

# KEEP CALM AND CARRY ON: MARTTI KOSKENNIEMI AND THE FRAGMENTATION OF INTERNATIONAL LAW

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## ABSTRACT

As fragmentation in international law and institutions increases unabated, the associated theoretical debate has virtually gone silent. Koskenniemi's contributions to the fragmentation debate, primarily the 2006 International Law Commission (ILC) Study Group Report and several academic articles, played a central role in this "normalization of fragmentation." They demonstrated that fragmentation is politically inevitable and legally manageable through formal rules of interpretation. Adopting an analogy between states and functional regimes, Koskenniemi views fragmentation through the same lenses he applies to international law more generally, by acknowledging and identifying its political undercurrents, while advocating an applied ethics of formalism. Although, generally, one might "keep calm and carry on" in the face of fragmentation, Koskenniemi nevertheless flags one concern—fragmentation's propensity to promote anti-formalist managerialism in international affairs.

## I. INTRODUCTION

Seven years have passed since the ILC Study Group on Fragmentation of International Law issued its Report, finalized by Martti Koskenniemi (ILC Report),<sup>1</sup> and it is more than a decade since Koskenniemi's more freely critical academic contribution to the fragmentation debate, "*Fragmentation of International Law? Postmodern Anxieties*."<sup>2</sup> Though not a long time has passed in terms of international legal history, this symposium on Koskenniemi's writings provides an opportunity to take stock of fragmentation's current state and its debate, while reflecting, both retrospectively and prospectively, upon Koskenniemi's approach—or rather, approaches—to contemporary international

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1. Rep. of the Study Grp. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., May 1-June 9, July 3-Aug. 11 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected, U.N. Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) [hereinafter *ILC Report*] (finalized by Martti Koskenniemi).

2. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002) [hereinafter Koskenniemi & Leino, *Postmodern Anxieties*].

law's fragmented structure.

Indeed, my modest intention in this concise essay is to focus more on the latter than on the former by considering fragmentation within some of Koskenniemi's broader engagements with international law. Because, to be blunt, at this point in time it seems that the only truly interesting development in the fragmentation discourse over the last few years—indeed, since the release of the ILC Report and its first round of commentaries—has been the debate's evident demise. Surely, fragmentation itself is alive and well, and particular technical and often controversial interpretative issues continue to arise, both in practice and, more often, in doctoral dissertations. But fragmentation as a phenomenon—its causes, effects, and significance—is now hardly the subject of heated arguments and lofty theoretical debates. In addition, perhaps most importantly, it is no longer considered to constitute an existential threat to international law as a system. Fragmentation, to a great extent, has been normalized, or accepted, as both politically inevitable and legally manageable. The grand normative and deontological questions have dissipated, almost as if they never were asked.

In other words, the guns of what seemed to be not long ago a defining debate have gone silent, at least for a while. Although the nature of this silence might be worth contemplating, in the present context, Koskenniemi's own role in producing it so effectively is more important. Because in different ways, Koskenniemi has played a central part in rationalizing our collective perceptions of fragmentation, perhaps more than any other contemporary international legal scholar. Both *Anxieties* and the ILC Report contributed to this alleviation of the fragmentation "problem," due to their strong overarching signal to international lawyers, which brings to mind the now-so-fashionable World War II poster slogan: "Keep calm and carry on." But, despite the soothing message, Koskenniemi has also highlighted certain dangers that accompany the phenomenon of fragmentation, even if they are not inherent to it, such as the danger of managerial anti-formalism.

Along these lines, I have structured this essay as a series of interconnected observations. In Section II, I elaborate on the normalization of fragmentation and Koskenniemi's contribution to it. Subsequently, in Section III, I locate Koskenniemi's views on fragmentation in relation to his more general expositions of the politics of international law, particularly the tensions between apology and utopia and between concreteness and normativity. On this backdrop, in Section IV, I discuss the importance of the analogy between states and functional regimes that has informed, at least in part, Koskenniemi's expressed views on fragmentation. In Section V, I explore ostensive paradoxes between the interpretative politics exposed in *Anxieties* and the interpretative formalism advocated by Koskenniemi in the ILC Report. As an open-ended conclusion, Section VI focuses on Koskenniemi's own fear of fragmentation, namely the rise of managerialism associated with it.

