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FRAGMENTATION OF INTERNATIONAL LAW: CHALLENGES AND PROSPECTS

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INTRODUCTION –

The international legal system includes many different legal standards, but the apparent growth in "fragmentation" of these norms has lately been seen as a threat for the system as a whole. A few famous examples have demonstrated the problems of several tribunals reaching contradictory conclusions. One example is the clear discrepancy between the International Court of Justice's ("ICJ") ruling in the Nicaragua case and the International Criminal Tribunal for the Former Yugoslavia's ("ICTY") decision in the *Tadic* case. The ICTY argued in *Tadic* case that the ICJ's "effective control" standard for assessing whether a foreign State is accountable for an internal civil conflict was overly stringent.[1]

Fragmentation of the public international law is a very topical issue to discuss in the last decade. It has been observed that International Organizations such as the International Court of Justice (ICJ) and the International Law Commission have highlighted concerns about the fragmentation of international law. The fragmentation of international law was of such concern that, in its fifty-fourth session in 2002, the International Law Commission established a research group to assess the fragmentation and the challenges that arise from the variance and extension of international law.[2]

The fast evolution of modern international law has been marked by greater specialisation. Matters that were originally covered by broad International Law have given way to specialised systems such as "trade law," "human rights law," "environmental law," "law of the sea," and so on — each with its own set of principles and organisations. As a result of the practical necessity for specialisation in international law, specialised regimes have emerged. They are intended to better control the particularities of a certain subject area than basic international law. Since then,

[1] https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1195&context=bjil
[2] https://deliverypdf.ssrn.com/delivery.php?ID=503093087027109080098078075117028007021074046013037027007064122088092069020003094022030063118118055022124000017024111088028023061039092033027017113126107006028028050077045092026025073094126123017022098121082119119084030119111091106110026084090102020&EXT=pdf&INDEX=TRUE

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normative disagreements have arisen between general international law and its specialised subdivisions, as well as between those areas themselves. Because the international legal system is decentralised and non-hierarchical, when the rules of one special regime are incompatible with either general international law or the norms of another special regime, a dispute may arise that must be addressed by using international law standards. Conflicts and incompatibilities that may emerge or have happened between international standards of various regimes have resulted in a substantial volume of legal literature and publications on the cohesion of international law.[3]

INSTITUTIONAL FRAGMENTATION –

Institutional Fragmentation refers to international institutions or branches that operate as self-contained regimes. There are a number of self-contained regimes that exist and evolve on the basis of their own assumptions of international law, without necessarily taking into account the conditions or facts that they are simply a component of the greatest system of Public International Law.

The International Law Commission highlighted the topic in 2006, publishing a study titled 'Fragmentation of International Law: Difficulties emerging from the variety and extension of international law'. In 2006, a number of conclusions were reached, which is essentially one of the examples of documents created on the topic of fragmentation.[4]

SELF CONTAINED REGIMES –

The majority of regimes that may meet the requirements of self-contained regimes are primarily based on international treaties, and thus the Vienna Convention on the Law of Treaties (VCLT) or its correspondence in international customary law applies when interpreting the regimes and their relationship to various norms in international law. It is worth noting, however, that the application of VCLT as the exclusive source of norms relating treaty law has been called into doubt in several specific sectors of law, such as human rights law.

When the borders of a particular self-contained regime are more apparent, it is simpler to

[3] https://www.researchgate.net/profile/Musa-Shongwe-2/publication/343338355_The_Fragmentation_of_International_Law_Contemporary_Debates_and_Responses/links/5fa53a1ba6fdcc062418b1d9/The-Fragmentation-of-International-Law-Contemporary-Debates-and-Responses.pdf
[4] https://deliverypdf.ssrn.com/delivery.php?ID=301002120071064124072126072098111105032027023067011038006026012072078073068031096101021018111115103010043005019083106117098082098074087007053112096119013106003064091026021066068120020088069085070006012110003030031007090031020119089095016025084116067089&EXT=pdf&INDEX=TRUE

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determine when to apply the regime's own rules and when to apply general international law. According to the International Law Commission (ILC), if the specific regime fails, the regime may fall back on general international law.

According to the ILC, when the specialized regime fails, a fallback on general international law takes effect. However, the definition of 'failure' is controversial and ambiguous. The ILC mentions a regime whose institution is incapable of carrying out its mandate. Whether a regime has collapsed or not must be determined in each circumstance using the government's constitutional tools. Koskenniemi categorizes failure as either substantive or procedural. The substantive failure is equated with a regime failing to achieve the objective for which it was designed, as illustrated by the instances provided by the ILC in its final report. A procedural failure is associated with institutions established by a regime; when an institution is unable to perform as it should, it is regarded as a failure. Koskenniemi draws a parallel from the rule on exhaustion of local remedies, stating that a failure is exhibited when the regime's institutions or norms on state accountability are unavailable, ineffectual, or if resort to them would otherwise be illogical.

