

A ius post bellum: necessary reconfiguring or further fragmentation?
Private sector actors in post-conflict situations and ‘the Meaning of Security in International Law’

Introduction

This paper considers foreign private / corporate / non-state actors in post-conflict settings, from the perspective of ensuring and improving human rights protection. Such an enquiry has a descriptive element: what are the sources and extent of any framework governing these actors’ conduct in such situations? It also has a more normative enquiry: how can we improve the prospect of human rights compliance by such actors in such settings? In particular, what is the role for our subject, public international law, in decreasing these actors’ impact on human insecurity?

Our panel is ‘peace and security.’ Despite the tone of much of the literature, foreign or transnational corporate actors² may of course have a generally positive influence on the likelihood of sustainable peace after conflict. However, for this paper I proceed on the basis that in post-conflict settings,³ one possible source of unregulated or under-regulated power (with a possibility for social harm such as human rights violations: ‘insecurity’)⁴ is the foreign or transnational company.

¹ Conference theme: ‘Security, Scarcity & Struggle: the Dilemmas of International Law’. The Call for Papers was based on the theme of ‘the Meaning of Security in International Law.’

² See Ford, J., & McKenna, K., ‘Peacebuilding & the Private Sector’ (Issues Paper No. 4, CIGJ – ANU, June 2008): it is of course difficult to be categorical in law or otherwise about what is a ‘local’ as opposed to ‘foreign’ or ‘transnational’ business. In addition, a cross-sectoral comparison and typology may be needed to reflect the range of corporate actors by sector, inclination, motivation in conflict areas, whether involvement is direct or only indirect (financiers), etc. Definitional issues require more attention than is attempted in this conference paper. For example, use of the term ‘foreign private or non-state actors’ could be seen as including transnational criminal networks.

³ ‘Post-conflict’ conceivably describes a range of different scenarios; ‘peacebuilding’ is variously defined: see n 2.

⁴ ‘Human rights violations’ do not necessarily result in ‘conflict.’ The relationship between human rights violations and the likelihood of conflict is something that needs to be disaggregated in more detail than is possible here.

I am one of those naïve conference-goers whose habit is to attempt to engage with the specific ‘call for papers’ and conference theme. This year, these appear to me to carry two contrasting tones. One is of despondency, of the ‘dilemmas of international law’ in the face of its own fragmentation, and in the face of ‘insecurity, scarcity, struggle...’ in the world. Then – merely a sentence later – the call for papers revealed a ‘yes we can!’ tone, one expressing excessive faith in the transformative and transfiguring (or reconfiguring) power and influence of international lawyers and law: that is, if we just in some way reconfigured our subject (and we can), we would thereby be a good way towards security, abundance, peace. (Perhaps I have walked into the conference organizers’ trap: am not just naïve, but also stupid).

There are three main reasons I have chosen the corporate actors / post-conflict topic as a vehicle for reflecting on this tone to the conference theme (as I saw it):

- There is uncertainty concerning what body or bodies of law apply in a post-conflict setting;
- There is uncertainty (or rather, known gaps) concerning norms on the human rights responsibilities of corporate actors (being non-state actors);
- There is an endemic (if not inherent) and recognized gap between the existence in law of human rights obligations, and compliance with or enforcement of these rules: the case of non-state actors, plus ‘post-conflict / weak governance / who-is-responsible’ settings, exacerbate this problem.⁵

This combination allows discussion of wider conference themes relating to our discipline. Some ‘dilemmas’ of international law(yers) may be a result of unreal expectations: of doctrinal coherence, and of law’s capacity to ‘secure’ the world.

⁵ [A fourth reason is that it relates to the subject of my PhD, which partly involves mapping the source and extent of norms possibly applying to foreign corporate actors in post-conflict peacebuilding scenarios.]

Post-conflict settings: lack of clarity

In addition to uncertainty about the bodies of law applicable during armed conflict,⁶ there is a lack of clarity concerning the source and content of ‘law after war’:⁷ what laws empower and limit various actors in territories once combat or enforcement action substantially ceases and peacebuilding begins?

