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Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project

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***Deconstructing Fragmentation:
Koskenniemi's 2006 ILC Project***

Temple International & Comparative Law Journal (forthcoming)

Sean D. Murphy*

I. Introduction

The purpose of this workshop is to assess Martti Koskenniemi's scholarship. My essay is fudging a bit in that regard, since I will focus principally on Koskenniemi's work as a member of the International Law Commission (ILC) from 2002 to 2006, and in particular his chairmanship of an ILC study group. Unlike Koskenniemi's scholarship, which is solely his own or perhaps his in conjunction with a co-author, the ILC study group report on *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report),¹ and the 42 associated conclusions,² were a group effort, though it is well-understood that Koskenniemi was the driving force in writing, editing, and finalizing them. In considering Koskenniemi's scholarly contributions to the field of international law, I think it reasonable to take into account this Report, especially since part of my interest lies in assessing the Report in relationship to Koskenniemi's scholarship.

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¹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission* UN Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi) [hereinafter "Report"].

² The Study Group's Conclusions appear at Rep. of the Int'l L. Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, 407–423, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) [hereinafter "Conclusions"]. Neither the Report nor the Conclusions were adopted by the Commission. The Commission, however, "decided to take note" of the Conclusions, "commended them to the attention of the General Assembly," and requested that the Report be made available on the Commission's website and published in its *Yearbook*. *Id.* at 402. Thereafter, the General Assembly also took note of the Conclusions "together with" the Report on which they were based. G.A. Res. 61/34, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/RES/61/34, at 2 (Dec. 18, 2006).

As it happens, we are meeting at Temple Law School on April 13, exactly seven years to the day since Koskenniemi finalized the Report of the Study Group. In briefly “deconstructing” the Report, I will approach it from three different vantage points. First, is the Report mostly a scholarly think-piece that will sit on the jurisprudential shelf in the library – a self-contained intellectual regime of a sort? Or is the Report useful for the practical lawyer toiling in the field of international law, one that will prove illuminating for emerging areas of international law in the years to come? Second, how does the Report relate to Koskenniemi’s own scholarship; might the Report be viewed as a confirmation or extension of that scholarship, or – more provocatively – a betrayal of it? Third, will the Report have “legs” in helping point the direction for future work by the ILC and other comparable institutions? Does it suggest new ways of thinking about codification and progressive development of international law?

II. The Report and Practical Lawyering

One way to understand the Report is as an effort by Koskenniemi to provide practical guidance for those international lawyers toiling in the field. Certainly the length and style of the Report is user-friendly: at 256 pages, it concisely covered a wide range of important issues in a relatively clear and systematic fashion. The Report began by explaining the phenomenon of “fragmentation” in international law, meaning “the emergence of specialized and relatively autonomous spheres of social action and structure,” which in turn leads to “conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.”³ The Report chose not to address the issue of overlapping institutional competences and focused instead on techniques for addressing conflicts in substantive norms. In doing so, the Report made two important moves that signaled an appreciation for the creativity and flexibility inherent in the international legal system.

First, the Report did not condemn the phenomenon of fragmentation; rather it recognized that special types of law emerge in response to special needs, thereby serving desirable functions. Nevertheless, when fragmentation results in frequent clashes between rules, the “unity of the law

³ Report, *supra* note 1, at 11.

suffers,” such that a conceptual framework for resolving such conflicts is needed.⁴ The report pursued that conceptual framework within the confines of the Vienna Convention on the Law of Treaties.⁵ Second, in identifying that conceptual framework, the Report did not purport to specify rules that automatically and definitively resolve conflicts. Instead, playing to notions of pragmatism and *ad hoc* decision-making, the Report identified four types of “collision rules” or relationships that promote harmonization – relationships that lawyers may use like tools out of a toolbox to reach a reasoned decision.⁶

The first relationship is between special and general law.⁷ A conflict might be resolved by favoring a norm of special law over a norm of general law – the *lex specialis derogare lege generali* principle – though in some circumstances it may be that the general norm should prevail. Among other things, this portion of the Report examined the idea of “self-contained regimes,” a concept that was sown in the *S.S. Wimbledon* case,⁸ flowered in the *Tehran Hostages* case,⁹ and was presciently explored by Bruno Simma in his still widely-cited 1985 article on the topic.¹⁰ The Report helpfully distinguished among three ways one might refer to a “self-contained” regime: as a set of primary rules, as distinguished from secondary rules of state responsibility; as a set of rules that form a sub-system of international law, as distinguished from general international law; and as a wholly discrete area of international law containing its own rules on substance, interpretation, enforcement, and so on.

The second relationship is between prior and subsequent law,¹¹ often expressed as the principle of *lex posterior derogate lege priori*. This later-in-time rule is well-known, but – like the *lex specialis* principle – cannot claim absolute priority in application; context remains important. In particular, problems arise when considering the divergences that arise when there is discordance in membership of States to overlapping multilateral treaty regimes.

⁴ *Id.* at 14–15.

⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

⁶ Report, *supra* note 1, at 17.

⁷ *Id.* at 30–115.

⁸ *S.S. Wimbledon* (U.K./Japan), 1923 P.C.I.J. (ser. A) No. 1, at 23–24 (Aug. 17).

⁹ *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 38–41 (May 24).

¹⁰ Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT’L L. 111 (1985); *see also* Pierre-Marie Dupuy, *L’unité d’ordre juridique international*, 297 RECUEIL DES COURS 15 (2002).

¹¹ Report, *supra* note 1, at 115–66.

The third relationship is between rules that operate on different hierarchical levels,¹² explored in the Report through discussion of U.N. Charter Article 103, the concept of *jus cogens*, and obligations *erga omnes*. Notably, the Report identified “the most frequently cited candidates for the status of *jus cogens*”: the prohibition on aggressive uses of force; the right of self-defense; crimes against humanity; and the prohibitions on genocide, torture, slavery, racial discrimination, apartheid, and hostilities directed at the civilian population.¹³ Further, the Report clarified that Chapter VII decisions of the U.N. Security Council, although binding upon every State pursuant to U.N. Charter Article 25 and thus trumping other treaty obligations under Article 103, remain inferior to *jus cogens*.¹⁴ At the same time, the Report viewed *jus cogens* as a “so far substantially quite thin doctrine” in its application¹⁵ and, though indicating the “most frequently cited candidates,” retained the ILC’s historical approach of not actually identifying the norms that qualified as *jus cogens*.

Finally, the fourth relationship is that each individual legal norm operates in a broader system of international law, which must be taken into account when interpreting and applying that norm.¹⁶ Here, the Report refers to a principle of “systemic integration” and notes that Article 31(3)(c) of the Vienna Convention on the Law of Treaties calls for the interpretation of a treaty to take into account “any relevant rules of international law applicable in the relations between the parties.”¹⁷ In explaining why such a principle exists, the Report asserted that

all treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any intrinsic priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.¹⁸

¹² *Id.* at 166–206.

¹³ *Id.* at 189.

¹⁴ *Id.* at 181.

¹⁵ *Id.* at 207.

¹⁶ *Id.* at 206–44.

¹⁷ Vienna Convention on the Law of Treaties, *supra* note 5, art. 31(3)(c).

¹⁸ Report, *supra* note 1 at 208.

As such, the broader normative environment must be taken into account when interpreting and applying a norm, so that it may remain integrated within the “substantive preferences, distributionary choices and political objectives” of the legal system as a whole.¹⁹ While, as noted above, the Report did not pursue analysis of overlapping institutional competences, it did stress the importance of resolving inter-regime conflicts through the use of a decision-maker not situated within one of the competing regimes, such as through a general dispute settlement forum.²⁰

Since its issuance, the ILC’s Report has been widely cited by scholars and practitioners, generally favorably though not uncritically. One set of criticisms is that the Report failed to address certain important areas of fragmentation, notably the relationship between international institutions, including how international courts or tribunals might be structured differently to avoid conflicting judgments.²¹ Others accept the scope of the Report, but criticize particular conclusions reached therein. For instance, one critic rejects the Report’s desire to promote systemic integrity by treating a later-in-time multilateral treaty as relevant when interpreting an earlier-in-time treaty even in circumstances when the relevant parties to the two treaties are not the same.²² Another rejects the Report’s assertion²³ that the *Pinochet* case²⁴ demonstrated a domestic court’s application of *jus cogens* to deny immunity to a former head of state, asserting instead that the court simply found that a specific treaty waived or created an exception to such immunity.²⁵ Some critics essentially shrug off the Report, seeing it as a relatively bland

¹⁹ *Id.* at 211–13, 244.

²⁰ *Id.* at 142.

²¹ See THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 8 (Ole Kristian Fauchald & André Nollkaemper eds., 2012) (“It is noteworthy that the International Law Commission in its work on fragmentation did not make any proposals as to how international courts could function, alone or cooperation, to” counteract problems of fragmentation); see also Suzannah Linton & Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT’L L. 407, 410–11, 465 n.297 (2009); Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?* 40 N.Y.U. INT’L L. & POL. 259 (2007).

²² Anthony Cassimatis, *International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law*, 56 INT’L COMP. L.Q. 623, 632–33 (2007) (citing to Report, *supra* note 1, at 237–39). For the ILC’s actual conclusions on this point, see Conclusions, *supra* note 2, at 416–18.

²³ Report, *supra* note 1, at 187.

²⁴ *R. v. Bow Street Metro. Stipendiary Magistrate, Ex part Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L.) (appeal taken from Eng.) (U.K.).

²⁵ Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?* 20 DUKE J. COMP. & INT’L L. 69, 71 n.10 (2009).

restatement of obvious rules and doubtful utility.²⁶ A common point among these critics is that the Report did not direct the handyman as to which “tools” to pull out of the “toolbox” in any given situation; rather, it envisaged considerable flexibility in how to approach each repair job.

