
Universality of International Law from the Perspective of a Practitioner

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Abstract

The ESIL Conference at which this article was originally presented as the Keynote Speech was devoted to the topic of “International Law in a Heterogeneous World”. The article attempts to demonstrate that heterogeneity does not exclude the universality of international law, as long as the law retains – and further develops – its capacity to accommodate an ever larger measure of such heterogeneity. After developing three different conceptions, or levels, of what the term ‘universality’ of international law is intended to capture, the article focuses on international rules, (particularly judicial) mechanisms, and international institutions which serve the purpose of reconciling heterogeneous values and expectations by means of international law. The article links a critical evaluation of these ways and means with the different notions of universality by inquiring how they cope with the principal challenges faced by these notions. In so doing, it engages a number of topics which have become immensely popular in contemporary international legal writing, here conceived as challenges to universality: the so-called ‘fragmentation’ of international law; in close connection with this first buzzword the challenges posed by what is called the ‘proliferation’ of international courts and tribunals; and, finally, certain recent problems faced by individuals who find themselves at the fault lines of emerging multi-level international governance. The article concludes that these challenges have not prevented international law from forming a (by and large coherent) legal system. Most concerns about the dangers of fragmentation appear overstated. As for the ‘proliferation’ of international judicial institutions, the debate on fragmentation has made international judges even more aware of the responsibility they bear for a coherent construction of international law. They have managed to develop a set of tools for coping with the

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undesirable results of both phenomena. Despite some evidence of competition among international courts for ‘institutional hegemony’, such competition has hitherto been marked by a sense of responsibility on the part of all concerned. Thus, from the viewpoint of a practitioner, the universality of international law is alive and well; there is no need to force the law into the Procrustean bed of ‘constitutionalization’.

1 Introductory Remarks

A keynote speech at a conference on ‘International Law in a Heterogeneous World’ on the topic of the ‘universality’ of international law might remind the listener – especially an audience like this evening’s, which, I am sure, includes a particularly high percentage of post-modernists – of frightened people whistling in the dark, for which, I would submit at the very outset, there is no reason. But what the topic I have been asked to talk about certainly seems to evoke is a tension between the two notions of heterogeneity and universality. The choice of the topic suggests the idea (or the hope) that heterogeneity does not exclude universality, that in today’s world the continued existence and vitality of universal international law will be contingent upon its capacity to accommodate an ever larger measure of heterogeneity. Therefore, my focus this evening will be on international rules and (particularly judicial) mechanisms and international institutions which serve this very purpose; that is, the accommodation of heterogeneous values and expectations by means of international law.

I am aware that my topic will necessarily engage a number of buzzwords in contemporary international law, but beyond juggling with these my approach this evening will be characterized by two main features.

First, I will treat my topic from the perspective of a practitioner; that is, I will deal with the huge amount of theoretical writing on the subject only when absolutely necessary, concentrating instead on practical aspects, and thereby demonstrating how the theoretical problems which emerge in my presentation play out in practice. In so doing, I will have to condense or summarize a number of issues that we will encounter on our rather extensive journey together, but with which, I trust, most of you will be familiar.

As for the second specific take on my topic, I will base my comments as much as possible on my personal experience – on insights gained through giving occasional advice to governments, by serving in a few legal teams in cases before the International Court of Justice, through membership of one of the UN’s human rights treaty bodies (the Committee on Economic, Social and Cultural Rights), through my work in the International Law Commission, as an arbitrator, and ultimately at the ICJ.

2 Three Conceptions (Levels) of Universality

In the following I will define what I understand the ‘universality’ of international law to mean. I will arrive at three different conceptions, or levels, each with its own

range of implications and problems. I will then deal with these conceptions in turn and select from among the clusters of problems to which they give rise – which I will call ‘challenges’ – as well as from the ways of coping with these challenges, those upon which I hope to be able to say something meaningful.

Let me now turn to my three different understandings, or ‘levels’, of universality of international law.

At a first, if you like, basic, level, and corresponding to what I would regard as the ‘classic’ understanding of our notion, universality of international law means that there exists on the global scale an international law which is valid for and binding on all states.¹ Universality thus understood as global validity and applicability excludes the possibility neither of regional (customary) international law nor of treaty regimes which create particular legal sub-systems, nor does it rule out the dense web of bilateral legal ties between states (I exclude constructs like ‘persistent objection’ from this evening’s analysis). But all of these particular rules remain ‘embedded’, as it were, in a fundamental universal body, or core, of international law. In this sense, international law is all-inclusive.

At a second level, a – wider – understanding of universality responds to the question whether international law can be perceived as constituting an organized whole, a coherent legal system, or whether it remains no more than a ‘bric-à-brac’, to use Jean Combacau’s expression² – a random collection of norms, or webs of norms, with little interconnection. This question is probably best viewed in terms of the ‘unity’ or ‘coherence’ of international law; and strong connotations of predictability and legal security that will be attached to such (in my terminology) second-level universality.³ International law has of course long been perceived as a legal system by international lawyers, most of whom admittedly have not been deeply bothered by fine points of systems theory, while today many commentators see this systemic character as being threatened by a process of ‘fragmentation’, a challenge to which I will turn later.

At a third level, universality may be taken as referring to an – actual or perceived – (changing) nature of the international legal system in line with the tradition of international legal thinking known as ‘universalism’. A universalist approach to international law in this sense expresses the conviction that it is possible, desirable, indeed urgently necessary (and for many, a process already under way), to establish a public order on a global scale, a common legal order for mankind as a whole.⁴ International law, according to this understanding, is not merely a tool-box of rules and principles

¹ Jennings, ‘Universal International Law in a Multicultural World’, in M. Bos and I. Brownlie (eds), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (1987), at 39, 40–41.

² Combacau, ‘Le droit international: bric-à-brac ou système’, 31 *Archives de philosophie du droit* (1986) 85.

³ ILC, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 Apr. 2006, A/CN.4/L.682, at para. 491.

⁴ von Bogdandy and Delavalle, ‘Universalism and Particularism as Paradigms of International Law’, International Law and Justice Working Paper 2008/3, 1.

destined to govern inter-state coordination and cooperation; rather it constitutes a ‘comprehensive blueprint for social life’, as Christian Tomuschat has called it.⁵ Universalism thus understood goes far beyond the addition of a layer of what Wolfgang Friedmann⁶ has termed the ‘international law of cooperation’ to the body of the law. The concept implies the expansion of international law beyond the inter-state sphere, particularly by endowing individuals with international personality, establishing a hierarchy of norms, a value-oriented approach, a certain ‘verticalization’ of international law, de-emphasizing consent in law-making, introducing international criminal law, by the existence of institutions and procedures for the enforcement of collective interests at the international level – ultimately, the emergence of an international community, perceived as a legal community.⁷ Indeed, international law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human beings. In so doing, it begins to display more and more features which do not fit into the ‘civilist’, bilateralist structure of the traditional law. In other words, it is on its way to being a true *public* international law.⁸

Just two quick remarks to complete this point: first, and addressing concerns of certain voices coming from the Left, one can perfectly adhere to a universalist view as described without entertaining, or accepting, hegemonic second thoughts. And, further, one can adhere to such a universalist approach without necessarily subscribing to the view that contemporary international law is undergoing a process of ‘constitutionalization’. I will return to this issue at the very end of this address.

3 Challenges Faced by Universality at Its Various Levels

After this brief *tour d’horizon* of what ‘universality’ of international law may be taken to mean, let me describe the challenges which the notion faces, and ways of coping with them, using as a point of departure the conceptions I have just developed.

The understanding of universality of international law in the classic (level I) sense, that is, its global reach, has long encountered many challenges, indeed attacks, from different quarters, both philosophical/theoretical and practical. These embrace more aggressive strands of regionalism and related, more ‘innovative’, concepts like those of a ‘league of (liberal) democracies’ versus ‘pariah’ or ‘rogue states’, designed to bypass the United Nations, cultural relativism in international human rights discourse, as

⁵ Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law’, 281 *Recueil des Cours* (1999) 63.

⁶ W. Friedmann, *The Changing Structure of International Law* (1964).

⁷ Mosler, ‘The International Society as a Legal Community’, 140 *Recueil des Cours* (1974 IV) 1, at 11–12.

⁸ Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *Recueil des Cours* (1994 VI) 217, at 231–234.

well as what I would call 'post-modern' challenges stemming from Critical Legal Studies, Marxist theory, the theory of Empire, and Feminist theory. Level II universality in particular has come under fire not only from a new species of *Völkerrechts-leugner*, negligible intellectually if they were not teaching at influential US universities, but also under more friendly, if ultra-theoretical, fire from a very specific sociological school, 'global legal pluralism', which sees the emergence of many autopoietic functional systems on a global scale to eventually substitute for the state.⁹ Finally, to formulate a challenge of my own to level III universality, universalism as thus understood appears to me not so far advanced as many of its protagonists (want to) believe; it suffers from serious practical shortcomings, and is also the subject of attack by several post-modern theories.

But let us now turn to this evening's specials, so to speak, from among the menu of challenges to universality. As I indicated at the outset, my choice is determined by the topic assigned to me, namely the universality of international law from the viewpoint of a practitioner, particularly that of the humble practitioner before you. This specific point of departure leads me to turn to a range of problems regarded by German international lawyers as belonging to *Völkerrechtsdogmatik* rather than being genuine theory, but which, wherever they may belong, have also considerable practical relevance. Thus, the challenge to level I universality which I have selected for discussion is that of the alleged fragmentation of international law; as my 'favourite' challenge to level II universality I will focus on the proliferation of international courts and tribunals; and, finally, I have not yet found a comparable buzzword to sum up the problems encountered by the common-legal-order-of-mankind approach embodied in level III universality.

Let me emphasize that these are quite subjective choices. The links between the various understandings of universality and 'their' respective challenges are anything but mutually exclusive, and notions like 'fragmentation' and 'proliferation' are not separated by sharp dividing lines. For instance, I could have selected fragmentation as the principal threat to universality in the sense of unity and coherence of international law, and many observers would regard the proliferation of international courts and tribunals as one aspect, or one prominent cause, of such fragmentation.

A In Particular: The 'Fragmentation' of International Law

1 The Phenomenon

After these clarifications I turn to the phenomenon of fragmentation, conceived as a challenge to the universality of international law in the sense of the latter's global validity and applicability, and to the international legal responses developed to cope with it.

⁹ Fischer-Lescano and Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2003–2004) 999.