The traditional law of occupation envisages a temporary military occupier obliged to leave local legal and political systems largely intact.⁸ Post-invasion state-building in Iraq, in particular, has triggered questions of whether traditional IHL is applicable or appropriate in coalition and/or UN-sponsored ‘transformative’ occupations and post-conflict peacebuilding.⁹ Traditional occupation law would seem inapposite (or bound to be breached) since the entire purpose of such ventures is to change or replace the incumbent legal and institutional regime.¹⁰ Closely related is uncertainty about the proper legal basis for the various forms of the modern UN’s engagement in the international administration of territory (‘ITA’).¹¹

⁶ Including interface between international humanitarian law (IHL) and international human rights law (IHRL), the extraterritorial effect of human rights treaty obligations, and – relevantly here – the position of private military contractors under IHL or other law (on which see generally Chesterman, S., & Lehnardt, C., (eds.), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007)). In addition is the perhaps more factual characterisation / triggering issue of what constitutes an armed conflict of a particular legal ‘type’.

⁷ Charlesworth, H., ‘Think Pieces: Law after War’ (2007) 8(2) *MJIL* 233. (Here I am assuming the result of conflict or intervention is that there is no local regulator or government, and perhaps only an embryonic state).

⁸ *Hague Regulations* 1907, Art. 43; *Geneva Convention IV* 1949, Art. 64.

⁹ Bhuta, N., ‘The Antinomies of Transformative Occupation’ (2005) 16 *European Jnl of Intl Law* 721.

¹⁰ Chesterman, S., *You, the People* (Oxford University Press, 2004), 7; Charlesworth, n 7, 236.

¹¹ Daghish, K., & Nasu, H., ‘Towards a True Incarnation of the Rule of Law in War-torn Territories: Centring Peacebuilding in the Will of the People’ (2007) 54 *Netherlands International Law Review* 81, 83, 97; Chesterman, n 10, 48-55 (‘practice has led theory’ not vice-versa); Wilde, R., ‘Representing International Territorial Administration: A Critique of Some Approaches’ (2004) 15 *European Journal of International Law* 71 (there is a tendency to gloss over the legal basis for ITA); these bases may include consent, Security Council enforcement or authorization, and an often unarticulated blend of both. There is no template for international regulation of territory – the responses have been ad-hoc: Charlesworth, H., & Chinkin, C., ‘Regulatory Frameworks in International Law’ in Parker *et al* (eds.) *Regulating Law* (Oxford University Press, 2004), 266. The heterogeneity of peacebuilding scenarios has prevented the development of readily applicable templates: White, N., ‘Towards a Strategy for

For today's purposes it is perhaps enough to note that in addition to creating for post-conflict occupiers and administrators an atmosphere largely free of legal constraints,¹² the difficulty of discerning a legal regime of some certitude is understood as one handicap to building a human rights-protective environment in ITA and post-conflict settings.¹³ This is not conducive to enabling balanced security.

In relation to both ITA and occupation it would seem unsatisfactory that case-by-case Chapter VII Security Council resolutions constitute the source and content of legal obligations, including because the practice is often to simply refer in such resolutions to the responsible authorities' international legal obligations.¹⁴

Some argue the law of occupation has evolved, or applies by analogy and with appropriate modifications, supplemented by Ch VII authorizations and constrained by IHRL.¹⁵ Others argue that an entire reconfiguring is necessary: a new coherent, overarching legal framework for modern post-conflict peacebuilding,¹⁶ a

Human Rights Protection in Post-Conflict Situations' in White & Klaasen, n , 471, 480. As may be clear from this paper, this flexibility, even if it is not inevitable and could be avoided by 'reconfiguring' law, is not necessarily a weakness. For arguments supporting the breadth of the Council's powers to regulate and change structures in post-conflict settings, see Ottolenghi, M., 'The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation' (2004) 72 *Fordham Law Review* 2177; Matheson, M., 'United Nations Governance of Postconflict Societies' (2001) 95 *American Journal of International Law* 76.

