LA FORMATION
DU DROIT INTERNATIONAL
Entre mimétisme
et dissémination

TOWARDS INTERNATIONAL
NORMATIVITY
Between Mimetism
and Dissemination

Editions A. PEDONE
LEGAL MIMETISM OR LEGAL MIMESIS?
CONCEPTUAL AND METHODOLOGICAL REFLECTIONS
ON THE STUDY OF NORM DIFFUSION

GRÉGOIRE MALLARD & STEPHANIE C. HOFMANN

Sociologists and political scientists often use legal mimetism and legal mimesis interchangeably. This is quite paradoxical. Indeed, *mimetism* – or mimetic behaviours\(^1\) – captures the un-reflexive act of copying and pasting something like an organizational form rather mechanically, without thinking about the reasons why one should want to emulate someone else’s organization in general; and whether such a mimetic adoption will adequately deal with the specific problems raised by a new situation. On the contrary, *mimesis* was conceived as the condition of possibility of creativity rather than as an end product lacking in originality.

If we apply this distinction to the realm of international legal practices, we may then say that the governmental officials sent abroad to negotiate treaties and conventions engage in *legal mimetism* when they use boilerplates and/or cut and paste from prior texts – when they demonstrate laziness and lack of imagination. On the contrary, we will say that they perform some kind of *legal mimesis* when they create something new while also taking certain parameters of the prior negotiations for granted. Indeed, originality needs a framework, and mimesis provides such a framework for their performance.

Faced with two different concepts (*legal mimetism* and *legal mimesis*), it seems to us that sociologists and political scientists need to engage in a systematic effort to define each notion precisely, and that they should spell out how they operationalize each concept in their study of (global) norm diffusion. This conceptual effort is especially important to undertake for sociologists and political scientists, as it has a central bearing on the question of international normative fragmentation and unification – a key

---

interrogation for many globalization and international relations scholars. As social scientists and legal theorists have started investigating the extent to which a plurality of rules coexist in the international legal system and, if so, whether the patchwork of legal complexes creates harmony or chaos, it seems key to us to understand how legal mimetism and legal mimesis can affect processes of unification and fragmentation.

In this chapter, rather than showing empirically whether the concept of ‘legal mimetism’ affects some of these processes operating in our fields of inquiry – the nuclear non-proliferation regime complex and the crisis management regime complex –, we propose to engage in a definitional endeavour with the goal of refining (or redefining) the concept of ‘mimesis’ that we find in each of our two disciplines: sociology and political science. We thus propose to take a step back from previous empirical investigations of the causal mechanisms that lead to either further fragmentation or further unification, and the role that mimetic processes may play toward unification. Our analytical reflections lead us to distinguish between two understandings of mimetic behaviour observed by sociologists and political scientists alike: (i) the concept of legal mimetism, which we claim, is often reduced to cut-and-paste textual practices of diplomats and jurists working in transnational arenas and which, according to sociologists and political scientists, leads to

---

2 Whether international law is characterized by a process of fragmentation or one of unification is a question that concerns many legal practitioners as the response to this question has clear practical reasons. For instance, legal unification ensures the predictability of the international environment for market actors and ensures that all states will be treated in a fair fashion in case they violate or conform to their international legal commitments – whether the latter are couched in investment and trade treaties, nonproliferation and disarmament treaties, or human rights conventions. Legal fragmentation offers opportunities for free-riding states or multinational companies, which US or European mega-law firms are happy to advise, for cash, on how they can best exploit the legal loopholes created by such fragmentation.


5 J. Meyer et al., op. cit.
a superficially unified international system of norms (superficial because it is one that remains fragmented as far as practices are concerned); and (ii) the concept of legal mimesis, which we believe could be further theorized by sociologists and political scientists as they go about empirically studying practices of emulation and learning in transnational and international forums.