Fragmentation has become one of the great favourites in international legal literature over the past years. Its connotations are clearly negative: something is splitting up, falling apart, or worse: bombs or ammunition can be designed to fragment and thus become even more destructive. In international legal parlance, the term has gained such prominence out of the fear that international law might lose its universal applicability, as well as its unity and coherence, through the expansion and diversification of its subject-matters, through the development of new fields in the law that go their own way, and that legal security might thereby suffer (remember that I will take up the proliferation issue separately).

In particular, it is the appearance of more and more international treaties of a law-making type, which regulate related or identical matters in a variety of, sometimes conflicting, ways and binding different but sometimes overlapping groups of states, that is a matter of concern.¹⁰ Indeed, there is simply no ‘single legislative will behind international law’.¹¹ The Arbitral Tribunal in the *Southern Bluefin Tuna* case has spoken of ‘a process of accretion and cumulation’ of international legal obligations.¹² The Tribunal regarded this as beneficial to international law, and I would agree with this in principle. However, if taken to the extreme, the question of course does arise whether this development might lead to a complete detachment of some areas of international law from others, without an overarching general international law remaining and holding the parts together. In arriving at this question one would not have to go so far as to suspect that ‘[p]owerful States labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created’.¹³

In my view, to see such sinister motives at work behind our phenomenon is not justified. I prefer to offer a much more natural or, let me say, technical explanation: the phenomenon described as ‘fragmentation’ of international law is nothing but the result of a transposition of functional differentiations of governance from the national to the international plane;¹⁴ which means that international law today increasingly reflects the differentiation of branches of the law which are familiar to us from the domestic sphere. Consequently, international law has developed, and is still developing, its own more or less complete regulatory regimes which may at times compete with each other.

¹⁰ Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions’, 5 *Max Planck UN Ybk* (2001) 67, at 71.

¹¹ ILC Report on Fragmentation, *supra* note 3, at para. 34.

¹² *Southern Bluefin Tuna case (Australia and New Zealand v. Japan)*, Award of 14 Aug. 2001 (Jurisdiction and Admissibility), 23 *UNRIAA* (2004) 40, at para. 52.

¹³ Benvenisti and Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, 60 *Stanford L Rev* (2007) 595.

¹⁴ Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70 *MLR* (2007) 1, at 4.

2 International Law's Ways of Coping with Fragmentation

(i) *Institutional Aspects*. So much for fragmentation as a phenomenon. Now, what are the institutions and methods by which international law attempts to reconcile necessary functional differentiation with unity and coherence? This task places responsibilities on different international actors: first – and leaving aside the law-making activities of international organizations – states as the principal creators of international legal rules ought to be aware of the need for coherence of the international legal system as a whole, for instance when they negotiate new international agreements. Secondly, international organizations and courts, when they interpret and apply international law, need to bear in mind that they are acting within an overarching framework of international law, residual as it may be. Last but not least, national courts which play an ever more relevant role in the application of international law must also be aware of the impact that their activities can have on the development of a coherent international legal system.

Staying with the institutional aspects for a moment, I would submit that – especially from my perspective as a practitioner – both the International Law Commission and the International Court of Justice represent pillars of unity and coherence of universal international law.

While the Court must, and thus claims to, apply the law as it stands, the Commission is supposed to systematize and progressively develop it. It is not unimportant to note that the personal ties between the two organs are strong. Many ICJ judges have formerly served on the ILC (in late 2008: seven out of 15). This has led to an interesting complementary relationship between the two bodies. Specifically with regard to this evening's topic, the Commission's projects pursue the purpose of fostering universality at all the levels I have introduced, with an emphasis on levels I and II; its work products aim to be applied as widely as possible, even though more recently the Commission has also drafted rules that are designed for concretization on the regional, or even bilateral, plane.¹⁵ Nor does the Commission shy away from the elaboration of special regimes if necessary. A case in point would be the accommodation of specific features of reservations made to human rights treaties, which is currently under way in the context of the broader ILC project on reservations: even Special Rapporteur Alain Pellet has come to accept that *leges speciales* to serve that purpose are no threat to the unity of the law but will lead to a more responsive regime, not 'self-contained' in any sense, and thus to a progressive development of international law.

The most recent, and most direct, contribution of the ILC to the unity and coherence of international law is the 2006 (final) Report of Martti Koskenniemi's Study Group on Fragmentation, with its 'tool box' of ways and means to cope with the undesirable

¹⁵ See, e.g., Convention on the Law of the Non-navigational Uses of International Watercourses (1997), Draft Articles on the Law of Transboundary Aquifers (2008), Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Draft Articles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (2006).

effects of our phenomenon.¹⁶ While this voluminous study has been criticized by some as merely stating the obvious, from my specific viewpoint it is of immense value as a piece of work which attempts to assemble the totality of international law's devices available to counter the negative aspects of fragmentation.

As for the role of the ICJ as a guarantor of the unity of international law, I will say a few words on this later, in the context of judicial proliferation.

I now turn from the institutions to the methods developed in international law to sustain its unity and coherence in the face of expansion and diversification. Again, the 2006 ILC Report on fragmentation is a great source of inspiration in this regard.

(ii) *Methods Employed*. The first device to be mentioned here is the introduction of a normative hierarchy in international law, especially the development of peremptory limits to the making and administering of international law in states' relations *inter se*.

From a voluntarist point of departure, the idea of any hierarchical relationship between international legal rules is problematic. Nevertheless, we have witnessed the recognition of two types of norms which do imply superior status: *jus cogens*, or peremptory norms, and, possibly, norms leading to obligations *erga omnes*. As for the latter concept, it does not necessarily entail a hierarchically superior position; therefore I will categorize it as a method of sustaining coherence in its own right. Let me just mention at this point that, while the ICJ was not the first to use the notion of obligations *erga omnes*, it was the Court's famous dictum in the *Barcelona Traction* judgment of 1970 which triggered the doctrinal fascination with the concept. Concerning *jus cogens*, and in rather surprising contrast, it was not until 2006, i.e., no fewer than 36 years after the *Barcelona Traction* judgment, and 26 years after the blessing of the concept by the entering into force of the Vienna Convention on the Law of Treaties with its Articles 53 and 64, that the ICJ could finally bring itself to issue an authoritative pronouncement. This was eight years after the ICTY had first explicitly mentioned *jus cogens* in its *Furundžija* judgment of 1998,¹⁷ five years after the European Court of Human Rights had done so in *Al-Adsani*,¹⁸ and three years after the Inter-American Court of Human Rights had followed suit.¹⁹ Better late than never, in its *Congo v. Rwanda* judgment of 2006, the Court affirmed both that this category of norms was part of international law and that the prohibition of genocide belonged to it.²⁰ A year later, the Court restated its recognition of *jus cogens* in the *Genocide* case.²¹

¹⁶ See *supra* note 3.

¹⁷ ICTY, Trial Chamber, *Prosecutor v Furundžija*, Judgment of 10 Dec. 1998, IT-95-17/1, at para. 153.

¹⁸ See the text to notes 23–24 *infra*.

¹⁹ IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, 17 Sept. 2003, at paras 97 ff.

²⁰ ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v. Rwanda)*, Judgment of 3 Feb. 2006, not yet reported, at para. 64.

²¹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007, not yet reported, at para. 161.

However, although the existence and relevance of *jus cogens* have by now been almost universally accepted, ‘the car has remained in the garage’, to use Ian Brownlie’s metaphor,²² most of the time. This might actually be a good thing (no offence intended to British cars!), because in instances in which the concept, or rather its legal consequences, became operational, its application has met with considerable difficulties. This is exemplified by two rather recent cases that had to do with the application of *jus cogens* in the field of human rights. In the first case, *Al-Adsani*, the European Court of Human Rights held that, even though the prohibition of torture had the character of *jus cogens*, the rules of state immunity were not trumped and set aside by it.²³ In effect, the Court blocked a specific protection afforded to individuals (Article 6 of the European Convention on Human Rights) by interpreting the Convention in accordance with general international law on state immunity, resorting to Article 31(3) (c) of the Vienna Convention on the Law of Treaties, on which later. The Strasbourg Court stated that ‘[t]he Convention, including Article 6, cannot be interpreted in a vacuum’; rather, the Court would have to take into account the ‘generally recognised rules of public international law on State immunity’.²⁴

Against this stands the joint Dissenting Opinion of those judges of the Grand Chamber with perhaps the strongest international law credentials on the Strasbourg bench at the time: while they did not question the majority’s method of interpreting (away) Article 6 of the European Convention, they were of the opinion that under general international law the rules on state immunity could no longer render a claim against a foreign state inadmissible in national courts where the claim was based on the peremptory prohibition of torture.²⁵ But, as I said, this remained the view of the minority.

The ICJ’s recognition of the status *juris cogentis* of the prohibition of genocide did not have much impact on the *Congo v. Rwanda* case either. The Court emphasized that its jurisdiction remained governed by consent irrespective of the *jus cogens* character of the substantive law involved. Lacking such consent on the part of Rwanda, which had excluded ICJ jurisdiction to rule on the Genocide Convention by way of a reservation, there was, in the circumstances of the case, no possibility for the Court to deal with the merits of the case.²⁶

However, a joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma pointed out that it was ‘not self-evident that a reservation to Article IX [of the Genocide Convention] could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration’.²⁷ The Opinion highlighted the role of decentralized

²² Which I remember from discussions in the International Law Commission.

²³ ECtHR, *Al-Adsani v. United Kingdom*, App. no. 35763/97, Judgment of 21 Nov. 2001, at para. 61.

²⁴ *Ibid.*, at paras 55–56.

²⁵ *Ibid.*, Joint Dissenting Opinion of Rozakis and Caflisch, joined by Wildhaber, Costa, Cabral Barreto and Vajčić, at para. 3.

²⁶ *Armed Activities*, *supra* note 21, at para. 67.

²⁷ *Armed Activities*, *supra* note 21, Joint Separate Opinion of Higgins, Kooijmans, Elaraby, Owada, and Simma, at para. 29.

enforcement of obligations under the Genocide Convention, with states parties being the sole monitors of each other's compliance (in contrast to later human rights treaties establishing treaty bodies with the competence of such oversight). According to the Opinion, this decentralized system can function properly only if states can bring a case before the ICJ concerning the alleged infringement of the Convention by another state.

In conclusion on this point, the last word in this tug-of-war between old and new international law within the Strasbourg and Hague Courts may not yet have been spoken – as far as the ICJ is concerned, at present it looks as if a new opportunity to probe *jus cogens* as against state immunity might come its way.²⁸

Another method of inserting hierarchy into international law, somehow related to the acceptance of *jus cogens*, has been embodied in Article 103 of the UN Charter, according to which the obligations of UN members under the Charter prevail over their obligations 'under any other international agreement'. The ICJ paid tribute, as it were, to Article 103 in the *Lockerbie* cases, followed by the European Union's Court of First Instance in *Yusuf and Kadi*, while the respect shown to the Charter and the human rights regime established under its auspices by the European Court of Justice itself in its final *Kadi* decision has, deservedly or undeservedly, shrunk to a mere *pro forma* gesture. I will return to this development towards the end of my speech.

