The Teaching of International Law: Fragmentation or Cohesion?

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**Introduction**

I am deeply honoured to have been asked to contribute to this volume. The eight years I spent studying at the University of Glasgow, School of Law, completing my LLB, PhD and Diploma in Legal Practice, were certainly among the best of my life and provided a wonderful foundation for my career as a teacher of international law. As well as marking the 300th anniversary of the Regius Chair, 2013 also marks the thirtieth year since I commenced my legal studies at Glasgow, the twentieth anniversary of my taking up my first lecturing position at the University of Reading and the tenth anniversary of my securing a Chair in International Law at the University of Sussex and so there is a great deal for me to celebrate. The writing this chapter has given me a wonderful opportunity to reflect on my teaching and research and especially on what I owe to my time at Glasgow.

I have been pondering the issue of the coherence of international law for some years and saw the invitation to contribute to this volume as an opportunity finally to contribute something to the debate. As I will show, international law has changed significantly in the last thirty years. It has become more pervasive, more mature and more complex. It has moved considerably beyond the basic existential question that used always to precede its formal study: the “Is international law really law?” question, into what has been described as a post-ontological period.[[1]](#footnote-1) International law now covers a wide range of sometimes unrelated issues and topics. As a result concern has been raised in the academic literature and beyond about the apparent fragmentation of international law and its division into unrelated sub-systems resulting, potentially, in a loss of universality and coherence. The academic literature addressing the question of the fragmentation of international law is vast and will not be explored fully in this Chapter. However, I will suggest that the fragmentation literature has not addressed what I consider to be one very important element of the response to the fragmentation argument; that is, the issue of the teaching of international law.

This chapter will begin with a brief description and personal analysis of the history of international law teaching at the University of Glasgow. It will then turn to consider the growing maturity and complexity of international law, before introducing the fragmentations debate. Drawing on my own teaching and research in the field of international immunities from jurisdiction, the chapter will then consider one of the most controversial examples of the fragmentation debate, that is, the conflict between State immunity and human rights, particularly as exemplified in the recent decision of the International Court of Justice in *Jurisdictional Immunities of States (Germany v Italy)*.[[2]](#footnote-2) Having highlighted the problems inherent in the process of fragmentation, the final section of the chapter will be argue that teachers of international law have a central role to play in avoiding further fragmentation of international law.

**The Teaching of International Law at Glasgow: An Institutional and Personal Journey**

The teaching of law at Glasgow appears always to have had an international element. When the

former Regius Professor of Law, David M Walker, wrote *The History of the School of Law, The University of Glasgow* he noted that: “until the fifteenth century the thorough study of law could only be pursued abroad, and there is ample evidence of young Scots, nearly all clerics, seeking leave of their bishops or abbots to go to Paris, Orleans, Toulouse, sometimes even Bologna, to study law. A few went to Oxford.”[[3]](#footnote-3) Latterly, international scholars were welcomed to Glasgow insofar as the establishment, by papal bull of a *stadium generalium* at Glasgow in 1451 was for a place of study “attended by scholars from all parts” where students from everywhere were welcome and not merely those from the local district or region.[[4]](#footnote-4)

The *lingua franca* of legal studies in medieval times was Latin and the law was thoroughly based on religious and Roman foundations. Thus, the establishment of the Scottish universities of St Andrews, Glasgow and Aberdeen in the fifteenth century was “for the study *inter alia* of canon and civil law”,[[5]](#footnote-5) and these Universities welcomed scholars from around the world. However, the years 1451-1712, described by Walker in his book as a period of “Foundation and Frustration”,[[6]](#footnote-6) saw the teaching of law removed from the University of Glasgow,[[7]](#footnote-7) only to be finally reinstated by the establishment of the Regius Chair of Law in 1713. Once re-established, the teaching of law at Glasgow continued to attract scholars from around the world.[[8]](#footnote-8)

Nevertheless, by the eighteenth century the teaching and study of law had developed from a single “science” into a multiplicity of different legal “sciences” based on national legal systems. As Reinhard Zimmermann has pointed out, “[t]here is no such subject as German chemistry or French medicine. But for the past hundred years or so there have been, in principle, as many legal systems (and consequently, legal sciences) in Europe as there are nations states”.[[9]](#footnote-9) In Glasgow this resulted, for example, in John Millar, Glasgow’s fourth Regius Chair, having to teach Scots Law and English Law in alternate years.[[10]](#footnote-10) To the extent that there was any international law teaching at Glasgow after the establishment of the Regius Chair, it was probably focussed around the work of the moral philosophers such as Hugo Grotius, Samuel Puffendorf and Emmerich de Vattel, individuals who we now recognise as among the classical writers on international law. In addition, the moral philosophy of Adam Smith, who was himself Professor of Moral Philosophy at Glasgow University from 1752-1764, contributed to the development of the discipline.[[11]](#footnote-11) It was not until the late nineteenth century, after the most noted Scottish international lawyer, Professor James Lorimer of the University of Edinburgh, delivered a course on Public Law at Glasgow in 1877, that there was established at Glasgow a lectureship in Public Law, including Jurisprudence and International Law, a position filled in 1878 by William Galbraith Miller. The teaching of both Public and Private International Law were separated from the teaching of Jurisprudence in 1894 and both have remained on Glasgow law syllabus since that date.[[12]](#footnote-12)

Although international law had featured independently on the Glasgow syllabus since the end of the nineteenth century, it was not until the early 1960s that the study of international law at honours level emerged. At this time, the need to expand international law teaching beyond merely the ordinary course necessitated the development of a range of Honours courses and the appointment of additional international law staff. The most significant appointment, from my perspective, was that of John P Grant who was appointed as a senior lecturer in 1974 and was elevated to a titular chair in 1988, serving as Dean of the Faculty of Law at Glasgow from 1985 to 1989 and from 1992 to 1996. My own passion and understanding of international law owes a great deal to this individual who became my mentor, co-author and friend.[[13]](#footnote-13) The teaching of international law at Glasgow has benefitted from the work of *inter alia* Professor Tony Carty, Professor Iain Scobbie and now Professor Christian Tams, ably assisted by Dr Akbar Rasulov and Dr James Sloane (with apologies to the many experts whom I have not mentioned).