SUBSTANTIVE FRAGMENTATION: SOLUTIONS AND SAFEGUARDS –

In key research conducted by Martti Koskenniemi, the United Nations International Law Commission (ILC) called for a toolbox of "Professional Techniques" for international attorneys. These strategies attempt to determine the shared purpose of nations party to the relevant regimes in resolving normative disagreements. The ILC acknowledged that, as international law continues to diversify, fragmentation is "inevitable," and that a framework to control it is required. The Vienna Convention on the Law of Treaties, which the Commission praised as a good tool for "unification" of international law, established the basis, according to the Commission. The present techniques of dealing with norm conflicts, as well as the function of the Vienna Convention, will be discussed more below.

In international relations, of general law and special law, or '*lex generalis'* and '*lex specialis'* are recurrent –

- Lex Generalis –

The term *"lex generalis"* literally means "general law." According to the areas examined in municipal law, each nation has its own concept of what constitutes "general law." It embodies a

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basic norm, a general framework that applies to all areas. International law governs the connections between the legal system's subjects, which are States and International Regimes. As a result, there appear to be two objects that are both subjects of general law and generators of general law.

- Lex Specialis –

The Latin word *"lex specialis"* implies "law governing a particular subject matter." The goal of lex specialis is to fill loopholes in general law. When defined, the scope of the particular right or law is limited than that of general law. As a result, it is concerned with a relatively narrow topic, such as maritime law, environmental law, or space law. Occasionally, the standing of a distinctive regime can be found in the way its standards convey a distinct intent and purpose.

The lex specialis principle can also be used to resolve fragmentation of international law in terms of normative conflicts. This simply indicates that if a general standard and a specific norm disagree, the specialised norm should take precedence. As seen, this regulation has been in effect for some time.[5]

THE EFFECTS OF FRAGMENTATION –

A) The Negative Effect: A Threat to The Reliability and Credibility of International Law –

The disintegration of the legal order jeopardizes the credibility, reliability, and, consequently, the authority of international law. The following are as follows –

1) Substantive Law –

In terms of substantive law (in the sense of core norms), we now have various regimes dealing with the same subject. In this approach, generic legal regimes compete with more specialised regimes, needing rules such as lex specialis to resolve inconsistencies.

Growing sectionalism and regionalism throughout the world has resulted in the establishment of new regional legal regimes, which are frequently more particular than global regimes, geographically and otherwise, and more general than national regimes. Such new legal frameworks raise the possibility of conflict. As a result, while sectionalism and regionalism are

[5]https://deliverypdf.ssrn.com/delivery.php?ID=301002120071064124072126072098111105032027023067011038006026012072078073068031096101021018111115103010043005019083106117098082098074087007053112096119013106003064091026021066068120020088069085070006012110003030031007090031020119089095016025084116067089&EXT=pdf&INDEX=TRUE

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potent agents of international cooperation, they are not always unqualified blessings for the advancement of international law.

As seen above, a given circumstance may be subject to various sets of international rules. This multiplicity of relevant rules needs intricate discussions over which regulation to apply, which may result in more disputes than the development of each unique legal system. Diversity of fundamental rules may solve specific problems better than a few global, universal regimes, leading to stronger compliance efforts by states if they believe compliance will yield results. However, regardless matter how positive one's judgement of multiplicity is, it necessarily risks conflicting demands imposed on a state.

2) Secondary Law –

Fragmentation in international procedural law regimes, which are meant to assure the respect of basic international law, is even more visible than fragmentation in primary international law. The emphasis of international law has shifted away from the development of general substantive law and toward the development of unique regimes and means of enforcement (dispute avoidance and dispute settlement mechanisms). Institutions for resolving disputes have proliferated. Unfortunately, serious issues develop when a state uses many enforcement tools (ranging from dispute resolution to compliance measures) to try to handle a single problem.

Each enforcement mechanism views itself to be first and foremost devoted to enforcing just its own system or subsystem of standards. Because most organs, particularly treaty organisations, may only apply their own substantive law to disputes or circumstances brought before them (with the exception of the ICJ), states may engage in forum shopping, choosing the mechanism that best serves their national interests. Classic examples of forum shopping include the Matthews case before the European Court of Human Rights, the cases of Richard Waite and Terry Kennedy before the same court, and the Tadic and Nicaragua cases, as well as the debates they provoked.

Furthermore, a settlement achieved by one organ resolves a problem within that system and is not always for the benefit of another or the universal system. As a result, any inclination toward a homogenous international law and system may be undermined, and the criteria to be used in a specific situation may become even more ambiguous.

The fragmented structure of judicial action is compounded by a lack of information sharing between and among conflict resolution authorities. It is difficult for one institution to get acquainted with all of the implications of another body's judicial reasoning, especially if the

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activity is not made public.

As a result of the recent growth of secondary norms, there is a danger of different solutions, which might weaken the authority and credibility of such organisations, as well as international law in general. While the system of secondary norms that underpins the primary norms of international law has a common core that helps define the normative nature of international law, the system's diversity tends to maintain or exacerbate the disintegrated nature of international law and the international system as a whole.