Yet supporters of the Report welcome it precisely because it recognized the inherent flexibility of international legal disputation. By doing so, the Report promoted a greater openness or transparency about what decision-makers are actually doing; for example, it may help us see that decision-makers are using regime conflicts as an excuse for denying fundamental human rights or humanitarian law protections.²⁷ If nothing else, supporters maintain that the Report “provides an impressive overview of the various questions raised by the increasing specialization and diversification of international law.”²⁸ Indeed, Pierre-Marie Dupuy maintains that as “a pedagogical work inviting commentators to return to basics, the International Law Commission report is probably deserving of our gratitude,”²⁹ noting in particular the Report’s insistence that there *does* exist an order or system of international law, and its useful explanation of the role within that system of self-contained regimes and *jus cogens*.³⁰ For Bruno Simma, the Report “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.”³¹

Whatever its strengths and weaknesses, the Report has already featured in a wide range of scholarly studies, including with respect to promoting human rights law as a coherent system;³² clashes between human rights law and other fields of law, such as international humanitarian law³³ or foreign investment law;³⁴ conflicts within international trade law,³⁵ within

²⁶ Benedetto Conforti, *Unité et fragmentation du droit international: “Glissez, mortels, n’appuyez pas!”*, 111 REV. GEN. DROIT INT’L PUB. 5 (2007).

²⁷ Cassimatis, *supra* note 22, at 638.

²⁸ Harro Van Asselt, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 N.Y.U. J. INT’L L. & POL. 1205, 1207–08 (2012).

²⁹ Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law*, 1 EUR. J. LEGAL STUD. 1, 15 (2007).

³⁰ *Id.* at 17.

³¹ Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L. 265, 272 (2009).

³² See, e.g., John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 34–37 (2010); see also **Error! Main Document Only.** Kristen E. Boon, *The Law of Responsibility: A Response to Fragmentation?* 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 395 (2012).

³³ See, e.g., Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. J. INT’L L. 299, 366 (2011); Laura M. Olson, *Security Detention: The International Legal Framework: Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law*, 40 CASE W. RES. J. INT’L L. 437, 446 (2009); Cassimatis, *supra* note 22, at 638.

international environmental law,³⁶ and between those two fields;³⁷ the problem of fragmented fisheries governance;³⁸ the ordering of procedural and substantive rules of international criminal law,³⁹ legal conflicts in relation to cultural diversity,⁴⁰ the effects of Article 103 of the Charter;⁴¹ the interpretive dialogue among disparate international and national courts and tribunals;⁴² and even whether “terrorism” might properly be considered as a new field of international law.⁴³ The Report has also been cited in studies that seek to deepen understanding of the broad phenomenon of fragmentation, such as by breaking the concept down into synergistic fragmentation, cooperative fragmentation, and conflictive fragmentation.⁴⁴ Finally, the Report has found a home in broader discussions of the practice,⁴⁵ history,⁴⁶ and philosophy⁴⁷ of international law.

As such, the Report seems to be resonating with those attempting to resolve particular problems that have arisen from fragmentation. The practical value of the Report will likely

³⁴ See, e.g., James Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 127; Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 485 (2008); Anne Van Aaken, *Fragmentation of International Law: The Case of International Investment Law*, 17 FIN. Y.B. INT'L L. 91 (2006).

³⁵ See, e.g., Panagiotis Delimatsis, *The Fragmentation of International Trade Law*, 45 J. WORLD TRADE 87, 91–92 (2011).

³⁶ See, e.g., Van Asselt, *Managing the Fragmentation of International Environmental Law*, *supra* note 28, at 1207–08; Karen N. Scott, *International Environmental Governance: Managing Fragmentation Through Institutional Connection*, 12 MELB. J. INT'L L. 177, 177 (2011); Tim Stephens, *Multiple International Courts and the “Fragmentation” of International Environmental Law*, 25 AUSTL. Y.B. INT'L L. 227, 228 (2006).

³⁷ See, e.g., Robert Howse, *The Use and Abuse of International Law in WTO Trade and Environment Litigation*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES* 635, 668 (Merit. E. Janow et al. eds., 2007).

³⁸ Margaret A. Young, *Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law*, 8 WORLD TRADE REV. 477, 480–81 (2009).

³⁹ See, e.g., Mark Klamburg, *What Are the Objectives of International Criminal Procedure? Reflections on the Fragmentation of an International Legal Regime*, 79 NORDIC J. INT'L L. 279, 282 (2010).

⁴⁰ See, e.g., H el ene Ruiz Fabri, *Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversit  des expressions culturelles*, 111 REV. GEN. DROIT INT'L PUB. 43, 82 (2007).

⁴¹ See, e.g., Milanovic, *supra* note 25, at 76–79.

⁴² See, e.g., **ERROR! MAIN DOCUMENT ONLY.** THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-) FRAGMENTATION OF INTERNATIONAL LAW (Ole Kristian Fauchald & Andr  Nollkaemper eds., 2012); Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959, 983 (2009).

