UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.682
13 April 2006

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Fifty-eighth session
Geneva, 1 May-9 June and 3 July-11 August 2006

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

Report of the Study Group of the International Law Commission

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* The Chairman gratefully acknowledges the help of a number of colleagues who have commented on the topic and provided advice and assistance on particular questions. Special mention should, among them, be made of Professor Campbell McLachlan, Dr. Anders Fischer-Lescano, Professor Gunther Teubner, Professor Emmanuelle Jouannet, Professor Pierre Marie Dupuy and Ms. Isabelle Van Damme. Several NYU interns provided assistance during the Study Group meetings and collecting background materials on particular items. They include Gita Kothari, Cade Mosley, Peter Prows, and Olivia Maloney. Anna Huilaja, Ilona Nieminen and Varro Vooglaid at the Erik Castrén Institute of International Law and Human Rights in Helsinki provided much appreciated help in research. Last but not least, the assistance throughout the years of Ms. Anja Lindroos from the University of Helsinki needs to be recognized. Without her careful notes of the Study Group meetings and her background research this Report would never have materialized. Nevertheless, the contents of this report - including any opinions therein - remain the sole responsibility of its author.

GE.06-61077 (E) 090506

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Appendix

Draft Conclusions of the Work of the Study Group
(see document A/CN.4/L.682/Add.1)

A. INTRODUCTION

1. At its fifty-second session in 2000, the International Law Commission decided to include the topic "Risks ensuing from the fragmentation of international law" into its long-term programme of work.[1] In the following year, the General Assembly requested the Commission to give further consideration to the topics in that long-term programme. At its fifty-fourth session in 2002 the Commission decided to include the topic, renamed "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", in its current work programme and to establish a Study Group.[2] The Study Group adopted a number of recommendations on topics to be dealt with and requested its then Chairman, Mr. Bruno Simma to prepare a study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".[3] At its fifty-fifth session in 2003, the Commission appointed Mr. Martti Koskenniemi as Chairman of the Study Group. The Group also set a tentative schedule for its work, distributed the studies decided in the previous year among its members and decided upon a methodology to be adopted for that work.[4]

2. In 2004 the Chairman of the Study Group produced an outline for a study "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" to the Group. After a preliminary debate on that outline, concentrating on substantive and methodological issues, the definitive study on that item was distributed to the Commission in the following year.[5] In

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[1] *Official Records of the General Assembly, Fifty-fifth Session*, *Supplement No. 10* (A/55/10), chap. IX.A.1, para. 729. See also the study by Gerhard Hafner, "Risks Ensuing from Fragmentation of International Law", ibid, Annex, p. 321.

[2] Ibid., *Fifty-seventh Session*, *Supplement No. 10* (A/57/10), chap. IX.A, paras. 492-494, 511.

[3] Ibid., para. 512. The five topics were: (a) The function and scope of the *lex specialis* rule and the question of "self-contained regimes"; (b) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (d) the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); (e) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

[4] *Official Records of the General Assembly, Fifty-eighth Session*, *Supplement No. 10* (A/58/10), chap. X, para. 413, 424-435.

[5] Ibid., *Fifty-ninth Session*, *Supplement No. 10* (A/59/10), chap. X, paras. 298-358.

addition to that study, the Study Group had in 2004 also before it the outlines produced by the members of the Study Group on the four remaining items. It held an in-depth discussion of the Chairman's report and gave some indications to the other members of the Commission in regard to the preparation of their reports. In addition, it commenced the discussion of the tentative "Conclusions" it might draw on the basis of its debates.[6]

3. In 2005 the Commission heard a briefing by the Chairman of the Study Group on the status of the work of the Study Group, and held an exchange of views on the topic. The Study Group considered the memorandum on "Regionalism", prepared by its Chairman, and received definitive reports on "the Interpretation of Treaties in the light of any relevant rules of international law applicable in relations between parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties); "the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties) as well as the final report on "Hierarchy in International Law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules". In addition, the Study Group also received an informal paper from one of its members on the "Disconnection clause". The Study Group envisaged that it would be in a position to submit a consolidated study, as well as a set of conclusions, guidelines or principles to the fifty-eighth session of the Commission in 2006.[7]

4. This is the consolidated report of the Study Group. It has been composed by its Chairman on the basis of outlines and reports produced in the course of four years of work by himself (on "Function and Scope of the *lex specialis* rule and the question of 'self-contained' regimes") and by Mr. Riad Daoudi ("the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties"); Mr. Zdzislaw Galicki ("Hierarchy in International Law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules"); Mr. William Mansfield ("The Interpretation of Treaties in the light of 'any relevant rules of international law applicable in relations between parties' (article 31 (3) (c) of the Vienna Convention on the Law of Treaties"), and Mr. Teodor Melescanu ("Application of Successive Treaties relating to the

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[6] Ibid.

[7] Ibid., *Sixtieth Session*, *Supplement No. 10* (A/60/10), chap. XI, paras. 445-493.

Same Subject-Matter"). Several other Commission members took part in the deliberations of the Study Group during the sessions and their special knowledge greatly facilitated the discussion of particular topics. In addition, this Report is complemented by an APPENDIX that contains the proposed set of draft conclusions to be adopted by the Study Group and to be forwarded to the Commission in 2006 for appropriate action.

B. FRAGMENTATION AS A PHENOMENON

1. The background

5. The background of fragmentation was sketched already half a century ago by Wilfred Jenks, drawing attention in particular to two phenomena. On the one hand, the international world lacked a general legislative body. Thus:

> … law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.[8]

6. Very presciently, Jenks envisaged the need for a close analogy with conflict of laws to deal with this type of fragmentation. This would be a law regulating not conflicts between territorial legal systems, but conflicts between treaty regimes. A second reason for the phenomenon he found within the law itself.

> One of the most serious sources of conflict between law-making treaties is the important development of the law governing the revision of multilateral instruments and defining the legal effects of revision.[9]

7. There is little to be added to that analysis today. Of course, the volume of multilateral - "legislative" - treaty activity has grown manifold in the past fifty years.[10] It has also been accompanied by various more or less formal regulatory regimes not all which share the public

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[8] C. Wilfried Jenks, "The Conflict of Law-Making Treaties", BYBIL vol. 30, (1953) p. 403.

[9] Ibid.

[10] Over 50,000 treaties are registered in the United Nations system. See Christopher J. Borgen, "Resolving Treaty Conflicts", George Washington International Law Review, vol. 37 (2005) pp. 57. In the twentieth century, about 6,000 multilateral treaties were concluded of which around 30 per cent were general treaties, open for all States to participate. Charlotte Ku, *Global Governance and the Changing Face of International Law* (ACUNS Keynote Paper 2001/2) p. 45.

law orientation of multilateral diplomacy.[11] One of the features of late international modernity has been what sociologists have called "functional differentiation", the increasing specialization of parts of society and the related autonomization of those parts. This takes place nationally as well as internationally. It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also lead to its increasing fragmentation - that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.

8. The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice.[12] What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialized knowledges as "investment law" or "international refugee law" etc. - each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[13]

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[11] Out of the various collections that discuss the diversification of the sources of international regulation particularly useful are Eric Loquin & Catherine Kessedjian (eds.), *La mondialisation du droit* (Paris: Litec, 2000); and Paul Schiff Berman, *The Globalization of International Law* (Aldershot: Ashgate, 2005). The activity of traditional organizations is examined in José Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005). Different perspectives of non-treaty law-making today are also presented in Rüdiger Wolfrum & Volker Röben (eds.), *Developments of International Law in Treaty-making* (Berlin: Springer, 2005) pp. 417-586 and Ronnie Lipschutz & Cathleen Vogel, "Regulation for the Rest of Us? Global Civil Society and the Privatization of Transnational Regulation", in R.R. Hall & T.J. Bierstaker, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002) pp. 115-140.

[12] See especially Andreas Fisher-Lescano & Günther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", Mich. J. Int'l L., vol. 25 (2004) pp. 999-1046. The matter was, however, discussed already in great detail in L.A.N. M. Barnhoorn & Karel Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (The Hague: Nijhoff, 1995).

[13] It should not be forgotten that the tradition of legal pluralism seeks precisely to deal with such problems. So far, however, pluralism has concentrated on the study of the coexistence of indigenous and Western law in old colonial territories as well as the emergence of types of private law in domestic societies. For a famous statement, see

9. While the reality and importance of fragmentation, both in its legislative and institutional form, cannot be doubted, international lawyers have been divided in their assessment of the phenomenon. Some commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security. Others have seen here a merely technical problem that has emerged naturally with the increase of international legal activity may be controlled by the use of technical streamlining and coordination.[14]

10. Without going into details of the sociological or political background that has led to the emergence of special or specialist rule-systems and institutions, the nature of the legal problem may perhaps best be illustrated by reference to a practical example. The question of the possible environmental effects of the operation of the "MOX Plant" nuclear facility at Sellafield, United Kingdom, has recently been raised at three different institutional procedures: an Arbitral Tribunal set up under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), the compulsory dispute settlement procedure under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) as well as under the European Community and Euratom Treaties within the European Court of Justice (ECJ). Three rule-complexes all appear to address the same facts: the (universal) rules of the UNCLOS, the (regional) rules of the OSPAR Convention, and the (regional) rules of EC/EURATOM. Which should be determinative? Is the problem principally about the law of the sea, about (possible) pollution of the North Sea, or about inter-EC relationships?

Sally Engel Merry, "Legal Pluralism", Law & Soc. Rev., vol. 22 (1988) pp. 869-896 and more recently (and critically), Simon Roberts, "After Government? On Representing Law without the State", Modern Law Review, vol. 68 (2005) pp. 1-24.

[14] "Fragmentation" is a very frequently treated topic of academic writings and conferences today. Apart from the sources in note 11 above, see also "Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle", New York Journal of International Law and Politics, vol. 31 (1999) pp. 679-993; Andreas Zimmermann & Reiner Hoffmann, with assisting editor Hanna Goeters, *Unity and Diversity of International Law* (Berlin: Duncker & Humblot, 2006); Karel Wellens & Rosario Huesa Vinaixa (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international* (Brussels: Bruylant, 2006 forthcoming). A strong plea for unity is contained in Pierre Marie Dupuy, "L'unité de l'ordre juridique internationale. Cours général de droit international public", *Recueil des Cours …*, vol. 297 (2002). For more references, see Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law. Postmodern Anxieties?". Leiden Journal of International Law, vol. 15 (2002) pp. 553-579.

