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**A CALL TO FREEDOM: TOWARD
A PHILOSOPHY OF INTERNATIONAL LAW IN
AN ERA OF FRAGMENTATION**

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ALEXANDRA KHREBTUKOVA
New York University

Faculty Director: Benedict Kingsbury

Co-Directors: Philip Alston and J.H.H. Weiler

Program Director: Angelina Fisher

Faculty Advisory Committee:

Philip Alston, Kevin Davis, David Golove, Benedict Kingsbury,
Marti Koskenniemi, Mattias Kumm, Linda Silberman,
Richard Stewart, J.H.H. Weiler, Katrina Wyman

Institute for International Law and Justice

New York University School of Law

40 Washington Square South, VH 314

New York, NY 10012

Website: www.iilj.org

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New York University School of Law
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U.S.A.



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Alexandra Khrebtukova

Abstract:

In an era of the expansion and diversification of international law into multiple specialized branches, many have expressed anxiety over its continued coherence as a unified legal system. In what follows I take the perspective that an under-explored challenge posed by the so-called fragmentation of international law is not so much that the decision-making bodies of specialized international legal regimes will fail to take account of one another, and thereby arrive at potentially inconsistent legal determinations; rather, it is that, in taking account of one another, they will overstep the bounds of their legitimacy in determining the hierarchical relationship between competing normative systems from the perspective of a structural bias in favor of the normative hierarchies particular to their regimes. In arguing for the recognition of inter-regime conflict as an essentially political conflict between incommensurable systems for prioritizing global values, I argue for a reconception of the state as the empty signifier of public space, to suggest one potentially fruitful avenue for addressing these democratic legitimacy concerns. Further, I argue that such a reconception, and its attendant implications for the concept of state sovereignty, may gradually lead to a more inclusive understanding of an international rule of law. I conclude by linking these themes to their suggested counterparts in the transmission of an appropriate professional sensibility in the course of legal education.

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Today, it is not uncommon to conceive of international law in terms of multiple specialized branches.¹ With the proliferation of international multilateral treaty regimes surrounding specific issue-areas, the international legal landscape will differ – from the law, to its administration, to the methods of dispute resolution – depending on whether the issue is seen as one of international trade, international human rights, international environmental concern, international humanitarian law, and so on. The many specific issue-areas into which international law has proliferated has been described as special “self-contained regimes.”² The fragmentation of modern international law poses a number of challenges for its role in global relations. Different international legal regimes may embody incommensurable systems of norms, and no over-arching legal system has been politically negotiated to create a global hierarchy. In this article, I argue that a re-politicization of the modes of global decision-making, and a re-conception of the nature and role of the state, are potentially fruitful avenues for rethinking our approach to international law in the modern era of fragmentation.

Often, the interests at issue in an international conflict may not fall unambiguously within a single pre-negotiated legal framework. As a result, conflicts between certain norms remain unresolved. For example, while the General Agreement on Tariffs and Trade balanced the protection of national industries against the free movement of goods and services, it did *not* fully settle the relationship between the interest in removing restrictions to trade and the interest in a precautionary approach to the exploitation of natural resources. What is the hierarchical relationship between the different norms these two interests embody? Is the norm favouring free trade in the absence of conclusive evidence of its harmfulness more important than the norm against engaging in enterprises whose long-term effects on the environment are unknown but potentially grave?

The starting point for this article is that each special ‘self-contained’ international legal regime represents a framework for systematically resolving a particular set of conflicting interests according to a particular hierarchy of norms and values. In specific contexts, whether the potential risks to the environment outweigh the negative consequences of a trade restriction is a decision

¹ Examples include, but are not limited to, international human rights law, international environmental law, international trade law, international law of the sea, international space law, European law, international health law, international humanitarian law, etc.

²Bruno Simma, "Self-Contained Regimes" (1985) 16 *Netherlands Yearbook of International Law* 111. Much debate continues to surround this issue since 1985. Cf. Bruno Simma & Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law" (2006) 17 *Eur. J. Int'l L.* 483; Anja Lindroos & Michael Mehling,

that is sure to affect the lives of many, irrespective of which side it comes out on. I will argue that the real issue with respect to the so-called fragmentation of international law is not, as is commonly argued, that the proliferation of regime-specific decision-making bodies poses a threat to the continued coherence of general international law. Rather, the threat is that, given the non-existence of a definitive global legal hierarchy of norms (outside of the extremely limited scope of *jus cogens*), important political and normative decisions will be made piecemeal by the decision-making bodies of particular legal regimes. These decision-making bodies, already embodying particular systems of valuation, are then thereby handed power and influence without a pre-negotiated body of law to apply.

In arguing for more democratic involvement at certain levels of normative decision-making, this article aims to complement and parallel the scholarship of the Global Administrative Law (GAL) Project.³ The GAL Project's aim is to increase the transparency, accountability, and participation in global regulatory regimes, and in that regard, represents a move toward greater democratic legitimacy. What I wish to do here, however, is flesh out an additional and often neglected perspective - rethinking the role of the state in the era of globalization.

Using a theoretical framework based on the notion of the "empty signifier," I aim to push for a particular ideal of the state - that is, the state as the concrete embodiment of individual freedom to engage the collective order through political struggle. I argue that a conscious move on the part of a state's agents toward this self-perception may stimulate a rethinking of the role of states in debating and negotiating the resolution of global normative conflict. Furthermore, I argue for a new approach to the vocational training of international lawyers, redefining and refocusing their role and agency in a globalized, though fragmented, legal landscape. In doing so, I seek to catalyze the movement toward a much-needed rethinking of the concept of the state and of the international rule of law, to allow for a more inclusive and more democratic understanding of international community.

Part I of this article presents a perspective for thinking about the nature of self-contained regimes. Part II explores the incommensurable clash of normative systems that results from inter-regime conflict. Part III proposes a re-conceptualization of the nature and role of the state as

"Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO," (2005) 16 Eur. J. Int'l L. 857.

³ See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68 L. & CONTEMP. PROBS. 15.

a potential starting point for rethinking the way in which normative conflict is approached through international law. Part IV suggests some ways in which this re-conceptualization could effect a novel understanding of an international rule of law, focusing on a shift in the concept of state sovereignty. Part V concludes the discussion with some remarks about the role and modes of education conducive to effecting these conceptual shifts.

I. I. Self-Contained Regimes

A. A. Introduction

The term ‘self-contained regime’ has enjoyed a number of usages in international law. Sometimes the notion appears to refer solely to a set of secondary rules of state responsibility, in contrast to, and with primacy over, general international law.⁴ Sometimes the phrase is used to describe interwoven bundles of primary and secondary rules dealing with an issue in a way other than that issue would have been dealt with under general international law.⁵ And sometimes it is used in reference to entire specialized branches of international law—such as ‘human rights law,’ ‘humanitarian law,’ ‘international trade law,’ ‘European law,’ ‘international environmental law,’ ‘space law,’ etc.—with particular modes and techniques for interpreting and administering a functionally specialized body of jurisprudence that often modify or exclude general international law.⁶ It is the latter of these three senses that forms the focus of the present discussion. It is this definition that is meant by usage of the phrase ‘self-contained/special regime’ throughout the remainder of this text.

One example of the way in which international law has been conceived as a set of discrete and relatively autonomous fields is provided by the *Legality of the Threat or Use of Nuclear Weapons* case, in which the International Court of Justice, having recognized the need to consider ‘the great corpus of international law norms available,’⁷ then proceeded to examine a series of smaller corpuses, each separate and distinct from one another: international human rights law,

⁴ See *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* [1980] I.C.J. Reports 41 at para 86.

⁵ See *Case of the S.S. “Wimbledon”* [1923] P.C.I.J. (Ser. A) No. 1 at 23-4.

⁶ See Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission*, 58th Sess., UN Doc. A/CN.4/L.682 (2006) at 62 [ILC Report]; see also ILC Report at 68-72 for an elaboration of this third sense of the phrase.

⁷ *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para 23 [*Nuclear Weapons*].

international environmental law, international humanitarian law. Throughout the opinion, the treaties embodying these various corpuses are seen not as instruments of a general and unitary international legal spectrum; rather, they are envisaged as forming relatively separate spheres of their own special law. Thus, for example, the Court points out that the Hague Conventions of 1899 and 1907, the St. Petersburg Declaration of 1868 and the Brussels Conference of 1874, as well as the Geneva Conventions of 1864, 1906, 1929 and 1949, cohere in a way that transcends the simplicity of their existence as multilateral treaties within the corpus of general international law. Rather, ‘they are considered to have gradually formed one single complex system, known today as international humanitarian law.’⁸ They are considered, in the terms of the present discussion, to have formed one self-contained regime.

As the *Nuclear Weapons* case illustrates, it is not uncommon that a single legal issue may implicate a multiplicity of such ‘single complex system[s]’. Thus, from the perspective of the International Covenant on Civil and Political Rights, the legality of the threat or use of nuclear weapons gives rise to a particular set of legal issues. From the perspective of the norms embodied in the international environmental regime, a whole new set of issues arises. Each seeks to effect a legal resolution most favourable to its own specific set of concerns. A solution satisfactory to the legal regime of one system of international law will not always (if ever) satisfy the others – a rule of the absolute illegality of the threat or use of nuclear weapons, favoured by the perspective of human rights, may not be acceptable from the perspective of the laws of war, concerned with national security and strategic self-defence. As a result, each legal regime will naturally assert *itself* as the proper forum in which to address the situation, claiming superior status for its particular descriptions and concerns.⁹

Moreover, each regime system is often equipped with its own structures of judgment and oversight, in the form of specialized international tribunals or other implementation mechanisms. Each such mechanism, by its very nature, is programmed to frame the legal matters before it in a way that addresses the issues pertinent to its special regime. Given that the issues pertinent to varying international regimes are often very different, and given also that the same legal matter may give rise to issues in multiple legal regimes – and hence appear before multiple international

⁸ *Ibid.* at para 75.

⁹ See e.g. *Commission of the European Communities v. Ireland*, C-459/03, [2006] E.C.R. I-04635, (European Court of Justice condemned Ireland for taking its issues in the MOX Plant case to the adjudicating bodies of international legal regimes other than the legal regime of European law, asserting its supremacy over international environmental law or

mechanisms – it is conceivable that there will emerge divergent and possibly incompatible legal resolutions of the same controversy. The multiplicity of international legal spheres may thus be seen to threaten the continued existence of a single and coherent international law.

Such concerns have sometimes been expressed at high levels. In 2001, Judge Guillaume, speaking as President of the International Court of Justice (ICJ) to the United Nations General Assembly, expressed his fear that "[t]he proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations."¹⁰ His predecessor, Judge Schwebel, had similarly spoken of the dangers inherent in the possibility "of significant conflicting interpretations of international law,"¹¹ and the current President of the ICJ, Judge Higgins, has also expressed a concern for prioritizing the resolution of issues arising from the fragmentation of international law.¹² In response to such growing anxieties, the United Nations enlisted the work of the International Law Commission to deal with the topic of problems arising from the diversification and expansion of international law. The Commission completed its work in 2006.¹³

Many have tried to quell the fears and anxieties arising from the fragmentation of general international law into numerous separate spheres of law. Some have urged the various regimes to monitor each other's decisions so as to assure maximum overall consistency.¹⁴ Others have suggested that the tribunals of a given particular regime take other regimes into account as relevant rules of law applicable to the relations between the parties.¹⁵ And some have argued that the proliferation of international regimes and their separate tribunals does not pose a threat to the coherence of the international legal system because, "[u]ltimately, one would expect that the best ideas will be adopted widely, contributing to the body of international law."¹⁶

international law of the sea in describing and framing the issues of the situation).