¹² Charlesworth, n 7 above, 247. It is possible that the dilute legal atmosphere might be *because* of the best efforts of authorities' international legal advisors to sustain ambiguities – not *despite* their best efforts to clarify the law.

¹³ Kelly, M. 'The UN, Security and Human Rights: Achieving a Winning Balance' in White & Klaasen (eds.) *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press, 2005), 118, 119, 148; also Kelly, M., *Restoring and Maintaining Order in Complex Peace Operations: the Search for a Legal Framework* (Kluwer, The Hague, 1999), 67-90.

¹⁴ There are other problems: not every scenario will have a comprehensive governing resolution; such instruments rely on states to idiosyncratically interpret and possibly apply their broad terms; there may be 'constitutional' (Art. 39 threshold-related) limits to the Council's regulatory power post-conflict; rule of law imperatives for predictability and consistency are not well served by ad-hoc instrumentation; and so on.

¹⁵ See for example Roberts, A., 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *American Jnl of International Law* 580.

¹⁶ McGurk, B., 'Revisiting the Law of Nation-Building: Iraq in Transition' (2005-6) 45 *Virginia Jnl of Intl Law* 451, 463.

comprehensive *ius post bellum*,¹⁷ or a ‘coherent and accountable regulatory regime drawn from general principles of international law.’¹⁸

One question in our panel and conference’s concern with international law, insecurity, fragmentation and dilemmas, then, is whether the development of a *ius post bellum* (or whatever the new body of law might be called) represents or requires a reconfiguring of traditional concepts to provide a new or more coherent field – or would we only further fragment the discipline, weaken coherence, or (in the course of trying to strengthen constraints) implicate law more deeply in the processes of justification of modern political interventions?¹⁹ I return to this point below.

Corporate actors: lack of cover

Now into this uncertain normative landscape, let us add non-state actors (foreign companies).²⁰ In recognition of the gap between corporations’ degree of influence and of their formal accountability (and partly as a result of the conduct of corporations themselves), there is a deliberate process towards conceptualizing or identifying, strengthening and connecting international legal frameworks. Currently, however, public international law human rights standards have limited direct applicability to corporate actors, and/or there are limited remedial options in relation to alleged abuses perpetrated by corporations.²¹

¹⁷ Stahn, C., “‘Jus ad Bellum’, “Jus in Bello”... Jus Post Bellum”? Rethinking the Conception of the Law of Armed Force’ (2006) 17 *European Journal of International Law* 921.

¹⁸ Daghish & Nasu, n 11, 104-5.

¹⁹ See generally Kennedy, D., *Of Law and War* (Princeton University Press, 2006).

²⁰ See n. 2 above; as non-state actors, one could also no doubt consider foreign NGOs and their individual staff; they are not the subject of this paper.

²¹ This large topic is beyond the scope of this paper. See generally ‘Protect, Respect, Remedy: A Framework for Business and Human Rights’ (Report of John Ruggie, UNSG Special Representative) A/HRC/8/5 (Human Rights Council, 8th Session, 7th April 2008), and the previous work, much of which is referenced therein. International law is still coming to terms with the place of the corporate actor (Danielsen, D., ‘Corporate Power and Global Order’ (Ch. 4) in Orford, A., (ed.) *International Law and its Others* (Cambridge University Press, 2006); Zirk,

Instead, and in addition to contractual or other legal measures on a national level by home or host states in respect of corporations, it is through a range of internal (voluntary), multi-stakeholder, industry and other self-regulatory regimes, incentives, pressures and influences that a bulk of the aggregate of (mostly non-legal or non-binding) human rights-related constraints on companies now exist. Of some relevance here to my topic are studies identifying a continuum of voluntary and mandatory options on regulating corporate complicity or contribution to ‘conflict trade.’²² From that perspective, the sources of regulatory influence are eclectic, and fragments of international law are but one of them. (I have now slipped into an external, regulatory or instrumental perspective on international law – I return to this shortly).