My personal involvement with Public International Law at Glasgow began in 1983, the year I began my legal studies. I was allowed in my first year to choose between Civil Law and Public International Law and I readily chose the latter, having failed to progress my Latin studies beyond merely rudimentary level at school. I vividly remember my first PIL lecture at the University of Glasgow, which was delivered by John Grant. Rather than begin with the standard ontological question referred to above, John began his course with an analysis of the recently concluded conflict between the United Kingdom and Argentina over the Falkland/Malvinas Islands introducing his students to key issues of title to territory, the law of armed conflict, and the laws of war. I, for one, was immediately hooked. The course then proceeded to cover the traditional core issues of international law including the sources of international law, the subjects of international law, the relationship between international law and municipal law as well as issues of State responsibility and the peaceful settlement of disputes. In the second term, the course moved to consider the use of force in more depth as well as the law of the sea, human rights and some of the emerging topics of international law including international environmental law. As the course progressed I became more and more enamoured of the subject, reflecting on many of the subject’s myriad of conceptual problems and practical questions.

As an aside I feel compelled to mention how much I benefited from pursuing an honours degree at a Scottish university. Having now taught in England for 20 years, I cannot question the level of achievement of my English-based students. However, that additional year of honours study that I was “required” to take in Glasgow provided a stronger foundation in international law than I would have achieved elsewhere. Having completed my “introduction” to public international law in my first year of study at Glasgow, I could not wait to submit my application to complete my honours in that subject. During my third and fourth years of study I completed courses in the Law of the Sea, Contemporary Issues in International Law, the Law of International Institutions, Private International Law, and took the opportunity to complete a Dissertation on “The Legality of the Strategic Defence Initiative” or “Star Wars”. During this time I was introduced to many of the key theories of international law, including New Haven Scholarship and Critical Legal Studies. I had the opportunity to analyse in detail some of the key judgments of the International Court of Justice, including, most notably, the decision of the Court in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)[[14]](#footnote-14)*. Additionally, I had the opportunity to participate in a new optional course in Foreign Relations Law, which introduced me to the study of the law of international immunities, including diplomatic and State immunity, which subsequently formed the basis of my PhD and much of my published work.

Having spent eight years of study developing my interest in, and knowledge of, international law, I was singularly disappointed after securing my first teaching job at the University of Reading that, as there was only one international law course - a final year option - that was being taught by another member of staff, I was required to teach Business Law, Employment Law and, latterly Company Law. This situation was not unusual in provincial English Law Schools in the early 90s as it was only the major University Law Schools in England that were teaching a broader range of international law subjects. Even at Masters level, the opportunities were limited and it was only through working with colleagues in the Department of Politics and International Relations that I was finally able to develop an MA in Diplomacy and an MA/LLM in International Law and World Order in order to allow me to teach international law. However this situation was quickly to change.

**The Maturity and Complexity of International Law[[15]](#footnote-15)**

In the relatively short time since the 1990s opportunities for teaching and learning international law have increased significantly, not only in the United Kingdom, but also around the world. This is due, in part at least, to the increasing maturity and complexity of international law. The School of Law at the University of Glasgow, like many other Law Schools in the United Kingdom, including my own, now offers, in addition to an undergraduate law degree, a number of Masters programmes in law. In addition to recruiting international students to Glasgow, an astonishing 65% of the School of Law’s Honours students now take the opportunity to spend some or all of their third year studying abroad. This internationalisation of the study of law and of the Law School itself must be a significant part of why Glasgow is currently ranked as the top Law School in Scotland.

This “brave new world” of internationalised law schools in the United Kingdom has developed not on the back of the desire of foreign students to learn about different domestic legal systems, although there will certainly be some comparativitists among them. Nor is it being driven by conflict of laws concerns. It has, rather, flourished on the back of the teaching of public international law and its various sub-systems. Many of the readers of this chapter will be surprised at this very broad assertion about the extent of public international law’s apparent reach. Those who did not study public international law will probably have deliberately avoided an interesting looking but ultimately not very “legal” optional subject. Even those who enjoyed the opportunity to take a break from the rigorous black letter of their more doctrinal subjects to take the PIL option will no doubt also question how such an ephemeral subject might now be seen as so important. Even the few of us who were, in my view, fortunate enough to take the study of international law to honours level and beyond will, like me, be constantly surprised at the size and content of the subject of public international law as it continues to develop today.

Undoubtedly Professor Franck’s assertion referred to earlier that international law has entered its post-ontological era is correct. According to Franck:

[International lawyers] need no longer defend the very existence of international law. Thus emancipated from the constraints of defensive ontology, international lawyers are now free to undertake a critical assessment of its content.[[16]](#footnote-16)

The analysis of the content of the law must also take account of the broader focus of the law in terms of its “subjects”. In 1994, the then Professor Rosalyn Higgins, in her seminal Hague Lectures, identified the subject/object dichotomy as “an intellectual prison of our own choosing”[[17]](#footnote-17). She preferred instead to speak of “participants” in the international legal process.[[18]](#footnote-18) Today’s participants include not only States but international governmental and non-governmental organisations, multilateral corporations and also individuals, among others.