¹⁰ Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 30 October 2001.

¹¹ Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice, 26 October 1999.

¹² Plenary Address by Judge Rosalyn Higgins, President of the International Court of Justice, American Society of International Law Annual Meeting, 31 March 2006 [Higgins].

¹³ ILC Report, *supra* note 6. For a more full account of the unease surrounding the proliferation of international branches of law and their special tribunals, see Martti Koskenniemi & Paivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 *Leiden J. Int'l L.* 553 [Koskenniemi & Leino].

¹⁴ See e.g., Andreas Fischer-Lescano & Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," (2004) *Michigan Journal of International Law* 25 at 999.

¹⁵ See e.g., Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands" (2004) 25 *Mich.J.Int'l L.* 903.

¹⁶ Jonathan I. Charney, "The Impact on the International Legal System of the Growth of International Courts and

These formulations suggest that the difficulties arising from the expansion and diversification of international law are a matter of purely technical concern. Such solutions assume a number of important propositions: (1) that a particular regime, engaged in managing an internally connected and relatively autonomous sphere of issues, has the capability to comprehend properly the problems arising from a given situation which would be pertinent to a wholly different regime; (2) assuming the truth of (1), that such concerns can then be easily integrated into the problematic situation, as formulated in the language of the first regime; and (3) assuming the truth of both (1) and (2), that the regime being taken account of will tend to be satisfied with the results thus obtained, and that the process will tend toward general agreement operating on Darwinian principles, where ‘the best ideas’ are accepted as such by all those involved.

It is not self-evident that such assumptions are correct. And in fact, these assumptions have not quelled the anxieties surrounding fragmentation – as recently as the spring of 2006, the President of the ICJ again placed the concerns of fragmentation at the forefront of problems confronting the international legal community.¹⁷ Yet any technical solution, seeking simply to coordinate existing structures, is bound to operate upon these non self-evident assumptions – assuming, at the very least, that one regime is capable of understanding and formulating the concerns of another, as well as of resolving the two sets of concerns in a manner acceptable to both. As will be further discussed in Part II, these assumptions are not necessarily warranted. Solutions built upon them may thus ultimately lack validity.

Part of the anxieties aroused by the proliferation of international regimes may stem from the lack of a consistent usage of the notion of a self-contained regime. In the *Tehran Hostages* case, the ICJ calls ‘rules of diplomatic law’ a ‘self-contained regime’ because they lay down obligations, foresee transgressions, and identify means of addressing them.¹⁸ But as has already been mentioned, the term has also been used in a narrower sense – referring solely to a set of secondary rules, without the requirement of its own special primary obligations – as well as in a much wider sense – referring to entire branches of international law, consisting not only of rules, but also of special institutions, complete with their own administrative procedures and

Tribunals" (1999) 31 N.Y.U.J. Int'l L. & Pol. 697 at 700.

¹⁷ Higgins, *supra* note 12.

¹⁸ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] I.C.J. Rep. 3, online: ICJ <http://www.icj-cij.org/icjwww/icasess/iusir/iusir_ijudgment/iusir_iJudgment_19800524.pdf>.

decision-making tribunals.

Furthermore, as early as 1985, Bruno Simma, in an article entitled ‘Self-Contained Regimes’, pointed to the ambiguity involved in addressing that aspect of an international regime which may be said to be ‘self-contained’.¹⁹ For, on the one hand, such regimes are distinguishable from one another precisely because they may be said to operate as the *lex specialis* applicable in separate legal situations; and yet, on the other hand, each such *lex specialis* acquires its legal character from the *lex generalis* of general international law, and in this sense bears a relation to other regimes that cannot be said to fall under the rubric of ‘self-contained’. This ambiguity is explored in greater detail in the Report of the International Law Commission on the Fragmentation of International Law, completed in the summer of 2006.²⁰ In other words, there does not appear to be a full grasp on the phenomenon that the term ‘self-contained regime’ is meant to describe.

The following two sub-sections, addressed to the notions of regime and systemic self-containedness respectively, will analyze a helpful and under-explored approach to conceiving international specialized legal regimes as formalizations of unique and self-perpetuating modes of reasoning. In sub-section B, an understanding of the concept of regime derived from political science literature and from the International Law Commission’s Fragmentation Study Group’s report serves to highlight important aspects of international legal regimes, whereby those acting within particular regime frameworks may be seen to at least partially commit themselves to a particular logic of argumentation, derived from a particular world-view. Sub-section C analyzes the concept of systemic self-containedness from the perspective of autopoietic systems theory, emphasizing the nature of international specialized legal regimes as normatively-closed self-perpetuating communicative systems. Sub-section D then addresses the epiphenomenon of structural bias that results from the combination of these characteristics. The resultant understanding of the nature of international legal self-contained regimes provides a useful refocusing for approaching an understanding of what’s at stake in a potential normative clash between them, subsequently discussed in Part II.

B. B. Rethinking the Regime

One influential definition of ‘international regime’ was given by Stephen Krasner in

¹⁹ Simma, *supra* note 2 at 111.

²⁰ See ILC Report, *supra* note 6.

1982²¹:

implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.²²

It is striking that, while the definition speaks of 'beliefs', 'standards', 'prescriptions/proscriptions for action', and 'prevailing practices', it never mentions a legal code, treaty, or judicial decision. In fact, no mention is made of any source of legal authority. Instead, the core of the definition resides in the convergence of the 'actors' expectations' about a specific area of international relations, whether these be explicit or implicit. Such a perspective appears to suggest a broader connotation of the regime concept, more akin to a separate culture than a mere list of primary and secondary rules. Hence Kratochwil and Ruggie conceive the 'international regime' as 'principled and shared understandings of desirable and acceptable forms of social behavior.'²³ Elaborating this definition, Hasenclever, Mayer, and Rittberger maintain that international regimes 'embody shared social knowledge, and they have both a *regulative* and a *constitutive* dimension: that is, on the one hand, they operate as imperatives requiring states to behave in accordance with certain principles, norms, and rules; on the other hand, they help create a common social world by fixing the meaning of behavior.'²⁴ Similarly, Neufeld describes such regimes as a 'web of meaning' making sense of state action in particular issue-areas and manifesting links between otherwise disjoint courses of action.²⁵

These early political science definitions of 'international regime' suggest a concept much broader than the legal conception of 'regime' as a set of treaties and institutions. Here the notion of a multiplicity of 'international regimes' is seen as an array of social cultures surrounding certain

²¹ For one recent discussion linking the legal discourse of 'self-contained regimes' to the political science discourse of Regime Theory generally, and Krasner's definition of regime in particular, see Math Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes*, Ashgate: 2005. Noortmann argues that the concept of "self-contained regimes" . . . [is] an interdisciplinary concept, which carries both dominant political and legal features.' *Ibid.* at 133-134.

²² Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in Krasner (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983) at 2.

²³ Friedrich Kratochwil and John Gerard Ruggie, "International Organization: A State of the Art on an Art of the State" (1986) 40 *Int'l Org* 764.

²⁴ Hasenclever, Mayer, and Rittberger, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997) at 163.

²⁵ Mark Neufeld, "Interpretation and the 'Science' of International Relations" (1993) 19 *Review of International Studies* 43. Please note: Neufeld seems to refer to a "web of meaning" in terms of individual interaction, rather than state action.

sets of issues, whose various rules of etiquette are not necessarily restricted to that which is explicitly set down within a set of multilateral treaties. The rules governing State conduct with respect to the issues pertinent to a given regime are envisaged rather as holistic modes of reasoning about specific situations, creating a ‘common social world’ by weaving a ‘web of meaning’.

In 2006, the Report of the Study Group of the International Law Commission took it one step even further, suggesting that the special regimes which are constituted by entire branches of international law

may even be said to express different social rationalities: a clash between them would appear as a clash of rationalities--for example, environmental rationality against trade rationality, human rights rationality against the rationality of diplomatic intercourse. Thus described, fragmentation of international law would articulate a rather fundamental aspect of globalized social reality itself--the replacement of territoriality as the principle of social differentiation by (non-territorial) functionality.²⁶

While ‘a common social world’ may be conceived in a way which allows for its self-understanding to be a bounded one – that is, such that it may be said to be capable of conceiving the limits of its own applicability, as well as the potential applicability of other ‘social worlds’ in other areas of interest – a ‘social rationality’ refers, by contrast, to something which can only conceive itself to possess a realm of applicability in all areas of social interaction. A social rationality is, after all, that which tasks itself with rationalizing the social as a whole.

What emerges is an understanding of the special regime as a particular way of reasoning the relationship between the elements of society. No longer is it seen as a set of institutions embodying the response of humanity to the conflicts of a specific issue-area: operating as a social rationality, the regime does not hold views about a bounded issue – it holds views about the *world*.²⁷

Fragmentation of international law thus points to the following transition: the international legal arena has ceased to harbour solely a spectrum of *national* identities, and has instead (and/or additionally) become a stage for the interaction of a spectrum of identities based on a given *world-view*.²⁸ From within a human rights regime, for example, *all* international political issues

²⁶ ILC Report, *supra* note 6 at 71. See also Koskenniemi & Leino, *supra* note 13; Andreas Fischer-Lescano & Gunther Teubner, *supra* note 14.

²⁷ For a discussion of the processes of social world-creation through shared rationalities, see Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality* (New York: Doubleday, 1966). For a detailed example of the effect of varying vocabularies of expertise on world re-construction – discussing how a ‘human rights’ vocabulary was used to reconstruct the previously ‘economic’ world-view of Europe – see Martti Koskenniemi, “The Effect of Rights on Political Culture,” in Philip Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999).

²⁸ See also Martti Koskenniemi, “The Fate of Public International Law: Between Technique & Politics” (2007) 70

invoke the applicability of its legal regime, because for such a regime the world is conceptualized, at the most fundamental level, in terms of the rights of human beings – it embodies a hierarchy of norms where those protecting individuals rights are given preference. In the dialectic of human rights, it is definitionally more important to evaluate a given situation on the basis of its effect on the exercise of such rights, all other potentially relevant considerations serving at most as secondary values. Thus actors within this regime structurally commit themselves to conceptualizing issues of global conflict in terms of, first and foremost, the potential impact they may have on the pervasive application of its primary norm – the protection of human rights.

Similarly, from the perspective of international environmental law, *all* international political issues invoke the applicability of *its* legal regime. This is so because, for an environmental rationality, the most fundamental concern of society is the maintenance of a safe and habitable ecosystem. Given the inevitable effect that human interaction has upon the environment, all international legal and political issues may be seen to potentially implicate the international environmental regime. The regime is committed to a world-view and method of structuring normative hierarchies so as to preference a description of global conflict that respects its particular method for balancing global values. This reasoning may continue: all political international interactions may be seen to have implications for trade relations, for Europe, and so on.

This understanding suggests a view of special regimes as *hegemonic* forces seeking identification of their specific rationalities with the structure of the international political world as a whole.²⁹ Conflicts between the various special regimes become the ‘expression of the fundamental conflicts between organizational principles of social systems.’³⁰

C. C. Rethinking Self-Containedness

It has been pointed out that the use of the term ‘self-contained’ in reference to the regimes presently at issue is inappropriate.³¹ Firstly, no regime is really self-contained. General international law penetrates these regimes by providing a normative background which comes into play when the special regime lacks primary or secondary rules appropriate to the situation, or else

Modern L. Rev. 1.

²⁹ See Koskenniemi & Leino, *supra* note 13.

³⁰ Fischer-Lescano & Teubner, *supra* note 14 at 1024.

