The Search of a Unifying Theory: Why Pluralism in Public International Law Isn't Such a Bad Thing

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Introduction

For well over 200 years since the coining of the term “international law”,¹ the world's legal and international relations communities have struggled to develop coherent theories and methodologies to explain a phenomenon that is quite different from the concept of law drawn from our domestic experiences. The root of this struggle can best be described in two words: “source” (the quest to explain from where public international law draws its power and authority) and “conflict” (the reconciliation of seemingly incompatible sources and rules).² This quest has produced various schools of thought and methodology which seem to seek, in one form or another, the same outcome: a unifying theory of, or approach to, the legal thinking that underpins systems of public international law and explains why they work, or don’t work. Some have viewed public international law broadly as the embodiment of certain existential, core or universal values that guide or trump lesser values.³ Others have seen public international law as a more specific part of a series of relatively discreet legal or regulatory schemes that largely operate

¹Jeremy Bentham is generally considered to have coined the term “international law”. See, Alex Mills, The Private History of International Law, 55(1) INT’L & COMP. L.Q. 1 (2006).
²For a general discussion on source and conflict issues in international law, see, Jorg Kammerhofer, Uncertainty in the formal sources of international law: customary international law and some of its problems, 15(3) EUR. J. INT’L L. 523 (2004). One false assumption in international law is that such conflicts are unheard of in municipal legal systems. In systems whose governments reflect a strong federal model, the question of source and conflict is a constant problem. See e.g., Michigan v. Long, 463 U.S. 1032, 1038 (1983) ("It is, of course, incumbent upon this Court to ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment.” (internal quotation marks omitted)); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”)
independently of one another and are dependent on state action. Others still have been rules-oriented as in positivism, multidisciplinary as in the International Law and International Relations (IL/IR) movement, or policy-oriented as evident in the “New Haven” school of thought. Finally, other attempts to articulate a unifying theme fall more in the category of methodologies seeking to explain public international law based on the influence of culture, gender, economics, state behavior, or even rational choice. Regardless of the underlying rationale, perspective, or motivation, no single approach offers an all-encompassing theory or methodology that rationalises the internal inconsistencies or fully explains the phenomenon of public international law. The existence of so many approaches demonstrates that no one has yet been able to singularly articulate the foundation and objectives of the system in a manner that produces a unity of language and explains the operations of a very complex and heterogeneous structure.

4 Id.
8 See e.g., Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621 (2004) (arguing that international law might change state behavior through acculturation, whereby state actors adopt the behaviors and beliefs of international culture out of pressures to assimilate).
13 See e.g., Kammerhofer, supra, note 2 (noting international law does not have a dominant theory, ideology or assumption, not even a dominant legal culture).
14 See e.g., Prosper Weil, Towards Relative Normativity in International Law? 77 AM. J. INT’L L. 413 (1983) (noting certain “slackness” in the conceptual strengths of public international law given evolving notions of what constitute international norms and the process by which norms are created).
Perhaps the best we can do in reflecting on public international law and its foundations is
to echo the immortal words of U.S. Supreme Court Justice Potter Stewart, "But I know it
when I see it..."\textsuperscript{15}

In this essay I offer two propositions. First, I submit that the quest for a “unifying” theory
or methodology to explain and underpin the public international law system is not only
extraordinary difficult, it is virtually impossible. As David Kennedy has observed,

“Over the last few years, innumerable scholars have turned their attention to the
fragmentation, disaggregation, and multiplicity of the international legal regime.
With so many diverse perspectives on the puzzle, the opportunity, the problem, of
legal pluralism in international society, I would be crazy to try to pull it all together.
In my view, we are far better off leaving the issue lying about in fragments."\textsuperscript{16}

