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The Proliferation of Special Regimes and the Unity of the International Legal System

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Abstract

International law is becoming increasingly more specialized and diversified. In response to these developments, international lawyers now widely refer to international investment law, European human rights law and many other branches as 'special regimes'. Scholars in the field see the proliferation of special regimes as a threat to the unity of the international legal system. In so doing, they are applying the traditional definition of a special regime as a collection of norms. This article encourages readers to conceive instead of a special regime as a community of practice—as an activity structured around the normative presuppositions of the people and institutions that participate in it. This new understanding, the article argues, is compatible with all predominant theories of law. When you adopt it, importantly, the proliferation of special regimes does not have the disintegrating effect that many scholars believe it to have.

Keywords International law · Special regimes · Unity of the international legal system · Fragmentation of international law

Introduction

International law is becoming increasingly more specialized and diversified. Already in 2006, the ILC Study Group on Fragmentation of International Law called attention to "the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice".[1] It illustrated this phenomenon with examples such as International Investment Law, European Human Rights

[1] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the 58th session of the International Law Commission (2006), 1 May–9 June and 3 July–11 August 2006, UN Doc A/CN.4/L.682, Corr 1 and Add 1, p. 10.

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Law, International Environmental Law, International Peace and Security Law, and the Law of the Sea. This trend continues. It has seen the development of some strikingly divergent legal practices. Compare, for example, the practice of the International Criminal Tribunal for Former Yugoslavia with that of the International Court of Justice. The two courts understand differently, both the rule that attributes to a state the action of a group of private persons when it controls it,[2] and the concept of *jus cogens*.[3] The trend has affected also the self-image of international lawyers and legal scholars. Today, rarely do you hear a person describe him- or herself as an international lawyer, pure and simple. Colleagues in the field are international investment or European human rights lawyers; they are specialists on International Environmental Law, International Peace and Security Law, the Law of the Sea, and so forth.

In response to these developments, international lawyers have coined a new term. They now widely refer to International Investment Law, European Human Rights Law, International Environmental Law and many others as 'special regimes' (see e.g. Hafner 2004; Humphrey; Siehr). A special regime is a subpart of the international legal system. This was the approach of the ILC Study Group on Fragmentation of International Law, and it has since also been the approach of those international scholars who have written on the topic. Hence, the term expresses an idea of the international legal system. This idea is markedly different from the one that traditionally dominated international legal thinking. International lawyers no longer conceive of the international legal system as an indivisible whole, but as something divided into separate segments.[4] Academics are struggling to understand this new construction of the international legal system. They ask: how can the development towards an increasingly more specialised and diversified international law be combined with the fundamental idea of international law as a single legal system?

Historically, there is a very close connection between this question and the discourse on fragmentation of international law. When, in 2002, the International Law Commission established a study group to examine the difficulties arising from the fragmentation of international law,[5] members of the Commission regarded the proliferation of special regimes as one of the important causes of this much-debated phenomenon. Already Gerhard Hafner, who had earlier been tasked to conduct a "feasibility study" of the topic, referred to the phenomenon as one that threatens to seriously "undermine any tendency towards a homogeneous international law and

[2] See e.g. *Prosecutor v. Duško Tadić*, Case No IT-94-1-A, Appeals Chamber, Judgment of 15 July 1999, available at: https://www.icty.org, paras 88–145; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, Judgment of 26 February 2007, ICJ Reports 2007, p 43, at paras 308–407.

[3] See e.g. *Prosecutor v. Anto Furundžija*, Case No IT-95-17/1-T, Trial Chamber, Judgment of 10 December 1998, available at: https://www.icty.org, paras 155–157; *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, *ICJ Reports 2012*, p 99, at paras 92–93.

[4] See Fragmentation of International Law (n 1), p 10.

[5] Report of the International Law Commission, Fifty-fourth Session, 29 April–7 June and 22 July-16 August 2002, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10), paras 492–494.

system" (Hafner 2002, 148). According to him, the proliferation of special regimes jeopardizes "the coherence of international law" (ibid, 146). It leads to "topic autonomy" (ibid), and thus poses a threat to "the unity of international law" itself (ibid, 149).

The Final Study of the ILC Study Group described the phenomenon as "[t]he splitting up of the law into highly specialized 'boxes' that claim relative autonomy from each other and from general international law".[6] Among other things, it examined it relative to the concept of a "self-contained regime", so called.[7] As it asserted, the proliferation of special regimes creates problems of coherence in international law, as "[v]ery often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law".[8] Just as Gerhard Hafner had done, the Study Group warned that "when such deviations become general and frequent, the unity of the law suffers".[9]

There is an assumption underlying all of these statements. Authors assume that, in the course of time, the developments towards an increasingly more specialized and diversified international law will serve to separate the many special regimes from the international legal system and transform them into legal systems of their own. There is reason to think of this assumption as flawed or greatly exaggerated. It builds on the traditional definition of a special regime as a collection of norms. As this article will argue, international lawyers should discard this definition and conceive instead of a special regime as a community of practice—as an activity structured around the normative presuppositions of the people and institutions that participate in it. When you conceive of a special regime in this way, the proliferation of special regimes does not have the disintegrating effect that members of the ILC seem to assume. This argument builds on four distinct propositions:

(1) There are strong reasons to conceive of a special regime as a community of practice, and not as a collection of norms, contrary to established practice.
(2) Knowledge-how presupposes knowledge-that. Still, the two concepts are analytically distinct and must not be confused.
(3) International lawyers have different conceptions of an international legal system. Three such conceptions are predominant in international legal discourse. In this article, they will be referred to as the legal positivist's, the legal realist's and the legal idealist's conceptions of an international legal system. These conceptions can all be described as systems of knowledge-that.
(4) Whereas the legal idealist's conception of an international legal system can also be described as a system of knowledge-how, the legal positivist's and the legal realist's conceptions cannot.

