ON THE UNITY OF INTERNATIONA LAW THEORY

SOBRE LA UNIDAD DE LA TEORÍA DEL DERECHO INTERNACIONAL

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Summary: I. METHODOLOGICAL OPULENCE OR PARADIGMATIC SPLIT? II. THE PARADIGMATIC MULTIPLICITY AND ITS REPERCUSSION ON THE MAIN RESEARCH AGENDA. III. PARADIGMATIC MULTIPLICITY AND THE LIMITS OF MEANINGFUL INTER-PARADIGM COMMUNICATION. IV. INTER-PARADIGM COMMUNICATION THROUGH MACRO-SPEECH ACTS: ON THE UNITY OF INTERNATIONAL LAW THEORY

ABSTRACT: It has become a truism that international lawyers are, nowadays, facing a sharp disagreement regarding the main methodological foundations of the discipline. The issue cannot be whether or not there is such a division in the IL school of thought, but which its specific features are. In the present paper, it is submitted here that the current situation is not due to the various methodologies at our disposal, but an actual paradigmatic schism with deep repercussions on the main research agenda. This paradigmatic split steers our attention to the incommensurability of the different paradigms at stake, and consequently the mere possibility of a meaningful communicative interaction between them is dismissed. This picture, though, may be not fully convincing. This multi-paradigmatic state and its ongoing reissue could be seen in a different way, once we accept that neither perfect communication ever obtains nor absolute lack of contradiction is such an epistemological premise. Then, the admittedly existing cross-references, links and overlaps between different approaches can be interpreted not as a paradigmatic mistake (a sort of an internally dysfunctional approach), but as an acknowledgement by each paradigm of its inability to fully explain International Law reality and its openness to alterity, i.e., a recognition of other paradigms as legitimate interlocutors. This interparadigmatic dialogue, that is also noticeable in the main debates on IL structure, shows the most appropriate direction for international lawyers to follow, even if a final paradigmatic converging horizon is not conceivable or even possible.

RESUMEN: Es hoy ampliamente aceptado que la comunidad iusinternacionalista atestigua un acentuado desacuerdo con respecto a los fundamentos metodológicos de la disciplina. Por ello, la cuestión no puede atender a si existe o no una división en la Teoría del Derecho Internacional, sino cuáles son los rasgos de esa división. Este trabajo sostiene que no nos enfrentamos a una situación de diversas metodologías disponibles, sino más bien a una auténtica fractura paradigmática, lo que

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conduce necesariamente a la eventual inconmensurabilidad de los paradigmas en concurrencia, dudándose de la mera posibilidad de una comunicación significativa entre ellos. Sin embargo, este diagnóstico no es enteramente persuasivo. Una vez que aceptamos que la comunicación perfecta no existe y que la ausencia de contradicción no es hoy día una premisa epistemológica indiscutible, la multiplicidad paradigmática y su continuada reedición puede entenderse como el reconocimiento por parte de cada paradigma de su incapacidad para explicar plenamente la realidad del Derecho Internacional y su apertura a la alteridad, esto es, como el reconocimiento de los demás paradigmas como legítimos interlocutores. Este diálogo interparadigmático, que se reproduce igualmente en los actuales debates estructurales del Derecho internacional, señala la dirección adecuada para la comunidad internacionalista, incluso si un horizonte de convergencia metodológica no es aventurable, o siquiera posible.

KEYWORDS: International Law Theory, IL paradigms, IL structural debate, international constitutionalism, IL fragmentation, hegemonic IL, incommensurability, macro-speech acts, interparadigmatic dialogue.

PALABRAS CLAVE: Teoría del Derecho Internacional, paradigmas, debates estructurales, constitucionalismo internacional, fragmentación del Derecho internacional, Derecho internacional hegemónico, inconmensurabilidad, macro-actos de lenguaje, diálogo interparadigmático.

It has been a while since scholars interested in theoretical and methodological questions, particularly Americans and Europeans, have vividly discussed about the very possibility of a unified International Law Theory (henceforth ILT).[1]

Despite the fact that there has always been a debate on the International Law (henceforth IL) method, in the past decade a revival in IL literature has been clearly visible. This revival runs parallel to a disagreement regarding the foundations of the discipline, which seems to have become broader, sharper and deeper. Thus, the issue cannot be whether or not there is a unified ILT, that is, a division in the IL school of thought, but which are the specific features of such a division and which consequences it has in the so-called invisible college.

