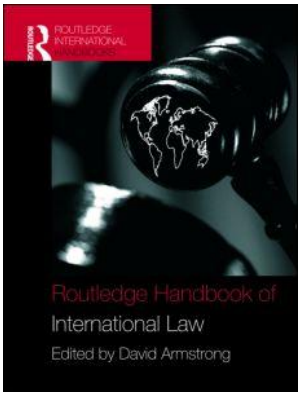

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Looking Ahead

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Looking ahead: international law's main challenges

Andrea Bianchi

This concluding chapter identifies several major challenges – or opportunities – faced by international law in the near future. These are the fight for inclusion as subjects with international legal personality by non-state actors, the need for suitable processes of lawmaking, the shifting boundaries of normativity, and associated questions about whether interstitial norms or soft law fully qualify as legal norms, the continuing problems raised by the absence in international law of the same kinds of enforcement mechanisms as may be found in domestic law, developments in the area of accountability mechanisms, including those applying to individuals and transnational corporations, whether the increasing complexity, specialization, and judicial fragmentation of international law place the system under strain or may be seen as a sign of maturity, and, finally, the similar questions raised by the fragmentation of theoretical discourse in international law.

Introduction

Short of a crystal ball, officially approved by Hogwarts,[1] nobody is really in a position to credibly predict the future of international law. Speculations are all the more risky at a time of increasing perplexity about the utility of the discipline for the understanding of international relations (Goldsmith and Posner 2005). In contrast, other members of the same profession have recently celebrated the entry of international law into its "post-ontological era" (Franck 1995: 6). Such shifting perceptions should not divert attention from the significant changes undergone by international law of late. It would be simplistic, and even erroneous, to presuppose that such changes are primarily due to the contingencies of international politics.

In fact, it is rather the structure and the changing demands of the societal body that have dramatically affected our understanding of international law and how it functions. The very idea of the international community has changed. The transformation of the international community "in potency" into the international community "in actuality" (de Visscher 1970: 123), could well be an accurate representation of the many achievements of international law in the 1990s: the decade of the materialization of international criminal justice and the world trading system, among other things. The proliferation of actors on the scene is also worth noting, together with the difficulty of accommodating them into a still predominantly state-centered system.

If to predict what lies ahead for international law pertains to the art of clairvoyance,

to highlight its main future challenges appears a more feasible, if less reassuring task. The problem with challenges is that one does not know in advance whether they will be met and, if so, how. And yet, to investigate such challenges and societal changes is also a way of directing the development of international law. If law and its underlying societal structure are closely intertwined, the way in which we think of the law, and what the law is, are indissolubly linked as the law has no tangible existence, distinct from our way of conceiving of it. This is why by highlighting the challenges awaiting international law, one inevitably unveils his own view of what international law is as well as his sense (or wish) of where international law is heading.

The fight for inclusion: non-state actors' claims

The traditional positivistic approach to international law provided a neat theory of the subjects of international law, whereby a limited number of entities, primarily states, would be the bearers of international rights and responsibilities. The concept of international legal personality was used to describe those entities that "the legal system has cast to appear on the stage of the law" (Cheng 1991: 24). As the etymology of the words suggests, only those *personae* that played a direct role in the legal system could appear on stage, regardless of the other entities which might participate in the production of the play. The latter would be of interest to sociologists and political scientists but were irrelevant to legal analysis. The question "Who is the subject?" found an obvious answer in a strongly state-centered system, where states had the monopoly of law-making, law adjudication and law enforcement processes (Weil 1992: 122). In a somewhat tautological fashion, "indices" of the legal personality of entities at international law were traced to the capacity of certain entities to perform such functions as to exchange diplomatic missions or to conclude treaties, which were all typical states' prerogatives (Cheng 1991: 38). Anomalies could always be accommodated and their marginal character posed no systemic threat (Arangio-Ruiz 1996). Over time, legal personality reached out to international organizations, in many ways a direct emanation of states, and the International Court of Justice Advisory Opinion on the *Reparation for Injuries* case paved the way for relativizing the doctrine of subjects and adjusting it to the new demands of the international community.[2]

Although mainstream scholarship still tends to reason in terms of "subjects" and international legal personality, the term "actor" borrowed from the language of political science has made its way into the common parlance of international lawyers. From the standpoint of theory, however, non-state actors have drawn little attention. The reluctance of international lawyers to provide a theoretical systematization to the doctrine of actors is nonetheless understandable. In fact, this is an issue that lies at the interface of theory and practice, law and policy and the stance one takes in relation to it is likely to have repercussions on such other systemic issues as law making and law enforcement. To use Jan Klabbers' words "subjects doctrine forms the clearing house between sources and substance: it is through subjects doctrine that the international allocation of values takes place, and as any political scientist knows, the authoritative allocation of values is one of the main political functions" (Klabbers 2003: 369).

Conceptual thinking about non-state actors poses numerous challenges. As regards terminology, one may wonder whether the term has merely a descriptive connotation, which is used to encompass those actors that are not states, or, whether, it refers, in a prescriptive fashion, to a particular status, recognized by the international legal order, to which specific legal connotations are attached. In fact, despite the increasing use of "non-state actors" as a term of art, no

systematization seems to have been made in the literature which could satisfactorily account for, from the theoretical perspective, the role played by non-state actors in contemporary international law.

Henceforth, the doctrine of subjects has resisted any attempt at revision and remains as a cornerstone of positivistic legal analysis. Most textbooks and treaties still contain a section on the subjects of international law and the unity of the system is preserved by denying the existence of new scientific paradigms and schools of thought that, in the meantime, have done away with traditional theory and have proposed frameworks of analysis based on entirely different tenets. The merit of sociological approaches to international law is to have highlighted that the social fabric and structure of the international legal system, on the one hand, and its subjects/actors, on the other, are "mutually constitutive". Constructivist theories, elaborated in the field of international relations, have shown that the interaction among different actors constitutes the structure of the system, and that the latter shapes the identity, interests and expectations of the actors in a mutual process of influence (Arend 1998: 129; Mertus 1999–2000).

