout à fait inutile et déplacé' ('to question the unity or the legal nature of the international order is most definitely useless and out of place').

[53] See, eg, Pierre-Marie Dupuy, 'Fragmentation du droit international ou des perceptions qu'on en a?' in Rosario Huesa Vinaixa and Karel Wellens (eds), *L'influence des sources sur l'unité et la fragmentation du droit international* (Brussels, Bruylant, 2006) v, xvi: 'c'est la sécurité même des rapports réglés par le droit international, donc l'efficacité de celui-ci, qui serait remise en cause [par la fragmentation]. L'unité d'application du droit international est un condition de son efficacité donc aussi de sa survie' ('it is the very security of international legal relations, and hence their efficacy, that would be impaired [by fragmentation]. The unity of application of international law is . . . a condition of its efficacy and therefore of its survival'). See also ILC Fragmentation Report, above n 12 at para 491: 'fragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security'.

[54] Aleksander Peczenik, 'Law, Morality, Coherence and Truth' (1994) 7 *Ratio Juris* 146, 154.

[55] I use the term 'ethos' here to underline that debates about unity/fragmentation are not merely about diverging legal theories but, more fundamentally, about competing ethical and ideological perspectives on law and social order. On unity and pluralism as 'ethos', see Margaret Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87. On the notion that discourses about fragmentation are predetermined by particular legal ideologies, see Mario Prost, 'Discours sur le fondement, l'unité et la fragmentation du droit international: à propos d'une utopie paresseuse' (2006) 39 *Revue Belge de Droit International* 621.

[56] Niklas Luhmann, 'The Unity of the Legal System' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Berlin, Walter de Gruyter, 1987) 13.

To this day, this gap remains unaddressed. Moreover, despite the proliferation of fragmentation discourse, one simple question is yet to be answered: regardless of whether it is good or bad, possible or utopian, a mere postulate or an actual fact, what does the 'unity' of international law actually mean? What does this taken-for-granted concept entail in theory and in practice?

III. TOWARDS AN EXPLORATORY PHILOSOPHY OF UNITY

It is this critical but essentially uncharted question that constitutes the subject of the present work. The basic assumption of this book is that there can be no serious or effective debate about fragmentation without some preliminary understanding of the concept of unity, a concept that is deceptively simple and that requires sustained critical analysis. What follows is thus an invitation to suspend the mainstream discourse on fragmentation and to put unity into question. This does not mean rebutting or eliminating it. Rather, it means questioning its use as an undisputed assumption, unsettling the usage of this taken-for-granted concept, showing that it is not self-evident and that unity may not necessarily be what we thought it was.

Thinking about unity, needless to say, is an old and vast project. Unity is among the ideas that have occupied a constant and prominent place in the history of philosophy, and in the history of thought more generally. In fact, metaphysical thought, from Parmenides and Aristotle to Heidegger, can be interpreted as a long quest for unity, that is, a deliberate attempt to overcome phenomenal multiplicity by unveiling foundational grounds, underlying forms of oneness, or what Jaspers calls 'the encompassing' or 'the comprehensive', that which transcends diversity and difference in everyday existence.[57] Defining unity is thus not an easy thing to do, for unity is not a 'thing', but rather an instinct or – as Camus would say – a form of nostalgia.[58] Even if unity is something that is capable of definition and which can be the object of rational knowledge, many will question whether it can be essentialised and captured in a stable concept or idea.

Although thinking about unity is not an easy thing to do, it is nonetheless necessary. Short of a minimal common understanding of unity, there can be no meaningful debate about fragmentation. Disagreements over issues of fragmentation may merely reflect deeper but unrevealed disagreements over the meaning of unity. Similarly, false or superficial agreements may be formed over fragmentation issues, because of some conceptual vagueness concerning the premise of

[57] Karl Jaspers, *Way to Wisdom: An Introduction to Philosophy*, 2nd edn (Yale, Yale University Press, 2003) 28–30.

[58] What Camus calls the 'nostalgia of unity' is man's natural and, in his view, absurd obsession with totality, oneness and the absolute. See Albert Camus, *Le mythe de Sisyphe* (Paris, Gallimard, 1942) 34–35.

unity. Any argument on fragmentation begins from a predetermined position on unity. Without explicitly theorising this position, international lawyers may be debating very different things without even knowing it. *Meaningful* agreement or disagreement requires some understanding of what the agreement/disagreement is actually about.