³¹ See Simma, *supra* note 2.

when the special regime fails to properly operate.³² More fundamentally, the term ‘self-contained’ is a misnomer. No legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force (‘validity’) only by reference to (valid and binding) rules or principles *outside it*.³³

Nevertheless, there is a different sense in which these special regimes, as social rationalities, may indeed be said to be ‘self-contained’: in so far as they are self-perpetuating. The institutions and tribunals of regimes are set up in order to administer the continued application of their specific rules and principles. Born of the rationality embodied in a given regime’s particular hierarchies of norms and values, its implementation bodies deal with issues formulated on the basis of that rationality. Their judgments are made with the aim of perpetuating the values expressed in their methods of reasoning. In this way, the regime perpetuates itself.

To understand the depth of the problem, it is helpful to have recourse to an examination of autopoietic systems theory.³⁴ Social rationalities are communicative self-perpetuating systems. Like all such systems, their evolutionary success depends upon ‘introducing the difference between system and environment into the system – a “re-entry of the form into the form.”’³⁵ This distinction is effected through the simultaneous closedness and openness of the system: ‘the system is *normatively* closed and *cognitively* open at the same time.’³⁶ That is, the system is simultaneously open to learning new facts (*did* this happen?), and closed to accepting them as new norms (*should* this have happened?). The system perpetuates the distinction between itself and the surrounding environment through an internal distinction between facts and norms. ‘Norms, then, are purely internal creations serving the self-generated needs of the system for decisional criteria without any corresponding “similar” items in its environment.’³⁷ The web of norms comprising a given system’s normative framework thus provides the operational closure essential to the system’s continued existence.

³² See ILC Report, *supra*, note 6 at 100; Simma & Pulkowski, *supra* note 2.

³³ ILC Report, *ibid*.

³⁴ An autopoietic system is one that “produces and reproduces its own elements by the interaction of its elements.” See Gunther Teubner, “Introduction to Autopoietic Law,” in Gunther Teubner, ed., *Autopoietic Law, A New Approach to Law and Society* (Berlin: Walter de Gruyter & Co., 1987) 1 at 3.

³⁵ Niklas Luhmann, “Operational Closure and Structural Coupling: The Differentiation of the Legal System” (1992) 13 *Cardozo Law Review* 1419, 1423 [Operational Closure], citing George S. Brown, *Laws of Form*, 56-57, 69-76 (New York: Dutton 1979). See also Niklas Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert (Oxford University Press: 2004).

³⁶ Operational Closure, *ibid*. at 1427.

³⁷ *Ibid*. at 1428.

The contrast between facts and norms nevertheless remains strictly internal to the system: 'The distinction of normative and cognitive expectations, and this holds true for any distinction, has to be *made* . . . It cannot be found in the natural or created world. It is not a "categorical" property of the world. . . Facts are constructions, statements about the world. . .'³⁸

Thus, although the system remains cognitively open, it nevertheless remains constrained in the manner in which the 'facts' of its environment are formulated. In the process of dynamic evolution, the systems may 'look for occasions, irritations [surprises, unpredictabilities], opportunities in their environment. But even the classification as occasion, irritation, opportunity . . . is an internal classification and not something which exists independently of the system in its environment''³⁹

As a result of this process of fact formation, the 'facts' of one cognitive system will often be radically different from the 'facts' of another. Thus, just as 'careful sociological investigations show that scientific facts and facts which serve as components of legal or political-administrative decision making differ in remarkable ways,'⁴⁰ so too the 'facts' of the international health regime may dramatically differ from the 'facts' of say, international trade law. In fact, this may be witnessed in the recent debates surrounding genetically modified foods, also known as 'biotech products' After the European Communities (EC) applied a moratorium on the approval of such products, the United States, Canada, and Argentina brought the matter to the Dispute Settlement Body of the World Trade Organization (WTO), arguing that the EC action was an unlawful restriction of their imported food products.⁴¹ The WTO Panel found that, because the EC's scientific committee had itself already assessed the risks of biotech products and had found no conclusive evidence of a threat to human health, such products were in fact safe, and a moratorium on their admission into the territories – pending further investigation – was unwarranted on grounds of health or safety.⁴² Thus the trade mentality: any product not scientifically proven to be unsafe for the human organism is 'healthy' and must be allowed free movement. The World Health Organization, on the other hand, took a broader view of conceiving the health of the

³⁸ *Ibid.* at 1429.

³⁹ *Ibid.* at 1427, n. 24.

⁴⁰ *Ibid.* at 1430, citing Smith, Roger, and Wynne, Brian (eds.), *Expert Evidence: Interpreting Science in the Law* (London: Routledge Chapman & Hall 1989).

⁴¹ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (2003) WT/DS291/1.

⁴² *European Communities – Measures Affecting the Approval and Marketing of Biotech Products—Reports of the Panel*, (2006) WT/DS291/R, WT/DS292/R, WT/DS293/R..

individual, taking into account social, cultural, and ethical considerations in addition those of the hard sciences.⁴³ Thus, whereas the mentality of international trade law saw the fact of safety as an inevitable conclusion stemming from a lack of conclusive scientific evidence that biotech products pose a threat to the human organism, the mentality of the international health regime did not see the ‘fact’ of its inevitability, and indeed saw the situation as being merely in its early stages of investigation.

It is in this sense, as a direct consequence of the systemic nature of the special regimes, that they may indeed be said to be ‘self-contained’. Even during the course of a given regime rationality’s interaction, conversation, or evolution within its environment, the distinctions demarcating the possibilities of such engagements remain eternally internal to the (albeit dynamic and evolving) system. However willing an international environmental regime may be to take into account certain factors of trade, for example, the fundamental issues will always remain, for it, environmental. Thereby its world is contained.

D. D. Structural Bias⁴⁴

This systemic reproduction of facts and norms according to a precommitted ethic also constitutes and motivates international legal institutions:

In contrast to the courts of developed Nation-States that guarantee legal unity, globally dispersed courts, tribunals, arbitration panels and alternative dispute resolution bodies are so closely coupled, both in terms of organization and self-perception, with their own specialized regimes in the legal periphery that they necessarily contribute to a global legal fragmentation. These conflicts are a result of the ‘polycontexturalization’ of law. They are created by the different internal environments of the legal system, which, for their part, are dependent upon multiple paradigms of social ordering.⁴⁵

International special regimes institutionalize themselves through the establishment of various tribunals, alternative dispute resolution and administrative bodies. These are in turn peopled with decision-makers, operating in their decision-making capacity on the basis of certain reasoned principles. The guiding rationality behind this decision-making process is none other than that of regime-specific hierarchies regarding global norms and values, and the particular structure of systematic reasoning that is necessary in order to maintain consistently these internal hierarchies. At bottom, the institution that is the office of a given intra-regime decision-maker exists, in

⁴³ See “Current GM foods can bring benefits but safety assessments must continue” 23 June 2005 WHO News Release, online: WHO <<http://www.who.int/mediacentre/news/releases/2005/pr29/en/index.html>>.

⁴⁴ See Martti Koskenniemi, *From Apology to Utopia* (New York: Cambridge University, 2005) at 600-15.,

⁴⁵ Fischer-Lescano & Teubner, *supra* note 14 at 1014.

self-perception and material effect, to perpetuate the values and the unique balance of interests reflected in the special mode of reasoning particular to that regime.

In virtue of this situation, it is inevitable that these decision-making bodies ‘are so closely coupled, both in terms of organization and self-perception, with their own specialized regimes in the legal periphery that they necessarily contribute to a global legal fragmentation.’⁴⁶ Different reasoning yields different conclusions. And dispersed international regime-specific decision-making bodies, operating on the basis of distinct value-systems and unique systematic approaches to harmonizing diverse interests, are thus likely to arrive at multiple, and sometimes incompatible, resulting outcomes.

Take, for example, the *Beef Hormones* case,⁴⁷ where the WTO’s Appellate Body (AB) upheld the Panel’s conclusion that the European Communities (EC) could not justify a restriction on United States and Canadian beef made with hormones on the basis of the precautionary principle with respect to the potentially grave and irreversible consequences that such hormones may threaten for human health. The Panel found, and the AB upheld that, irrespective of the EC’s understanding of it, the principle was given a WTO-specific meaning in article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). This WTO-specific meaning makes the principle subordinate to articles 5.1 and 5.2 of the SPS Agreement,⁴⁸ which the AB analyzes to require sufficient scientific proof of a sufficiently specific threat posed by the enterprises at stake.⁴⁹ This hierarchy in the structure of the SPS agreement reflects the hierarchy of norms of the WTO regime, and is itself reflected in the regime’s distribution of the burden of proof: although the precautionary principle appears in some translation in SPS article 5.7, the burden of proof, as reflected in the superiority of articles 5.1 and 5.2, is on the party seeking to avoid the risk to show sufficient scientific evidence that the risk exists, in order to justify application of the principle. Although in this specific case the EC argued for the precautionary principle as a customary rule of international law, one can easily see how its role changes in the context of a different regime’s normative hierarchy. Thus, for example, Principle 15 of the Rio Declaration on Environment and Development (1992), applying the

⁴⁶ *Ibid.*

⁴⁷ *EC Measures Concerning Meat and Meat Products (Hormones)*, (1998) WT/DS26/AB/R, WT/DS48/AB/R, online: WTO <http://www.wto.org/english/tratop_e/dispu_e/hormab.pdf>.

⁴⁸ *Ibid.*, recital 125.

⁴⁹ See *ibid.* at 178-209. Compare especially 199-201, 207, and fn. 182 (describing the existence of some level of risk) with 200, 201, 205, 208-209 (finding insufficient data on the specifics of the threat, and so presuming insufficient risk).

precautionary principle, is not subordinate to scientific proof of the existence of risk but rather to the potential seriousness or irreversibility of the risk, and the Wingspread Consensus Statement on the Precautionary Principle, for example, has interpreted the principle to place the burden of proof on the party taking the risk to show that the risk is not sufficiently grave.⁵⁰ This difference in the distribution of the burden of proof, and the subsequent effect this has on the controversy's outcome, reflects the bias inherent in the normative hierarchies particular to the structures of different regimes toward certain norms over others.

This structural bias unavoidably guides the decisions of special regime decision-making bodies. It is precisely in virtue of its firm hold upon the minds of these decision-makers that certain mainstream solutions to the anxieties aroused by the fragmentation of international law are likely to be illusory. For example, Joost Pauwelyn concludes that

before a particular court or tribunal, it is important to include *all* international law binding between the parties as part of the *applicable law*, even if the *jurisdiction* of the adjudicator is limited to a given treaty (say, WTO covered agreements). If all courts and tribunals follow this approach, it would mean that, although they may have *jurisdiction* to examine different claims, in so doing they would apply *the same law*. Hence, in theory, no conflict should arise.⁵¹

Thus, the argument goes, the emerging fragmentation of international law may be made whole by appealing to the diverse special regimes to continuously take account of one another in the process of their decision-making. If State A and State B, both simultaneously being party to both a multilateral environmental treaty (forming part of the constellation of the international environmental regime) and a multilateral trade treaty (and thereby participating in the international trade regime), appear before a decision-making body of one of these regimes, that decision-making body is implored to consider, as part of the applicable law between the parties, the implications arising from the parties' involvement in the other regime, and the resulting outcomes of these various regime decision-making bodies will be consistent.

However, a theory under which 'no conflict should arise' if all courts and tribunals take account of all the regimes to which the parties before them may be subject neglects to take into account the phenomenon of structural bias. The international trade regime decision-making body may well attempt to consider the effect of the international environmental regime's involvement upon the situation before it. But, as is amply exemplified by the *Beef Hormones* case, it will

to restrict trade).

⁵⁰ See report by the Science and Environmental Health Network, online: <<http://www.sehn.org/wing.html>>.