Far from being a science, the creation and implementation of the international legal order
is an inherently chaotic business—a contact sport if you will—comprised of many players
often with different motivations, seeking different outcomes, promoting different
concepts, complying for different reasons, and using different language with only
marginal refereeing.\textsuperscript{17} As such, international law resists easy categorizations or strictly
developed normative hierarchies because it is variegated, not monochromatic, in nature.
Pluralism, not singularity, is the main attribute of international law. To say that a single
theory or methodology can “unify” our understanding of public international law is like
saying that a single etymology can explain human behavior, bridge cultural diversity, or
illuminate the meaning of divinity across all human faiths. The quest for a unifying theory
or methodology to explain the phenomenon of international law generally, and public
international law in particular, is like the best-laid plans of a military expedition: it never

\textsuperscript{15} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Potter, J., concurring).
\textsuperscript{16} David Kennedy, International Law: One, Two, Three, Many Legal Orders: Legal Pluralism and the
\textsuperscript{17} Guglielmo Verdirame, “The Divided West”: International Lawyers in Europe and America, 18(3) EUR. J. INT’L
L. 553 (2007).
survives first contact with the enemy. In this case, the enemy is the tradecraft of international lawmaking, the conduct of states, and the influence of human behavior.

Second, I submit that rather than seeking to articulate a unifying theory to hold an increasingly fragmented international legal system in some stasis of intellectual equilibrium (really an attempt to develop a universally acceptable descriptive and normative language), it is better to focus on something far less ambitious, more eclectic, and more realistic: acknowledging the multifarious nature of public international law in order to bring practical coherency to the broad systems of rules that it comprises, regardless of speculative categories or theories. Such an approach does not view public international law through the quest for a single normative language but rather in the relational language of a Venn diagram. In this context, various theories, methodologies, and systems of international law are simultaneously independent and interdependent under the broad umbrella of public international law, intersecting at points of contact and common interest. Thus, for example, human rights law and trade law can be seen as regulatory systems with points of common interest but not necessarily unified interest. Just as a single criminal act under a municipal legal system can trigger both criminal law and civil law, so too actions in the international sphere can trigger the interests of multiple legal regimes, including municipal legal regimes with extraterritorial impact. Further, just as the goal of a municipal legal regime is not to form a unifying theory that bridges the interests of criminal and civil law, but rather to establish rules within each system so that they can cooperate coherently, so too the goal of public international law should be to articulate general and specific modalities that bring greater coherency to the multiple legal regimes with which it interacts. As the international legal system develops, the likelihood of greater fragmentation and conflict between existing systems of rules and emerging systems of rules will increase. It is only in acknowledging and appreciating the
multifarious nature of the international legal system that we can discover points of commonality and points of departure, and recognize that even the most robust of explanations leaves ample room for differences, as well as opportunities for greater cooperation.

I. Why the Quest and Why is this Search so Elusive?

The public international law community has spent the better part of a century seeking to explain its reason for being. Questions such as, “Is public international law really law?” or, “Why do states comply with international law?” or, “Is there a clear distinction between the various aspects of international law?” have plagued scholarly debate without resolution. For example, in 1898, international law was described as “a science . . . of comparatively recent origin.” The use of the word “science” undoubtedly reflected the desire for legitimacy, but may also have injected into the quest for unity an unfortunate expectation that can never be tested: that it has a “scientific” basis undiminished by such human activities as politics, history, and parochialism. The

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18 Henry H. Perritt, Jr., The Internet is Changing International Law, 73 CHI.-KENT L. REV. 997 (1998) (noting that dualists distinguished sharply between public international law as the law of relations between states (mocked by John Austin as not really “law”) and private international law as the law governing persons (mocked by Austin as not really “international” although it was “law”).


22 As an aside, Hans Kelsen was hugely influential in the development of domestic constitutions in Europe as reflected in the “constitutional court”. See, Zdenek Kuhn, Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic, 2(2) EUR. CONST. L. REV. 183 (2006). In Kelsen’s theory, the ordinary judiciary was incompetent to rule on matters related to the constitutionality of legislation precisely because invalidation was a form of negative legislating that violated strict separationist on the allocation of political power. See, Gianluca Gentili, A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court, 29 PENN．ST．INT’L L. REV. 705 (2011). Consequently, Kelsen proposed that the way to deal with constitutional questions was in the constitutional court, a distinctly “political” court
outcomes of pure science are generally measurable, repeatable, reliable, and predictable. Can anyone rationally describe any legal system—let alone the public international legal system—in those terms?