When and how the terminology of actors and/or participants made its way into international law is subject to controversy. Certainly, Rosalyn Higgins' critique of the old theory of subjects, and its advocacy of the notion of participants in international decision-making processes has greatly contributed to giving legitimacy to this new terminology. The argument that by construing the reality of international law in terms of "subjects" and "objects," "[w]e have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint" (Higgins 1994: 49) carries much force, particularly because the distinction does not seem to serve any particular functional purpose. This, however, is unlikely to convince the positivist who would rebut, not without reason, that the doctrine of sovereign equality and the doctrine of subjects are constitutive fictions that require "acceptance if the whole edifice of the international legal system is not to be called into question" (Dupuy 2003a: 179). The point is well taken, insofar as it highlights that the way in which one conceives of international law inevitably reflects on the way in which such fundamental questions as "who makes the law" and "who is the subject of the law" are answered. In fact, to conceive of international law as a body of rules in a community of states or as a legal process in a community where "there are a variety of participants, making claims across state lines, with the object of maximizing various values" (Higgins 1994: 50) is not the same thing, and the use of a different terminology hardly hides a fundamental difference in thinking of the international legal system. The state of disarray in which the doctrine of subjects/actors seems to be is further attested by the attempt to pull together such different visions with a view to reconciling them.

Many commentators have highlighted the unsuitability of the doctrine of subjects in providing an accurate representation of the current realities. Emphasis has been placed on the changing societal structures of the international community and the need to develop new conceptual tools that adequately account for them. The inadequacy of the doctrine of subjects has been underscored by numerous authors. Key to any such critique is the acknowledgment that the changing social structure of the international community must be adequately accounted for, and that new conceptual tools are required. The solipsistic vision of state sovereignty as the quintessential element of the international community of states must give way to a contemporary assessment of the social forces that structure a wider community whose members have "values, identities and roles distinct from the geographic limitations of states" (McCorquodale 2006: 149). "The logic of the liberal representative state and consent-based notions of international law"

(Cutler 2001: 150) do not allow for a reconsideration of the state as the only subject of the international legal system, thus causing a "disjunction between theory and practice which is conducive to a legitimacy crisis" (Cutler 2001: 147 ff.). As is well known, despite Franck's effort to introduce legitimacy into the vocabulary of international law (Franck 1990), the term makes positivist lawyers diffident by their incapacity to attach to it sufficiently precise legal connotations. In this context, however, its meaning is self-evident. If the participants in international legal processes fail to see their social practices reflected in the law, the latter's claim to authority will be undermined (Cutler 2001: 147).

Whether the solution lies in relativizing the subjects, or rather, in subjectivizing the actors, remains open to doubt (Bianchi 2009). The constant swing of the pendulum from the normative to the descriptive mesmerizes the observer and makes him wonder whether the observed reality can provide the answers he is looking for. In fact, the disjunction between theory and practice and the strain between the different ways of looking at the same reality is a symptom of a more general disease affecting international law. The "politics of forms" (Schlag 1991: 1742) has long exhausted its ordering function and has been supplanted by a panoply of narratives that tell different stories about the same reality. If one acknowledges that international law has changed dramatically in the past few decades, the need to reformulate some of its foundational tenets seems an obvious solution. The contemporary international community, which provides the terrain on which the game of international law is played, is no longer perceived as consisting solely of states and, inevitably, the inclusion/exclusion mode with which the traditional theory of subjects has been set and used in a restrictive fashion to preserve the integrity of the system, needs to be reconsidered. An alternative conceptual framework has not been created and the language of other disciplines has been borrowed to provide a temporary accommodation. That the participants need "legitimacy" and must be made "accountable" is an expression which would mean little to many positivist lawyers and yet seems to have become part and parcel of the fabric of international law.

International law has proved many times to be flexible enough to adjust to change. In many ways, it is and will most likely remain a "pragmatic project," which tends to accommodate societal and normative developments in a pragmatic fashion. It may very well be that the attempt to distinguish between subjects and actors hardly meets any functional purpose. It would be simplistic, however, to think that terminology is neutral and that its underlying conceptual categories may even handedly serve different purposes. In fact, as Alston rightly noted, the "negative and euphemistic term" of non-state actors may not "stem from any language inadequacies" but may have been adopted "to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve" (Alston 2005: 3). The doctrinal debate on subjects/actors fails to conceal the power struggle for recognition as a legitimate participant in international law processes. Inevitably, time will tell us who has won the battle for inclusion.

Law making and the need for general law

The most compelling challenge in the area of law making seems to be the lack of suitable mechanisms of general law making. On the one hand, when a prompt normative response is required there does not appear to be an adequate general law-making mechanism (Bianchi 2004: 515–18). Multilateral treaty making is a lengthy and cumbersome procedure. Ultimately, its capacity to become general law depends on the number of states that will ratify the relevant treaty.

In a community of nearly 200 states, the efficacy of a multilateral treaty appears as a daunting task, let alone the lapse of time required to have states duly ratify the treaty according to their domestic constitutional arrangements. Along similar lines, customary law making – at least as traditionally understood – is incapable of producing rules of general applicability when prompt action is required. No matter which particular theory of custom one adheres to, some generality of practice and *opinio juris* needs to be established. This is the reason why whenever a particular situation demands urgent regulation alternative mechanisms are required. The U.N. Security Council has recently gone well beyond the express powers originally conferred to it by the Charter when it has acted in a quasi-legislative capacity, imposing general obligations on the member states under Chapter VII of the Charter, although responding to a demand of the societal body (Bianchi 2006a: 889). Rightly or wrongly, in terms of legality and conformity with the letter of the Charter, there was a widespread perception among states that international terrorism required a prompt normative response at the general level. In fact, the Security Council was the only body that could produce such a prompt response in legally binding terms, by providing a broad and expanded reading of its powers to act to maintain or restore international peace and security. It is of some significance that neither the General Assembly, nor states individually, voiced any strong objection at the time of enactment of resolution 1373. Subsequent attempts by the Council to act as lawmaker have met with some opposition and qualifications appended by several states to their approval of resolution 1540. Whatever hubris one reproaches the SC for, its attempt to produce general law is also a way of making up for a lacuna in general international law making.