## II. THE NORMALIZATION OF FRAGMENTATION

Fragmentation in international law is now the norm, not the exception. Indeed, as an empirical matter, one might casually observe that fragmentation,

showing no sign of abatement, has only increased in the last few years. New issue regimes continue to crop up under “hard law” instruments, replete with their own institutional entourages, such as the Framework Convention on Tobacco Control<sup>3</sup> and its World Health Organization Secretariat, which has sent tremors through the World Trade Organization (WTO)<sup>4</sup> and the international investment law community.<sup>5</sup> At the time of this writing, the U.N. General Assembly is adopting the text of a new Arms Trade Treaty, also with its own secretariat and a conflicts clause privileging its own provisions to all other present and future treaty obligations.<sup>6</sup> Veteran international institutions and agencies that have only rarely been resorted to in the past for dispute settlement, such as the International Civil Aviation Organization (ICAO),<sup>7</sup> or meaningful law-making, such as the International Telecommunications Union,<sup>8</sup> are enjoying a renaissance, as their issue areas gain an importance that well transcends the technical—even if their vernacular remains deceptively technocratic.<sup>9</sup> In international criminal law,

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3. WHO Framework Convention on Tobacco Control, art. 7, May 21, 2003, 2302 U.N.T.S. 166 (entered into force Feb. 27, 2005).

4. See, e.g., Request for Establishment of a Panel by Ukraine, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/11 (Aug. 17, 2012). See generally Joseph N. Eckhardt, *Balancing Interests in Free Trade and Health: How the WHO’s Framework Convention on Tobacco Control Can Withstand WTO Scrutiny*, 12 DUKE J. COMP. & INT’L L. 197 (2002) (analyzing the relationship between global tobacco controls and free trade rules); Tania Voon & Andrew Mitchell, *Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia*, 14 J. INT’L ECON. L. 516 (2011) (discussing tobacco companies’ responses to an Australian law passed to implement WHO Framework Convention on Tobacco Control); Alyssa Woo, *Health Versus Trade: The Future of the WHO’s Framework Convention on Tobacco*, 35 VAND. J. TRANSNAT’L L. 1731 (2002) (arguing that the health exception to normal GATT rules should protect legislation passed in compliance with WHO Framework Convention on Tobacco Control).

5. See generally Deborah H. Gleeson, Kyla S. Tienhaara & Thomas A. Faunce, *Challenges to Australia’s National Health Policy from Trade and Investment Agreements*, 196 MED. J. OF AUSTL. 354 (2012); Press Release, Philip Morris Asia Ltd., Philip Morris Asia Files Lawsuit Against the Australian Government Over Plain Packaging (Nov. 21, 2011), [http://www.pmi.com/eng/media\\_center/press\\_releases/documents/20111121\\_australia\\_plain\\_packaging\\_lawsuit.pdf](http://www.pmi.com/eng/media_center/press_releases/documents/20111121_australia_plain_packaging_lawsuit.pdf).

6. See Final United Nations Conference on the Arms Trade Treaty, New York, Mar. 18-28, 2013, *Draft Decision*, art. 26(1), U.N. Doc. A/CONF.217/2013/L.3 (submitting the text of the Arms Trade Treaty to the U.N. General Assembly for adoption).

7. See generally Paul S. Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT’L & COMP. L. 231 (2004).

8. International Telecommunications Union, World Conference on International Telecommunications, Dubai, U.A.E., Dec. 3-14, 2012, *Finals Acts of the World Conference on International Telecommunications*, available at <http://www.itu.int/pub/S-CONF-WCIT-2012/en>.

9. See, e.g., Lorand Bartels, *The WTO Legality of the Application of the EU’s Emission Trading System to Aviation*, 23 EUR. J. INT’L L. 429, 433-35 (2012) (discussing the evolution of the European Union aviation tax scheme); Keri Forsythe, *The Emissions-Trading Battle Continues*, AIR CARGO WORLD (Oct. 29, 2012), <http://www.aircargoworld.com/Air-Cargo-News/2012/10/the-emissions-trading-battle-continues/2910371> (stating that European Union taxes on emissions by foreign airlines has emerged as potential dispute in ICAO).

fragmentation persists, despite the establishment of a permanent International Criminal Court,<sup>10</sup> as ad hoc international criminal regimes refuse to run their course<sup>11</sup> and new ones still appear.<sup>12</sup>