A critical assessment of the content of international law must also recognise the vast array of topics of that international law now purports to cover. This is perhaps best illustrated by reference to another of Franck’s assertions to the effect that “international law has entered the stage of practitioner-specialist”.[[19]](#footnote-19) He notes that: “Specialization (sic) is a tribute which the profession pays to the maturity of the legal system”.[[20]](#footnote-20) It is certainly the case that the legal profession in the UK, and in many other states, is increasingly concerned not only with matters of international commerce, trade and investment, but also with human rights, with the protection of the environment and with international criminal law. The interface between international and domestic law has always given rise to interesting legal questions, many of which have been argued before the British courts. However, recently, the significance of issues such as immunities from jurisdiction, immigration, and the exterritorial application of domestic and regional human rights obligations have come more and more to the fore in the actual practice of the law.

Twenty years ago when I was considering how I might use my interest in (and passion for) international law in practice, and taking the step after completing my PhD of actually qualifying as a solicitor, I searched around in vain for solicitors’ practices that had more than simply a couple of enthusiasts who professed to being international law specialists, and most of those I did find were located in only a very few large commercial firms based in London. Furthermore, the barristers who took instruction in international law matters were essentially professors of international law who had qualified at the bar. My only options at that time appeared to be to become and academic, go and work for the United Nations or one of a very small number of international institutions, or to secure a job in the Foreign and Commonwealth Office as a Legal Adviser (hence the decision to complete my solicitor qualifications).[[21]](#footnote-21) Ultimately I chose the academic route and have never looked back.

A student who is enthusiastic about international law today has a wealth of opportunities available to him or her. Most large commercial firms now practice international (or perhaps more properly transnational) commercial law to a greater or lesser extent,[[22]](#footnote-22) and many have a significant international practices.[[23]](#footnote-23) Outside the commercial world, many law firms offer specialisms in areas such as human rights, immigration, the environment and international criminal law. Indeed, one firm Volterra Fietta has recently set themselves up in London as “the Public International Law Firm” and specialise only in matters of public international law. Many Barristers Chambers in London are similarly focussed on matters of international law including, most notably, Matrix Chambers in international human rights and 39 Bedford Row in international criminal law. The extraordinary growth in international governmental institutions and non-governmental organisations offer significant opportunities for students of international law to develop their skills. Having taught international criminal law for the last ten years I have seen a significant number of students undertake internships in the primary ICL institutions in The Hague, including not only the International Criminal Court (ICC) but also the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and the Special Tribunal for the Lebanon (STL). A number have gone on to secure full-time positions in these and other international organisations.

Having had the opportunity of teaching across a variety of sub-disciplines of international law, including, in particular, international criminal law and, most recently, international commercial law, I have become aware of the need for students to have a grounding in the fundamental principles of international law. In the context of international criminal law, for example, although the jurisprudence of the *ad hoc* and hybrid tribunals, as well as the emerging jurisprudence of the International Criminal Court itself, are creating a wealth of material that is increasing demanding of specialist analysis, the foundations of the sub-discipline are firmly grounded in general international legal scholarship. Thus, the Nuremberg Tribunals were products of a desire to punish those responsible for serious violations of international law; and the core crimes of genocide, crimes against humanity and war crimes themselves were developed by international lawyers rather than by domestic criminal lawyers.[[24]](#footnote-24) The *ad hoc* tribunals were created by the United Nations Security Council and demand an understanding of Chapter VII of the UN Charter in order to fully comprehend both their historical provenance and their current importance.[[25]](#footnote-25) Finally, the International Criminal Court is founded on an international treaty and many of its current problems relate to the consensual nature of its Statute and to questions of jurisdiction that have been the concern of international law for many centuries.[[26]](#footnote-26)

My recent “forced” introduction into the teaching of International Commercial Law has caused me further to realise the reach of international law as a discipline. As well as providing the historical context for the development of transnational commercial law, public international law is increasingly important in the development of a harmonized system of rules that might, in due course, lead to the creation of a truly harmonised system of international commercial relations that might properly be called an international legal system.[[27]](#footnote-27) Thus, although writers have frequently tried to draw parallels between *lex mercatoria* and customary international law, and between the general principles of commercial law and the general principles of international law, it is, more particularly, the international treaty that is at the heart of the on-going harmonization of international commercial law.[[28]](#footnote-28) Furthermore, the importance of the development of soft law processes is as important in the field of international commercial law as it is in the field of international environmental law.

All of this positivity about international law presents exiting opportunities but also problems to the teacher of the general subject of international law. While it is, of course possible and, indeed, necessary to provide a general survey of the nature, subjects, and sources of international law it is becoming increasingly difficult even to attempt to do justice to this wide array of substantive topics. The result is that students and teachers are increasingly become specialists in one or two specific sub-systems of the law. They are, if you like, delivering a fragmented syllabus

**The Fragmentation of International Law**

The suggested fragmentation of the teaching of international law mirrors a broader debate at the heart of international legal discourse concerning the fragmentation of international law itself. This concern recently gave rise to the creation of a special study group within the International Law Commission aimed at addressing this perceived problem. The Report of the International Law Commission’s Working Group on “Fragmentation of International Law”[[29]](#footnote-29) published in 2006 has noted that one of the features of “late international modernity” is “functional differentiation”; that is, “the increasing specialisation of parts of society and the related autonomization of those parts”.[[30]](#footnote-30) According to the Report: “It is a well-known paradox of globalisation that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation – that is, to the emergence of specialised and relatively autonomous spheres of social action and structure”.[[31]](#footnote-31) This apparent fragmentation has been no more apparent than in the field of international law. Thus, according to the Report:

The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by “general international law” has become the field of operations for such specialist systems as “trade law”, “human rights law”, “environmental law”, “law of the sea”, “European law” and even such exotic and highly specialised knowledges as “investment law” or “international refugee law” etc. – each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialised law-making and institution-building tends to take place within 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 international practices and, possibly, the loss of an overall perspective on the law.[[32]](#footnote-32)

Portrayed in this way, the fragmentation of international law is a problematic and negative process. As one commentator has suggested, use of the notion of fragmentation implies that “something is splitting up, falling apart, or worse … In international legal parlance the term has gained … prominence out of the fear that international law might lose its universal applicability, as well as its unity and coherence”.[[33]](#footnote-33) On the other hand, the fragmentation analysis is intended both to explain the phenomenon (of fragmentation) and to identify various legal techniques, such as *lex specialis* and *lex posterior*, or normative hierarchy, that might be used to avoid conflict between different regimes. The response to fragmentation becomes a process of developing relationships between rules and systems, seeking harmonization through systemic integration, and clarifying jurisdictions and applicable law.