Yet another challenge lies in the attempt to revisit the process of customary law making. The much debated issue of how customary law rules come into being ought to be inquired afresh, as recent developments attest to the increasing difficulty of adhering to the traditional dualist doctrine of custom, whereby customary rules should be ascertained on the basis of a generality of practice accompanied by *opinio juris*. In some areas of international law, the dualist doctrine has been seriously called into question. As regards international humanitarian law, for instance, it has been contended by some authors that the requirement of practice is no longer indispensable when the "laws of humanity and the dictates of public conscience" widely support the existence of a norm (Cassese 2005: 160 ff., 2000). Such primary reliance on *opinio* is not deprived of practical consequences. It has allowed for a certain expansion of international criminal norms, arguably to the detriment of the principle of *nullum crimen*. Evidence of this trend can be traced to the jurisprudence of the ICTY. It suffices to think of the *Galic* case to realize that even in the absence of a general practice, the prohibition of terrorism can be considered a customary rule.[3] This finding by the ICTY, which raised the firm opposition of some dissenting judges, bears witness to the fact that the ascertainment of custom in some areas and by some international jurisdictions may remarkably depart from the standards traditionally applied by the ICJ and widely accepted by mainstream doctrine.

Similar considerations apply to the international regulation of the use of force under customary international law. As is well known, recent practice has remarkably strained the law of the U.N. Charter and different claims have been put forward either to foster an expansive reading of the Charter provisions, or to rely on customary international law which would be coterminous with the law of the Charter. The two instances of recent practice which best illustrate the current strains on the international legal regulation of the use of force are the military intervention by NATO countries in Kosovo and the U.S.-led military invasion of Iraq. As will be

recalled, the use of force in Kosovo was justified on grounds of humanitarian intervention, undoubtedly a justification which falls outside the Charter. As far as Iraq is concerned, several justifications have been used over a period of time by the U.S., among which anticipatory self-defense stood out. Other uses of force have stirred up quite a lot of controversy, ranging from the intervention against Afghanistan in 2001 and the Israeli attack against Lebanon in 2006 to minor occurrences such as the U.S. bombings against alleged al Qaeda affiliates in Somalia in January 2007. There are many issues that remain unsettled. Is the use of force against terrorist groups on the territory of other states permitted? Can one intervene in anticipatory self-defense? If so, what are the circumstances which may trigger such intervention? In fact, the problems that have arisen in this particular area are as much related to the content of the law as they are to the way in which the law is perceived to be legitimately made and its existence ascertained.

In fact, it is difficult to characterize such instances in terms of customary international law. Bin Cheng used the qualification "instant customary law" to give account of similar instances of state practice, in which general practice and time requirements were relegated to a secondary role (Cheng 1965). Customary law rules regulating the conduct of states in outer space would thus form "instantly" as states that had the technical capability of undertaking such activities express them favorably as regards any given standard of conduct. However, as Jennings aptly put it (Jennings 1998: 742), one should have taken the hint that perhaps Bin Cheng in inventing the paradox had called it "instant" simply because it was not custom! Be that as it may, the traditional mechanisms of general law making at international law need to be revisited against the background of the changing demands of the international legal system. The late Jonathan Charney rightly emphasized the need for devising new mechanisms to create universal standards and underscored the need to take into account the new modalities by which states could freely express themselves in international fora (Charney 1993). It must be conceded that to leave the evaluation of the legality of any given conduct to the *ex post* reaction of the international community certainly presents a major risk of over-contextualization of legal claims. However, this approach has the merit of respecting the inherent characteristics of the dynamic of customary law making, namely the formation of law by evaluating the reaction vis à vis the unilateral claims put forward. The latter may be accepted, refused or acquiesced, thus giving rise to a confirmation of the existing law or to its modification. The fact that the claim of anticipatory self-defense, primarily if not exclusively, used by the United States to justify its military intervention in Iraq has been largely rejected is not without consequence for evaluating what the current state of the law on the use of force is. By the same token, the not negligible acquiescence in the military intervention in Kosovo leaves the door open to further developments, which may confirm the communal perception of the legality of certain practices of armed intervention in specific contexts, where massive violations of human rights need be brought to a halt. Furthermore, such methodology to reconstruct the content of the law is no less predictable than the current state of uncertainty where practically any argument can be put forward to justify the use of force.

The attempt to stretch the notion of self-defense to its outer boundaries at the detriment of the credibility of international law is evidence of the inadequacy of the current regulation, as well as the methods used to ascertain its content. To portray certain instances of the use of force such as the U.S. air raids against Afghanistan, Sudan, and Iraq in the 1990s as instances of self-defense rather than armed reprisals is to pay lip service to international law. If the law mystifies the realities of the societal body from which it emanates, it is doomed to lose both its credibility and

its capacity to control the social processes it aims to regulate. To abandon a formalistic approach to the law and opt for a regulatory scheme, which takes into account recent practice is likely to increase respect for the law and avoid sanctioning the power politics that thrives on the current uncertainties. It is somewhat unfortunate that the ICJ, which wields a certain power in directing the development of international law, has been unable to take a firm stance on the issue of the use of force. Presumably divided within its ranks, the Court has clumsily addressed the most challenging issues and carefully avoided providing guidance to international actors.[4]

Shifting boundaries of normativity

As Sir Gerald Fitzmaurice acutely noted once, if in domestic legal systems there is often uncertainty about "what is the law," the additional difficulty at international law is that this uncertainty also relates to "what the law is" (Fitzmaurice 1973: 251). In fact, the difficulty in identifying norms is tantamount to placing an element of systemic uncertainty at the heart of international law (Higgins 1994: 17). By no means, however, is this a new phenomenon. Even at the time when positivism represented the predominant and almost exclusive theoretical framework, some among the most eminent members of the profession critically approached the issue of sources and acknowledged the difference with domestic legal systems. Unlike domestic legal systems, where the status of sources is predetermined by constitutional arrangements and easily discernable, the absence of any centralized and hierarchically structured system of sources makes the task a difficult one in international law.

Traditionally viewed as originating from the sources listed in Article 38 of the Statute of the International Court of Justice, international law norms have been categorized according to the dichotomy legally binding/non-legally binding. In particular, whatever falls outside the categories of treaties, custom or general principles of law is considered to lie outside the realm of international legal normativity. The current approach to normativity is still based on the paradigms hard/soft law and legally binding/non-legally binding norms. Although such parameters still provide the main framework of reference, they no longer provide a satisfactory explanation of normative phenomena in international law. Suffice to cast a glance at international case law to realize that such distinctions are far from being straightforward and clear cut and that the way in which decisions are taken and judgments rendered by courts does not always entail rigorous adherence to such paradigms.