The quest to articulate a unifying theory for public international law may rest in the desire for validity and predictability in the normative orders that comprise the system. However, too often the quest seems more like an existential search for meaning by the public international law community, rather than a deliberation on proper legal order or improving the tradecraft of international lawmaking. The concept of law is similar to concepts of morality or religion: it is inherently ambiguous, fluid and varied in purpose and design. Legal systems do not fit one concept to the exclusion of others and therefore are not conducive to definitional certitude. Laws do not exist independently of the cultural, political, historical, or interest-driven considerations of those who make them. To the trade lawyer, international law may have an entirely different meaning and purpose than it does to the human rights lawyer or the non-proliferation lawyer or the foreign ministry lawyer. Each may claim “expertise” in international law, but based on very different visions of the system and distinct desired outcomes. As Malcolm N. Shaw has observed, “It is actual practice, illustrated by custom and by treaty, that formulates the role of international law, and not formalistic structures, theoretical deductions or moral stipulations.”23 Hence, a unifying theory of international law is possible only if we

are to believe that there is one form of international law, one normative language of international law, and we all practice it in exactly the same way all the time without regard to our own idiosyncratic legal, cultural, governmental or political experiences. This is clearly not realistic.

Moreover, rather than being a static concept, public international law, like its domestic counterpart, is largely a reaction-based enterprise reflecting dynamic processes occurring over time in relation to incidents that were either not regulated or were inadequately regulated. Consequently, public international law generally—and discreet legal regimes in particular—have both a reactionary and aspirational dimension: they seek to prevent a known past harm from reoccurring and to encourage particular conduct in the hope of preventing an anticipated but unclear future harm. For example, would the rapid and extensive development of human rights law over the last sixty years have occurred, if not for the horrors of the 20th century?24 Would Europe have pursued an economic union, leading to a union of other interests, if not for the integration of the global economy and the need to compete more effectively?25 Would Canada, the United States and Mexico have created the North American Free Trade Agreement (NAFTA) in the absence of a collective belief that it would lead to enhanced economic conditions for their citizens and greater global political power for the trading bloc?26 Probably not. Accordingly, articulating a unifying theory or methodology for public international law is difficult given the clash of interests, personalities, culture and its inherently reactionary basis.

The challenge in articulating a unifying theory to underpin international law is partly due to the fact that the range of definitions applied is broader than the range applied to

As Rosalyn Higgins observed, “In domestic legal systems the sources of legal obligation are treated in a much more matter-of-fact way.” But in public international law, “we have become so preoccupied with jurisprudential debate about the sources of international law that we have, I think, lost sight of the fact that it is an admission of uncertainty[.]” This is perhaps best illustrated by the classical dilemma presented in two of the earliest attempts at explaining public international law as a formal field of science—by the naturalists and positivists. The naturalists saw law as “a normative teleology”, believing that international law, like municipal law, had binding force on states and their peoples because law emanated from a higher foundation in nature. In contrast, the positivists saw law as a “normatively deontology” devoid of naturalistic moral foundations and resting instead in the power and consent of sovereign states, who alone were also the source of law domestically and internationally. The positivist approach was particularly influential in Europe as evidenced in many of its legal systems.

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27 See e.g., Halldor E. Sigurðarson, Max-Planck, A Critique of “Kantian International Law”, 5 INT’L LEGAL THEORY 51, 52 (1999). The authors note: Many legal philosophers during the eighteenth-century through the twentieth-century were primarily occupied with this entirely different branch of law referred to by Anglo-American legal scholars as “conflict of laws” but by most Continental Law writers as “private international law” (internationales Privatrecht or droit international privé). That is the branch of private (civil) municipal law of States that governs the operation of conflict rules that control the application of foreign private (civil) law by a court of the forum in cases containing foreign elements, using connecting factors stated in Latin as “lex domiciliī” and so forth, originally located by the German legal scholar, Friedrich Carl von Savigny under the aegis of the conflicts theory, seeking a proper “seat” (Sitz), for every legal relationship. (Citations omitted)

The authors also note:

Summing up at this point, the legal theories developed by Kant are based on analogies made from municipal legal norms, which are norms of entirely different legal constitutions than the public international legal norms that are recognized today. Therefore, the application of Kant’s legal theory to modern juridical international state relations appears incongruous, while the fundamental subject-matter of his inquiry is erroneous (ab initio) in light of the modern developments of public international legal theory.