⁴³ See, e.g., Daniel Moeckli, *The Emergence of Terrorism as a Distinct Category of International Law*, 44 TEX. INT'L L.J. 157, 171–72 (2009).

⁴⁴ See, e.g., Frank Biermann, Philipp Pattberg, Harro van asselt, & Fariborz Zelli, *The Fragmentation of Global Governance Architectures: A Framework for Analysis*, 9 GLOBAL ENVTL. POL. 14, 20 (2009).

⁴⁵ See, e.g., Simma, *Universality of International Law*, *supra* note 31.

⁴⁶ See, e.g., Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT'L L. 1 (2009).

⁴⁷ See, e.g., Alexandra Khrebtukova, *A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation*, 4 J. INT'L L. & INT'L REL. 51 (2008) (article by a former assistant to Martti Koskenniemi during the ILC fragmentation project).

endure as new issues arise that straddle different areas of international law, often driven by the emergence of new technologies. One need only pick up a newspaper or scan the blogosphere to see potential applications. The advent of drone aircraft capable of engaging in targeted killing implicates the fields of the *jus ad bellum*, international humanitarian law, and human rights. Cyber-attacks threaten to upend traditional notions of the divide between international criminal law and the law of war. Myriad uses of the Internet wreak havoc on regulations concerning privacy, data-control, intellectual property, and freedom of expression, empowering both private actors and governments in new and unexpected ways. And so on.

The extent to which governments and other actors in the field of international law have actually consulted and relied upon the Report since 2006 is hard to gauge. One would not necessarily expect a practitioner to cite to the “manual” that comes with his toolbox; rather, she just uses the tools. Even so, there is evidence that the Report is being read and relied upon. For example, in last July’s decision in *Al-Jedda v. United Kingdom*, the European Court of Human Rights quoted at length from the Report’s discussion of U.N. Charter Article 103, particularly on what is meant by a U.N. Charter obligation “prevailing” over a “conflicting” treaty obligation, and whether the lower-ranking obligation becomes null and void.⁴⁸ The Report’s analysis appears to have assisted the Court in concluding that U.N. Security Council resolution 1546⁴⁹ – although deciding “that the multinational force [in Iraq] shall have the authority to take all necessary measures to contribute to the maintenance of security and stability” – did not require the United Kingdom to place individuals in indefinite detention without charge.⁵⁰ As such, there was no conflicting obligation of the United Kingdom under the Charter that prevailed over its obligation under Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁵¹ which the Court found was violated.⁵² The Report has featured as well in other cases and pleadings, and is even extracted for use in educating law students about the field of international law.⁵³

⁴⁸ *Al-Jedda v. United Kingdom*, App. No. 27021/08, ¶ 57 (Eur. Ct. H.R. July 7, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612>.

⁴⁹ S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

⁵⁰ *Al-Jedda v. United Kingdom*, *supra* note 48, at ¶¶ 104, 109.

⁵¹ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(1), Nov. 4, 1950, 213 U.N.T.S. 221.

⁵² *Al-Jedda v. United Kingdom*, *supra* note 48, at ¶ 118.

⁵³ See, e.g., LORI F. DAMROSCH, LOUIS HENKIN, SEAN D. MURPHY & HANS SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 37–41 (5th ed. 2009).

In sum, the Report seems to have garnered attention and traction in the world of practical lawyering.

III. The Report in Relation to Koskenniemi's Scholarship

A different way of understanding the Report is to perceive it as a confirmation or – more provocatively – a betrayal of Koskenniemi's scholarship. Koskenniemi's scholarly oeuvre runs wide and deep, but he is especially identified with his post-modernist reinterpretation of the doctrine and intellectual history of international law, viewing it as a realm of rhetorical patterns and structures, where instead of neutral governing rules there reside inescapable antimonies, animated by the tension between formalism and realism, between objectivism and subjectivism, and between naturalism and positivism.⁵⁴ Arguments about an applicable rule of international law take advantage of these antimonies, allowing each side to advance its position through equally relevant and plausible legal claims. Some years after publishing his seminal *From Apology to Utopia*, Koskenniemi indicated that his “descriptive concern was to try to articulate the rigorous formalism of international law while simultaneously accounting for its political open-endedness—the sense that competent argument in the field needed to follow strictly defined formal patterns that, nevertheless, allowed (indeed enabled) the taking of any conceivable position in regard to a dispute of a problem.”⁵⁵

The identification and description of the repeated antimonies in international law doctrine sits very well with the Report on fragmentation. Whereas the practical lawyer may lament that the Report fails to provide specific guidance on how a particular problem or dispute should be resolved, Koskenniemi as a scholar has amply explained why that must be the case: international law as a whole is not designed to dictate an obvious and singular answer, at least not in most instances. Rather, it allows for movement between opposite ends of a spectrum, accommodating variegated values or methods, ones that might be applied in different ways, at different times, by different decision-makers. The point in the Report was not to dictate outcomes, but to “provide

⁵⁴ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005) (reissue of 1989 edition with a new epilogue).