Attention to relative normativity was drawn by Prosper Weil in a pioneering article at the beginning of the 1980s, in which a clear warning was issued about relativizing normativity in international law (Weil 1983). Weil's work has shaped the subsequent debate and has caused international lawyers to approach the subject along similar lines. Most prominently the distinction between hard and soft law is made. As aptly noted by Abi-Saab (Abi-Saab 1987: 206f.), the expression soft law is not deprived of ambiguities as it may refer to the norm, the *negotium* (a soft legal norm). By way of example, a treaty norm worded in such a qualified and conditional manner as to suggest no real undertaking by the state will be difficult to enforce, regardless of the binding nature of the instrument in which it is contained. Or, soft law may be taken to point to the *instrumentum* (a soft legal instrument), that is the instrument containing the norm. For instance a norm of a General Assembly resolution may derive its legal strength from the importance of the instrument or the voting process, but remains legally non-binding.

This distinction can be used either to set aside as non-legal whatever normative prescription falls short of a binding effect, holding that the very essence of legal norms lies in their being binding (Klabbers 1998). Or it can be used to differentiate between the

binding character and the legal effect of a prescriptive statement, the two elements being distinct. In so doing this approach divorces the question of what constitutes a norm from whether or not the norm is legally binding by arguing that although some norms are non-legally binding, they are nevertheless often more efficacious in practice than their legally binding equivalents, and that these instances of "soft law" are just as effective in addressing the needs of the international community as legally binding norms.

These distinctions are not as clear cut as one would like to think and soft law may become relevant in highly heterogeneous contexts. It may set the preparatory stage for the development of international hard law, be it a treaty or a custom, or provide a model for internal legislation. It may provide the normative standards to enforce treaty or customary due diligence obligations or be used interpretatively to give further strength arguments based on hard law. Overall, an effort must be made to better grasp the functioning of soft law. It has to be acknowledged that soft law fulfills important functional needs within the system, as an increasing recourse to it by states clearly attests. To look at soft law as a form of normative pathology has little connection with the realities of international relations. Soft law could be regarded instead as a sign of maturity that the system has attained, and as an important component of "post-tribal international law" (Allott 1998: 413). In fact, all developed societies are familiar with the "complexification of normative space" phenomenon. Rather than intervening by traditional command and control instruments, domestic decision makers often prefer to opt for recommendations and incentives. International law may be going through a similar process.

As the use of the binary code legal/illegal is what characterizes and distinguishes the law from other social practices at both the domestic and international level, one needs to inquire afresh if the connotations we traditionally attach to these terms are still accurate representations of the current reality. In particular, the parameters by which the binary code is made operational are shifting and need to be reassessed. Similarly, the traditional approach to the hierarchy of norms in international law demands a re-evaluation consistent with current practice. Whereas *jus cogens* norms are traditionally viewed as voiding the competing norm, practice suggests that they play a more nuanced role in reality and are perhaps better seen as reflecting the fundamental values of the international community and serve to influence *inter alia* the interpretation of rules. This may well be the way to bring *jus cogens* forward, as suggested by Judge Dugard in his concurrent opinion attached to the ICJ's judgment on the *Armed Activities on the Territory of the Congo* case, where the Court finally sanctioned the category of peremptory norms.[5] While agreeing with the Court that *jus cogens* may not sweep away everything that stands in its way, including the principle of the requirement of consent for the exercise of jurisdiction by the ICJ, Dugard highlights the peculiar nature of peremptory norms on the grounds of their alleged hierarchical superiority. Peremptory norms do not only express fundamental principles, they also give legal form to the fundamental policies of the international community, thus advancing both principle and policy.[6] By attributing to them a predominant interpretive role in the process of judicial choice, peremptory norms may eventually bring about the desired result of fostering their underlying values, while at the same time avoiding the rigidities of their mechanical application which pretends to trump any conflicting norm (Bionchi 2008).

An additional challenge to normativity is represented by what Lowe calls "interstitial norms", yet another by-product of the complexity of international law. By this expression, reference is made to normative concepts, which do not possess an autonomous normative charge of their own, but rather aim to "direct the manner in which competing or conflicting norms that do have

their own normativity should interact in practice" (Lowe 2000b: 216). The examples are numerous. Such concepts as proportionality or reasonableness are often called to fulfill the function of mediating and reconciling opposite or conflicting normative claims on the basis of flexibility and ad hoc interest accommodation. These and other normative concepts emerge from the societal body and they tend both to express the policies that the community wants to pursue and to occupy normative space. By exercising a strong pull towards primary rules they influence their content and shape their interpretation. Other concepts such as sustainable development and the precautionary principle, on the one hand, or elementary considerations of humanity or the dictates of public conscience underlying the Martens clause, on the other, are apt illustrations (in such diverse areas as environmental law and international humanitarian law) of normative concepts that escape traditional categorizations (Bianchi 2006b). The function performed by interstitial norms is not simply that of ensuring a higher degree of systematic coherence in international law. Although they serve the purpose of directing law making, interpretation and adjudication with a view to conforming to the policies that the international community thinks desirable to pursue, they also have the capacity to provide the degree of generality and flexibility required to adjust the law to the changing demands of the societal body.

The capacity to accommodate such normative developments in the fabric of international law theory and practice will be crucial to enhance its credibility and, arguably, its future functioning.

Efficacy: international lawyer's inferiority complex

International lawyers have long suffered from an inferiority complex towards their fellow domestic lawyers. The complex has caused a great deal of negative effects, as the frustration of international lawyers has long been a reason for them to demonstrate that international law is like domestic law. Such an effort, inevitably doomed to failure, given the differences between the two legal orders, lies at the root of many theories developed by international lawyers in a vain attempt to appeal to their domestic law colleagues. As is well known, the disdain of domestic lawyers for international law is largely due to the absence of adequate enforcement mechanisms in the international legal system. The existence of rules would not suffice to confer the dignity of the "law" to standards that remain unenforceable. As to be expected, international law has not evolved in the direction of developing enforcement mechanisms similar to those in domestic legal systems. Although there has been a proliferation of international courts and tribunals, "enforcement," as traditionally understood in domestic legal orders, is not international law's main strength. This may well be evidence of a lost battle or of a lack of communication that has created a major misunderstanding.