Id. at 53.

28 Rosalyn Higgins, Problems and Process: International Law and How We Use It 17 (1994)

29 Id.


31 Id.
modern municipal legal systems and the constant quest for articulating “basic law” and “pure law” and “grundnorm”.

Nevertheless, both movements ultimately focused their energies more on theoretical sources than practical outcomes.

Notwithstanding this varying terminology within public international law, we continue to try to understand it relative to our domestic experiences. Domestic concepts of law tend to be the focal points for understanding public international law and its structure, even though the two systems perform different tasks and fundamentally apply to different matters. To be clear, there is nothing inherently wrong with relying on domestic experiences to illuminate our understanding of public international law—quite the opposite. As Dan Danielsen implies in his recent work, it is folly to believe that we can compartmentalize our approach to legal thinking into a strictly domestic analysis and strictly international analysis, or between a strictly normative analysis and strictly policy analysis. But it is equally clear that domestic understandings of law do not always transfer to the international stage. Why is this? This is because all municipal systems share some basic characteristics – whether they are based on common law, civil law, Islamic law, or even modes of Indigenous law. Each exhibits in some form the notion of the single, ultimate lawgiver, be it a monarch, a legislature, a dictator, a religious leader, or a tribal chief. Each expresses a set of explicit or implicit social, political, and

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35 See e.g., U.S. Const. amend. VII (suits at common law).

36 See generally, Merriman, supra note 22.

37 See e.g., Iran Const. art. 1.

38 See e.g., Bhutan Const. arts. 1.2 & 2 et seq.


40 See e.g., North Korea Const. ch. VI § 3.

41 See e.g., 1983 Code c. 330-367 (pope as supreme authority within the Roman Catholic Church).
cultural values that promotes certain behaviour or discourages behaviour, and which legitimate the actions of the lawgiver, law enforcer, and law interpreter. Each is constructed around systems of legal norms delineated by accepted structures such as constitutions, statutes, judicial decisions, customary understandings, or even religious creeds. In addition—and perhaps most importantly—each has a system of enforcement and interpretation that, if truly effective, not only secures compliance with legal dictates but hopefully lends legitimacy and coherency to the law itself.

Public international law enjoys no such advantages. If pluralism is a challenge in the municipal law context, it presents an entirely different dimensional challenge in the public international law context. There is no common lawgiver outside of the amorphous “international community”, as represented by various and competing institutions where no individual player has final authority over sovereign nation-states. There are scant systems of common values apart from very broad categories such as “human rights” or “international norms” that lend overarching legitimacy to the system. Even these so-called common values are ambiguous, pluralistic, and elastic, notwithstanding...

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42 Jan-Werner Muller, A general theory of constitutional patriotism, 6(1) INT’L J. CONST. L. 72, 82 (2008) (“citizens attach themselves to the norms and values at the heart of the constitution, that is, the constitutional essentials, and, in particular, to the fair and democratic procedures that can be presumed to produce legitimate law”).

43 See e.g., Adam M. Samaha, Dead Hand Arguments and Constitutional Interpretation, 108 COLUM. L. REV. 606 (2002) (philosophy has subdivided the normative questions into law’s legitimacy, law’s authority, and the obligation to obey law; legitimacy involves the justifiable enforcement of a law or legal system); Natsu Taylor Saito, At the Heart of the Law: Remedies for Massive Wrongs, 27 REV. LITIG. 281 (2008) (“[I]nstances in which laws and their enforcement have simply served to reinforce political power rather than ensure justice are myriad, and that is why the legitimacy of any legal system is dependent upon the extent to which, in concrete terms, it safeguards both the most fundamental of substantive rights and the due process necessary to ensure their realization.”).