⁵¹ Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands"

inevitably do so strictly based on the principles and modes of reasoning of a rationality specific to the regime of which it forms a part. Were the same case, between the same parties, ever to end up in front of a decision-making body of the *other* regime(s), the divergent reasoning inherent in the very essence of the otherness of that regime will in all likelihood, despite having considered the ‘applicable law’ of the first regime’s involvement, render a decision that will not neatly fit the framework established by the first regime’s conclusion, thereby continuing to contribute to the fragmentation of international law. This was noted by the International Tribunal for the Law of the Sea, set up under the United Nations Convention on the Law of the Sea (UNCLOS,) in its discussion of the *MOX Plant* case, a controversy regarding the operation of the MOX Plant nuclear facility at Sellafield, United Kingdom, which was also brought before the Tribunal under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), as well as the European Court of Justice under the European Community (EC) and Eurotom Treaties: owing to ‘differences in the respective context, object and purposes, subsequent practice of parties and *travaux préparatoires*’⁵² of the different regimes involved, the UNCLOS arbitral tribunal concluded that ‘even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a separate existence from those under [the UNCLOS].’⁵³

This same reasoning is recognized in the report of the International Law Commission Study Group on the topic of Fragmentation of International Law:

It is true that by now, WTO Dispute Settlement organs have used international customary law and general principles very widely to interpret WTO treaties. Few lawyers would persist to hold the WTO covered treaties, whatever their nature, as fully closed to public international law. The question remains, however, that trade rationality may occasionally – perhaps often – be at odds with the rationality of protecting the sovereign and that when a choice has to be made, the general objectives and ‘principles’ of trade law – however that is understood – will seem more plausible to trade institutions and experts than traditional interpretive techniques.⁵⁴

Naturally, ‘the general objectives and ‘principles’ of trade law . . . will seem more plausible to trade institutions and experts’, for it is these objectives and principles which flow from the very structure

(2004) 25 Mich.J.Int'l L.

⁵² *MOX Plant* case, *Request for Provisional Measures Order (Ireland v the United Kingdom)* (3 December 2001) International Tribunal for the Law of the Sea (2005) 126 ILR vol. 273-74, at [51].

⁵³ *Ibid.*, 273 at [50].

⁵⁴ ILC Report, *supra*, note 6, at 71-2.

on which these institutions, and the reasoning of experts operating within them, are based. Such seduction by the overpowering plausibility of the reasoning inherent in the structure of one's own regime is the experience of structural bias.

II. II. Incommensurability: Rethinking Inter-Regime Conflict

To sharpen the analysis of regime-conflict, it is useful to have recourse to the analysis of what Jean-Francois Lyotard calls the *differend*.⁵⁵ As Lyotard defines the term, '[A] case of differend between two parties takes place when the "regulation" of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.'⁵⁶

When a matter of concern to the international environmental regime appears before the regulating bodies of the WTO, the structural bias of these bodies will inevitably formulate the situation in the language – the facts and norms – of its system. But the issues formulated by the international environmental regime are, as we have seen, a part of the 'self-contained' production of its own, different, facts and norms. The original environmental issue is thereby 'regulated' in an idiom in which its complete sense, in particular its sense under competing regimes, cannot be signified.

We have already seen how a special regime may be 'self-contained' through the perpetual reproduction of a unique set of facts and norms relating to the world at large. That which links a given set of such facts and norms internally – the particular world view embodied in the regime's foundational understanding of rational social organization – is, ultimately, a specific teleology. The aim of each regime is to perpetuate *its* rationality of the fundamentals of social ordering, and to effect *its* applicability (if not total primacy) in every area. Thus, the international human rights regime aims toward a world in which issues of human rights, *as formulated by the international human rights regime*,⁵⁷ arise at all junctures where humans are affected by the rights of others. So too, the international environmental regime aims toward a world where environmental issues, as formulated by the international environmental regime, are given proper consideration (as well as their deserved priority) in every instance where the acts of human interaction affect the

⁵⁵ Jean-Francois Lyotard, *The Differend* (Minneapolis: University of Minnesota Press, 1988) Originally published as *Le Differend* (Les Editions de Minuit, 1983).

⁵⁶ *Ibid.* at para. 12.

⁵⁷ This concern may be manifested by, for example, the fact that the international human rights regime does not present the International Law Commission with difficult human rights issues for their 'resolution' through

environment. The same may be said for each international special regime appearing as a particular social rationality. In a world as interconnected as ours, large-scale international human interaction will generally implicate certain issues within each of these regimes – whether it be human rights, the environment, trade, the EU, or even space – and each in turn aims that *it* be the one who gets to formulate these issues, and that these issues attain their proper priority.

Lyotard dubs this coupling of teleology with a rationality of coupling phrases (which may be seen as the embodiment of various facts and norms) *genres of discourse*.⁵⁸ For Lyotard, genres of discourse determine the way in which phrases may be linked together to form description, thoughts, projects, etc. ‘The stakes bound up with a genre of discourse determine the linkings between phrases,’⁵⁹ such that, ‘a genre of discourse imprints a unique finality onto a multiplicity of heterogeneous phrases by linkings that aim to procure the success proper to that genre.’⁶⁰ It is precisely this ‘unique finality’ that makes for the irreconcilably different idioms of two or more regimes in conflict:

There are stakes tied to genres of discourse. When these stakes are attained, we talk about success. There is conflict, therefore. The conflict, though, is not between humans or between any other entities; rather, these result from phrases. [. . .] No matter what its regimen, every phrase is in principle what is at stake in a differend between genres of discourse. This differend proceeds from the question, which accompanies any phrase, of how to link onto it. And this question proceeds from the nothingness that 'separates' one phrase from the 'following.' [. . .] This 'nothingness' is, [], what opens up the possibility of finalities proper to the genres.⁶¹

Different social rationalities arise from the openness – the ‘nothingness’ – of the potentiality for social organization. Precisely because there is no determined law that this rather than that form of social reaction follow from a particular state of affairs, different ways of rationalizing the world, and human interaction within it, arise. And due also to this absence of necessity, conflicts over the manner of rational construction inevitably come into play. But, as Lyotard also points out, in the ‘absence of a universal genre of discourse to regulate them (or, if you prefer, the inevitable partiality of the judge),’⁶² the various rationalities cannot pursue a mutually satisfying resolution.

The wrong done from the point of view of one regime is not signified in the idiom of the other because the two rationalities are untranslatable into one another. This follows, again, from

codification or progressive development. The regime prefers, instead, to apply its own expertise to these difficulties.

⁵⁸ Lyotard, *supra* note 55.

⁵⁹ *Ibid.* at para. 148.

⁶⁰ *Ibid.* at para. 180.

⁶¹ *Ibid.* at para. 188.

⁶² *Ibid.* at. xii.

the specificity of the *world* created by each separate rationality.

A genre of discourse exerts a seduction upon a phrase universe. It inclines the instances presented by this phrase toward certain linkings, or at least it steers them away from other linkings which are not suitable with regard to the end pursued by this genre. It is not the addressee who is seduced by the addressor. The addressor, the referent, and the sense are no less subject than the addressee to the seduction exerted by what is at play in a genre of discourse.⁶³

Thus, properly understood, a teleological ‘self-contained’ rationality, functioning as a genre of discourse, effects a complete encompassing of the entire world for those operating within its idiom. It is not the case that the addressor of one idiom is seducing, by means of persuasion in a common language, the addressee of a wholly different idiom. Rather, in the eyes of this addressor, the concepts being used, and that which is being talked about, are all formulated entirely differently than if one were to venture into the eyes of the addressee from the other idiom. Such is the power of this teleological seduction, that ‘genres are incommensurable, each has its own “interests”,’⁶⁴ each is a world unto itself, and unlike any other:

whether child, diplomat, subordinate, or superior, the author of the image does not link up the same way with the original phrase as with its ‘transcription.’ For them, the analogy of ‘sense’ between the two phrases is not only the analogy between the abstract concepts to which they can be reduced, but it should also extend to the universes which are presented by the two phrases and within which they are themselves situated. These universes are constituted by the way the instances (not only the sense, but also the referent, the addressor, and the addressee) are situated as well as by their interrelations. The addressor of an exclamative is not situated with regard to the sense in the same way as the addressor of a descriptive. The addressee of a command is not situated with regard to the addressor and to the referent in the same way as the addressee of an invitation or of a bit of information is.⁶⁵

Nevertheless, it may be objected, these special regimes are all part of the arena of general international law. They can and they certainly do communicate in *some* sort of a common language. After all, every international regime ‘communicates’ by using such terms as ‘international law’, ‘*erga omnes*’, ‘*jus cogens*’, etc. This does not mean, however, that the same referent or ‘meaning’ is invoked by all those involved.⁶⁶ The incommensurability of the various regimes may well be masked by common proper names - its proper name allows it to be pinpointed within a world of names, but not within a linking together of phrases coming from heterogeneous

⁶³ *Ibid.* at para. 148.

⁶⁴ *Ibid.* at para. 231.

⁶⁵ *Ibid.* at para. 79.

⁶⁶ Personal observations of the work of the International Law Commission’s Study Group on the topic of Fragmentation in International Law, for example, revealed profound differences in the meanings attributed by various international lawyers to the term ‘*erga omnes*.’ ILC Report, *supra* note 6. On the issue of semantic indeterminacy in general, see e.g., H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961) at 126-28.

regimes and whose universes and the tensions exerted upon them are incommensurable with each other.

The incommensurability is not only masked in this way, but is completely not regarded by the party in whose idiom the dispute is being ‘regulated’. From its point of view, no problem exists. From its perspective, incommensurability is not an issue precisely because ‘one speaks in [the other’s] place, one reinterprets [the other’s] theses, one makes [the other] presentable for dialogue.’⁶⁷ It is thus that the conflict is ‘regulated,’ thus that ‘agreement’ is reached. But the cost of this ‘resolution’ is the victimization of one rationality to the idiom of the other – its reduction to silence. The bias of the judge will only hear a tongue in which its wrongs cannot be phrased. And so we have the *differend*:

the case where the plaintiff is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized [the witnesses silenced, the judges made deaf, and the testimony inconsistent (insane)], everything takes places as if there were no damages.⁶⁸

And thus there is always a wrong and a victim in cases of inter-regime conflict. When the question is given to the tribunals or institutions of one regime, the rationality of the other is effectively silenced. The judge becomes the hegemon:

[Humans] are situated in heterogeneous phrase regimes and are taken hold of by stakes tied to heterogeneous genres of discourse. The judgment which is passed over the nature of their social being can come into being only in accordance with one of these regimens, or at least in accordance with one of these genres of discourse. The tribunal thereby makes this regimes and/or this genre prevail over the others. By transcribing the heterogeneity of phrases, which is at play in the social and in the commentary on the social, the tribunal also necessarily wrongs the other regimes and/or genres.⁶⁹

This is why no solution to inter-regime conflict may take place by letting the regimes ‘talk it out’ by taking stock of each others’ issues. The incommensurability of these social rationalities leads not to compromise, but to the silence of one (or many) and to the complete victory of another. No matter how much international trade law attempts to conceive and take into account issues pertinent to the international environmental regime, for example, these issues will always be formulated in the world of the international trade regime so as to be unrecognizable to the regime which engendered them. If the tribunals of a given regime assert a wider jurisdiction than another over issues pertinent to both, then the rationality of one will inevitably be silenced by the

⁶⁷ Lyotard, *supra* note 55 at. 24.

⁶⁸ *Ibid.* at para. 12.