My intuition is that the community of international lawyers faces a situation not just of methodological wealth, but of a proper paradigmatic multiplicity.[2] This steers the attention to the incommensurability of the different paradigms at stake, and consequently to the possibility of a meaningful communicative interaction between

[1] A prior version of this paper was debated in the ASIL-ESIL Interest Group on International Law Theory's Joint Workshop, *European Society of International Law – American Society of International Law Joint Research Forum "Changing Futures: Science And International Law*, held in Helsinki on the 2nd and 3rd October 2009. In that occasion, the paper tried to ask the questions explicitly put by the organizers as to whether or not there is a unified international law theory or, at least, there should be any. The author wishes to thank all participants there for their useful comments.

[2] The intention here is not to fully defend the concept of paradigm built by Th. Kuhn and P. Feyerabend. This concept along with others like "epistemological obstacle" (Bachelard), "research program" (Lakatos), "research traditions" (Laudan) or even "episteme" (Foucault), have arisen in the post-Popperian philosophy of science to mean a set of postulates, axioms or statements (whether substantive or instrumental) which is shared by a scientific community as organizing and legitimizing its scientific discourse, but being, at the same time, quite impervious to rational and/or empirical demonstration (CRUZ, M., *Filosofía contemporánea*, Madrid, Taurus, 2002, at 327-348). Paradigm is here used in this broad sense.

them, more than any eventually converging theoretical horizon. This paper tries to develop that reasoning.

I. METHODOLOGICAL OPULENCE OR PARADIGMATIC SPLIT?

Strictly speaking, a genuine debate on the scientific method requires a shared understanding of the nature of the scientific object which once might exist among international lawyers, but it seems to me currently missing. This situation in ILT probably makes a paradigmatic approach more adequate and useful to grasp the general picture, than the usual presentation as a mere, though rich, list of different IL methods or methodologies at disposal.[3]

Setting aside so-called moral theories of IL,[4] most theories can be ascribed to four different concurrent paradigms clearly identifiable in IL literature: (1) the traditional normative paradigm, (2) the realist processual paradigm, (3) the postmodern discursive paradigm and (4) the instrumental systemic paradigm. Although these four paradigms compete with each other, they do not do it in the same way in the sense that their genesis and evolution are different, their scope and theoretical ambitions vary from each other's, and more importantly their relevance inside the international lawyers community is uneven. For that reason, it is convenient to review these paradigms by highlighting their major premises and theoretical scope.

(1) The *normative paradigm* understands IL as a set of rules and principles (i.e., norms) and, as a consequence, it is interested in what these norms are and how they are created and applied. This traditional paradigm is undoubtedly the benchmark in ILT[5], given that it has been the unique paradigm for centuries since the inception of Eurocentric IL during the 17th century and that it remains the most widespread paradigm nowadays.

Due to its normative essence, once natural law was abandoned, which gave path to positivism and the equation of law and State, the very foundation of the binding nature of IL emerged as the crucial methodological issue. This question today almost left aside[6] has also served as the soundest yardstick to identify opposite IL schools of

[3] Even if some disagreements have arisen as to the specific methods to be included, such a list is the canonical presentation of current ILT. See PETERS, A. *et al*, "Focus Section: International Theory", *German Yearbook of International Law* (44) 2001, at 25-201 or RATNER, S.R. & SLAUGHTER, A.-M., "Symposium on Method in International Law", *American Journal of International Law* (93) 1999, at 291-423, later improved and updated in *The Methods of International Law*, American Society of International Law, Washington, 2004.

[4] Moral theories of IL are not interested in how or what IL *is* but in how it *should be* in order to achieve moral goals and fairness standards. Since these theories do not claim legal validity, but only philosophical, they differ from natural law approaches which should be classified inside the normative paradigm.

[5] RATNER, S.R. & SLAUGHTER, A.-M., "Appraising the Methods of International Law: A Prospectus for Readers", *American Journal of International Law* (93) 1999, at 299.

[6] ALLAND, D., "Ordre juridique international", *Droits*, (35) 2002, at 90.

thought, such as voluntarism, consensualism, sociological objectivism, institutionalism, normativism, natural law, etc.

Despite the fact that the variety of theories covered by this paradigm has not even decreased a bit in contemporary ILT, a common temperance on their theoretical ambitions is highly remarkable. Perhaps because of the serious difficulties witnessed when trying to explain convincingly the drastic changes which IL is undergoing during the UN era,[7] these authors may have felt inclined to soften their theoretical claims, and enter a plea of non belligerent pragmatism.[8] Thus, there emerges a sort of a paradigmatic self-awareness, probably promoted by concomitant paradigms' pressure. Conspicuous examples of this moderation are Simma-Paulus's "enlightened positivism"[9], Dupuy's "consensualisme empirique"[10], social consensus in Tomuschat's objectivism[11], Carrillo Salcedo's "IL relativism and its exceptions"[12] (1996) or Liñán Nogueras's "legitimacy framework".[13]

(2) The *realist paradigm* considers IL as a social process of power and authority. Rooted in American legal realism, normative indeterminacy and pragmatic empiricism are the keys of this paradigm. Since norms are undetermined, legal formalism cannot explain judges' rulings, henceforth it is necessary to look elsewhere for their real motives.[14] This claim gives support to "law as a process" approaches, as well as it founds not just the use of other complementary rationales (political, economic, etc.) but their substitution for the legal one[15].