It is noteworthy that in his famous book on how nations behave, Louis Henkin boldly asserted that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Henkin 1989: 69). What might have been the strenuous defense of the corporation by one of its members, has turned out to be a widely accepted proposition, the empirical value of which has been given support by a number of sectoral studies. The reason why nations obey international law has been thoroughly investigated and interesting theories have been put forward to explain why this may be so. Koh, for instance, argued against the background of his theory of transnational legal process that a transnational actor's moral obligation to obey international law is internalized in domestic legal systems to become a domestic legal obligation that shapes domestic law by international law, thus contributing to a mutually reinforcing process of interest and identity creation

between the national and the international spheres (Koh 1991, 1996b).

Certainly, the overall efficacy of the system can be further enhanced. What can hardly be denied, however, is that there is a great deal of spontaneous observance of international law. When judging the overall efficacy of the system, regard should be had not only to enforcement mechanisms, properly so called, but to all those elements that can contribute to the effective implementation of international standards. Little matters whether the vocabulary used varies and reference is alternatively made to compliance, observance, obedience, or whatever else. The goal is no longer to show how close to domestic legal orders the international legal system is, but rather to appreciate its overall capacity to ensure respect for its normative standards.

The traditional obsession of international lawyers with efficacy has presumably made international legal scholarship fertile ground for the law and economics movement to thrive. Rational choice and game theories provide for many the ultimate explanation of why there is international law compliance, even if this disrupts the very idea of law, in particular the idea of the law that the real participants on the ground actually have of the game they are playing. The mantra that the "law is efficient" pervasively permeates recent scholarship and heralds new times for international law (Guzman 2008). The bundle of normative assumptions and presuppositions of the law and economics movement makes the boundary between the descriptive and prescriptive dimensions of the theory a tenuous one. Whether rational choice is the behavioral model that shapes the conduct of the actors in international law remains unsubstantiated against the background of empirical observation. To be sure, the new myth that the "law is efficient" is appeasing the conscience and scientific zeal of many an international lawyer but, whether actual social practices can be satisfactorily explained on the basis of such theory remains open to question.

Accountability mechanisms and their heterogeneous character

Admittedly, the notion of accountability is not strictly legal. Responsibility and liability would rather be the preferred terms for lawyers to describe the way in which an individual or an entity can be held accountable at law. And yet the term "accountability" seems better suited to encompass and describe the panoply of mechanisms that can be used to control the conduct of relevant international law actors. The standards against which such an evaluation must be performed are numerous and not all of them are amenable within the purview of the law, properly so called. That said, it would be misleading to think that accountability stands in contradistinction to legal responsibility, which continues to be the most relevant form of accountability for some of the actors, such as states, international organizations and individuals.

As far as states are concerned, the adoption by the International Law Commission in 2001 of the "Articles on State Responsibility" after more than 40 years since the inception of the codification process – admittedly the longest period of time it has ever taken for the ILC to accomplish codification of an area of international law – significantly contributed to systematizing one of the most controversial areas of international law (Crawford 2002a). The ICJ has sanctioned the Articles, endorsed the same year by the General Assembly,[7] on different occasions and held some of them as declaratory of customary law.[8] This process of mutual reinforcement and legitimization between the Court and the ILC is evidence that the formal status of the Articles, certainly an instrument of soft law at the outset, is largely irrelevant to their practical impact on international practice. This, in turn, may be an argument to advise against their being submitted to a treaty negotiation process with a view to the adoption of a convention on state responsibility. This option, so far put off

by the General Assembly, would have the obvious disadvantage of re-opening negotiation on the most sensitive issues of state responsibility and would make the overall efficacy of the would-be convention dependent on the number of states that eventually ratify it. It is to be hoped that the accomplishment of the ILC in bringing to completion such a difficult codification will not be disrupted by untimely diplomatic initiatives, particularly at a time when the articles appear to be steadily consolidating in state practice.

As is well known, the ILC has also undertaken the codification of the responsibility of international organizations.[9] Partly to be developed by analogy to the law of state responsibility, partly to be inferred from the rules of each organization's constitutive instrument, the codification is no easy task. Piercing the veil of the international organization, and holding individual member states accountable for their own conduct, are among the numerous difficulties. It must be conceded that the recent case law of international tribunals, often influenced by considerations of political expediency and opinable judicial policies,[10] are unlikely to help the task of the ILC special rapporteur in putting forth fair and socially acceptable solutions. Be that as it may, the success of the codification process, which could be sanctioned simply by its completion in a reasonable time frame, is likely to enhance the system of accountability mechanisms at international law with reference to entities the activities of which are more and more relevant to international law.

As far as individuals are concerned, mechanisms of legal accountability have steadily developed since Nuremberg. The principle of individual criminal liability for at least some core international law crimes is widely recognized as a matter of customary international law, and individual criminal liability is also attached to a number of conducts proscribed by specific treaties. If the principle of individual criminal liability is no longer seriously called into question, major flaws still hamper its effective implementation. International criminal jurisdictions have been scant until recently, and the International Criminal Court is still in its infancy. Domestic jurisdictions, which, according to the principle of complementarity,[11] will bear the main burden for adjudicating international crimes, have not been very active on the enforcement side (Ratner and Abrams 2001: 160 ff.), mostly due to the carelessness of national legislators in failing to provide domestic courts with the necessary enabling legislation to apply international criminal law standards.

Different considerations apply to the accountability of transnational corporations. International legal scholarship has extensively dealt with this subject. The most impressive account of a theory of the legal responsibility of corporations for human rights abuses is Steven Ratner's book-length *Yale Law Journal* article (2001–2002). Ratner develops an international law-based theory of corporate responsibility, whereby international obligations can be deemed to address corporate entities insofar as the latter cooperate with states and commit violations of human dignity "of those with whom they have special ties" (Ratner 2001–2002: 449). An array of tools for the implementation of the theory is also put forward, ranging from corporate-initiated codes of conduct, NGO scrutiny, and national legal regimes to soft international law and treaties. The merit of Ratner's theory lies in its comprehensive character and in its foundation on international law rather than the domestic law of any particular state. Given that a large part of domestic litigation involving the human rights abuses of corporate entities has taken place in the U.S. on the basis of the Alien Tort Claims Act, and that most of the literature relies on this strand of domestic case law to account for the responsibility of corporate entities (Joseph 2004), such a wider focus is indeed welcome. Furthermore, Ratner emphasizes the importance of other elements, not necessarily of a legal character, which may prompt the accountability of corporate entities (Ratner

2001–2002: 545). Corporate social responsibility as well as market incentives to comply with international standards in certain areas may well provide additional tools for a comprehensive system of corporate accountability.