In the first part of the chapter, we analyze how the notion of mimetism is defined by sociologists and political scientists; and how it is operationalized in studies of norm diffusion. We claim that the notion of legal mimesis, when associated to a purely textual approach to lawmaking cycles, has too often led sociologists and political scientists to emphasize the processes of unification in international law. In short, to us, overestimating mimetic behaviours leads to overestimating the extent of legal unification. Indeed, legal ‘mimetism’\(^7\), which is akin to ‘cut and paste’ practices, when combined with the greater accessibility of legal documents in libraries and on the internet, can only lead to a greater unification of international legal norms. The circulation of the same texts (or paragraphs) within governmental branches, drafting committees, legislative bodies and expert communities in charge of writing model laws or international conventions, leads, however, only to a superficial unification in the international legal system, as some are quick to underline the disappointing realization that a multiplicity of contradictory interpretations of the same set of global norms exists at the state level\(^8\). We contend that it is hard to disprove claims of legal unification if, methodologically, sociological and political science research is reduced to the textual search for observable traces of citation and textual borrowing, by which the gospels of human rights, economic development and trade openness spread from one country to the next\(^9\).

As we claim in the second part, following the lead of those legal anthropologists who focus on writing and interpretive practices in international and transnational settings\(^10\), mimesis should not be just conceived as the act of copying and pasting a portion of an existing text onto

---


another one. Otherwise, mimesis is reduced to its textual outcome: a paragraph that gets transplanted from one legal (con-)text to another legal (con-)text. *Legal mimesis* – in contrast to legal mimetism – should be conceived as a performance that does not necessarily have to lead to more unification in the international system of legal rules. Already in its original meaning, mimesis referred to the activity of re-presentation, which consists in generating a vision of possible futures – or making their presence visible and felt – based on a set of fixed formal parameters. Still, the performative study of legal mimesis also bears some risks: if social scientists completely move away from the analysis of the circulation of legal texts, they might wrongly assert that the whole system of legal rules cannot be but fragmented since it is only made of a series of singular performances, which are loosely tied to one another. This conclusion – or rather, this assumption, as the conclusion is embedded in the premise – would be wrong, which is why we claim that scholars interested in mimesis should not reduce reality to local practices whose embeddedness in a broader system of practices and norms cannot be interrogated.

Instead, we claim, social scientists should study acts of legal mimesis in various contexts (what anthropologists have called multi-sited ethnography), so that they can relate the types of performance with the social characteristics of the performers: whether the authors of international legal texts form an epistemic community, a transnational advocacy network, a specific caste which occupies a specific position in domestic and transnational legal fields as conceived by Bourdieuan scholars. Only by adopting an essentially genetic and comparative framework can they avoid the pitfalls of both too general or too localized studies of legal mimesis, and derive from them some assessment on whether the latter participate in processes of unification or fragmentation in the international legal system.

**LEGAL MIMETISM: THE SEARCH FOR TEXTUAL SIMILARITY IN QUESTION**

Among sociologists and political scientists interested in international law (or global governance, in modern parlance), there exists a tendency to adopt a purely textual approach to *legal mimetism*, which is defined as the act of cutting and pasting some parts of a text onto another. This notion of ‘mimetism’ comes from the landmark essays by sociologists that subscribe to the theoretical outlook of neo-institutionalism that has since been

---

incorporated to political science. As DiMaggio and Powell famously wrote in the article that remains the most cited paper in sociology (with more than 28,000 citations), their model of organizational mimetism is meant to answer the question: ‘Why is there such a startling homogeneity of organizational forms?’ as neo-institutionalists ‘seek to explain homogeneity, not variation’. Indeed, in most fields of activity – international law being one such field – DiMaggio and Powell find ‘isomorphism’ – e.g. ‘a constraining process that forces one unit of the population [a state for instance] to resemble other units [other states] that face the same set of environmental constraints’. Moreover, they claim that most often since the 1960s wave of post-colonial independences, isomorphism is essentially ‘mimetic’ rather than ‘coercive,’ in the sense that states (and/or any other kinds of organizations) copy each other for the sole purpose of reducing strategic uncertainty – rather than to obey the command of a more powerful competitor. Along the same lines, John Meyer et al. also famously ignored local conditions when studying new states’ efforts of incorporating legal norms of the international community. The global diffusion of norms made it easy to predict the organization of a new state’s administration without knowing anything of the national and local conditions.

