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Global Law in Pieces
Fragmentation, Regimes and Pluralism

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Abstract: The idea that life undergoes a process of functional differentiation, and that, as a consequence, law becomes increasingly specialized – and maybe even transforms in its very nature – is now widespread. The specialized clusters of law or regulation are very often called regimes, in the international arena, international or transnational regimes. This paper deals, first, with three strong representations of international regimes and discusses some of their problems. It argues that, in order to make a good use of the category, it is necessary to keep in mind the differentiation between law and non-law in the wider context of governance. It then turns, firstly, to the notion of regimes as fragments of a unified and coherent public international law order and, secondly, as meeting points of regulations emerging from different legal orders as well as from other non-legal sources. Within public international law, regimes are seen as related to what is called the double fragmentation of that legal order. As clusters of regulation within a wider global regulatory order, regimes are put in relation to two types of legal or regulatory pluralism.

Keywords: fragmentation; international regimes; global law; international law; legal pluralism.

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Introduction

For quite some time, and especially in the last few years, scholarly literature on international law has been filled with references to notions such as fragmentation and regimes.

As I tried to understand the debate, construct competent concepts of one and the other notion, in order to assess both their usefulness and the risks they bring about, I must confess, I failed to a great extent.

It seemed to me that the abundant literature was rich in uncertainty, in confusion and in mixing perspectives. In such an environment regimes received apparently clear definitions, which, at least in some cases, were not appropriate to the theoretical constructs within which they appeared. More than that, I found it particularly difficult to identify in practice the regimes as they are defined and their relations as they have been described.

The failure may be due to the scarcity or superficiality of my reading, or to my intellectual shortcomings. Notwithstanding, I decided to try a personal ordering of the matter and a personal judgment.

As one approaches the theme of fragmentation or of regimes, very soon one encounters another problem of considerable relevance and difficulty. Such a problem combines the transformation of (international) law, its relation with other regulatory instruments or systems, and the place it occupies in the regulation of life in the international arena.

In fact, the general idea that law or regulation tend to reorganize in relatively autonomous blocks to respond to the complexity of life brings into light the fact that law springing from diverse legal systems combine with one another, or that what some would call formal law combines and interacts with regulation of other nature in order to govern specific areas of life.

In some senses in which regimes are understood, they constitute combinations, areas of confluence between legal systems or areas of convergence between law and multi-sourced, including private, regulation whose legal character is object of polemics.

The polemics are probably the result of a double frustration or a double ambition. Discovering that law – what is usually known as law – does not regulate more that a small portion of life, lawyers feel the need to widen the scope of their object of study. Very often, though, uncomfortable dealing with non-law, they feel the need to call law what was usually not understood to be so.

There is, however, another general understanding, of regimes, a more usual one in fact. It is the view of regimes as specialized and relatively autonomous parts of a fragmented single legal order.

Whether they are thought of as instances of fragmentation in a particular legal order, or as elements in a plural regulatory environment, the regimes – legal or regulatory and, in our case, international or transitional – present challenges to the quality of the legal order or of the regulatory environment. It means they seem to be challenges to the construction of rule of law.

I shall start the discussion with a chapter centred on the idea of functional differentiation and its influence on the notions of international or transnational legal orders (Chapter I). This chapter is essentially concerned with exploring three strong representations of international or global regimes.

Chapter II focuses on the discussion of the differentiation between law and non-law in the context of global governance, as a necessary step to understand the nature of regimes as fragments of coherent legal orders or as clusters of regulation that is multi-sourced.

Chapter III deals with the regimes as the specialized parts of a fragmented Public International Law. There I discuss what I see as the two types of International Law fragmentation and the means of resolving the conflicts between or within regimes.

Chapter IV deals with the relation between the notion of regimes and what is seen as two types of legal pluralism, one in which the basic units are legal orders and the other in which the units are regimes.

1 Functional differentiation – The notion of international regimes

It would seem that all of life is becoming (more) fragmented. Through something called functional differentiation, society is being divided in numerous sectors organized around sets of interests, themes and specific knowledge².

These segments of society demand and tend to produce or at least to bring about the production of regulation that is sector-specific. The rules and, eventually, the organizations (institutions) constitutive of these sector-specific bodies of regulation would appear, and tend to be seen, as distinct and differentiated ensembles.

² This is a statement famously brought into fragmentations discussion by Gunther Teuber. See e. g. TEUBNER, 1996; TEUBNER, 1997; FICHER-LESCANO; TEUBNER, 2004.

These ensembles of rules and institutions can be seen, and will be seen, as either constituting fragments of a single but fragmented legal order or as a variety of legal orders in a pluralistic legal environment. They are either expression of fragmentation or of legal pluralism, or of both. This, of course, if one assumes the legal character of the rules or norms that constitute the ensemble. Otherwise, one can speak of the fragmentation of regulation and of regulatory pluralism.

Whether they are or are perceived as being a differentiated part of a single legal order or independent legal orders, these regulatory ensembles tend to be called ‘legal regimes’³.

Because the fragmentation of life and society does not take place (only) within domestic, national, societies, but is a phenomenon that touches upon a now unified (in another sense) global social sphere, these legal regimes are (also) international or transnational or global⁴.

It is the existence of something called international legal regimes that serves as an excuse for what will follow in the next pages. However, in an environment saturated by learned literature on fragmentation and legal pluralism, there may be need for a justification of the existence of what will follow.

The fact is that in the description of reality given above, although it is truthful, many very important variables remain unknown or unanswered for. For example, is there an underlying conception of law that will tell us that the regulation constituting a regime is legal? What conception would that be? Is there the acceptance of a need to differentiate legal regulation from what is non-legal, or is there a dismissal of this need? How is it possible to

³ This denomination will be further explored in the next parts of this paper.

⁴ The notion of a “global society” leads to a “global law”, according to Gunther Teubner, as law is a system derived from the societal one. For the author, “global law” differs from “international law” (among nations and previous to the fragmentation process) in four aspects: frontiers, legal sources, independence and unity: “1. Boundaries: The boundaries of global law, are formed not by maintaining a core ‘territory’ and expanding on a ‘federal’ basis as Kant perceived in terms of nation-states, but rather, the boundaries of global law are formed by invisible colleges, invisible markets and branches, invisible professional communities, invisible social networks that transcend territorial boundaries but nevertheless press for the emergence of genuinely legal forms. A new law of conflicts is emerging on the basis of inter-systemic, rather than international, conflicts (see TEUBNER, 1993, Ch. 5; forthcoming). 2) Sources of law: General legislative bodies will become less important with the development of globalization. Global law is produced in self-organized processes of structural coupling of law with ongoing globalized processes of a highly specialized and technical nature (see TEUBNER, 1991). 3) Independence: While in nation-states, at least in some of them – the legal process has developed a rather high degree of institutional insulation, global laws will probably remain, for the foreseeable future, in a diffuse but close dependency upon their respective specialized social fields with all their attendant problematic side-effects of which strong exposure to outside interests and a relative weakness of due process and the rule of law are important examples. Obviously, this creates a strong need for legal change. (4) Unity of the law: For nation-building in the past, unity of the law was one of the main political assets – a symbol of national identity and simultaneously a symbol of (almost) universal justice. A worldwide unity of the law, however, would become a threat to legal culture. For legal evolution the problem will be how to make sure that a sufficient variety of legal sources exists in a globally unified law. We may even anticipate conscious political attempts to institutionalize legal variation, for example, at regional levels.” TEUBNER, 1998, p. 5.

identify a rule or institution as belonging to a specific regime? How can one recognize the contours of the regime? What are the criteria used to identify a regime as being part of a more ample legal order and what are those used to qualify it as a legal order in itself?

Answers to these and other questions may appear, explicitly or implicitly, in some of the literature on fragmentation and pluralism. Very often they don't, or at least they do not appear crystalline to the reader.

In any case, whether the answers appear clearly or not, it is a fact that they constitute points of divergence among authors who write on the phenomena of fragmentation, pluralism and legal regimes. As they answer differently to these central questions, or as they present different attitudes towards them – some ignoring them as unimportant, some answering very firmly, some showing unawareness of their existence – they are actually constructing or describing different realities.

They describe different realities when they look at something that exists from diverse perspectives and take into account what is within their eyesight, leaving out what is not. They construct different realities as they interpret and make normative statements about something that exists and that they see from different perspectives.

Perspective is everything then, or almost. One can judge a theory, on fragmentation, for example, and find it wanting because the perspective from which it is generated gives an inaccurate, distorted, view of reality or because it constructs a view of reality which has no relation with what exists.

And one can find a theory wanting because its conclusions are not consistent with the perspective in which they are supposed to be based. There is a correspondence – or lack of – between the perspective and the real, and there is a correspondence – or lack of – between the conclusions and the fundamentals of a certain perspective.

For any such judgment to be made, however, there must be clarity about the perspective that has been adopted.

It seems to me that there is a somewhat deafening cacophony⁵ permeating the discussions on fragmentation, pluralism and regimes. Very often, concepts, arguments, diagnosis, are transported from one perspective to another without much care about whether it will make any sense there or whether it will not undo any coherence of that point of view. Sometimes, regardless of the eventual recourse to these inappropriate borrowings, some readings are simply devoid of internal cohesion, or are at least unconvincing.

⁵ This expression was also adopted in a similar discussion at NICOLAiDIS; TONG, 2004.

In order to start painting the panorama of the discussions concerning regimes, I will present briefly three strong representations of the notion.