A different approach to the same issue, based on an expansive reading and use of the law of state responsibility, has been recently advocated in international legal scholarship (McCorquodale and Simons 2007). By focusing on the applicability of human rights obligations incumbent on the home state to the extraterritorial acts of the national corporate entity, the application of the relevant rules of state responsibility to the conduct of home states with a view to holding them accountable for the acts of their corporate entities has been invoked.[12] This approach has the merit of fostering solutions that are clearly available within the system, the rules on state responsibility, and to provide states with an incentive to act diligently if they want to avoid international responsibility. To argue that states should be responsible for the acts of national corporate entities abroad makes sense, particularly as one realizes that home states attempt to impose their laws and regulations on foreign subsidiaries of corporate nationals in a number of areas, ranging from export controls to antitrust regulation. The argument that the same states should be accountable for the acts of the same entities, when these violate human rights standards could reasonably follow. Criteria of attribution for the purpose of state responsibility, such as the exercise of elements of governmental authority or the direction or control by the state of the relevant activities could well provide adequate tools for the implementation of such normative strategy.

Two considerations, however, might stand in the way. The first is the acknowledgment that states do not seem inclined to accept such an expansive reading of their obligations under international law and international practice does not seem to develop in that direction. The second remark stems from an assessment of the judicial policy of the International Court of Justice on matters of attribution. It will be recalled that in one of the few instances of conflicting jurisprudence among international jurisdictions the ICJ made use of the criterion of "effective control" to attribute the conduct of groups of individuals to a state,[13] whereas the Appeals Chamber of the International Tribunal on Former Yugoslavia (ICTY) later adopted a much softer criterion, that of "overall control."[14] In the recent *Genocide* case,[15] the ICJ has reiterated its previous jurisprudence and made clear, not without some institutional acrimony,[16] that general international law requires "effective control" for conduct by an individual or a group of individuals to be attributed to a state. Besides the institutional aspects of the dispute between the two tribunals, it is reasonable to speculate that the ICJ, whose self-perception as the guardian of the international legal system is traditionally strong, when opting for the much more stringent criterion of "effective control" must have had in mind not only the circumstances of the case, but also the potential application of the criterion to other areas, including state responsibility for terrorist acts and state responsibility for the extraterritorial acts of corporate entities. The discussion boils down to determining whether for the purpose of assuring the accountability of non-state actors, to have recourse to traditional mechanisms of state responsibility is a good normative strategy to ensure greater effectiveness. At the very least, this can be doubted.

As regards the accountability of NGOs, reliance on traditional international law mechanisms of accountability is of no avail. In this area, the most engaging attempts to develop mechanisms of accountability rely on interdisciplinary approach (Bluemel 2005–2006), where an attempt is being made to move the debate of accountability from the actor to the function performed. In so doing, a composite theory of NGO accountability in international governance has been put forward, which does away with many of the traditional dividing lines peculiar to the field

of law such as international/domestic and public/private. To speak in terms of international governance rather than in terms of international legal order may be more an issue of disciplinary allegiance than a real difference of conceptual categories. Furthermore, to dismiss as "non-law" social practices that constitute the fabric of day-to-day international life and are increasingly perceived by the relevant actors as demanding respect as a matter of law, may be an attitude that fosters certain vested professional interests, but it is unlikely to advance the cause of international law and to enhance its credibility (Krisch and Kingsbury 2006b). In this respect, interdisciplinary dialog may well produce interesting outcomes and, for once, may be instrumental in providing a better understanding of societal dynamics.

Complexity, specialization, and judicial fragmentation: the system under strain or a sign of maturity?

It may well be true that the ever-increasing expansion and complexity of international law is credited to its maturity (Franck 1995: 4ff.). However, the very same phenomenon is likely to produce deep anxieties among international lawyers and to cause some objective difficulties in ensuring the smooth functioning of the system. Inevitably, in a highly complex normative system without any centralized authority, issues of coordination and conflict among its different components are likely to arise and their solution may not be immanent.

One effect of the complexification of international law is the drifting of the discipline towards a higher degree of specialization. Indeed, the extent to which specialization may affect the way in which we look at the world is greatly affected by specialization (Kuhn 1996: 50–51). As Bernhardt once said, the fact that many of those working at the European Court of Human Rights are more familiar with domestic law, in particular constitutional law, may be linked to the development of the evolutive interpretation doctrine by the Court and the characterization of the European Convention as a "living instrument" (Bernhardt 1999: 24). Indeed, a sociological analysis of interpretation can help us understand that a specialization in a particular domain of international law provides the "interpretive community" with a "correct" understanding of the law (Fish 1980: 167–73). The "correct" interpretation assured by the interpretive community has the effect of marginalizing alternative interpretations. As Foucault famously said, the culture of the discipline is an effective procedure to control and delimit the discourse in the discipline (Foucault 1981: 61). The actors of any given "interpretive community" not only speak the same language and share the same set of values, they may also have the same vested interests in preserving the monopoly of what is regarded as a legitimate interpretation and tend to support one another in the effort of maintaining their position of power within the discipline. That specialization has created a panoply of interpretive communities has produced a widespread perception of a patchy reality, composed of different normative regimes, each characterized by a certain degree of independence. However, the problem is the fragmentation into interpretive communities!

A fatal blow to the self-reassuring perception of the international legal order as a unitary system has been struck by the fragmentation of international jurisprudence. As the very essence of the judicial function implies an objective and independent assessment, the existence of conflicting assessments in a system where there is no judicial hierarchy risks jeopardizing the international legal order. The absence of a hierarchical structure is frequently recognized by international courts and tribunals, which tend to look at themselves as autonomous international judicial bodies.[17] The jurisprudential fragmentation of international law has thus

created a certain anxiety, reinforced by the proliferation of international courts and tribunals. In fact, there is reason to be concerned, as international courts have the tendency to view legal problems through the looking glass of their particular expertise. As Mark Twain aptly said: "[T]o a man with a hammer, everything looks like a nail."