⁶⁹ *Ibid.* at para. 196.

hegemony exerted by the other. This is, as we have seen, the problem of the differend resulting from structural bias. Escape from victimization lies solely in finding the means to lift the silences effected by its presence: ‘To give the differend its due is to institute new addressees, new addressors, new significations, and new referents in order for the wrong to find an expression and for the plaintiff to cease being a victim. This requires new rules for the formation and linking of phrases.’⁷⁰

The freedom to do so lies in the openness that allows, and indeed beckons, for a multiplicity of rationalities and ways of structuring and restructuring the social. Thus, ‘[Human beings] are summoned by language, not to augment to their profit the quantity of information communicable through existing idioms, but to recognize that what remains to be phrased exceeds what they can presently phrase, and that they must be allowed to institute idioms which do not yet exist.’⁷¹

Pointing to structural bias is useful not only to re-conceptualize inter-regime conflict, but also to respond with institutions better suited for the re-conceptualization: ‘to *institute* idioms which do not yet exist.’ This is precisely the work of politics: ‘it is the multiplicity of genres, the diversity of ends, and par excellence the question of linkage.’⁷²

What politics is about and what distinguishes various kinds of politics is the genre of discourse, or the stakes, whereby differends are formulated as litigations and find their 'regulation.' Whatever genre this is, from the sole fact that it excludes other genres, ... it leaves a 'residue' of differends that are not regulated and cannot be regulated within an idiom, a residue from whence the civil war of 'language' can always return, and indeed does return.⁷³

In this way, the recognition of the problem of structural bias may be seen as a call to political freedom: freedom from the hegemony of one social rationality over another (or others), and freedom to recreate the language and the institutions upon whose stages the conflicts among different modes of social ordering take place. ‘The “people”,’ Lyotard proclaims, ‘is not the sovereign, it is the defender of the differend against the sovereign.’⁷⁴

⁷⁰ *Ibid.* at para. 21.

⁷¹ *Ibid.* at para 23.

⁷² *Ibid.* at para. 190.

⁷³ *Ibid.* at, para. 201.

⁷⁴ *Ibid.* at para. 208.

III.III.Rethinking Statehood

A. A. Introduction

Thus far, I have attempted to draw attention to the essentially extra-legal decisions that are being made when the norms of one regime are evaluated with respect to those of another in the absence of a politically pre-negotiated normative relationship. In doing so, I have noted the lack of political legitimacy and accountability in creating hierarchy between incommensurable legal norms. Saturated with its own teleology and reasoning, the institutional structure of any particular international legal regime will fail to phrase issues pertinent to a different regime as the latter would have. The incommensurability of regime dialectics, and the impossibility of articulating the concerns of one regime in the forums of another, inevitably lead to the potentially undesirable situation where, by redefining the values of an opposing regime in its own terms, the regime with the widest jurisdiction constrains the modes of reasoning available to the global public. In a world where each forum is already conquered, what is needed is an un-figured and flexible space from which one may engage with the forces of functional rationalities on grounds more open to the simultaneous presence of multiple idioms.

In an effort to pursue one potentially fruitful avenue for the re-politicization of discourse regarding the normative clash at the heart of genuine regime conflict, I argue for a re-conceptualization of the state that will allow for the creation of a multiplicity of spaces. Within these spaces, the competition of different international regime normative hierarchies may receive, if nothing else, a less biased expression. Subsection B argues that the fragmentation of international law along the functional lines of distinct teleological reasoning is not sign of the demise of the state as a needed sphere of public organization, but rather, paralleling numerous other efforts to increase the democratic legitimacy of global decision-making, is a call to renew its usefulness.

The state is already a concept that resonates with the notion of emptiness and a lack of functional rationality. It exists, in its own self-perception, primarily to serve the public space. Indeed from its birth as a political formation out of the feudal order, the self-understanding of the state, as originally embodied in its king, was that of a public space independent of individual teleologically-oriented estates, serving the public precisely through its lack of a given

pre-determination.⁷⁵ This historicity suggests that the concept of the state can be a potentially ideal candidate for a modernizing re-conceptualization that will help alleviate some of the tensions presented by the fragmentation of international law. In this section, I propose a new conception of the state based on the idea of the state as an empty signifier – that is, the state as a public space disentrenched from the permanence of specific teleological commitments. By refocusing on the idea of the state, its agents, both domestically and abroad, may work toward a more inclusive and more politically accountable environment for the production and application of international law.

B. B. Fragmentation and the Need to Rebuild the State

As argued above, one way of thinking about the fragmentation of international law is to emphasize the threat to the political freedom of global society – the freedom to negotiate different normative hierarchies – posed by delegating structurally-biased special regime decision-makers to sit as the ultimate authority over the conflicting norms of incommensurable regimes. Delegating such normative decision-making in the final instance to the special regimes constrains, through the phenomenon of structural bias, the lines of argument available for reasoning the stakes of inter-regime conflict. The idioms of dominant regimes silence that which is lost in translation, leaving important issues and norms off the table.

A potentially serious threat from this system is that dominant regimes will naturalize themselves to the exclusion of all others. Interests unrepresented by any particular interest-balancing scheme may come to be regarded as illegitimate or insane.⁷⁶ As Ernesto Laclau and Chantal Mouffe point out, when dealing with political struggle, ‘[W]e are dealing with discourses which seek, through their categories, to dominate the social as a *totality*.’⁷⁷

One way to combat the threat of this freedom-constraining and potentially dangerous naturalization is to preserve the multiplicity of spaces for public decision-making. As Laclau and Mouffe state: ‘The multiplication of political spaces and the preventing of the concentration of power in one point are . . . the preconditions of every truly democratic transformation of society. . . . This requires the autonomization of the spheres of struggle and the multiplication of

⁷⁵ See e.g. the idea of the State as a *civitas*, in contrast to a purposeful enterprise, in Michael Oakshott, *On Human Conduct* (Oxford: Clarendon Press, 1975). See also Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, 1997).

⁷⁶ See e.g., Michel Foucault, “Power/Knowledge”, in S. Seidman (ed.), *The Postmodern Turn: New Perspectives on Social Theory* (Cambridge University Press, 1977) at 29–45.

⁷⁷ Ernesto Laclau and Chantal Mouffe, *Hegemony & Socialist Strategy: Towards a Radical Democratic Politics*, (London: Verso, 1985) at 182-183.

political spaces⁷⁸

However, as will be explored in the following sub-section, the state already exists as a concrete manifestation of the ever-present possibility for change. If the state is viewed as an empty signifier, it is always subject to internal hegemonic struggle and revolution. Hence, a multiplicity of states may facilitate the autonomization of diversified spheres of struggle. Thus, as put by Roberto Mangabeira Unger, ‘those whose hopes depend upon our further emancipation from false necessity cannot bypass the state; they must rebuild it.’⁷⁹

C. C. The State As Empty Signifier

Inseparably linked to the role of the state as protector against hegemonic naturalization of particular idioms and interests to the exclusion of others is the concept of the state as an empty signifier. The notion of *empty signifier*, as used, for example, by Ernesto Laclau,⁸⁰ signifies a concept without specificity of content, inseparable from its concrete manifestations. Laclau gives the example of the concept of ‘order’:

‘Order’ as such has no content, because it only exists in the various forms in which it is actually realized, but in a situation of radical disorder ‘order’ is present as that which is absent; it becomes an empty signifier, as the signifier of that absence. In this sense, various political forces can compete in their efforts to present their particular objectives as those which carry out the filling of that lack.⁸¹

The same may be said for the concept of the state. Already it, too, exists only ‘in the various forms in which it is actually realized’: one knows nothing of the state in the abstract, but rather knows only *particular* states. When describing a state in detail, one will always be forced to clarify which state is being described. Further, in the experience of statelessness, the state, like ‘order’ during chaos, ‘is present as that which is absent.’ When the state falls, as during revolution, the concept of the state continues to hover as an ever-present lack throughout its populace. It is this concept – the state – that signifies such absence, and, having done so, it engenders a political maelstrom in the battle to fill it.

Clearly, it would be improper to assume that a situation of utter statelessness is required for such an experience of absence. As Laclau describes, ‘If democracy is possible, it is because the universal has no necessary body and no necessary content; different groups, instead, compete

⁷⁸ *Ibid.* at 178.

⁷⁹ Roberto Mangabeira Unger, *False Necessity* (London: Verso, 2004) at 312.

⁸⁰ Laclau, Ernesto, *Emancipations* (London: Verso 1996).

⁸¹ *Ibid.* at 44.

between themselves to temporarily give to their particularisms a function of universal representation.’⁸²

So, while there may well be a state in the particular expression given to the term by some, this very term will signify that which is so obviously absent in the philosophies of others. The ‘universal representation’ of any given state, therefore, in any of its myriad specific incarnations, will always be temporary, always facing competition. Recall: ‘the universal has no necessary body and no necessary content;’ the state is an empty signifier. In its abstract emptiness, no final content, apart from that of endless cycles of particulars, awaits discovery, and its particular expressions may never hope to pass beyond the status of the hegemon:

[I]f that impossible object – the system – cannot be represented but needs, however, to show itself within the field of representation, the means of that representation will be constitutively inadequate. Only the particulars are such means. As a result the systematicity of the system, the moment of its impossible totalization, will be symbolized by particulars which contingently assume such a representative function. This means, first, that the particularity of the particular is subverted by this function of representing the universal, but second, that a certain particular, by making its own particularity the signifying body of a universal representation, comes to occupy – within the system of differences as a whole – a hegemonic role.⁸³

Precisely owing to the openness of that which falls within the rubric of the empty signifier, its any given content, in so far as it professes to portray *the* content proper to the form, will always be a subject to re-evaluation. The one propounds to signify the many, and exerts upon them hegemonic force. So long as minds are free and politics makes space for change, the ever-present lack of the residual differends assures that any given content will always be impermanent.

As a result, the structure of the state remains inevitably never ‘fully reconciled with itself, ... it is inhabited by an original lack . . .’⁸⁴ Its implication, then, is the existence of ‘a radical undecidability that needs to be constantly superceded by acts of decision.’⁸⁵ This is, in Lyotard's language, ‘the nothingness that “separates” one phrase from the “following”.’⁸⁶ It is this ‘nothingness’ – this ‘radical undecidability’ at the heart of all empty signifiers (whether ‘state’ or ‘law’ or ‘order’) – that permits the identification of a particular reasoning with the representation of rationality per se. Yet it is nonetheless this same ‘nothingness’ that allows for the creation of spaces within which the hegemony may fall prey to contest. ‘As society changes over time this

⁸² *Ibid.* at 35.

⁸³ *Ibid.* at 53.

⁸⁴ *Ibid.* at 92.

⁸⁵ *Ibid.*

⁸⁶ Lyotard, *supra* note 55 at para 188.

process of identification is no longer automatic, different projects or wills will try to hegemonize the empty signifiers of the absent community. The recognition of the constitutive nature of this gap and its political institutionalization is the starting point of modern democracy.⁸⁷

The empty signifier of the state is thus a perfect stage for the conception of a space for something like political freedom – a space signified through the political institutionalization of ‘the constitutive nature of [the] gap’ between the given and what follows.

D. D. Aims Toward a Negative Structural Bias

It is not enough, however, to point to the concept of the state as empty signifier. The current understanding of states is often in terms of static and purely nationalistic interests. There is no desire to simply trade in the structural bias inherent in current fragmentation for a nationalistic bias in favour of a particular group of nationals. Hence, a reconceptualization of the State itself and its democratic institutions is necessary. As Laclau maintains, ‘[a] democratic society is not one in which the “best” content dominates unchallenged but, rather, one in which nothing is definitely acquired and there is always the possibility of challenge.’⁸⁸ A reconceptualization of the modern democratic state can perhaps provide a sphere of articulation more suitable to the political resolution of global normative conflict than its counterpart in the institutions of regimes.