Finding a common frame of understanding does not require complete agreement over the meaning, form and content of unity. One can debate fragmentation without an *a priori* consensus on the 'correct' interpretation of unity. After all, lawyers speak about international law all the time without sharing a universal conception of law. But finding a common frame of understanding involves at the very least some consideration of the conceptual space within which the discussion is situated. It means being 'in tune' with other participants and calibrating one's instruments (in our case conceptual instruments) according to accepted standards. Just like in an orchestra, this 'tuning' exercise is what allows the different participants to listen to each other and play their individual parts together, in the same space, without the music turning into a cacophony of out-of-synch voices. Unity must therefore be theorised. Without a preliminary understanding of what unity might mean, the fragmentation debate may turn out to be no more than a series of unrelated propositions, a concert of disjointed voices in which arguments seemingly respond to each other but never really meet up on the same epistemological terrain.

Having said this, the unity of international law can be approached and theorised from a great many perspectives. The descriptive approach, for instance, would endeavour to show the extent to which unity exists, in some real sociological sense, as a matter of 'positive' international law. The normative approach would have us evaluate unity against possible alternatives (for example, pluralism) as a paradigm of law. The genealogical approach, for its part, would search for the causes of unity and would seek to identify the circumstances under which the 'law-as-unity' postulate emerged as a condition of legal thought.

Although it contains elements of these various approaches, the present book is of a rather different genre. What follows is fundamentally a work of legal philosophy. The term is not used here in the Kantian sense, that is, as a set of normative or evaluative inquiries into the nature of law and justice. Rather, philosophy is taken here in its Deleuzian sense, as a creative mode of thought that seeks to construct and develop concepts. Deleuze sees philosophy as the art of acquiring 'competent intimacy' with conceptual personae and objects, that is, giving life to their intensive multiplicity without ever reducing them to finite, stable or definitive categories.[59] In this broad Deleuzian perspective, the present book 'does' legal philosophy by dealing with the rudimentary and under-theorised concept of unity, and exploring its various possible forms, shapes and meanings in the context of international law.

[59] See especially Gilles Deleuze and Félix Guattari, *Qu'est-ce que la philosophie?* (Paris, Les Editions de Minuit, 1991).

This philosophy of unity, as will become clear, is merely exploratory. What follows is not an attempt to definitively establish the concept of unity. Neither is it a comprehensive and self-standing theory of international law's unity, a ready-made model that can be used to define, describe and interpret the legal world around us. This book only aims to *make a start*. It seeks to explore the possibility of discourse about international law's unity, by identifying and comparing various candidate conceptions of unity, without engaging in arguments about their respective merits. In other works, I have found certain perspectives to be preferable, from a descriptive or a normative point of view, but this book remains primarily an exercise in scene-setting. Its principal objective is to infuse theoretical life into an embryonic notion, and to expose unity for what it really is: an ambivalent, complex and fundamentally contested concept.

This exploratory philosophy is also a pluralist philosophy, though perhaps again not in a conventional sense. In the roughly 30 years in which it has been used in legal and social scientific writings, the concept of legal pluralism has generally been understood in two different ways. Pluralism as fact refers to the observation and designation of an empirical state of affairs, that is, the existence of a plurality of laws – or normative orders – within a given social arena. To be a legal pluralist in this first sense is to see – or be prepared to see – different types of law operating simultaneously in a particular social environment. This is pluralism about the sources of law (state law, customs, folk law, religious norms, private regulations and so on) and about the spaces in which they operate (nation-states, the international community, villages, families, churches, industries, schools and so on). Pluralism as (counter)ideology, on the other hand, refers to the intellectual move against the ideology of legal centralism, that is, the claim that law is and should only be understood as official state law. To be a pluralist in this second sense is to rebut the notion that the state is the sole relevant source of authority, and to understand the category 'law' as including non-state legal forms.[60]

This book is not strictly speaking pluralist in either of these two conventional ways. At work in what follows is pluralism as a mindset, rather than as fact or ideology. This version of legal pluralism is a looser form of pluralism, which attaches to the way we think about the legal. It is pluralism about the concept of law. In examining the concept of unity in international law, I do not advocate or adhere to one single concept of law. Instead, I adopt a relaxed attitude towards law's many faces and dimensions. International law is examined *tour à tour* as substantive rules, as a system of norm-generation and norm-interpretation, as an intellectual project, as a form of argument and as a value system. It is mainly in this sense that this work can be labelled as a pluralist philosophy of international law.[61]

[60] For a discussion of the different versions of legal pluralism, see Gordon Woodman, 'Ideological Combat and Social Observation: Recent Debate About Legal Pluralism' (1998) 43 *Journal of Legal Pluralism* 21; as well as Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

[61] This way of thinking about legal pluralism is taken from Craig Scott, '"Transnational Law" as Proto-Concept: Three Conceptions' (2009) 10 *German Law Journal* 860.