Until recently my own thinking on the fragmentation debate was initially rather dismissive. I tended to agree with the views of Judge Simma of the International Court of Justice to the effect that “the phenomenon described as ‘fragmentation’ of international law is nothing but the result of a transposition of functional differentiations of governance from the national to the international plane … international law has developed, and is still developing, its own more or less complete regulatory regimes which may at times complete with one another.”[[34]](#footnote-34) In other words, I believed, insofar as the post-ontological era has begun and we should not be put off course by overly technical concerns about *lex specialis*, *lex posterior,* normative hierarchy and self-contained regimes. Unfortunately, these technical issues are not easily dismissed.

**Competing Discourses of International Immunities and Human Rights**

As a result of this realisation, my views on the problem of fragmentation have changed somewhat in recent years, particularly as a result of my struggle to balance the competing normative frameworks of immunities from jurisdiction and human rights. Having routinely ignored the problem of fragmentation, the full extent of the problem came crashing to the fore as a result of the recent decision of the International Court of Justice in *The Case Concerning the Jurisdictional Immunity of the State (Germany v Italy)* of 3 February 2012, a decision that fell squarely within my area of research expertise. In my early work on immunity from jurisdiction I had confronted the potential conflict between immunity and human rights in a variety of articles and case reviews, most notably in relation to the decision(s) of the House of Lords in the *Pinochet* litigation.[[35]](#footnote-35) In that case, former Chilean President Augusto Pinochet was arrested in London in execution of a warrant for his extradition to Spain to face charges of, amongst other things, torture. Ultimately, any possible conflict between international legal rules pertaining to what was an issue of head of state immunity and questions of human rights and international criminal law were avoided as a result of a technical decision involving an analysis of the impact of the incorporation of the relevant international treaty on torture into UK domestic law. Although subject to criticism, I felt comfortable with my analysis of what was a particularly difficult case. Others, however proclaimed the so-called *Pinochet* precedent as the basis for future challenges to jurisdictional immunities on human rights grounds which resulted in a plethora of cases emerging in primarily domestic and international courts around the world.[[36]](#footnote-36)

A particularly important case for present purposes was brought in the Italian courts by Mr Luigi Ferrini, an Italian national who had been arrested and deported to Germany during the Second World War. Mr Ferrini and many of his compatriots had been forced to work in munitions factories in Germany and had been subjected to gross violations of their human rights and were seeking compensation in respect of that treatment. The Italian courts at first instance, and on appeal, dismissed Ferrini’s case due to the jurisdictional immunity of Germany.[[37]](#footnote-37) However, at the Italian Court of Cassation on 11 March 2004, it was held that the immunity of Germany did not apply as the act complained of constituted an international crime.[[38]](#footnote-38) The case was returned to the original court which held, nevertheless that the claim was time barred. This decision was, however, reversed by the Court of Appeal of Florence, and Germany was held liable to pay damages.[[39]](#footnote-39) After the initial Court of Cassation decision in Ferrini, subsequent cases were brought by further claimants in Turin and Sciacca. These led to the filing of an interlocutory appeal by Germany before the Italian Court of Cassation requesting a declaration of lack of jurisdiction. By two orders of 29 May 2008, “the Italian Court of Cassation confirmed that the Italian courts had jurisdiction over the claims against Germany”.[[40]](#footnote-40) Ultimately, Germany brought the case to the International Court of Justice alleging *inter alia* that by allowing civil claims to be brought against it, Italy had failed to respect the jurisdictional immunity that Germany enjoyed under international law.[[41]](#footnote-41) It is not intended here to provide a detailed analysis of the Court’s decision, something that has been done elsewhere by others as well as by the present author.[[42]](#footnote-42) The purpose here, rather, is to highlight, very briefly, the two very different approaches to the case taken fist by the majority and, secondly by the minority judges, including, in particular, that of Judge Cançado Trindade.

The Court, in its majority decision, pursued an essentially positivist analysis. First, it acknowledged the illegality of the various acts committed by German forces during the requisite period. It proceeded then to examine the relevant law of State immunity asserting that States have a rights to claim immunity before the courts of foreign States on the basis of established State practice, particularly in light of the, as yet inoperative, United Nations Convention on the Jurisdictional Immunities of States and Their Property 2004.[[43]](#footnote-43) In relation to the specific circumstances of the case, based on an analysis of a limited number of domestic cases and legislation, the Court found that the so-called territorial tort exception to immunity did not apply in the case of the activities of the armed forces of a State during an armed conflict, effectively asserting thereby the negative proposition that, insofar as there was no exception to immunity in such cases, Germany was entitled to immunity.[[44]](#footnote-44)