As with the debates on uncertain post-conflict legal regimes, so here there are calls for international legislation: ‘more and clearer international law’ in relation to transnational corporations.²³ For example, earlier this year Rudi Teitel observed (in relation to international criminal justice) ‘a marked demand by diplomats and legal scholars for more judicialisation and tribunalisation at the global level’

Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge University Press, 2006). Although the home state is sometimes responsible for the violations of its corporate nationals abroad (McCorquodale & Simons ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 *Modern Law Review* 599), and while there are some mechanisms for holding companies liable in national courts for conduct elsewhere in breach of human rights (Joseph, S., *Corporations and Transnational Human Rights Litigation* (Hart, Oxford, 2004), the international legal framework on human rights responsibilities of corporate actors is still evolving. International criminal law provides few options, especially where conflict has ceased: Schabas, W., ‘War Economies, Economic Actors, and International Criminal Law’ in Ballentine & Nitzschke *Profiting from Peace: Managing the Resource Dimensions of Civil War* (Lynne Rienner, Boulder, 2005).

²² See for example Lilly, D., & Le Billon, P., *Regulating Business in Zones of Conflict: A Synthesis of Strategies* (ODI, London, 2002); Le Billon, P., ‘Getting it Done: Instruments of Enforcement’ in Bannon, I., and Collier, P., *Natural Resources and Violent Conflict* (World Bank, Washington DC, 2003).

²³ For example, Schabas, n 21, 438-9 mentions the possibility of a new international instrument aimed at corporate actors and economic conduct in conflict. His view is that ‘technical issues’ are capable of solution – the problem is rather political consensus, so that the ‘most plausible’ regulatory measure is ad-hoc Security Council intervention.

including ‘more complex forms of accountability’ associated with the rise of private actors implicated in violent conflict.²⁴

Speaking of ‘fragmentation’, John Ruggie recently noted that what can be detected by way of international normative (human rights) frameworks on corporations are a range of ‘differentiated but complimentary’ responsibilities, and ‘fragments’ of international institutional and other provisions with similar aims; but in aiming for greater coherence and coverage ‘our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects. That is what needs fixing.’²⁵

Ruggie has noted (but resisted) calls for his study to recommend to states that they negotiate an overarching treaty or other formal instrument imposing binding human rights standards (on states, or on companies directly?) under international law.²⁶ The final part of this paper is a consideration of what such calls, resonating in this context with calls for a new framework for post-conflict settings, might reveal about international law and some of its apparent ‘dilemmas.’

‘Dilemmas of International Law’, Fragmentation and Reconfiguration

A ‘dilemma’ is from the Greek for ‘two propositions.’ It refers to a choice between two options of equal merit, although it is usually used to refer to two or more equally unappealing options (cf. appealing: choice of ice cream dilemmas).²⁷

²⁴ Both as victims – civilians – and perpetrators – PMCs, non-state groups, etc: Teitel, R., ‘Editorial Note – Transitional Justice Globalised’ (2008) 2 *International Journal of Transitional Justice* 1, 2.

²⁵ Ruggie, n 21 above, [105]-[106].

²⁶ *Ibid.*

²⁷ A ‘dilemma’ is strictly speaking a choice between two bad or at least incompatible things, a trade off. Late Latin, from the Greek for ‘two propositions’: used for a situation that requires a choice between options that are or seem

In this conference context of both ‘fragmentation’ and ‘addressing security’ concerns, I restrict myself here to one issue that might be considered a ‘dilemma’:

- (1) on minimizing corporations’ violations as a source of human insecurity, whether to concentrate norm-accretion, advocacy and other efforts on a ‘top-down’ legalization and formal, treaty-based law on corporations, or whether to accept the fragmented and plural nature of norms and emphasise productive synergies between them, including the process of ‘bottom-up’ self-regulatory and other forms of control;
- (2) on post-conflict / ITA settings, one set of choices is whether to attempt to reconfigure a clear normative framework, or to work within existing legal concepts and traditions to ensure more comprehensive, consistent and coherent legal restraints.