The study of legal mimetism – or mimetic legal isomorphism – has often been translated into methodological approaches that privilege the study of texts over that of practices. Neo-institutionalists, in particular, have focused on the circulation of international legal texts, their diffusion, and their incorporation into domestic laws by all kinds of states. Indeed, they believe that they can best describe the increasingly global unification of legal systems by following a common thread in the myriad of lines through which international law is distilled to arrive at a ratified treaty, a convention or a set of model laws that states mimetically adopt one after the other. In practical terms, this means that their research objects are the texts in which international law is penned, as well as their circulation, their diffusion, their adaptation to new contexts and new (textual) domains of international legislation. As they turn the hundreds of pages that they unearth in the

15 As opposed to the colonial world for instance, although they cite the adoption of Western standards by Meiji Japan in the late nineteenth century as an instance of mimetic isomorphism; P. DiMaggio & W. Powell, The Iron Cage Revisited, 1983, p. 151.
17 J. Meyer et al., op. cit.
18 Ibid.
archival funds of policymakers, international organizations, national governments, and other negotiators, their eyes catch mostly textual similarities – in which neo-institutionalist scholars see the manifestation of mimetic isomorphism applied to the international legal realm–, and they relegate to the less interesting shadows of their analyses (and books) what differentiates one document from another.

Human rights specialists will start with the Universal Declaration of Human Rights in mind, and will look into the tens of constitutional bills of rights passed since its adoption to identify textual traces of that document. Nuclear non-proliferation specialists will look for instance for traces of past drafts into the many documents that circulated into transatlantic diplomatic circles, whether they are interested in explaining the historical influences behind the Baruch plan, the EURATOM Treaty, the Multilateral Force (MLF) Treaty, or the Nuclear NonProliferation Treaty (NPT). And scholars interested in European security institutions will focus on drafts that resulted in the North Atlantic Treaty, the Fouchet Plans, the Maastricht Treaty or its reincarnations in form of the Nice and Lisbon Treaties.

This tendency to look for textual passages that are just cut and pasted from one legal text to another – e.g. what the term legal mimetism effectively captures – may be reinforced by a widely shared professional preference for generality over singularity. First comes similarity, then comes difference, but difference only makes sense if similarity exists first. This explains why students of legal mimetism underline the lines in the text that manifest some ‘influence’: these are the lines that scholars find ‘quotable’, or at least, the lines that make the document quotable. Rather than quoting one piece of archive to illustrate how a legal proposition has come to emerge at one moment in time, scholars generally cheer when they can quote several documents citing the same idea, and place extensive footnotes in papers or books. A piece of archival material will rapidly fall out of the scope of studies of legal mimetism if it finds no echo anywhere else in the archival material. Only the historian interested in bizarreness will try to uncover the story behind the drafting of a ludicrous legal project that appears only once in one archival fund, and that is cited or copied nowhere else.

This tendency to equate professional seriousness with the number of cited documents is aggravated when scholars listen to the sirens of quantitative

20 G. Mallard, Fallout, op. cit.
21 For instance, Mallard found a document in the archives of a US diplomat, which assessed the pros and cons of the establishment of an Anglo-American confederacy to which British nuclear weapons would be entrusted. That was the only paper on the topic, and the idea was promptly killed. And in his case, this document was evacuated from his bibliographic references for his book, for this document had almost no future (and no past).
hubris and when they start coding large amount of textual data – legal texts turned into databases (see for example the Comparative Constitutions Project).

In all of these cases, sociologists and political scientists also believe that they can ‘prove’ the existence of an ‘epistemic community’ within which texts circulate, and in which international legal ‘experts’ copy one another, by pointing to the circulation of similar paragraphs which is assumed to render manifest some mimetic kind of behaviour. Indeed, the ontological status of the ‘research object’ also becomes more established in the process of piling up citations. From the repetition of the same clauses in circulating legal documents, scholars shall conclude that the diagnosis behind a new legal provision – for instance, the idea that a peace agreement will be sustainable only if it includes transitional justice mechanisms – is widely shared among the experts who participate in the drafting of legal documents – either non-proliferation treaties, transitional justice provisions in peace agreements, or constitutional provisions. These beliefs in the validity of general (or generic) approach to nuclear proliferation or crisis managements are usually quite un-reflexively adopted by experts, in the sense that they betray fads and fashions among epistemic communities. They have nonetheless a force of their own that is made manifest by textual repetition.