International investment treaties, in their thousands,<sup>13</sup> continue to constitute both symptoms of fragmentation and promoters of it through Most Favored Nation provisions and “umbrella clauses” whose potential for inter-regime interaction and conflict has yet to be fully realized.<sup>14</sup> On the backdrop of the WTO’s Doha Round failure, the “alphabet soup” of international trade agreements and intellectual property-related agreements, whether already executed or under negotiation, has grown considerably only recently—the Anti-Counterfeiting Trade Agreement (ACTA),<sup>15</sup> the Trans-Pacific Partnership (TPP),<sup>16</sup> the Transatlantic Trade and Investment Partnership (TTIP),<sup>17</sup> and more. Fragmentation in trade and investment even has its mutant children, such as the Softwood Lumber Agreement,<sup>18</sup> under which certain trade-related disputes between the United States and Canada are

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10. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

11. See Gabriël Oosthuizen & Robert Schaeffer, *Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL*, 3 HAGUE JUST. J. 48, 50 (2008) (explaining that criminal tribunals for Yugoslavia and Rwanda, and the Special Court for Sierra Leone, will not be closed on their completion dates because of necessary residual functions).

12. S.C. Res. 1664, ¶ 7, U.N. Doc. S/RES/1664 (Mar. 29, 2006) (establishing the Special Tribunal for Lebanon).

13. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 1–2 (2008) (describing growth in international investment treaties).

14. See *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 1 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) (providing example of inter-regime conflict arising from international investment treaty); *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶¶ 1–6 (Aug. 6, 2003), 18 ICSID Rep. 307 (2003) (providing example of inter-regime conflict arising from international investment treaty); see also *CMS Gas Transmission Co. v. Republic of Arg.*, ICSID Case No. ARB/01/8, Jurisdiction, ¶¶ 18–22 (July 17, 2003), and *Annulment*, ¶¶ 30–35 (Sept. 25, 2007), 14 ICSID Rep. 251 (2009) (describing dispute between regime and private company regarding effect and adjustment of gas tariffs on stock in recently privatized gas transport company).

15. See Press Release, Office of the U.S. Trade Representative, Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties (Oct. 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag> (announcing eight governments’ reaffirmation of ACTA and three governments’ continued support of ACTA).

16. See Press Release, Demetrios Marantis, Acting U.S. Trade Representative, Statement by Acting U.S. Trade Representative Demetrios Marantis on Japan’s Announcement Regarding the Trans-Pacific P’ship (Mar. 15, 2013), <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/amb-marantis-statement-japan-tp> (exemplifying growth of the TPP).

17. See Press Release, Office of the U.S. Trade Representative, Obama Admin. Notifies Cong. of Intent to Negotiate Transatlantic Trade and Inv. P’ship (Mar. 20, 2013), <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/administration-notifies-congress-ttip> (providing example of growth of international trade agreements as Obama Administration intends to negotiate TTIP with the European Union).

18. Softwood Lumber Agreement, U.S.-Can., art. XIV, ¶ 13, Sept. 12, 2006, State Dep’t No. 07-222, <http://www.state.gov/documents/organization/107266.pdf>.

settled, or not, in the London Court of International Arbitration (LCIA), a forum normally used for private disputes.<sup>19</sup> Indeed, fragmentation has taken on new dimensions, such as “private” standards<sup>20</sup> and “informal” law-making,<sup>21</sup> while more traditional “soft law” abounds;<sup>22</sup> all interacting with traditional international law in a variety of fields. International law’s vocabulary continues to expand and would be only vaguely familiar to previous generations’ practitioners.

Under these circumstances, the obvious anxieties of international jurists that Koskenniemi was so critical of a decade ago—such as the fear from “serious risk . . . of [a] loss of overall control” and the threat to “the unity of international law”<sup>23</sup>—might seem to have been vindicated, with concerns now rising to the level of genuine hysterics. But, instead, fretting about the systemic implications of increased fragmentation today seems entirely passé. Of course, particular normative conflicts and frictions continue to attract the specialized attention of those who care enough. But, in recent years, we have by and large been encouraged to “stop worrying and love fragmentation,”<sup>24</sup> to think “beyond fragmentation,”<sup>25</sup> and to embrace fluid notions of “global legal pluralism.”<sup>26</sup> Fragmentation—ever present, ever real—appears to be accepted as the “new normal,” either because it is understood as lodged in a political inexorableness that is in itself not so problematic or because reasonable solutions exist when difficulties do arise—or, most often, for some combination of both reasons.

Koskenniemi’s writings on fragmentation undoubtedly have played a prominent part in fragmentation’s gradual normalization. This is not necessarily to say that they have influenced the practice of creating fragmentation, which is mainly actor-driven, but they have influenced, in at least two ways, how fragmentation is interpreted and understood.