1.1 Regimes in International Relations' Theory

The notion of international regimes appeared and has developed primarily in international relations theory. In this field, the publication in 1983 of a book edited by Stephen Krasner has framed the debate on the existence, definition and functions of international regimes. The book organized what was then the state of the art on the matter and has since then continued to be a necessary reference for whoever wants to study the subject.⁶

There, international regimes are looked at as a possible explanatory tool for the functioning of international relations. The discussion is centred on the possible role of regimes as variables that act as intermediaries between the basic causal determinants of behaviour and the outcome and actual behaviour.

A tentative definition is offered: regimes are 'sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations''⁷.

The terms of the definition are thus explained: 'Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions of action. Decision-making procedures are prevailing practices for making and implementing collective choice'⁸. Neither this definition of regimes nor that of the constituting parts is accepted by all without restriction. However, it may be retained as a *working definition*⁹ and is, in any case, a referential one.

The stances that international relations' scholars take towards the definition of regimes, towards the role they perform and towards the determinants of their existence, vary according to the underlying theoretical approach from which they study the functioning of international society. The differences may in essence be viewed as concerning the role of law or regulation (principles, norms, rules) in international relations.

This very important aspect of the international relations' conception of regimes appears very clear: international regimes are legal, regulatory, in their nature. To speak, then, of international 'legal' regimes would be pleonastic. But here law is being looked at from the

⁶ KRASNER, Stephen D. (ed.). *International Regimes*. Ithaca: Cornell University Press, 1983.

⁷ Idem, *ibidem*, p. 2.

⁸ Idem, *ibidem*, p. 2.

⁹ HASENCLEVER; MAYER; RITTBERGER, 1997, p. 13.

outside, as a product of the dynamics that govern relations in the international scene and as possible conditionings of behaviour and outcomes. It is not a legal discussion on law, but a political one.

Another aspect of the discussion is that, even though the general definition speaks of 'actors' expectations', it is centred on states' behaviour and expectations. States are viewed as the central actors of international relations and international regimes are seen as those sets of principles, norms, rules and decision-making procedures produced by the states and destined to influence their expectations and behaviour.

Finally, I feel I must underscore one central aspect of regimes as defined: these sets of norms, principles etc. govern specific issue-areas of international relations¹⁰. It is clear then that the international relations' discussion on international regimes is not concerned with the existence, function or unity of one overarching international legal system. As it strives to explain the interactions between states and identify the path that takes from the basic causal variables to the related behaviour and outcome it looks at clusters, sets, of regulatory instruments organized around specific themes such as security, trade, environment, etc.

Seen by international relation scholars, international regimes appear to be essentially regulatory ensembles constituted by norms and organizations which are part of what is usually known as public international law, even though no effort is made to check whether these norms and organizations belong to and correspond to the canons of international law which, in its own eyes, make of it a coherent legal system.

These basic traits of international regimes, norms and organizations produced by states and directed at states' behaviour, corresponding to the characteristics of public international law, organized around specific themes, are the ones that spring from the international relations literature, but they are not necessary. Different responses can be given. It suffices to adopt a different notion, a different concept, of international regime.

1.2 The social theory conception of regimes

One such divergent conception can be found among those who see the emergence of a global law that is fragmented in several functionally differentiated regimes, corresponding to specific sectors of the social tissue¹¹.

¹⁰ KRASNER, 1983, p. 1.

¹¹ FISCHER-LESCANO; TEUBNER, 2004, p. 1000.

This view, anchored in a social theory perspective, sees law as a transformed reality. It is no longer normative and no longer territorially based. Law is now seen as cognitive and devoid of any possibility of unity (TEUBNER, 2004). Law's traditional organization according to national territories would be giving way to a global law fragmented along social sector lines such as economics, science and others¹².

These regimes, because they constitute this global law, which is different in its essence, are said to be transnational and not international¹³. They differ, or are supposed to differ, from the latter in several aspects. The cognitive community that gives rise to the regime and its rules is not constituted necessarily or exclusively by states. The norms are said to be legal but they do not and need not conform to the canons of either national domestic nor public international law. The recipients of the norms, those whose behaviour they are supposed to regulate, are not the states, or not only the states, but rather whoever is a member of the cognitive community or of the social sector in case¹⁴.

Because this view presupposes a transformation in the very nature of law it is only to be expected that there be an answer to the question of what it means for a (transnational) regime to be a legal one. This answer, unfortunately, is not to be found. It is an important one, though, since for the proponents of this view, who set out to offer a solution for the collision of regimes, it is very important to decide and know whether colliding norms or rules are legal ones and not social norms¹⁵. According to them, a legal norm will always have precedence over a social norm with which it collides¹⁶.

The functionally differentiated transnational legal regimes are therefore said to be law, but they would be expressions of a different law, organized around cognitive and sector specific lines, not produced by the state, not destined to rule over a particular territory or over the relations among states. They may, and do, it is argued, collide, with domestic law as well as with international law, both of which do not disappear¹⁷.

This non disappearance is somewhat comforting and indicates the existence or emergence of a new kind of law that is not yet able to substitute the old, normative, territorial, ones. It is to be

¹² FISCHER-LESCANO; TEUBNER, 2004, p. 1006-7.

¹³ "The traditional differentiation in line with the political principle of territoriality into relatively autonomous national legal orders is thus overlain by a sectoral differentiation principle: the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for them- selves." FISCHER-LESCANO; TEUBNER, 2004, p. 1009.

¹⁴ FISCHER-LESCANO; TEUBNER, 2004, p. 1007-9. See also TEUBNER, 1997.

¹⁵ KORTH; TEUBNER, 2012, p. 52.

¹⁶ Idem, ibidem, p. 52.

¹⁷ FISCHER-LESCANO; TEUBNER, 2004, p. 1013.

expected, therefore, that such transnational legal regimes do not coincide with those regimes that, at the heart of domestic or international law, are expressions of the basic characteristics of these legal systems, even if organized around specific themes or areas of concern.

Transnational legal regimes either have a definition that differentiates them from what are legal regimes that belong to public international law or they have to respond to a more inclusive definition that will embrace both types of sets of norms, rules, etc.

In the same breath, trade law, environmental law, *lex mercatoria*, *lex constructionis*, *lex digitalis*, are given as examples of these functional regimes that are the expression of the fragmentation of global law¹⁸. The proliferation of international tribunals and courts is called upon as supporting evidence of such fragmentation¹⁹. But all examples of such proliferation are taken from public international law²⁰!

According to this social theory view the legal fragmentation is just an ephemeral reflexion of social fragmentation²¹. Any desire of unity is illusion²². In the best-case scenario, conflict norms will allow for the establishment of fluid networks between the units in conflict²³. The need should remain however for the possibility of recognition and delimitation of the said units.

Either international trade law and, for example, *lex constructionis*, correspond to one same and single definition, or they don't. If the latter is true, the only justification for their appearing together is the fact that they demonstrate the tendency of law or regulation to become specialized and compartmentalized. Can it really be that the fact that one of these regulatory ensembles is part of public international law is of no importance?

To decide on that, one needs to verify the concept of transnational regime with which the tenants of this perspective are working. The one offered is this:

A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches. When such a regime seeks precedence in regard to the general law, we have a 'self-contained regime,' a special case of *lex specialis*. (FISCHER-LESCANO, TEUBNER, 2004, p. 1013²⁴)

¹⁸ FISCHER-LESCANO; TEUBNER, 2004, p. 1010-1; 1013.

¹⁹ Idem, ibidem, 2004, p. 1012-1014.

²⁰ Idem, ibidem, 2004, *passim*.

²¹ Idem, ibidem, 2004, p. 1004. The authors also conclude that not even the creation of judicial hierarchy to the legal fragmentation can solve this matter, as its fragmentation is due to the social structural contradictions. To quote from Luhmann (*Die Gesellschaft der Gesellschaft*, 1997, p. 1088-96) "[T]he sino f differentiation can never be undone. Paradise is lost", FISCHER-LESCANO; TEUBNER, 2004, p. 1007.

²² FISCHER-LESCANO, TEUBNER, 2004, p. 1004.

²³ Idem, ibidem, 2004, p. 1004.

²⁴ Definition of Koskeniemi (2004).

This definition is presented as a demonstration that these regimes do not belong to either national or international law because, it is said their secondary norms do not conform to either legal system²⁵. However, the definition is taken from a report by the International Law Commission dealing with the fragmentation of (public) international law, and referred to the notion of self-contained regimes that would function as *lex specialis* in relation to the general (public international) law.

The definition cannot be applied to *lex mercatoria*, *lex constructionis*, *lex digitalis*, etc. The general traits of the definition “*a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches*” – may apply to those as independent, legal if we will, systems, but not as regimes of a legal system to which they cannot belong. The idea of derogation with regards to the general law can only mean the new, not prone to unity, global law²⁶.

Several mentions are made as well to the referential literature of international relations with which I have dealt before²⁷. Here again it is clear that the regimes of which ones and others speak can only be different things.

Other than the basic idea that sets of norms, rules and procedures tend to evolve around specific issue areas, there is nothing that unites the notion of international regimes as conceived in international relations theory and that of transnational regimes as part of a global law devised by systemic social scientists whom we have visited here. Moreover, the latter lacks a clear definition, one that is not inappropriately borrowed from international relations literature or from strictly dogmatic public international law studies. And there is no clarity on what it means to say that such regimes are legal.