Already to pose such questions points to the difficulty of providing an answer. How do such rule-complexes link to each other, if at all? What principles should be used in order to decide a potential conflict between them?

11. Yet the problem is even more difficult. Discussing the British objection to its jurisdiction on account of the same matter being also pending before an OSPAR arbitral tribunal and the ECJ, the Arbitral Tribunal set up under Annex VII UNCLOS observed:

> even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a separate existence from those under [the UNCLOS].[15]

12. The Tribunal held that the application of even the same rules by different institutions might be different owing to the "differences in the respective context, object and purposed, subsequent practice of parties and *travaux preparatoires*".[16] The UNCLOS Arbitral tribunal recognized that the meaning of legal rules and principles is dependent on the context in which they are applied. If the context, including the normative environment, is different, then even identical provisions may appear differently. But what does this do to the objectives of legal certainty and the equality of legal subjects?

13. The previous paragraph raises both institutional and substantive problems. The former have to do with the competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission has instead wished to focus on the substantive question - the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law.

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[15] *MOX Plant* case, *Request for Provisional Measures Order* (*Ireland* v. *the United Kingdom*) (3 December 2001) International Tribunal for the Law of the Sea, ILR vol. 126 (2005) p. 273, para. 50.

[16] Ibid., pp. 273-274, para. 51.

What are the substantive effects of such specialization? How should the relationship between such "boxes" be conceived? In terms of the above example: what is the relationship between the UNCLOS, an environmental treaty, and a regional integration instrument?

14. The Commission has understood the subject to have both positive and negative sides, as attested to by its reformulation of the title of the topic: "Fragmentation of international law: Difficulties arising from the diversification and expansion of international law". On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices. On the other hand, it reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques. The title seems to suggest that although there are "problems", they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that may have arisen in the past.

15. The rationale for the Commission's treatment of fragmentation is that the emergence of new and special types of law, "self-contained regimes" and geographically or functionally limited treaty-systems creates problems of coherence in international law. New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. The emergence of "environmental law" is a response to growing concern over the state of the international environment. "Trade law" develops as an instrument to regulate international economic relations. "Human rights law" aims to protect the interests of individuals and "international criminal law" gives legal expression to the "fight against impunity". Each rule-complex or "regime" comes with its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighbouring specialization. "Trade law" and "environmental law", for example, have highly specific objectives and rely on principles that may often point in different directions. In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations or become general and frequent, the unity of the law suffers.

16. Such deviations should not be understood as legal-technical "mistakes". They reflect the differing pursuits and preferences that actors in a pluralistic (global) society have. In conditions of social complexity, it is pointless to insist on formal unity. A law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and authoritarian simultaneously.[17] But if fragmentation is in this regard a "natural" development (indeed, international law was always relatively "fragmented" due to the diversity of national legal systems that participated in it) then it is not obvious why the Commission should deal with it.

17. The starting-point of this report is that it is desirable to provide a conceptual frame within which what is perhaps inevitable can be grasped, assessed, and managed in a legal-professional way. That frame is provided by the Vienna Convention on the Law of Treaties of 1969 (VCLT). One aspect that does seem to unite most of the new regimes is that they claim binding force from and are understood by their practitioners to be covered by the law of treaties. As the organ that had once prepared the Vienna Convention, the Commission is in a good position to analyse international law's alleged fragmentation from that perspective. It is useful to note what is implicated here. This is that although, sociologically speaking, present fragmentation contains many new features, and its intensity differs from analogous phenomena in the past, it is nevertheless an incident of the diversity of the international social world - a quality that has always marked the international system, contrasting it to the (relatively) more homogenous domestic context. The fragmentation of the international legal system into technical "regimes", when examined from the point of view of the law of treaties, is not too different from its traditional fragmentation into more or less autonomous territorial regimes called "national legal systems".

18. This is why it is useful to have regard to the wealth of techniques in the traditional law for dealing with tensions or conflicts between legal rules and principles. What is common to

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[17] The emergence of an international legal pluralism has been given an ambitious overview in Boaventura de Sousa Santos, *Toward a New Common Sense. Law, Science and Politics in the Age of the Paradigmatic Transition* (New York: Routledge, 1995) especially p. 114 et seq.

these techniques is that they seek to establish meaningful relationships between such rules and principles so as to determine how they should be used in any particular dispute or conflict. This Report discusses four types of relationships that lawyers have traditionally understood to be implicated in normative conflicts:

(a) Relations between special and general law (section C);

(b) Relations between prior and subsequent law (section D);

(c) Relations between laws at different hierarchical levels (section E); and

(d) Relations of law to its "normative environment" more generally (section F).

19. Such relations may be conceived in varying ways. At one end of the spectrum is the case where one law (norm, rule, principle, rule-complex) simply invalidates the other law. This takes place only in hierarchical relations involving *jus cogens*. Much more often, priority is "relative". The "other law" is set aside only temporarily and may often be allowed to influence "from the background" the interpretation and application of the prioritized law. Then there is the case where the two norms are held to act concurrently, mutually supporting each other. And at this end of the spectrum is the case where, finally, there appears to be no conflict or divergence at all. The laws are in harmony.

20. This Report will discuss such relations especially by reference to the practice of international courts and tribunals. The assumption is that international law's traditional "fragmentation" has already equipped practitioners with techniques to deal with rules and rule-systems that point in different directions. This does not mean to cancel out the importance of the recent push towards functional specialization of regulatory regimes. But it does suggest that these factual developments are of relatively minor significance to the operation of legal reasoning. In an important sense, "fragmentation" and "coherence" are not aspects of the world but lie in the eye of the beholder. What is new and unfamiliar, will (by definition) challenge accustomed ways of thinking and organizing the world. Novelty presents itself as "fragmentation" of the old world. In such case, it is the task of reasoning to make the unfamiliar familiar by integrating it into received patterns of thought or by amending those patterns so

that the new phenomenon can be accommodated. Of course, there will always remain some "cognitive dissonance" between the familiar conceptual system and the new information we receive from the world. The problems of coherence raised by the MOX plant case, for example, have not *already* been resolved in some juristic heaven so that the only task would be to try to find that pre-existing solution. But the fact that the potential overlap or conflict between the rules of the UNCLOS, the OSPAR Convention and EC law cannot be immediately resolved does not mean that it could not be brought under familiar patterns of legal reasoning. This report is about legal reasoning. Although it does not purport to give ready-made solutions to a problem such as the MOX plant it does provide a toolbox with the help of which lawyers dealing with that problem (or any other comparable issue) may be able to proceed to a reasoned decision.

2. What is a "conflict"?

21. This report examines techniques to deal with conflicts (or prima facie conflicts) in the substance of international law. This raises the question of what is a "conflict"? This question may be approached from two perspectives: the subject-matter of the relevant rules or the legal subjects bound by it. Article 30 VCLT, for example, appears to adopt the former perspective. It suggests techniques for dealing with successive treaties relating to the "same subject-matter". It is sometimes suggested that this removes the applicability of article 30 when a conflict emerges for example between a trade treaty and an environmental treaty because those deal with *different* subjects.[18] But this cannot be so inasmuch as the characterizations ("trade law", "environmental law") have no normative value per se. They are only informal labels that describe the instruments from the perspective of different interests or different policy objectives. Most international instruments may be described from various perspectives: a treaty dealing with trade may have significant human rights and environmental implications and vice versa. A treaty on, say, maritime transport of chemicals, relates at least to the law of the sea, environmental law, trade law, and the law of maritime transport. The characterizations have less to do with the "nature" of the instrument than the interest from which it is described.

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[18] Borgen, "Resolving Treaty Conflicts", supra, note 10, pp. 603-604.

22. If conflict were to exist only between rules that deal with the "same" subject-matter, then the way a treaty is applied would become crucially dependent on how it would classify under some (presumably) pre-existing classification scheme of different subjects. But there are no such classification schemes. Everything would be in fact dependent on argumentative success in pigeon-holing legal instruments as having to do with "trade", instead of "environment", "refugee law" instead of "human rights law", "investment law" instead of "law of development". Think again about the example of maritime carriage of chemical substances. If there are no definite rules on such classification, and any classification relates to the interest from which the instrument is described, then it might be possible to avoid the appearance of conflict by what seems like a wholly arbitrary choice between what interests are relevant and what are not: from the perspective of marine insurers, say, the case would be predominantly about carriage while, from the perspective of an environmental organization, the predominant aspect of it would be environmental. The criterion of "subject-matter" leads to a *reductio ad absurdum*. Therefore, it cannot be decisive in the determination of whether or not there is a conflict.[19] As pointed out by Vierdag in his discussion of this criterion in regard to subsequent agreements under article 30 VCLT:

> the requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied.[20]

23. This seems right. The criterion of "same subject-matter" seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party.

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[19] This is not to say that the fact that two treaties may or may not belong to the same "regime" is irrelevant for the way their relationship is conceived. See further specially section D.3. (a). below.

[20] E.W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", BYBIL vol. 59 (1988) p. 100.

24. This is not the end of the matter, however. What does "pointing in different direction" mean? A strict notion would presume that conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule. This is the basic situation of incompatibility. An obligation may be fulfilled only by thereby failing to fulfil another obligation. However, there are other, looser understandings of conflict as well.[21] A treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions. Two treaties or sets of rules may possess different background justifications or emerge from different legislative policies or aim at divergent ends. The law of State immunity and the law of human rights, for example, illustrate two sets of rules that have very different objectives. Trade law and environmental law, too, emerge from different types of policy and that fact may have an effect on how the relevant rules are interpreted or applied. While such "policy-conflicts" do not lead into logical incompatibilities between obligations upon a single party, they may nevertheless also be relevant for fragmentation.[22]

25. This Report adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem. Focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption. In fact, any decision will involve interpretation and choice between alternative rule-formulations and meanings that cannot be pressed within the model of logical reasoning.