The illusion that "managerial skills" would limit such a risk by guaranteeing the sound management of conflict and coordination between different sets of rules has rapidly turned into disillusionment about the capacity of "legal techniques" to address and solve such problems. The International Law Commission, aware of the need to act promptly to address such compelling concerns, has recently produced a study,[18] which attests to the difficulty of bringing order, by way of interpretive techniques, in the intricacies of regimes and norms collision and/or coordination that characterize a highly incoherent reality.[19]

It is an irony of sorts that the debate on the expansion, complexity and fragmentation of international law has gone hand in hand with a parallel debate on the constitutionalization of the international legal order. Some strands of international legal scholarship have emphasized varying aspects of what can be roughly defined as the emergence of a constitutional order in international law. The obvious temptation for mainstream scholarship lies in looking at the U.N. Charter as an international constitution of sorts, either standing prominently as the only international document resembling a constitution (Dupuy 1997; Fassbender 1998b), or approaching such a status, despite falling short of some fundamental requirements usually associated with national constitutions.

By and large, however, the normative, as opposed to the institutional, dimension of international constitutionalism has been emphasized. Thriving on an ever increasing consolidation of the notion of international community and its foundational normative tenets, such as *jus cogens* and obligations *erga omnes*, numerous scholars have identified fundamental norms with the distinguishing traits of the constitutionalization process (Mosler 1974; Simma 1994; Tomuschat 1993). Hierarchically ordered norms, even without the backing of adequate institutional mechanisms, could fulfill constitutional functions (Peters 2006). Although the issue of legitimacy is a cause for concern, the existence of universal values that can be enforced at international, regional and domestic law levels is tantamount to a constitutional structure in which different but complementary components may be looked at as a whole (de Wet 2006a, 2006b). Other eclectic versions have been proposed with a view to reconciling the institutional and normative elements (Frowein 1994). The interaction of different layers of normative authority and levels of governance, which already present varying degrees of constitutionalization, is advocated as the paradigm for the twenty-first-century constitutionalism (Cottier and Hertig 2003). Integration of such constitutional elements as human rights protection into existing allegedly self-contained regimes is also perceived as a way of constitutionalizing international law (Petersmann 2006). Imaginative models of would-be international orders continue to blossom and never has the debate on constitutionalism been so alive.

In fact, the contradiction between such dramatically distinct ways of looking at current developments is more apparent than real, and attests to the existence of those "post-modern anxieties" which characterize much of the contemporary literature (Koskenniemi and Leino 2002). On the one hand, attention is drawn to the difficulties of keeping the unity of the system and ensuring its coherence by interpretive techniques and institutional coordination. On the other, such unity is postulated and guaranteed by an alleged process of "constitutionalization" that makes international law look like domestic legal systems. It is a vision driven by despair or more simply an act of faith. Such divergent

representations of the same reality pave the way for further remarks on the relevance of the theoretical discourse to the future of international law.

The fragmentation of the theoretical discourse and its practical consequences

By far the most compelling threat, however, seems to be the fragmentation of the doctrinal discourse and theory's difficulty to provide a satisfactory framing of the increasing complexity of international law. It is an irony of sorts that fertile grounds for new approaches and theories to develop have been provided by the inadequacy of formalism and the unsuitability of critical legal studies – admittedly among the most prominent approaches to international law – to supply a satisfactory framework of analysis.

Formalism, meant to refer to mainstream positivistic doctrine, is still in many ways the prevailing lingua franca of international law. This approach suggests that we look at practice as raw materials that need be rationalized and ordered in a systematic fashion. Inspired and shaped by some of the fundamental tenets of western philosophy, this approach tends to project into the practice the ideal of an absolute coherence, both diachronically and synchronically, at the price of distorting reality by discarding any variance, which is at odds with the preordained theoretical model. Contradictions are banned and the coherence of the international legal order not only presupposed but often times imposed. Rules are considered as still and immutable normative propositions to which reality is doomed to bend. The obsession with rules as they appear on paper goes well beyond reasonableness, when theory simply ignores the practice of international law in order to defend dogmatically what it thinks to be the applicable rules. When even states are ready to shift the legal paradigms of self-defense, some commentators continue to think that this is a distortion of the extant rules, as if the latter were immutable.

Critical legal studies import into international law, by way of contrast, is mainly taken up with criticizing the presuppositions of the traditional international legal discourse, which, according to the critique, is a projection of political paradigms, namely those of international legal liberalism. The internal inconsistencies of the liberal paradigm would cause international law to swing constantly from apology to utopia, from concreteness to normativity (Koskenniemi 1990, 2006). The skeptical outlook of critical legal scholars does not provide a satisfactory account of international law either. Criticism takes place at quite a high level of abstraction and its intended objective is not to provide an alternative theory but rather to "trash" the various mythologies of liberal legalism. If it were not temerity, one would be tempted to trace similarities between such apparently distinct approaches. First of all, they both tend to neglect the social practice of international law, characterized by its own logic and by the perception of the "players." Furthermore, by underscoring the international legal system's inherent contradictions, critical legal studies ends up construing its arguments starting from the posture of formalism, namely the assumption of the coherence of law. Be that as it may, both formalism and its mortal enemy, the critical legal studies movement fails to provide guidance in understanding international law. The former by failing to adjust its frame of analysis to the changing demands of international law and by pretending to continue to use intellectual categories which no longer account for the current realities, and the latter by limiting itself, by its own vocation, to a critique and deconstruction of the traditional approach, without venturing into a *pars construens* or alternative normative project. Admittedly, this has left an empty space for new approaches to burgeon and prosper.

The "mushrooming of theory" (Carty 1991: 93) has thus spurred countless approaches and methods, among which even the skilled reader will have difficulty in orientating herself. The once "invisible college of scholars" (Schachter 1977) has turned into myriad highly visible professional circles. There is no universal language of international law anymore: there are as many dialects as there are observers and commentators. Most of the problems find their roots in the way in which we think of international law. It may well be true that in diversity lies richness. It would be simplistic, however, to believe that such a huge variety of approaches leading to an extreme doctrinal fragmentation has no bearing on the practice of international law and, consequently, on the functioning of the international legal system.