In its ‘dilemmas’ tone, the ‘call for papers’ spoke of fragmentation. In relation to both norms on corporations and post-conflict occupation or ITA, one of the problems might be this perception of institutional and substantive fragmentation and lack of coherence. As well as the ILC’s work, ‘fragmentation’ has a meaning in the world of IT and computers:²⁸

- *Internal fragmentation* occurs in IT when storage is allocated without ever intending to use it. This space is wasted:

Post-war law is ‘internally fragmented’ in this sense because there exists a large body of precedent (‘space’) that perhaps we do not use because of

equally unfavorable or mutually exclusive, or an argument that presents two alternatives, each of which has the same consequence. It is more commonly used as a problem that seems to defy a satisfactory solution: *Wikipedia*.

²⁸ *Wikipedia* ‘fragmentation.’

political denial about the quintessentially autocratic and trusteeship nature of temporary territorial administration,²⁹ so we are left with the dilemma described above (and feel inclined to create more or new law).

In relation to corporations, some commentators express despair because there is no formal human rights treaty on non-state actors, whereas if their concern is with ‘effective accountability’ and ‘human rights protection’ (rather than whether it takes a certain form), a deal of ‘free storage space’ is available already – a range of possible legal and non-legal responses.³⁰

It is possible that other (non-treaty) processes can obscure the development of binding law in this area, while making us feel we are ‘doing something’ about the accountability gap. So, ethics-based self-regulation can contribute to norm development on corporations; but it may also prevent ‘harder’ norms developing.³¹ However, concentration on formal legal frameworks can preclude attention to more imaginative, achievable, effective or functional synergies between existing binding and voluntary initiatives.

²⁹ See for example Kelly, n 13. This is a recurrent theme of much of Chesterman’s work on ITA: n 10, and see Chesterman, S., ‘Building Democracy through Benevolent Autocracy: Consultation and Accountability in UN transitional administrations’ in Newman, E., and Rich, R., (eds.) *The UN Role in Promoting Democracy: Between Ideals and Reality* (UN University Press, New York, 2004).

³⁰ For example, in relation to control of private military contractors, search for a formal international law response can obscure more effective efforts using private law (contract conditions for PMCs on human rights issues) and the merits of a ‘bottom-up’ approach that brings corporate actors along with it, and can also contribute to international norms in the process. Advocacy for a global legal response can continue: see the recommendations of the Netherlands Advisory Council on International Affairs (AIV) ‘Employing Private Military Companies: A Question of Responsibility’ Report #59, December 2007 (AIV, The Hague).

³¹ Chesterman, S. ‘The Turn to Ethics: Disinvestment from MNCs for Human Rights Violations’ IILJ Working Paper 2008/2 (Global Administrative Law Series), New York University School of Law, 2008. He leaves aside the question of whether ‘formal regulation’ (treaty or legislation) is desirable or possible. He argues that a resort to ethics can be a means of generating legal norms, including by providing a language for the articulation of rights, but that ‘they can also be a substitute for generating those norms’, providing ‘illusory’ rather than genuine accountability (20), so reducing the demand for actual change: the appearance of regulation may, in some circumstances, be worse than no regulation at all; ethics-based and self-regulatory schemes, he argues, can lead a state or other actor to feel it is ‘doing its bit’ to promote good corporate behaviour, but should not be seen as a substitute for a legal regime intended to change transnational corporations’ behaviour: 20. Such mechanisms are supplements – not replacements – for binding laws.

We tend to see international law as the most appropriate tool because of its moral aura and because the issue is accountability of *global* business actors. Because of our professional or academic identities and perceptions of the special moral claim of international law, we perhaps want *international law* solutions. There is a risk that international law becomes an end in itself, not a means to an end. . A determination to find *public international law* solutions can obscure other means to the same ends.

The sense of frustration in the literature about the difficulties of regulating non-state actors in under-governed areas derives partly from unwillingness to accept that not every solution to an issue that has ‘global’ dimensions must be or can be a public international law one; moreover, the focus on ‘more or better law’ obscures other means to the same end. Despair about the lack of clear binding law is not warranted – unless only formal international law ‘counts’, or unless it is believed that law would bring better security. However, this law-making focus should not be an end in itself to the neglect of the range of mechanisms available and possible synergies between these. Many elements of an overall strategy for ‘non-state actors and security’ lie beyond the legal sphere altogether. But this would be the case even if one had a fully-developed normative framework.