Political scientists and sociologists who adopt such a textual approach to legal mimetism (whether their method of analysis of textual material is quantitative or qualitative) are not comfortable with singularity, uniqueness, lonely fragments of hazardous thoughts. But they are not the only ones, in fact, to dislike singularity and fragmentation. When our ‘materials’ speak, they also express their uneasiness with singularity in the way they try to anticipate what our criteria for citing them (as well as other interviewees) are. For instance, in Hofmann’s research, some diplomats that were interviewed to collect background information on EU treaty negotiations have asked her first in what international relations paradigm she bases her theoretical underpinnings instead of answering the questions to their best knowledge. Displaying signs of mutual understanding works to push away the dreadful thought that one could be left outside the realm of textual re-appropriations. Interviewees can anticipate on which paragraphs from interview transcripts will make it into the final version of an article.

This privilege attributed to homogeneity, which sociologists and political scientists often display when they ask the research questions that belong to the neo-institutionalist paradigm, can lead them to conclude, wrongly, that the legal system moves toward unification: but in fact, as DiMaggio and Powell who admitted the exclusivity of their focus on ‘homogeneity not
variation’, sociologists of the world society school are just inherently attracted to the idea of increasing homogeneity – which often manifests itself in international legal unification. Likewise, political scientists who draw on mimetic isomorphism equate legal harmonization (which presupposes an incomplete process of plurality reduction) with legal unification, and often reduce harmonization to diffusion processes. In political science, or better international relations, scholars have focused on so-called diffusion – sometimes making reference to sociological work emphasizing the global spread of scripts of modernity. While scholars are split as to whether diffusion has to lead to complete convergence or isomorphism, the focus remains on mimetic isomorphism seen through the prism of textual similarities: in other words what is taken on and not what is left out in textual re-appropriations of a common stock of legal norms. Differences are the unexplained residue, even though the discipline of international relations is slowly waking up to norm localization. While international relations scholars make reference to ‘crisis of adjustments’ or firewalls, these phenomena are too often of secondary concern to their studies.

In this perspective, fragmentation is thus a threat to the conceptual structural framework of many sociologists and political scientists (in particular, international relations scholars). Theoretically, this can be mitigated if scholars can point to some pockets of homogeneity in the fragmented international system. Said otherwise, if they cannot find similarity at the world level, sociologists and political scientists of legal norms diffusion will change level-of-analysis and will look for similarity within regional legal traditions: the Common Law tradition, the continental tradition, the EU ‘acquis communautaire,’ etc. Spatial and temporal boundaries divide sub-
groups of unified textual zones where appropriation and borrowing are the norm. Other possibilities exist: issue-specific regimes emerged in response to specific events: since 1945, first came the attempts to codify and punish various crimes against humanity; and then, after the Soviets exploded nuclear weapons, the attempts to curb nuclear proliferation with the creation of the IAEA and EURATOM in the mid-1950s. Then, as our ecological consciousness arose in the 1970s (to some extent, in response to the excesses of nuclear testing), the world society started to be concerned with climate change, and sought to find ways to prevent it from destroying our future. Each sequence started a process of field construction and stabilization which delineated a new zone of homogeneity within the broader international legal system. Each had to invent its own language, which was re-appropriated by subsequent generations of jurists who specialized in the management and consolidation of issue-specific regimes.