1.3 Fragmentation in public international law

A third perspective from which the notion of regimes was looked at is that of public international law. Here regimes are yet again thought to be sets of rules organized around specific issue-areas, but they constitute parts, fragments, of a unified and coherent system of law. The principles, norms, rules, decision-making procedures and organizations that can be thought of as constituting relatively aggregated or self-contained ensembles, are all part of international law and correspond to the recognition criteria set by this legal system.

²⁵ FISCHER-LESCANO; TEUBNER, 2004, p. 1013.

²⁶ Idem, ibidem, 2004, p. 1017.

²⁷ Idem, ibidem, 2004, p. 1011, nota 45.

1.3.1 Dogmatic view

The fragmentation of international law proper springs, it seems, from the latter's expansion and growing specialization and brings about problems and difficulties²⁸. Expansion and specialization touch both the norms and institutions or organizational structures of international law²⁹. Fragmentation is therefore both normative and institutional.

The main perceived difficulty arising from fragmentation is the likeliness of contradictions and collisions between norms that are called to regulate the behaviour of the subjects of international law and which may be susceptible to application by one or more international tribunals or institutions³⁰. The problem, therefore, is thought to be the possibility for a state to be subject to contradicting norms or to be faced with contradicting decisions given by different tribunals and based on norms that in principle belong to different fragments or branches of international law.

A tentative path for the solution of the normative fragmentation was designed³¹. The solution to the institutional collisions was thought best to be left for the institutions themselves³².

Regimes are the resulting product of fragmentation (or one resulting product among others, since, maybe, one will not always see the formation of self-contained regimes and may see simple fragments, maybe even individual norms)³³. They may be understood as specific international responsibility regimes³⁴, as an ensemble of rules concerning the same issue-area, or as a more complex system of rules and organizational structures relative to a theme or issue-area³⁵.

The tentative solution to both main problems – the relationship between the regimes and general international law and the irritation between regimes – starts by adopting the Vienna Convention on the Law of Treaties as a guiding framework, if not for any other reason but

²⁸ ILC Report, 2006, para. 8-9; 15.

²⁹ Idem, ibidem, para. 8-9; 13.

³⁰ Idem, ibidem, para. 8-9; 15.

³¹ Idem, ibidem, p. 248-256.

³² Even though, it is stated that: [d]isputes concerning the operation of the regimes may not always be properly dealt with by the same organs that have to deal with the recognition of claims of rights. Likewise, when conflicts emerge between treaty provisions that have their home in different regimes, care should be taken so as to guarantee that any settlement is not dictated by organs exclusively linked with one of the other of the conflicting regimes. ILC Report, 2006, p. 252.

³³ ILC Report 2006, para. 14. See also para. 123-137.

³⁴ Idem, ibidem, para. 138 – 152. I will return to this possibility in the third chapter.

³⁵ Idem, ibidem, 2006, para. 159 – 185.

because all regimes are treaty based (ILC...). It then resorts to the classical techniques for the solution of antinomies – *lex specialis*, the law in time and hierarchy. Of course, because international law is a particular and specific legal system, all these techniques function within it in very specific ways too, especially the notion of hierarchy between the norms.

But it is very important to note that at every moment it is clear that this perspective looks at international law as a unitary and coherent legal system and sees the phenomenon of legal regimes as a challenge that can and should be answered to within this mind frame. This is the perspective from which international law looks at itself from within. In it, regimes appear as manifestations of a tendency, which is problematic and challenging, of fragmentation. The context for fragmentation and regimes is the functional differentiation of life, dividing society in areas or sectors of knowledge and interests. Here, however, for international law, sectoral functional differentiation does not distribute different actors in social clusters, but rather it is the states, or parts of the states, who are at the same time acting and producing special, thematic, regimes of international law.

Because it is still the states who are the producers of international law and its addressees, according to this view, by the law, of the law. Only, the states act, through different parts of its bureaucracy, or even through the same central one responsible for foreign policy, adopting and responding to different rationalities when dealing with different themes of concern and when establishing different normative responses to different problems.

So here we find again the basic determinant for the existence of something called (legal) (international) regimes: the fragmentation of life and society in specific issue-areas of concern, of knowledge, of interaction. Only, here, the regimes of which international law speaks, which are a problematic but integral part of its identity as a legal system, seem to be essentially the same of which speaks the international relations theory literature. The main difference is that the latter does not concern itself neither with the legal nature of the principles, norms, rules, decision-making procedures or organization, or rather assumes their legal nature, nor with their belonging to a legal system which is unified and coherent. And they are not the same regimes of which speaks some of the literature placed at a social theory perspective mentioned above.

1.3.2. Discourses or narratives of legal fragmentation

The legal view just discussed is a dogmatic one and relates to the vision law has of itself and the language international lawyers have to articulate to act within the law.

There is much legal literature on the theme of fragmentation which departs from this dogmatic view and tends to discuss the theme or look at it from more theoretical or problematic points of view³⁶. Some of it discusses the narrative or the discourses concerning fragmentation and shows it against the background of the historic intellectual constructions of international law. Some discusses the underlying philosophical, political options that inform the choices for or against fragmentation³⁷.

And, of course, an important part of the literature deals with the concrete instances of regime collision or friction, between specific regimes, before specific tribunals or decision-making organisms³⁸. Many of those try to offer or discuss theoretical matrixes for the solution of the concrete cases³⁹.

It seems to me, however, that much of the theoretical explanations and proposed solutions suffer from an imperfect construction of the concrete problems and of the concrete way in which tribunals come to deal with cases of fragmentation. More on that will be said later.

1.4 Coherence and communication between perspectives

As mentioned before, the understanding of the notion of regimes and the connected ones of fragmentation and pluralism may be a difficult enterprise if one fails to take into account the differences in perspective – the theoretical underpinnings, the purpose, the question being asked – and the internal logic of each perspective. For it is certain that each perspective should have an internal logic.

Some may take issue with the limited nature of a legal dogmatic take on fragmentation but it remains a valid perspective. On the other hand, the social theory perspective is no less valid, whether one appreciates its expansive and revolutionary conclusions.

However, differences in perspective are not all that explains the difficulties in understanding. I have mentioned before two problems that can and do occur within and between perspectives.

The first of those is the problem of inappropriate borrowing of concepts and reasoning or of inappropriate cross-referencing.

³⁶ See, e.g., KOSKENNIEMI; LEINO, 2002; HAFNER, 2004; SIMMA, 2003-2004; FISCHER-LESCANO; TEUBNER, 2003-2004; ABI-SAAB, 1998-1999; DUPUY, 1998-1999; JACKSON, 1998-1999; SALAMA, 2004; KOSKENNIEMI; LEINO, 2002.

³⁷ See KOSKENNIEMI, 2005; MARTINEAU, 2009.

³⁸ SALAMA, 2005; JACKSON, 1999; DUPUY, 1999.

³⁹ HALBERSTAM, 2009; TEUBNER, 2012.

The view of regimes held by international relations' theorists, as it has been here discussed, is not guilty of this sin, and is only the object of sometimes harmless, sometimes inappropriate reference by the others.

In principle, as it was said, this view has more in common with the one espoused by international law itself, as they both are centred on normative ensembles that regulate states conduct. But international law cannot rely on or find support for any normative contention about the legal nature of the norms or their belonging to a legal system in the international relations theory.

The too liberal relations occur, otherwise, between legal literature and the specific social theory that I have explored here.

Much of the legal discussion makes reference to Teubner and Fischer-Lescano's work⁴⁰. It is sometimes credited with having introduced the discussion of fragmentation in the field of international law⁴¹. The references can only be accepted if one wants to point at another way of looking at fragmentation and regimes, which means pointing at another fragmentation, at another conception of regimes, because the fact is that, as they wrote on regime collisions, they were not talking about international law.

And because this is the case, Teubner and Fischer-Lescano could and should not have borrowed the definition of self-contained regimes that was inserted in an ILC report discussing fragmentation of international law, to describe something completely different that they conceive as being transnational social sectoral regimes.

This example referring to the very concept of regimes, the expected to be central notion of a work dealing with regime-collisions illustrates the second problem that affects the understanding of regimes and fragmentations. Not only it is the most extreme example of inappropriate borrowing, but it consists also in a break of the internal cohesion of the perspective, of its very internal logic.

Indeed, no consistent general theory on the transformation of law's nature, on law's functional differentiation, on regimes and their collisions, and on remedies to such collisions can arise if the concept of regimes needs to be borrowed from dogmatic public international law and if the concept can at best fit very few of the loosely described examples of the fragmented law.

The three perspectives discussed above offer strong representations of the theme of international regimes, even if they are not the only possible ones. Schematically, it's possible

⁴⁰ "Regime-collisions: the vain search for legal unity in the fragmentation of global law", 2004.

⁴¹ MARTINEAU, 2009, p. 4, nota 8.

to say that they announce two big points of view about fragmentation, pluralism and regimes. The first is focused on the State's role as International relation's regulator, and, by extension, at its centrality alongside Public International Law's. The second one escapes from this State and International Law centrality, or at least it is not restricted to that.

This fundamental dichotomy announces the central choice that I made in this paper, it discusses regimes as manifestations of the Public International Law fragmentation (chapter III) and as agglomerates of norms springing from many legal systems and other types of regulation sources (chapter IV).