The Court then specifically rejected Italy’s assertion that the nature of the acts in question, as international crimes, required that immunity should be removed. Again the Court drew on a limited number of international and municipal cases in which the so-called *jus cogens* argument had been rejected.[[45]](#footnote-45) Crucially, the Court did not deny that certain substantive rules of the law of armed conflict could be considered as *jus cogens.*[[46]](#footnote-46)However, it did not see a conflict between those rules and the rules on State immunity. In the circumstances of the present case, the Court was clear that the violations of the law of armed conflict were openly recognized as illegal by all parties, but that did not involve any conflict with the question as to whether or not the Italian courts had jurisdiction to hear claims arising out of the violations.[[47]](#footnote-47)

The decision of the majority in this case should be clearly contrasted with the position taken by the minority and, in particular, by Judge Trindade. Trindade premised his dissent on his fundamental rejection of the “State-centred distorted outlook” approach to international law,[[48]](#footnote-48) in favour of an approach based on fundamental human values.[[49]](#footnote-49) Trindade did not explicitly acknowledge the existence of two different systems of international law. Rather, he argued that recent doctrinal developments in international law have changed the law from being exclusively State-centric into one in which individuals are “subjects” and not simply “actors”.[[50]](#footnote-50) Trindade’s analysis is worthy of significantly more analysis than is possible here. But that is not the purpose of this article. The purpose here is to highlight a potential schism at the heart of international legal discourse and that is, perhaps best encapsulated in the following quote from Trindade’s dissenting opinion. In a direct and undisguised critique of the majority’s positivist analysis, Trindade challenged the Court’s methodological framework:

As to national legislations, pieces of sparse legislation in a handful of States, in my view, cannot withhold the lifting of State immunity in cases of grave violations of human rights and of international humanitarian law. Such are positivist exercises leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, of the kind of the ones so widespread in the legal profession, such as, inter alia, the counterpositions of “primary” to “secondary” rules, or of “procedural” to “substantive” rules, or of obligations of “conduct” to those of “result”. Words, words, words . . . Where are the values?[[51]](#footnote-51)

In the context of the present discussion I find these words both troubling and challenging. They appear to suggest something greater than “mere” fragmentation. To this extent the debate around the relationship between State immunity and human rights may be one debate too far in terms of the progress of international law and may eventually result in a schism at the heart of international law.[[52]](#footnote-52) Far from evidencing shared understandings and cooperative analysis of the nature and language of international law, the discourse, as evidenced in the judgment and dissents in *Germany v Italy*, is moving towards what has been described as an “epistemic trap” whereby different autopoietic systems[[53]](#footnote-53) produce reality constructions of their own but struggle to interrelate.[[54]](#footnote-54)

**Beyond Fragmentation: The Role of the Teacher of International Law**

Given the apparent fragmentation of international law into separate and, arguably unrelated sub-disciplines it seems inevitable that the cohesion of international law will, at some point, collapse. After all, given the clear differences of approach in *Germany v Italy* in relation to even the most fundamental of principles concerning, for example, the subjects and sources of international law, it is at least arguable that the existentialist debate that characterised international law until relatively recently served only to mask incoherence and disunity. It is certainly the case that the growing complexity and sophistication of international law has opened it up to greater and more intense critical analysis. However, this should not in and of itself be a bad thing. The study of international law should be a study not only of the successes and achievements of international law but also of its failures and its inconsistencies. Having moved beyond the “is international law really law” question, scholars and students can finally engage in that critical analysis that ought to be at the heart of learning about the law.

Perhaps I can best illustrate this by undertaking a critical analysis of the *Germany v Italy* case in the context of the fragmentation debate. My time at Glasgow instilled in me a belief in the importance of legal doctrine. In international law terms that locates me within the oft-disparaged “positivist” intellectual camp. From this perspective, although engaged by the emotion of Trindade’s position and, perhaps, a belief in the justice of his cause, I find it difficult to accept his reasoning. Trindade summarily rejects and criticises the accepted sources of international law, including both treaty and customary international law, in favour of the moral discourse of normative hierarchy based on the rather esoteric and malleable concepts of humanity and human dignity.[[55]](#footnote-55) The normative hierarchy discourse undoubtedly has validity when understood alongside the recognised sources of international law. However, when States have explicitly rejected any and all human rights exceptions to State immunity, as they certainly have in the context of the relationship between State immunity and human rights,[[56]](#footnote-56) it is difficult to accept an analysis that ignores this “positive” law in favour of a moral assertion of human dignity.

On the other hand, while the decision of the majority in *Germany v Italy* may be technically “correct”, it is also troubling and problematic. Trindade’s allegation that the majority decision is excessively State-centric is undoubtedly correct. The Court’s condemnation of the acts of German forces during the Second World War and its contention that Germany could have done more to compensate those affected,[[57]](#footnote-57) appears rather hollow when set alongside the Court’s overt reliance on a Peace Treaty that Italy had been effectively forced to sign in 1947,[[58]](#footnote-58) and on the United Nations Convention on the Jurisdictional Immunities of States and Their Property 2004,[[59]](#footnote-59) a treaty that has secured only sixteen States parties and twenty-eight signatories in the decade since its conclusion.[[60]](#footnote-60) Furthermore, the process of identification of customary international law was equally problematic. Insofar as the evidence of State practice relied on by the majority consisted only of the legislation of and judicial decisions in a very limited number of Western states,[[61]](#footnote-61) the bold, although very narrow, assertion that there is no exception to State immunity in the case of a tort committed by armed forces on the territory of another state during an armed conflict seems rather unproven. The fact that the Court tried to limit the extent of its decision as much as it could suggests that the majority were themselves at least a little bit uncomfortable with the effect of their decision in the context of the extent and level of Nazi atrocities.