[6] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the fifty-eighth session of the International Law Commission, 1 May–9 June and 3 July–11 August 2006, UN Doc A/CN.4/L.702, para 8.

[7] Fragmentation of International Law (n 1), pp 31–45.

[8] Ibid.

[9] Ibid.

Sections "The Concept of a Special Regime"–"The International Legal System as a System of Knowledge-How" will explain each of these four propositions in more detail. Section "Conclusions" will spell out in clear words why they entail the suggestion that the proliferation of special regimes does not pose any threat to the unity of the international legal system.

The Concept of a Special Regime

In an inquiry into the concept of a special regime, focus is on two questions in particular:

Question (1): What are the defining features that allow international lawyers to think about a segment of the international legal system as a special regime separate from other special regimes and from general international law?

Question (2): What is the significance of having identified a segment of the international legal system as a special regime?

International lawyers answer these questions differently, depending on their conception of an international legal system.

For *legal positivists*, a legal system is a system of norms. These norms are reasons for action and bases for justification of legal decisions. They are organized along chains of authority—according to the way in which they confer authority upon each other. In a chain of authority, a "superior" norm provides only a reason of validity of the norm or norms that are "inferior" to it, but does not itself provide the contents of these norms. Hence, in the legal positivist's conception of a legal system, the relations between norms are purely formal. They are conditioned only by the pedigree of norms and their logical form. If a special regime is a subpart of the international legal system—which it is for all international lawyers, irrespective of the theory of law that they endorse—this concept must be understood accordingly. It, too, must be conceived as a collection of norms organized according to their pedigree and logical form. This is not to say that a special regime is ever "self-contained",[10] in the sense of a collection of norms, which derive from an entirely distinct set of legal sources, unknown to other parts of international law, or which have no logical connection to norms that do not belong to that collection (Simma & Pulkowski). If that had indeed been the case, we would not be able to speak any more about a special regime as an integral part of the international legal system, but would have to deal with it instead as a legal system of its own.

As we have to conclude, then, a special regime is for legal positivism a collection of norms, the pedigree or logical structure of which somehow distinguishes it

[10] See *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment of 24 May 1980, ICJ Reports 1980, p 3, at 86.

from other parts of international law with respect to some, *but not all*, of its several features (Linderfalk 2022, 109–119). As a legal positivist would argue, the concept of a special regime helps us to understand and to describe social facts in a logically coherent fashion (ibid). Say that positivists find that legal decision-makers understand differently the rule that attributes to a state the action of a group of private persons when it controls it. Logical coherence requires that there be a sound reason for these differences. For legal positivists, the proposition that practices pertain to different special regimes provides such a reason (ibid).

Legal realists reject the existence of norms in the sense of objective reasons for action and as bases for justification of legal decisions (Green 2005). For them, a legal norm is a piece of language, which guides the behaviour of its addressees because of its grammatical form and legal meaning (ibid, 1921–1925). This piece of language is not inscribed in any written legal instrument, such as a treaty or a resolution adopted by an international organisation. It is essentially a prediction of how adjudicators and other legal decision-makers would generally decide (ibid, 1934). This prediction is based on social facts, if and to the extent that these can be thought to have an influence on legal decision-making—irrespective of whether these facts express anything that the legal positivist would consider legally binding (ibid).

With this approach to law, the relationship between the legal norms of a legal system cannot possibly pertain to their logical form. It can only pertain to their legal meaning. By the legal meaning of a norm, realists understand its relationship with what it refers to (Ross). While, for legal realists, the function of law is to cause adjudicators to change their opinions and behaviour, more specifically, they identify the legal meaning of a norm with its referential function in this chain from cause to effect (ibid). For the legal realists, consequently, a special regime is a collection of norms, which address either a set of similar facts or a set of similar legal consequences. The concept offers a way for the realists to conceive of legal facts and legal consequences in general terms (Linderfalk 2022, 109–119). This seems to be necessary if predictions of future legal decision-making is to be at all possible.