Let us take a brief look at obligations *erga omnes*. For any observer capable of grasping the meaning of the Latin words involved, the relevance of this concept as a means to secure the universal grasp of fundamental values consecrated by modern international law is obvious (let me mention in passing that the intricacies of the Latin phrase involved were not the least of the reasons why the point of departure upon which the minimalist regime of 'ce qui reste des crimes' (that is, of notorious Draft Article 19 on 'crimes of states') rests in the ILC Articles on State responsibility of 2001 was finally changed from breaches of obligations *erga omnes* to breaches of peremptory norms. Of course, *jus cogens* is also Latin, but this phrase has apparently lost its horror for the younger generation of international lawyers, having been around for half a century). While the concept of obligations *erga omnes* is certainly related to that of *jus cogens*, the fine points of their relationship are far from clear. Something resembling a regime of these obligations is in the making, but still finds itself in a very initial stage – let me refer to the ILC's Articles on State Responsibility, to the resolution of the *Institut de droit international* based on reports by Giorgio Gaja and adopted in Cracow in 2005,²⁹ and to the monograph on the enforcement of obligations *erga omnes* by Christian Tams³⁰

²⁸ What looked like a possibility in September 2008 turned into reality in December of the same year when Germany brought an Application suing Italy for breaches of international law committed by the Italian Corte di Cassazione through its refusal to accept the German plea to jurisdictional immunity for alleged crimes against humanity perpetrated by Germany in Italy and against Italian citizens between 1943 and the end of World War II: *Jurisdictional Immunities of the State (Germany v. Italy)*.

²⁹ Resolutions of the *Institut de droit international*, Krakow Session, 2005, Fifth Commission: Obligations and rights *erga omnes* in international law, Rapporteur: Giorgio Gaja, adopted on 27 Aug. 2005.

³⁰ C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005).

as major doctrinal efforts in this direction. On the other hand, state practice has not (yet?) embraced the concept with any notable passion – in this sense I would still stick to what I wrote in 1993: '[v]iewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is"' (this, of course, not in the Kelsenian sense).³¹ In view of this, the bold confirmation of the concept by the ICJ in its *Wall* Opinion of 2004 is remarkable,³² as, unfortunately, is the confusion about its use by the Court in certain commentaries on the Opinion.

A further tool for coping with negative consequences of fragmentation is to be seen in the establishment of a regime around the *lex specialis/lex generalis* distinction, with the more specific norm setting aside a more general one. The rationale for this is that the more specific rule is more to the point, regulates the matter more effectively, and is better able to accommodate particular circumstances.³³

Turning to a specific aspect of *lex specialis*, let me make a short remark on 'self-contained regimes'.³⁴ In the wake of a problematic statement of the ICJ in the 1980 *Tehran* judgment, the international academic community has taken increasing notice of this phenomenon – a development which recently culminated in the profound analysis of 'self-contained regimes' by the ILC's Study Group on Fragmentation. The Study Group's final report identified three uses of the term, even though, as the report acknowledges, these might not always be clearly distinguishable from each other: first, and perhaps most commonly, the term refers to primary rules coupled with special sets of secondary rules under the law of state responsibility; secondly, 'self-contained regimes' are said to consist of subsystems of international law, that is, sets of rules, not necessarily secondary in nature, which regulate specific questions differently from general international law; thirdly, the concept is sometimes accorded an even wider meaning, denoting an entire area of international law allegedly following its own rules of interpretation and enforcement, such as international human rights law or international trade law.³⁵

What there now seems to be agreement about is that all three categories of 'self-contained regimes' cannot, at least not completely, 'contract out' of, decouple themselves, from, the system of general international law. It is a fact, however, that differing approaches to interpretation and application of such regimes have developed, for instance in international trade law, human rights, or environmental law. Each regime has thus established its separate epistemic communities of lawyers working in the field, institutions developing and applying the law, and courts and tribunals enforcing it. But this is not necessarily a development which threatens the unity and

³¹ Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *erga omnes*?', in J. Delbrueck (ed.), *The Future of International Law Enforcement. New Scenarios – New Law* (1993), at 125.

³² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 [2004] ICJ Rep 131, at paras 155ff.

³³ Cf. ILC Report on Fragmentation, *supra* note 3, at paras 65 ff.

³⁴ Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *EJIL* (2006) 483.

³⁵ ILC Report on Fragmentation, *supra* note 3, at paras 128–129.

coherence of international law. The formation of specific methods of interpretation or enforcement is inherent in the set-up of such regimes, and the expertise that lawyers will accumulate by working within them, as well as bodies of case law of the various courts and tribunals mandated to interpret and enforce these regimes, will contribute to a growing and ever more dense corpus of law which responds to the needs of the specific regime. In a positive light, these sub-systems of international law, more densely integrated and more technically coherent, may show the way forward for general international law, as both laboratories and boosters for further progressive development at the global level.

The last method to which I turn in my ‘*tour d’horizon*’ of ways and means developed in international law to cope with the challenge of fragmentation is that of systemic integration of regimes *inter se* by way of interpretation.

I think we can speak of a presumption that states, when creating new rules of international law, do not aim at violating their obligations under other, pre-existing rules, but rather intend to operate within this framework.³⁶ This very general proposition can be complemented by the maxim that any legal rule should be read in context with other rules applicable to the parties. For the law of treaties, this idea has been encapsulated in Article 31(3)(c) of the 1969 Vienna Convention.

The exact conditions for the application of this provision are far from clear, however. Article 31(3)(c) stipulates that, in interpreting a treaty, there shall be taken into account ‘any relevant rules of international law applicable in the relations between the parties’. While it is now agreed that the ‘relevant rules’ within the meaning of the provision can be norms having their pedigree in any of the recognized sources of international law,³⁷ it is still disputed whether the term ‘parties’ refers to all parties to, for instance, the treaty establishing the ‘relevant rules’, or whether it is sufficient that the parties to a particular dispute are bound by the rule in question. A WTO panel in the *EC – Approval and Marketing of Biotech Products* case³⁸ has opted for the first approach, basing its reasoning on the principle of state sovereignty and the corollary principle of consent: ‘[i]ndeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept’.³⁹

As the ILC’s Study on Fragmentation rightly observes, such a construction of the term ‘parties’ ‘makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31 (3) (c) would be allowed’,⁴⁰ due to ‘the unlikelihood of a precise congruence in the membership

³⁶ In this sense see R. Jennings and A. Watts, *Oppenheim’s International Law* (9th edn, 1992), at 1275.

³⁷ ILC Report on Fragmentation, *supra* note 3, at para. 426; ECtHR, *Golder v United Kingdom*, App. no. 4451/70, Judgment of 21 Feb. 1975, Series A, vol. 18, at 17 (para. 35); *Al-Adsani*, *supra* note 24, at para. 55.

³⁸ WTO, Panel Report, *EC-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R, 29 Sept. 2006, at para. 7.68.

³⁹ *Ibid.*, at para. 7.71.

⁴⁰ ILC Report on Fragmentation, *supra* note 3, at para. 450.

of most important multilateral conventions'.⁴¹ If the *Biotech* approach were followed, the most important multilateral agreements could not be interpreted by reference to one another. On the other hand, interpreting 'parties' to mean only those involved in a particular dispute before a court or tribunal would risk divergent interpretations of one and the same rule even for multilateral treaties of the law-making type. Hence, it has been suggested that it would be sufficient for the purposes of Article 31(3)(c) that the parties in dispute are both parties to the other treaty (i.e., the treaty informing the interpretation of the instrument in question), if this instrument is of a 'reciprocal', 'synallagmatic', or 'bipolar' type, whereas the rule adopted by the panel in *Biotech* should apply if the treaty to be interpreted is of the 'integral' or 'interdependent' type.⁴² While this solution takes into account different structures of international treaties, it has yet to be adopted by and applied in practice. What the discussion certainly shows is that the principle of 'systemic integration' is far from being a panacea for fragmentation. Besides, as the judgment of the European Court of Human Rights in *Al-Adsani* demonstrates, Article 31(3)(c) may, if applied 'strictly', 'solve' norm collisions in a way which is at odds with other rules of international law, such as *jus cogens*.

Let me conclude this section with a brief look at fragmentation as a matter before the ICJ. In explicit terms, and contrary to some of its former Presidents, the Court has not yet raised its voice in the discourse about this challenge. However, certain recent judgments do offer insights in the Court's perception of the coherence and unity of international law and the ways to preserve these qualities. Thus, the Court has used the tool of systemic interpretation in the *Oil Platforms* case, resorting to Article 31(3)(c) of the Vienna Convention on the Law of Treaties to place a specific bilateral treaty within the broader context of general international law.⁴³ Although this approach has been criticized by some observers as getting dangerously close to a circumvention of the principle of consent delimiting the jurisdiction of the Court, it demonstrates that international law does provide us with tools which allow for a coherent conception of its rules. In the recent case of *Djibouti v. France*, the Court again applied Article 31(3)(c) of the Vienna Convention, this time to two bilateral treaties, and interpreted a Convention on Mutual Assistance in Criminal Matters of 1986, the alleged violation of which by France constituted the essence of Djibouti's claim, in the light of a Treaty of Friendship and Co-operation concluded between the two parties in 1977. This proved to be far less contentious than the use of our Vienna Convention Article in the *Oil Platforms* case, especially since the Court clarified that the earlier treaty, while having 'a certain bearing' on the interpretation and application of the later one, neither broadened the scope of the Court's jurisdiction, nor could significantly alter the interpretation of the Mutual Assistance Convention of 1986.⁴⁴

⁴¹ *Ibid.*, at para. 471.

⁴² *Ibid.*, at para. 472.

⁴³ ICJ, *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 Nov. 2003, [2003] ICJ Rep 161, at para. 41.

⁴⁴ ICJ, *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, at para. 112.

B The ‘Proliferation’ of International Courts and Tribunals as a Challenge

1 The Phenomenon and Its Effects

In the second part of my speech I now turn to the issue of the proliferation and growing diversity (not of the substance of international law itself, but) of international courts and tribunals, here conceived as a challenge particularly to what I have called ‘second-level universality’, that is, the systemic coherence of international law, but of course also to be seen as an accelerant of fragmentation.