44 See e.g., Emily Kidd White, et al., Humanity as the Alpha and Omega of Sovereignty: Four Replies to Anne Peters, 20(3) EUR. J. INT’L. L. 545 (2009) (lack of any enforcement mechanism engenders reliance on UN organs which necessarily ensures that the legal authority and relevance of ICJ in practice is dependent on the will of the very organs the powers of which it evaluates).

45 See e.g., Mehrdad Payandeh, The Concept of International Law in the Jurisprudence of H.L.A. Hart, 21 EUR. J. INT’L. L. 967 (2010) (noting that the international law system consists of some norms that are never practiced or at least not practiced over a considerable period of time and furthering noting that Article 94(2) of the UN Charter grants the Security Council authority to decide upon measures to enforce judgments of the ICJ but is hardly been used in practice).
declarations based on *jus naturale* or *jus cogens*.

There is no universally-accepted hierarchy or normative construct to classify and guide legal regimes and international lawmaking. There is no ultimate law enforcer or law interpreter to maintain coherency within the system and across its many components, or to bind its primary objects – states – to certain behaviour with clear consequences without the consent and continuing power of a nation-state. Perhaps the one point on which international law and municipal law share technical and pragmatic elements is in the creation of substantive categories of law, such as commercial law, criminal law, trade law, which recognise the need for general internal organizational principles to bolster external relevancy. However, even here international law proves far more fragmented than municipal law, largely because the other common elements of a municipal legal system are absent and because the system itself is subject to such flux.

There are, however, three aspects of public international law that pose a particular challenge in articulating a unifying theory or singular methodology to explain its workings. The first challenge rests in status terms such as the “nation-state”, “sovereignty”, and “sovereign equality”. These terms, which describe relational

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46 See, By Dinah Shelton, *In Honor of the 100th Anniversary of the AJIL and the ASIL: Normative Hierarchy In International Law*, 100 AM. J. INT'L L. 291 (2006) (noting that literature and jurisprudence reveal confusion over the rationale for *jus cogens* norms as well as the interface of such norms with obligations *erga omnes* and international crimes)

47 *Int’l Law Comm’n*, 58th Session, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 8, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) ("The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.").

48 See Payandeh, supra note 46.

49 See *e.g.*, *Int’l Law Comm’n*, 58th Session, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Difficulties Arising from the Diversification and Expansion of International Law, 6 & 8, U.N. Doc. A/CN.4/L.702 (July 18, 2006) (noting that the fragmentation of the social world has legal significance and that fragmentation raises both institutional and substantive problems having to do with the jurisdiction and competence, international legal rules and their hierarchical relations, and the splitting up of the law into highly specialized “boxes” that claim relative autonomy from each other and from the general law).
paradigms in state-to-state relationships and state-to-citizen relationships, add fluidity to an already highly fragmented system because they create even greater choice and reduce accountability. Unlike a municipal legal system where the primary objects—the citizens—have limited choice in selecting the relevant law applicable to a given circumstance or the mode of accountability for breaches of the law, the primary objects in public international law—sovereign states—by virtue of their status have a wide range of choices as to which law they feel is acceptable and applicable, and who should be accountable. Even when international legal regimes act specifically upon nation-states or directly upon their citizens, it is only because states, as independent entities, have in practice consented to be objects—a choice that can always be revisited. A nation can choose to reject the jurisdiction of the International Criminal Court (ICC) without much fear of consequences, thereby placing itself and its citizens beyond the ICC’s authority. A state may choose to adopt a particular international convention but hold reservations that effectively limit its application to state or individual behavior. A state may choose to turn a blind eye to a sanctions regime, notwithstanding its broad support for the regime within the “international community.”