First, *Anxieties* exposed the simple institutional politics at the international

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19. Leonila Guglya, *The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy*, 2 J. INT’L DISP. SETTLEMENT 175, 206 (2011).

20. See generally HARM SCHEPPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005).

21. JOOST PAUWELYN ET AL., *INFORMAL INTERNATIONAL LAWMAKING* (2012).

22. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 708 (2010) (presenting a discussion of how hard and soft law interact in varying conditions); see also Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 766–67 (2006) (discussing the emergence of a new structure for the exercise of governance authority).

23. See Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 2, at 555 (referring to various sentiments voiced at the turn of the millennium by senior judges of the International Court of Justice).

24. Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475 (2008).

25. Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation*, UC DAVIS LEGAL STUDIES RESEARCH PAPER NO. 243 (2011), available at <http://ssrn.com/abstract=1739997>.

26. Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1196 (2007); see also William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 965 (2004) (discussing the benefits of global legal pluralism).

level by driving both the fragmentation of norms and authority and the outcry surrounding it, while downplaying its dangers to the coherence of international law. The rise of new and, at times, surprisingly effective international institutions and judiciaries, as well as novel forms of law-making, may constitute a threat to certain conservative post-World War II international institutions, such as the International Court of Justice (ICJ). But, they are part and parcel of the normative fluidity that is international law, not a threat to its continued existence.

Second, the ILC Report, in contrast, focused less on institutional and political elements of fragmentation and more on practical and formal solutions for normative conflict provided by rules of interpretation, in particular, those provided by the Vienna Convention on the Law of Treaties (VCLT).<sup>27</sup> One might contest these solutions' specific applications, like any legal interpretation, but the remedial value of utilizing this framework to address the issues raised by fragmentation will not be contested.

Therefore, although distinct, the two contributions would seem at first glance to be mutually consistent and complementary to each other. *Anxieties* was a descriptive diagnosis and prognosis of fragmentation, while the ILC Report attempted a formal, rule-based prescription. Read together, *Anxieties* and the ILC Report encapsulate fragmentation's normality selon Koskenniemi. "Keep calm and carry on;" fragmentation, as a political construction, is not really new or especially threatening, nor does it present challenges with which tried and tested legal forms cannot cope.

Nonetheless, there are also significant underlying tensions between the ideas put forth in *Anxieties* and the ILC Report, especially when read against the backdrop of Koskenniemi's more general expositions of international law's politics; these tensions call into question the characterization of fragmentation's normalcy. Simply put, if, as *Anxieties* argues, institutional proliferation in international law stems from the political preferences of states and institutions, and in turn creates new and diverse actors with political, organizational preferences and interests of their own, then why, if at all, should these actors be expected to subscribe, in practice, to a legal panacea, like the one promoted in the ILC Report, of harmonious and integrative interpretation, which would depend on a notoriously elusive normative "culture of formalism"<sup>28</sup> as a prerequisite and regulate their fragmentation?

### III. FRAGMENTATION AND THE POLITICS OF INTERNATIONAL LAW

Attempting to answer this question demands recourse to Koskenniemi's broader conceptual frameworks of international law's politics. However, it is in several respects telling that his early grand exegesis of international law—the 1989 *From Apology to Utopia*<sup>29</sup> and its mini-thesis in the 1990 *The Politics of*

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27. See ILC Report, *supra* note 1, at 245–46.

28. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 494–509 (2002).

29. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Univ. Press 2005) (1989) [hereinafter

*International Law*<sup>30</sup>—was entirely oblivious to the “problem” of fragmentation. After all, although the much later ILC Report deliberately made the valid methodological and historical point that “[t]he background of fragmentation was sketched already half a century ago[,]”<sup>31</sup> what we recognize today as “fragmentation,” whether in its institutional or normative dimensions,<sup>32</sup> is very much a post-Cold War phenomenon. As Koskenniemi noted in *Anxieties*, it was only after 1989 that “[t]he structure provided by the East-West confrontation was replaced by a kaleidoscopic reality in which competing actors struggled to create competing normative systems often expressly to escape from the strictures of diplomatic law—though perhaps more often in blissful ignorance about it.”<sup>33</sup>

Thus, in *Politics*, the discussion of international law’s sources—today a topic that easily spills over into ostensible “fragmentation” questions like “what are the sources of WTO law?”<sup>34</sup> or “how have international judicial decisions functioned in formulating general principles of international humanitarian law?”<sup>35</sup>—focused on the more fundamental, indeed traditional, theoretical problems that stem from the consensual character of classical international law: its waning concreteness when consent is absent or questionable and its lack of normativity when consent is present.<sup>36</sup> Nevertheless, a reading of *Politics* is absolutely necessary to understand, as well as critique, Koskenniemi’s later, more direct, engagements with fragmentation. This is because the general approach to international law found in *Politics* informed his understanding of fragmentation.