In recent years, maybe the last two decades, a growing number of international legal scholars, among them several Presidents of the ICJ, have become quite concerned by this development and the ensuing problems. The choice of the word ‘proliferation’ must have been born out of these concerns, because, like ‘fragmentation’, the term has all kinds of undesirable connotations and undertones, again stemming mostly from the military world. Returning to the concerns as such, they result in part from the fact that, quite naturally, the jurisdiction of most international tribunals is limited to the rules established by the treaty instruments which set them up, i.e., that such tribunals are not normally mandated to apply ‘general’ international law, at least not in express terms.

There is no doubt that international judicial dispute settlement is decentralized, without coordinated allocation of jurisdiction or hierarchy between different international courts. Some international courts and tribunals have explicitly described themselves as ‘self-contained systems’,⁴⁵ or as ‘autonomous judicial institutions’.⁴⁶ International dispute settlement is indeed ‘insular’.⁴⁷ On the other hand, some authors manage to see in the same picture the emergence of a system of international courts. Of course, this is a question of definition: Even those arguing for an ‘international court system’ or a ‘global community of courts’⁴⁸ – defined to comprise both international and national courts – recognize that ‘the international judiciary is an evolving, complex, and self-organizing system’.⁴⁹ Most of them would probably also agree that the international judiciary is ‘dancing on the edge of chaos’.⁵⁰

However, irrespective of whether we are in the presence of an emerging system or an uncoordinated mess of diverse mechanisms, the fact is that the present state of affairs, characterized as an ‘explosion of international litigation and arbitration’, has not – yet? – led to any significant contradictory jurisprudence of international courts; such cases remain the exception, and actually courts have gone to great lengths to avoid contradicting each other.⁵¹ The discussion also misconceives to some extent

⁴⁵ ICTY, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, IT-94-1-AR72, 2 Oct. 1995, at para. 11.

⁴⁶ IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 Oct. 1999, at para. 61.

⁴⁷ Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals* (2003), at 109.

⁴⁸ Slaughter, ‘A Global Community of Courts’, 44 *Harvard Int’l LJ* (2003) 191.

⁴⁹ Martínez, ‘Towards an International Judicial System’, 56 *Stanford L Rev* (2003–2004) 429, at 443–444.

⁵⁰ *Ibid.*

⁵¹ Simma, ‘Fragmentation in a Positive Light’, 25 *Michigan J Int’l L* (2003–2004) 845, at 846.

the mindset and professional ethos of international judges. In the words of Anthony Aust, 'No wise judge (international or national) wants to reinvent the wheel'.⁵² Thus, most international judges fundamentally agree on the way the international legal system is structured; often, they have similar educational backgrounds. Furthermore, it will obviously add to the legitimacy of a judgment if an international court relies on the case law of other such courts, applies and maybe develops it, without, however, changing it fundamentally. Finally, quite a few international judges have moved from one court to another, thus also, more or less consciously, adding to the consistency of international jurisprudence.⁵³

Rather than resulting in fragmentation, the emergence of more international courts, combined with an increasing willingness of states to submit their disputes to judicial settlement, has revived international legal discourse. This discourse has gained in frequency and intensity: courts nowadays have a greater say in it compared to doctrine. The more international courts apply a specific rule of international law in the same manner, the more legitimacy it will be accorded, and the more can we be certain about its normative strength. On the other hand, if various international courts do disagree on a point of law, the ensuing judicial dialogue may possibly further progressive development of the law.⁵⁴

2 *Convergence and Divergence of International Jurisprudence*

(i) *Instances of Divergence.* Let me now illustrate the *problématique* of proliferation by telling you a few stories about divergence and convergence in international jurisprudence and the phenomenon of parallel proceedings, to provide you with a concrete picture of the actual weight of the problem. First, instances of divergence: let me state already at the outset that these few cases can be explained to a large extent by reference to the specific functions of the courts involved within the sub-systems in which they have been set up.

The most prominent of all these cases is certainly the collision between the ICJ in *Nicaragua* and the ICTY in *Tadić*.

In the *Tadić* case, the ICTY – in what has been called an 'aggressive attack'⁵⁵ – diverged from the ICJ's holding in the *Nicaragua* case on the question of the level of control necessary for the attribution of acts of paramilitary forces present in one state to another state. Whereas the ICJ had decided that, for these acts to be attributable, the state in question had to exercise 'effective control' over such paramilitaries, the

⁵² Aust, 'Peaceful Settlement of Disputes: A Proliferation Problem?', in T.M. Ndiaye and R. Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah* (2007), at 131, 137.

⁵³ Martinez, *supra* note 50, at 436.

⁵⁴ Simma, *supra* note 52, at 846.

⁵⁵ Goldstone and Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *Leiden J Int'l L* (2008) 95, at 101.

ICTY Appeals Chamber did not hold the *Nicaragua* test to be persuasive and proposed that a less stringent test, i.e., ‘overall control’, was sufficient.⁵⁶

The ICJ used the 2007 *Genocide* judgment to give its response to *Tadić*. It held that the argument in favour of the *Tadić* test was unpersuasive and did not reflect international law on state responsibility. In the Court’s view, the ‘overall control’ test suggested by the ICTY had ‘the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf’. The Court thus came to the conclusion that the ICTY’s reading of the rules of attribution in question had gone too far, stretching the connection between the conduct of a state’s organs and its international responsibility ‘almost to the breaking point’.⁵⁷

In an exercise of judicial diplomacy, the ICJ made it appear as if the ICTY had intended to limit its divergent test to the specific (jurisdictional) question whether a conflict was internal or international. While *Tadić* can certainly be read in such a conciliatory way, a member of the ICTY Appeals Chamber which had decided the *Tadić* case, Nino Cassese, has recently stated quite bluntly that the Yugoslavia Tribunal actually did intend to replace the *Nicaragua* standard developed by the ICJ at the level of general international law and posit two different tests or degrees of control leading to attribution: one for acts performed by private individuals, in case of which attributability would require ‘effective control’, and one for acts of organized and hierarchically structured groups, such as military or paramilitary units, in case of which ‘overall control’ would suffice. Cassese emphasized that – contrary to what the ICJ found in its *Genocide* Judgment – the Appeals Chamber did in fact hold that the legal criteria for these two tests reflected the state of international law both for international humanitarian law and the law of state responsibility. The ICJ, Cassese suggested, should pay attention to state practice and case law instead of simply and uncritically restating its previous views.⁵⁸

As far as the ICTY itself is concerned, it probably will not have much of a chance left to reply to the ICJ and thus initiate another round in what (with all due respect for my own Court) might be called a ‘*dialogue des sourds*’. But the International Criminal Court appears set to do so: quite recently, in the *Lubanga* case, an ICC Pre-Trial Chamber, about one month before the ICJ delivered its judgment in the *Genocide* case in early 2007, held – without discussing *Nicaragua* – that the overall control test as established in *Tadić* was also valid for the purposes of determining the nature of the conflict under the ICC Statute.⁵⁹

⁵⁶ ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Judgment of 15 July 1999, IT-94-1-A, at paras 99 ff., in particular 115 ff.

⁵⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 21, at para. 406.

⁵⁸ Cassese, ‘The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, 18 *EJIL* (2007) 649, particularly at 657, 663, and 668.

⁵⁹ ICC, Pre-Trial Chamber 1, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 Jan. 2007, at paras 210–211.

A further example of divergent views on the same matter held by different international courts or human rights treaty bodies is provided by the question of the territorial scope of the application of human rights treaties. The European Court of Human Rights has developed its approach in this matter in a long line of case law, not without a little meandering, however. In the *Banković* case, concerning a complaint arising out of the NATO bombing of a Serbian television station in April 1999, the Strasbourg Court held that the European Convention on Human Rights did not apply to acts of member states of the Convention effected outside their territory, and stressed the 'essentially territorial notion of jurisdiction' under the European Convention.⁶⁰ The Court distinguished the case from other situations where it had extended the applicability of the European Convention to extraterritorial acts, such as in *Louizidou v. Turkey* and *Cyprus v. Turkey*. In *Loizidou*, the Court had held that the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Responsibility could also arise when as a consequence of military action – whether lawful or unlawful – a state exercises effective control over an area outside its national territory.⁶¹ In *Cyprus v. Turkey*, the ECtHR had found that, '[h]aving effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support'.⁶² Extraterritorial acts would thus only exceptionally qualify as an exercise of 'jurisdiction' within the meaning of Article 1 of the Convention, said the Strasbourg Court in *Bankovic*, if the state, 'through effective control of the relevant territory and its inhabitants ... as a consequence of military occupation ... exercises all or some of the public powers normally to be exercised by that Government'.⁶³ More recently, in *Ilaşcu v. Moldova and Russia*, and again in *Issa v. Turkey*, the Court has confirmed this jurisprudence.⁶⁴

The ICJ followed a somewhat more liberal approach in its *Wall* Opinion of 2004 with regard to the extraterritorial application of both UN human rights Covenants as well as the Convention on the Rights of the Child. The Court did so in a considerably less nuanced way, however. It stated simply that, 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.'⁶⁵

⁶⁰ ECtHR, *Banković v. Belgium*, App. no. 52207/99, Decision of 12 Dec. 2001, Admissibility, ECHR 2201-XII, at para. 61.

⁶¹ ECtHR, *Loizidou v. Turkey*, App. no. 15318/89, Judgment of 18 Dec. 1996, at para. 52.

⁶² ECtHR, *Cyprus v. Turkey*, App. no. 25781/94, Judgment of 10 May 2001, at para. 77.

⁶³ *Bankovic*, *supra* note 61, at para. 71.

⁶⁴ ECtHR, *Ilaşcu v. Moldova and Russia*, App. no. 48787/99, Judgment of 8 July 2004, at para. 316; *Issa v. Turkey*, App. no. 31821/96, Judgment of 16 Nov. 2004, at paras 68–71.

⁶⁵ ICJ, *supra* note 33, at para. 109. In its Order on Provisional Measures of 15 Oct. 2008 in the *Georgia v. Russia* case (*infra* note 87), the Court took the same view with regard to the territorial reach of CERD: see *ibid.*, at para. 109.