It may be that ‘more law’ is needed, but it is not obvious. In his Special Representative capacity, Ruggie has strongly argued against focusing on a formal treaty on corporations’ human rights responsibilities.³² Indeed, non-binding

³² Ruggie has defended his reasons for not recommending negotiations on legislating an overarching treaty: this would be unlikely to get off the ground, and even if it did, ‘the outcome could well leave us worse off than we are today.’ He gave the following reasons: treaty-making can be painfully slow, while the challenges are immediate and urgent; a treaty-making process would divert attention and resources from interim innovations; a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights (‘The strategic interplay between treaty negotiations and gaining state support for short-to-medium term solutions does not always work in favour of the latter. Where states are reluctant to do very much in the first place, as is the case for quite a few states in the business and human rights area, they may invoke the fact of treaty negotiation as a

instruments may be so prevalent and integrated into the international legal system that in terms of compliance, actors do not appear to differentiate between them.³³

For different reasons, in relation to rebuilding states after conflict, it has been noted that creating ‘more law’ may not necessarily be the solution: for one thing, rules can have a distancing effect on responsibility.³⁴ (Leads narrow avenues of technical issues, although process of rule formation allows expression, and rules not that certain in content).

I am conscious that adopting an ‘inter-disciplinary’ perspective in which international law is merely one of a range of regulatory tools carries risks. One of these is that the ‘sacredness’ or profound symbolic meaning of an *international law* response to issues risks being lost if we see it as merely one instrument in the management of certain social purposes.³⁵ One of my concerns *is* the integrity and

pretext for not taking other significant steps, including changing national laws – arguing that they would not want to “pre-empt” the ultimate outcome’); even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced; the level of standards that would be incorporated into such a treaty would not match the highest voluntary standards today but likely reflect the lowest common denominator: in the wake of a treaty with low standards, pressure on all companies to perform at the highest voluntary levels... would become less effective because companies could, and many would, respond that they were following newly pronounced international law. Such a loss of social leverage would be even more probable, with worse effects, if a treaty with low standards were not ratified by enough states to become law; states already have the obligation to protect individuals within their territory or jurisdiction from corporate-related human rights abuses. If they are unwilling to discharge it, an additional treaty is unlikely to help. Those who have not acceded to existing treaties are unlikely to sign a new specific one; home states are already legally permitted to take more extensive action to regulate overseas human rights harm by corporations based in them without interfering in the host state’s jurisdiction: ‘None of these issues has been systematically addressed by advocates of an overarching treaty imposing binding international standards on companies; it is assumed that this must be the answer because the current system does not function well enough.’ His proposed framework of ‘protect, respect and remedy’ offers ‘a platform for generating cumulative and sustainable progress without foreclosing further development of international law.’ Ruggie, J., ‘Business and human rights – Treaty road not travelled’ *Ethical Corporation* 6 May 2008.

³³ See Shelton, D., *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, New York, 2000).

³⁴ Charlesworth, n 7, 243 (referring to Kennedy, n 19: the legalisation of war and its aftermath can create a form of professional distance, limit our responsibility and our capacity or need to make ethical decisions, because the same law provides a vocabulary for a variety of agendas). A critical international law perspective would note that formal measures intended to control corporations or order ITA interventions carry the risk of legitimising those actors and processes. Kennedy has argued that certain actors –perhaps corporations too – *want* to be regulated, for the legitimising effect, and the ability to use the discourse of law to evade responsibility (Lecture, ANU, 2 June 2008).

³⁵ Koskeniemmi has criticized any turn in international law to using ‘the language of interdisciplinarity’ whereby academic lawyers must ‘painstakingly learn the new vocabularies: to speak instead of institutions of regimes;

aura of international law: but if it becomes an end in itself (‘we need a treaty on this’), this urge for more law can instead dilute or damage international law.³⁶

‘Whether the law works well’ is of course a different question to ‘what is the law.’ I am cautious not to simply sound frustrated with international law (‘lets be more practical!’). Nor am I suggesting that the process of norm-building is futile. Nor am I trying to show off by saying ‘pity your internal doctrinal queries: I am interdisciplinary.’ But of all subjects, an extreme internal doctrinal view of international law is not particularly tenable. And if the question is of ‘reconfiguring law’ it is legitimate to stop and question the limitations of law, the resources to be found within normative plurality, and to place our subject more explicitly in the range of strategies that exists outside, alongside international law, and which in time may become a part of international law.