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[21] The most in-depth discussion is in Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge Studies in International and Comparative Law, (Cambridge: Cambridge University Press: 2003) pp. 164-200 (noting the way the WTO bodies have used a narrow understanding of "conflict" as incompatibility). See also the distinction made by Jenks between "conflicts" and "divergences", "The Conflict of Law-Making …", supra note 8, pp. 425-427 and for a rather strict definition of "conflict", Jan B. Mus, "Conflicts between Treaties in International Law", Netherlands International Law Review, vol. XLV (1998) pp. 214-217; Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Leiden: Nijhoff, 2003) pp. 5-7.

[22] For a discussion, see Rüdiger Wolfrum & Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer, 2003) pp. 6-13 and Nele Matz, *Wege zur Koordinierung völkerrechtlicher Verträge. Völkervertragsrechtliche und institutionelle Ansätze* (Berlin: Springer, 2005) pp. 8-18 (a categorization of conflict-types from logical incompatibility to political conflicts and overlaps of regulatory scope).

26. Conflicts between rules are a phenomenon in every legal order. Every legal order is also familiar with ways to deal with them. Maxims such as *lex specialis* or *lex posterior* are known to most legal systems, and, as will be explained in much more detail below, to international law. Domestic legal orders also have robust hierarchical relations between rules and rule-systems (in addition to hierarchical institutions to decide rule-conflicts). In international law, however, as will also be discussed in section E below, there are much fewer and much less robust hierarchies. And there are many types of interpretative principles that purport to help out in conflict-resolution. Nevertheless, it is useful to agree with Jenks:

> Assuming, as it is submitted we must, that a coherent body of principles on the subject is not merely desirable but necessary, we shall be constrained to recognize that, useful and indeed essential as such principles may be to guide us to reasonable conclusions in particular cases, they have no absolute validity.[23]

3. The approach of this Study: seeking relationships

27. Conflict-ascertainment and conflict-resolution are a part of *legal reasoning,* that is, of the pragmatic process through which lawyers go about interpreting and applying formal law. In this process, legal rules rarely if ever appear alone, without relationship to other rules. Typically, even single (primary) rules that lay down individual rights and obligations presuppose the existence of (secondary) rules that provide for the powers of legislative agencies to enact, modify and terminate such rules and for the competence of law-applying bodies to interpret and apply them.

28. But even substantive primary rules usually appear in clusters, together with exceptions, provisions for technical implementation and larger interpretative principles. The commonplace distinction between "rules" and "principles" captures one set of typical relationships, namely those between norms of a lower and higher degree of abstraction. A "rule" may thus sometimes be seen as a specific application of a "principle" and understood as *lex specialis* or *lex posterior* in regard to it, and become applicable in its stead. In such case,

[23] Jenks, "The Conflict of Law-Making …" supra note 8, p. 407.

the special/general or prior/subsequent distinction does not work as a conflict-solution technique but as an interpretative guideline indicating that one rule should be interpreted in view of the other of which it is only an instance or an elaboration.[24]

29. Alternatively, the general or earlier principle may be understood to articulate a rationale or a purpose to the specific (or later) rule. Thus, for instance, the fisheries provisions in the United Nations Convention on the Law of the Sea may be seen as background principles of which any particular treaties concerning fishery resources could be seen as instances or elaborations.[25]

30. For example, in the *Southern Bluefin Tuna* case (2000), Japan had argued inter alia that the 1993 Convention on the Conservation of the Southern Bluefin Tuna (CCSBT) applied to the case both as *lex specialis* and *lex posterior,* excluding the application of the 1982 UNCLOS.[26] The Arbitration Tribunal, however, held that both the 1982 as well as the 1993 instrument were applicable. The Tribunal recognized that:

> … it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention. The broad provision for the promotion of universal respect for and observance of human rights,

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[24] See Neil McCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978) p. 156 and generally pp. 152-194. There are many understandings of the nature of the difference between “rules” and “principles”. For these, see Martti Koskenniemi, “General Principles: Reflections on Constructivist Thinking in International Law”, in Martti Koskenniemi, *Sources of International Law* (London Ashgate, 2000) pp. 359-402. For a recent discussion of the operation of the rule/principle dichotomy in international law (of self-determination), see Karen Knop, *Diversity and Self-Determination* (Cambridge: Cambridge University Press, 2002) pp. 20-39.

[25] This seems also affirmed in article 87 of the United Nations Convention on the Law of the Sea, United Nations, *Treaty Series* vol. 1834, p. 396.

[26] *Southern Bluefin Tuna* case (*Australia and New Zealand/Japan)* Award of 4 August 2000 (Jurisdiction and admissibility) UNRIAA vol. XXIII (2004) p. 23, para. 38 (c).

> and the international obligation to co-operate for the achievement of those purposes, found in the Articles 1, 55 and 56 of the Charter of the United Nations, have not been discharged for States Parties by their ratification of Human Rights Covenants and other human rights treaties … Nor is it clear that the particular provisions of the 1993 Convention exhaust the extent of the relevant obligations of UNCLOS. In some respects, UNCLOS may be viewed as extending beyond the reach of the CCSBT.[27]

31. This is quite an appropriate description of a number of situations that may arise between a general multilateral treaty and specific bilateral or regional treaties. In such cases, the characterization of the latter as *lex specialis* or *lex posterior* may not all lead to the setting aside of the general treaty. Instead, that earlier and general instrument remains "in the background", controlling the way the later and more specific rules are being interpreted and applied.[28] Whether this relationship is then conceived in terms of an (informal) hierarchy or a division of labour seems beside the point. However, none of this takes away the difficulty of appreciating what it means that the later or more specific instrument involves a "development" or "application" of a more general instrument and when it is intended to be an exception or a limitation thereto. Any technical rule that purports to "develop" the freedom of the high seas is also a limitation of that freedom to the extent that it lays down specific conditions and institutional modalities that must be met in its exercise.

32. The Commission has traditionally been aware of the difficulty to make a clear distinction between "progressive development" and "codification". An analogous difficulty affects any attempt to distinguish clearly between "application" of a general rule and "limitation" or "deviation" from it. All this is dependent on how one interprets the general law to which the specific or later instrument seeks to add something. Care should thus be taken not to infer

[27] Ibid., pp. 40-41 para. 52.

[28] Thus for example, article 4 of the United Nations Fish Stocks Agreement provides that it "shall be interpreted and applied in the context of and in a manner consistent with the [UNCLOS]", Agreement for the Implementation of Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and High Seas Migratory Fish Stocks, United Nations, *Treaty Series* vol. 2167, p.3.

that a special law need automatically be interpreted "widely" or "narrowly". Whichever way interpretation goes depends on how the relationship between the general and the special law is conceived ("application" or "exception"?). This, again, requires seeing the relationship as part of some "system".

33. It is often said that law is a "system". By this, no more need be meant than that the various decisions, rules and principles of which the law consists do not appear not randomly related to each other.[29] Although there may be disagreement among lawyers about just how the systemic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it.

34. This cannot be understood as reaffirming something that already "exists" before the systemic effort itself. There is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives - they are "bargains" and "package-deals" and often result from spontaneous reactions to events in the environment. But if legal reasoning is understood as a *purposive* activity, then it follows that it should be seen not merely as a mechanic application of apparently random rules, decisions or behavioural patterns but as the operation of a whole that is directed toward some human objective. Again, lawyers may disagree about what the objective of a rule or a behaviour is. But it does not follow that no such objective at all can be envisaged. Much legal interpretation is geared to linking an unclear rule to a purpose and thus, by showing its position within some system, to providing a justification for applying it in one way rather than in another. Thus, while the conclusion of a general treaty may sometimes be intended to set aside previously existing scattered provisions in some area - for example, the 1982 United Nations Convention on the Law of the Sea explicitly set aside the 1958 Law of the Sea conventions[30] - sometimes no such intention can be inferred.

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[29] The view that holds international law a "primitive" structure bases itself on the claim that the rules of international law do not form a "system" but merely an aggregate of (primary) rules that States have contracted. See H.L.A Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) pp. 208-231.

[30] See article 311 of the United Nations Convention on the Law of the Sea.

The adoption in 1966 of the two universal human rights covenants (the Covenants for Civil and Political Rights and for Economic, Social and Cultural Rights) did not imply any setting aside or overriding of the (more specific) provisions of the 1951 European Convention on Human Rights and Fundamental Freedoms.[31] Whether the later regulation intends to preserve or push aside previous legislation cannot, again, be decided *in abstracto*. This can only be decided through interpretation.

35. Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. Far from being merely an "academic" aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators.[32] This results precisely from the "clustered" nature in which legal rules and principles appear. But it may also be rationalized in terms of a *political obligation* on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer.[33]

36. It is a preliminary step to any act of applying the law that a prima facie view of the matter is formed. This includes, among other things, an initial assessment of what might be the applicable rules and principles. The result will often be that a number of standards may seem prima facie relevant. A choice is needed, and a justification for having recourse to one instead of another. Moving from the prima facie view to a conclusion, legal reasoning will either have to seek to harmonize the apparently conflicting standards through interpretation

[31] See article 44 of the International Covenant on Civil and Political Rights. United Nations, *Treaty Series,* vol. 99, p. 171 and comment in Karl Zemanek, "General Course on Public International Law", *Recueil des Cours* … vol. 266 (1977) pp. 227-8. See also Sadat-Akhavi, *Methods of Resolving Conflicts* … supra note 20, pp. 120-124.

[32] For "systematization" - that is, the establishment of systemic relationships between legal rules - as a key aspect of legal reasoning. See e.g. Aulis Aarnio, *Denkweisen der Rechtswissenschaft* (New York Springer, 1979) pp. 50-77 and generally Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1979). For a treatment of international law through a sociologically oriented ("Luhmannian") systems theory, see Andreas Fischer-Lescano, "Die Emergenz von Globalverfassung", *ZaÖRV* vol. 63 (2003) pp. 717-760.