Legal idealism can be distinguished from legal positivism by the way in which it approaches the separation thesis: the idea that law can exist independently of its moral or other merits. Contrary to legal positivism, legal idealism dismisses this idea (ibid). For legal idealists, no law can be self-justifying. If law exists, this is always because of the presence of some or other idea, either of what law should be like, or what the legal project should achieve (ibid). This fundamental idea—sometimes referred to as 'the connection thesis' (Spaak)—is a necessary element in all legal idealists' theories of law. To have an idea of what law should be like, or what law should achieve, is to set an ideal for the legal project (Taekema, 1–45). As defined by legal philosophers, an ideal is a state of affairs presented by a person or a group of persons as something desirable and worth aspiring to (ibid, 4). Idealists are divided over the issue of what precisely are the ideals set for the legal enterprise. Examples range from justice and the well-being of all members of the international community, to legality and the integrity of law (Linderfalk 2020, 53–59). These differences notwithstanding, legal idealists have a common conception of a legal system. They all think of a legal system as a system of norms arranged to accommodate for the one or several ideals set for the legal project. A legal norm is a reason for

action and a basis for justification of legal decisions. Since ideals lack this prescriptive dimension, the logical form of a norm cannot explain the relationship between a legal norm and an ideal. This relationship can only be a matter of the efficacy of the norm relative to the ideal (Linderfalk 2022, 31–32). Interestingly, idealists conceive similarly of the relationship between the norms themselves. The one conclusive issue that in all cases determines this relationship is the degree to which norms help to bring about the ideal or ideals set for the legal project (ibid).

Legal idealist have to align their definition of a special regime with this particular conception of an international legal system, or else a special regime cannot be a subpart of the international legal system. This prompts them to think of a special regime as a community of practice, in the sense of educational theorist Etienne Wenger: as a group of people, who experience and continuously create their shared identity within larger society through engaging in and contributing to a more or less well defined activity, much like footballers, carpenters, neurobiologist or dentists (Wenger). A community of practice presupposes the existence of a very particular kind of relationship between community members (Wenger, 72–73). According to Wenger, this relationship manifests itself in a distinct set of normative presuppositions. Applied to the concept of a special regime, different international law specialists think of themselves as engaged in the pursuit of an enterprise together with different people; they have different ideas of what desirable state or states of affairs they are pursuing and how assignments should be performed properly; and they have different opinions about the appropriateness of different rhetorical tools, such as forms of argumentation, legal terminologies and legal concepts. To illustrate, think of the difference between International Environmental Law and the Law of International Investment. International environmental lawyers generally think of themselves as pursuing the ideal of sustainable development, whereas international investment lawyers generally do not.

For legal idealists, the mere existence of an international legal discourse manifests a commitment on the part of all its participants—a willingness to give time and energy to the realisation of some presupposed legal ideal or ideals. From the point of view of legal idealists, the concept of a special regime helps to understand and describe social facts in a way that coheres with this commitment. International criminal lawyers may be using a different definition of the concept of torture than European human rights lawyers,[11] for example. Similarly, environmental lawyers may be more inclined than investment lawyers to understand legal texts in the light of the principle of sustainable development (Chi). Legal idealists would justify these differences in terms of the efficacy of international law. As they would contend, if the practice of international norms is to be of any help for the realisation of the presupposed legal ideal or ideals, we have to accept that different contexts of law sometimes require different solutions to similar problems.

The different emphases of these three conceptions of a special regime make them unequally suited to contain the effect of legal fragmentation.[12] Fragmentation of

[11] See *Prosecutor v. Kunarac and others*, IT-96-23-T & IT-96-23/1-T, Trial Chamber, Judgment of 22 February 2001, available at: http://www.icty.org, paras 465–497.

[12] Fragmentation of International Law (n 1).

international law has been a much-discussed issue among international lawyers and scholars, all since the mid-1990 (e.g. Barnhoorn and Wellens; Fisher-Lescano and Teubner; Koskenniemi and Leino-Sandberg). Discussions led the International Law Commission to include the topic on its agenda of work, and to establish a group with the task of conducting a study on the topic.[13] In parallel to the work of the ILC, scholars published a long series of articles and monographs addressing particular issues raised by the trend seeing a fragmenting international law (e.g. Lindroos; McLachlan; Paulus). This research—much like the work of the ILC Study Group—concentrated mainly on the formal relationships that exist between rules of international law, and on phenomena such as legal hierarchy, the resolution of normative conflicts, the filling of legal gaps, the systemic interpretation of treaties, and the possibility of review of international legal decisions. It paid little attention to the more acute issue of communication across legal disciplines. Because of the increasing specialisation and diversification of international law, specialists are experiencing increasingly greater difficulty with understanding the reasoning of other specialists and their particular solutions to legal problems. Generalists are having similar problems with understanding the specialists, and vice versa. This is the real threat posed by a fragmenting international law and legal practice. When lawyers cannot any more understand each other, all that they will see is incorrect thought and behaviour. It is at this point that they start seriously questioning the fundamental idea of international law as a single legal system.

To improve communication across specialisations, a doctrine must be developed that can explain why, sometimes, international lawyers active in different fields of law do things differently, and why they have such difficulty understanding each other. Neither of the legal positivist's and the legal realist's conception of a special regime can perform this task. The positivist's conception directs attention to the formal relationship between legal norms: its explanation to why specialists prefer different solutions is that they address norms with partly different logical structures or pedigrees. The realist's conception directs attention to the referential meaning of legal norms: its explanation is that specialists focus upon norms that address different categories of facts or legal consequences. Both explanations beg further questions. They do not explain why the different logical structures or pedigrees of norms, or the focus of these norms on different categories of facts or legal consequences, give specialists reason to prefer different solutions. They lack the depth of a sound explanation of human behaviour, for the same reason that legal positivism and legal realism do not offer any full explanations of the concept of legal obligation.