[7] Some of these are the following five: a) the creation of UN involving the historical prohibition of the use of force and the instauration of a Security Council with coercive powers; b) the emergence of new legal categories, such as obligations *erga omnes*, international crimes or peremptory norms, which denote a noteworthy invigoration of the axiological component of IL, but lack clear undisputed enacting procedures; c) the yet thorny codification of IL runs parallel to the contestation of prior customary law by decolonized countries, which makes normative interactions more complicated, but most of all shows the categorical schizophrenia of the normative system, which uses treaty and custom regarding its dynamic, but general and particular IL from a static point of view; d) international treaties' increasing continuity and flexibility blurs their consensual features, whereas international customary law, being bent over the *opinion iuris*, seems to acquire certain consensual appearance; and e) the blossoming of international organizations and other institutional international devices have multiplied the confusing effects of the ubiquitous international soft-law instruments.

[8] DAILLIER, P. & PELLET, A. (NGUYEN QUOC DINH †), *Droit international public*, LGDJ, Paris, 7th ed., 2002, at 107.

[9] SIMMA, B. & PAULUS, A., "The Responsibility of Individuals for Human Right Abuses in Internal Conflicts: A Positivist View", *American Journal of International Law* (93) 1999, at 304-307.

[10] DUPUY, P.-M., "L'unité de l'ordre juridique international: Cours général de droit international public", *Recueil des cours de l'Académie de droit international*, (297) 2002, at 9-489.

[11] TOMUSCHAT, CH., "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *Recueil des cours de l'Académie de droit international*, (281) 1999, at 46-47.

[12] CARRILLO SALCEDO, J.A., "Droit international et souveraineté des états: cours général de droit international public", *Recueil des cours de l'Académie de droit international*, vol. 257, 1996, at 35-221.

[13] LIÑÁN NOGUERAS, D.J., *Proyecto docente y de investigación*, Granada, inédito, 1986, at 47-54.

[14] LEITER, B., "American Legal Realism", in M. Golding, W. Edmundson (eds.): *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell, Oxford, 2005, at 53.

[15] If norms are undetermined, they cannot condition any behaviour in the sense of prescribing one only result (a unique solution). Then, law turns empirically into a bulk of decisions or more properly

As a social decision making process, these authors are interested in who are the relevant political actors, what objectives, interests and values they pursue, how they interact and what strategies they can deploy in any concrete situation. The crucial point here is that this process is constitutive, i.e, *all these elements and data do constitute International Law* and not just explain why IL has the content it has or why it works or not. When analyzing this process, that is, when understanding and explaining IL, they resort to several rationales: a political perspective would allow to offer a policy-oriented jurisprudence (whatsoever its purposes might be), but also an economic rationale or an IR approach could be used. All of this shows the wide theoretical scope of this paradigm that is not limited to the New Haven School. I think international or transnational legal process theories, law and economic approaches, constructivism, rational choice, liberal politics or any other IR approach should be attracted to this paradigm whose very premise is the lost of faith in legal norms as the key for understanding IL.

(3) In the *postmodern paradigm*, IL is conceived of as a discourse concealing political interests. These theories, which could be deemed as the international mirror of the Critical Legal Studies movement, do not consider IL as a social process different from politics, but more precisely as a discourse-instrument used by power to perpetuate their dominant position. IL in itself becomes a complicit as well as any international lawyer adhering to the "IL official discourse". So, any theory trying to unveil this situation and opening IL for wider political contestation should be considered as pertaining to this paradigm.

As one of its theoretical pillars, this discursive paradigm holds the absolute indeterminacy of law, but unlike Critical Legal Studies,[16] the postmodern IL paradigm offers an additional sounder explanation of this indeterminacy. Backing on post-structuralism, Koskenniemi has extensively claimed the structure of the international legal argument to be based on binary contradictory premises underpinning all IL concepts[17]. Drawing up an IL legal argument demands to construct and to deconstruct these binary elements whose meanings depend on each other's. This operation results in a reversible dynamic that validates any single argument and its opposite at the same time. This means, in his own words, that "there is no space in international law that would be 'free' from decisionism, no aspect of the legal craft that would not involve a 'choice' – that would not be, in this sense, *a politics of international law*".[18] Rather complementarily, it has been shown that change and progress of the IL professional language and scholarly vocabulary is

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into the social process of making an authoritative decision whose content is, thus, not entirely foreseen in advance; on the contrary, it will depend on the specific context. In a simple process, normativity becomes normalcy: a rule, if there remains any at all, turns into what is usual, that is, what has been done before in similar cases (accumulated past decisions), but nothing more (HIGGINS R., *Problems and Process: International Law and How We Use It*, Clarendon, Oxford, 1994, at 3).