⁵⁵ *Id.* at 565.

resources for the use of international law’s professional vocabulary,” in the hope that they will be used for good causes.⁵⁶

Yet while the basic methodology of the Report may be consonant with Koskenniemi’s international legal theory, arguably the Report’s view of the field of international law as a single “system” was not. Much of Koskenniemi’s scholarship appears predicated on the idea that formal unity of international law is impossible; that there is no unified theory of international law other than a theory that the field is riddled with irresolvable dilemmas.⁵⁷ Although the Report early on indicated that “it is pointless to insist on formal unity,”⁵⁸ the Study Group concluded that international law is a single “legal system”; it is not a “random collection” of norms.⁵⁹ Indeed, the entire Report was built around the idea that such norms “act in relation to” each other, and that they “exist at higher and lower hierarchical levels.”⁶⁰ As one observer puts it, “the Report panders to the notions of formal unity, for such unity is preconditioned by the uniform application of [seemingly] secondary rules.”⁶¹ To the extent that Koskenniemi’s pre-Report scholarship might have been viewed as doubting the existence of a coherent international legal system, the findings of the Report suggest otherwise, and Koskenniemi’s post-Report scholarship now asserts that international law “is a whole,” though he remains quick to assert that it is a system without definite hierarchies to resolve internal conflicts.⁶²

Is this view correct; is international law a single system? While the Report as finalized by Koskenniemi addresses fragmentation arising from different courts or tribunals interpreting the same body of law differently, and arising from a single court or tribunal attempting to interpret conflicting bodies of law that speak to the same issue, arguably it failed to perceive a more fundamental form of fragmentation, one in which two very different legal systems are colliding. For example, one critic of the Report argues that human rights law as a system operates in a fundamentally different way than other areas of international law, radically and systematically

⁵⁶ *Id.* at 589.

⁵⁷ See David Kennedy, *The Last Treatise: Project and Person (Reflections on Martti Koskenniemi’s From Apology to Utopia)*, 7 GERMAN L.J. 982, 985 (2006).

⁵⁸ Report, *supra* note 1, at 15.

⁵⁹ **Error! Main Document Only.** Conclusions, *supra* note 2, at 4.

⁶⁰ *Id.*

⁶¹ Sahib Singh, *The Potential of International Law: Fragmentation and Ethics*, 24 LEIDEN J. INT’L L. 23, 30 (2011).

⁶² Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN L. REV. 1, 17 (2007).

downplaying the role of State consent. For him, conflicts between human rights law and traditional international law are not disagreements over interpretation but, rather, over the application of rudimentary values. As such, the doctrinal and jurisdictional rules set forth in the Report fall short; they simply cannot help reconcile such different systems any more than they might help reconcile California law and Jewish law.⁶³

Similarly, as applied to the issue of climate change, another critic maintains that the Report’s “narrow focus on conflicts misrepresents the multifaceted nature of climate change and precludes an adequate jurisprudential understanding of the relationship between the climate regime and other regimes.”⁶⁴ By focusing on “conflict-of-norm” rules the Report missed an opportunity to explore “conflict-of-law” rules – such as those found in private international law – that are available to help reconcile entirely different legal systems (even if the relevant norms “point in the same direction”).⁶⁵ Likewise, one critic notes that the Report is silent on other important tools that the lawyer might deploy relating to negotiation, cooperation, and coordination, which may lead to more satisfactory and effective outcomes than would application of “conflict of norm” rules.⁶⁶ For such critics, the Report’s “soaring rhetoric” about the ability to harmonize interpretation “is unlikely to stand a chance in the face of fierce competition between diverse interests operating in the different regimes of international law.”⁶⁷

In my view, such critics are onto something; the Report might have done more to explain why international is a single system, and whether conflict of law rules have a place in addressing its fragmentation. But it may also be said that the Report also fell short in the opposite direction: that it failed to acknowledge the myriad forces that help *unify* international law, thereby precluding many problems of fragmentation from arising or being left unresolved.⁶⁸ For example, greater attention could have been paid to factors such as the quasi-harmonization of

⁶³ Harlan Grant Cohen, *Symposium: The Global Impact and Implementation of Human Rights Norms: From Fragmentation to Constitutionalization*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 381, 387–89 (2012); see Singh, *supra* note 61, at 30 (“whilst [the Report] recognizes the obvious weakness of formal unity, it comes dangerously close to presupposing this weakness”).

⁶⁴ Harro Van Asselt, Francesco Sindico, & Michael A. Mehling, *Global Climate Change and the Fragmentation of International Law*, 30 LAW & POL’Y 423, 425 (2008).

⁶⁵ Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law*, in MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 19, 21 (Tomer Broude & Yuval Shany eds., 2011).

⁶⁶ Van Asselt et al., *Global Climate Change*, *supra* note 64, at 440.

⁶⁷ Linton & Tiba, *supra* note 21, at 441.