The legal idealist's conception of a special regime certainly does better. It directs attention to the relationship between the human beings that are engaged with understanding, discussing and applying legal norms. Unlike the legal positivist's and legal realist's conceptions of a special regime, it helps to explain why lawyers active in different fields of law do things differently. The explanation is that they operate in different social contexts. This observation, in turn, helps to explain why different groups of lawyers have such difficulty understanding each other. Access to the social context of human behaviour is often crucial to understanding it. Assume, for

[13] Report of the International Law Commission, 2002 (n 5), paras 492–494.

example, that in the beginning of a game of football, a TV commentator sounds off: “United has a good bench”. Football buffs will immediately understand that the commentator is referring to the substitutes of the one team. Outside of the community of football buffs people will understand this utterance differently, and they will no doubt conceive of it as very peculiar. As argued in this Section, a special regime can be conceived of as fully comparable to the community of football buffs. In line with this particular conception of a special regime, if lawyers that are not themselves active in a field of law are not equipped to understand the reasoning and behaviour of those who are, this is because they do not have full access to the social context in which these other lawyers operate.

It is on this basis that I suggest that a special regime be conceived as a community of practice. Importantly, if we adopt this new understanding of the concept, this does not commit us to the legal idealist’s conception of an international legal system—regardless of the earlier reference to it as associated with this conception. As will transpire from later sections of this article, the conception of a special regime as a community of practice is fully compatible with all of the legal positivist’s, legal realist’s and legal idealist’s conceptions of an international legal system. This adds to the reasons in favour of its adoption.

The Concepts of Knowledge-That and Knowledge-How

When you conceive of a special regime as a community of practice, the increasing specialisation and diversification of international law does not pose any threat to the unity of the international legal system. This argument presupposes that the legal positivist’s, the legal realist’s and the legal idealist’s conceptions of an international legal system all be described as systems of knowledge. The important upshot is the suggestion that they be described as systems of knowledge in different senses. As Sects. "The International Legal System as a System of Knowledge-That" and "The International Legal System as a System of Knowledge-How" of this article will argue, the legal positivist’s and the legal realist’s conceptions of an international legal system should be characterized as systems of knowledge-that; the legal idealist’s conception, on the other hand, should be described as the combination of a system of knowledge-that and a system of knowledge-how. The explanation of this proposition requires further engagement with the concept of knowledge itself. It presupposes an answer to a much-discussed issue in epistemology: what is the difference between knowledge-that and knowledge-how, and how are these different kinds of knowledge related? The author of this article will now spend a few pages on briefly explaining how he positions himself in this discussion.

In epistemology textbooks, philosophers remind us to distinguish between two kinds of knowledge. A first kind is knowledge of facts. Since belief in the existence of a factual state of affairs can be represented by a logical proposition, and since propositions are commonly stated in the form “It is the case that …”, philosophers refer to this kind of knowledge as *knowledge-that* (e.g. J Roland, 380). It is the kind of knowledge that we acquire when we learn that Ferrari is an Italian race car, for example, or that people in different countries celebrate Christmas on different

days, or again that international law imposes on states the obligation to abstain from sending military troops to invade the territory of other countries. A second kind of knowledge is what you need to have to be able to say, truthfully, that you know how to carry out a practical task, such as cook spaghetti, play the guitar, grow sweet potato in cold climate, drive a Ferrari, or argue a case before a court of law. To distinguish this kind of knowledge from knowledge-that, philosophers refer to it as *knowledge-how* (ibid).

The concept of knowledge-how goes back to the writing of Aristotle, who distinguished between *epistêmê* (that is, scientific knowledge or knowledge-that) and *technê* (knowledge of craft or knowledge-how). The relationship between knowledge-how and knowledge-that was brought to serious scrutiny for the very first time in 1946 by analytical philosopher Gilbert Ryle in a paper presented to the Aristotelian Society (Ryle). In this paper, Ryle defended two propositions: (1) that knowing-how must be treated as a faculty distinct from knowing-that, and not reducible to it, as commonly assumed at that time; and (2) that knowing-how in fact presupposes knowing-that. These propositions presupposes a definition of the two concepts that are their focus—knowledge-that and knowledge-how. Ryle's conception of knowledge-that is simple enough—it is the orthodox knowledge about facts. His conception of knowledge-how is slightly more difficult to grasp.

For Ryle, knowledge-how implies an ability (Ryle, 8). Thus, if you know how to swim, you have the ability to swim. Ability, however, is not enough. In the same way as a lucky guess cannot represent a piece of knowledge-that (e.g. Engel), there is a sense in which someone, who does something just once by pure chance, still does not know how to do it—like staying afloat by merely waving your arms. This is why Ryle introduces a second requirement: "When a person knows how to do things of a certain sort his performance is in some way governed by principles, rules, standards or criteria" (Ryle, 8–9). This requirement does not imply that a person who knows how to swim should be able to articulate explicitly all those norms that govern swimming. What it does imply, Ryle emphasizes, is an ability to distinguish between correct and incorrect swimming (ibid).