[33] This view is famously articulated in Ronald Dworkin, *Taking Rights Seriously* (Harvard: Harvard University Press, 1977).

or, if that seems implausible, to establish definite relationships of priority between them. Here interpretative maxims and conflict-solution techniques such as the *lex specialis, lex posterior* or *lex superior* become useful. They enable seeing a systemic relationship between two or more rules, and may thus justify a particular choice of the applicable standards, and a particular conclusion. They do not do this mechanically, however, but rather as "guidelines",[34] suggesting a pertinent relationship between the relevant rules in view of the need for consistency of the conclusion with the perceived purposes or functions of the legal system as a whole.[35] The fact that this takes place in an indeterminate setting takes nothing away from its importance. Through it, the legal profession articulates, and gives shape and direction to law. Instead of a random collection of directives, the law begins to assume the shape of a purposive (legal) system.

4. Harmonization - systemic integration

37. In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well. As Rousseau puts the duties of a judge in one of the earlier but still more useful discussions of treaty conflict:

> … lorsqu'il est en presence de deux accords de volontés divergentes, il doit être tout naturellement porté a rechercher leur coordination plutôt qu'à consacrer à leur antagonisme.[36]

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[34] As suggested by the United States comments to the Waldock draft of what became articles 30 and 31 VCLT. See Sir Humphrey Waldock, Sixth Report on the Law of Treaties, *Yearbook of the International Law Commission* (1966) vol. II, Part two, p. 94.

[35] For the techniques of "second order justification" that enable the solution of hard cases (i.e. cases where no "automatic" decisions are possible) and that look either to the consequences of one's decision or to the systemic coherence and consistency of the decision with the legal system (seen as a purposive system), see McCormick, *Legal Reasoning* … supra note 24, pp 100-128.

[36] Charles Rousseau, "De la compatibilité des normes juridiques contradictoires dans l'ordre international", RGDIP vol. 39 (1932), p. 153.

38. This has emerged into a widely accepted principle of interpretation and it may be formulated in many ways. It may appear as the thumb-rule that when creating new obligations, States are assumed not to derogate from their obligations. Jennings and Watts, for example, note the presence of a:

> presumption that the parties intend something not inconsistent with generally recognized principles of international law, or with previous treaty obligations towards third States.[37]

39. As the International Court of Justice stated in the *Right of Passage* case:

> it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.[38]

40. There are other reasons, too, for which one might wish to avoid formal statements confirming incompatibility. As noted above, this may often be a matter of political assessment. In the controversial *Austro-German Customs Union* case from 1931, for example, the Permanent Court of International Justice observed that the projected Union with Germany violated the obligation Austria had undertaken in the Versailles Treaty and the Protocol of Saint Germain not to alienate its independence. As Judge Anzilotti pointed out, the Court was here invited to decide a wholly political question. What legal standards were there to instruct on whether a customs union between Austria and Germany, with all the history of their relationship and its linkage to European problems, would encroach on Austria's independence? In this regard, a treaty with Germany was of a completely different nature than a treaty with, say, Czechoslovakia.[39] The potential "fragmentation" at issue in the Austro-German case highlights

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[37] Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (London: Longman,1992) (9th ed), p. 1275. For the wide acceptance of the presumption against conflict - that is the suggestion of harmony - see also see Pauwelyn, *Conflict of Norm …* supra note 21, pp. 240-244.

[38] *Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India) I.C.J. Reports 1957* p. 142.

[39] As pointed out in Rousseau, "De la compatibilité des norms …", supra note 36, pp. 187-8.

the linkage of the legal problem of compatibility with the preferences of the actors and the need for some subtlety in coping with them. A straightforward statement of incompatibility might sometimes be strictly inadvisable.

41. There is relatively little - in fact, until recently, astonishingly little - judicial or arbitral practice on normative conflicts. As Borgen suggests, this must result in part from the wish of States parties to negotiate issues of apparent conflict between themselves and not to give the power to outsiders to decide on what may appear as coordinating difficulties that may have their roots already in the heterogeneous interests represented in national administrations. And negotiation is rarely about the "application" of conflict-rules rather than trying to find a pragmatic solution that could re-establish the disturbed harmony. Although it might be interesting to discuss the way States have resolved such problems by negotiation, the fact that any results attained have come about through contextual bargaining make it difficult to use their results as basis for some customary rule or other.[40]

42. However, although harmonization often provides an acceptable outcome for normative conflict, there is a definite limit to harmonization: "it may resolve apparent conflicts; it cannot resolve genuine conflicts".[41] This does not mean that there are normative conflicts whose intrinsic nature renders them unsuitable for harmonization. Between the parties, anything may be harmonized as long as the will to harmonization is present. Sometimes, however, that will may not be present, perhaps because the positions of the parties are so wide apart from each other - something that may ensue from the importance of the clash of interests or preferences that is expressed in the normative conflict, or from the sense that the harmonizing solution would sacrifice the interests of the party in a weaker negotiation position. In this respect, there is a limit to which a "coordinating" solution may be applied to resolve normative conflicts. Especially where a treaty lays out clearly formulated rights or obligations to legal subjects, care must be taken so as not to see these merely as negotiating chips in the process of reaching a coordinating solution.

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[40] Borgen, "Resolving Treaty Conflicts", supra note 10, pp. 605-606 (but see also his discussion of diplomatic practice, 606-610).

[41] Ibid., p. 640.

43. When normative conflicts come to be settled by third parties the pull of harmonization remains strong though perhaps not as compelling as between the parties themselves. Because already the ascertainment of the presence of a conflict requires interpretation, it may often be possible to deal with potential conflicts by simply ignoring them, especially if none of the parties have raised the question. But when a party raises a point about conflict and about the precedence of one obligation over another, then a stand must be taken. Of course in such case, it is still possible to reach the conclusion that although the two norms seemed to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no overlap or conflict will remain. This may sometimes call for the application of the kinds of conflict-solution rules which the bulk of this Report will deal with. But it may also take place through an attempt to reach a resolution that integrates the conflicting obligations in some optimal way in the general context of international law. Inasmuch as the question of conflict arises regarding the fulfilment of the *objectives* (instead of the obligations) of the different instruments, little may be done by the relevant body. In any case, the third party settlement body is always limited in its jurisdiction.

5. Jurisdiction vs. applicable law

44. In debates about fragmentation and normative conflict, the suggestion is sometimes made that whatever the relations between legal rules and principles as conceived under *general international law*, those relations cannot be applied as such by treaty bodies or dispute-settlement organs whose jurisdiction is limited to or by the constituting instrument. A human rights body, for example, should have no business to apply a WTO covered agreement. This suggestion, which in essence is merely an argument about the self-contained nature of some regimes, will be discussed in detail in section C.3 below. Thus, only a few remarks here will suffice.

45. The jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties. A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties. Particularly in the WTO context a distinction has been made between two notions, jurisdiction

and applicable law.[42] While the WTO Dispute Settlement Understanding limits the jurisdiction to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law.[43] By contrast, for example article 38 of the Statute of the International Court of Justice listing the sources that the International Court of Justice should apply in deciding cases does identify the law applicable by the Court.[44] Similarly, the UNCLOS provides that the LOS Tribunal has "jurisdiction over any dispute concerning the interpretation and application of this Convention" and when deciding the cases, it "shall apply this Convention and other rules of international law not incompatible with this Convention".[45] As no such explicit provision exist in the Dispute Settlement Understanding, the question of the scope of applicable law has seemed problematic. However, the WTO is certainly not the only context in which a treaty body has been set up without expressly mentioning that it should apply international law. As will be argued in length especially in section C and F below, WTO covered treaties are creations of and constantly interact with other norms of international law.[46] As the Appellate Body stated in its very first case, 'the General Agreement [GATT] is not to be

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[42] Lorand Bartels, "Applicable Law in WTO Dispute Settlement Proceedings", Journal of World Trade, vol. 35 (2001) pp. 501-502; David Palmenter and Petros C. Mavroidis, "The WTO Legal System: Sources of Law", AJIL vol. 92 (1998), pp. 398-399; Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?"AJIL vol. 95 (2001), pp. 554-566; Gabrielle Marceau, "WTO Dispute Settlement and Human Rights", EJIL vol. 13 (2002), pp. 757-779; Anja Lindroos and Michael Mehling, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO", EJIL vol. 16 (2005) pp. 860-866.

[43] Articles 1.1, 3.2, 7, 11, and 19.2 of the Dispute Settlement Understanding, ILM vol. 33 (1994) 1144, has been used to argue both in for and against a more extensive scope of applicable law in the WTO dispute settlement. See e.g. Bartels, "Applicable Law in WTO …" ibid., pp. 502-509; Lindroos and Mehling, "Dispelling the Chimera 'Self-Contained Regimes'", ibid., pp. 873-875 and *Korea-Measures Affecting Government Procurement*, 1 May 2000, WT/DS163/R, para. 7.101, note 755.

[44] See e.g. Bartels, "Applicable Law in WTO …", ibid., pp. 501-502 and Palmenter and Mavroidis, "The WTO Legal System: Sources of Law", supra note 42, pp. 398-399.

[45] Articles 288 (1) and 293 (1) of the UNCLOS.

[46] For instance, Palmenter and Mavroidis, "The WTO Legal System: Sources of Law", pp. 398-399; Joel P. Trachtman, "The Domain of WTO Dispute Resolution", Harvard International Law Journal vol. 40 (1999) pp. 333-377; Bartels, "Applicable Law in WTO …", supra note 42, pp. 501-502; Pauwelyn, "The Role of Public International Law in the WTO …", supra note 42, pp. 554-566; Pauwelyn, *Conflict of Norms in Public International Law* … supra note 21, *Law;* Marceau, "WTO Dispute Settlement and Human Rights" … supra note 42 pp. 757-779; Lindroos and Mehling, "Dispelling the Chimera …", supra note 42, pp. 860-866.

read in clinical isolation from public international law".[47] What this means in practice is by no means straightforward. But it states what has never been seriously doubted by any international tribunal or treaty-body, namely that even as the jurisdiction of a body is limited (as it always - even in the case of the International Court of Justice - is), its exercise of that jurisdiction is controlled by the normative environment.

C. CONFLICTS BETWEEN SPECIAL LAW AND GENERAL LAW

46. This section deals with the issue where a normative conflict is characterized through the relationship of speciality vs. generality between the conflicting norms. The section is in four parts. Section C.1 provides a framework for the discussion of conflicts where the "speciality" or "generality" of conflicting norms becomes an issue. Section C.2 outlines the role and nature of the *lex specialis* rule as a pragmatic mechanism for dealing with situations where two rules of international law that are both valid and applicable deal with the same subject-matter differently.[48] Section C.3 is an overview of the case-law and academic discussion on "self-contained regimes". Section C.4 is a brief discussion of regionalism in international law.