Before, however, we have to deal with another dichotomy, one that is central to the understanding of regimes and their functioning, namely the relation, opposition or combination, between the notion of governance and that of law, that triggers a discussion on the distinction between law and non-law.

2 Governance – law and non-law – place and reality of IL

Some thought, then, should be given to a necessary discussion that runs parallel with the theme of fragmentation, if it is not totally intertwined with it. That is the question of the nature of law and its role in regulating the world, in our case, international society – which I shall not define in any specific way, in order to keep, for the moment, the general character of the discussion.

Let us choose the following question as a starting point: is there a place, a role, for law in a world, and in a world of thought, dominated by the notion of governance?

A more traditional international lawyer may feel sometimes, and be looked at, as a specimen from long-gone times who has just woken up in a new, more complex world in which the language he or she speaks has no relation to anything real or, at best, describes a very insignificant part of reality.

The notion of governance, though it is conceptually rather difficult to pin down – it is indeed one of those words that, when heard, give us the impression that we know what it means but, if asked, we would have a hard time explaining it – has progressively gained preference and is on everyone's tongue⁴².

⁴² See e. g. ABBOTT, 2008; BÖRZEL; HEARD-LAURÉOTE, 2009; DANN et al., 2007; DAVIS; CORDER, 2009; ESTY, 2011; HARLOW; CAROL; RAWLINGS, 2006; HOOGHE; LIESBET; MARKS, 2003; KEYNES;

Governance can be understood either in more abstract, generic, terms or in more specific, sometimes charged sense. Sometimes, it is accompanied by some adjective or predicative, such as ‘new’⁴³ or ‘without government’⁴⁴.

For our purposes, more important than to define governance – a task that I will not attempt – is to understand how it relates to law and to its role in regulating life.

In this sense, there are two basic types of relationship that can be conceived between the two notions. One that very often is left in our minds as an impression of the discussion is that in some manner they find themselves in adversarial positions, one against the other, governance trying to take the place of law and law trying to resist the invader.

The second, which seems more in accordance with today’s and yesterday’s reality, in as far as one wants to work with the notion of governance as meaning the ways – means and mechanisms – by which society is regulated, is that law is and has always been a part of governance.

This is why the question is precisely what is the place of law in the governance of life – for our purposes, of international life. One radical solution, or answer, would be that law has no place, or that it no longer has a place.

More often, however, the accent on governance as the privileged category is used to indicate that law has a progressively shrinking place in the regulation of social life, loosing space to other kinds of regulatory means⁴⁵.

Of course, both assertions – that law has no role or that the role is shrinking – may be read as meaning that law *as we know it* is destined to obsolescence or to a minor status. And this in its turn may lead to two basic attitudes in the matter: either something else, different from law, is taking its place, or law itself is changing into something else in order to cope with the new realities.

In the latter case the very nature of law and its concept would be seen as evolving, for example, in order to be able to include new or previously excluded forms of regulation.

Of course, it is not excluded that both things may be seen as happening contemporaneously: a transformation of the nature of law and a growing insignificance. If the conceived transformation is that of the phagocytising expansion, how could law be more than

LEO, 2009; KINGSBURY; BENEDICT et al., 2005; KRISCH, 2006a; MICHAELS, 2010; PIATTONI, 2009; SLAUGHTER, 2003; TRUBEK, 2007.

⁴³ See e. g. ABBOTT, 2008; TRUBEK, 2007.

⁴⁴ See e. g. SLAUGHTER, 1997, p. 184.

⁴⁵ See variations of the approach to law and governance at KINGSBURY; KRISCH; STEWART; WIENER, 2005.

it used to be and at the same time less relevant? Only because by transforming in this way it becomes less differentiated.

It appears then that there is no escaping a fundamental question. Whether one wants to say that law has no place, or that its place is shrinking, or that it is transforming, one will have to deal with what is, or used to be, law, and what is not law. It is as inescapable, if not more, to whoever wishes to sustain a somewhat more traditional view of law's role.

This question is very often and voluntarily sidestepped. Of course, the very simple reason for that may be the fact that many people consider the differentiation between law and non-law, and the feeding of the dichotomy, to be a futile and unimportant exercise.

And this is a legitimate choice. However, one cannot relinquish the differentiation between law and non-law and at the same time pretend to be wearing the shoes of a lawyer and adopting a legal discourse or stance. If law does not need to be differentiated from what it is not, then it is potentially either nothing or everything.

Of course, it would make no sense for a thus undifferentiated law to be the object of legal perspective on governance and, for our purposes, on fragmentation, pluralism and regimes, for the simple reason that there would be no relevant meaning for the word *legal* which would not be distinguishable from *non-legal*. Neither category would have a significant existence.

Thus, when one abandons the need to differentiate, one is adopting a different perspective, that of the political scientist, the social theorist, the philosopher, the anthropologist, etc. One may even be a jurist sustaining the argument that, for certain purposes, for example, to observe behaviour in a certain social sphere and decide what influences it, there is no need to put a label on that and call it law or anything else.

In reality, the perspective one adopts has an intimate relationship with the purposes pursued and with the questions one wants to ask. Is one preoccupied with describing reality more precisely, trying to recount who are the relevant actors, how they act or interact and why they do it in certain ways? Or is one simply concerned with finding the right terminology, the right names for things, law, regulation, governance? Or is one making normative assertions on how things should be or become?

Then what is the purpose of thinking and talking about law, as part of governance if we will, and, more specifically, when dealing with the idea of regimes?

The starting point is this: does something called law influence behaviours, participate in the regulation of the social space and serve as a mechanism to decide on the correctness of behaviour and to solve disputes? If the answer is positive, the next question is this: in order to

understand how law does what it does, do we need to know how it functions? And does the way it functions depend on the image law has of itself and of the language, the code, that is internal and specific to law?

Since this internal language, this internal logic differentiates between what is inside law and what is outside, and since it determines how law performs its functions and influences social behaviour, in order to describe reality, we cannot do away with the differentiation.

2.1 Law and non-law

We come back to the question concerning whether it is useful to determine whether something, some kind of provision, contained in some instrument, resulting from some inception process, is or is not law.

Much ink has been used to defend positions that either tended to be restrictive, protective of the exclusivity of the legal status, or to be extensive, opening the realm of law to more, specially new, categories of prescriptions or simply of language.

In the international arena and elsewhere, everywhere in fact, there is a permanently ongoing discussion on whether prescriptions (normative language, therefore) that are not produced by the state, or do not come about through the recognized sources of law, or are not intended to be binding, or do not contain obligations, or lack enforceability, etc, may or may not be considered law

Of course, as I have pointed out before, this question is resolved differently depending on the concept of law that is espoused by the person seeking to answer the question. The answer will depend on whether or not the observer considers, for example, that law is necessarily and exclusively made of norms, that these norms need to be valid, that validity is a consequence of specific procedures being followed by specifically empowered actors, that the norm needs to be recognized as part of a specific legal system, etc.

However, even though it awakens passionate debates and polemics, it may very well be that the question whether something is or is not, in its nature, essence or substance, law, is a useless one; at least unimportant to some extent.

First of all, it is assumed that the construction of arguments and reasoning to demonstrate that something is law is an especially important need for those who find themselves outside the canonical conceptions of law. If you wish to agree with Kelsen, Hart or Raz, your work is cut out for you.

But in fact, if one wishes to say that something is law because it has legal effects, or because it makes expectations converge, or because it gives reason to act, or because it is effectively implemented by its addressees, even though this something does not spring from the traditional sources and is not binding, one is doing nothing more than describing that something, telling about its effects on reality and nothing more.

To call that something law has no special consequences. To say that this something is law because it affects behaviour and to say that this and law both affect behaviour have both exactly the same bearing on the description of reality.

The question gains importance, however, when by asking whether something is law we are indeed asking whether that something belongs to a specific legal system. In this sense, it is one thing to say that a certain kind of prescription contained in a specific type of instrument, is, generically speaking, law, and it is another to say that it is an integral part, say, of public international law.

It is much easier to advance the argument of the general legal quality of certain types of prescriptions or instruments than to demonstrate that they belong to a specific legal system.

To demonstrate the belonging to a specific legal system one has to adopt the internal point of view of the system, one has to look at the system and see it as it sees itself. In other words, only what the system recognizes as belonging to it can pretend to be a part of the system.

Domestic legal systems and public international law tend to differentiate between what is law and what is not by having recourse to the binding character of legal prescriptions and their validity. But even if, theoretically speaking, one could debate about the meaning of the binding character and about the necessity of such criteria for identifying law, and even admit that a legal system does encompass non-binding legal prescriptions, the fact remains that even such non-binding prescriptions must be recognized as belonging to the system. For this to happen, they must have integrated the system by one of the recognized mechanisms, by one of its admitted sources⁴⁶.

Of course, one may always sustain that the legal system should change or has already changed, and that the traditional set of sources does not reflect the reality of the coming into life of law. Such arguments, however, either mean simply that some non-recognized prescriptions influence the behaviour of the legal system's subjects and this, by itself, has no

⁴⁶ See NASSER, 2006, p. 59 e ss.

bearing on the legal character of the prescriptions, or are expressions of a militant effort to change the legal system.

If the system has already and really changed, incorporating, for example, new sources to its list, nothing changes in substance since it is still the system to say when a prescription is legal and is part of the system⁴⁷.