This common emphasis among sociologists and international relations scholars on textual approaches to legal mimetism comes to one consequence. It makes it credible that, although the system of international law could be fragmented, beyond the surface, we can still find some measure of similarity; we can still trace influences; we can still look for sentences that circulate from one text to another; we can still quote all these texts in a compact list of references to our bibliography. In affirming the necessity of that belief, sociologists and political scientists act like the professional judges for whom the jurisprudence they cite offers a reassuring stream in which they can couch their own opinion without fear of sounding utterly subjective – and it gives the force of the law to their opinions. If their methodology as sociologists of norm diffusion is bound to privilege textual coherence and similarity over singularity and radical difference, then their job may be best conceived as the one of assisting, and sometimes justifying \textit{ex post}, the work of diplomats, judges in international courts and legal advisors who try to create consistency in the design and application of standards and legal rules across time and space. These methodological choices and their way of operationalizing their notion of legal mimetism complicate – to say the least – the conceptualizing of any notion of fragmentation. In the next section, we analyze how we can define the notion of legal mimesis in contra-distinction with this notion of legal mimetism.

\footnotesize

13 N. Fligstein & A. S. Sweet, \textit{op. cit.}

Tous droits, Tous pays © - 2016- Editions A. PEDONE
LEGAL MIMEsis AS PERFORMANCE

Not all of us have to abide by the methodological precepts, which we just associated with the textual approach to legal mimesis. While it might be true that ‘across many issue-areas, the use of law to structure world politics seems to be increasing’34, this does not imply that everything will look the same, and that law can be reduced to the creation of higher piles of legal parchments. But abandoning this textual approach means changing our research object, and, we argue, substituting to the study of what neo-institutionalist sociologists like John Meyer and Paul DiMaggio call mimetic behaviour, that of mimesis.

Mimesis should be conceived as performance rather than as text. To illustrate mimesis, we can think of a young actor trying to imitate the acting of a famous tragedian for instance; or a young judoka trying to re-produce the actions of her master; or an author writing like one of her elders. In mimesis, in contrast to mimeticism, the emphasis is thus placed on learning rather than on blind behavioural routines. Also, the emphasis is placed on process rather than outcome. Indeed, as Egbert Bakker writes, mimesis ‘does not denote a relation between a text and its reference, but between an action (i.e. a process) and its model’35. In all of the examples cited above, we can immediately sense that visual attention and perceptual knowledge combine with one another in the process and performance of mimesis: mimesis is a performance effectuated with the memory of a scene remembered in its graphic details. A clear and detailed vision of the moves of the judo master is essential to the young apprentice who practices mimesis. In that sense, mimesis differs from kléos, which is the memory of the previous performance that mostly uses the auditive sense– the kind of knowledge that Foucault called in *The Order of Things*, the ‘murmur of the world’ by which the pre-Renaissance scholars pretended to discover the essences of things and animals36. So to recap, mimesis is a performance realized with the goal of learning a new skill by imitating an action previously seen, and a performance whose visuality makes it amenable to also be copied by a new emulator later on.

35 E. Bakker, Mimesis as Performance: Rereading Auerbach’s First Chapter, Poetics Today 20(1), 1999, p. 11-26, at p. 16.
36 It is not surprising if the type of knowledge/observation process called mimesis is then closely associated with the Renaissance aesthetics, which invented perspective as a way to impose vision as the primary medium (over all other senses) through which the world is apprehended. Space then gained absolute epistemic primacy over temporality (and cyclical temporality in particular), and since then, mimesis has not lost its superiority over other ways of knowing and learning new ways of engaging with reality.
LEGAL MIMETISM OR LEGAL MIMESIS