[16] TUSHNET, M.V., "Critical Legal Theory", in M. Golding, W. Edmund-on (eds.): *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell, Oxford, 2005, at 80-83.

[17] KOSKENNIEMI, M., *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge University Press, Cambridge, 2nd ed., 2005.

[18] KOSKENNIEMI, M., *op. cit.*, at 596.

more apparent than real. Through political and intellectual dynamics of affiliation and commitment, domination and submission, power gets to shape any new professional lexicon keeping up its silences and holes so as to maintain the *statu quo* while being legitimized by this ongoing progress of the IL discourse.[19]

(4) Finally, the *systemic paradigm* is here suggested as the fourth IL paradigm. The notion of a legal system is commonly linked to the normative paradigm, but this is not a perfect equation[20]. That is why this paradigm might be considered instrumental and probably having more to do with an epistemological premise, as a sort of an intellectual operation for understanding law. Although this is a debatable question from both philosophical and historical points of view,[21] we are interested now in this paradigm as used in IL doctrine, where the notion of a system is certainly bent over the normative kind. In this sense, we can find among international lawyers some examples illustrating many of the types in which a legal system has been conceived of in Law Theory,[22] such us aggregative,[23] material,[24] organicist,[25] structuralist[26] or autopoietic.[27]

Nonetheless, it remains true that a theoretical effort underpinning them is mostly absent in the IL literature, showing up more a metaphorical use of this concept than a paradigmatic one.[28] This is particularly shocking, given the extraordinary difficulties that IL suffers so as to fit in the notion of a legal system, either classical[29] or autopoietic. However, at the end of the day, even though lacking a sound theoretical

[19] KENNEDY, D., *Rompiendo moldes en el Derecho Internacional: cuando la renovación es repetición*, Dykinson, Madrid, 2002.

[20] Systems theory can be used of course to explain other than normative systems (KOSKENNIEMI, M., *op. cit.*, at 567). But it must be noted that there is nothing in the normative paradigm that would compulsorily require one single unique system, as Middle Age Law in Europe shows (GROSSI P., *El orden jurídico medieval*, Marcial Pons, Madrid, 1996).

[21] VAN HOECKE, M., *Law as Communication*, Hart Publishing, Oxford, 2002, at 109.

[22] Every conception of law as a legal system is always biased towards unity as a formal structure (RAZ, J., *The Authority of Law. Essays on Law and Morality*, Oxford, Clarendon, 1979, at 78-81) enabled to assure coherence and predictability to the detriment of substantial or material concerns and the possibility of questioning the political *statu quo* (CARACCIOLO, R., *La noción de sistema en la teoría del Derecho*, Fontamara, México D.F., 1994, at 62).

[23] MONACO, R., "Profili sistematici del Diritto internazionale", *Rivista di Diritto Internazionale* (69) 1986, at 745-761.

[24] GRAF VITZHUM, W., "Die herausgeforderte Einheit der Völkerrechtsordnung", in *Weltinnenrecht: Liber amicorum Jost Delbrück*, Duncker & Humblot, Berlín, 2005, at 849-864.

[25] ABI-SAAB, G., "Cours général de droit international public", *Recueil des cours de l'Académie de droit international*, (207) 1987-VII, at 41.

[26] COMBACAU, J., "Le droit international: bric-à-brac ou système? ", *Archives de philosophie du droit* (31) 1986, at 85-105.

[27] FISCHER-LESCANO, A., "Die Emergenz der Globalverfassung", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, (63) 2003, at 717-760.

[28] Wyler, E., "Propos sur la fécondité du paradigme systémique en droit international à la lumière de la théorie de Georges Abi-Saab", in L. Boisson de Chazournes & V. Gowlland-Debbas (eds.): *The International Legal System in Quest of Equity and Universatity. Liber Amicorum Georges Abi-Saab*, Kluwer Law International, 2001, at 23-24.

[29] SALMON, J., "Le droit international à l'épreuve au tournant du XXI[e] siècle", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, (6) 2002, at 75-115.

foundation and/or empirical support evidence, the systemic quality of IL does not seem to be put into question, but docilely accepted inside the internationalist community. So this assumption gets close to a myth, and somehow to a paradigmatic premise, even when the specific kind of a legal system, which IL may come to, is not unequivocally decided, or maybe the other way around, precisely because it is not decided.[30]

II. THE PARADIGMATIC MULTIPLICITY AND ITS REPERCUSSION ON THE MAIN RESEARCH AGENDA

To my eye, the paradigmatic split lies in how IL (and ILT) might transform or shape reality by means of norms, processes, discourse or any other kind of genetic, organic or operating interaction between certain elements amounting to a (legal) system. As a result of these gross differences in perspective, not only lexicons, but also practices and topics, change among the authors coming from diverse paradigms. It is not, thus, bizarre that this paradigmatic multiplicity is mirrored in the main research agenda on current IL structure. Even though they seem to start losing momentum right now, three major issues have been discussed in IL literature in the past decade, namely international constitutionalism, hegemonic IL and fragmentation of IL[31].