The reason lies in the very ontology of law, more particularly in its psychological nature. As Philip Allott has noted: "[S]ociety and law exist nowhere else than in the human mind" (Allott 2000: 70). Paul Amselek, too, is convinced that law has no separate existence in nature, nor can one bump into it in the actual world: it only inhabits "l'esprit des hommes" (Amselek 1989: 29–30). The acknowledgment of the psychological nature of the law brings with it important consequences. Unlike other instruments of physical measure, the legal rule is a relative instrument of measure: it may vary. One of the factors of such variations is the different manner in which it may be conceptualized, which is scholars' main task. The extreme fragmentation of the theoretical discourse of international law may well lead to normative relativism and eventually, to the demise of the system. By altering the relevant actors' perception of their activities, theory may alter the way in which the legal world is constructed (Fish 1989: 208). Scholars must be aware that theory matters. If nihilistic and excessively skeptical approaches dominate, there is a risk of significant change in practice. Among new theoretical approaches to international law there are movements that may have important practical effects on the functioning of the international legal system.

What is striking, however, is that most would concede that the ultimate object of thinking about international law is to improve mechanisms of global governance and the condition of humankind (Slaughter and Ratner 1999). Such a noble cause rejoins the sophisticated analysis of other authors who, at the (provisional) end of a stimulating, albeit winding, intellectual itinerary, look at international law as a kind of "secular faith," a "project of critical reason" geared to "re-establishing hope for the human species" (Koskenniemi 2007a: 30). It is both stimulating and disconcerting that the panoply of theories and opinions converge, after years of confrontation, at such fundamental a truth. Divergences persist, however, on how to achieve such an ambitious goal.

Conclusion

The problem with so many different theories is that they all have a certain degree of plausibility and explanatory force. Through the looking glass of each and every theory some bits and pieces of the system seem to become more readily comprehensible and easy to grasp. However, when such theories lay claim to providing an all encompassing and unitary vision of the larger whole, their capacity to explain the nooks and crannies of the international legal system subsides and gives way to a deep sense of dissatisfaction. Perhaps, one sensible way to move the debate forward is to realize that international law as a social practice remains a pragmatic project. The inconsistencies that according to some would undermine its credibility are perhaps what allow the system to be operational and to fulfill its regulatory function, by constantly evolving and adjusting to the changing demands of a heterogeneous societal body.

Whether a grand political project will emerge to shape and sustain such a diverse reality is premature to tell. Meanwhile, international law should continue to represent a driving force in assuring, in a flexible and pragmatic manner, the orderly interplay between the different social forces that shape contemporary international relations. But besides its pragmatic character, international law is also capable of materializing collective beliefs and coalescing consensus on them. In this respect, international law is an important part of any political project, whatever connotations the latter may take up.

It is against this background that the challenges expounded above ought to be evaluated. The fascinating character of any challenge lies in the uncertainty of the outcome. Ultimately, whether or not these challenges will be met depends on a number of variables, the most important of which are not within the purview of international law. Almost certainly, the way in which we have long understood international law is inadequate.

The old king is dead. Long live the new king or queen. Only time will tell us who he or she is.

Notes

1 The worldwide popularity of Harry Potter and his saga hardly warrants the specification that Hogwarts is the school of magic arts that our eponymous hero attends.

2 "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life," ICJ Reports 1949, p. 178.

3 See *Prosecutor vs. Stanislav Galić*, Case No. IT-98-29-A, Judgment, Trial Chamber December 5, 2003, and Appeals Chamber, November 30, 2006.

4 See *Islamic Republic of Iran vs. United States of America* (Case Concerning Oil Platforms), Judgment of November 6, 2003, ICJ Reports 2003, p. 161; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, July 9, 2004, ICJ Reports 2004, p. 136; *Congo vs. Uganda* (Case Concerning Armed Activities on the Territory of the Congo), Judgement of December 19, 2005, ICJ Reports 2005, p. 168.

5 See *Congo vs. Rwanda* (Case Concerning Armed Activities on the Territory of the Congo), Judgment of February 3, 2006, ICJ Reports 2006, paras. 64, 125, pp. 32, 52.

6 See *Congo vs. Rwanda*, *Separate Opinion of Judge ad hoc Dugard*, ICJ Reports 2006, para. 10, p. 89.

7 General Assembly, Resolution 56/83 of December 12, 2001.

8 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, July 9, 2004, ICJ Reports 2004, paras. 147 ff.; *Bosnia and Herzegovina vs. Serbia and Montenegro* (Application of the Convention on the Prevention and Punishment of the Crime of Genocide), Judgment of February 26, 2007, paras. 385, 398, 407, 431.

9 Special Rapporteur G. Gaja has so far submitted six reports. See Sixth Report on Responsibility of International Organizations by G. Gaja Special Rapporteur, International Law Commission, 60th Session, A/CN.4/597.

10 For a recent example, see European Court of Human Rights, *Behrami vs. France* (application no. 71412/01) and *Saramati vs. France, Germany and Norway* (no. 78166/01), Grand Chamber, May 2, 2007; *Berić and Others vs. Bosnia and Herzegovina* (Application no. 36357/04), Admissibility decision, October 16, 2007).

11 Article 17 of the Rome Statute of the International Criminal Court provides for the inadmissibility of cases that are being investigated or prosecuted by a state that has jurisdiction over them, unless that state is unwilling or unable genuinely to carry out the investigation or the prosecution, thus creating a primacy of national jurisdictions over the ICC.

12 For an earlier approach along similar lines, see Fatouros 1983. More generally, on the applicability of the rules of state responsibility to the conduct of individuals or groups of individuals, see Roucounas 2005 and Wolfrum 2005.

13 *Nicaragua vs. United States of America* (Case Concerning Military and Paramilitary Activities in and against Nicaragua), ICJ Reports 1986, pp. 64–5, para. 115.

14 See *Prosecutor vs. Dusko Tadic*, ICTY, No. IT-94-1-A, Appeals Chamber, July 15, 1999, paras. 115–45.

15 See *Bosnia and Herzegovina vs. Serbia and Montenegro* (Case Concerning the Application

of the Convention on the Prevention and Punishment of the Crime of Genocide), ICJ Reports 2007, paras. 396–407.

16 Ibid., para. 403.

17 See the following cases: *Celebici*, IT-96-21-A, ICTY, Appeals Chamber, Judgment of February 20, 2001, para. 24; *The Right to Information on Consular Assistance in the Framework of the Guaranteed of the Due Process of Law*, ICtHR, Advisory Opinion, OC-16/99 of October 1, 1999, Series A No. 16, para. 61.

18 "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission", finalized by Martti Koskenniemi, A/CN.4/L.682, April 13, 2006.

19 For a critique of the kind of coherence the study focuses on, see Del Mar 2008.