⁶⁸ Fry, *International Human Rights Law in Investment Arbitration*, *supra* note 34, at 125–26.

procedures between international courts and tribunals, and to “the spontaneous reconciling, and even borrowing, of norms between specialized regimes...”⁶⁹ Moreover, the Report may have placed too much emphasis on the need to promote the coherence of the international law system, rather than recognizing and celebrating, for example, the value of competition between international tribunals.⁷⁰

Separate from whether international law is a single system is the issue of whether the Report confirms or betrays the ethics that undergird Koskenniemi’s scholarship. The overarching objective of *From Apology to Utopia* seems to have been to strip away the structural biases of international law – to unmask the false promises of equality and pluralism ostensibly guaranteed by its rules. Yet the Report might be seen as swimming in the opposite direction. For example, the Report arguably fails to pay sufficient heed to fragmentation in the form of regionalism, viewing it as simply an example of a possible *lex specialis*,⁷¹ and thereby denying regionalism’s rich cultural content.⁷² Even more damning, the Report’s general sentiment that fragmentation is an unfortunate but largely harmless phenomenon might be seen as a failure to acknowledge that fragmentation is actually sabotaging the emergence of a more democratic and egalitarian system of international law. Arguably fragmentation is creating narrow, functionalist institutions, restricting the scope of multilateral agreements, fostering ambiguous boundaries that hamper rational organization, and creating conditions favorable to powerful states that can use the piecemeal system to project power without incurring the constraints that a more integrated system would provide.⁷³

Further, to the extent that Koskenniemi’s scholarship decries “deformalisation,” whereby legal regimes are removed from political control and placed in the hands of managers and

⁶⁹ *Id.* at 135.

⁷⁰ William Thomas Worster, *Competition and Comity in the Fragmentation of International Law*, 24 BROOKLYN J. INT’L L. 119, 120–21, 132–34 (2008).

⁷¹ Report, *supra* note 1 at 212.

⁷² Carl Landauer, *Regionalism, Geography, and the International Legal Imagination*, 11 CHI. J. INT’L L. 557, 571 (2011).

⁷³ Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596–98 (2007) (citing to Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553 (2002) and to Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 4 (2007)); *see also* Leathley, *supra* note 21, at 271.

experts,⁷⁴ his Report's rule-centrism arguably keeps international lawyers trapped in a technical maze and "managerial mindset." For some critics, the Report should have grappled better "with the political realities of international law," and advocated a more "liberating methodology" for international lawyers.⁷⁵ Indeed, by viewing fragmentation as arising from differences between equally-valid values of functionally-defined legal regimes, the Report might be said to invite an approach to international law that downplays the validity or content of law, and invites pernicious subjectivism.⁷⁶

My own view is that the Report does not abandon or betray the ethics that animate Koskenniemi's scholarship. The Report is what it is – a useful study of an important piece in the puzzle of the fragmentation of international law. The Report may not be a call to action for the reform of international law, let alone a blueprint for doing so, but then neither was *From Apology to Utopia*. While Koskenniemi in his scholarship is well aware of the ability of power to be projected through use of international legal structures (viewing fragmentation largely as a struggle for institutional hegemony),⁷⁷ his overall scholarly project has largely been to deconstruct the field, "to provide resources for the use of international law's professional vocabulary for critical or emancipatory causes,"⁷⁸ an objective ably furthered by issuance of the Report. Koskenniemi the scholar is certainly worried the ills of "deformalisation," but he seems equally worried about the proposed cures, be it the doctrine of constitutionalism or of pluralism (he sees the former as promising rights and order but at the cost of authoritarianism, and the latter as promoting diversity and freedom but ultimately destroying international law's center of gravity).⁷⁹ International law (and international relations for that matter) is largely an "effort to develop rules, techniques and strategies to fortify the middle zone against collapse over the margin, and to make life there as good as possible."⁸⁰ Here is where the Report does some work; it conceives of the international lawyer's role not as technically applying pre-determined rules in a rigid manner, but as using the Report's toolbox in a more cosmopolitan way, one that

⁷⁴ Koskenniemi, *The Fate of Public International Law*, *supra* note 62, at 9–15.

⁷⁵ Singh, *supra* note 61, at 41.

⁷⁶ Klamberg, *What Are the Objectives of International Criminal Procedure?*, *supra* note 39, at 282.

⁷⁷ See, e.g., Martti Koskenniemi, *Hegemonic Regimes*, REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 305 (Margaret A. Young ed., 2012); Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197 (2007).

⁷⁸ KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 54, at 589.

⁷⁹ Koskenniemi, *The Fate of Public International Law*, *supra* note 62, at 15–24.

⁸⁰ Koskenniemi, *Hegemonic Regimes*, *supra* note 77, at 309.

understands and seeks to advance the politics of differentiated regimes within the system of international law, without having to opt for a single abstract doctrine. And while Koskenniemi the scholar seems keenly interested in international law being used to as a device for achieving justice, equality, and solidarity, neither as a scholar nor as an ILC Member does he advance a meta-theory for the precise path forward.

