

Michigan Journal of International Law

Volume 25 | Issue 4

2004

Fragmentation in a Positive Light

Bruno Simma

International Court of Justice

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Law Commons](#)

Recommended Citation

Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2004).

Available at: <https://repository.law.umich.edu/mjil/vol25/iss4/1>

This Symposium is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjil.repository@umich.edu.

FRAGMENTATION IN A POSITIVE LIGHT

*Bruno Simma**

The organizers of the present symposium demonstrated a keen sense of topicality when they chose “Diversity or Cacophony? New Sources of Norms in International Law?” as the subject-matter of the 25th Anniversary Symposium of the *Michigan Journal of International Law*. For the last decade or so, the question whether the international legal order finds itself in the process of fragmentation, and if so, what the consequences of this development will be, has been a popular area of study for many jurists; most of them expressing their concern about what they consider to constitute a threat to the unity of international law—a unity which they believe to have existed or to still exist, or towards which, in their view, both the law-maker and the practitioner/judge ought at least to strive.

Interestingly enough, at the same time this concern is voiced, a growing number of authors, particularly but not exclusively from Europe, believe to perceive precisely the opposite, namely a movement of international law towards its “constitutionalization”—by which term these observers denote a development turning the traditional, “horizontal,” minimalist international law governing more or less exclusively relations among sovereign states in strictly bilateral ways, into something more “vertical,” as it were—more densely institutionalized, more mature, community-oriented, value-laden, peremptory and hierarchical, according to some even quasi-federalist.

Personally, I believe that both camps are right: one and the same international law is indeed simultaneously steering such contrary courses—this is one of the reasons why I find our field so fascinating. Let me mention in passing, however, that I find the “constitutionalist” approach towards the theoretical digestion of the undeniable trends just mentioned somewhat misguided. It forces thinking about these developments into dogmatic structures (and strictures) that are, with regard to many questions, alien to the field and do not contribute to their creative-constructive handling. To give just one example, I have always been perplexed by the readiness of quite a few of my fellow international lawyers to accept the upgrading of the UN Security Council to the level of, at least an embryonic, world government. To the extent that these authors come from countries possessing a permanent seat on the Council, I can identify some rather pragmatic reasons for their taking this view; as to all the others, I can only explain their fascination and eagerness to endow the activities of the Council with “constitutional” dignity as the result of a sort of inferiority complex from which these

* Judge, International Court of Justice.

international lawyers must have suffered because, after all, the law they were taught appeared to lack almost everything which their domestic colleagues hold to be essential for the existence of "real" law.

To return to the issue of "fragmentation" of international law, interest in and discussion of this topic seems to have been triggered by the increase in the number of international courts and tribunals. The International Court of Justice appears to be the institution most concerned about this development, as evidenced by recent speeches of certain of its (former) Presidents before the UN General Assembly. Possessing a little inside knowledge in this matter, I would submit that, at least until present, and with only very few exceptions, the various judicial institutions dealing with questions of international law have displayed utmost caution in avoiding to contradict each other. I would go as far as claiming that if there are international institutions that are constantly and painstakingly aware of the necessity to preserve the coherence of international law, it is the international courts and tribunals. Such caution might sometimes come at the price of dodging issues that would very much have deserved to be tackled; an example being the way in which the Hague Court in the *LaGrand* case refused to decide the question whether the right of foreign nationals to information about consular notification had assumed the features of a human right in the context of the right to life, thus escaping the necessity of taking a critical stand *vis-à-vis* an advisory opinion of the Inter-American Court of Human Rights to that effect. It took the insistence of Mexico in the *Avena* case, shortly following *LaGrand*, to force the International Court of Justice to unambiguously reply in the negative. *Si tacuisses*. I would venture to submit that, as a rule, international judges or arbitrators have to experience an extreme sense of urgency before they would decide to straight-up contradict their colleagues in another international jurisdiction. And if such sense of urgency were based on genuine concerns about the state of development of an international legal matter, the ensuing divergencies in international jurisprudence might be welcome triggers of progress in the law.

On this positive note let me turn from the issue of fragmentation *vel non* through the growth of international judicial institutions to questions relating to the substance of international law. Here, too, initial and exaggerated fears appear to gradually give way to more sober considerations. The prime illustration of this is furnished by the approach of the UN International Law Commission to the matter. In its session of 2000 it first took up the question by requesting its Austrian member, Professor Gerhard Hafner (a contributor to the present Symposium) to produce a feasibility study on the topic of "risks ensuing from fragmentation of international law." When the Commission started its

actual debate two years later (in a study group which I had the pleasure to chair), the Commission members soon agreed that the emphasis on risks in the original title was not adequate because it depicted the phenomena described by the term “fragmentation” in too negative a light. Thus, the title of the topic was changed to “Fragmentation of international law: difficulties arising from the diversification and expansion of international law.” Please note the Commission’s move: while the term “fragmentation” with its rather negative connotations was retained, the risks following from it were downgraded to difficulties, such difficulties now being regarded as arising from two developments that are described in decidedly positive terms, namely diversification and expansion of international law. I would suggest that the Commission’s look at the matter in such a friendlier light is typical for the treatment of the phenomenon in international legal discourse as a whole. What frequently happens now (like in the case of the present Symposium) is that instead of speaking of “fragmentation,” scholars employ terms such as “diversity”; i.e., the focus now is on a certain state of affairs, viewed in a positive light, instead of being directed at the negative consequences, which certainly continue to exist but do not any longer dominate the discussion.

Of course, also here beauty is in the eye of the beholder. To diagnose a process of fragmentation at all logically presupposes that the observer proceeds from an image of international law constituting a whole, something closed and firm, which now threatens to fall into pieces. For such universalists the salvation is to be found in the principle that, as fragmented certain segments of international law, like WTO law for instance, might appear, there will always be the possibility, however remote in practice, of residual application of general international law—in other words, the various fragments will never be totally “self-contained.” For observers like Teubner and Fischer-Lescano in the present Symposium, which dismiss all claims of an organizational or dogmatic unity of international law from the beginning, fragmentation, or more euphemistic *ersatz* terms, denote a false or non-issue. But please note that most international lawyers would not regard these two authors as “mainstream” members of their profession. Such closing of the ranks is another, more “personalized” method of maintaining the unity of international law.