Certainly, these topics are old but renewed, complex and wide-open debates whose content and evolution cannot be reported in depth here, but whose direct link with one of the aforementioned paradigms is clearly visible. They all three seem to have arisen to cope with the huge changes that the international system has gone through in the last 20 years, blatantly exposing the need for a deep theoretical renovation felt inside every paradigm.

International constitutionalism shows itself as a possible solution to most of the gross flaws of normative theories when dealing with the legal consequences of the progressive exhaustion of the sovereign state-centred framework at the international level. Likewise, hegemonic IL gives answer to the major changes affecting the distribution of international power since WWII, and the international social process of power and authority whose content is realist processual theories' main concern. On its part, the issue of IL fragmentation was brought up along the 90's because the multiplication of international jurisdictions could threaten the systemically coherent nature of IL by ending up in countless contradictory rulings.

[30] MARTÍN RODRÍGUEZ, P., "Sistema, fragmentación y contencioso internacional", *Revista Española de Derecho Internacional* (60) 2008, at 486-488.

[31] Several international events have slowed down the thrust of these three structural debates, but it is quite premature to take them for finished. The Iraq debacle during the second Bush Administration (2004-2008) has pointed to the limits of military force touching the hegemony core. On its part, the quite modest reform of UN following the 2005 World Summit, not to mention the collapse of the European Constitutional Treaty, have evidenced once more the serious real obstacles for constitutional discourse in the international realm. Finally, the "neglecting" ILC Final Report on IL Fragmentation in 2006 seems to be an official closure on the general problem.

Any of these three topics only seem to make sense within its own paradigm, and therefore they are seen by postmodernist approaches as a discourse reissue rather than as a real paradigmatic renovation. International constitutionalism does not result in a change of the normative paradigm, but in its survival as a useful paradigm, just as hegemonic IL cannot end up in anything but a realist paradigmatic reissue. Furthermore, looking at these two topics from the opposite paradigm, they seem rather incomprehensible. Probably there is no better illustration of this paradigmatic reissue than IL fragmentation's debate,[32] especially according to the ILC, which issued a Final Report that asserts an undisturbed IL systemicity. Even when fragmentation was supposed to put into question that systemic character, the ILC has not arrived to this denial through an empirical analysis, but has used the systemic nature of IL as a starting point not to be challenged even by admittedly existing black legal holes (see 1st Conclusion of the Final Report). The consequence is, of course, apart from an immanent coherence, the ongoing legitimacy of a systemic approach to understand IL, that is, the endurance of the systemic paradigm as such, especially given the fact that fragmentation did not really challenge any other paradigm.[33]

III. PARADIGMATIC MULTIPLICITY AND THE LIMITS OF MEANINGFUL INTER-PARADIGM COMMUNICATION

In case we accept the paradigmatic multiplicity drawn up above, we should necessarily deal with the question of incommensurability, even if this notion as elaborated by Kuhn and Feyerabend since the 60's is still under construction and remains especially uncertain regarding fields other than natural sciences[34]. Both authors in somehow crossed evolutions have insisted upon two different notions of incommensurability.[35] On the one hand, taxonomic incommensurability would stem from semantic/lexical divergences reflecting differences not only in the meaning of some words, but also in the concept and categorial structures used by two scientific theories, with eventual ontological implications on the nature of reality. On the other, incommensurability has been described too as including, along with semantic

[32] KOSKENNIEMI, M. & LEINO, P., "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law* (15) 2002, at 553-579.

[33] The dangers of IL fragmentation are simply not intelligible for realist processual or postmodern approaches. Because fragmentation does not challenge any basis of these paradigms, it is not an issue for these authors. Even if the normative and systemic paradigms appear intertwined, there is no such an absolute parallelism, as already claimed. Actually, the ILC Final Report is quite illuminating of this imperfect equation, since it holds IL as a progressive law of international special regimes, while admitting its inability to solve conflicts between them (black legal holes).

[34] It is true that incommensurability was primarily brought up in the context of scientific revolutions, that is, in a diachronical relation between various theories concerning the same scientific field, but lately Kuhn also admitted incommensurability during the process when a discipline is succeeded by different philogenetically related subdisciplines (KUHN, Th.S., *El camino desde la estructura*, Paidós, Barcelona, 2002, at 295-298). This phenomenon might be deemed closer to the situation of current ILT.