German philosopher Stefan Brandt recently published an article, in which he develops Ryle's understanding of the concept of knowledge-how (Brandt). As Brandt argues, Ryle was wrong in assuming that knowledge-how in all cases implies an ability. Brandt illustrates this point by giving two examples: "A seamstress with arthritis may still know how to make a dress, although she is not able to do it anymore, and an athletic coach may know how to perform certain routines although he was never able to perform them himself" (ibid, 161). If Brandt is correct—and his two examples are certainly very convincing—then the sole emphasis in a definition of the concept of knowledge-how should be on the second of Ryle's two requirements. Thus, Brandt suggests that we modify Ryle's definition. In the case of the previous example (swimming), it would read something like the following: A person knows how to swim if and only if: (a) he or she knows what swimming is; and (b) he or she is able to arrive at correct situation-specific judgments about how to swim successfully (ibid). Condition (a), Brandt explains, might be taken by many readers to be implied by condition (b). It is nevertheless included to ensure that we do not think of a person as one who knows how to do something, if that person him- or

herself does not grasp what kind of activity is involved. Thus, a person does not know how to play chess, for example, if he or she does not know that chess is a game played according to certain rules with the purpose of winning (ibid, 162).

Having now what seems to be a solid definition of the two concepts of knowledge-how and knowledge-that, we are able to understand better the difference between them. The difference lies in the way in which knowledge can be measured or assessed. Knowledge-that is something that a person either possesses or not. You either know that Ferrari is an Italian race car, or you do not. Knowledge-how, on the other hand, comes in degrees: you can be a more or less proficient swimmer or defense counsel, just as you can be more or less skilled at cooking spaghetti or sewing clothes. Thus, unlike knowledge-that, knowledge-how cannot be stated in terms of logical propositions.

These observations explain the description that Ryle offered in his 1945 paper of the relationship between knowledge-how and knowledge-that. Knowledge-how is a distinct faculty that cannot be reduced to or defined in terms of knowledge-that. We can sometimes say correctly of someone that he knows how to perform an activity, say swimming, although he is not able to cite any general rules, principles or instructions about this activity. In the reverse, we can sometimes say correctly of someone that he *does not* know how to swim, although he can indeed cite such rules, principles or instructions (ibid, 155). Knowing how to do something is not exhibited by citing the rules governing that activity, but by correct situation-specific judgments. On the other hand, the specific judgments in which knowledge-how is exercised will always have propositional content. If you know how to play chess, for example, your instructions to a beginner may read something like the following propositions:

- "The king moves exactly one square horizontally, vertically, or diagonally".
- "A rook moves any number of vacant squares horizontally or vertically".
- "A bishop moves any number of vacant squares diagonally" (Schiller, 17–19).

In this sense, knowledge-how presupposes knowledge-that, and this is exactly what Ryle argued (Ryle, 15–16).

The International Legal System as a System of Knowledge-That

What this article suggests is that the legal positivist's, the legal realist's and the legal idealist's conceptions of an international legal system all be described as systems of knowledge-that. The explanation of this proposition requires further engagement with the conditions for saying correctly that you possess a piece of knowledge of this kind. In Sect. "The Concepts of Knowledge-That and Knowledge-How", knowledge-that was referred to as knowledge of facts. A few further distinctions would now have to be added.

Legal knowledge is a cognitive achievement (Steup and Neta, 6). It is the result of a mental process of sorts, manifested in a specific kind of attitude of an individual to either a proposition or a set of propositions. Epistemologists refer to this attitude as a *belief*. To possess a piece of legal knowledge is to *believe* that some certain legal

state of affairs obtains. A person may believe, for example, that international law imposes on states the obligation to abstain from sending military troops to invade the territory of other countries. If an individual does not believe that this legal state of affairs obtains, he cannot *know* it (Ichikawa and Steup, 3).

Belief is not a sufficient condition for knowing. In philosophy textbooks, it is standard to define knowledge as a justified true belief (ibid, 2). According to this definition, a person (S) knows something (*p*), if and only if: (i) *p* is true; (ii) S believes that *p*; and (iii) S has good reasons for believing that *p* (ibid). If *p* is made to stand for the proposition that the Earth is flat, for example, then this proposition will for S represent a piece of knowledge if and only if: (i) S believes that the Earth is flat; and (ii) it is true that the Earth is flat, and (iii) S has good reasons to believe that the Earth is flat.

The requirement that a proposition must be true derives from the mere character of what we would like to think that the proposition represents—a fact (ibid, 2–3). For the same reason as a false proposition cannot represent a fact, no belief in false propositions can be defined as knowledge possessed by any person. Another way of putting this is to say that people cannot know things about which they are wrong. It is primarily because of the requirement of truth that no person can be said to know that the Earth is flat.

The requirement that a person must have good reasons to believe whatever he or she happens to believe would seem to be necessary to fil the gap that would otherwise be left between knowledge and the truth. Truth is a matter of how things are and not of how they can be established to be (ibid, 3). Thus, when we say that only beliefs in true propositions can be referred to as knowledge, we are not saying anything about how anyone can access that truth. If knowing something means to have a certain access to the truth—which is what the terminology assumes—a definition of knowledge must include an element that can guarantee that access, at least tentatively. This is what the requirement of justification supposedly does.

But what does this requirement mean precisely? What does it mean to say, for example, that a person has good reasons to believe that international law imposes on states the obligation to abstain from sending military troops to invade the territory of other countries? This question is indeed fundamental for the consideration of the effect that the proliferation of special regimes may have on the unity of the international legal system. Yet, it impresses on the author of this article the need to engage with some of the most contentious of issues addressed in epistemology. He will try to make his line of argument as plain and easily accessible as possible. Since he has dealt with issues of epistemic justification in his previous writing (Linderfalk 2022, 10–15), he will limit himself to just summarizing, in two paragraphs, how he positions himself relative to some of the contentious points.