- *External fragmentation* in IT is the phenomenon in which free storage is available but unusable because it becomes divided into many small pieces over time, too small to satisfy the demands of the application:

Our subject is increasingly ‘fragmented’ in a similar way, as the ILC has observed. However, one possible response to this is find opportunities in

instead of “rule”, of “regulation”; to change the language of government to “governance”; responsibility to “compliance”; lawfulness to “legitimacy”, and, finally, to think international law as “international relations” Koskeniemi, M., ‘International Law: between Fragmentation and Constitutionalism’ (unpublished paper, ANU, Canberra, 27 November 2006), [21]. His argument is that through this vocabulary, ‘law is finally drained out of international law, conceived as a professional technique for the management of values, purposes, ideals’ ([22]); instead ‘it is the political business of international law to endow such events with sacredness or with a symbolic meaning that lifts them beyond their individuality. It works as a standard of criticism without which expert systems could not be distinguished from crack parties, and calculations of costs and benefits might as well be carried out by lottery... a serious politics of law is resistant, indeed opposed, to managerialism. It cannot survive as an instrumental project’: ([35]). It is difficult to reconcile this tone with Koskeniemi’s views on pluralism and multiple normativity in the ILC ‘fragmentation’ report.

³⁶ Bowden, B., Charlesworth, H., & Farrall, J., (eds.), *Great Expectations: The Role of International Law in Building Democracy and Justice after Conflict* (Cambridge University Press, forthcoming).

this multiplicity and plurality.³⁷ While not forsaking doctrinal clarity, we can avoid excessive ‘dilemma’ if as a discipline we learn to be comfortable with the complexity, plurality, lack of neatness;³⁸ indeed these features provide opportunities for achieving some of the ends in mind (in terms of security and non-state actors, in terms of normative contributions from non-state sources).³⁹ While lawyers are drawn to neat, ‘hierarchical visions of order’ and control, this is unreal in contemporary international law (and life): one need not necessarily despair or be overwhelmed by complex webs

³⁷ The ILC report noted that fragmentation may in fact not require a fundamental transformation of public international law, but for ‘imaginative uses of its traditional techniques.’ Other ‘rule complexes’ are undoubtedly necessary (or inevitable) as the world is ‘irreducibly pluralistic’ (487; the poet Louis MacNeice memorably described the world as ‘incorrigibly plural’). These bodies of rules do not exist in ‘clinical isolation’ from international law any more than apparently ‘sovereign’ states do. International law is needed to coordinate bodies of norms, but it ‘cannot resolve in an abstract way any possible conflict that may arise.’ Public international law ‘does not contain rules in which a global society’s problems are, as it were, already resolved. Developing these is a political task.’ (488).

‘The absence of general hierarchies in international law does not mean that normative conflicts would lead to legal paralysis. The relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise’: 485. ‘Normative conflict is endemic to international law. Because of the spontaneous, decentralized and unhierarchical nature of international law-making - law-making by custom and by treaty - lawyers have always had to deal with heterogeneous materials at different levels of generality and with different normative force’: 486.

‘The very effort to canvass a coherent legal-professional technique on a fragmented world expresses the conviction that conflicts between specialized regimes may be overcome by law, even as the law may not go much further than require a willingness to listen to others, take their points of view into account and to find a reasoned resolution at the end. Yet this may simply express the very point for which international law has always existed’: 487; see also *Law as process* (Higgins, R., *Problems and Process* (Oxford University Press, 1994).

³⁸ Fragmentation puts to question the coherence of international law, but ‘alongside coherence, pluralism should be understood as a constitutive value of the system.’ Indeed, ‘in a world of plural sovereignties, this has always been so’ ... no homogenous, hierarchical meta-system is realistically available to do away with such problems. International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions: ILC (491; 493).