When we propose to study mimesis in international law, we propose to study some type of performance(s) that international legal actors engage in when they legislate or litigate cases. We thus abandon the textual approach to legal mimetism that we have sketched above, and in order to operationalize this concept of legal mimesis, we prioritize participant or non-participant observation as the privileged method by which we analyze such ‘performances’. Such ethnographies of legal mimesis as a particular method used to learn new skills will thus focus on micro-level interactions. This is for instance the approach that Grégoire Mallard followed in one of his research projects in which he studied how policymakers from the Middle East ‘learnt from’ Europe’s history. Here, he was not interested in looking at the normative questions that were raised by the notion that Europe could be brandished as a model for other regions to emulate or in the question of whether the creation of another regional entity in the field of nuclear trade and development would reinforce or further fragment the international non-proliferation regime centered around the NPT and the IAEA. Hence, the focus was not on whether textual similarity could be found in legal templates that circulated in each committee gathering. Rather, he was concerned with studying what the analogy (which he calls ‘forward analogy’) between the Middle East’s future and Europe’s past, when deployed in the context of track-2 meetings, allowed policy-makers to learn and to do in terms of performance: what topics the analogy allowed them to leave unaddressed; what types of discursive rules it allowed them to select for their deliberation. In so doing, he found that the deployment of such an analogy allowed negotiators from the Middle East to evacuate the question of whether they believed that their future plan would have any chance of being accepted ‘in reality.’ This was one of the most important facet of their work, as such a concern for their belief and/or disbelief would have immediately stopped the discussion, as the chances of any regional framework to be accepted in the Middle East and on nuclear politics are very low.

When mimesis is studied as performance, ethnographers realize that diplomats and legal experts who practice legal cut-and-paste are not doing it because they blindly believe that they have identified the best way to address and solve a specific problem, as many theorists of ‘epistemic communities’ assume. Rather, they might do it precisely because the performance of
mimesis allows them to avoid raising the question of their beliefs about the adequacy of problem diagnosis and solution prognosis. When legislators, legal experts or policymakers look upon some past international legislative action – the whole sequence which resulted in legislative texts, treaties, conventions, etc., and not just the latter –, they do not ask themselves all the time: ‘Do I believe that the textual provision is really how the problem is best legally addressed?’ ‘Do I believe that the legislative sequence adequately solves the problem that I am supposed to address?’ No, whether legal experts actually believe that the UN Declaration on Human Rights adequately defines the range of rights worth fighting for, and whether the institutional mechanisms that the UN put in place in order to monitor states’ compliance with human rights conventions is not what concerns ethnographers when they study mimesis as performance. Or, whether US nuclear non-proliferation experts believe that the NPT, and the type of monitoring mechanisms adopted by the IAEA is based on an adequate diagnosis of the causes of nuclear proliferation is not the question that nuclear disarmament experts in the Middle East try to answer by taking the example of EURATOM. The questions that they are asking themselves are more of the kind: ‘What action comes next in the treaty-making sequence that we took as a model? How and why does one move from here to there?’ (just like ‘How does the judo master make the younger judoka fall?’). The main focal point of those who are engaged in such learning processes is on the logical links between one move to the next; on the internal consistency of the sequence; on its decomposition in a series of smaller actions and the logical relation they have with one another rather than on the relationship between the legal outcome (a text, most often) and a supposedly exterior real-life problem.

Whether the participants to a performance of legal mimesis are convinced or not at the end of the process that the result of their act of taking one past legal approach and applying it to a new situation adequately solves the new real-life problem to which they are confronted is not what really matters: what matters is that the process of engaging in mimesis allowed them to engage in a legally-oriented action with new partners. As Aristotle long remarked about mimesis, which he attached to the realm of poetry and not rhetoric, ‘the poetic process of poeisis-mimesis-catharsis can be in no way confused with the rhetorical process of rhetoric-proof-persuasion’ as ‘the poetic process does not seek to persuade but to purge the tragic emotion’.

Thus, Aristotle was not ‘worried about the belief states one acquires or changes while hearing poetry’, as the pleasure one derives from mimesis and catharsis are similar to that of learning a new skill, and not to that which is

LEGAL MIMETISM OR LEGAL MIMESIS

associated with the discovery of truth – which one experiences when one is being converted to a new creed.