However, the decision is particularly problematic when examined in the context of the recent development of the law of State immunity. Until the middle of the twentieth century State immunity was regarded as absolute.[[62]](#footnote-62) A process of development within domestic law, primarily within Western States,[[63]](#footnote-63) led to the development of the so-called restrictive doctrine of State immunity, which limits the immunity of States in the case of commercial transactions. Had that process been challenges before the International Court of Justice during the 1960s or 1970s the ICJ would, most likely, have asserted the pre-eminence of the absolute theory, which remained dominant in State practice at that time. The effect would have been to block the development of the restrictive doctrine. However, that did not happen and the restrictive doctrine is now fully accepted within State practice and reflected in the 2004 United Nations Convention.

As noted previously, since the 1990s similar challenges to the extent of State immunity in the context of human rights violations have been raised in domestic and international courts.[[64]](#footnote-64) These challenges have given rise to important domestic decisions purporting to limit State immunity and analogous sovereign rights,[[65]](#footnote-65) in a variety of circumstances. However, these decisions have not yet crystallized a change in the international law of State immunity. In fact they may never do so. However what is clear is that the decision of the International Court of Justice in *Germany v Italy*, particularly when set alongside the failure of State representatives negotiating the 2004 United Nations Convention to include a Human Rights Protocol to the Convention,[[66]](#footnote-66) will constitute a significant, if not insurmountable obstacle, to the future development of a human rights exception to State immunity.

All of this is speculation. For the purposes of the present discussion, the question is not about the future development of the law of State immunity. Rather it concerns the fragmentation of international law of which the *Germany v Italy* case is a recent example. More particularly my question concerns the role of teachers of international law in light of fragmentation and the almost inevitable conflicts that will arise between different sub-systems of the law. One response is for traditional, positivist international lawyers to assert the correctness of the decision and to disparage the claims of human rights lawyers. Human rights lawyers, on the other hand, will undoubtedly condemn the decision and hold up the dissenting opinion of Judge Trindade as the “correct” interpretation of State immunity and human rights. This divisive reaction is already apparent in the published literature on the case. However, this is the path to further fragmentation..

The teacher of international law ought to avoid such extreme discourse. On the other hand, the *Germany v Italy* case, and other examples of regime conflict within international law, should not be avoided by teachers. They reflect the type of complex legal question that is apparent in many branches of domestic law, and European law. They provide an excellent framework for the critical analysis of the law. Students can be challenged to consider the different approaches from a critical perspective through questions such as: If States are the primary subjects of international law, what is the role of human rights organisations such as Amnesty International and Human Rights Watch? If international law is based upon the fundamental concept of human dignity, how do we conceptualise and implement that concept? If States have enacted a treaty that ignores human rights concerns, is that treaty valid? Can the treaty be interpreted in such a way that it would, nevertheless, give rise to the application of human rights concerns? All of these are legitimate and interesting questions and only a very few of many that arise.

It is my firm view that the international law of State immunity does need further development in order to reflect human rights concerns but this cannot be done simply by ignoring or deconstructing the existing law. We cannot simply assert, for example, that human rights law and the law of State immunity are different regimes and that one is legally, or morally, superior to the other. Both “regimes” are forms of international law. The same applies, for example, to international criminal law, to international environmental law and international trade law. Each of these specialisms requires its own analysis and, indeed, its own experts. But each requires a core understanding of the fundamental principles of international law, its sources, its subjects and its implementation. Each specialism will develop its own processes, its own substantive law and, in many cases, its own organisational structures. These organisations structures themselves reflect the growing sophistication of international law and include, for example, the World Trade Organisation in the context of international trade, and the International Criminal Court in the context of international criminal law. However, at some point students of these specialist areas need to understand that the foundations of their specialisms are to be found in traditional, general international law. In this more complex international law world a key role for the teacher is to look across the various specialisms in order to identify the lessons that might be learned from one sub-discipline to another particularly in relation to the constitutional framework of international law. Finally the teacher of international law is ideally placed to consider, analyse and assess some “constitutional” principles, such as fairness.[[67]](#footnote-67)

**Conclusions**

The international law I learned at Glasgow thirty years ago did not address all of the different areas of international law that now abound. One could not have expected it to do so, given the exponential growth in the importance and reach of international law that has occurred during that period and that has been described above. Nevertheless, there was recognition, even then, of the interrelationship of different aspects of international law. The ways in which the law relating to armed conflict, which I was introduced to in my first ever lecture, interrelated with the law of human rights and the law of the sea was recognised. I have had the opportunity over twenty years to teach elements of the law of armed conflict, the law of international immunities, international criminal law, international trade law and international commercial law and I could not have done so without the understanding built from my time in Glasgow, of the cohesion of international law. Now, more than ever, when faced with the challenge of fragmentation, teachers of international law, whatever their specialism, must make a conscious effort to assert the coherence of international law.