The justification of a belief held by an individual is dependent on the structure of the entire system of beliefs that this same individual possesses (ibid, 10). The fact that single beliefs are not arbitrarily pieced together, but arranged as a unitary whole (‘a system of knowledge’) (ibid), presupposes the existence of two kinds of beliefs. Not only do people hold first-order beliefs, thinking, for example, that a certain legal states of affairs obtains. They also hold second-order beliefs: they have a certain idea of how first order beliefs should be fitted

together. Hence, it is a first necessary condition for the justification of a first-order belief relative to any person that the second-order beliefs held by that same person allow it (ibid, 11–12).

The justification of a belief is also dependent on factors that are external to a believer's mind (ibid, 12). These factors vary with the context in which knowledge is being sought, as for example international legal discourse (ibid, 13–15). Hence, if, for some individual, the internal justification of a single belief about international law is dependent on the second-order structural beliefs held by that same person, these second-order structural beliefs will have to enjoy recognition by other participants in international legal discourse, or else the belief will not classify as a piece of knowledge. Put differently, international legal discourse presupposes some notion of how single pieces of knowledge of international law should be fitted together. In this article, this notion has been referred to throughout as a 'conception of an international legal system' (ibid, 16–18).

The legal positivist's, the legal realist's and the legal idealist's conceptions of an international legal system all enjoy recognition among the community of international lawyers and scholars (e.g. Van Hoof, 29 *et seq*). For all three conceptions, legal norms are a constitutive element of the international legal system, although, of course, legal positivists, legal idealists and legal realists understand the concept of a legal norm differently. For legal positivists and legal idealists, a legal norm is a reason for action and a basis for justification of legal decisions. It guides the behavior of its addressees because of the legal obligations that it imposes. For legal realists, a legal norm remains no more than a piece of language. It never entails any obligations. Instead, it guides the behavior of its addressees because of its grammatical form and referential meaning.

In the case of all three conceptions of an international legal system, legal knowledge is a belief in the existence of a factual state of affairs represented by a proposition. Again, different lawyers would articulate this proposition differently. Legal positivists and legal idealists would articulate the proposition in terms of an obligation. They may say: 'International law imposes upon Russia the obligation to abstain from sending military troops to invade the territory of Ukraine'. Legal realists would articulate the proposition in terms of a prediction of the legal consequences of a set of facts. They may say: 'If Russian troops invade the territory of Ukraine, then international legal decision-makers are likely to find that Russia has acted wrongfully, and, thus, that Russia must immediately redraw all troops, that it must make full reparation for the injury that its action has caused, and that it must offer appropriate assurances and guarantees of non-repetition'. Still, for all three conceptions of an international legal system, legal knowledge is propositional. This is to say that they are all systems of knowledge-that.

The International Legal System as a System of Knowledge-How

The previous analysis conducted in this article of the concepts of knowledge-how and knowledge-that highlighted several distinguishing features. Based on these observations, it is possible to make now a comparison of the legal idealist's conception of an international legal system with that of the legal positivists and the legal realists. Comparison suggests that we describe the legal idealist's conception as a system of knowledge-how, in contrast to the legal positivist's and the legal realist's conceptions, which can only be described as systems of knowledge-that. Consider the following three defining features of knowledge-that and knowledge-how:

(1) *Whereas knowledge-that is knowledge about facts, knowledge-how is the kind of knowledge that you need to have to be able to carry out practical tasks.*

From the point of view of the legal positivist's and the legal realist's conceptions of the international legal system, international law does not include any normative elements akin to ideals. International law is a set of norms, and a set of norms only. The existence of these norms is a matter of social fact. In the case of the legal positivists, more specifically, the existence of a legal norm is inherent in the occurrence of a past event—the conclusion of an international agreement or the adoption of a decision by an international organization—to the extent that the basic criteria of the legal system identify it as a law-making act. In the case of the legal realists, the existence of a legal norm is inherent in the occurrence of past events, to the extent that these events can be thought to have an influence on future legal decision-making. From the point of view of the legal positivist and the legal idealists, people know the law if they have knowledge of these facts.

For legal idealism, law is a social practice. One of the characteristic features of a social practice is the idea among its participants that there is something that makes this practice worthwhile. Thus, law does not exist for its own sake. It exists because of the presence of some or other idea, either of what law should be like, or of what the legal project should achieve. This idea was earlier referred to as an ideal—a state of affairs presented by a group of people as something desirable and worth aspiring to. This characterization explains the essence of the legal idealist's conception of law: compliance with the law is never a goal in itself; what ultimately counts is always whether the law helps to realize the assumed legal ideal, and, if so, to what extent. Legal idealists think of legal knowledge in the same way. People know the law if they are able to make situation-specific judgments about how to apply it to realize the assumed legal ideal.