[35] HOYNINGEN-HUENE, P., "Three Biographies: Kuhn, Feyerabend, and Incommensurability", in R.A. Harris (ed.), *Rhetoric and Incommensurability*, Parlor Press, West Lafayette, 2004, at 155-171.

conceptual differences, changes in world-views and in standards and problems (holistic incommensurability).

Facing this incommensurability between IL paradigms, I have explored three well-established different perspectives when approaching Law, which in Buchanan-Golove's terminology[36] can be named as "analytical" (if we deal with what law is), "normative" (if we look at how law should be), and "epistemological" (if we consider how law is known and/or how that knowledge is organized and stored). I tried to find if these three dimensions merged or severed depending on the paradigm chosen. So, for instance, positivism seems to distinguish them clearly, while postmodern approaches appear to merge all of them.[37] Although I am not persuaded anymore that this three-dimension approach can be used to individualize proper paradigms against simple theories, I still deem it useful to show some traits of incommensurability. Regarding the analytical dimension, we have seen that these four paradigms are based on opposite premises concerning the real capacity of norms (and ILT) to determine behaviour, and as a consequence, the nature of IL. Whereas the normative paradigm stands upon its affirmation, and the realist and postmodern paradigms upon its denial, the systemic paradigm even when resorting to norms does not find that question relevant and it is more worried about the interactions with other elements of the system through which norms (either determined or undetermined) actually reach coherent (systemic) results. Together with these differences there are other divergences in concepts, analytical practices and standards (which would affect the epistemological dimension), as well as research topics and purposes (as regards the normative dimension). Following the classification by Harris[38], we could then say that a clear semantic and pragmatic incommensurability obtains between these four IL paradigms.

Given this certain degree of incommensurability between IL paradigms, three questions should be answered as regards ILT.

(a) Does incommensurability imply the impossibility of rational choice in ILT?
Putting aside the question of the real meaning of incommensurability as a lack of a common measure or as incomparability, it must be said that incommensurability does not deprive a paradigm choice from rationality, which has never been claimed. However, it does show the so called methodological incommensurability, which means that even if a theory choice is justifiable in terms of the comparison of epistemic values, it responds to a personal decision more than to a possible objective

[36] BUCHANAN, A. & GOLOVE, D., "Philosophy of International Law", in J. Coleman & S. Shapiro (eds.): *The Oxford Handbook of Jurisprudence and Philosophy of Law*, OUP, Oxford, 2002, at 801.
[37] MARTÍN RODRÍGUEZ, P., *Los paradigmas del Derecho internacional: Ensayo interparadigmático sobre la comprensión científica del Derecho internacional*, Universidad de Granada, Granada, 2008, at 110-118.
[38] HARRIS, R.A., "Introduction", in R.A. Harris (ed.), *Rhetoric and Incommensurability*, Parlor Press, West Lafayette, 2004, at 21-60.

standards procedure, which would lead everyone within the scientific community to the same decision.[39]

(b) Does incommensurability imply the impossibility of theoretical convergence?
In principle, incommensurability seems to avow an unfeasible converging horizon, because the relationship between multiple competing paradigms only ends in victory or defeat of one over the others, or in the split of scientific domains. However, difficult as it may appear to me, we cannot exclude the hypothetical emergence of a new paradigm embracing previous opposite paradigms and trying to avoid that "bipolarité des erreurs".[40]

(c) Does incommensurability imply the impossibility of meaningful inter-paradigm communication?
This is by far the most relevant question. Since incommensurability arises when two theories do not share the same taxonomic lexicon, that is, the same terminological, conceptual and categorial structure, this is a serious obstacle to inter-paradigm communication: "A lexicon is not only prerequisite to making meaningful statements, it also sets limits on what can be meaningfully said within the community of speakers that share it".[41] A statement stemming from one paradigm turns into non-sensical in other paradigms and probably also untranslatable. Therefore, even when participating in the same debate, authors from different paradigms would be talking past to each other. It is not hard to find some instances of this phenomenon exceeding mere semantic discrepancies. I deem illuminating enough, if not definite the ASIL attempt to compare several IL methods as dealing with criminal responsibility for humanitarian international law violations in internal conflicts.[42]

IV. INTER-PARADIGM COMMUNICATION THROUGH MACRO-SPEECH ACTS: ON THE UNITY OF INTERNATIONAL LAW THEORY

This presentation becomes less persuasive when facing the frequent cases of theoretical cross-references, linkages and overlaps in IL literature. This is because, strictly speaking, most of these cases should be regarded as methodological mistakes or contradictions, resulting in paradigmatic dysfunctional approaches. Then, we would not be witnessing times of paradigmatic multiplicity but just times of paradigmatic confusion. IL would not be undergoing a phase of scientific revolutionary advance or progress but a stage of scientific collapse because of the