For our purposes, as we look at regulatory or legal regimes that operate in the international sphere, we may have to deal with a sequence of questions: i) whether the prescriptions, the rules, the norms, are legal in their nature – considering though, as has been said, that in itself this question may be devoid of importance; ii) whether the prescriptions, rules or norms belong to public international law or to other known, domestic, legal systems; iii) whether they would belong to and constitute a different, specific, legal or normative system.

A guiding key to understand our overall theme – the existence and nature of international legal or normative regimes – which runs in parallel with these questions on the legal nature and belonging to a legal system, is represented by another set of questions: i) one can ask how some theme, specific or general, some issue-area is regulated by public international law; ii) or one can ask whether and how the theme or the issue-area is regulated, full stop; iii) and one can ask whether there is a global or international regime to deal with the theme or issue-area.

Since the social sphere we are looking at is the international society, it is the relationship between law and governance at the international or global level that will appear as more relevant. One could look at how domestic law relates to what could be called global governance, but most probably this would only be feasible – in any way other than a purely theoretical one – by looking at particular domestic legal systems. This is not my intention. I will focus on public international law.

Of course, someone may say that international law, as historically understood, is today responsible for so little of the organization of the post-modern world that it is hardly worth talking about, and, therefore, there is no need to master its internal language. Others may say that it is this internal language that is out of date and in need of transformation in order to allow international law to cope with new realities.

Essentially, therefore, we are left with two main questions: what is the importance of the role played by international law and what are international law's known or transformed characteristics?

⁴⁷ See NASSER, 2006, p. 60.

In other words, we are first invited to consider a set of primary investigations: is international law worth talking about? Does it exist? Does it operate in any significant manner? Is it important to know whose behaviour it regulates and how it does it? Is it important to know what its relationship to other types or ensembles of regulation is?

But we should not forget that the official excuse for this is the discussion of the notion of regimes. How exactly does this discussion get entwined with the one on the place of law in governance?

Well, if we accept the first contention on the fact that life is becoming (more) fragmented and that to this fragmentation corresponds the formation of ensembles of regulation, clusters of governance if we will, then the relationship between law and the rest of governance happens not only in general but will be reflected, potentially, in every single partition of the governance of life.

That is why I will discuss later the way in which legal systems come together and combine with non-legal regulatory mechanisms to effectively regulate sectors of international life.

But this partition of life, whether it is new or old, does not only serve as a key to understand the interplay between legal systems and other types of regulation. It also gets reflected within the legal systems and, in our case, in international law.

I will then, first deal with international law and its functioning, and discuss the notion of international legal regimes within this legal system. Then I will turn to the discussion of regimes as meeting points to law from different legal systems and non-legal regulation.

3 Public International Law and Fragmentation

According to its internal language, international law is essentially, and still today, an interstate legal order. Of course, one can insist that in a world in which the state is no longer the main actor, such a legal system is no longer adapted to the social reality. But the fact is that the international society was never exclusively made up of states and the growing role played by other actors is just one aspect of its transformation. What has not changed however is the fact that the state is still the main actor. And, even if this were to be proved wrong or false, the fact is that public international law is produced and operated in the system composed by states. If it were to change in this essential characteristic, it would be another, different international law. This one has not vanished yet, even if, as any other legal system, it is founded on a fiction.

And it is a powerful fiction. One can always discuss whether it is true that states are sovereign, whether they really are only bound by legal norms which they have accepted voluntarily, whether other actors are or are not affected by these norms, etc. But it remains true that what we call international law comes about (its norms are created) through the states, that it regulates directly and primarily only the states or whatever entity the states create or will that it be bound by the rules, and that there is a consensus on what is needed for a norm to be considered valid and what is needed for the norm to be applicable to any particular state or entity.

When two states or a group of them or organizations and entities authorized by them, appear before an international court or other decision-making body created by international law, asking that a dispute be resolved in accordance with the law as it emerges from valid sources, they are not living in some sort of bizarre world or speaking a dead language.

*3.1 The determinants of the double fragmentation of international law*⁴⁸

The idea of functional differentiation of society is, as we have seen, central to the notions of fragmentation of law and of legal pluralism. In many ways, the view that social actors emerge and interact around specific themes or issue-areas is essential to the understanding of the phenomenon that brings together clusters of norms, rules or regulatory tools in general. In many ways, it seems impossible to conceive or understand these clusters, these regimes, without reference to their underlying theme or issue-area.

This division of life, this specialization trend, is a driving force behind the formation of legal or regulatory regimes. The theme, it is thought, will determine or will correspond to an *ethos*⁴⁹, to the overarching objectives of the regime and its norms⁵⁰.

Depending on the perspective from which one looks at fragmentations or, if we will, depending on the type of fragmentations one is talking about, the theme may help determine who is expected and who is entitled to produce the norms and create the organizations. And it may determine as well who are the actors whose expectations the regime is supposed to attend to and whose behaviour it is supposed to regulate.

⁴⁸ Korth and Teubner (2012) make reference to a double fragmentation they identify in global law, alongside two types of pluralism. The definitions differ from those proposed here.

⁴⁹ According to Merriam-Webster Dictionary: “the distinguishing character, sentiment, moral nature, or guiding beliefs of a person, group, or institution”.

⁵⁰ See, e. g., KOSKENNIEMI, 2007, *passim*.

As we have seen, this relationship between the theme and the actors may be more adequate for the systemic social theory perspective which views the regimes mainly as epistemic communities and as the legal manifestation of the functional fragmentation of society. For this perspective, the actors who take part in the constitution of the regimes and who have their behaviour regulated by them are themselves functionally differentiated sectors of society⁵¹.

On the other hand, from what we have seen of the traditional international relations theory perspective of regimes, the issue or the theme of the regime does not determine the relevant actors. There the relevant actors are predetermined. The states are viewed as the determinant actors of international relations and they are the ones who tend to regulate their own behaviour around issue-specific lines⁵².

The same is also true for public international law. Here fragmentation and the multiplication of regimes is a (new or increasingly relevant) trait of an international law that continues to be created by states and directed at states' behaviour. The functional differentiation of international life, in this realm, means the multiplication of issue-areas in which interaction between states occurs and needs regulation.

This is why, essentially, in international law, the discussion on its fragmentation is concerned with the potential occurrence of situations in which *states* will be subjected to divergent legal norms, belonging to different international law regimes, and or subjected to different proceedings before law applying institutions that are part of different international legal regimes.

The more general phenomenon of sectoral differentiation in society is filtered, therefore, and limited. In the case of international relations theory, the filter is the disciplinary or theoretical choice made: the state as the central actor of the political and societal interactions. In the case of International law, the filter is the internal logic of the legal system that sees the state as the primary legislator and primary subject.

For International Law, therefore, its fragmentation is due to the differentiation of life yes, but the effects of such differentiation suffer a limitation, as it cannot determine the actors (legislators and subjects) of the issue-specific regulation. The social actors other than the states that are necessarily involved in the social sector will affect international law only indirectly and be affected by it indirectly, through the action of the states.

⁵¹ FISCHER-LESCANO; TEUBNER, 2003, p. 1007-9.

⁵² KRASNER, 1983, p. 1.

But the specific characteristics of international law as a legal system do not only limit the way in which fragmentation occurs within the system. These characteristics operate as well as a facilitator of the system's fragmentation, which, although related to the functional or sectoral differentiation, is not totally determined by it.

In other words, international law is not only increasingly fragmented because different themes demanding its regulatory action give rise to fairly autonomous differentiated regimes according to diverse logics, but it is also fragmented in another sense, because each state has the prerogative of deciding whether it wants to or accepts to be bound by each norm, treaty or regime (excepted, of course, the relatively newly accepted general, *erga omnes* or public order norms).

Of course, in this sense, fragmentation is a basic mathematical operation: every one of a historically large number of states decides, by taking part in the norm creating processes, whether and when it wants to be bound by any of a number of norms that augment at a geometric progression rhythm. For this reason, the one question that could always be asked (and needed to be asked indeed), whether in every particular case a particular state was bound by a particular legal norm, needs still to be asked but now it is being asked many more times.

There is, therefore, a different kind of fragmentation in international law, one in which the fragments are the different sets of norms by which each state is bound and the different sets of norms by which a pair or a group of states is bound. In fact, every time a norm is added or subtracted to the normative set and every time a state starts or stops being bound by a norm or a set of norms, a different fragment will result.

When these fragments are composed of rules that have some degree of familiarity with one another, because their combination presents some unifying element or aggregator, perhaps they can then receive the name of regimes.

This aggregating element can be geographical – when, for example, states belonging to the same region celebrate agreements or are bound by regional customary law – or may relate to categories of states, albeit in different regions of the world, who have similar characteristics or related interests.

Perhaps we could then talk about a regime bearing in mind something like a Latin-American international law, for example, or as an international law of developed countries.

But the most usual would be to speak of sets of international law that either bind certain states or regions or are open to all States of the world, and that deal with specific themes. Then there would be a regime, Latin-American or international, for the protection of human rights, one for disarmament, and so on.

Although the subject matter, the functional differentiation, seems to be the most usual and most natural key for the existence of regimes, the truth is that it is not easy to identify and delineate the boundaries of international regimes.

3.2 Difficulties relating to the identification of legal regimes in international law

As we have seen, the prevailing idea is that a regime is an aggregate of norms and institutions regulating a theme or issue-area which is of concern to states and or other social actors, and that each regime is governed by a specific ethos or logic.\

3.2.1 The theme and the self-contained regimes

There is no doubt that an unlimited number of themes can be thought of. Some of the traditional ones, of which we will have the opportunity to discuss more, are: the environment, human rights, international security, war and peace, trade, development.