B) The Positive Effect: Tailored Laws Are Worth Following –

The argument that fragmentation indicates an increasing specialisation of international norms and regimes is a counterpoint to the previous parade of negatives surrounding the fragmentation of international law. Specialization meets the diverse requirements and concerns of the states involved in international law-making, and states believe that their particular viewpoints are more honoured in these specific regimes than in the global one. Under such conditions, one may fairly anticipate states to be more compelled to comply with these norms and frameworks.

Fragmentation illustrates the need to provide multiple institutions with varied frameworks, allowing individuals to choose the institution that is most suited to a specific issue. Special regulations can better fit the unique requirements of specific situations. For example, conflict resolution institutions such as the International Law of the Sea Tribunal or the Court of Conciliation and Arbitration under the Organization for Security and Cooperation in Europe (OSCE) may be adjusted to the specific circumstances. The latter necessitates that the conciliation commission address specific promises included in OSCE texts. Other instances of such international law laboratories include the so-called self-contained regimes, which were designed as such by the International Court of Justice in the Hostages case.

A less-than-global approach is especially required when various countries plainly have opposing views on which fundamental principles should be protected by international law. The plain reality of reservations to human rights accords suffices to illustrate these diverse viewpoints without referring to a conflict of civilizations. Another example is the endeavour to regulate the fight against terrorism; it is significantly simpler to establish common ground for a law, particularly one defining terrorism, inside a region than in the global environment. Such specialized regimes might even be utilized to gradually establish international law and set the stage for a global rule.

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Although issues will surely arise as a result of the growth of special regimes and laws, the potential for good impacts on conformity with international law, as well as the stability and predictability of international relations, is undeniable.[6]

SPECIAL LAW CLAIMING EXCEPTIONS OR PRIORITY –

Special law happens when an international court or institution reaches a judgement that differs from how comparable circumstances have been determined in the past because the current case is believed to be governed by an "exception" to the general rule rather than the general norm. The examples that follow demonstrate this notion –

1) The Southern Bluefin Tuna Case (Australia and New Zealand vs. Japan) –

New Zealand and Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, inter alia, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and had requested an arbitral tribunal to be constituted. The Applicants asked the arbitral tribunal to declare that Japan had breached its obligations under Articles 64 and 116 to 119 of United Nations Convention on the Law of the Sea (UNCLOS).

2) Belilos vs. Switzerland –

In a report of 16th April 1981, the Lausanne police laid an information against Belilos for having contravened the municipality's General Police Regulations by having taken part in a demonstration in the streets of the city on 4th April for which permission had not been sought in advance.

Mrs. Belilos complained that she had not been tried by an independent and impartial tribunal within the meaning of Article 6-1 of the Convention, with full jurisdiction to determine questions both of law and of fact.

The Government maintained –

A) the Court has no jurisdiction to consider the merits of the case;

[6] https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1272&context=mjil

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B) there has been no infringement of that provision as it is applicable to Switzerland.

The applicant lodged a public-law appeal against this decision with the Federal Court. On 2nd November 1982, the Federal Court (1st Public-Law Division) delivered a judgment dismissing the appeal.

The case was referred to the Court by the European Commission of Human Rights and by the Government of the Swiss Confederation on 18th July and 22nd September 1986 respectively. It originated in an application (no. 10328/83) against Switzerland lodged with the Commission under Article 25 by Mrs. Marlene Belilos, a Swiss national, on 24th March 1983.[7]

CONCLUSION –

Although the debate over the fragmentation of international law is still in its early stages, it has already drawn the attention of a wide range of organisations and agencies. The following may be deduced from the discussion -

1) International law is not a homogeneous body;

2) The problem of diversification arises in relation to primary and secondary rules;

3) Fragmentation reflects the current multilayer situation of international law (including individual emancipation), may induce States to comply with international law more rigorously, and may contribute to the progressive development of international law; and

4) Fragmentation creates problems.

There is no one answer to the problem of conflicting pieces of international law. Different solutions are required for main and secondary rules, particularly when building mechanisms for conflict avoidance and resolution. Although the international legal system already provides some answers to the challenges outlined above, the disintegrative effect of fragmentation can be eradicated only when the international community is made fully aware of such concerns.

Indeed, it is feasible to remain calm and go on, despite the fact that the international legal system is fundamentally broken in terms of internal coherence. As much as we might recognise the

[7] https://www.researchgate.net/profile/Musa-Shongwe-2/publication/343338355_The_Fragmentation_of_International_Law_Contemporary_Debates_and_Responses/links/5fa53a1ba6fdcc062418b1d9/The-Fragmentation-of-International-Law-Contemporary-Debates-and-Responses.pdf

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benefits of fragmentation, the following truths must not be overlooked. The international legal system lacks a centralised adjudicatory body, and the principle of free choice or consent enshrined in Article 33(1) of the UN Charter allows states to establish dispute resolution mechanisms tailored to their specific needs or requirements. States are free to settle their disputes through any peaceful means they choose, and states may use different but parallel dispute resolution mechanisms for parallel or even similar obligations.