³⁹ ‘Even as international law’s diversification may threaten its coherence, it does this by increasing its responsiveness to the regulatory context; [International law provides] a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems. They can be used so as to give expression to concerns ... that are legitimate and strongly felt; [the undermining of the coherence of law] has been counterbalanced by the contextual responsiveness and functionality of the emerging (moderate) pluralism’: ILC (492-3). The international legal system is becoming more inclusive: McCorquodale, R., ‘An Inclusive International Legal System’ (2004) 17 *Leiden Journal of International Law* 477–504. This can be seen as threatening, with a dilution of responsibility and elusive accountability, but also enriching the source of normative input and attribution.

of influence, differing normative strength,⁴⁰ etc: these can also ‘deliver productive kinds of dynamism and unpredictability that we might relish’.⁴¹

Conclusion

I now return to the contrasting tone, as I perceived it, in the call for papers.

One of the reasons, perhaps, for the despondent, dilemma-ridden tone of the conference theme is excessive faith and expectations in the reach and transformative power of our discipline.

On the one hand, we are professionally anxious about the claims of our universal creed in the face of insecurity, etc, but perhaps tend to ignore or undervalue complementary measures from a plurality of sources, because they are not formal international treaty norms (what all good ANZSIL stuff is about). On the other hand, we exaggerate our ability to transfigure not just our discipline but the world: if a comprehensive instrument were obtainable on post-conflict duties or corporations, it would not necessarily be the last word on security or human rights effectiveness. On the other hand, if our faith is justified, and law can do many things, we might then face dilemmas in extending law to govern transformative occupations and corporate actors in a way that elevates and legitimates these actors and activities in a more troubling way.

⁴⁰ The ILC report noted that soft law does not exist in isolation, and saw a role for traditional international law to ‘channel and control these patterns of informal, often private interest-drawn types of regulation as well...such decentralized, private regulation may be grasped within the scope of international law.’ (490). International law is itself in many respects a self-regulatory system: Charlesworth and Chinkin, n X, 248.

⁴¹ Braithwaite, J., and Parker, C., ‘Conclusion’ in Parker *et al* (eds.) *Regulating Law*, 271, 276. There are lessons from domestic law. Public measures taken to deal with private power (mainly command and control) can suffer from weaknesses (be ineffective or inefficient) but the interaction between them has created fresh opportunities for better regulation, including the responsiveness and other advantages of private law (in achieving public ends) and the ‘productive disintegration’ of private law including its infusion with public standards. Collins, H., *Regulating Contracts* (Oxford University Press, 1999), related in Parker *et al* (‘Introduction’), 8-9.

In relation to our panel and conference theme:

1. The search for clear formal norms and the pursuit of a range of other legal and non-legal options are not necessarily mutually exclusive processes: but just as we need to be cautious that non-legal interim measures do not obscure norm development or represent the whole story, we also need to see that seeking public international law solutions can obscure other means to the valued ends of peace and security. In considering peace & security, private actors and post-conflict settings, two propositions (i) there is perhaps not ‘enough’ law; (ii) law is not enough.
2. Increasing the coherence and coverage of law (in relation to post-conflict situations generally; in relation to non-state actors) is perhaps one component towards greater ‘security’. However, unless we believe that law is simply an end in itself (or that its rules provide certainty), more or better or clearer public international law is not necessarily the answer to the problem being addressed. Perhaps law cannot be reduced to an instrumentalist project; but nor can it become an end in itself.
3. We do feel a more persuasive and profound commentator when we are able to say (instead of ‘there are a range of influences which point away from that conduct’) that ‘*international law* forbids this conduct.’ It carries a certain force, which has a value in obtaining security. One challenge in facing security issues is to avoid excessive faith in law and legalization, while not surrendering or undermining the considerable aura of power of international law as ‘the law of peace.’⁴²

⁴² Graduate Public International Law courses at the University of Cambridge have traditionally been offered by the formal title of ‘the Law of Peace’.