1. Introduction

47. One of the most well-known techniques of analysis of normative conflicts focuses on the generality vs. the particularity of the conflicting norms. In this regard, it is possible to distinguish between three types of conflict, namely:

(a) Conflicts between general law and a particular, unorthodox interpretation of general law;

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[47] In the *United States - Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R, p. 17. Similarly, e.g., in the *Korea - Measures Affecting Government Procurement*, 1 May 2000, WT/DS163/R, para. 7.96, the panel stated that "customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it".

[48] To say that a rule is "valid" is to point to its being a part of the ("valid") legal order. To say it is applicable means that it provides rights, obligations or powers to a legal subject in a particular situation.

(b) Conflicts between general law and a particular rule that claims to exist as an exception to it; and

(c) Conflicts between two types of special law.

48. Fragmentation appears differently in each of such three types of conflict. While the first type is really about the effects of differing legal interpretations in a complex institutional environment, and therefore falls strictly speaking outside the Commission study, the latter two denote genuine types of conflict where the law itself (in contrast to some putative interpretation of it) appears differently depending on which normative framework is used to examine it.[49] Each of the three types of conflict is illustrated briefly below.

(a) Fragmentation through conflicting interpretations of general law

49. In the *Tadic* case in 1999, the Appeals Chamber of the International Criminal Tribunal of the former Yugoslavia (ICTY) considered the responsibility of Serbia-Montenegro over the acts of Bosnian Serb militia in the conflict in the former Yugoslavia. For this purpose it examined the jurisprudence of the International Court of Justice in the *Nicaragua* case of 1986. In that latter case, the United States had not been held responsible for the acts of the Nicaraguan *contras* merely on account of organizing, financing, training and equipping them. Such involvement failed to meet the test of "effective control".[50] The ICTY, for its part, concluded that "effective control" set too high a threshold for holding an outside power legally accountable for domestic unrest. It was sufficient that the power have "a role in organizing, coordinating, or planning the military actions of the military group", that is to say that it exercised "overall control" over them for the conflict to be an "international armed conflict".[51]

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[49] I have discussed the dependence of normative conflict of different conceptual frameworks in Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law? …" supra note 14, pp. 553-579.

[50] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) I.C.J. Reports 1986* pp. 64-65, para. 115.

[51] See *Prosecutor* v. *Dusko Tadic*, Judgment of 15 July 1999, Case No. IT-94-1-A, A.Ch. See also ILM vol. 38 (1999) pp. 1540-1546, paras. 115, 116-145.

50. The contrast between *Nicaragua* and *Tadic* is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law.[52] *Tadic* does not suggest "overall control" to exist alongside "effective control" either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to *replace* that standard altogether.

51. The point is not to take a stand in favour of either *Tadic* or *Nicaragua*, only to illustrate the type of normative conflict where two institutions faced with analogous facts interpret the law in differing ways. This is a common occurrence in any legal system. But its consequences for the international legal system which lacks a proper institutional hierarchy might seem particularly problematic. Imagine, for example, a case where two institutions interpret the general (and largely uncodified) law concerning title to territory differently. For one institution, State A has validly acquired title to a piece of territory that another institution regards as part of State B. In the absence of a superior institution that could decide such conflict, States A and B could not undertake official acts with regard to the territory in question with confidence that those acts would be given legal effect by outside powers or institutions. Similar problems would emerge in regard to any conflicting interpretations concerning a general law providing legal status.

52. Differing views about the content of general law create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. Second, they put legal subjects in an unequal position vis-à-vis each other. The rights they enjoy depend on which jurisdiction is seized to enforce them. Most domestic laws deal with these problems through the instrumentality of the appeal. An authority (usually a court) at a higher hierarchical level will

[52] This need not be the only - nor indeed the correct - interpretation of the contrast between the two cases. As some commentators have suggested, the cases can also be distinguished from each other on the basis of their facts. In this case, there would be no normative conflict. Whichever view seems more well-founded, the point of principle remains, namely that it cannot be excluded that two tribunals faced with similar facts may interpret the applicable law differently.

provide a formally authoritative ruling.[53] Such authority is not normally present in international law. To the extent that such conflicts emerge, and are considered a problem (which need not always be the case), they can only be dealt with through legislative or administrative means. Either States adopt a *new law* that settles the conflict. Or then the institutions will seek to coordinate their jurisprudence in the future.

(b) Fragmentation through the emergence of special law as exception to the general law

53. A different case is one where an institution makes a decision that deviates from how situations of a similar type have been decided in the past because the new case is held to come not under the general rule but to form an *exception* to it. This may be illustrated by the treatment of reservations by human rights organs. In the 1988 *Belilos* case the European Court of Human Rights viewed a declaration made by Switzerland in its instrument of ratification as in fact a reservation, struck it down as incompatible with the object and purpose of the Convention, and held Switzerland bound by the Convention "irrespective of the validity of the declaration".[54] In subsequent cases, the European Court has pointed out that the normal rules on reservations to treaties do not as such apply to human rights law. In the Court's view:

> … a fundamental difference in the role and purpose of the respective tribunals [i.e. of the ICJ and the ECHR], coupled with the existence of a practice of unconditional acceptance […] provides a compelling basis for distinguishing Convention practice from that of the International Court.[55]

54. Again, the point is neither to endorse nor to criticize the European Court of Human Rights but to point to a phenomenon which, whatever one may think about it, has to do with

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[53] From a systems-theoretical perspective, the position of courts is absolutely central in managing the functional differentiation - i.e. fragmentation - within the law. Coherence here is based on the duty to decide even "hard cases". See in this regard especially Niklas Luhmann, *Law as a Social System* (transl. by K.A. Zeigert, ed. by F. Kastner, R. Nobles, D. Schiff and R. Zeigert) (Oxford: Oxford University Press 2004) especially pp. 284-296.

[54] *Belilos* v. *Switzerland*, Judgment of 29 April 1988, ECHR Series A (1988) No. 132, p. 28, para. 60.

[55] *Loizidou* v. *Turkey*, Preliminary Objections, Judgment of 23 March 1995, ECHR Series A (1995) No. 310, p. 29, para. 67.

the emergence of exceptions or patterns of exception in regard to some subject-matter, that deviate from the general law and that are justified because of the special properties of that subject-matter.

(c) Fragmentation as differentiation between types of special law

55. Finally, a third case is a conflict between different types of special law. This may be illustrated by reference to debates on trade and environment. In the 1998 *Beef Hormones* case, the Appellate Body of the World Trade Organization (WTO) considered the status of the so-called "precautionary principle" under the WTO covered treaties, especially the Agreement on Sanitary and Phytosanitary Substances (SPS Agreement). It concluded that whatever the status of that principle "under international environmental law", it had not become binding for the WTO.[56] This approach suggests that "environmental law" and "trade law" might be governed by different principles. Which rule to apply would then depend on how a case would be qualified in this regard. This might seem problematic as denominations such as "trade law" or "environmental law" have no clear boundaries. For example, maritime transport of oil links to both trade and environment, as well as to the rules on the law of the sea. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity? The responses are bound to vary depending on which one chooses as the relevant frame of legal interpretation.

2. The function and scope of the *lex specialis* maxim

(a) *Lex specialis* in international law

(i) Legal doctrine

56. The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.[57] It suggests that if a

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[56] European Communities - Measures Concerning Meat and Meat Products (Hormones) 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 123-125.

[57] The principle *lex specialis derogat lege generali* has a long history. The principle was included in the Corpus Iuris Civilis. See Papinian, Dig. 48, 19,41 and Dig. 50, 17,80. The latter states: "in toto iure generi per speciem

121. The relationship between general law and particular rules is ubiquitous. One can always ask of a particular rule of international law how it relates to its normative environment. This may not always be visible. States sometimes create particular rights and obligations where there appears to be no general law on the matter at all. In such cases, these rights and obligations do not seem, on the face of them, to have the character of *leges speciales*. They are not contrasted to anything more "general". The normative area "around" such rules appears to remain a zone of no-law, just like the matter they now cover used to be before such new regulation entered into force.

122. The foregoing reflections suggest, however, that whatever logical, conceptual or political problems there are around the old problem of "gaps" in international law,[147] there is at least one sense in which the idea of a zone of no-law as regards *lex specialis* is a conceptual *impossibility*. If a legal subject invokes a right based on "special law", then the validity of that claim can only be decided by reference to the whole background of a legal system that tells how "special laws" are enacted, what is "special" about them, how they are implemented, modified and terminated. It is impossible to make legal claims only in a limited sense, to opt for a part of the law, while leaving the rest out. For legal reason works in a closed and circular system in which every recognition or non-recognition of a legal claim can only be decided by recognizing the correctness of other legal claims. This can be illustrated in the matter of so-called "self-contained regimes".

3. Self-contained (special) regimes

(a) What are self-contained regimes?

123. The Commentary to article 55 (*lex specialis*) of the Commission's draft articles on responsibility of States for internationally wrongful acts makes a distinction between "weaker forms of *lex specialis*, such as specific treaty provisions on a single point" and "strong forms of *lex specialis,* including what are often referred to as self-contained regimes". Though the

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[147] The present discussion is not intended to take sides in the debate about the permissibility or desirability of "*non liquet*", as discussed between Hersch Lauterpacht and Julius Stone and elaborated in the writings of Lucien Siorat, Gerald Fitzmaurice, or Ulrich Fastenrath, among others.

commentary refrains from defining what that "strong form" is, it gives two examples: the judgment by the Permanent Court of International Justice in the *S.S. Wimbledon* case (1923) and that of the International Court of Justice in the *Hostages* case (1980).[148]

124. This approach is not free of ambiguity. The Commission recognized and defined self-contained regimes as a subcategory (namely a "strong form") of *lex specialis* within the law of State responsibility. As such, it appears to cover the case where a special set of secondary rules claims priority over the secondary rules in the general law of State responsibility. Such a definition closely follows the use of the term by the International Court of Justice in the *Hostages* case where the Court identified diplomatic law as a self-contained regime precisely by reference to the way it had set up its own "internal" system for reacting to breaches:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse.[149]

125. In other words, no reciprocal breach of diplomatic immunity is permissible; the receiving State may only resort to remedies in diplomatic law which, the Court presumed, were "entirely efficacious". In *Nicaragua*, the Court viewed human rights law somewhat analogously: the relevant treaties had their own regime of accountability that made other ways of reaction inappropriate.[150]

126. The judgment by the Permanent Court of International Justice in the *S.S. Wimbledon* case, however, uses a broader notion of a self-contained regime. At issue here was the status of the Kiel Canal which was covered both by the general law on internal waterways as well as the

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[148] Draft Articles on State Responsibility, Commentary on Article 55, para. 5 in *Official Records of the General Assembly, Fifty-sixth Session*, *Supplement No. 10* (A/56/10), 2001) pp. 358-359.