1. See Franck T. *Fairness in International Law and Institutions* (OUP, Oxford, 1995) at p. 6. See further below. [↑](#footnote-ref-1)
2. *Case Concerning Jurisdictional Immunities of the State (Germany v Italy)* ICJ Judgment of 3 February 2012. [↑](#footnote-ref-2)
3. Walker, D.M. *A History of the School of Law The University of Glasgow* (Glasgow, 1990) at 9 [↑](#footnote-ref-3)
4. See Rashdall, H. *The Universities of Europe in the Middle Ages*, Vol. II, p. 3 (1895, reprinted by Bibliobazaar, 2009) [↑](#footnote-ref-4)
5. Walker *op cit*, at 9. [↑](#footnote-ref-5)
6. *Ibid*, p. 11. [↑](#footnote-ref-6)
7. Walker refers to the decision of John Mair (or Major) to divert revenues of the readership in canon law to the teaching of Arts (*ibid*, p. 15). He notes also, nevertheless, that this lack of legal education did not prevent Viscount Stair from self-teaching himself law and developing his *Institutions of the Law of Scotland* (1681), *ibid*, pp. 16-17. [↑](#footnote-ref-7)
8. *Ibid*, 26. Walker refers specifically to the reputation of John Millar who was appointed to the Regius Chair in 1781 and who “attracted students from England, and even two from Russia”. [↑](#footnote-ref-8)
9. Zimmermann, R. “Civil Code and Civil Law: ‘The Europeanization’ of Private Law within the European Community and the Re-emergence of a European Legal Science” 1 *Columbia Journal of European Law* 63 (1995) at 65. [↑](#footnote-ref-9)
10. Walker *op cit*, at 26. [↑](#footnote-ref-10)
11. *Ibid*, pp. 27-8. [↑](#footnote-ref-11)
12. See, generally, Walker, *op cit*. [↑](#footnote-ref-12)
13. John and I have co-authored three books including *Deskbook of International Criminal Law* (Cavendish, London, 2005); *The Harvard Research in International Law: Contemporary Analysis and Appraisal* W.S. Hein & Co, Buffalo, New York (2007); and *Encyclopaedic Dictionary of International Law* (3rd Ed., OUP, New York, 2009). [↑](#footnote-ref-13)
14. 1984 ICJ Rep. 392. [↑](#footnote-ref-14)
15. I readily admit to having borrowed this heading from the work of Franck *op cit*, pp. 4-6. [↑](#footnote-ref-15)
16. Franck, *op cit*, p. 6 [↑](#footnote-ref-16)
17. Higgins R. *Problems and Process: International Law and How We Use It* (OUP, Oxford 1994) at p. 49. [↑](#footnote-ref-17)
18. *Ibid.* See also Higgins R ”Conceptual Thinking about the Individual in International Law” 4 *British Journal of International Studies* 1 (1978) at p. 5. [↑](#footnote-ref-18)
19. Franck, *op cit*, at p. 4. [↑](#footnote-ref-19)
20. *Ibid*. [↑](#footnote-ref-20)
21. Glasgow has historically been very successful in placing alumni in the Legal Adviser’s Department at the FCO due in no small measure to the work of Professor Grant. [↑](#footnote-ref-21)
22. In spite of the significant number of LLM programmes in International Commercial Law taught in the UK and around the world, the term transnational commercial law is probably the more correct term to use, particularly in the context of international or trans-boundary commercial transactions and refers to “that stet of private law principles and rules, from whatever source, which governs international commercial transactions and is common to legal systems generally or to a significant number of legal systems”. (Goode, R. Kronke, H. McKendrick E., *Transnational Commercial Law: Text, Cases and Materials* Oxford, Oxford University Press, 2007) at p.4. [↑](#footnote-ref-22)
23. The leading city law form Clifford Chance, for example, only took on its current form in 1987 with the merger of two city firms and operated primarily in Europe until 2000 when it merged with German firm Pünder Volhard Weber & Axster and New York firm Rogers & Wells to create an international law firm which is currently based in twenty-seven countries around the world (see www.cliffordchance.com).Other major city firms boast a similar if not greater international networks of offices and partnerships. [↑](#footnote-ref-23)
24. See further Cryer, R. Friman, H. Wilmshurst E., *An Introduction to International Criminal Law and Procedure* (2nd Ed, CUP, Cambridge, 2010) at p. 8. [↑](#footnote-ref-24)
25. See *Prosecutor v Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* decision of 2 October 1995. [↑](#footnote-ref-25)
26. See Rome Statute of the International Criminal Court 1998, 2187 UNTS 90; 37 ILM 1002 (1998). [↑](#footnote-ref-26)
27. See further Goode et al, *op cit*, Chapter 3. [↑](#footnote-ref-27)
28. *Ibid*, Chapter 5. See, in particular the Vienna Convention on the International Sale of Goods 1980, 1489 UNTS 3; 19 ILM 668 (1980) [↑](#footnote-ref-28)
29. UN Doc A/CN.4/L.682. The Report was authored by Professor Marti Koskenniemi. [↑](#footnote-ref-29)
30. *Ibid*, p 11, para. 7. [↑](#footnote-ref-30)
31. *Ibid*. [↑](#footnote-ref-31)
32. *Ibid*, at para. 8. [↑](#footnote-ref-32)
33. Simma, B. “Universality of International Law from the Perspective of a Practitioner” 20 *European Journal of International Law* 265 (2009) at 270. [↑](#footnote-ref-33)
34. *Ibid*. [↑](#footnote-ref-34)
35. See, in particular, *R v Bow Street Metropolitan Stipendiary Magistrate and others Ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147. See further Barker J.C. “The Future of Head of State Immunity after *ex parte* Pinochet” 48 *International and Comparative Law Quarterly* 937 (1999) [↑](#footnote-ref-35)
36. There is insufficient space to develop an analysis of all of these cases but some of them certainly deserve mention here. Reference can be made to the *Case concerning the Arrest Warrant of 11 April 2000* *I.C.J. Reports 2002*, p. 3 before the International Court of Justice, *Al-Adsani v United Kingdom* (2002) 34 EHRR 237 before the European Court of Human Rights, *Filartiga v Pena-Irala* (630 F2d 876 (2d Cir. 1980)) and *Siderman de Blake v Republic of Argentina* (965 F.2d 699 (1992)) before the US courts and *Jones v Saudi Arabia* [2006] 2 W.L.R. 1424 in the UK as examples. [↑](#footnote-ref-36)
37. See *Germany v Italy, (*hereinafter Judgment), *op cit,* para. 27. [↑](#footnote-ref-37)
38. *Ferrini v. Federal Republic of Germany*, Decision No. 5044/2004 (Rivista di diritto internazionale, Vol. 87, 2004,