IV. OUTLINE OF THE BOOK

The main thesis of this book is that unity is not – as is generally assumed in the fragmentation literature – self-evident, stable and unequivocal. Unity is, on the contrary, a graded and dynamic concept. It is a graded concept, for it can be taken from different angles and standpoints, and it possesses various 'semantic layers'. It is also a dynamic concept, for unity always rests on a complex of forces in tension, sometimes compatible and sometimes at odds with one another.

The argument is set out in six chapters, forming three broad analytical moves. The first part of the analysis serves to define, delimit and problematise the object of the study. Chapter two constitutes an *entrée en matière* through the history of ideas, and in particular the history of philosophy. It seems inconceivable to engage in a theoretical elaboration of unity without mentioning – if only by way of introduction – the long tradition of philosophical thinking on the issue of unity. From its inception, philosophy has been interested in the question of the one and the many, and in the relations of part to whole, so much so that it has become the object of a separate branch or tradition known as 'mereology'. Mereology, needless to say, does not provide definitive and linear answers to the question of international law's unity. It is, however, useful in at least two ways. First, mereology provides conceptual tools that are used in the rest of the study, such as the concepts of part, whole, categorial predicates, causation relationship, foundation, form and so on. Second, mereology is useful for what it suggests about the nature of unity. Philosophers have long formed the conviction that unity is never a pure and objective given, but rather something that always requires a certain degree of construction and interpretation. In this process of construction, the role of the observing subject is key. This conviction, as will become clear, very much underpins the whole of this book.

In chapter three, I define the scope of inquiry and explain what is *not* being addressed in the book. This chapter sets out a series of key distinctions, such as that between the question of unity and the related – but nonetheless distinct – questions of unification and universality of the law. This will hopefully serve to avoid analytical confusion in a debate that sometimes lacks clarity and precision.

The second part of the analysis features an 'internal' critique of the conventional discourse on international law's unity. The purpose here is to break down the rather vague and indistinguishable notions of unity generally found in the literature and to show that, behind these simplifying – and at times simplistic – discourses, lies a wide range of complex questions that are commonly overlooked. With regard to 'material' unity, for instance, I show that most lawyers discuss conflicts of norms as if the notion of conflict was semantically settled. In response to this rather ambiguous use of the term conflict, I show that 'norm conflict' is a polysemic and controversial notion, that no less than three definitions for this notion are available, and that depending on which definition is used, international law will look more or less unitary (chapter four).

Similarly, with regard to 'formal' unity, I show that the ordering of norms into a coherent system can be understood in various ways, which involve different logics and organisational laws. The conventional discourse on unity tends to understand formal unity as a monocausal phenomenon, that is, something that answers to a single 'law of arrangement'. A number of scholars, for instance, understand formal unity as having to do solely with the presence in the system of 'secondary norms'. Against these rather simplistic perspectives, I seek to diversify and complexify the analysis by identifying other dynamics – in particular institutional and hermeneutic dynamics (chapter five).

This first level of critique is 'internal' in the sense that it responds to conventional doctrines of unity on their own terrain. To this day, the fragmentation debate has for the most part limited itself to considerations of norm conflict and secondary rules, and the discussion has essentially been located within positivist frameworks. I have thought it necessary and interesting first to take stock of the conventional discourse on unity within these parameters, before considering non-positivist approaches to international law's unity. This is why, for instance, an entire section is dedicated to Hart's theory of the legal system, which today informs most discussions on 'formal' unity. I show that international lawyers often misunderstand or misuse Hart's theory and that, if one were to take Hart seriously, a number of highly problematic (and neglected) questions would arise, such as those of the determinacy and uniform acceptance of secondary norms.

The third and last part of the book considers what it means to think of international law's unity from a non-positivist standpoint. This is an 'external' critique in the sense that it does not respond to conventional doctrines of unity on their own terms. Instead, it seeks to articulate new visions of unity, the source of which does not reside strictly in positive law or in the interaction between legal norms. Two perspectives are considered, one called 'cultural' (chapter six) and the other 'logical' (chapter seven). In the first instance, international law is approached not as an organised set of rules, but rather as an intellectual discipline and discursive formation. Cultural unity, from this point of view, has very little to do with conflicts of norms or formal legal arrangements. Instead, it involves thinking about the mental and grammatical structures which frame international law as a social field and professional language, that is, as a space for the production and circulation of legal arguments. In the case of 'logical' unity, the unity of international law stems not from the compatibility between legal norms but rather from elements of transcendence of positive rules. This can be a rational and abstract transcendence, postulated *a priori* by the legal theorist or interpreter (what I call *epitesmo*-logical unity). Or this can be material transcendence, that is, the super-determination of legal norms by values or value-systems (what I call *axio*-logical unity). In either case, to think of international law's unity from these points of view becomes something radically different, which involves new objects, new forms and new criteria of unity.