To start, the mutually corresponding phenomena of international institutional proliferation and normative fragmentation lend themselves quite easily to the critiques of “utopia” and “apology” and their mutual tensions in international legal argumentation that undergird Koskenniemi’s *Politics*.<sup>37</sup> In the ILC Report, Koskenniemi recognized fragmentation as, at least in part, the result of—broadly political—projects of expansion of international law into novel fields, arising in

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KOSKENNIEMI, FROM APOLOGY TO UTOPIA].

30. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4 (1990) [hereinafter Koskenniemi, *Politics*].

31. ILC Report, *supra* note 1, ¶ 5 (citing Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 403 (1953)).

32. See Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 LOY. U. CHI. INT’L L. REV. 173 (2009) (claiming that international bodies resist normative integration to avoid the centralization of international law-making authority).

33. Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 2, at 559.

34. See generally Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT’L L. 421 (2008) (critically assessing the body of law relied upon by the World Trade Organization).

35. See generally Fabián O. Raimondo, *The International Court of Justice as a Guardian of the Unity of Humanitarian Law*, 20 LEIDEN J. INT’L L. 593 (2007) (arguing that the International Court of Justice’s decisions have been a persuasive precedent for other international courts).

36. See *Politics*, *supra* note 30, at 7–8 (arguing that concreteness and normativity cannot exist simultaneously because their qualities “cancel each other out”).

37. See generally *id.* at 7 n.12 (condensing the information within FROM APOLOGY TO UTOPIA, *supra* note 29).

response “to new technical and functional requirements.”<sup>38</sup> Koskenniemi wrote even more lucidly in *Anxieties* that “[s]pecial regimes and new organs are parts of an attempt to advance beyond the political present that in one way or another has been revealed unsatisfactory.”<sup>39</sup>

Thus, fragmentation would seem to be the outcome of pushing the diverse envelopes of utopian demands from international law—stretching one way in the field of international trade law, venturing in another way in the area of human rights law, etc. Yet, at the same time, fragmentation is clearly a reflection of what states actually do which is what they consider to be effective for their own, inevitably political and practical ends.<sup>40</sup> Therefore, importantly, a fragmented international law—and the functional regimes that come with it—is no less and no more apologetic of state behavior than any other structure of international law.<sup>41</sup> The lubrications of fragmentation provided by the VCLT are ultimately palatable to all relevant actors, states, stakeholders, tribunals, and of course, advocates.

More particularly, *Politics*’ powerfully critical framing of the tension between concreteness and normativity in international law, in general, surely informs Koskenniemi’s later visions of fragmentation. Indeed, one might imagine *Anxieties*, with its exposure of fragmentation stemming from political preferences, as descriptive of a quest for concreteness. Correspondingly, the ILC Report, due to its attempt to impose, or at least identify, a rational interpretative order in situations of normative conflict, might be imagined to be representative of international law’s pursuit of normativity. All this is said without any reference to the substance of international law, but only with respect to its overarching structure.

Moreover, although there is no direct reference in *Politics* to fragmentation, it focuses instead on states, sovereignty, and traditional sources of international law. It includes clear understandings of the potential for fragmentation and its challenges for both concreteness and normativity, even before the end of the Cold War and the actual advent of international institutional proliferation. For example, in one particularly striking passage of *Politics*, Koskenniemi describes modern international law as “an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on.”<sup>42</sup> Such an elaborate framework is surely fertile ground for fragmentation, as depicted here, in which both concreteness and normativity can find expression.

Therefore, the tension between apology and utopia surely exists in the fragmentation of international law; indeed, to Koskenniemi, this would appear to be part of its normality. As such, fragmentation is no different, no better but no

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38. *ILC Report*, *supra* note 1, ¶¶ 13–15.

39. Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 2, at 578.

40. See Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) (arguing that States promote fragmentation to maintain their own international power).

41. See generally *Politics*, *supra* note 30, at 9 (providing a basic setup of apology and utopia in international law).

42. *Politics*, *supra* note 30, at 28.



worse, than international law in general, and it does not—in and of itself—pose an inordinate challenge to international law’s consistency or coherence. It is not difficult for international actors to fervently encourage fragmentation and also pursue curative processes through an instrument such as the VCLT. “Keep calm and carry on” applies in this context as well.