[149] *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) I.C.J. Reports 1980* p. 41, para. 86.

[150] The Court noted that the use of force was not "the appropriate method to ensure respect of human rights", for "when human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided in the conventions themselves. *Nicaragua* case, paras. 267-8.

special rules on the Canal as laid down in the Treaty of Versailles of 1919. Here is how the Court characterized the law applicable:

> Although the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway of the State holding both banks, the Treaty [of Versailles] has taken care not to assimilate it to the other internal navigable waterways of the German Empire. A special section has been created at the end of the Part XII … and in this section rules exclusively designed for the Kiel Canal have been inserted; these rules differ on more than one point from those to which other internal navigable waterways of the Empire are subjected … The difference appears more specifically from the fact that the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways … is limited to the Allied and Associated Powers alone … The provisions of the Kiel Canal are therefore self-contained. The idea which underlies [them] is not to be sought by drawing an analogy from [provisions on other waterways] but rather by arguing *a contrario*, a method of argument which excludes them.[151]

127. Now here the notion of a "self-contained regime" is not limited to a special set of secondary rules. The "special" nature of the Kiel Canal regime appears instead to follow rather from the speciality of the relevant primary rules - especially obligations on Germany - laid down in the appropriate sections of the Treaty of Versailles than of any special rules concerning their breach. Though the Court here used the expression "self-contained", it is hard to say whether it meant more than that where there were conventional rules on a problem, those rules would have priority over any external ones. This is clearly the sense of that expression it employed in a 1925 opinion where it held that in order to interpret certain expressions in a treaty, it was unnecessary to refer to external sources: "Everything therefore seems to indicate that, in regard to this point, the Convention is self-contained and that … the natural meaning of the words [should be employed]."[152] This is of course a very common judicial technique and corresponds to the principle, stated in section C above, concerning the pragmatic priority of treaty rules over general law.[153]

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[151] *Case of the S.S. "Wimbledon", P.C.I.J. Series A,* No. 1 (1923) pp. 23-4.

[152] *Exchange of Greek and Turkish Populations, Advisory opinion, P.C.I.J. Series B,* No. 10 (1925) p. 20.

[153] This is frequently seen in territorial disputes. If a treaty determines a territorial boundary, then there is no need to discuss *uti possidetis*, intertemporal law of the relevant *effectivités*. See e.g. *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad) I.C.J. Reports 1994* pp. 38-39, paras. 75-76.

128. Thus, provisionally, it is possible to distinguish between two uses for the notion of "self-contained regime". In a narrow sense, the term is used to denote a special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation. In a broader sense, the term is used to refer to interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law. That set of rules may either be a very limited one - for example, the regime of judicial cooperation between the International Criminal Court and States Parties under the Rome Statute[154] - or then it may be rather wide - such as, for instance, the technique of interpreting the European Convention on Human Rights as "an instrument of European public order (*ordre public*) for the protection of individual human beings".[155] In this wider sense, self-containedness fuses with international law's contractual bias: where a matter is regulated by a treaty, there is normally no reason to have recourse to other sources.

129. But an occasional use of the notion of "self-contained regime" extends it even further than the *S.S. Wimbledon* case. Sometimes whole fields of functional specialization, of diplomatic and academic expertise, are described as self-contained (whether or not that word is used) in the sense that special rules and techniques of interpretation and administration are thought to apply.[156] For instance, fields such as "human rights law", "WTO law", "European law/EU law", "humanitarian law", "space law", among others, are often identified as "special" in the sense that rules of general international law are assumed to be modified or even excluded in their administration. One often speaks of "principles of international environmental law", or "principles of international human rights law" with the assumption that in some way those principles differ from what the general law provides for analogous situations.

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[154] For this suggestion, see Göran Sluiter, "The Surrender of War Criminals to the International Criminal Court", Loyola of Los Angeles International and Comparative Law Review, vol. 25 (2003) p. 629.

[155] *Cyprus v. Turkey*, Judgment of 10 May 2001, ECHR 2001-IV, p. 25, para. 78.

[156] This is implied in many of the essays in L.A.N.M. Barnhoorn & K.C. Wellens (eds.), *Diversity in Secondary Rules* … supra note 12.

130. For instance, the principle of "dynamic" or teleological interpretation is much more deeply embedded in human rights law than in general international law.[157] In the view of the European Court of Human Rights, as is well-known, in applying a "normative treaty", one should look for its object and purpose and not to that interpretation that would provide the most limited understanding of the obligations of States parties.[158] Making the contrast to general law even sharper, it has stated that:

> … unlike international treaties of the classic kind, the [European] Convention comprises more than merely reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral relationships, objective obligations.[159]

131. In comparing itself to the International Court of Justice, the European Court has found "such a fundamental difference in the role and purpose of the separate tribunals [which] provides a compelling basis for distinguishing Convention practice from that of the International Court".[160] That this is not an idiosyncratic aspect of the European Convention, is suggested by the parallel attitudes within the Inter-American Court of Human Rights and the Human Rights Committee.[161]

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[157] For the role of "dynamic" or "teleological" interpretation in human rights law, see Patrick Wachsmann, "Les methodes de l'intérpretation des conventions à la protection des droits de l'homme", in: SFDI, *La protection des droits de l'homme et l'évolution du droit international, Coll. 1998* (Paris: Pedone, 1998) pp. 188-193. See also Lucius Caflisch & Antonio Cancado Trindade, "Les conventions americaine et européenne des droits de l'homme et le droit international général", 108 RGDIP vol. 108, (2004) pp. 11-22.

[158] *Wemhoff v. FRG,* Judgment of 27 June 1968, ECHR (1968) Series A, No. 7, p. 23, para. 8.

[159] *Ireland v. the United Kingdom*, Judgment of 18 January 1978, ECHR (1978) Series A, No. 25, p. 90, para. 239. Likewise *The Effect of Reservations*, OC-2/82, Int-Am CHR Series A, No. 2, pp. 14-16, paras. 29-33 and *Restrictions to the Death Penalty,* OC-3/83, Int-Am CHR Series A, No. 3, pp. 76-77, para. 50.

[160] *Loizidou v. Turkey* (Preliminary Objections) Judgment of 23 March 1995, ECHR (1995) Series A, No. 310, pp. 26-27, paras. 70-72 and p. 29, paras. 84-85.

[161] Invoking the practice of the European Court, the Inter-American Court has identified as part of the "corpus juris of human rights law" the principle that "human rights treaties are living instruments whose interpreters must consider changes over time and present-day conditions", *Consular Assistance,* Advisory opinion of 1 October 1999, Int-Am CHR Series A, No. 16, pp. 256-7, paras. 114-115. In its controversial General Comment No. 24 the United Nations Human Rights Committee stated that the provisions of the Vienna Convention on the Law of Treaties were "inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant in particular, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place …", General comment on issues

132. A self-contained regime in this third sense has effect predominantly through providing interpretative guidance and direction that in some way deviates from the rules of general law. It covers a very wide set of differently interrelated rule-systems and the degree to which general law is assumed to be affected varies extensively. What, indeed, may be the normative sense of the division of international law into 17 different "topics" or "branches" in a 1971 Report to the Commission by the United Nations Secretariat?[162] Even as it may be argued that such a classification is merely "relative" and serves principally didactic purposes, it is still common to link to the branches or subsystems thus identified with special legal principles concerning the administration of the relevant rules.[163]

133. None of this is to say that the effect of a self-contained regime in this third sense would be clear or straightforward. Indeed, writers such as Brownlie or Pellet have been quite critical of giving too much emphasis on the speciality of something like "human rights law".[164] Likewise, the question whether "international environmental law" designates a special branch of international law within which apply other interpretative principles than apply generally, or merely an aggregate of treaty and customary rules dealing with the environment, may perhaps seem altogether too abstract to be of much relevance.[165] The standard designation of the laws of armed conflict, for instance, as *lex specialis* and a self-contained regime - or even "a deviant body of rules of public international law"[166] - leaves it wide open to which extent the general

relating to reservations made upon ratification or accession to the Covenant of the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, document CCPR/21/Rev.1/Add.6 (1994), see also ILM vol. 35 (1995) p. 839, para. 17.

[162] Survey of International Law, Working Paper Prepared by the Secretary-General, *Yearbook … 1971* vol. II, Part one, pp. 1-99.

[163] See e.g. the discussion in Peter Malanczuk, "Space Law as a Branch of International Law" in Barnhoorn & Wellens, *Diversity in Secondary Rules …* supra note 12 pp. 144-146.

[164] See Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003) 6th ed., pp. 529-530 (a criticism of the speciality of human rights law); Alain Pellet, "Droit de l'hommisme et droit international", Gilberto Amado Memorial Lecture, 18 July 2000 (United Nations 2000).

[165] This issue is at the heart of Tuomas Kuokkanen, *International Law and the Environment. Variations on a Theme* (The Hague: Kluwer, 2002) (tracing a history of international lawyers' treatment of environmental problems from rather straightforward application of traditional rules to a complex management of resource regimes).