In an equally broad manner, the UN Human Rights Committee, in its General Comment No. 31 [80] of the same year on the territorial scope of the International Covenant on Civil and Political Rights, expressed the view that ‘a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.⁶⁶

While you will probably agree with me that the Strasbourg, Hague, and Geneva views on the extraterritorial applicability of human rights treaties differ in rather subtle ways only, my next example is more robust. It concerns the characterization of Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations by the Inter-American Court of Human Rights on the one hand and the ICJ on the other. While the Inter-American Court, in an advisory opinion delivered in 1999, had held that a detained foreigner’s right to have his consular post notified was ‘part of the body of international human rights law’,⁶⁷ the ICJ in the *LaGrand* judgment of 2001 saw no necessity to enter into this controversial question and contented itself with holding that Article 36 amounted to an individual right, without pronouncing on its human rights character *vel non*.⁶⁸ A few years later, in the *Avena* case, Mexico unfortunately raised this issue again and squarely confronted the Court with a submission to that effect – which led a somewhat irritated Court finally to state that the characterization of the individual Article 36 right as a human right found support neither in the text nor in the *travaux préparatoires* to the Consular Convention.⁶⁹ This finding was not necessary for the disposition of the case; it has rightly been criticized as an unfortunate instance of deliberate divergence of jurisprudence⁷⁰ as well as an unnecessary obstacle to the development of a new human right.

(ii) (*Much More Numerous*) *Cases of Convergence*. Let me now show you the other side of the coin and speak about convergence of international jurisprudence.

In a major study on our topic published in 1999, Jonathan Charney concluded that ‘the different international tribunals of the late twentieth century do share a coherent understanding of [international] law’.⁷¹ A more recent analysis (published in 2002) came to the conclusion that ‘by a margin of 173 to 11, tribunals are much more likely to refer to one another in a positive or neutral way than to distinguish or overrule’.⁷²

⁶⁶ HRC, General Comment no. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 Mar. 2004, CCPR/C/21/Rev.1/Add. 13, at para.10.

⁶⁷ IACtHR, *supra* note 47, at para. 141.

⁶⁸ ICJ, *LaGrand (Germany v. United States)*, Judgment, [2001] ICJ Rep 466, at paras 77–78.

⁶⁹ ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, [2004] ICJ Rep 12, at para. 30.

⁷⁰ Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’, 55 *ICLQ* (2006) 791, at 796.

⁷¹ Charney, ‘Is International Law Threatened by Multiple International Tribunals?’, 271 *Recueil des Cours* (1998) 101, at 161.

⁷² Miller, ‘An International Jurisprudence? The Operation of “Precedent” Across International Tribunals’, 15 *Leiden J Int’lL* (2002) 483, at 495.

Rather than damaging the unity of international law, frequent cross-referencing between international courts has thus contributed to its strengthening and greater coherence. By way of example of this tendency, I will concentrate on reference made by specialized courts and tribunals to ICJ jurisprudence.

Thus, the WTO Appellate Body has often referred to decisions of the ICJ (and other international courts), mostly with respect to the rules on treaty interpretation,⁷³ but also with regard to procedural issues such as the allocation of the burden of proof.⁷⁴

The European Court of Human Rights has also looked to the case law of the ICJ in interpreting its own procedural law. For instance, the ICJ's judgment in *LaGrand* to the effect that the Court's provisional measures were binding upon the parties was referred to in the *Mamatkulov* case decided by the Strasbourg Court, which confirmed that its interim measures were equally binding.⁷⁵ More recently in the *Stoll* case, the European Court of Human Rights has approvingly referred to ICJ case law on the interpretation of multilingual treaties, and in the *Blečić* case on the question of temporal jurisdiction.⁷⁶

The Inter-American Court of Human Rights has relied on holdings of the ICJ in numerous instances as well. Most importantly, it has looked to the Hague Court and its predecessor, the Permanent Court of International Justice, with regard to questions of reparation⁷⁷ or the standard of proof.⁷⁸

The International Tribunal on the Law of the Sea has made reference to the jurisprudence of the ICJ in the *M/V 'Saiga'*, the '*Grand Prince*', and, more recently, the *Straits of Johor* and the '*Hoshinmaru*' cases,⁷⁹ on issues as varied as the existence of a state of necessity, the power and duty of an international court to examine its jurisdiction *proprio motu*, and the question whether international law required the exhaustion of diplomatic negotiations between states before they could turn to an international court.

Among the tribunals vested with international criminal jurisdiction, the ICTY has made such ample use of ICJ jurisprudence that the divergence in the *Tadić* judgment

⁷³ See, e.g., WTO, Appellate Body, *US Standards for Reformulated Gasoline*, WT/DS2/AB/R, 29 Apr. 1996, at 17; WTO, Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DSS/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, 4 Oct. 1996, at 12; WTO, Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 Dec. 1999, at para 81.

⁷⁴ WTO, Appellate Body, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 Apr. 1997, at 14.

⁷⁵ ECtHR, *Mamatkulov and Abdurasulović v. Turkey*, Grand Chamber, App. nos 46827/99 and 46951/99, Judgment of 4 Feb. 2005, at paras 116–117.

⁷⁶ ECtHR, *Stoll v. Switzerland*, App. no. 69698/01, Judgment of 10 Dec. 2007, at para. 59; *Blečić v. Croatia*, App. no. 59532/00, Judgment of 8 Mar. 2006, at para. 47.

⁷⁷ IACtHR, '*White Van*' (*Paniagua-Morales et al.*), Judgment of 25 May 2001, Series C, No. 76, at para. 75 (n. 19).

⁷⁸ IACtHR, *Vélasquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 4, at para. 127.

⁷⁹ ITLOS, *The M/V 'Saiga' (No. 2)*, Judgment of 1 July 1999, at para. 133; *The 'Grand Prince'*, Judgment of 20 Apr. 2001, at para. 78; *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 Oct. 2003, at para. 52; *Hoshinmaru*, Judgment of 6 Aug. 2007, at paras 86–87.

has to be seen in perspective. For some more recent instances of favourable references let me mention the Trial Chamber Judgments in the *Boškoski*⁸⁰ and *Strugar*⁸¹ cases, where the Yugoslavia Tribunal turned to the ICJ's jurisprudence for the interpretation of Security Council resolutions and the customary law status of the Hague Regulations. As for the International Criminal Court, its Pre-Trial Chamber in the *Lubanga* case (already mentioned in another context) has favourably quoted the ICJ on the legal issue of when a territory is considered to be occupied under customary international law. It also took into account the factual findings of the ICJ with regard to the Ugandan involvement in the DRC in the *Armed Activities on the Territory of the Congo* case, and used it to qualify the conflict as international rather than internal in character, which had been the submission of the ICC Prosecutor.⁸² Concerning the ICC Appeals Chamber, it seems to have made only cursory reference to ICJ decisions so far.

Arbitral Tribunals in inter-state cases have relied on ICJ jurisprudence as a matter of routine.⁸³ ICSID tribunals regularly quote decisions of the ICJ and its predecessor, in particular in relation to treaty interpretation or procedural questions, such as those related to jurisdiction and evidence, but also with regard to the protection of shareholders (*Barcelona Traction*), the assessment of damages, and other matters.

Interestingly, the jurisprudence of the ICJ, on its part, displays very little reciprocity, so to speak. The Court has until recently carefully refrained from referring to the case law of other existing international courts (while having no problems with citing old arbitral decisions and the like). (Un)fortunately this is not the place to speculate about the reasons for such abstinence. The Court's attitude changed fundamentally in the *Genocide* case, in which the ICJ followed the jurisprudence of the ICTY on various fundamental issues as a matter of practical necessity. We will have to wait and see whether this new openness will spill over into other areas.

3 Parallel Proceedings

(i) *The Challenge*. Let me continue with some observations on the phenomenon of parallel proceedings, understood as the initiation of litigation in different international courts on what is essentially the same substantive dispute. The most prominent example to date is the *Swordfish* case.⁸⁴ Chile had closed its ports to Spanish ships which – as Chile contended – had overfished swordfish in the High Seas adjacent to Chile's EEZ. While the EU regarded the case as predominantly trade-related and

⁸⁰ ICTY, Trial Chamber II, *Prosecutor v. Boškoski*, Case N. IT- 04-82-T, Judgment of 10 July 2008, at para. 192 (n. 779).

⁸¹ ICTY, Trial Chamber II, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment of 31 Jan. 2005, at para. 227 (n. 775).

⁸² ICC, *supra* note 60, at paras 212, 214–217, 220.

⁸³ See, e.g., *Belgium v. The Netherlands, Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway*, Award of 24 May 2005, at paras 45 and 59, available at the PCA's website..

⁸⁴ ITLOS, Case No. 7 (20 Dec. 2007), *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*. On the developments referred to above see the Hamburg Tribunal's Press Releases on the case.

consequently initiated a case in the WTO. Chile saw it as relating to the law of the sea, bringing proceedings before ITLOS in Hamburg. While the case has been suspended before both institutions pending an amicable settlement, it demonstrates that multiple proceedings before several international courts and tribunals are a real possibility.

A somewhat different situation occurred in the *MOX Plant* case, where the EU Commission initiated proceedings against Ireland in the European Court of Justice for breach of EU law committed through bringing a case against the United Kingdom under the Law of the Sea Convention. Here, it was not only the parties which initiated parallel proceedings (before ITLOS, an arbitral tribunal under the OSPAR Convention as well as an arbitral tribunal under UNCLOS⁸⁵), but also the organ of a regional organization which tried effectively to prevent the states involved from having their dispute settled by an independent arbitral tribunal outside the EU legal system.

The most recent examples of parallel proceedings are probably the cases brought by Georgia against Russia in relation to the war in the Caucasus last summer. Georgia initiated proceedings before both the ICJ and the European Court of Human Rights. The President of the ICJ issued an Urgent Communication to the parties (pursuant to Article 74(4) of the ICJ Rules of Court),⁸⁶ while her Strasbourg counterpart indicated provisional measures (under Rule 39 of the Strasbourg Rules of Court).⁸⁷ As a state party to the ICC Statute, Georgia also could have made a state referral to the ICC under Articles 13(a) and 14 of its Statute.

(ii) *Possible Remedies*. There are several rules which might help to solve the dilemma of parallel proceedings on the same dispute. The principle of *lis alibi pendens* requires a court to abstain from exercising jurisdiction where the same parties have already instituted proceedings before another court on the same subject-matter. It has been argued that this principle forms part of international procedural law as a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.⁸⁸ And of course the principle of *res judicata* is relevant here, too.

Another concept which has recently been resorted to in the case of parallel proceedings is the principle of comity, that is, of respect for the competence of other tribunals. In the *MOX Plant* case, the Hague arbitral tribunal suspended its proceedings in order to wait for the decision of the ECJ, invoking 'considerations of mutual respect

⁸⁵ See ITLOS, *MOX Plant Case (Ireland v. United Kingdom)*, Request for Provisional Measures Order of 3 Dec. 2001; Arbitral Tribunal, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom and Northern Ireland)*, Final Award of 2 July 2003; ECJ, Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635.