[39] OBERHEIM, E. & HOYNINGEN-HUENE, P., "The Incommensurability of Scientific Theories", *Stanford Encyclopedia of Philosophy*, 2009, http://plato.stanford.edu, access in August, 2009.
[40] OST, F. & VAN DE KERCHOVE, M., "De la «bipolarité des erreurs» ou de quelques paradigmes de la science du droit", *Archives de philosophie du droit* (33) 1988, at 177-206.
[41] OBERHEIM, E. & HOYNINGEN-HUENE, P., "The Incommensurability of Scientific Theories", *Stanford Encyclopedia of Philosophy*, 2009, http://plato.stanford.edu, access in August, 2009.
[42] SLAUGHTER, A.-M. & RATNER, S.R., "The Method is the Message", *American Journal of International Law* (93) 1999, at 410-423.

lack of method or, to the least, of faith therein, ending up in the very best-case scenario in the dissolution of ILT in several subdisciplines.

Nonetheless, I think that this multi-paradigmatic state and its ongoing reissue could be seen through different lenses, once we accept that neither perfect communication ever obtains nor absolute lack of contradiction is such an epistemological premise. These unquestioned cross-references, links and overlaps between different approaches could be interpreted as an acknowledgement by each paradigm of its inability to fully explain IL reality and its openness to alterity, i.e., as the recognition of other paradigms as legitimate interlocutors, entailing a dialogue through macro-speech acts.[43]

In this vein, it could be convenient reconsidering some instances of these interparadigmatic connections.

Firstly, we should consider *paradigmatic eclecticism or complementarity self-claims*. This claim to complementarity (mostly with the normative paradigm as the benchmark) is quite straightforward in Law and Economics approaches[44] or in the IR/IL method.[45] This is perhaps due to the fact that their eventual sheltering placement in other scientific disciplines makes their interdisciplinary contention sounder and also safer. Besides complementarity, there are as well accurate eclectic positions alleging not belonging to any paradigm, as International Law Process sustains regarding positivism and realism.[46] It is suggested that, if holding complementarity could be interpreted as the assumption of the appropriateness or, to the least, the usefulness of other paradigms' results, the eclectic claim would point to the insufficiency of the paradigms superseded by the eclectic new proposal.

Secondly, I must mention *the search for normativity identifiable within the realist paradigm*. This search would make little sense if one eventually considers norms as

[43] In the 60's, philosophers of language regarded language as action, as well, because when we speak we do something (Austin 1962). Scholars distinguished between what speakers say, their intentions, and what addressees understand after the communicative event has taken place. Then, a speech act is an utterance that serves a function in communication, like an apology, greeting, request, complaint, invitation, compliment, or refusal. Therefore, we must speak about locutionary and illocutionary acts, and perlocutionary effects. Van Dijk likes the idea of micro- and macro-speech acts. Macro-acts serve one single function in communication, but can consist of several micro-speech acts in a linear sequence. A letter is a good example of a macro speech act, since it is made up of different utterances (greeting, request, compliment, assertions, etc.) but it is in itself a speech act (for instance, an apology). Macro speech acts have different conversational, interactional and cognitive functions such as organizing and reducing speech acts or allowing a general pragmatic plan that can be adjusted according to the addressee's reactions (VAN DIJK, T.A., *Estructuras y funciones del discurso*, Siglo XXI Editores, Madrid, 1991, 7ª ed., at 58-76).

[44] DUNOFF, J.L. & TRACHTMAN, J.P., "The Law and Economics of Humanitarian Law Violations in Internal Conflict", *American Journal of International Law* (93) 1999, at 395-409.

[45] ABBOTT, K.W., "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts", *American Journal of International Law* (93) 1999, at 361-364.

[46] O'CONNELL, M.E., "New International Legal Process", *American Journal of International Law* (93) 1999, at 334-337.

incapable to fully determine international behaviour. Nevertheless, this noteworthy overlap is pretty visible in distinctively realist approaches as IR/IL[47] or transnational legal process;[48] and at the same time, the other side of the coin, that is, when the foundation of international norms is somehow articulated in other paradigm languages, as constructivism,[49] or general systems theory.[50]

Thirdly, we might understand the *structural bias* lately contended by Koskenniemi[51] as a wink given to the realist paradigm. Stating that "the system still de facto prefers some outcomes or distributive choices to others" blurs the random nature of international law due to the absolute indeterminacy of its legal argumentation structure, or its concealing intention, and gets it closer to a social process, of course linked to politics.