A theme, however, is not defined by nature but by communicative conventions, and the number of imaginable themes is infinite. Thus, the mere existence of a theme, even if superficially conceived, to which one can connect one or several norms of international law either does not necessarily give rise to the emergence of a legal regime or, if it does, this will pose serious problems for the theoretical and practical implications of the very idea of international law's regimes.

Let us imagine an example. One can conceive a few themes: the Amazon forest, deforestation, climate change, the environment. One will easily identify norms of international law that bind different sets of states and which deal with each of these themes. However, can one say that there is a regime for each of these themes?

The mere fact that one can conceive of a theme and find norms that relate to it cannot mean that to that theme corresponds a regime. If that were the case, there would be an infinite number of those and the usefulness of the concept would be null.

Not only that, but among the infinite number of themes, some, more general, will tend to include others, more specific. If for each theme with connected norms there is a regime, then we would be facing a Russian dolls scenario, with regimes contained in regimes contained in regimes.

Let's deal then with the question of the usefulness of the notion of international legal regime.

I think we have to start with this: the regimes – and the concept – do not transform or affect the operation of international law; more specifically, they do not change how international law is interpreted and applied⁵³. Regimes are rather a manifestation of the structure and functioning of international law, now in a different way, which is the mechanism of the genesis of its rules and its institutions.

The concept serves to represent, to explain, how states can create or bring about various standards and norms on various topics and can create various organizational structures, perhaps guided by specific concerns and potentially conflicting logics.

The problems resulting from this basic fact of international law, that the notion of regimes has deepened, are the possibility that norms belonging to different sets, inspired by different logics, are carriers of contradictory contents and the possibility that different entities also decide in conflicting ways as they interpret or apply the rules differently.

The notion, therefore, does not change the reality of international law, does not change the way legal problems are resolved; what it does is try to explain and portray this reality and point out the problems that may be faced when the solution of legal issues in a system so fragmented by the themes and approaches is pursued.

First I shall explore the regimes as a description of reality and then deal with the way problems and their solutions are presented.

As we are dealing with public international law and its fragmentation, it is only appropriate that we address the approach that the report of International Law Commission, to which I alluded above, offers.

There are three limitations contained in the report. First, the report refers to regimes as a manifestation of fragmentation but not the only one. The second is that the report chooses to speak of regimes as arising primarily, if not exclusively, from treaties, thus leaving out other usual standards. The third is the focus on the relationship that the regimes have with the general international law and not so much on the relationship between the regimes themselves.

That being clear, we can see that the report tells us three different things that can receive, and do receive from the report itself, the name of self-contained regimes.

⁵³ There are possible objections to this affirmation, which I will address ahead.

In a narrower sense, “... the term is used to denote a particular set of secondary rules under the law for States, which aims to take precedence over the general rules concerning the consequences of a breach”⁵⁴.

In a broader sense, “... the term is used to refer to integrated sets of primary and secondary rules, sometimes also referred to as ‘systems’ or ‘subsystem’ of rules which cover a particular problem differently than would be covered under the general law”⁵⁵. This report reminds us that, when used in this sense, the term *self-contained regimes* merges with the contractual bias of treaty law, a bias whereby, with conventional standard, there is no need to seek applicable others in the general law nor in customs⁵⁶.

There is still a usage, that is usual according the report, which extends the notion of the self-contained regimes to “... whole fields of functional specialization, diplomatic and academic expertise”⁵⁷. It is understood that in such fields as human rights law, law WTO, European Union law, humanitarian law, law of space, among others, special rules and techniques of interpretation and administration shall apply, with the removal of the divergent principles contained in the general law⁵⁸.

We are told that the main effect of these sets of norms, if understood more broadly, as “branches of international law,” is to provide interpretive guidance and direction that somehow deviate from the general law. This sense of the term would cover “a broad set of interrelated regulatory systems” and the “degree to which it is thought that the general right is affected varies greatly”⁵⁹.

54 In a narrow sense, the term [self-contained regime] is used to denote a special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation. ILC Report 2006, vide nota 32.

55 In a broader sense, the term is used to refer to interrelated wholes of primary and secondary rules, sometimes also referred to as “systems” or “subsystems” of rules that cover some particular problem differently from the way it would be covered under general law. ILC Report 2006, see footnote 34. The examples cited are telling: the regime of judicial cooperation between the International Criminal Court and the States Parties or the techniques for the interpretation of the European Convention of Human Rights as an instrument of European public order.

56 ILC Report, 2006, p. 68.

57 Idem, ibidem, p. 68.

58 But an occasional use of the notion of “self-contained regime” extends it even further than the S.S. Wimbledon case. Sometimes whole fields of functional specialization, of diplomatic and academic expertise, are described as self-contained (whether or not that word is used) in the sense that special rules and techniques of interpretation and administration are thought to apply.¹⁵⁶ For instance, fields such as “human rights law”, “WTO law”, “European law/EU law”, “humanitarian law”, “space law”, among others, are often identified as “special” in the sense that rules of general international law are assumed to be modified or even excluded in their administration. ILC Report, 2006, p. 68

59 A self-contained regime in this third sense has effect predominantly through providing interpretative guidance and direction that in some way deviates from the rules of general law. It covers a very wide set of differently interrelated rule-systems and the degree to which general law is assumed to be affected varies extensively. ILC Report, 2006, p. 70; 81.

Note that, first, all three senses in which the term is commonly used, according to the report, bring the three limitations that I mentioned above. And notice, then, that it is only relatively easier to identify and delineate a system when it is thought more narrowly, as in the case of the second type and especially in the first type.

But it should be noted that these regimes are only definable according to the combination of the topic of concern with other criteria, which indeed give the contours of their application: the states that are part of the specific mechanism of responsibility or subsystem, the type of response to violations, the institution in charge of applying the answer or the rules of the subsystem etc.

When, however, we speak of regimes as larger subsystems, as branches of international law, the definition becomes more difficult because the theme – human rights, the environment, commerce etc. – does not receive the support of other criteria with the same precision or to the same extent. In fact, in the universe of rules that deal with each of these themes or concerns, there are several different answers to specific violations and, more importantly, there are several subsystems that meet diverse groups of states and there are several institutions charged with the administration of different sets of standards.

Let us return, to give concreteness to the discussion, to the example cited earlier of four issues related to environmental concerns: the Amazonian forest, deforestation, climate change and environment. It can be said that the first three are related to the general subject constituted by the latter, the environment. It is also true that all these issues have many things to do with so many others, trade, human rights, development etc., but we leave that aside for now.

If the environment is the most comprehensive theme, and the rules and institutions related to it constitute the specific branch of international law, then it is understood that the sets of rules and organizations connected to other issues are what is described as interconnected subsystems within the broader set.

The fact is that it is virtually impossible to know all the rules that refer to each subject and it is difficult to know which institutions are part of each system or subsystem – and even more to know which institutions are likely to act on the issues even if they have not been created by the rules of the scheme and therefore not properly a part of it.

In any case, as they are difficult to define, much of the internationalist legal literature does not seem ready to relinquish the category, although it would perhaps call it by another name, which it considers central to the understanding of friction and collisions between different sets of regulatory arrangements. This literature recognizes that the boundaries of the

regimes are not necessarily clear but still considers them as recognizable and organized around a theme and guided by an *ethos*.

3.2.2 The *ethos*

It may be, then, that the *ethos* is the central criteria that could give regimes their unity and, as it is thought that different regimes have divergent *ethos*, would explain the relevance of the potential collisions or frictions between regimes.

But what exactly is the *ethos* of a regime? The term could be understood as the disposition, character, or fundamental values peculiar to a specific person, people, culture, or movement. But is it an orientation, a motivation, that is to be found at the moment in which the regime was constituted or its norms created? Is it the sense that arises from the norms as they are? Is it the orientation or the tendency of states and institutions to interpret and apply the norms in certain ways? Is it the actual result of the operation of the regime?

Let us suppose the existence of an international legal regime of trade. And let us suppose that this regime's *ethos* is the idea that trade should be as free as possible. One can try to verify whether the states, as they created and as they continually recreate the regime, act under the real or declared inspiration to move towards greater freedom in trade.

Or one can seek to identify the freedom of trade as what results from the systematic reading and interpretation of the norms, from their contents.

Or one may ask whether, as the institutions of the regime, for example the ones charged with the settlement of controversies, act, interpret and apply the norms, they do so with a tendency to accomplish the result of greater freedom of trade.

Finally, one may ask whether the regime as a whole and as it functions really gives rise to such increased liberty.

Of course the formulation of the *ethos* need not be one and undisputed. Someone could say that greater and better development, economic or more general, is or should be the *ethos* of the trade regime rather than the freedom, the latter being a means to an end.

And the same questions would be put to the newly established or identified *ethos*. Knowing the *ethos* of a regime is, therefore, a matter of choice and perspective in the sense that I may choose to think and say that a regime's *ethos* is this or that.

But admitting that a regime is affected by something that can be called an *ethos*, as a regime is expected to be dynamic and able to evolve, there should be no theoretical impediment for the regime's *ethos* to change and evolve itself.

Moreover, there is nothing to say that one will not find different answers to the diverse questions conceived of before: what are the intentions or orientations of the states, even if only declared? What comes out from the content of the norms? What is the mindset of the institutions as they interpret and apply the norms? What is the actual result of the functioning of the regime? The same regime may, therefore, be found to have more than one ethos, so it seems.