p. 539; International Law Reports (ILR), Vol. 128, p. 658). [↑](#footnote-ref-38)
39. See Judgment, para. 27. [↑](#footnote-ref-39)
40. *Giovanni Mantelli and others* (Italian Court of Cassation, Order No. 14201 (Mantelli) *Foro italiano*, vol 134, 2009, I, p. 1568), and *Liberato Maietta* (Order No. 14209 (Maietta) *revisita di dritto internazionale,* Vol 91, 2008, p. 86). See Judgment para 28. [↑](#footnote-ref-40)
41. See further Judgment, paras 15, 16, 17 & 37. [↑](#footnote-ref-41)
42. For my own analysis of the case see Barker J.C. “*Jurisdictional Immunities of the State (Germany v Italy) Judgment of 3 February 2012*” 62 *International and Comparative Law Quarterly* 741 (2013) and Barker J.C. “Negotiating the Complex Interface between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in *Germany v. Italy*” 15 *International Community Law Review* 415 (2013). [↑](#footnote-ref-42)
43. Judgment paras 53-56. [↑](#footnote-ref-43)
44. Judgment, paras 62-77 [↑](#footnote-ref-44)
45. The *jus cogens* (or normative hierarchy) argument, briefly stated asserts that certain norms, including specifically certain international criminal prohibitions are hierarchically superior to other international law rules, specifically rules relating to State immunity, and therefore the rules of immunity are “trumped” and made ineffective when argued alongside the hierarchically superior human rights and international criminal norms. [↑](#footnote-ref-45)
46. The Court specifically referred to the prohibition of “the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour. [↑](#footnote-ref-46)
47. Judgment para 94. [↑](#footnote-ref-47)
48. Judge Conçado Trindade Dissenting Opinion to the Judgment of the Court [hereinafter Judgment Dissent], paras. 172-176 [↑](#footnote-ref-48)
49. Judgment Dissent, paras. 32-40.. [↑](#footnote-ref-49)
50. Judgment Dissent, para 180 [↑](#footnote-ref-50)
51. Judgment Dissent, para. 294. [↑](#footnote-ref-51)
52. A schism constitutes more than just a split or separation. In theological terms, it is a “rupture of ecclesiastical union and unity” (See Catholic Encyclopaedia <http://www.newadvent.org/cathen/13529a.htm> *sub* nom Schism). Within an intellectual community, schisms may be unavoidable. Thus St Paul’s call to the people of the Church that he established in Corinth that they: “agree in what you say so that there will be no divisions among you. Be completely united, with only one thought and one purpose” (1 Corinthians 1, 10), apparently fell on deaf ears. [↑](#footnote-ref-52)
53. Autopoiesis is biological concept developed by Humberto Maturana and Francisco Vaturela (see Maturana H & Vaturela F, *Autopoiesis and Cognition* (Boston, Reidel, 1980)) that defines a closed system that is capable of creating itself. The term has been used in systems theory and sociology, primarily by Niklas Luhmann (see Luhmann N, *Soziale Systemme: Grundriβ einer allgmeinen Theorie* (Frankfurt, Suhrkamp (1984)), and has been applied to legal analysis by Luhmann himself and by Gunther Teubner (see Teubner G. “How the Law Thinks: Toward a Constructivist Epistemology of Law” 23 *Law and Society Review* 727 (1989)).. Teubner’s analysis identifies law in its entirety as an autopoietic system that struggles to interrelate with other autopoietic systems. Thus, he argues that “[I]n the dynamics of social evolution, self-referential relations are multiplying within the legal process, culminating in a hypercyclical linkage of the law’s components. The law becomes autonomous from general social communications. It develops into a closed communicative network that produces not only legal acts as its elements and legal rules as its structures, but legal constructions of reality as well. The autonomy of modern law refers primarily to its normative operations that become independent from moral and political normativity (*ibid*, p. 742). [↑](#footnote-ref-53)
54. *Ibid*, p. 742. [↑](#footnote-ref-54)
55. Judgement Dissent, para. 292. [↑](#footnote-ref-55)
56. On this point see further below. [↑](#footnote-ref-56)
57. The Court expressed this as a “matter of surprise – and regret”. Judgment, para. 99. [↑](#footnote-ref-57)
58. 1 UNTS 747. [↑](#footnote-ref-58)
59. G.A. Res 59/38 (2 December 2004). [Hereinafter, the 2004 United Nations Convention] On the Convention see further O'Keefe R., Tams C.J. and Tzanakopoulos A. *The United Nations Convention on the Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford, Oxford University Press, 2013) [↑](#footnote-ref-59)
60. As at 20 February 2014. For up-to-date information on the current status of the Convention and a list of parties see https://treaties.un.org/. [↑](#footnote-ref-60)
61. On legislation see Judgment, paras 70 & 71 covering the legislation of only seven States and on national judgments see Judgment, paras 72-75, covering the state practice of fourteen States.. [↑](#footnote-ref-61)
62. See, for example, the decision of the House of Lords in *The Cristina* –[1938] AC 495. [↑](#footnote-ref-62)
63. See, for example, the Tate Letter *26 State Dept. Bull. 984 (1952)*;*47 A.J.I.L. 93 (1953*) in the US and *Trendtex v Central Bank of Nigeria* [1977] QB 529 in the UK. [↑](#footnote-ref-63)
64. See footnote 36 above. [↑](#footnote-ref-64)
65. Including the immunity of former Heads of Stateand of high-ranking State officials. [↑](#footnote-ref-65)
66. On attempts by Amnesty International and Human Rights Watch to have included as an annex to the Convention a Human Rights Protocol see Hall C.K. “UN Convention on State Immunity: The Need for a Human Rights Protocol” 55 *International and Comparative Law Quarterly* 411 (2006). [↑](#footnote-ref-66)
67. See, Franck*, op cit*. [↑](#footnote-ref-67)