⁸⁶ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Urgent Communication, 15 Aug. 2008. On 15 Oct. 2008, the ICJ issued an Order on Provisional Measures directed at both parties to the conflict.

⁸⁷ ECtHR, Press Release 2008/581 of 12 Aug. 2008.

⁸⁸ Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to avoid Conflicting Dispute Settlement Outcomes', 3 *Law & Practice of Int'l Courts and Tribunals* (2004) 37, at 48.

and comity which should prevail between judicial institutions'.⁸⁹ An example to the contrary would be the stance taken by the Inter-American Court of Human Rights in its advisory opinion on the *Right to Information on Consular Assistance*. Here, the Court refused to suspend proceedings with a view to a (albeit contentious) case on similar legal questions before the ICJ (*Breard*), insisting on its status as an 'autonomous judicial institution'.⁹⁰ These two opposing approaches show that the principle of comity can hardly claim to be firmly rooted in international procedural law, even though considerations of the good administration of international justice speak in its favour.

Other possibilities for preventing parallel proceedings before international courts are conflict clauses in international treaties (e.g. Article 292 of the EC Treaty, Article 23 of the WTO Dispute Settlement Understanding, Article 55 of the European Convention on Human Rights, and Article 282 UNCLOS). However, a survey of different provisions contained in jurisdictional instruments and treaties reveals a rather disorganized picture. Equally, a look at the practice of international courts and tribunals shows that the instruments described for the prevention of parallel proceedings are hardly coordinated or effective.

Before I leave this point let me mention the approach taken by the Arbitral Tribunal in the *Iron Rhine* case between Belgium and the Netherlands, in which the Tribunal saved its turf in matters of EC law *vis-à-vis* the European Court of Justice and MOX-type problems by resorting to an analogy with the position of domestic courts in a preliminary ruling procedure in accordance with Article 234 of the EC Treaty. The Tribunal proceeded to put itself in the shoes of a domestic court, as it were, and in so doing arrived at the conclusion that the questions of EC law arising in connection with the track of the Iron Rhine were not to be referred to Luxembourg because they were not relevant (*entscheidungsrelevant*) for the decision of the case,⁹¹ and then went on to decide the case itself.

3 *The Challenge Posed to International Courts and Tribunals*

(i) *A Particular Task for the ICJ?* Does the ICJ have a particular responsibility, and particular competence, to ease undesirable consequences of the birth of so many brothers and sisters, as it were?

The question of a role for the ICJ as a 'guarantor of the unity of international law' (to be distinguished from that of a 'guardian of the *ancien regime*' in international law⁹²) has different aspects. In favour of such a function, it could be said, first, that the ICJ is the only court with general jurisdiction, and the principal judicial organ of the UN

⁸⁹ Arbitral Tribunal Constituted Pursuant to Art. 287, and Art. 1 of Annex VII, of UNCLOS for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, *The MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3 (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, at para. 28, available at the PCA website.

⁹⁰ IACtHR, *supra* note 47, at paras 61–65.

⁹¹ *Supra* note 84, at paras 97–137.

⁹² Von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harvard J Int'l L* (2006–2007) 223, at 226.

(Article 92 UN Charter). Moreover, the Hague Court constitutes a universal interpretative community in the sense that all principal legal systems are represented on its bench. Article 9 of the ICJ Statute specifically mandates the General Assembly to take into account 'that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured' when electing Judges of the Court.

Turning from institutional rules to their practical application, it has been suggested that in the discourse among international courts the voice of the ICJ ought to receive particular attention. As a matter of course, findings by the Court on questions of general international law will as such counteract tendencies of fragmentation arising from the increase in the number of judicial 'speakers'. The less 'transactional' the ICJ's jurisprudence will be,⁹³ the more it will be able to unify and homogenize the law.

On the other hand, as I have mentioned earlier, ICJ jurisprudence on its part has hardly ever openly referred to other international courts and tribunals, the Court's reliance on the work of the ICTY in the 2007 *Genocide* judgment being the recent exception. One can surely regard this recent example as an instance of judicial dialogue, even though it took the ICJ quite a few years to reply to the challenge posed from about one mile away. What the *Genocide* judgment also illustrates is that international courts are entitled to respect for their interpretation of those areas of international law over which they have been given jurisdiction. In this sense, the ICJ stressed that the ICTY did not have jurisdiction *ratione materiae* over questions of state responsibility, and thus in the *Tadić* case did not have to decide the question of the proper test of control. On the other hand, the ICJ expressly stated that it attached utmost importance to legal findings made by the ICTY in ruling on the criminal liability of the accused, since this was the Tribunal's proper area of jurisdiction.⁹⁴ What I take from this is that judicial comity for the specialized jurisdictional regimes of other international courts could possibly be considered an emerging general principle of international procedural law.

The possibility of divergence of views between international courts exists not only with regard to the law, but also with regard to the factual assessment of a situation. Until now, this aspect has not played a major role, probably because many of the 'older' international cases have been decided on more or less undisputed factual bases. However, one recent example of two international courts looking at essentially the same set of facts is, again, the *Genocide* case. There, the ICJ referred to the ICTY not only with respect to findings of law, but also concerning findings of fact. Out of sheer necessity, it relied heavily on those findings, carefully distinguishing, however, between different forms of documents and decisions produced by the Tribunal (such as indictments, on the one hand, and judgments, on the other). The case is thus an example of how two international courts can avoid divergence in the determination of facts, while it is clear that the principle of *res judicata* does not apply here.

⁹³ Cf. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *NYU J Int'l L and Politics* (1998–1999) 919, at 929–930.

⁹⁴ ICJ, *supra* note 58, at para. 403.

(ii) *The task of other international courts.* Let me turn to the role of other international courts. As a rule, these courts, while being aware of their specialized character and their specific mandate to interpret the instruments under which they were set up, have recognized that the special rules which they have the jurisdiction to apply and interpret are not detached from general international law. Thus, for instance, the WTO Appellate Body has, already early in its history, accepted that WTO law ‘should not be read in clinical isolation from public international law’.⁹⁵ Likewise, the European Court of Human Rights has held that ‘the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law... although it must remain mindful of the Convention’s special character as a human rights treaty.’⁹⁶

The perceived risk of divergent interpretations of international law and ‘forum shopping’ by states made possible by the remarkable increase in the number of international judicial bodies has led to a discussion on the need for some kind of hierarchical structure among international courts. It has been suggested, for instance, that it should be possible (or even mandatory) for other (specialized) international courts to refer questions of general international law to the ICJ for some kind of preliminary ruling.⁹⁷ Some commentators have gone as far as suggesting that the ICJ should be turned into a constitutional court of the world community, or given appellate jurisdiction.⁹⁸ However, apart from the question whether sufficient know-how and resources would be available at the Hague Court to tackle the highly complicated technical issues on the agenda of many of the specialized international courts and tribunals – and some psychological difficulties for the alpha personalities involved, a direct reference by a specialized international tribunal to the Hague Court would require both an amendment to the ICJ Statute and an enabling provision in the treaty establishing the specialized court.

Frankly speaking, another question which could – and should – legitimately be asked in this context would be whether it would necessarily always be a good idea for other international courts to look for guidance from, and defer to, the ICJ in all circumstances. The Court’s jurisprudence is sometimes infuriatingly ‘transactional’, and its reasoning sometimes more than sparse. Further, we have already come across instances where other, regional, international courts have taken desirable innovative steps and introduced more adequate solutions in ways which are far ahead of those of the ICJ. Let me remind you of the way in which the Court has for decades beaten around the bush concerning *jus cogens*, or its recent unnecessary negation of the character of the right to consular information as a human right. The Court has been rather timid when faced with the challenge of setting judicial limits to the powers of the UN

⁹⁵ WTO, *United States – Standards of Reformulated Gasoline*, *supra* note 74, at 16.

⁹⁶ ECtHR, *Banković v. Belgium*, *supra* note 61, at para. 57.

⁹⁷ Guillaume, ‘The Future of International Judicial Institutions’, 44 *ICLQ* (1995) 848.

⁹⁸ Charney, *supra* note 72, at 130–131.

Security Council.⁹⁹ And if one compares the treatment of the issue of reparation in the 2007 *Genocide* judgment with certain decisions of the Inter-American Court of Human Rights on the matter of reparation of violations of human rights obligations, or with the 2003 Decision of the Human Rights Chamber for Bosnia and Herzegovina in the *Selimović (Srebrenica)* cases,¹⁰⁰ one could not be blamed for indeed regarding the Hague Court as a stubborn defender of certain ‘*ancien régimes*’ in international law.

Returning to the issue of coordination and cooperation between international courts, such courts have explored other, less formal, cooperative mechanisms on their own initiative. For instance, more recently, meetings of judges of international courts also at the universal level have been organized upon the initiative of the ICJ, and are on their way to being institutionalized. Such meetings are certainly useful for the development of a common understanding of legal questions and for the fostering of mutual professional respect. But of course they cannot be a substitute for a sound conceptualization of overlapping and conflicting jurisdictions. It is also true that such meetings lack transparency.

In conclusion of my remarks on the issues of fragmentation and proliferation: even critics of the idea of a coherent international legal system now seem to have conceded that international law can, and indeed does, form a system. For instance, Martti Koskenniemi recently agreed that ‘[h]ere is a battle European jurisprudence seems to have won. Law is a whole – or in the words of the first conclusion made by the ILC Study Group, “International law is a legal system”’.¹⁰¹

As to fragmentation, it seems to me that many of the concerns about this phenomenon have been overstated. No ‘special regime’ has ever been conceived as independent of general law.¹⁰² And no master plan of *divide et impera* lies behind this development. Rather than being couched in terms of the ‘dangers’ of fragmentation, the phenomenon ought to be assessed in a much more positive way: the significance of international law has grown; it regulates more and more fields which before were left solely to foreign policy or domestic jurisdiction, like the protection of the individual, environmental concerns, or international trade. International law is dynamic, and globalization calls for global legal solutions.

As for the ‘proliferation’ of international courts and tribunals, I would submit that the debate on fragmentation has made international judges even more aware of the responsibility they bear for a coherent construction of international law. Nevertheless,

⁹⁹ In the Provisional Measures phase of the *Lockerbie* cases: e.g., ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Yamahiriya v. United States of America)*, Order, 14 Apr. 1992, at paras 42–44.

¹⁰⁰ Human Rights Chamber for Bosnia and Herzegovina, *Ferida Selimovic & Others v. Republika Srpska*, Case No. CH/01/8365, Judgment of 7 Mar. 2003.