Of course, every structure will effect a certain bias - no truly innocent spaces can arise. Yet, spheres may be conceived that tend toward what can be termed a bias toward disentanglement. By manifesting a commitment not to posited functional teleologies, but rather to the negative space within which new modes of description and normative ordering may arise, the democratic institutions can come to minimize their bias toward specific substantive directions. Such institutions would thereby allow for a less constrained debate and decision-making procedure. Conceived in this way, they may be said to maximize the effect of a *negative* structural bias – an acknowledgment of the empty gap between the universal and the specific order seeking to depict it. In this way, we can conceive of the democratic process as one where institutions and procedures serve not to restrict but to facilitate competition among various idioms and methods for both describing and evaluating the priorities and values of the social order.

Unger sees the potential for a similar ‘negative capability’ in a society that empowers

⁸⁷ Laclau, *supra* note 80 at 46.

⁸⁸ Laclau, *supra* note 80 at 100.

‘through disentanglement.’⁸⁹ That is, a society that allows for the constant rethinking of its structures and values before these are so entrenched in routine that their particularism becomes inseparable from the empty universal. Through a commitment to disentanglement, democratic structures can single out the ultimate falsehood of all that is professed as absolutely necessary, and thereby free its people from the constraints of any permanently absolute system.

By building structures favourable to the emergence, expression, and competition between new and different idioms, the empty signifier of the state may be a space in which contending normative systems face each other in as near to fair a context as possible. The terms of the conflict’s outcome would have no set and predetermined character. Such context may, as Lyotard puts it, thus ‘save the honor of thinking’ for the policy decision-maker.⁹⁰

Conceived in this way, the state is an appropriate forum in which to vest the ultimate legitimacy for resolving global normative conflict from different international special regimes. As political spaces committed to disentanglement and the ever-present potential for renewed political struggle over the modes of social ordering, states are more legitimate spaces for balancing global interests than the structurally biased institutions of conflicting regimes.

Of course, there are times when the expertise of a special regime’s decision-making body is legitimate, such as when interpreting the application of its legal regime to a conflict between interests that fall within the scope of those addressed in the balance of interests constitutive of the forum regime’s normative structure. However, owing to the nature of international regimes as not only rules, norms, and principles, but also particular descriptive dialectics for formulating the content of global issues, the regime’s decision-making bodies may be structurally prevented from recognizing the involvement of interests not implicated in the negotiation of their regimes’ interest-balancing schemes.

In deciding these types of issues, it is important to remember that what is at stake is a hegemonic struggle for the (ultimately temporary) content of the structural relationship between various global normative systems in particular situations, not the reflexive protectionist and purely nationalistic perspective so often characteristic of modern state negotiations. In a globally integrated world fragmented along functional lines of different teleologies for describing and ordering global values, what is needed is not only a shift in the internal self-perception of the state

⁸⁹ *Ibid* at 249.

⁹⁰ Lyotard, *supra* note 55 at xii.

ideal, but also a shift in the self-perception of the state itself, represented by its agents on numerous global stages vis-à-vis the global community. The following section describes how the shift in the self-perception of the state toward a space for political struggle with respect to global norm hierarchies can lead to the development of a body of customary international law that responds to a more inclusive international community.

IV. IV. Toward a Philosophy of International Law in an Era of Fragmentation

A. A. Introduction

One way in which a re-conceptualization of the state as a genuinely open public space can effect a shift in thinking about international law in an era of fragmentation results from its effect on the concept of state sovereignty. To witness the impact that such a re-conceptualization of the state ideal may have upon the concept of state sovereignty, and hence upon the role of the state in the creation and application of international law, it is helpful to recast the discussion of hegemonic struggle for the content of the empty signifier (section III C above) so as to highlight some important implications of instituting a commitment to the empty signifier for the relationship between the freedom of the individual within the state and the sovereignty of the state over the individual. Here a Hegelian conception of the freedom of an individual in relation to his state provides a useful parallel for launching the discussion from the re-conceptualization of the state on the basis of the empty signifier toward beginning to rethink the nature of an international rule of law conducive to a more inclusive and more democratically legitimate international society.⁹¹

Using this framework as a helpful tool, subsection B discusses the re-conceptualization of individual freedom attendant to restructuring the state on the basis of a commitment to the empty signifier, as well as the relation of individual freedom to the sovereignty of the state over its subjects. Subsection C subsequently expands upon this conception of sovereignty to address some of its potential implications for rethinking the role of an international rule of law in alleviating some of the tensions produced by the anxieties surrounding fragmentation.

⁹¹ As there appears to exist a modern tendency to cringe at the mention of Hegel, I must say that the use of one Hegelian concept does not entail an uncritical subscription to the whole complex of Hegelian thought.

B. B. The Freedom of the Individual and the Sovereignty of the State

A useful bridge from the discussion of the state as empty signifier to the impact that this theoretical move has on the understanding of state sovereignty may be found in the Hegelian notion ‘that what we call “the state” is nothing other than a further aspect of our own self-determination.’⁹² In this vein, Hegel proposes that ‘[t]he state is the actuality of concrete freedom.’⁹³ For Hegel, ‘concrete freedom consists in this, that personal individuality and its particular interests not only achieve their complete development and gain explicit recognition for their right . . . but, for one thing, they also pass over of their own accord into the interest of the universal, and, for another thing, they know and will the universal.’⁹⁴

One is of course free to become oneself, to be counted as such, and achieve one's particular goals and interests. The Hegelian notion of freedom has, however, two subsequent layers of meaning, the freedom of individuality within a sea of individuals being but the beginning.

‘[F]or one thing,’ writes Hegel, the experience of ‘concrete freedom’ requires also that these individuals ‘pass over of their own accord into the interest of the universal.’ This is the moment at which, in the words of Laclau, ‘. . . a certain particular, by making its own particularity the signifying body of a universal representation, comes to occupy – within the system of differences as a whole – a hegemonic role,’ such that ‘the systematicity of the system, the moment of its impossible totalization, [is] symbolized by particulars which contingently assume such a representative function.’⁹⁵ The further step taken in the development of the concept of freedom is thus the recognition of the phenomenon of hegemonic struggle whereby certain particular interests may in effect surpass their individuality and (temporarily) occupy the interest of the universal.

‘[A]nd, for another thing,’ writes Hegel, in the experience of concrete freedom, ‘personal individuality and its particular interests’ must ‘know and will the universal.’ Therein lies the highest emancipation: for Hegel, the release of immortality. To illustrate the distinction, Hegel contrasts the civic involvement of citizens in the Greek polis with those of the subsequent Roman Empire. As Avineri explains,

Under the [Roman] Empire, the readiness to work for the whole disappeared and the citizen

⁹² Shlomo Avineri, *Hegel's Theory of the Modern State* (London: Cambridge University Press, 1972) at 138.

⁹³ G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox. (Oxford: University of Clarendon Press, 1942) at 160 [Hegel, *Philosophy of Right*].

⁹⁴ *Ibid.*

⁹⁵ Laclau, *supra* note 80 at 53.

became a private person, not recognizing anything transcending his particularity. If in the polis the citizen was ready to go to war for the commonwealth, under the Empire the only thing he could defend would be his property, and for *this* no one was ready to sacrifice life and limb.⁹⁶

When all one knows and wills is one's own private individuality and one's own private property, one is forever constrained by the mortality of one's own existence. Though the individual may develop such an individuality to its fullest, and though she may accumulate all her desired possessions, she will never attain a true freedom, for she will always be bound by her death. Such is the warning served by the example of the Roman Empire, where the mentality of life as the polis – an inter-connected whole of social existence – gave way to an atomization of the individual:

[A]ctivity was no longer for the sake of a whole or an ideal. Either everyone worked for himself or else he was compelled to work for some other individual . . . All political freedom vanished also; the citizen's right gave him only a right to a security of that property which now filled his entire world. Death . . . must have become something terrifying, since nothing survived him.⁹⁷

By contrast, the citizen of the Greek polis is seen in a state of emancipation from the oppression of man's fixation upon his own mortality: 'the republican's whole soul was in the republic; the republic survived him, and there hovered before his mind the thought of its immortality.'⁹⁸ Such is the last step taken by Hegel in his development of the concept of 'concrete freedom' that finds actuality within the political space of the state: the freedom not only to partake in hegemonic struggle to advance one's own individualistic interest, but also in order to expand beyond the bounds of individuality and to identify one's movements with the movements of the whole – it is the freedom, as Hegel puts it, to 'know and will the universal.'⁹⁹

It is of course the second of these three freedoms that binds together the experience of freedom as an individual qua subjective particular (first tier), and that of the individual qua member of the universal (third tier). As previously discussed, it is precisely this type of freedom that allows for the particular subject to fill the gap of 'nothingness' between the given and the yet anticipated of social reality in his own particular way. Such filling will, as has already been mentioned, inevitably foster countless differends, which, in their quest to find expression,

⁹⁶ Avineri, *supra* note 92 at 25-6.

⁹⁷ G.W.F. Hegel, *Early Theological Writings*, trans. T. M. Knox, (Chicago: University of Chicago Press, 1948) at 157.

⁹⁸ *Ibid.*

⁹⁹ Hegel, *Philosophy of Right*, *supra* note 93 at 160.

motivate unrepresented interests to redefine the ‘nothingness’ within this gap and so arrive at alternate modes of social ordering. It is this environment of hegemonic struggle that allows for the particular to vie for its expressions of the larger universal. And it is in this sense that leeway to engage in competition for this ‘nothingness’ presents the individual with opportunity to ‘know and will the universal.’ For, says Hegel, “the eternal nothing is one’s own. It, and all its movements, are the highest beauty and freedom.”¹⁰⁰

It is also the three-fold freedom at the heart of hegemonic struggle that forms the source of its converse, the sovereignty of the state over its subjects, embodied in a democracy in the rule of law. For Hegel, the laws of the state are the specific embodiment of the freedoms actualized through its existence. They are the fruits of one’s self-determination through the unhindered development of both self and state. Thus:

[the laws] are not something alien to the subject. On the contrary, his spirit bears witness to them as to its own essence, the essence in which he has a feeling of his own self-hood, and in which he lives on in his own element which is not distinguished from himself. The subject is thus directly linked to the ethical order by a relation which is more like an identity than even the relation of faith or trust.¹⁰¹

Again, the subject attains her ultimate emancipation not only through the private enjoyment of exclusive title to a tangible set of objects, but rather also through her participation in the struggle to participate in the value-formation and –prioritization within her society. In the words of Aristotle: man is a political animal. His freedom lies in spheres of movement wider than the confines of his own corporal existence. Thus, when ‘his spirit bears witness to [the laws] as to its own essence, the essence in which he has a feeling of his own self-hood,’ the laws are not felt as a flight from politics, where the rule of law is conceived as an independent and objective realm.¹⁰² Such a conception would have precisely the contrary effect of alienating the subject from his legal order. Rather, the ‘essence’ herein attested to – that ‘feeling of his own self-hood’ – is the manifestation of the subject’s ultimate capacity for self-determination through his continuous movement within the political spaces made possible by the existence of the state. The subject extends herself into the socio-political realm. In this way, the laws that incarnate her presence and interaction on these substantive planes are but the extension of her wider, freer self. The rule of law embodies this realm, ‘in which [the subject] lives on in his own element which is not distinguished from himself.’

¹⁰⁰ Hegel, *Schriften zur Politik und Rechtsphilosophie*, ed. G. Lasson. (Leipzig: Felix Meiner, 1913) at 469.

¹⁰¹ Hegel, *Philosophy of Right*, *supra* note 93 at § 147.

¹⁰² See Martti Koskenniemi, “The Politics of International Law” [1990] 1 Eur J Int L. 4 at 4-5.