#### IV. THE STATE-FUNCTIONAL REGIME ANALOGY

Indirectly, *Politics* is preoccupied with “fragmentation,” but with a fragmentation of a different, more primary and indeed familiar, traditional type—the classical Westphalian, state-based, structural architecture of international law, composed of diverse national legal systems.<sup>43</sup> How does this traditional fragmentation relate to the contemporary, functional fragmentation of international law in Koskeniemi’s mindset? Koskeniemi readily analogized functional regime fragmentation within international law to this more conventional type of fragmentation in subsequent writings.<sup>44</sup> Most explicitly, in his 2009 work *The Politics of International Law – 20 Years Later*,<sup>45</sup> he posited outright: “It is useful to think of the ‘functional regime’ by analogy to the ‘sovereign state’ that existed once upon a time.”<sup>46</sup> These latter words not only spread prematurely the rumor of the state’s death, but also betray more than a touch of longing for the older, simpler, state-based type of fragmentation. The notion that “functional regimes” have displaced states as international law’s building blocks—though not, as Koskeniemi cautioned, as “billiard” balls<sup>47</sup>—is also evident in *Anxieties*, where the relegation of the state and its formal status to a lesser normative level is to some extent lamented—“[t]he new global configuration builds on informal relationships between different types of units and actors while the role of the state has been transformed from legislator to a facilitator of self-regulating systems.”<sup>48</sup>

This repeated descriptive analogy about states, functional regimes, and networks suggests that the method and themes of *Politics* are, schematically, intellectual precursors to Koskeniemi’s later approaches to fragmentation. This can also explain Koskeniemi’s making light of ICJ judges’ complaints regarding institutional competition in *Anxieties*, which are not very different from a

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43. See *Politics*, *supra* note 30 (implying the natural or inherent existence of a “fragmented” or political structure to international law).

44. See *ILC Report*, *supra* note 1, at 15 (comparing fragmentation of international law into technical regimes of parties to international treaties and traditional or territorial regimes of sovereign nations).

45. Martti Koskeniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT’L L. 7, 11–13 (2009).

46. *Id.* at 12.

47. *Id.* at 13; see also ARNOLD WOLFERS, *The Actors in International Politics*, in THEORETICAL ASPECTS OF INTERNATIONAL RELATIONS (William T.R. Fox ed., 1959), reprinted in DISCORD AND COLLABORATION ESSAYS ON INTERNATIONAL POLITICS 3, 19–24 (1962) (distinguishing functional regime fragmentation from realist conceptions of the state system through the metaphor).

48. Koskeniemi & Leino, *Postmodern Anxieties*, *supra* note 2, at 557.

diplomat's grumblings about rivalry from a fellow government.<sup>49</sup> Again, "keep calm and carry on." International lawyers accustomed to decentralized systems of law should not balk at the emerging, functionally fragmented international legal landscape.

Analogizing the international regime complex to the sovereign states' horizontal fragmentation provides some comfort to anyone who feels uncomfortable with the latter and all its uncertainties. But a more complicated, dialectical relationship is evident, and there is an underlying, if still unidentified, cause for concern. Functional regimes or "norm complexes" and their diversity might be the outcome of state-driven political processes. They might be broadly analogous to states, but they are not legitimate substitutes for the state. Indeed, they may even weaken the state construct—now merely facilitators and not legislators or even normative contractors—and threaten the traditional international legal system's formal structures.

There is something troublingly simplistic in the state-regime analogy. The glove does not exactly fit when one considers a range of complexities such as legitimation, organization, jurisdiction, and more, not to mention further pathological differences. But it does provide some hints at Koskenniemi's real concerns about fragmentation; not fragmentation itself, upon which he has gone well out of the way to attach stamps of approval and normalization, but, perhaps, its representation of a shift from state power, with all its apologetic and utopian baggage, to a less fathomable, less structured, international system that is lacking in both political sanction and normative vision.

#### V. PARADOXES OF INTERPRETATIVE POLITICS AND INTERPRETATIVE FORMALISM

In any case, once international functional regimes are analogized to states—a sufficient but hardly necessary step—it is only logical that interpretative clarity and process are key junctures in any viable approach to fragmentation. Let me now turn to a loose—though informed, at least by hindsight—reading of the part(s) played by interpretation in *Anxieties*, contrasted then with the ILC Report. What is of at least passing interest here is the paradoxical role of legal interpretation in fragmentation's understanding and management, concurrently comprising a part of the problem and a part of the solution.