¹⁰¹ Koskenniemi, *supra* note 14, at 17.

¹⁰² *Ibid.*, at 16.

the great increase in the number and subject areas of international courts has led to certain problems. The possibility of divergence between the jurisprudence of international courts does exist. Ultimately, from a very practical viewpoint, because of the ‘structural bias’ of specialized fields of international law and of the corresponding international institutions and courts, the real issue about fragmentation may be which court may be resorted to in order to decide a particular dispute. This choice will in many cases pre-judge the outcome, given that a dispute may be conceived under different paradigms, for instance, as either a trade or an environmental dispute.¹⁰³ Any international institution will necessarily be biased in its analysis of the dispute, depending on the specialized area which it has been designed to service. I thus agree with Martti Koskenniemi that, looked at from this angle, the phenomenon of fragmentation of international law, or proliferation of international courts and tribunals, essentially appears as the struggle of different international institutions, mainly international courts, for what he has called ‘institutional hegemony’.¹⁰⁴

But, as I said, this struggle has hitherto been one among friends. It is being led with a sense of responsibility by all concerned. It has not stood in the way of mutual respect, coordination, and cooperation where necessary.

C Related Responsibilities of National Courts: Two Brief Observations

Let me add to my treatment of relations between international courts and tribunals a few observations on the relationship between international and national courts and the responsibility arising for the latter in the context of our topic. As I have already mentioned at the outset, the jurisprudence of domestic courts on questions of international law is gaining more and more relevance for the development of the law. But together with this, there also arises an increasing responsibility on the part of these courts to maintain the law’s coherence and integrity. It would be tempting to pursue this topic in more depth – today I can only touch upon it in passing and limit myself to two remarks which lead back to the issue of the relations between courts at the international and the national level.

First, it is quite obvious that in these relations mutual respect is as important as it is between different courts at the international level. As for the position taken by national courts towards the jurisprudence of their international counterparts, we come across remarkable varieties indeed. Just compare the professional respect with which the Israeli High Court of Justice has dealt with the *Wall* Opinion of the Hague Court on the legal questions of necessity and proportionality relating to the course of the wall (while disagreeing on the factual assessment by the ICJ)¹⁰⁵ with the way in which US courts, including the Supreme Court, disposed of the domestic repercussions of the

¹⁰³ *Ibid.*, at 5 ff.

¹⁰⁴ *Ibid.*, at 8 and Koskenniemi, *supra* note 14, at 205–206.

¹⁰⁵ Above all, HCJ 7957/04, *Mara'abe and others v. The Prime Minister of Israel and others*, Judgment of 15 Sept. 2005, not yet reported, particularly at paras 56 and 74.

LaGrand and *Avena* judgments concerning the individual right to consular information enshrined in the Vienna Convention on Consular Relations and the consequences of its violation spelt out by the ICJ;¹⁰⁶ and compare this again with the position taken on the same matter by the German Federal Constitutional Court.¹⁰⁷

With my second remark I refer to an article by Eyal Benvenisti in the April issue of the *American Journal*.¹⁰⁸ Benvenisti sees national courts engaging in what he calls a 'globally coordinated move' to constrain national governments caught in the 'debilitating grip of globalization' from resorting to policies (for instance in the field of counter-terrorism, environmental protection, or migration) which the judiciary considers to lead to disproportionate infringements of civil and democratic rights. According to Benvenisti, governments have begun to react to this judicial move and attempt to pre-empt their courts from reviewing such sensitive decisions by setting up, or mandating, international institutions which are – presumably – immune from national judicial review (such as the UN Security Council Counter-Terrorism Committee, or the EU apparatus in charge of legislating migration policy). Then the author touches the point which is directly relevant to us here: he views a 'potential standoff' between national and international courts. While national courts have thus far shown deference to international courts (the House of Lords in *Jones v. Ministry of Interior (Kingdom of Saudi Arabia)* for instance, saying that the claimants in that case were 'obliged to accept' the ICJ's ruling in the *Arrest Warrant* case), this may change once national courts realize that their international counterparts are more acquiescent with respect to intrusive governmental action, less assertive in restraining governments, and that international courts are somehow dependent on them, for instance, when they look at national jurisprudence to ascertain customary international law, or when international decisions need to be enforced at the domestic level.

D The Claims of 'Universalism' Facing the Reality of Recent International Decisions

Eyal Benvenisti's interesting ideas lead me directly to the third – and concluding – part of my speech. Up to now I have dealt with the topic of universality linked to the two buzzwords of 'fragmentation' and 'proliferation' viewed from a practical angle. Let me, in the third and last part of my speech, make a few observations on a challenge encountered by what I have called the third-level universality of international law,

¹⁰⁶ Simma and Hoppe, 'From *LaGrand* and *Avena* to *Medellin* – a Rocky Road Toward Implementation', 14 *Tulane J Int'l and Comparative L* (2006)7, and 'The *LaGrand* Case: A Story of Many Miscommunications', in J.E. Noyes et al. (eds), *International Law Stories* (2007), at 371. The developments described and evaluated in these two papers were then topped, as it were, by the decision of the Supreme Court of 25 Mar. 2008 in *Medellin v. Texas*, 128 S Ct 1346 (2008).

¹⁰⁷ Hoppe, 'Implementation of *LaGrand* and *Avena* in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights', 18 *EJIL* (2007) 317.

¹⁰⁸ Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 102 *AJIL* (2008) 241.

that is, its ‘universalist’ understanding as a common legal order not only for states but for all human beings. Obviously, the idealistic traits of this conception face many problems, questions, and doubts, even about its justification outside the philosophical world of the pure ‘ought’. But quite apart from any idealism, the application of international law in a multi-level system of international governance with manifold consequences for the individual is already a fact of life. This phenomenon has led to the creation of legal responsibilities for individuals and their being targeted directly by international acts or decisions. These acts or decisions may emanate from precisely the international regulatory mechanisms that Benvenisti has in mind when he speaks of the attempts of governments to pre-empt their courts from scrutinizing human rights-sensitive policy moves.¹⁰⁹ This gets us to the question of international remedies: Individuals seeking judicial review of such decisions enacted against them turn to international or supranational courts with increasing frequency. Let us have a brief look at where they can go, and how far they can get.

First *Yusuf* and *Kadi* before the European Community courts. In these cases, the Court of First Instance of the EC had decided on an action for annulment of EU legislative acts implementing the UN Security Council regime for the suppression of international terrorism. The CFI declined to review these acts on the basis of EU law.¹¹⁰ Its main reason for doing so was that the EC was bound by the obligations under the UN Charter in the same way as its Member States¹¹¹ and that, in accordance with Article 103 of the Charter, decisions of the Security Council take precedence over any other obligations. Neither did the CFI see itself as in a position to review the lawfulness of the Security Council resolutions indirectly¹¹², given that the Community did not have any discretion in implementing them by EC regulations. What the CFI did, however, was to test the Security Council Resolutions in question against international *jus cogens*.¹¹³ The CFI did not find a conflict in this regard. The approach thus described was remarkable – and markedly universalist, to say the least, given that a judicial organ of one entity (the EC/EU) undertook to review acts of an organ of another entity (the UN) against the standards to which that second entity is subjected (*jus cogens*, i.e., international law).

The judgment of the CFI in the *Kadi* and *Al Barakaat* cases was appealed. In his identical Opinions on these cases of 16 January 2008, Advocate General Poiares Maduro recommended that the European Court of Justice take a different stand from the CFI, assert jurisdiction, review the EC Regulation in question against higher EC law, and consequently annul the Regulation. The Advocate General stressed that the Community legal order was autonomous, the EC Treaty having created ‘a municipal legal order of trans-national dimensions, of which it forms the ‘basic constitutional char-

¹⁰⁹ Benvenisti, *supra* note 109.

¹¹⁰ Case T–306/01, *Yusuf v. Council* [2005] ECR II–3533; Case T–315/01, *Kadi v. Council* [2005] ECR II–3649.

¹¹¹ *Yusuf* and *Kadi*, *ibid.*, at paras 243 ff.

¹¹² *Yusuf* and *Kadi*, *ibid.*, at para. 266.

¹¹³ *Yusuf* and *Kadi*, *ibid.*, at para. 277.

ter'.¹¹⁴ However, according to the Advocate General, the relationship between the Community legal order and international law was not a completely detached one: 'the Community's municipal legal order and the international legal order [do not] pass by each other like ships in the night'.¹¹⁵ While there was a presumption that the Community intended to honour its international legal commitments, it was the task of the 'Community Courts [to] determine the effect of international obligations within the Community legal order by reference to conditions set by Community law'.¹¹⁶ The case law of the European Courts showed that, while respecting the international legal obligations of the Community, the Community's Court of Justice, as a priority, had to preserve the constitutional framework established by the EC/EU Treaty. 'The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community'.¹¹⁷ A limit on permissible judicial review by the Community Courts could be derived neither from Article 307 of the EC Treaty nor from a 'political questions doctrine' à l'Américaine. 'On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process',¹¹⁸ and thus the higher the urgency to provide these persons with a judicial remedy.

Given the unavailability of state-of-the-art judicial review against the listing of the claimants in the case at the UN level, and the questionable legitimacy of the process of listing altogether, Advocate General Maduro certainly had a point. What he consequently proposed was that the Luxembourg Court assume the role of protector of individual rights that Professor Benvenuti diagnoses at the level of domestic courts.

Yesterday, the European Court of Justice delivered its Judgment in the *Kadi* and *Al Barakaat* cases.¹¹⁹ The Court appears to have followed *grosso modo* the Opinion of the Advocate General, even though it did not annul the contested regulation, and the jury still seems to be out on the question of just how determined the Judgment was designed to be with regard to Mr. Kadi's human rights concerns.¹²⁰

The Judgment of the CFI was worrisome insofar as its approach would have rendered the actions of the Security Council immune to judicial review on any level, subject only to the rather indeterminate standard of *jus cogens* (which might in this context shrink from a car in the garage to a figleaf). Such deference was problematic,

¹¹⁴ *Yusuf and Kadi, ibid.*, at para. 21.

¹¹⁵ *Yusuf and Kadi, ibid.*, at para. 22.

¹¹⁶ *Ibid.*

¹¹⁷ *Yusuf and Kadi, ibid.*, at para. 24.

¹¹⁸ *Yusuf and Kadi, ibid.*, at para. 35.

¹¹⁹ Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment of 3 Sept. 2008, not yet reported.