The rule of law is thus not something logical or objective, to which one may bear ‘the relation of faith or trust.’ It is the gesture of the subject and the concrete outcome of his political struggle, and, as such, bears to him ‘a relation which is more like an identity.’

In this way, the rule of law that is the sovereignty of the state over its subjects may be seen as the extension of the subject’s self-determination into the realm of public existence. Thus Hegel writes, ‘in the state, as something ethical, as the inter-penetration of the substantive and the particular, my obligation to what is substantive is at the same time the embodiment of my particular freedom.’¹⁰³

By broadening herself into the public realm, the subject takes the whole into herself. No longer is she a mere part of that whole – in the sense of belonging to an aggregate of individuals – rather, the whole becomes a part of her, for she no longer simply knows and wills her own particular existence, but knows and wills the universal as well. This is the sense of identity from which the subject subsequently recognizes herself in the laws that are the concrete productions of political interaction: the subject is ‘directly linked to the ethical order’ for she has, in achieving her liberation, taken this larger realm into herself; it is thus that she feels to it ‘a relation which is more like an identity,’ and thus that she finds in obligation to it to be ‘the embodiment of [her] particular freedom.’

C. C. State Sovereignty and International Law

As Avineri points out, Hegel himself is ‘adamant about the distinction between the nature of internal and international law.’¹⁰⁴ To explain, he provides the following distinction:

While internal law is binding, under penalty of sanctions, and in case of infringement there exist both an objective criterion for judgment as well as an objective judge to administer it, international law is binding only insofar as the parties concerned are willing to abide by it. It is of the nature of a voluntary act, expressing the subjective wills of the parties involved, not of a binding, objective law. Hence international law remains always an ‘ought’.¹⁰⁵

The operative dissimilarity thus appears to be that internal law, on the one hand, has the character of ‘a binding, objective law,’ with ‘an objective criterion for judgment as well as an objective judge,’ whereas international law, on the other hand, has only a subjective character, in so far as it ‘is binding only insofar as the parties concerned are willing to abide by it.’

¹⁰³ *Ibid.* at 161.

¹⁰⁴ Avineri, *supra* note 92 at 200.

Given the above discussion of the Hegelian notion of internal rule of law as ‘the essence in which [the subject] has a feeling of his self-hood,’¹⁰⁶ however, it seems more than a little strange that the same Hegel would now lay such emphasis on the objectivity of internal law, in contrast to the subjectivity of the international. To maintain that ‘[t]he subject is ... directly linked to the ethical order by a relation which is more like an identity than even the relation of faith or trust,’¹⁰⁷ appears to make the call for legal validity to find its basis in objective judgment and administration a moot point. To maintain the relation of identity of the particular to the legal order – stemming from the nature of the rule of law as ‘the embodiment of my particular freedom’ – requires, as discussed above, that a certain subjectivity be placed at the very core of the legal relation. As such, the rule of law is not diminished by being ‘of the nature of a voluntary act, expressing the subjective wills of the parties involved.’ It is, rather, fortified by the subjective sentiment of its existence as the manifestation of the concrete freedom of its subjects. The subject abides by the laws as the outcome of political struggle knowing the continuity of that struggle, and the ever-present possibility that his particular value-system may (temporarily) come to signify the collective social order.

In this way, the present discussion departs from Hegel's literal argument, though stays within the Hegelian theoretical framework. Though international law may indeed project a largely subjective character, the path of our previous discourse suggests that this need not be a hindrance to the nature of its legality. It is with this notion in mind that I will now venture to extend the re-conceptualization of state sovereignty and its embodiment in the rule of law, as defined above, to the international realm, in an effort to show how rethinking the role of the state in a democratic society may lead toward a useful rethinking of the role of international law in addressing conflicts between competing global normative systems.

When a participant in domestic government, at any level of involvement, partakes in the creation or application of governing laws, she acts, at some level of consciousness, on the basis and in furtherance of a particular understanding of the structural nature of her state. Similarly, when such participants interact, on behalf of their state, on various global stages with participants from other states, they do so on the basis and in furtherance of their understanding of the nature and interests of the states involved. In negotiating, renegotiating, and interacting with the various

¹⁰⁵ *Ibid.*

¹⁰⁶ Hegel, *Philosophy of Right*, supra note 93 at 106.

¹⁰⁷ *Ibid.*

sources of international law, to the extent that these actors participate as agents and representatives of their states,¹⁰⁸ they are exercising a sovereignty that derives from the internal sovereignty of the state over its constituents. If the state agent understands its state's internal sovereignty on the basis of a rule of law instituted to allow for the potential of open debate and rethinking with regard to prioritizing collective commitments, this understanding of sovereignty may translate into the agent's understanding and goals in exercising state sovereignty on an international plane. Hegemonic struggles at the domestic level inform the hegemonic struggles for the empty signifier of global coordination.

Because, as shown above, shifting the understanding of political freedom entails a shift in the relationship between the rule of law and its subject, approaching global normative conflict from the perspective of a democratic struggle attentive to the presence of a multitude of differends will similarly effect a shift in the relationship between state agents and the international rule of law. From this perspective, the interest of the state becomes an extension of its own political contestations over the content of its value systems and the indeterminacy of structuring a systematic hierarchy of global values.

The outcome of such global hegemonic normative battles in terms of the formation of a body of customary, general principle-, or treaty-based international law with respect to the ranking of competing normative and legal systems in particular contexts will depend, as in the domestic context of the politically free state itself, on the persuasive force of a particular mode of structuring the values and interests at stake – that is, on the ability of the particular to succeed in representing the universal. The agents of the state engaged in the creation and/or application of international law, if democratically accountable through domestic state mechanisms, become place-holders for the particular in one sense and the universal in another. As agents of the state, they are accountable for upholding the outcomes of political struggle at home, and in that sense hold the place of the universal – the temporary winning constellation of the ordering of social values with respect to a particular context. But as agents of one state among many, and even perhaps still as representatives of one agency of the state among many, they are particulars negotiating to have their particular approach come to occupy, however briefly, the universal of the global order with respect to the hierarchical relationship, in a specific context, between competing legal systems

¹⁰⁸ As already mentioned, this discussion is intended as a complement to the numerous other democracy-enhancing discussions currently under way in the re-conceptualization of international law. As a result, the role of non-state actors and their agents is left for another day.

embodying competing normative orders.

As in the state reconceived on the basis of the empty signifier, the rule of law emergent from these global hegemonic struggles is the embodiment of the political freedom of its subjects. Similarly, the interest of the state bears an identity relation to the sources of international law that concretize international political interactions, as the realization of that part of itself which has surpassed its own territorial boundaries and entered the will of a larger entity. Thus, an international rule of law emerges as the manifestation of international political freedom.

However, as in the domestic context, owing to the non-necessity of any given particular mode of structuring the normative relationship, competing considerations will always remain, and so there will always remain countless differends. So, again as in the context of the state reconceived on the basis of the empty signifier, the approach to creating and applying sources of international law must be sensitive to the inclusion of different interests and descriptive dialectics in the negotiations surrounding the proper particular place-holder for the global empty signifier, and must be flexible enough to respect the disentanglement of hegemonic outcomes. Such flexibility may reflect the self-perception of the state, on the basis of which and in furtherance of which its agents engage in political and legal interaction with one another, as a space for the protection of political freedom, and one conducive to rethinking the bases of normative relationships. Legal sources created and applied by agents of states oriented in this way may thereby manifest a more community oriented law-making process.

V. V. Professional Sensibility

A potentially very effective way of shifting the self-conception of the state, both domestically and internationally, toward a more inclusive community is to attend to the education of its agents. For no amount of structural coherence, no amount of technical safeguard, can sustain a system geared toward teleological openness when its operators are not well-equipped to master it. As one method of facilitating a rethinking of international law so as to address the issues of democratic legitimacy by the foregoing discussion, this section will address some potential avenues for refocusing the training of the international lawyer.

First, it is important to note that developing a legal sphere whose structural bias lies in a negative direction – that is, whose institutions are geared *against* their own automatic entrenchment, thereby maintaining sufficient fluidity to accept re-description – does not mean

creating a legal sphere in complete abstraction from the political and legal traditions of the state. Rather than placing the advisors, advocates, and judges operating and maintaining such legal structures into a socio-political vacuum, the creation and sustenance of a system geared toward systemic openness requires instead that these legal professionals preserve a sensibility oriented toward the protection of the system's sensitivity to re-conceptualization and change.

Maintaining the negative structural bias of such a legal system thus requires its legal professional to serve in a certain role of statesmanship – the role of preserving the openness and freedom of the state.¹⁰⁹ Indeed, it has been noted that in this capacity – that of the guardianship of the statesman himself (and so too of his state) from the ensnaring passions of fleeting ideologies – the statesman finds the very heart of his vocation. As Max Weber observed in his 1918 speech entitled 'Politics as a Vocation',¹¹⁰ the 'devotion of those who obey the purely personal "charisma" of the "leader",' and the legitimacy that thereby attaches to the 'leader's political acts – the defining characteristic of statesmanship, as the leadership of a state – is reserved for those who manifest the symptoms of a true political *calling*: 'the leader is personally recognized as the innerly "called" leader of men. Men do not obey him by virtue of tradition or statute, but because they believe in him.'¹¹¹

This calling, and above all this belief in the 'leader of men', is that which, alongside the 'traditional' and the 'legal' considerations, legitimates the obedience and following of his fellow countrymen.¹¹² It is that which elevates the mere political dilettante to the role of the statesman, that which enables the formation and maintenance of states in the face of political anarchy. The calling thus lies at the heart of the statesman, and that which lies at the heart of this calling Weber characterizes as follows: 'The "strength" of a political "personality" means, in the first place, the possession of the ... qualities of passion, responsibility, and proportion.'¹¹³

'Passion' in the sense of '*matter-of-factness*, of passionate devotion to a "cause".'¹¹⁴
'Responsibility' in the sense of making 'responsibility to this cause the guiding star of action.'¹¹⁵

¹⁰⁹ For the similar suggestion that the effective lawyer should hold a mentality similar to that of the moral politician, see Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization" (2007) 8 *Theoretical Inquiries in Law* 9.

¹¹⁰ M. Weber, "Politics as a Vocation", reprinted in H.H. Gerth and C.W. Mills, *From Max Weber: Essays in Sociology* (Oxford: Oxford University Press, 1946) 77.

¹¹¹ *Ibid.* at 79.

¹¹² *Ibid.*

¹¹³ *Ibid.* at 116.

¹¹⁴ *Ibid.* at 115.

¹¹⁵ *Ibid.*

And ‘proportion’ as that capacity which acts as the condition of possibility for the coexistence of both ‘passion’ and ‘responsibility’ within a single individual. For ‘mere passion, however genuinely felt, is not enough. It does not make a politician, unless passion as devotion to a “cause” also makes responsibility to this cause the guiding star of action. *And for this, a sense of proportion is needed.*’¹¹⁶

Weber goes on to explain, however, that ‘a sense of proportion’ cannot, of itself, conclude the inquiry. ‘For the problem is simply how can warm passion and a cool sense of proportion be forged together in one and the same soul?’¹¹⁷

And for this he provides a solution. At the heart of the true statesman – that which ‘distinguishes the passionate politician and differentiates him from the “sterilely excited” and mere political dilettante’¹¹⁸ – is the following requisite characteristic:

This is the decisive psychological quality of the [true] politician: his ability to let realities work upon him with inner concentration and calmness. Hence his *distance* to things and men. . . . [And] that firm taming of the soul, which distinguishes [the statesman from the dilettante], is possible only through habituation to detachment in every sense of the word.¹¹⁹

In this way, Weber has brought us home to the very idea with which we began. For the legal professional’s adherence to a negative structural bias – her unending devotion to a sense of openness, and her consequent readiness and ability to redescribe each situation – mirrors Weber’s perception of ‘the decisive psychological quality’ at the heart of the true, because legitimate and because effective, statesman. For that ‘firm taming of the soul’ that allows for the capacity ‘to let realities work upon [oneself] with inner concentration and calmness’ comes, as Weber puts it, from ‘*detachment*’ – from the maintenance of a ‘*distance* to things and men’. It is precisely the ability to guard oneself from the specific biases of fashionable ideologies that provides the statesman with the space he needs to cultivate his ‘inner concentration and calmness’ – his definitive quality. This mentality is particularly crucial to the statesman concerned with safeguarding the freedom of the state itself. For here the ‘cause’ to which the statesman finds herself devoted – in the ‘passionate devotion to a “cause”’¹²⁰ that elevates her actions to the realm of the political – is that of making space for the unanticipated, of allowing for the possibility of

¹¹⁶ *Ibid.* (emphasis added)

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at 115-16.