[166] H.H.G. Post, "Some Curiosities in the Sources of the Law of Armed Conflict Conceived in a General International Legal Perspective" in Barnhoorn & Wellens, *Diversity in Secondary Rules …*, supra note 12, p. 96.

rules of, say, the law of treaties are affected.[167] But however doubtful international law "generalists" may be of the normative nature of such designations, specialists in such fields regularly hold them important. Functionally oriented as such regimes are, they also serve to identify and articulate interests that serve to direct the administration of the relevant rules.[168]

134. This may be illustrated by the debate over the role of general international law in trade law. There is no doubt that the WTO dispute settlement system is a self-contained regime in the sense that article 23 of the Dispute Settlement Understanding (DSU) excludes unilateral determinations of breach or countermeasures outside the "specific subsystem" of the WTO-regime.[169] It is sometimes argued that general international law should not be applied in the administration of WTO treaties as the latter differ fundamentally in their general orientation from the orientation of regular public international law: where the latter is based on State sovereignty, the former derives its justification from the theory of comparative advantage. Principles of interpretation inspired by the latter may often be in complete contrast with those inspired by the former.[170] It is true that by now, WTO Dispute Settlement organs have used international customary law and general principles very widely to interpret WTO treaties.[171] Few lawyers would persist to hold the WTO covered treaties, whatever their nature, as fully

[167] The potential conflict between the need to uphold the binding force of peace treaties and the principle laid down in Article 52 of the Vienna Convention on the Law of Treaties ("invalidity in case of coercion of a State by the threat of force") for example, may not be soluble within the confines of the Vienna Convention at all.

[168] In a sociological sense, they may even be said to express different social rationalities: a clash between them would appear as a clash of rationalities - for example, environmental rationality against trade rationality, human rights rationality against the rationality of diplomatic intercourse. Thus described, fragmentation of international law would articulate a rather fundamental aspect of globalized social reality itself - the replacement of territoriality as the principle of social differentiation by (non-territorial) functionality. See further Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law? …", supra note 14, pp. 553-579 and Andreas Fischer-Lescano & Gunther Teubner, "Regime-Kollisionen: Kompatibilität durch vernetzung Statt Rechsteinheit", to be published.

[169] The term "specific subsystem" is used in Gabrielle Marceau, "WTO Dispute Settlement …" supra note 42, p. 755, pp. 766-779.

[170] Jeffrey Dunoff, "The WTO in Transition: Of Constituents, Competence and Coherence", George Washington International Law Review, vol. 33 (2001) pp. 991-2.

[171] See generally James & Kevin R. Gray, "Principles of International law in the WTO Dispute Settlement Body", ICLQ, vol. 50 (2001) pp. 249-298 and Eric Canal-Forgues, "Sur l'interprétation dans le droit de l'OMC", RGDIP, vol. 105 (2001) pp. 1-24.

closed to public international law.[172] The question remains, however, that trade rationality may occasionally - perhaps often - be at odds with the rationality of protecting the sovereign and that when a choice has to be made, the general objectives and "principles" of trade law - however that is understood - will seem more plausible to trade institutions and experts than traditional interpretative techniques.

135. The three notions of "self-contained regime" are not clearly distinguished from each other. A special system of secondary rules - the main case covered by article 55 of the draft articles on responsibility of States for internationally wrongful acts - is usually the creation of a single treaty or very closely related set of treaties. An example might be the "non-compliance system" under the 1985 Vienna Convention on the Protection of the Ozone Layer and the related 1987 Montreal Protocol that has priority over the standard dispute settlement clause in the Vienna Treaty.[173] A special regime on some (territorial, functional) problem-area - the *S.S. Wimbledon* case - may cover several instruments and practices, united by their orientation towards a single problem - establishment of a free trade area, say, or a universal trade regime such as the one administered under the WTO. It goes without saying that a treaty-regime may be both special in the first and the second sense, that is as a self-contained regime of remedies (State responsibility) and a set of special rules on adoption, modification, administration or termination of the relevant obligations.

136. The widest notion covers a whole area of functional specialization or teleological orientation at a universal scale: the laws of armed conflict, for instance, identified as *leges speciales* by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* case, or environmental law, often thought to be accompanied with special principles, such as the principle of precaution, "polluter pays" and "sustainable development" that seek to direct the administration of environmental matters.[174] We can see the significance

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[172] See further section C.3. (c) (ii) (2) below.

[173] See Article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer and comments in Martti Koskenniemi, "Breach of Treaty or Non-Compliance. Reflections on the Enforcement of the Montreal protocol", YBIEL vol. 3 (1992) pp. 123-162.

[174] See e.g. Brownlie, *Principles* … supra note 164, pp. 274-281. See also case details Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, *I.C.J. Reports 1996* p. 226 passim.

of such speciality in situations such as the *Beef Hormones* case where the European Community argued within the WTO that the precautionary principle that had been included in the 1992 Rio Declaration should influence the assessment of the justifiability of the EC prohibition of the importation of certain meat and meat products. The Appellate Body, however, stated that while it may have "crystallized into a general principle of customary environmental law", it was not clear that it had become a part of general customary law.[175] Cantoning the principle as one of "customary environmental law" left it open, of course, under what circumstances it might have become applicable under "international trade law".

137. It often seems that "much of the action in international law [has] shifted to specialized regimes".[176] At least as concerns State responsibility, this has been the price to pay for a uniform regime. To succeed in devising a single set of secondary rules (and this was a focus of some disagreement among the Special Rapporteurs) they needed to be of such general nature that when States then adopt primary rules on some subject they are naturally tempted to adopt also secondary rules tailored for precisely the breach of those primary rules. The turn from formal dispute settlement to "softer", non-adversarial forms of accountability under environmental treaties ("non-compliance mechanisms") may serve as an example. Such variation need not be overly problematic. As Crawford has observed, there never was any assumption in the Commission that its system of responsibility would be a "one-size-fits all". Whether States would wish to follow the general law or opt out from it was both a "political question and (in relation to existing regimes) a question of interpretation".[177] But if instead of enhancing the effectiveness of the relevant obligations the regime serves to dilute existing standards - a problem identified years ago famously by Prosper Weil[178] - then the need of a residual application, or a "fall-back" onto the general law of State responsibility may seem called for.

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[175] *European Communities - Measures Concerning Meat and Meat Products (Hormones)* (16 January 1998) WT/DS26/AB/R, DSR 1998:I, p. 180-181, para. 123-125. For the "precautionary principle" in environmental law, see Patrick Daillier & Alain Pellet, *Droit international* … supra note 73, 2002) pp. 1307-1310.

[176] Daniel Bodansky & John R. Crook, "Introduction and Overview to Symposium: The ILC's State Responsibility Articles", AJIL vol. 96 (2002) p. 774.

[177] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", AJIL vol. 96 (2002), p. 880.

[178] Prosper Weil, "Towards Relative Normativity in International Law", AJIL vol. 77 (1983) pp. 413-442.

(b) Self-contained regimes and the ILC work on State responsibility

138. Special Rapporteur Roberto Ago came to the question in connection with his discussion of the "source" and "content" of the international obligation breached.[179] Does the identity of the norm that has been breached affect the type of responsibility that follows? As is well-known, Ago discussed this question predominantly in terms of the gradation of State responsibility through the distinction between international "crimes" and "simple breaches".[180] There is no need to embark upon that question here. Nevertheless, it is useful to note that apart from that distinction, Ago did not see a need for classifying different consequences by reference to the source or the content of the obligation breached. What he aimed at, and achieved, was a single, generally applicable set of rules about wrongfulness that could cover the breach of any primary rules. As a counterpart to that generality, he accepted that States were at liberty to provide for special consequences for the breach of particular types of primary rules:

> In the text of a particular treaty concluded between them, some States may well provide for a special regime of responsibility for the breach of obligations for which the treaty makes special provision.[181]

139. The matter of how these special treaty-regimes would relate to the general rules was not pursued by Ago but was taken up at great length by Special Rapporteur Riphagen in 1982 in connection with his discussion of what he called the "general problem underlying the drafting of Part 2 of State responsibility". What for Ago had been a matter of taking note of the self-evident competence of States to set up by treaty special systems of State responsibility appeared to become quite central, and rather problematic, for the drafting of part 2. In Riphagen's words:

> International law as it stands today is not modelled on one system only, but on a variety of international sub-systems within each of which the so-called 'primary rules' and the so-called 'secondary rules' are closely intertwined - indeed, inseparable.[182]

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[179] See especially Roberto Ago, Fifth Report on State Responsibility, *Yearbook … 1976* vol. II, Part one, p. 6, paras. 12-15.

[180] Ago, Fifth Report, ibid., p. 26, para. 80.

[181] Ago, Fifth Report, ibid., p. 6, para. 14. See also Draft Article 17, Ago, Fifth Report, ibid., p. 24, para. 71.

[182] Willem Riphagen, Third Report on State Responsibility, *Yearbook* … 1982 vol. II, Part one, p. 28, para. 35.

140. As Riphagen saw it, the presence of such "subsystems" (which he also sometimes termed "regimes"), that is, interrelated systems of primary and secondary rules as well as procedures for realizing responsibility,[183] was a very common occurrence: when States elaborated primary rules, the question what to do if these were violated emerged almost automatically. And in such case, the States would often provide for some special rules on the content, degree and forms of State responsibility. Though the main case seemed to be the one where a special regime was provided by treaty, Riphagen, in apparent contrast to Ago, also assumed that the content of a particular primary rule might justify supplementing it by special secondary rules. The attempt to construct such linkages became quite central for Riphagen who, for this purpose, discussed aggression and other breaches of international peace and security, as well as countermeasures in connection with a wide definition of objective regimes. Apart from the question of international "crimes", the discussion did not proceed towards the identification of other specific types of relationships between particular primary rules and the consequences of their violation.[184]

141. Riphagen's approach was inspired by a "functional analysis" of three different types of rules of international law: those seeking to keep States separate, those that reflected what he called a "common substratum" and those that sought to organize parallel exercises of State sovereignty.[185] Whatever its sociological merits, the analysis failed to convince the Commission which did not integrate his "systems" or "subsystems" into the draft articles. Also his attempt to depart from Ago by classifying the consequences of the breach of obligations by the source or content of those obligations (general custom - conventional international law - judicial, quasi-judicial and other institutional decisions) never ended up in the draft.[186] This did not mean that the Commission wished to exclude tailoring the consequences of a breach to the nature of the primary rule violated - only that it felt it sufficient to deal with this by a savings clause the formulations of which finally ended up in what became article 55.