(2) *Knowledge-that is something that a person either possesses or not, in contrast to knowledge-how, which comes in degrees.*

From the point of view of the legal positivist's and the legal realist's conception of the international legal system, legal knowledge is the belief in the existence of a factual state of affairs. In the case of the legal positivist, more specifically, it is a

belief in the occurrence of an event, which basic criteria of the legal system identify as a law-making act. In the case of the legal realist, it is a belief in events that they predict will have an influence on future legal decision-making. These states of affairs can be represented by logical propositions. Such propositions are either true or false. Hence, from the point of view of the legal positivist's and the legal realist's conceptions of the international legal system, legal knowledge does not come in degrees—you either possess it, or you do not.

Legal idealists think of norms as means to realize the ideal set for the legal project. People know the law if they are able to make situation-specific judgments about how to apply it to realize the assumed legal ideal. This ability presupposes knowledge of the factual consequences of applying individual norms relative to the ideal. Such knowledge is not easy to obtain. Legal norms do not operate in a vacuum. Their effect is always more or less dependent on a context. This context includes other individual norms of the same legal system. Consider, for example, the principle of the freedom of the high seas. Whether and to what extent the application of this principle will serve to realize an ideal such as the accommodation of the basic needs of human beings will depend on the existence and scope of application of other norms concerning navigational safety, for example, or the conservation of fish stocks, or again the control of pollution by dumping or from sea-bed activities. Even more importantly, the context of operation of norms includes the world at large. Clearly, the realisation of legal ideals is not served by legal means exclusively, but also by means that are outside of law proper. In the case of many societies, for example, a right to liberty and security of person may be needed to accommodate the basic needs of all human beings, but the realisation of this same ideal may also be dependent on factual conditions, such as the supply of water and foodstuffs. The interesting thing to acknowledge is the frequent interaction of norms with their factual context. Interaction may take many different forms (Linderfalk 2020, 128–129), as illustrated by the following three examples:

- Some legal norms serve the realisation of an ideal only on the condition of the existence of some factual circumstances. For example, the right to participate in cultural life laid down in Article 15 of the International Covenant on Economic, Social and Cultural Rights will not lead to the realisation of any well-being of community members if there are no cultural activities to begin with.
- Some factual circumstances are unable to serve the realisation of an ideal independently of law. For example, normally, the translation of documents into another language has no bearing on the realisation of justice. However, when translation occurs in the context of judicial proceedings involving a foreign national charged with a criminal offence, because of the right to a fair trial and the principle of equality of arms (e.g. Art 6 of the European Convention on the Protection of Human Rights), a different assessment will no doubt have to be made.
- Many legal norms help to alleviate the effect of factual circumstances, which serve to impede the realisation of an ideal. For example, if certain methods of fishing threaten the extinction of some species of fish, and the continued existence of these species serve to accommodate the basic needs of human beings,

then in order not to compromise the ideal altogether, the conclusion of an agreement on the total abolishment of these methods may be necessary.

As these examples make apparent, the factual consequences of applying individual norms relative to an assumed legal ideal are not easily determined. When an idealist says that he or she has knowledge of the factual consequences of applying a legal norm relative to an assumed legal ideal, clearly, this person does not mean knowledge in any absolute sense. The kind of knowledge assumed is one that can be possessed only partly. The person may be an expert with extensive previous experience of the application of a norm, but he or she can never know it to the full.

(3) *Knowing-how supposes knowledge-that, but it is not reducible to it.*

The difference between the three conceptions of an international legal system is well illustrated relative to the exercise of a legal discretion. Discretion is a power conferred by a lawmaker on a legal decision-maker. It enables the legal decision-maker to make decisions in conformity with a legal rule, while giving at the same time this person or institution the possibility to choose between diverse courses of action (Linderfalk 2019). For example, Article 5 of the Interim Accord of 13 September 1995 between Greece and FYROM may impose on the Greek and FYROM Governments an obligation to "continue negotiations" with a view to settle outstanding differences over the name of the latter country.[14] Yet, it may confer upon them the discretion to decide how, precisely, negotiations are to be conducted and when.[15] A legal decision-maker 'exercises discretion' when it avails itself of a decision-making power so framed.

From the point of view of the legal positivist's and the legal realist's conceptions of an international legal system, legal knowledge is a belief in the existence of a legal norm or set of legal norms. Such a belief can be either true or false: either a legal norm exists, or it does not. This approach to legal knowledge gives legal positivists and legal realists limited possibility to criticize the exercise of a discretion. As long as a legal decision-maker stays within the scope of what law allows, every decision will be equally good.

From the point of view of legal idealism, people know the law if they are able to make situation-specific judgments about how to apply it to realize the assumed legal ideal. Suppose that a norm leaves to decision-makers to choose between four different courses of action. Legal idealists would not say that people know this norm just because they can tell us that four courses of action can be taken. They would insist that people tell us which of these four courses of action is best aligned with the assumed legal ideal.

[14] 1891 UNTS 18.

[15] See *Application of the Interim Accord of 13 September 1995 (The Former Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, ICJ Reports 2011, p 644, at 683–686.