Thus, as we move from the textual to the ethnographic approach of legal mimesis, we need to abandon the question of belief and consensus-building behaviour, which has been at the heart of the questioning lead by neo-institutionalists and rational choice institutionalists, who often criticize diplomats and statesmen for their assumed hypocrisy, as the latter learn ‘to talk the talk but not walk the walk’. Indeed, behind the focus on mimetic behaviours demonstrated by neo-institutionalists and rational choice institutionalists often lies a concern for the beliefs shared by the members of an epistemic community and the ways by which these beliefs spread: what they believe the problem they have to solve is; what they believe the best solution to address it is; what they believe should be their broader strategy beyond solving one particular issue-specific problem, etc. Sociologists and international relations scholars should learn from ethnographic studies of legal mimesis that, to a great extent, international law acts like fiction, not in the sense that people would not believe it can be implemented, or that they believe it is fiction as opposed to ‘reality,’ but because, in international law, just like in fiction in general, the question of people’s beliefs in its reality is evacuated. Indeed, those who define fiction as characterized by the realm of stories about the situations which one does not believe to have existed in reality are in the wrong. As Sarah Worth writes, ‘in order to disbelieve something willingly, one must first be aware of the belief – in order to disbelieve it’, and this does not happen when one reads fiction or sees a movie: confronted with mimesis (performance) or fiction, one does not control one’s own beliefs, asking continuously: ‘Is it real?’ ‘Does this legal norm/rules adequately solve the ‘real’ problem with which my country is confronted?’ Evacuating the question of belief and disbelief is precisely what legal mimesis allows legal actors to do.

Still, the concept of legal mimesis, especially when it is operationalized in studies that privilege participant or non-participant observation methods, may also present some shortcomings if the goal is to assess the question of whether the international system is becoming increasingly fragmented or not. Ethnographers who study how the micro-level performances of international legal actors mostly focus on discontinuous moments in the process of legal unification. In doing so, they provide some helpful descriptions for young policymakers and the public in general, which explain how legal skills are

42 J. Meyer et al., op. cit.
43 B. Simmons, op. cit.; Z. Elkins et al., op. cit.
45 S. Worth, op. cit., p. 334.
learnt by diplomats and experts in a variety of localized settings, and which actions can be deployed after some fixed parameters are set for the conversation. But they renounce the ambition of providing a grand vision of the past, present and future of the international legal system. When ethnographers focus on legal mimesis as performance, they tend to espouse a methodological preference for the study of the ‘local,’ whose ethnographic attention to detail, whose graphic representations of action, described with their specific material objects as well as cultural meanings, becomes the center of theoretical efforts. With some few exception, ethnographers generally leave normative concerns about unification and fragmentation to be addressed by legal theorists and judges for whom fragmentation is precisely a problem – see for instance the ethnographic work of Annelise Riles46, which provides absolutely critical perspectives on the process of legal innovation and the use of boiler plates in international convention negotiations, but which does not raise the issue of fragmentation or unification.

To those concerned about the normative issue raised by the fragmentation of international law, the study of legal mimesis may risk to look emblematic of the post-modern renunciation to find grand narratives and to think the evolution of the system of international laws and norms as a whole. Unity here is self-enclosed: it refers only to the action that is being studied, mimicked, by legal advisors and diplomats who focus on trying to emulate it. As Erich Auerbach wrote in his classical book on *Mimesis*, in the classical Greek age of Homer, mimesis produced fragmentary re-presentation of the actions of the heroes, as they were evoked in graphic detail, with no background, but just in an absolute present of their sequence47: the cinematographic present of a leg being cut during battle, or a body being thrown on the ground, etc. In similar ways, when international law is described as performance, the sequences of practical actions, which are both the object of attention and the object that is being repeated, are self-contained, e.g. reduced each one in its specificity and singularity, rather than historicized and placed against a larger historical background. As Auerbach writes, when analyzed as process, mimesis provides a graphic picture that is a foreground with no background. If the description of this foreground becomes the only task that social scientists and ethnographers can perform, then, they will tend to assume (rather than conclude) that the international system of laws is fragmented, and that each performance contributes further to its fragmentation rather than to unification.