I do not think that these examples are all outstanding cases of paradigmatic self-denial and consequently just major methodological errors. For example, transnational legal process does not trespass the realist paradigmatic threshold because it assesses that "norm-internalisation is not self-activating".[52] Equally, the structural bias does not prevent political contestation by international lawyers, being the latter political actors as well.[53]

Somehow, the same strain could be detected in the structural debates mentioned above. Even if a formal constitution does not mean that much for the realist paradigm, international constitutionalism is in itself a step towards it taken by normative paradigm theories: a constitution translates the legitimate political process (i.e., the social process of power and authority) into legal language and it does it at the top level.[54] I would even dare to say that this would be corroborated by the systemic paradigm as a structural coupling between politic and legal systems.[55] A similar friendly disposition to dialogue has been also present in the hegemonic IL debate, when the report of the countless IL violations by the USA, that is, a pure

[47] KRATOCHWIL, F.V., "How Do Rules Matter?", in M. Byers (ed.): *The Role of Law in International Politics. Essays in International Relations and International Law*, Oxford University Press, Oxford, 2000, at 35-68.
[48] KOH, H.H., "Why Do Nations Obey International Law?", *The Yale Law Journal*, (106) 1996-1997, at 2599-2659.
[49] BRUNÉE, J. & TOOPE, S.J., "International Law and Constructivism: Elements of an Interactional Theory of International Law", *Columbia Journal of Transnational Law* (39) 2000, at 19-74.
[50] OETER, S., "International Law and General Systems Theory", *German Yearbook of International Law* (44) 2001, at 72-95.
[51] KOSKENNIEMI, M., *op. cit.*, at 606-607. More in detail in "The Politics of International Law – 20 Years Later", *European Journal of International Law*, (20) 2009, at. 7-19.
[52] KOH, H.H., "Opening remarks: Transnational legal process illuminated", in M. Likosky (ed.), *Transnational Legal Processes*, LexisNexis, London, 2002, at 332.
[53] KOSKENNIEMI, M., *op. cit.*, at 614-615.
[54] FASSBENDER, B., *The United Nations Charter as the Constitution of the International Community*, Nijhoff, Leiden, 2009, at 27-51.
[55] FISCHER-LESCANO, A., *loc. cit.*, at 739.

normative approach[56] is abandoned and the focus is put on the normative channels through which power shapes IL.[57]

To sum up, it is true that, taken in isolation, all these contributions and examples can be deemed as paradigmatically flawed; and we could stay to the fact that meaningful communication between different paradigms is impracticable, because there is no possible common code. One must be bilingual due to the fact that statements from one paradigm are ineffable in other paradigm/language/code.

But if taken as illocutionary macro-acts, moderation on theoretical ambitions, resort to foreign paradigmatic argumentation or data, calls to methodological complementarity, participation in other paradigm's reissuing debates or just simply reporting paradigms semantic divergences on a subject-matter, to name a few, amount to various micro-acts which constitute a macro-act intending communication even if this act cannot always be felicitous, because the goal of the illocutionary act may be not reached.

This interparadigmatic dialogue, though imperfect, comes from the conviction among international lawyers that their own paradigm is missing something important in the depiction of the functioning of IL in current international society; that the results of different paradigms approaches are more often than not complementary; and that, in any case, contradiction is preferable to intellectual blindfoldedness.

I cannot see in the near future any kind of paradigmatic convergence, but only the invigoration of this interparadigmatic dialogue, as international lawyers become more competent in other paradigms' lexicons and more and more often opt for a multiparadigmatic approach, which respects each method's theoretical concepts and structures instead of looking for synthesis.[58] I find this ILT position extremely tempting because it casts an image of IL as a complex unfinished reality that, like best Russian literary characters, is only apprehensible at the price of contradiction. All in all, this looks fascinating and suspiciously familiar.

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[56] See TOMUSCHAT, CH., "Multilateralism in the Age of US Hegemony", in R.S. Macdonald & D.M. Johnston (eds.): *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, Nijhoff, Leiden, 2005, at 31-75 or SÁNCHEZ RODRÍGUEZ, L.I. (2005), "Poder imperial y Derecho internacional. La *pax* Americana", in *Soberanía del Estado y Derecho Internacional. Homenaje al Profesor Juan Antonio Carrillo Salcedo*, Universidades de Sevilla, Córdoba y Málaga, Sevilla, 2005, at 1293-1310.

[57] See KRISCH, N., "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", *European Journal of International Law* (16) 2005, at 369-408 or BYERS, M. & NOLTE, G. (eds.), *United States Hegemony and the Foundations of International Law*, Cambridge University Press, Cambridge, 2003.

[58] ALVAREZ, J.E., "Legal Perspectives", in Th. Weiss & S. Daws (eds.): *The Oxford Handbook on the United Nations*, Oxford University Press, Oxford, 2007, at 58-81.