Conclusions

In Sect. "Introduction", this article ventured a bold suggestion: when you conceive of a special regime as a community of practice, the proliferation of special regimes does not pose any threat to the unity of the international legal system. Sects. "The Concept of a Special Regime"–"The International Legal System as a System of Knowledge-How" explained the four propositions that form the basis of this suggestion:

(1) There are strong reasons to conceive of a special regime as a community of practice, and not as a collection of norms, contrary to established practice (Sect. "The Concept of a Special Regime").
(2) Knowledge-how presupposes knowledge-that. Still, the two concepts are analytically distinct and must not be confused (Sect. "The Concepts of Knowledge-That and Knowledge-How").
(3) International lawyers have different conceptions of an international legal system. Three such conceptions are predominant in international legal discourse. They were referred to throughout this article as the legal positivist's, the legal realist's and the legal idealist's conceptions of an international legal system. These conceptions can all be described as systems of knowledge-that (Sect. "The International Legal System as a System of Knowledge-That").
(4) Whereas the legal idealist's conception of an international legal system can also be described as a system of knowledge-how, the legal positivist's and the legal realist's conceptions cannot (Sect. "The International Legal System as a System of Knowledge-How").

In this concluding section, the article will tie all things together: it will spell out in clear words why these four propositions entail the suggestion that the proliferation of special regimes does not pose any threat to the unity of the international legal system.

Let us start with reminding ourselves of the definition that was established already at the outset of this article: a special regime is a subpart of the international legal system. This definition applies alike to the legal positivist's, the legal realist's and the legal idealist's conceptions of a special regime. Hence, if the legal idealist's conception of an international legal system can be described as a combination of a system of knowledge-that and a system of knowledge-how, this is bound to affect also the legal idealist's conception of a special regime.

The way this article understands things, the crucial difference between the many special regimes in international law is not they represent different sets of knowledge-that, but that different international law specialists have different ways of carrying out their legal tasks. To illustrate, consider International Environmental Law and the Law of the Sea. There is, of course, something that we can refer to as knowledge-that of International Environmental Law and the Law of the Sea, and we typically expect specialists to possess it. However, this is not the knowledge that distinguishes International Environmental Law from the Law of the Sea, or specialists of the one

field from specialists of the other. It cannot be, for the same reason as knowledge of the Law of the Sea in many cases presupposes knowledge of International Environmental Law, and vice versa. If any evidence is needed, consider Article 216, paragraph 1 of the United Nations Convention on the Law of the Sea:

> Laws and regulations adopted in accordance with this Convention and applicable international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping shall be enforced: (a) by the coastal State with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf; (b) by the flag State with regard to vessels flying its flag or vessels or aircraft of its registry; (c) by any State with regard to acts of loading of wastes or other matter occurring within its territory or at its off-shore terminals.[16]

The knowledge that distinguishes International Environmental Law from the Law of the Sea is rather the *knowledge-how* that specialists develop over time, by actively engaging in the discourse that is specific for each branch. Thus, the difference between International Environmental Law and the Law of the Sea is not any greater than that between different schools of chess. What distinguishes different schools of chess is not their different knowledge of the rules of chess, but their different ways of playing chess within the framework of what these rules allow. In the same way, what distinguishes lawyers specializing in different branches of international law are the different ways in which they carry out their tasks *within the existing legal framework*.

This understanding squares well with how Etienne Wenger addresses the concepts of knowledge and learning. Learning for him is a process by which knowledge is produced (Wenger, 3). Knowledge, in turn, "is a matter of competence with respect to valued enterprises—such as singing in tune, discovering scientific facts, fixing machines, writing poetry, being convivial, growing up as a boy or a girl, and so forth" (ibid). For Wenger, clearly, knowledge is not propositional knowledge, but knowledge-how. The focus of his entire book is on *how to do things* in a community of people.

Two important conclusions follow from this understanding of a special regime. First, and importantly, the legal idealist's conception of a special regime is compatible with all of the legal positivist's, legal realist's and legal idealist's conceptions of an international legal system, although for different reasons. It is compatible with the legal positivist's and legal realist's conceptions of an international legal system because they are systems of knowledge of a fundamentally different kind—they are systems of knowledge-that, whereas the idealist's conception of a special regime focuses on knowledge-how. The legal idealist's conception of an international legal system, in contrast, can indeed be described as a system of knowledge-how, just like the idealist's conception of a special regime. Certainly, the idealist's conception of an international legal system presupposes that legal tasks be carried out in a way that does not always agree with what a specialist would think correct. However, this

[16] 1833 UNTS 397.

does not make the two conceptions incompatible. It is to allow for precisely such differences that idealists need the concept of a special regime in the first place. As they would argue, "if the practice of international norms is to be of any help for the realisation of the presupposed legal ideal or ideals, we have to accept that different contexts of law sometimes require different solutions to similar problems" (Sect. "The Concept of a Special Regime").

Secondly, as far as the legal idealist's conception of a special regime is concerned, the development towards an increasingly more specialised and diversified international law does not pose any threat to the fundamental idea of international law as a single legal system. It cannot, for reasons already noted:

- As far as the legal idealist's conception of a special regime is concerned, a special regime is a system of knowledge in a different sense than the legal positivist's and the legal realist's conception of an international legal system. Thus, from the point of view of these two conceptions, in no way does the proliferation of special regimes in international law affect the international legal system.
- The concept of a special regime is what the legal idealists need to explain why similar tasks should sometimes be carried out differently. Thus, from the point of view of the legal idealist's conception of a special regime, the proliferation of special regimes in international law does indeed affect the international legal system, but only in a positive way—it increases the efficacy of international law relative to the assumed legal ideal.

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