3.2.3 Relations between regimes

There is still a problem that affects both the delineation of regimes and the possible relationships between them. Whereas a rule of international law can be present in more than one legal instrument, as it may arise from more than one source, nothing prevents a rule from belonging to more than one regime, or from belonging at the same time to a regime and to general international law.

It is equally certain that disputes concerning the rules of the regime may fall under the jurisdiction of a court of broader jurisdiction. The International Court of Justice is only the most obvious example.

And it is also true that some international institutions have explicit competence for the administration of what could be several different regimes. Note, for example, the role of the World Bank on the issues of environment, development, human rights, trade, foreign investment etc.

These points state the difficulty in delimiting the regimes and provide evidence of problems related to the idea of the relative autonomy of regimes, in relation to each other, and in relation to the accepted notions of collisions and frictions among them.

Let us consider four candidates to the status of regimes in public international law: the regime of peace and security; the regime of human rights; the regime of humanitarian law; the regime of international criminal law.

First, in relation to a regime's borders and content: does the regime of international peace and security limit itself to the corresponding chapters of the UN Charter? Does it include the treaties on nuclear proliferation? Does it include other treaties or regimes concerning disarmament? Does it include international humanitarian law? The same questions could be asked about international human rights law. Does it include humanitarian law and international criminal law?

Second, in relation to the sequestration of the ethos and of the theme: when the UNSC creates an international criminal tribunal or refers a case to the ICC, is it acting in accordance with the rules contained in the peace and security regime and safeguarding this regime's ethos or is it acting under the rules of the international criminal law and safeguarding this regime's ethos? And in this case, the UNSC would be seen as an organ that is part of which regime? Or can it belong to more than one? Or is the SC actually sequestering the second regime's ethos and submitting it to the politically charged ethos of the regime to which it belongs?

Third, in relation to the cross-referencing between regimes: when international criminal law refers to human rights law and to humanitarian law in order to define the crimes, what does this tell us on the specific identity of each regime⁶⁰?

3.2.4 The answer that comes from the norms

What remains clear, therefore, is that both the conceptualization of regimes and the drawing of their boundaries based on the themes and based on the ethos are virtually impossible or would be exercises attempted with a high degree of inaccuracy.

However, the notion of regimes should have a chance to prove itself useful. For that to happen, one needs to seek the criteria for their existence on the side of the normative sets. It will be the identity and characteristics of the normative standards that will allow the determination of the issue for which there is a regime and not otherwise.

The only way to do this is to find if there are legal criteria for the recognition of regimes. One can only understand the limits, the boundaries of self-contained or special arrangements if these are determined from within, by the rules of the scheme to the extent that they determine its scope, its relations with other rules of the system, with related standards on the same theme, with norms of other schemes, and to the extent that they establish jurisdiction or recognize the jurisdiction of courts or other institutions.

This is true whether we speak of regimes or not. Accordingly, if the system has an ethos or principles or objectives that are recognizable, they will be given by the rules. This is the delineation of regimes from within, and, accordingly, the original functional differentiation. What is functional from within is what makes the legal system.

⁶⁰ International Criminal Tribunal for Rwanda. *Jean Paul Case*, Sentence, 02.10.1998 (Case N.: ICTR – 96 – 4 – T). International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, *Caso Zlatko Aleksovski*, 1999 (Case n. IT-95-14/1-T).

3.2.5 Collisions and conflicts

As I had already announced, the emphasis is often placed on possible relations of shock or conflict between the regimes, especially in collisions that can lead to antinomies and contradictory decisions and, therefore, bring about legal uncertainty.

The first possibility is that a state is bound by contradictory norms arising from distinct regimes. That is, for example, bound by rules of international trade, commanding the freedom of trade and bound by rules of international environmental law to restrict.

The second possibility is that different institutions, related to different regimes, are called to decide on the same factual set and to apply contradictory norms or rules, and reach decisions that are incompatible.

A third possibility is that different institutions, perhaps also related to various schemes, are called to decide applying the same standards, but interpret them in different ways and, again, reach contradictory conclusions.

Whatever the case, the primary concern is the possibility that the normative content or its interpretation and application by various institutions do command divergent behaviours for the States.

It is clear that there is implied the broader risk that, in an environment of normative inflation, a general uncertainty about norms and institutions is established and that these do not coordinate because they belong to regimes, again, guided by different rationalities and pursuing different efforts.

The fact is, however, that these same problems may arise, and they present themselves, in international law, regardless of the notion of regimes, and regardless of notions of themes and *ethos*.

But it is true that the regimes can act as a complicating issue. Still, the portrait of these conflicts often presents problems in an unreliable manner and, in any case, the solutions are the same and should be sought in the technique of international law.

3.2.6 An illustration

One of the most often cited cases in which the problems arising from fragmentation are thought to appear in their full strength is the sequence of decisions made or undertaken by international courts and arbitral tribunals in the MOX plant cases⁶¹.

⁶¹ ITLS. Mox Plant Case. (Ireland vs. United Kingdom) Provisional Measures based on the United Nations Conventions of the Sea on its art. 290 § 5° n. 10, Order 2001/5, 2001. Available at: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/2001-5.13.11.01.E.pdf>; TIDM. Mox Plant

These are usually presented as an illustration of how the same set of facts may be brought before several decision-making bodies (institutional fragmentation) who would be called upon to potentially apply diverse sets of norms (normative fragmentation).

It is true that the factual starting point is the same: the construction of a MOX⁶² plant on the territory of the United Kingdom to which Ireland objected. And it is true that several international law norms bound both the United Kingdom and Ireland and could be relevant to the generally stated controversy. They were both parties to a convention on the protection of the Northeast Atlantic⁶³. They were both parties to the Convention on The Law of The Sea⁶⁴. And they were both members of the European Union, and they were therefore bound by all of Community law.

As it looked for ways to impede the coming into being of the plant and its functioning, Ireland developed several grievances towards the United Kingdom. One of them related to the amount and quality of information given to it by the latter. As it felt that the information was not satisfactory it decided that the UK was not complying with an obligation contained in article 9 of the OSPAR convention.

This convention contained a dispute resolution clause that was used by Ireland to begin an arbitral proceeding⁶⁵. The arbitral tribunal had to deal with one specific legal question, regarding the compliance with article 9. Accordingly, it had to deal with a specific factual universe, which had direct relation to the legal question under consideration.

Ireland also felt that the United Kingdom was in breach of several norms of the convention on the law of the sea (UNCLOS) and, in accordance with the conflict resolution

Case (Ireland vs. United Kingdom) Provisional Measures, n. 10, Order 2001/3, 2001. Available at: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf>; PCA. Mox Plant Case, (Ireland vs. United Kingdom), Order n. 1 – Ireland’s Amended Statement, 2002. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Order%20no1.pdf>>; PCA. Mox Plant Case, (Ireland vs. United Kingdom), Order n. 2 – Time-Limits for Submission of Pleadings, 2002. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Order%20no2.pdf>>; PCA. Caso Mox Plant, (Ireland vs. United Kingdom), Order n. 3 – Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 2003. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf>>; PCA. Mox Plant Case, (Ireland vs. United Kingdom), Order n. 4 – Further Suspension of Proceedings on Jurisdiction and Merits, 2003. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Order%20No4.pdf>>; PCA. Mox Plant Case, (Ireland vs. United Kingdom), Order n. 5 – Suspension of Periodic Reports by The Parties, 2007. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Order%20No5.pdf>>; PCA. Mox Plant Case, (Ireland vs. United Kingdom), Order n. 6 – Termination of Proceedings, 2008. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf>>; ECC. European Commission vs. Ireland, Case C-459/03, 2006. Available at: <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003CJ0459:EN:PDF>>. See ILC Report, 2006, paragraphs. 10-13.

⁶² “Mixed oxide fuel”.

⁶³ Available at: <http://www.ospar.org/content/content.asp?menu=01481200000000_000000_000000>.

⁶⁴ Available at: <http://dai-mre.serpro.gov.br/atos-internacionais/multilaterais/direito-do-mar/m_487/>.

⁶⁵ ITLS. Mox Plant Case. (Ireland vs. United Kingdom), Ireland Memorial, Volume 1, 2002, §§ 4.35-4.36. Available at: <<http://www.pcacpa.org/upload/files/Ireland%20Memorial%20Part%20I.pdf>>.

rules contained in it, started another arbitral procedure⁶⁶. This second arbitral tribunal also had to deal with specific legal questions, concerning the breach of specific legal norms and, accordingly, to deal with the related factual background.

Because it felt that provisional measures were necessary, also in accordance with the convention, Ireland requested that the International Tribunal for the Law of the Sea (ITLOS) order them⁶⁷. The ITLOS had, therefore to deal with the legal question of whether provisional measures were warranted and what they should be. It had to be convinced that the factual prerequisites were present for that purpose.

Finally, because the European Commission⁶⁸ felt that the provisions of the UNCLOS whose breach Ireland was arguing before the arbitral tribunal had been incorporated in Community Law, it brought a complaint before the Tribunal of the European Community against Ireland for breach of an obligation to resolve cases between itself and another state party to the Community concerning Community law before its institutions⁶⁹. Here, again, the Tribunal had to deal with a specific question and with its related facts: whether Ireland had breached an obligation arising from Community Law.