V. SOME CAVEATS AND CLARIFICATIONS

Thus far, I have described the background, purpose and main argument of this book. Some caveats are in order at this point. First, a word on the scope of the inquiry. This book is primarily concerned with the concept of unity in the field of *public* international law. Whilst I am well aware that 'public international law' is increasingly contested as a category, the present work is only marginally interested in debates that have taken place in other disciplines, most notably questions of unification in private international law. This is not to say that these questions are uninteresting or bear no relation to our subject but they *are* of a very different nature and, for the sake of clarity, they have been left out of this work.

Neither is this a book about legal pluralism. In the process of writing this book, I was often asked – and indeed I often asked myself – about its relation to legal pluralism. Initially, I found this question rather puzzling and challenging. Isn't saying something about legal unity necessarily saying something about legal pluralism? Are unity and pluralism simply two sides of the same coin? Eventually, however, I realised that this book is not directly concerned with legal pluralism. As mentioned above, although my approach can be described as loosely pluralistic, since it explores a multiplicity of conceptual perspectives, my argument is not. I am not interested in showing that international law is unitary or plural in any sociological sense. Neither do I argue that unity is superior to pluralism as a paradigm for understanding law. At the risk of repeating myself, this book is neither descriptive nor evaluative, in the way that the tradition of legal pluralism can be. The present work is mostly conceptual, and starts from the assumption that there can be no meaningful debate about norm conflict, fragmentation, or indeed legal pluralism, without some prior consideration of what it means to say that there is unity in the law. This book is therefore interested in a different set of questions than the literature on legal pluralism. It follows, in other words, a different epistemological agenda.

In describing the approach of this book, I have used some rather contested notions. I have, in particular, called my work a 'philosophy' of international law and a 'critique' of dominant discourses on fragmentation. Both notions require clarification. First, I must say something about my use of philosophy. To specialist philosophers, some of what follows may appear impure, wrong, or perhaps even heretical. They may dispute my handling of certain concepts and ideas, and consider that I have taken liberties with established theories, vocabularies or traditions. They may, to some extent, be right. I should describe myself as an amateur rather than professional philosopher. I have borrowed from philosophy that which I have found useful in thinking about the unity of international law. But this remains a book written by an international lawyer and principally for international lawyers. I accept that, in this process of borrowing, some concepts and categories will have lost some of their initial meaning from

the 'source' discipline of philosophy. I have, however, tried to be fair to the original context of philosophical ideas. If I have misconstrued them, I must ask for the indulgence of the professional philosophers. In any event, I take comfort in the fact that Deleuze himself, whose approach to philosophy has very much influenced this work, recognised the value of profane or 'non-philosophical' uses of philosophy, and in fact celebrated the resonance that his concept of 'the fold' had had in a society of paper-folders and in a group of surfers . . .[62]

The term 'critique', which I use to describe my main argument, is also far from unproblematic. Critique means different things to different people. The term 'critical' can be used to mark one's belonging to a particular school or movement, like the 'crits' movement. Or it can be used simply to signify a particular way of thinking about accepted wisdom. It is in this second sense that the term critique is used here. This book is critical not because it is part of a recognisable intellectual tradition or 'brand' of critique, but because it calls into question established methods and epistemologies. My aim here is to make explicit that which is often implicit in the fragmentation discourse, to map the ways in which the concept of unity is used in the literature, and to identify some gaps and problems along the way. Put simply, I seek to explain the existing tradition, and then critique it.

Something remains to be said about one important question that this book does not directly address. The main contribution of this book is to give shape to a concept that is used more intuitively than consciously by most people, to show what unity *can look like* in the context of international law, and to compare various possible conceptions of unity. However, this book does not elaborate on the way these different versions of unity interact. I do not argue that these different types of unity are either compatible or competing, only that they *are* different and that this difference matters for our understanding of international law and fragmentation. This approach may seem unsatisfactory or incoherent to those who see conceptual analysis as the art of turning fuzzy knowledge into stable conceptual constructs. I can only respond that conceptual analysis is *also* the art of picking concepts apart, attending to the vast diversity of meaning and suggesting possible models of reasoning. It is in this spirit that I have written this book. My project is not to provide the reader with a single and definitive vision of unity, but only to initiate analytical momentum and open the door to a richer, more complex and thicker theorisation of unity in international law. No sound or correct ideas then. Just ideas, and a few anchoring points, to get started, and 'zigzag' – as Deleuze might have said – between potential unities.[63]

[62] 'C comme Culture' in Gilles Deleuze, *L'abécédaire de Gilles Deleuze*, a series of video interviews with Claire Parnet, published in CD-Rom by Vidéo Editions Montparnasse (2003).

[63] Ibid, 'Z comme Zigzag'.