¹²⁰ In conformity with the policy that I set out at the beginning, I will not comment on *Kadi* beyond the few remarks that I made in my speech of 4 September, neither do I claim already to have a firm opinion on the Judgment. What I have begun to realize, however, is that *Kadi* is probably neither the ultimate step by which Community law emancipates itself from public international law nor a principled high stand on the protection of individuals against Kafkaesque diplomatic bureaucracies.

given that no efficient judicial remedy exists at the level of the UN law and institutions administering the regime of smart anti-terrorism sanctions. From the angle of the universality of international law, what was also problematic about the CFI's approach was that here for the first time a regional international court declared itself competent directly to review Security Council resolutions passed under Chapter VII of the UN Charter, a power from which even the ICJ has hitherto shied away – remember its caution, if not deference, in the *Lockerbie* cases. Hence the danger that the universal application of international law might be hindered by a court which does not even belong to the institutional set-up of that (universal) international organization.

The ECJ's Judgment of yesterday declared that the CFI had no competence at all to engage in a review of this kind. The Judgment of 3 September carefully abstains from reaching into the UN system in the way that the CFI did; rather, it adopts the opposite approach and stops – albeit halfheartedly¹²¹ – the impact of this system at the EU's legal borders, as it were, insofar as the UN system does not provide adequate protection of individual rights.¹²²

From a strictly universalist viewpoint, neither the CFI solution, nor the Maduro approach, nor the solution ultimately adopted by the ECJ appears satisfactory. Such decentralized, either direct (CFI) or indirect (ECJ), judicial review of acts of the Security Council will always involve the risk of divergent assessments by different courts and, thus, fragmentation.

However, I am not only a proponent of universality but also a moderate '*droit-de-l'homme*' in Alain Pellet's classification. To repeat: for the individuals affected, no effective judicial review is being offered at the UN level. How should this dilemma be solved? It seems that here we really are between a rock and a hard place: As international institutional lawyers and defenders of universal, i.e., UN law, we would have to argue that the European Courts, just like national courts, overstep their jurisdiction if they review acts of the Security Council. On the other hand, as human rights lawyers, we will have to advocate the upholding of human rights review also under circumstances such as those encountered in the fight against international terrorism. If, under such conditions, universal institutions like the UN cannot maintain a system of adequate protection of human rights,¹²³ considerations of human rights deserve to trump arguments of universality. The only question is whether this effectively happened in the ECJ Judgment of 3 September 2008. The decisions in *Yusuf* and *Kadi* thus also exemplify the difficulties faced by judicial review within a multi-level system of

¹²¹ See the preceding and the following notes.

¹²² Just how sincere the Court's Judgment actually is with regard to the purported aim of protecting Mr. Kadi's rights, is another matter and not for me to take up here. In light of the follow-up to the case I cannot avoid the impression that, maybe, once the dust has settled, the decision will share the reputation of quite a few ECJ leading cases of being grandiose on principles without being of much help to the individual claimant.

¹²³ In my view, this was demonstrated with unfortunate precision by the Decision of the Human Rights Committee of 22 Oct. 2008 on the individual communication by *Nabil Sayadii and Patricia Vinck*, Communication No. 1472/2006, CCPR/C/94/D/1472/2006.

international governance: In the end, it is the individuals addressed by international measures who may get caught up in its wheels.

The next two cases I have in mind are *Behrami* and *Saramati*, decided by the European Court of Human Rights (ECtHR). The applicants had sought relief against both actions and omissions by states contributing to UNMIK or KFOR in Kosovo. *Behrami* concerned a claim for compensation for the failure of troops of the French KFOR contingent to mark or defuse undetonated bombs or mines known to be present on a specific site. Two children had played on the site; one was seriously injured by the explosives, the other died. In *Saramati*, the applicant demanded compensation for extra-judicial detention. The ECtHR declined jurisdiction in both cases since the acts of both KFOR and UNMIK were not attributable to individual UN member states, but rather to the UN as an 'organisation of universal jurisdiction fulfilling its imperative collective security mandate'.¹²⁴ The Court concluded that reviewing acts or omissions of states parties to the European Convention on Human Rights which, however, had been acting on behalf of the UN would 'interfere with the fulfilment of the UN's key mission in this field including ... with the effective conduct of its operations'.¹²⁵ The Strasbourg Court has since reiterated this reasoning in the cases of *Kasumaj v. Greece*¹²⁶ and *Gajić v. Germany*.¹²⁷

The ECtHR apparently did not consider it possible that the UN, NATO, and the particular state in question could be concurrently liable (multiple attribution).

Thirdly, *Berić and others v. Bosnia and Herzegovina*. Here, the Strasbourg Court likewise declined jurisdiction to review acts of the High Representative for Bosnia and Herzegovina, acting under the Dayton Peace Agreement and the so-called 'Bonn powers'. Between June and December 2004, the High Representative, Paddy Ashdown, had removed the applicants from all their public and political-party positions and indefinitely barred them from holding any such positions as well as from running for elections, for having personally contributed to obstructing the arrest and surrender of persons indicted by the ICTY in the Republika Srpska. When the Constitutional Court of Bosnia and Herzegovina ordered the domestic authorities to make sure that an effective remedy against the removal from office was available, the High Representative reacted in a manner which the Court mildly characterized as 'vigorous', but which can more aptly be compared to the behaviour of an absolute monarch. He decided that '[a]ny step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation of the civilian aspects of the [Dayton Peace Agreement] and shall be treated in itself as conduct undermining such implementation'. The High Representative decided further that 'for the avoidance

¹²⁴ ECtHR, Grand Chamber, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. nos. 71412/01 and 78166/01, Decision on Admissibility, 2 May 2007, at para. 151.

¹²⁵ *Ibid.*, at para. 149.

¹²⁶ ECtHR, App. No. 6974/05, *Kasumaj v. Greece*, Decision on Admissibility, 5 July 2007.

¹²⁷ ECtHR, *Gajić v. Germany*, App. no. 31446/02, Decision on Admissibility, 28 Aug. 2007, at para. 1.

of any doubt or ambiguity ... it is hereby specifically ordered and determined, in the exercise of the ... international mandate of the High Representative ... that no liability is capable of being incurred on the part of the Institutions of Bosnia and Herzegovina ... in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decision of the High Representative made pursuant to his or her international mandate, or at all', and that 'it is hereby specifically declared and ordered that the provisions of the Order contained herein are, as to each and every one of them, laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of Bosnia and Herzegovina or its Entities or elsewhere, and no proceedings may be brought in respect of duties in respect thereof before any court whatsoever at any time thereafter'.¹²⁸

The Strasbourg Court held that the UN Security Council had 'effective overall control' over the High Representative and that thus his acts were attributable to the UN, rather than to individual member states.¹²⁹

You will agree that the European Convention cases I have presented have the tendency, to put it mildly, to confirm Eyal Benvenisti's point about the higher degree of 'acquiescence' on the part of even specialized human rights courts towards problematic policies of their government clientèle.¹³⁰

What these cases show is that the question of judicial review of the exercise of public authority by or at the behest of international institutions is of utmost topicality. Regional international courts such as the ECtHR have demonstrated their unwillingness efficiently to control the acts of the UN Security Council or its sub-organs, operating at the universal level. Such lack of protection at the regional level is, however, not compensated for by any effective individual complaint mechanism at the UN level.¹³¹ And this brings me back to my principal challenge to third-level universality: as international law becomes more universal in the sense of directly regulating the behaviour of individuals, it is mandatory that this development be accompanied by judicial control through independent courts to which those individuals have access and which are ready to assume jurisdiction over acts of international institutions which directly encroach upon individual freedoms. If it were a regional court deciding that it was willing to provide for adequate judicial control, universality might suffer, but it would be a kind of universality which deserved to suffer.¹³²

¹²⁸ ECtHR, *Berić and Others v. Bosnia and Herzegovina*, App. no. 36357/04, Decision on Admissibility, 16 Oct. 2007, at para. 19.

¹²⁹ *Ibid.*, at paras 27–30.

¹³⁰ *Supra* note 109.

¹³¹ I am speaking of 'regional international courts' here so as to exclude the European Community's Court of Justice which in its *Kadi* Judgment has indicated its own way out of what I would call a denial of international justice. Particularly in the 'light' of the follow-up to the *Kadi* Judgment, I am not sure, however, whether the ECJ was really determined to go the whole way in this regard.

¹³² See the preceding note.

4 Conclusion

Thus far my review of the various conceptions of universality of international law, of the challenges that universality in its various appearances meets, and of the ways by which international law, especially the international judiciary, attempts to cope with them. I have exposed you to a veritable *tour de force*, also with regard to the amount of time I have been assigned to fill tonight. For this reason I will desist from treating you to a typical German academic ‘conclusion’, i.e., another 15 minutes of condensed wisdom, but only say the following: from the viewpoint of we practitioners, the universality of international law in all its variations is in relatively good shape. We may not always be aware of how thin the theoretical ice is on which we are moving, but what we keep in mind in very pragmatic ways is that we must handle the law, its reach, unity, and coherence, in a responsible way. This is a state of mind the presence, and dominance of which I have personally experienced: in Geneva at the sessions of the Committee on Economic, Social and Cultural Rights, during entire summers spent with the International Law Commission, and now in the Great Hall of Justice of the Peace Palace. The international judiciary in particular has developed a set of tools to cope with the undesirable aspects of both fragmentation and proliferation, and appears to employ it in full awareness of these challenges on a regular basis. Hence, there is among us practitioners no feeling of urgent need for a ‘constitutionalization’ of international law – finally to introduce the third great buzzword to which German international lawyers in particular seem to have to bow if they want to be ‘cool’. Personally, I could never entirely rid myself of the suspicion that the great attraction that ‘constitutionalization’ of international law seems to have for German colleagues must have something to do with the fact that most, if not all, of them also have to teach *Staatsrecht* and European Community law at their universities, compared to which public international law does indeed still look pretty dishevelled in many places. Hence the desire to imbue international law with some of the orderliness and hierarchy which constitutions create in most of our countries in most instances most of the time. In the words of Goethe, *‘Legt ihr’s nicht aus, so legt was unter.’*¹³³ Take this as the statement of the practitioner which I am supposed to impersonate. And do not get me wrong: we practitioners are not hostile towards any of the features or developments on which the protagonists of ‘constitutionalization’ rest their case. We are as happy about the ‘widening and thickening’ of international law, to use Rosalyn Higgins’ words,¹³⁴ without, however, seeing the necessity of couching our happiness in misleading terms or forcing it into some Procrustean bed.

¹³³ *Zahme Xenien*.

¹³⁴ Higgins, ‘Keynote Address’, 100 *ASIL Proceedings* (2006) 388, at 389.