In reality, therefore, each tribunal was trying to respond to different legal questions, dealing with different, even if related, sets of facts, and asked to apply different norms, from different regimes, if we want. One was to apply article 9 of OSPAR, the other was to apply certain norms of UNCLOS, the other UNCLOS rules on provisional measures, and the last one was to deal with Community Law.

The only moment in which the problematic traits of fragmentation show themselves more clearly is at the crossing between the arbitral tribunal called to apply UNCLOS and the Tribunal of the EC. The normative interaction appears more clearly but only because one regime or, to be more precise, one legal system which in many things is equivalent to a closed domestic legal order, the EC law, has incorporated in itself, norms that constitute a part of what would be seen as an international law regime.

⁶⁶ ITLS. Mox Plant Case. (Ireland vs. United Kingdom), Provisional Remedy based on the United Nations Conventions of the Sea on its art. 290 § 5° n. 10, Order 2001/5, 2001. Available at: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/2001-5.13.11.01.E.pdf>; ITLS. Mox Plant Case. (Ireland vs. United Kingdom), Provisional Remedy, n. 10, Ordem 2001/3, 2001. Available at: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf>.

⁶⁷ European Comission – Legal Service, Sumary of Important, Case C-459/03 (Comission vs. Ireland), 2006.

⁶⁸ European Comission – Legal Service, Sumary of Important, Case C-459/03 (Comission vs. Ireland), 2006.

⁶⁹ ECC. Commission of the European Communities vs. Ireland, Case C-459/03, 2006. Available at: <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003CJ0459:EN:PDF>>.

The institutional contact or friction is manifested in the decision of the arbitral tribunal to suspend its proceedings as it expected the EC Tribunal to make its decision⁷⁰. This deference is not based on any belief that while having to apply a same set of norms, the EC Tribunal had precedence over the arbitral tribunal because, in fact, they were not being called to resolve the same legal question or to apply the same legal provisions. The decision was based on the belief that if the EC Tribunal was to decide that Ireland had violated EC law by commencing the arbitral proceedings, these would very naturally come to an end⁷¹.

4 A Global regulatory constellation?

If we approach the matter from the side of the theme or issue-area of international life, as we ask ourselves how and by what it is regulated we can be faced with a variety of possible answers.

We may discover that the theme is completely regulated by public international law, meaning that all regulation pertaining to the theme is to be found within international law and is recognized as constitutive part of this legal system. We may find that the issue-area is regulated by both international and domestic law. Or we may find that alongside the legal prescriptions that are part of either international law or domestic law, or of both, there are other types of regulation, other instruments, whose legal character may be discussed and which are produced by one type of actor or a plurality of those, but which have in common the undeniable fact that they actually regulate behaviour in a specific social sphere or among certain actors, in relation to certain themes.

We may like to think that the ensemble of prescriptions, or norms, that deal with a specific issue-area constitutes a, regulatory regime, maybe a legal one. If we ignore or consider unimportant the exercise of determining whether parts or the whole of the prescriptions are law and whether all or some of them belong to one or other legal system, we are choosing as sole organizing element the fact that the regulations deal with a specific theme.

⁷⁰ PCA. *Caso Mox Plant*, (Ireland vs. United Kingdom), Order n. 3 – Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 2003. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf>>; PCA. *Mox Plant Case*, (Ireland vs. United Kingdom), Order n. 4 – Further Suspensions of Proceedings on Jurisdiction and Merits, 2003. Available at: <<http://www.pca-cpa.org/upload/files/MOX%20Order%20No4.pdf>>.

⁷¹ ECC. *Commission of the European Communities vs. Ireland*, Case C-459/03, 2006. Available at: <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003CJ0459:EN:PDF>>.

As we do that we condemn ourselves to only describing how something is regulated. However, even such a merely descriptive exercise would be incomplete since one cannot actually describe how something is regulated overlooking the question of whether this or that prescription is or is not binding, whether it may or may not be enforced by a jurisdictional body, etc.

Alternatively, we may find that to properly describe the ensemble of norms or prescriptions dealing with one chosen issue-area, we must take into account whether they are legal, in the sense that they belong to a legal system, whether this legal system is public international law or a domestic legal order, and, if they do not belong to either, whether we choose to uphold the thesis that they are nevertheless legal, because they are part of a third or specific type of legal system that operates only around that theme, between those actors, for a specific set of legal subjects.

Our theoretical options are, therefore: i) to consider that each regulatory ensemble is a legal system which, by recognizing the prescriptions relating to the theme, gives them legal character, and this will pose the problem of whether prescriptions belonging to international or domestic law are incorporated, reproduced, into the specific legal system, or are simply recognized for purposes of application; ii) to consider that the theme is a meeting point, a point of convergence, of different legal systems, when there is more than one involved, whose prescriptions regulate together the specific issue-area, in combination, if it is the case, with non-legal prescriptions and or with what is called private regulation.

Indeed, very often, when one looks at any global theme, environment, security, trade, food safety, and the list goes on, one may find international law, of the traditional kind, dealing with it. This means that one will find treaties and/or customary norms and/or general principles of law, springing from the usual, recognized sources of the legal system, dealing with the issue, regulating the field. These international law norms will be found to be, as expected, valid and binding, and their inobservance by states, the usual recognized subjects, will give rise to their international responsibility. If there is delegation to a body with established jurisdiction, such body will interpret and apply the norms to cases eventually brought before it.

Very often as well, one will find that other prescriptions, created by states or other actors, springing from sources different from those recognized by international law, also play a part in ordering, organizing life and behaviour in relation to that specific field or theme.

These prescriptions will emerge from resolutions or decisions by international organizations, from informal agreements between states, from codes of conduct and from a great number of other types of instruments or mechanisms.

Many of these, because they are so close to the mechanics of international law and are intimately related to the activity of states and international organizations, give rise to the question of their legal character in the sense of belonging to public international law.

And, also very often, one will find that the specific theme or sector is also ordered, organized, regulated by what is usually termed private regulation, private arrangements, codes of conduct, certification processes, networks of contracts, etc.

This kind of regulation can hardly be suspected of belonging to public international law. Its legal character is, however, debated, and its expressions are thought by some to belong to a broadly defined global or transnational legal order or to that sector-specific legal or regulatory regime or system.

Finally, almost always, one will see that domestic state law also deals with the theme or field.

One may argue strongly that to try to know or understand only how domestic law or only how international law deal with the field will provide only a partial view of that regulatory micro-cosmos and will serve limited purposes. This will be acceptable if the intention is really to work only with the limited purposes, and will not be appropriate if the intention is to describe in an integral manner the way in which the regulation of that specific sector presents itself.

However, a competent description of the regulatory reality of a field, sole basis on which more ambitious purposes can be constructed, cannot do away with technical distinctions between what is part of public international law, combined with the functioning of the legal system and the functioning of the prescription or set of prescriptions within it, what is part of this or that domestic legal system, also combined with the functioning of the system and of the prescriptions, of what is binding, of what is not binding, of who is the producer of each regulatory element, of who is the addressee of each provision, etc.

4.1 Two legal or regulatory pluralisms

The idea that served as a starting point, the functional differentiation that leads to the norms coalescing around specific themes or issues, when considered in relation to international life, brings us face to face with two types of legal pluralism.

The first has as its basic units the legal systems. Essentially, these legal systems are national law and international law. It is possible, however, that some would want to include among the legal orders some systems whose legal nature is more controversial, among other things, because, for example, their norms are not produced by states. Perhaps the most obvious example is the *Lex mercatoria*. In this case, there would be a pluralism of legal or regulatory systems, but it would not be strictly *legal* pluralism.

One perceives pluralism as a space of multiple legal systems, a space in which these systems are not defined by their thematic concerns, but rather by their systemic features i.e. each legal system is defined by its answers to a series of questions that are essentially these: i) what is the field of territorial or social application? ii) which mechanisms it recognizes as apt to create valid norms? iii) who are the recipients of the rules? iv) what are the institutions created by the rules of the system and how they operate?

These questions can be asked and answered with reasonable ease in relation to national and international law. Even if one wants to include non-state systems, and maybe non-legal systems, such as *Lex mercatoria*, the answers to the questions could show a reasonable and systematic unity.

The second type of international legal pluralism that is drawn before us, from the idea of functional differentiation is one in which the basic units are not the legal systems, but the legal regimes, but these, as we have seen, do tend to be defined by the theme, by the problem or the regulated sector.

As it was already said, it is possible to conceive legal or regulatory regimes that are composed of only one type of regulation and constituting a complete and closed system. However, the most common is that various norms from more than one legal system come around a specific theme and that such standards also accompany other types of regulation whose legal character is controversial.

It is clear that what is already difficult when speaking of regimes as fragments of a given legal system, like public international law, defining the boundaries of the regimes, the norms and institutional structures that are part of the regimes, is not easier to do when one thinks of the regimes as points of convergence of norms springing from legal systems and from various regulatory sources.

Here, therefore, one also works with zones of indeterminacy. Just as it has happened with self-contained regimes within international law, it may prove difficult to identify an ethos to lead the genesis and operation of the rules that come from different legal systems or regulatory sources and that deal with a specific theme. Indeed, precisely because they

constitute a cluster of norms belonging to different orders, it is even more difficult to prove a single ethos.

For the same reason, here there are also more likely collisions or frictions between norms or levels of decision-making connected to the same subject, to say nothing of those that exist between norms and bodies dealing with various different themes, constituting diverse regimes.

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