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51 See e.g., UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.unhcr.org/refworld/docid/3ae6b3a94.html [accessed 17 November 2011]


the ultimate expression of universal values, is almost totally dependent on state consent and state action for its practical application. In short, the “community of nations” that espouses “universal values” upon which public international law rests is itself fragmented, as reflected in the operationalisation of international law through the choices of nation-states. How does one promote singularity of methodology or uniformity of theme when almost everything is constantly negotiable?

The second aspect of public international law that makes it difficult to articulate a unifying theme or single methodology is the rapid and evolutionary development of the field over the last sixty years. For example, while it initially emerged largely to regulate state-to-state conduct, public international law has since expanded to embrace subjects ranging from banking to trade and human rights. These emerging areas not only regulate state behavior but now, with state consent, they also regulate individual behavior. In some circumstances, the promulgators of public international law are more quasi-state actors than states themselves. The development of overlapping and fragmented systems of regulation is seen in the sheer breadth of topics subject to international law and the assimilation of what were once thought to be exclusive fields of law into a fragmented system of subspecialties that ignores technocratic classifications. Thus a single transaction or series of transactions can implicate more than one substantive category of international law without regard to its public or private nature,

58 See e.g., North American Free Trade Agreement, supra note 26.
with differing consequences stemming from each category.\textsuperscript{62} International law is no longer easily categorized by such terms as “private international law” or “public international law” or even “human rights law.”\textsuperscript{63} These strict categorisations or methodologies of analysis have typically been used by certain schools of thought to describe public international law. However, they now conflict with international legal practice, which evidences the plurality, fragmentation, and fluidity inherent in a system that is devoid of many of the features that maintain order in a municipal legal system.

The third challenge is in the effects of globalisation, which increasingly contribute to fragmentation.\textsuperscript{64} While law may have a philosophical component, it essentially designs systems of pragmatic rules to address particular problems. Global or regional legal regimes must evolve and become more pragmatic if they are to have a normative impact.

The increasing need for global regulatory regimes has only further fragmented public international law's objectives and purposes.\textsuperscript{65} Globalisation highlights the difficulty of reconciling world interests with domestic political priorities, and strict normative orders with fast-paced conceptual change.\textsuperscript{66} As a result, international legal regimes are increasingly built around models of consensus involving multiple actors which promotes


\textsuperscript{63} See, Fiona Macmillan, \textit{International Economic Law And Public International Law: Strangers In The Night}, 10(6) INT’L TRADE L. REV. 115 (2004) (international economic law is about denationalisation and the progressive erosion of national boundaries; public international law is concerned with the relationships between sovereign states; public international law looks partly to national legislation while international economic law looks to progressively remove national laws; attempts to distinguish between them on the basis of an opposition between globalisation and internationalisation understates the complexity of relationships with the Westphalian system and the processes of global economic integration).


ambiguity and self-interest. Globalisation will force the public international legal community to confront the tension between local politics and the need for more effective international legal regimes.

This highlights the fact that public international law exists in two different spheres, one based on status and the other based on operational needs. These spheres are not easily collapsed into a single structure of understanding or a universal language. The first sphere is defined by the status of its principal actors—nation-states—and the wide range of interests and concerns they represent and on which they advocate. Common relational identities, such as “I am a South African” or “I am a Chilean”, can support the legitimacy of a legal system and support the interests of a common community. However, the international community has no common global identity to fuse its diverse interests into a single structure. Instead, the international legal sphere is becoming increasingly complicated because of emerging international organisations that are granted the equivalence or quasi-equivalence of sovereignty. While the international community may use the language of a “community” or a “global order”, it remains generally ambivalent about these terms, with individual members using them more for political convenience than to convey a common identity attached to a universal purpose. Thus, the notion that the nation-state is an archaic relic that will soon succumb to the force of globalization is both simplistic and unrealistic. As Robert Gilpin observed in his work *Global Political Economy: Understanding the International Economic Order*, this is still a

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67 Mahnoush H. Arsanjani, W. Michael Reisman *Interpreting Treaties For The Benefit Of Third Parties: The “Salvors’ Doctrine” And The Use Of Legislative History In Investment Treaties*, 104 Am. J. Int’l. L. 597 (2010) (ambiguity may be intended by the parties because it was the only text on which they could reach consensus or because they had opted for “constructive ambiguity”).