*Anxieties* was initially framed as an almost cynical critique of the concerns voiced at the time—recall that this was merely a decade ago; how eccentric this seems now—by senior judges of the ICJ about the proliferation of international adjudicative bodies and their lack of fealty to the ICJ, as a self-appointed or imagined central interpreter of international law.<sup>50</sup> These "anxieties" were ostensibly those of a particular, venerated, yet fragile, international institution whose principals expected the end of the Cold War to expand their interpretative hold on the empire of international law—to the extent that "hold" and "empire"

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49. *See id.* at 575–76.

50. *See generally id.*

had ever existed—only to be surprised and disappointed by increasing institutional and normative interpretative competition.

In this context, Koskenniemi implicitly pursued the state-functional regime analogy discussed above, more than merely suggesting that the conservative ICJ, as the aristocratic ancient régime of international law, by definition, felt threatened by the onset of a multiplicity of new, operative, competing international institutions, seized with the powers of independent legal interpretation, much as a hegemonic state might feel threatened by the rise of lesser powers who might attempt to assert their own interpretations of international law.

Most importantly, Koskenniemi referred in this respect to the VCLT as a crux of such interpretative power and politics, even suggesting that it served as an instrument of institutional hegemony:

If a human rights treaty body or a WTO panel interprets the 1969 Vienna Convention on the Law of Treaties . . . so as to reinforce that body's jurisdiction or the special nature of the relevant treaty, and in so doing deviates from the standard interpretation, then this is bound to weaken the authority of that standard interpretation and to buttress the interests or objectives represented by the human rights body or the WTO panel. The interpretations express institutional moves to advance human rights or free trade under the guise of legal technique. In the language of political theory, the organs are engaged in a hegemonic struggle in which each hopes to have its special interests identified with the general interest.<sup>51</sup>

In other words, the power of interpretation of international norms could and would be used by competing international institutions to bolster their respective positions of influence and authority, with the VCLT and its inevitable instrumentality serving as a fundamental normative-political intersection. Indeed, from that point on, the bulk of *Anxieties* is devoted to reviews of “institutional ambitions”<sup>52</sup> in some central fields of international law—international criminal law, international human rights law, and international trade law—emphasizing the role of the indeterminacy of law in this respect.

Thus, *Anxieties* was far from a statement about the ICJ's institutionally idiosyncratic dimensions. Rather, it was much more broadly about divergent international institutions' competitive positions. Post-Cold War international politics had brought about an overarching division of international norms and institutions—fragmentation, functional regimes—that were destined to be in a kind of “hegemonic struggle” with each other.<sup>53</sup> Each such regime could empathize with the same anxiety voiced by the ICJ's Presidents, and this anxiety would be shared by any international lawyer worthy of the title.

In *Anxieties*, Koskenniemi describes this post-modern international law situation; it is both his diagnosis and prognosis of fragmentation. But prospectively

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51. *Id.* at 561–62.

52. *Id.* at 571.

53. *Id.* at 561–62.

and normatively, Koskenniemi seems to make little of the problems it might pose:

While international lawyers have always had to cope with the absence of a single source of normative validity, it may seem paradoxical that they should now feel anxiety about competing normative orders. Perhaps this anxiety reflects their past strategy to defend international law by a domestic analogy.<sup>54</sup>

The message to international lawyers would seem to be akin, again, to “keep calm and carry on;” these anxieties of fragmentation are your bread and butter and have always been so.” The fragmentation of functional regimes in international law is similar to the fragmentation of the nation-state system. Moreover, cognizant of the powerful role of interpretation in the political construction of fragmentation, in *Anxieties*, Koskenniemi half mocks and half sanctions the integrative value of formal interpretative efforts: “confronted by the experience of fragmentation, international lawyers suggest combating it by the technique of a single, coherent, public law driven system of control.”<sup>55</sup> Indeed, as we have already seen in *Anxieties*, Koskenniemi accepted that the VCLT could be used and instrumentalized as a central power juncture in fragmentational international relations.<sup>56</sup> So while integrative interpretation might satisfy the formal jurists, it cannot evade, let alone cure, the bedrock international politics of normative and institutional fragmentation.