46 A. Riles, *op. cit.*

MOVING BEYOND SINGLE METHODS AND SINGLE LEVELS OF ANALYSIS

To avoid being afflicted by one of these two methodological limitations (e.g. the search for pockets of unification that translate shared beliefs among members of an epistemic community, or the description of singular performances that are foregrounded rather than contextualized in larger trends), is there a third alternative? To contribute to the production of knowledge, researchers should be honest about the scope of their analysis and what it does and does not contribute to the study of different social phenomena such as the formulation of international law. Disciplines and methods constrain us to focus more on the micro or the macro level of analysis or to study social phenomena from a particular set of methods. The study of legal texts has treated legal singularities as counterproductive to the study of the evolution of international law. The study of legal singularities via ethnographic studies, on the other hand, has tended to focus on singularities in their own right without contemplating much what the implications of these singularities are for the so-called legal body called international law, i.e. its fragmentation or unification.

By looking at the legal mimesis as performance, we should not loose sight of the broader legal discussions, and the broader evolution in which these performances take their meaning. To avoid being completely swayed by the beauty of the local, we need to choose our ‘cases’ systematically: singularities could be assessed against the backdrop of other singularities. We could move towards a typology of different fragmentation and unification models in international law, by selecting various cases of harmonization processes, based on the type of legalities that are being harmonized: for instance, whether the social interpretation of contradictory legal texts is transparent, ambiguous or opaque. Contextualizing the description of various performances of legal mimesis can also lead social scientists to choose various cases from different moments in the autonomization of an international legal field, like human rights law.

By adopting a comparative approach to performances of legal mimesis, we could pay more attention to the different mechanisms that lead to fragmentation or unification such as learning, persuasion, coercion, signalling, competition, socialization, bargaining, or shaming and the roles actors take (amplifiers, multipliers). This would help us better understand in which case legal mimesis can bring further fragmentation and which case it increases the homogeneity of international law.

49 Y. Derralay & B. Garth, op. cit.; G. Mallard, Crafting the Nuclear Regime Complex, op. cit.
### Table des matières

**Liminaire**.......................................................................................................................... 3

**Sommaire**.......................................................................................................................... 5

#### Mimétisme et dissémination :

**Prologue**

*Entre caméléon et papillon*

par Geneviève KOUBI.................................................................................................. 9

*Mèmes: pour une lecture anthropologique de la construction du droit*

par Vincent NEGRI & Isabelle SCHULTE-TENCKHOFF ........................................ 15

#### Mimesis :

**Notions**

*La mimesis comme dynamique du droit international*

par Eric WYLER & Alain PAPAUX................................................................. 33

*Le mimétisme jurisprudentiel en droit international*

par Fuad ZARBIYEV ...................................................................................... 59

*Progressisme et attentisme dans l’interprétation du droit européen des droits de l’Homme*

par Fabien MARCHADIER.................................................................................. 73

**Legal Mimetism or Legal Mimesis:**

*Conceptual and Methodological Reflections on the Study of Norm Diffusion*

par Grégoire MALLARD & Stephanie C. HOFMANN................................. 89

#### Mimesis :

**Champs de dissémination**

*Mimesis and Epistemic Endurance:*

*An Ethnographic Gaze at the United Nations Security Council Resolutions*

par Barbara BRAVO ...................................................................................... 107

**Diffusion and Reappropriation:**

*The Mimetic Reproduction of Sovereignty in International Law*

par Janis GRZYBOWSKI.................................................................................... 127

*Gouvernement colonial, techniques mimétiques et ‘droit coutumier’ au Timor oriental*

par Ricardo ROQUE ..................................................................................... 157

*Genocide, the State, and Original First Nations*

par Irene WATSON .......................................................................................... 171
TABLE DES MATIÈRES

Disséminer et enrayer :

discours internationaux et locaux autour du crime d’honneur
par Aurore SCHWAB ..................................................................................... 187

Gender Dynamics of Intangible Cultural Heritage:
Cross-disciplinarity in International Law – Questioning Accepted Truths
and Challenging Human Rights
par Janet BLAKE ........................................................................................... 211

Waverley Goes West:
The Globalization of a National Cultural Property Export Control Law
par Robert K. PATERSON .............................................................................. 231

EPilogue

Reflections on Mimesis and International Law – An Epilogue
par Jan KLABBERS ........................................................................................ 249

Les auteurs........................................................................................................... 263