¹²⁰ *Ibid.* at 115.

causes as of yet still unforeseen. Thus here especially the keeper of such open spaces must retain that ‘inner concentration and calmness’, that ‘distance from things and men’, and that ‘firm taming of the soul’ which guards oneself from falling prey to the hegemony of present particulars without regard to the perception of proportionality.

The requisite professional sensibility for a legal profession geared toward the building and maintenance of the types of open institutions argued for above is thus akin to that of the statesman championing the cause of the state as empty signifier. Because the legal sphere envisioned responds to the state’s call to freedom, its lawyers must, just as its statesmen, remain the ever-watchful wardens of its flexibility. And since the lawyer is a trained professional, this principle must find expression in the course of her professional training. Thus, she must find in the course of her studies the means to attain that ‘inner concentration and calmness’ that will allow her to retain her distance from the eternal systemic closure of dominating paradigms. Like the detachment central to the calling of the statesman, she must find at the core of her legal training the distinction between, on the one hand, working in the service of a functional teleology and, on the other, ‘let[ting] realities work upon [her] with inner concentration and calmness’, guided by a sense of proportion.

This distinction may be found in, for example, Michael Oakeshott’s idea of ‘education in the true sense.’¹²¹ Oakeshott distinguishes and distances his idea of a liberal education from ‘a world of power and utility, of exploitation, of social and individual egoism, and of activity, whose meaning lies outside itself in some trivial result or achievement ...’¹²²

This is the world of functional teleology. One’s movements, motivation, and reasoning within this world are explicitly guided by the pursuit of specific ends. To function in this world, one demands a particular world-view to map his course, a particular goal in furtherance of which to overpower, utilize, and to exploit. It is this end, this goal, this telos – ‘some trivial [or even grand] result or achievement’ – that structures this world, and actions have no meaning without reference to it. The description is a perfect parallel to what has already been ventured during the analysis of international regime-rationalities above – the functional world-views of teleologically-oriented regimes, structurally biased to act and to reason according to a particular schematic of prioritizing values. Of course, lawyers would cease to be competent professionals if

¹²¹ Michael Oakeshott, "The Idea of a University" in *The Voice of Liberal Learning* ed. by Timothy Fuller (New Haven: Yale University Press, 1989) at 95-104.

¹²² *Ibid.* at 103.

they were to discontinue their training in these fields. Yet there is truth in Oakeshott's warning that an educator must be wary of placing too much emphasis – and not enough detachment – on this functional world, lest she find that 'instead of educating men and women [she] is training them exactly to fill some niche in society.'¹²³ Thus, in contrast to the type of education which provides mere 'qualification for earning a living or a certificate to let [the student] in on the exploitation of the world,'¹²⁴ Oakeshott proposes one which imparts on the student an 'understanding of the manners of conversation'¹²⁵:

The pursuit of learning is not a race in which the competitors jockey for the best place, it is not even an argument or a symposium; it is a conversation. And the peculiar virtue of a university (as a place of many studies) is to exhibit it in this character, each study appearing as a voice whose tone is neither tyrannous nor plangent, but humble and conversable.¹²⁶

Such is the world of 'inner concentration and calmness',¹²⁷ imparted onto the student in 'a place of many studies' – studies engaged not in argument or competition, but rather in conversation. It is a world where the voices of these many studies do not pound upon one's heart with teleological argument – do not scream with a passionate fever to drown out their competitors – they are 'neither tyrannous nor plangent, but humble and conversable.' Here, as the interlocutor of multiple idioms, the student is shown precisely that position of distance and detachment from the passions of particular ideologies which is so crucial to the calling of the statesman, and so central to the maintenance of systemic openness.

Although Oakeshott focuses specifically on 'the peculiar virtue of a *university*', the key to the conversational character at the heart of this exercise is that it occurs within 'a place of many studies' – if indeed this virtue be 'peculiar' to the specific institutions of a university, the fact is contingent and easily rectifiable. For it is equally important for trained professionals seeking to safeguard legal and political spaces from hegemonizing rationalities to be able to retain their distance – their 'cool sense of proportion'¹²⁸ – from the bounded ideologies inherent in the structural biases of functional legal regimes. Only then may they truly guard 'the nothingness that

¹²³ *Ibid.*

¹²⁴ *Ibid.* at 104.

¹²⁵ *Ibid.* at 99.

¹²⁶ *Ibid.* at 98.

¹²⁷ Weber, *supra* note 110 at 115-116.

¹²⁸ *Ibid.*

“separates” one phrase from the “following”.¹²⁹

In the legal world, the school of law is indeed ‘a place of many studies’ – the study of contract law will differ from the study of criminal law or property law, and so on. And in the study of *international law*, the student will encounter here as well the sound of many different voices – international human rights law, international trade law, international environmental law, international humanitarian law, European law, and the list goes on.. However while these voices may often be studied side-by-side one another, and while one often has the opportunity to learn to speak in the languages of these various disciplines, rarely is one taught, while learning them, to step outside of them, or to engage them in an open conversation with each other, in other words, to gage their impact on one another, and, further, to gage their impact on one’s self. Education, in addition to functional training, should allow the student to distance herself from the argument inherent in the value-orientation of each particular voice, and to find herself as an interlocutor, where the pursuit of learning is no longer argument but conversation, ‘each study appearing as a voice whose tone is neither tyrannous nor plangent, but humble and conversable.’¹³⁰ This is not to propose that the student may then piece together the ‘best’ parts of a political arrangement, the ‘best’ components of conceiving and structuring international values. This would be, as Oakeshott puts it, ‘a corrupting enterprise and one of the surest ways of losing one’s political balance.’¹³¹ Rather, it is important that the lawyer, operating and maintaining spaces oriented toward safeguarding the open nature of the state, take great care to retain his own ‘cool sense of proportion.’¹³² As Socrates once said, one should attend to one’s self that one may attend to the city-state itself.¹³³

At the core of the state itself lies the emptiness of the empty signifier. It takes great care, and great responsibility, to see that it be filled – and re-filled, and re-filled again – consciously and deliberately. It takes a custodian of negative structural bias, and so it takes an education of the self,

¹²⁹ Lyotard, *supra* note 55 at para 188.

¹³⁰ Oakeshott, “The Idea of the University”, *supra* note 121 at 98.

¹³¹ Michael Oakeshott, "Political Education" in *The Voice of Liberal Learning* ed. by Timothy Fuller (New Haven: Yale University Press: 1989) at 154.

¹³² Weber, *supra* note 110 at 115-16.

¹³³ Plato, “Apology”, in Benjamin Jowett (tr.), *Selected Dialogues of Plato* (New York: The Modern Library, 2000), at 313-314. Socrates argues that, because teaching citizens to attend to themselves also teaches them to attend to the city-state itself, he has indeed been providing ‘a useful service to the city-state, more useful even than an athlete’s victory at Olympia’. Appears also in Michel Foucault, “The Hermeneutic of the Subject,” in Paul Rabinow (ed.), *Ethics: Subjectivity and Truth* (vol. 1) (The New Press of New York, 1997).

beyond mere ‘training . . . to fill some niche in society.’¹³⁴ Having mastered the art of responsibility to oneself – and not to predetermined forces of coercion – one may then guide his state through its conscious encounters with threats of hegemony.

VI. VI. Conclusion

In a globally integrated world, national borders no longer confine the diverse views prioritizing subjects of international law. Today, different perspectives are often less identifiable with specific states than with discrete branches of the law, each manifesting separate functional perceptions of what that law should take as its primary focus. What significance does such a shift hold for the international legal community? Many have argued that this shift poses a threat to the uniformity and coherence of general international law. Further, it is argued that this shift has created a given international law a too fragmented and inchoate existence, and that to recapture whatever sense of singularity that law may have at some point in the past attained, it is imperative that these regimes themselves be made to take account of one another, to understand one another, and to go about their respective decision-making processes in a way that places them within the scheme of one cohesive international legal system. This position has been the starting point of the present discussion that the real possibility of such seemingly logical and straight-forward solutions has all too often been assumed without its due examination.

Upon further exploration, the functional rationalities of distinct international regimes have shown themselves incommensurable. Worse than not taking account of one another at all, they formulate each others’ problems in a language radically different and utterly unknown to the original. In speaking for the other, they reduce the each other to silence. In applying their regime to overpower values outside the scope of their pre-negotiated normative system, the decision-making bodies of special international legal regimes overstep the limits of their legitimacy, removing the choice of prioritizing global values from those whose lives will be affected by it.

It has been the aim of this article to show the necessary closedness of the teleologically-oriented, autopoietically structured systems of such regimes. The introduction of a more open-textured conception of statehood and the consequent rethinking of the nature of a more inclusive rule of law has been but the beginnings of a method aimed at recognizing the constraints

¹³⁴ Oakeshott, “The Idea of the University”, *supra* note 121 at 103.

imposed upon the powers of description by the very nature of such posited and functionally-oriented orders. For to lock oneself within a single self-proliferating scheme of structuring the world's priorities is to close oneself within a needlessly self-limiting world-view. So long as one speaks in the language of a single systemic perspective, one may never step out of oneself to see with the eyes of the other – to formulate thoughts in the words and formations of different regimes. This was the lesson of Lyotard's *differend*. How then do must legal scholarship deal with this emergent multiplicity of closed and incommensurable systems of structuring global priorities? This article has suggested that, preserving the dignity of one's liberty and limitless potentiality can only be done by approaching these systems from outside of the systems themselves – that by freeing oneself from the constraining power of any one particular language, by engaging oneself in the endless task of re-description, one may effectively break out of their autopoietic systemic closedness and wage the battle of discourse on a playing field less pre-determined by structural happenstance.

What follows from this point is only the beginning of an answer. To see the dangers of one's steadfast course, that is, to see the threatening hegemony of international regimes that seek to meld the fragmentation of the legal world by 'taking account' of the other's perspective – is but the first step mapping movement toward recourse. What follows after it is surely much more difficult. The above reflections have attempted to convey a sense of opportunity lurking in the apprehension of disharmony among the international regimes. They have witnessed the despair inflicted by the radical disparity of self-perpetuating modes of reasoning, and they have seen the hopes unveiled upon the quest for novel re-conceptualizations. They seek to be a launching pad for the rethinking of the international rule of law required to preserve democratic legitimacy in the age of fragmentation into self-contained regimes of international law disciplines.

These thoughts have sought to peer upon the pathways open to a thinker wielding hosts of empty signifiers. The hope remains only to have these closing lines deliver the sense of possibility inherent in the very notion giving rise to that well-placed unease with which our searching lines began. Such fears are but a call to freedom; such searching, but a path to gain.