IV. The Report and Future Codification or Development of International Law

A third way of thinking about the Report is whether it helps point the direction for future codification and progressive development of international law. The Report itself advanced three specific areas where further work might be pursued, including by the ILC.

First, the Report suggested an even more refined look at the types of treaty “collision rules” addressed in the Report, leading to a more sophisticated means for dealing with specialized situations. Thus, while the Report’s rules tended to view all treaties as having similar characteristics, rules or at least guidelines might distinguish multilateral treaties from bilateral treaties, might recognize the special relationship between “framework” treaties and their “implementation” treaties, and might consider the unique nature of treaties that generate quasi-legislative rules in highly-specialized areas. In short, the Report proposed the development of “guidelines on how the Vienna Convention provisions might give recognition to the wide variation of treaty types and normative implications of such types,” for use when treaty conflicts arise.⁸¹

Second, the Report suggested studying whether there were special rules that should apply inter-regime as opposed to intra-regime. It may be that the means for resolving conflicts arising within a particular branch of international law, such as international environmental law, are not the same means that should be used for resolving conflicts between that branch and a different branch, such as trade law. Notably, the Report suggested that some regimes are imbued with the representation of non-governmental interests and non-governmental participants, which may suggest special rules for their interpretation and operation as opposed to regimes where such interests and actors are not present.⁸²

⁸¹ Report, *supra* note 1, at 251.

⁸² *Id.* at 252–53.

Third, the Report asserted that further work might be done on understanding the relationship of all these rules to “general international law,” typically understood as including both customary international law and general principles of law present in national legal systems, but perhaps also principles of international law proper and analogies from domestic law. Though international law is evolving through highly specialized treaty regimes, those regimes operate against the backdrop of this general international law, presenting questions about whether and how that law undergirds and even unites specialized regimes.

To date, the International Law Commission has arguably addressed some aspects of these issues, such as its Articles on the Legal Effects of Armed Conflict on Treaties,⁸³ which at its heart is concerned with whether certain treaty regimes dissipate in times of war, or its Guide to Practice on Reservations to Treaties⁸⁴ which, when you think about it, is all about one form of fragmentation of treaty regimes. But the reality is that the Commission has not taken up as a topic for Commission work any of the three areas suggested in the Report. If anything, the Commission is moving away from the study of fragmentation, as may be seen in the appointment in 2012 of three special rapporteurs for new topics. Where the Report sought greater study of variegated treaty types, the Commission is now embarking on the topic of “provisional application of treaties,”⁸⁵ a project that is destined not to draw distinctions between treaty types. Where the Report encouraged greater study of collisions between regimes, the Commission is now pursuing the topic of “subsequent agreements and subsequent practice in the interpretation of treaties,”⁸⁶ a project that is focused on how a particular treaty regime can change over time, not on its relationship to other regimes. Where the Report envisaged a study of the interplay between the broad realm of general international law and specialized treaty regimes, the Commission has launched the topic on the “formation and evidence of customary international law,”⁸⁷ which promises to be a deep look at that source of law, but only tangentially at its connections to other sources. I say this not to dismiss the utility of any of those new topics;

⁸³ **Error! Main Document Only.** Draft Articles on the Effects of Armed Conflicts on Treaties, *in* Rep. of the Int’l Law Comm’n, 63d sess, April 26–June 3, July 4–Aug. 12, 2011, UN Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10, ¶ 100 (2011).

⁸⁴ Guide to Practice on Reservations to Treaties, *id.*, at ¶¶ 75–76.

⁸⁵ *See* Rep. of the Int’l Law Comm’n, 64th sess, May 7–June 1, July 2–Aug. 3, 2012, UN Doc. A/67/10 GAOR, 67th Sess., Supp. No. 10, ¶¶ 140–41 (2012)

⁸⁶ *Id.* at ¶¶ 222, 227.

⁸⁷ *Id.* at ¶ 157.

indeed, I supported their adoption. But it is to say that, so far, the ideas of the Report for a path forward in addressing the phenomenon of fragmentation have not come to pass.

Yet one enduring legacy of the Report may be the model that it presents. The idea of the ILC issuing a “report” analyzing a particular area of international law had practically died out in Geneva before the Koskenniemi Report came along. For the first thirty years of the Commission, reports were sporadically used to help advance an understanding of key areas of international law. In 1950, the ILC submitted to the General Assembly a Report on the Ways and Means for Making the Evidence of Customary International Law More Readily Available.⁸⁸ In 1951, it submitted a Report on Reservations to Multilateral Conventions.⁸⁹ In 1963, the ILC submitted a Report on Extended Participation in General Multilateral Treaties Concluded under the Auspices of the League of Nations.⁹⁰ And in 1979 it submitted to the Secretary-General the Report of a Working Group on Review of the Multilateral Treaty-Making Process,⁹¹ which focused on the Commission’s role in that process. Yet for almost the next thirty years, no reports of this type were issued until the one finalized by Koskenniemi.