Fast-forward—though not by much—to the ILC report. First and foremost, fragmentation is acknowledged as a problem of sorts; otherwise, the Report would not even be necessary. It is then treated as primarily a technical doctrinal problem—not a fundamentally systemic one. Second, the VCLT rules of interpretation, with their formal, legal relationships, are hailed as the elixir for virtually all fragmentation issues. In this sense, the ILC Report constitutes a radical shift—compared to *Anxieties*—to practical pragmatism, an alleviative or prescriptive project rather than a critical one. But overall, the message carries the same tenor. The phenomenon of fragmentation is not a special or unprecedented threat to international law. Interpretative politics have always existed and are inevitable; interpretative formalism is the only practicable way to diminish conflicts and incoherence.

The paradox—interpretation acting as the currency of inter-institutional political wrangling, yet simultaneously serving as the formal vocabulary for bridging normative gaps—is not reconciled any more than the overarching tension between apology and utopia is defused. It is a paradox, although a common one, as far as international law is concerned.

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54. Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 2, at 558.

55. *Id.* at 556.

56. *Id.* at 556–62; *see also* Koskenniemi, *The Politics of International Law – 20 Years Later*, *supra* note 45, at 9 (“The point of creating such specialized institutions is precisely to affect the outcomes that are being produced in the international world. Very little is fully random out there, as practicing lawyers know very well, directing their affairs to those institutions where they can expect to receive the most sympathetic hearing”).

## VI. AN OPEN-ENDED CONCLUSION: FRAGMENTATION AND THE SPECTER OF MANAGERIALISM

Koskenniemi's writings and analyses ultimately show us that fragmentation is not a cause for worry. Fragmentation does not undermine international law as a system, and its underlying problems are largely reflections of the difficulties international law has always faced and presented. The tensions and even paradoxes discussed above—the state-functional regime analogy, the use of formal interpretation as a bridge between competing institutional and other political frameworks, apology, and utopia—pose both theoretical and normative questions for international lawyers regardless of fragmentation. Even with respect to the increasing fragmentation over the last few years, we could rather matter-of-factly conclude at this point, “keep calm and carry on.” Although the anxieties caused by fragmentation are understandable, the current, and foreseeable, silence in the fragmentation debate is equally so—business as usual.

Why, then, devote so much thought to this now normalized and inevitable, yet remediable, phenomenon of fragmentation? Why engage in seemingly contradictory intellectual efforts such as the ILC Report, on one hand, and *Anxieties*, on the other hand? If fragmentation itself—the problems of incoherence and disunity, its political apologias, and extended reaches into many utopias—is not really a fundamental change or concern in the international legal system, why should it bother us? Who is the enemy that provoked such heated debate? Or rather, who is the enemy that Koskenniemi sees, or has seen, through the veil of fragmentation?

The answers to these queries lie elsewhere—in Koskenniemi's critical views regarding international law, or perhaps in law itself. Consider this: in an outspoken 2007 article, Koskenniemi identified the new fragmentation as “a profound change in the organization of faith and power,” in which “the ethos of law and republicanism are replaced by individual interests, strategic planning, and technical networks; formal sovereignty replaced by disciplinary power; constraint received from cognitive instead of normative vocabularies.”<sup>57</sup>

Here, Koskenniemi's own post-modern anxieties regarding fragmentation and its baggage seem to be starkly revealed—a genuine fear of the substitution of the cognizable, statist, governmental, Westphalian system of control under international law, with all of its familiar political warts, by a globalized, functionalist, system of “governance,” whose politics are informal, raw, and unconstrained. This is the enemy—not fragmentation as a phenomenon, but fragmentation's propensity to promote anti-formalist managerialism in international affairs.

The turn to formalist interpretation in the ILC Report, described above, must be understood in this context—a prescription for regaining the powers of the ethos of law, form, and norm in the face of the deeper threats posed by fragmentation.

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57. Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law*, 4 NO FOUNDATIONS 7, 11 (2007).

Furthermore, this explains both the sarcastic understatements of *Anxieties* and the formal prescriptions of the ILC Report. Fragmentation itself is not the problem, and, in any case, there are staple doctrinal solutions to it. The real problem, for Koskenniemi, is the susceptibility of a fragmented system to be captured by unaccountable governance networks.

At best, this essay has attempted to explain, in context and with the benefits of hindsight, some of the main and currently relevant dimensions of the fragmentation debate, with particular attention to Martti Koskenniemi's writings. At worst, it has shown that fragmentation as a theoretical issue has constituted a decoy, drawing attention from political, substantive, and normative issues in international law. Regardless of fragmentation, Koskenniemi is certainly right to be more worried about managerialism than fragmentation, and in this sense, we would do best to "keep calm and carry on," leaving this essay open-ended.