world where “the nation-state remains the dominant actor in both domestic and international economic affairs.”70 The same can be said for the political systems that support the international legal system, with fragmentation a necessary by-product. At the same time, the operational sphere largely displaces neo-classical thinking on the purposes of public international law with an outcome-focused agenda. This is the sphere of rules and legal regimes, generally created and functioning independently of one another, that worry less about sources of power than the conflict of rules. In this sphere we are confronted with subcomponents of the “global” legal system that again serve different purposes and seek different results. For example, international trade law is operationally focused on regulating the movement of goods. The law of the sea (LOS) is operationally focused on balancing freedom on the high seas with the provincial concerns of nation-states. Human rights law is operationally focused on promoting and protecting various assumed universal rights as evidenced by the relevant conventions. Accordingly, even assuming that some unifying theory of public international law could be articulated, it would not survive first contact with the enemy: in this case, the the wide range of problems that international legal regimes seek to resolve and the various methodologies and interests that emerge in the problem-solving exercise of international legal tradecraft.

II. Is There a Future for Public International Law?

If one accepts the proposition that much of the effort aimed at articulating a unifying theory of public international law has been misplaced, and that international lawmaking and the demand for new legal regimes increasingly evades strict theoretical categories, does the discipline of public international law have a future? In short, can the discipline of public international law avoid irrelevancy, as the practice of international law overtakes

the community’s capacity to articulate a legitimizing purpose? Public international law can remain a legitimate discipline and even become more relevant but only, I submit, to the degree that its community focuses less on the theoretical unpinning and more on its relational capabilities to bring practical coherency to questions of source, conflict and regulation. Thus, rather than seeing public international law as a discreet system or legal regime dedicated to finding definitional certitude through a single normative language, it must be viewed more in its relational capacities and strengths.

This is where the relational language of Venn diagrams can bring greater insight into the operational effect and opportunities of public international law. When the public international legal system is seen through the language of Venn diagrams, its relational components—both in terms of status and operations—can bridge differences in regulations, break through neoclassical stereotypes, and promote greater coherency across diverse elements of the system. In many respects, the language of the Venn diagram evidences the reality of what is happening: various systems are “bumping up” against each other without consideration of notional labels, strict classifications, and technocratic or academic categorizations.

Arguably, a new relational paradigm for public international law is already evolving. As Dan Danielsen has pointed out, the global legal order is no longer defined by a dualist vision of international law strictly divided between “international” law and “domestic law” but increasingly by the interchange between municipal legal regimes,71 traditional non-state actors,72 and international law.73 For example, municipal legal regimes no

71 See Danielsen, supra note 35.
72 Mashood A. Baderin, Religion and International Law: Friend or Foes?, 5 EUR. HUMAN RIGHTS L. REV. 637 (2009) (noting international law has moved beyond its traditional state-centric nature to impact directly or indirectly on the lives and activities of individuals, groups and non-state actors).
Today the examples of rules of international law which require to be likewise known and applied by the local courts are legion: to mention only a few very familiar examples, there is much of the law of human
longer concern themselves strictly with the “domestic” legal order but instead have increasing extraterritorial effect. International legal systems are not formulated only in the halls of foreign ministries but also by non-state or quasi-state actors whose actions may not represent the formalistic interests of states but rather address the narrow interests of communities within states. And international law is no longer grounded exclusively in treaties signed by heads of state, but rather emanates from administrative agencies that are far removed from the politics of state-to-state dealings, yet intimately involved in determining global order. The European Union’s efforts to reverse climate change evidences these trends, producing legal regimes that tax international air carriers\(^{74}\) and most likely will be extended to maritime carriers as well.\(^{75}\) Other nations have not formally consented to such efforts, but their economic and political interests are clearly impacted.\(^{76}\) The globalization of judicial power as both a source of law and an enforcement mechanism for the international legal order further demonstrates the evolving relational aspects, not only of the international legal order, but also of the types of public power that are brought to bear on legal issues.