There is resistance to such reports within the Commission; the concern is sometimes expressed that the ILC is not an academic think-tank and that’s its *raison d’être* remains the development of draft treaties. Yet the Report is probably right that a key and unique function of the Commission is its ability to “speak the language of general international law, with the aim to regulate, at a universal level, relationships that cannot be reduced to the realization of special interests and that go further than technical coordination.”⁹² Fulfilling that function is rather hard to do through new treaties or even through “draft articles” that are not expected to become new treaties. Hence, other forms for “packaging” the ILC’s work may be necessary for the ILC to remain relevant;⁹³ indeed, it might be noted that of the three new ILC topics referred to above

⁸⁸ Rep. of the Int’l Law Comm’n, 2d sess, June 5–July 29, 1950, U.N. Doc. A/CN.4/34; GAOR, 5th Sess., Supp. No. 12, ¶¶ 24–94 (1950).

⁸⁹ Rep. of the Int’l Law Comm’n, 3d sess, May 16–July 27, 1951, U.N. Doc. A/CN.4/48; GAOR, 6th Sess., Supp. No. 9, ¶¶ 12–34 (1951).

⁹⁰ Rep. of the Int’l Law Comm’n, 15th sess, May 6–July 12, 1963, U.N. Doc. A/CN.163; GAOR, 18th Sess., Supp., ¶¶ 18–50 (1963).

⁹¹ Rep. of the Int’l Law Comm’n, 31st sess, May 14–Aug. 3, 1979, U.N. Doc. A/34/10; GAOR, 34th Sess., Supp. No. 10, ¶¶ 184–95 (1979).

⁹² Report, *supra* note 1, at 255.

⁹³ For a survey of the variety of ILC products, see Sean D. Murphy, *Error! Main Document Only. Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC’s Work Product*, in THE

that were adopted in 2012, two of them – on subsequent agreements and subsequent practice in relation to the interpretation of treaties and on customary international law – are not expected to result in draft articles.

So further reports by the Commission of the kind demonstrated in the 2006 Report may be in order. As one contemplates the possibility of such studies in the area of fragmentation, the three topics advanced in the Report should be considered, but others come to mind as well. What about the conflict in competences among international courts and tribunals; are there any rules or guidelines that might help in resolving problems that may arise? What about the relationship of international law to national law; for example, what rules, if any, are triggered by treaty regimes that purportedly generate private rights enforceable in national courts?⁹⁴ And what about the rise of non-State actors as subjects of international law, capable of bringing claims against States before international tribunals or of being prosecuted for crimes before international courts? One might ask not only whether the presence of such actors helps characterize a regime as special in character, but also whether these actors themselves sometimes become bound by the same rules that bind States, such as obligations arising under humanitarian law or human rights treaties.⁹⁵

The answers to these questions are not easy and they, of course, are not the only questions. But a lasting value of the Report is that it demonstrated a way that the ILC, a body with a global mandate and useful expertise, might help bring greater clarity and coherence to international law, values that no doubt will be in great need during the century to come.

V. Conclusion

Koskenniemi without question is one of the best international law scholars of his generation, having crafted what some regard as the greatest English monograph in the field

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE 29 (Maurizio Ragazzi ed.) (forthcoming 2013).

⁹⁴ See, e.g., **Error! Main Document Only.** Sean D. Murphy, *Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 61 (David Sloss ed.) (2009).

⁹⁵ See, e.g., LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 38–55 (2002); Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, in *KRISENSICHERUNG UND HUMANITÄRE SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 573, 588 (Horst Fisher et al. eds., 2004); ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 82 (2006); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, Annex (2011).

during the past thirty years.⁹⁶ What makes this achievement all the more remarkable is that for almost two decades Koskenniemi was a practitioner of international law, serving in the Finnish diplomatic service, and that his path breaking work, *From Apology to Utopia*, was published during that time, not after he entered academia. For all the imagination, history, and theory that are the hallmarks of Koskenniemi's work, the practitioner's mindset remains readily apparent. Even while portraying international law as a series of argumentative structures and rhetorical patterns that defies traditional "black letter" legal reasoning, Koskenniemi was always clear that international law *worked*; that from the inside of the system, international lawyers on a daily basis practiced international law, robustly using it for serious purposes that made a difference in the world.

As such, it is no surprise that Koskenniemi, after becoming an established academic, chose to return to the field of practice through election to the International Law Commission, and chose to become chairman of a study group that was seeking to clarify how international law operates in a time of fragmentation. The Report finalized by Koskenniemi in 2006 has practical value and in some respects is a distillation for practitioners some of the main themes of Koskenniemi's best scholarship. No doubt the Report could have done better to explore or explain certain issues, and perhaps should have addressed a wider range of issues, but the Report is a considerable achievement, one that is broadly consistent with Koskenniemi's scholarly views. Moreover, the Report helps point the way for future work on the issue of fragmentation, both in identifying specific topics that might be studied by the ILC and in resurrecting one important model for packaging the Commission's work.

⁹⁶ Kennedy, *supra* note 57, at 982.