While the relational aspects of international law are most profound in the economic sphere, the need to understand public international law in its cross-sectional capacities is


not limited to this arena. The practical implementation of human rights law is increasingly defined in relation to the use of municipal judicial power to hold leaders of other nations accountable for their human rights records, based on a theory of universal jurisdiction. In addition to traditional international tribunals, the courts of Austria, Belgium, Canada, and Spain have all asserted authority to enforce human rights requirements against individuals who are not typically subject to their territorial jurisdiction. Environmental considerations define international relationships not only at the state-to-state level but also in their practical effects on individual and commercial behavior. International child protection and choice of law agreements impact the municipal legal order, which in turn impacts the recognition and enforcement of international relationships. Currently, the Permanent Bureau of the Hague Convention on Private International Law is examining issues ranging from the management of personal data flows, to civil liability for environmental damage, to choice of law in

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78 Public Prosecutor v. Cvjetkovic. (Austria.) Trial judgment, Landesgericht Salzburg (May 31, 1995); Appeals judgment, Oberste Gerichtshof (July 13, 1994) (accusations of genocide against former military commander in Yugoslavia).
79 Public Prosecutor v. the "Butare Four." (Belgium.) Trial judgment, Assize Court of Brussels (June 8, 2001) (prosecution for genocide against the Tutsi and the massacres of moderate Hutu in Rwanda).
81 Unión Progresista de Fiscales de España et al. v. Pinochet. (Spain.) Central Investigating Tribunal No. 5, Audiencia Nacional (October 16 and 18, November 3, 1998); Criminal Division, Plenary Session, Audiencia Nacional (November 5, 1998).
international contracts\textsuperscript{87} for possible international agreements. While such efforts technically arise in the context of “private international law”, their impacts clearly extend beyond regulating purely private relationships, to also impact on state-to-state relationships and the municipal legal order.

This illustrates the reality that finding a single unifying theory to underpin the public international law system is all but impossible. The search, which has generated years of debate, has proven fruitless largely because the process of constructing international legal regimes has been less concerned with their theoretical underpinning and more concerned with their practical regulatory impact. Pyramids and discussions regarding “source” that are intended to give a unified normative order to public international law seem out-of-step with international law developments. It is in the construction and day-to-day management of legal regimes that law draws its substantive meaning. By focusing on the substantive relationships between diverse systems of international law, the public international law community could contribute greatly in bringing greater coherency to a diverse and unregulated system of lawmaking. By identifying the relational aspects of legal regimes, lawmakers, and legal objects can enable us to see points of common interest, points of departure, and points of conflict in regulating the international law order. And it is in examining the substantive relationships of the international legal order that we can move to a more common—though never universal—language.

\textbf{III. Conclusion}

Contrary to what some may perceive, the fragmentation of public international law is a natural result of a maturing legal system that is adapting to increasingly complex human

activity. Two-hundred years ago, a municipal legal system would not have subspecialties such as “family law”, “intellectual property law” or “environmental law.” Today, municipal legal systems have become increasing “fragmented” with specialties and subspecialties seeking to address evolving areas of human conduct. However, this fragmentation does not require a unifying theory. Rather, it is the hallmark of a maturing legal system—one that is capable of acknowledging the practical and evolving legal needs of the human community. In this context, we expect the elements of a municipal legal system to make coherent—although not perfect—sense in relation to one another.

Municipal legal systems have the advantage of courts and constitutions to promote these relational connections. Public international law does not. However, it is here that public international law may have its greatest impact by jettisoning the old pursuit of single normative languages or unifying theories, and focusing on the relational aspects of the system. Regardless of whether we are considering non-proliferation treaties, human rights conventions, or trade agreements, states remain dominant actors in the international legal order. Their agreements now regulate state-to-state conduct and individual conduct, sometimes through the same instrument.88 Consequently, public international law can continue to play a critical role in promoting international legal order by examining, building upon, and promoting relationships within the international legal system, rather than by being consumed with the quest for the “grundnorm” of the entire system.

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