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[183] Riphagen, Third Report, ibid., p. 28, para. 38.

[184] Willem Riphagen, Fourth Report, *Yearbook … 1983* vol. II, Part one, pp. 8-24, paras. 31-130.

[185] Riphagen, Third Report, supra note 182 pp. 28-30, paras. 39-53.

[186] For the proposal, see Willem Riphagen, Third Report, ibid., pp. 40-44, paras. 106-128.

142. It was, in other words, accepted that the articles had residual nature, and that special regimes of responsibility could be adopted by States. What was the relationship of such regimes to the general law? Even though Riphagen used the term "self-contained", and foresaw a "theoretical" possibility that the relevant set of conduct rules, procedural rules, and status provisions [might form] a closed legal circuit,[187] in fact he never wanted to say they were completely isolated:

> "This does not mean that the existence of the subsystem excludes permanently the application of any general rules of customary international law relating to the legal consequences of wrongful acts … [T]he subsystem itself as a whole may fail, in which case a fall-back on another subsystem may be unavoidable".[188]

143. This seems evident. Two observations are in place, however. First, though Riphagen only speaks of "failure" of a subsystem, it must be assumed that the same consequence may also follow from the simple silence of the subsystem. On the other hand, although Riphagen only speaks of a fall-back on other "subsystems", it is hard to see why he would wish to exclude fall-back on the general rules of State responsibility - as indeed he elsewhere specifically says:

> Every one of the many different régimes (or subsystems) of State responsibility … is in present-day international law subject to the universal system of the United Nations Charter, including its elaboration in unanimously adopted declarations ...[189]

144. Riphagen did not elaborate on the nature or scope of this "universal system" - apart from noting that it also included *jus cogens*. That question was in due course completely absorbed by the question of "crimes".[190]

145. Despite the terminology used by Riphagen, the substance of his arguments is relatively uncontroversial and does little than recapitulate points made in the first part of this study concerning the relationship between special and general law and the pragmatic need to prioritize

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[187] Willem Riphagen, Introduction, *Yearbook … 1982* vol. I, p. 202, para. 16.

[188] Willem Riphagen, Third Report, supra note 182, p. 30, para. 54.

[189] Riphagen, Third Report, ibid., p. 39, para. 104.

[190] Riphagen, Third Report, ibid., p. 39, paras. 104-105.

the former to the latter. The draft articles, Riphagen noted, "cannot exhaustively deal with the legal consequences of any and every breach of any and every legal obligation".[191] Thus, although he had described the question of subsystems as a "general problem underlying the drafting of part 2", Riphagen felt it could still be resolved in a relatively simple and uncontroversial way by a general savings clause.[192] The result was then that the provisions of the draft itself became "no more than rebuttable presumptions as to the legal consequences of internationally wrongful acts".[193]

146. At this stage, Riphagen noted the possibility that there might be violation of rules under two subsystems providing for parallel or differing consequences (e.g. countermeasures might be allowed under one subsystem but prohibited under another). While the *lex specialis* rule might resolve some such problems, it could not automatically resolve a possible conflict where the object and purpose of the subsystems might differ - an example might concern the application of principles of environmental law within the administration of a trade instrument. For this purpose Riphagen suggested that "it would still seem necessary to draw up a catalogue of possible legal consequences in a certain order of gravity, and to indicate the principal legal circumstances precluding one or more legal consequences in a general way".[194] This led him to a discussion of the hierarchy of legal consequences - a discussion that peaked in, and in the end was exhausted

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[191] Riphagen, Third Report, ibid., p. 31, para. 55.

[192] The original form of that clause in 1982 was as follows:

Article 3

> The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Riphagen, Third Report, ibid., p. 47. The effect of this was to provide for the application of the ILC draft "*unless otherwise provided for*". See also Riphagen, Riphagen, Third Report, ibid., p. 39, para. 103. The Commission agreed. In 1983, it adopted the following savings clause (article 2): "… the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question". *Yearbook ... 1983* vol. II, Part two, p. 42, para. 113.

[193] Riphagen, Third Report, ibid., p. 31, para. 57.

[194] Riphagen, Third Report, ibid., p. 34, para. 77.

by, the discussion of international crimes.[195] In the end, the only hierarchy proposed by Riphagen were two limitations to the savings clause. A self-contained regime could not deviate from rules of *jus cogens* nor from "the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security".[196]

147. Like Riphagen, his follower Arangio-Ruiz accepted the "presence of those treaty-based systems or combinations of systems which tend to address, within their own contractual or special framework, the legal regime governing a considerable number of relationships among States parties, including in particular the consequences of any breaches of the obligations of the States parties under the system".[197] Within such a broad, systemic view, he noted that "some legal scholars" had identified a category of "self-contained regimes" that affected "the *faculté* of States parties to resort to the remedial measures that are open to them under general law".[198] Arangio-Ruiz made express the difference between the broader view that spoke in terms of systems or subsystems of rules in general and the narrower view which he identified with Bruno Simma's influential 1985 article, focusing on subsystems that intended:

> to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party.[199]

148. Arangio-Ruiz himself appeared initially to adhere to the wider notion, noting as examples of self-contained regimes such as the "system" set up by the treaties establishing the EC, human rights treaties in addition to diplomatic law as stated by the ICJ in the *Hostages* case. Developing his argument, however, he focused on the narrower problem, namely whether the remedial measures - especially countermeasures - in such regimes "affect[ed] to any degree the

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[195] For Willem Riphagen, "crimes" denoted one special subsystem of international law that provided a special set of consequences. See Riphagen, Third Report, ibid., pp. 44-46, paras. 130-143.

[196] Willem Riphagen, Introduction to draft article 2, *Yearbook … 1984* vol. I, p. 261, paras. 4, 6-9.

[197] Gaetano Arangio-Ruiz, Third Report on State Responsibility, *Yearbook … 1991* vol. II, Part one, p. 25, para. 84.

[198] Arangio-Ruiz, Third Report, ibid., p. 25, para. 84.

[199] Arangio-Ruiz, Third Report, ibid., pp. 25-26, para. 84, quoting Bruno Simma, "Self-Contained Regimes", *Netherlands Yearbook of International Law*, vol. XVI (1985), pp. 115-116.

possibility for legal recourse by States parties to the measures provided for, or otherwise lawful, under general international law".[200] Consequently, most of Arangio-Ruiz's treatment of self-contained regimes - in particular his discussion of the relevant State practice - sought an answer to the question whether such regimes were fully isolated from general law ("formed closed legal circuits") or, in other words, excluded future recourse to the remedies in the general law of State responsibility. His answer to that question was an emphatic no. Because he defined self-contained regimes as sets of rules that were hermetically isolated from general law he found no such regimes in practice: "… none of the supposedly self-contained regimes seems to materialize *in concreto*".[201]

149. Arangio-Ruiz did not oppose the establishment of special treaty-based regimes. They were needed "to achieve, by means of ad hoc machinery, a more effective organized monitoring of violations and responses thereto". But he rejected the conclusion that this would bar them from ever resorting to general law.[202] Fall-back to general remedies was needed at least if the State failed to receive effective reparation or where the unlawful act persisted while the procedures in the special regime are in progress.[203] He admitted that derogations or "fall-backs" should only take place in "extreme cases". A special regime was, after all, a multilateral bargain from which each party received some benefits for submitting to the common procedure. Nonetheless, his main point concerned the openness of allegedly "closed" regimes. The priority of the special regime followed from the general rules of international law and treaty interpretation. But it did not entail a presumption of abandonment of the guarantees of general law - this is how Arangio-Ruiz read the clause concerning the residual nature of the draft articles n the (then) article 2. It would fail to correspond to the intent of the States wishing to strengthen (instead of to derogate from) the ordinary rules on State responsibility.[204]

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[200] Arangio-Ruiz, Third Report, ibid., p. 26, paras. 85-86. Likewise Gaetano Arangio-Ruiz, Fourth Report, *Yearbook … 1992* vol. II, Part one, p. 35, para. 97.

[201] Arangio-Ruiz, Fourth Report, ibid., p. 40, para. 112.

[202] Arangio-Ruiz, Fourth Report, ibid., p. 40, paras. 112 and 114.

[203] Arangio-Ruiz, Fourth Report, ibid., pp. 40-41, para. 115.

[204] Arangio-Ruiz, Fourth Report, ibid., p. 42, paras. 123-124.

150. Special Rapporteur James Crawford came to self-contained regimes in 2000 in connection with draft articles 37-39 that dealt with the relationship between the draft of the Commission and the law outside it. Article 37 contained the general clause on the residual role of the draft: special rules would be allowed. Crawford refrained from responding in general terms to the question whether such special rules were also exclusive. This was "always a question of interpretation in each case".[205] As an example of the case where the self-contained regime was "exclusive", Crawford referred to the WTO remedies system. As a case where the special regime only modified some aspect of the general law, he referred to article 41 of the European Convention on Human Rights. Crawford left open, however, whether "exclusivity" here meant exclusive and *final* replacement of the general law or merely its substitution at an initial stage with the possibility of "fall-back" if the self-contained regime had, as Riphagen had put it, "failed". The two examples survive in the Commentary to the draft articles.

151. In this connection, article 37 was lifted from part 2 into part 4 ("General Provisions") where it became article 55, was titled *lex specialis* and came to cover all of the draft, both conditions of existence of a wrongful act as well as the content and implementation of State responsibility.[206] As pointed out at the beginning of this Report, the Commission did not mean thereby that every deviation under article 55 would have the nature of a "self-contained regime". It distinguished between what it called a "strong" and a "weak" form of *lex specialis* and labelled only the former "self-contained". Why it used the terminology of "strong"/"weak" is far from clear, however, and possibly a source of confusion. The operative distinction in the Commentary is not between provisions that are normatively "stronger" and those that are normatively "weaker" but that between "specific treaty provisions on a single point" (regular *lex specialis* - the Commission's "weak" form) and whatever could be extracted from the *S.S. Wimbledon* and *Hostages* cases (the Commission's "strong" form). Because the Commission only defined

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[205] James Crawford, Third Report on State Responsibility, document A/CN.4/507/Add.4 (2001) p. 27, para. 420.

[206] Article 55 (*Lex specialis*) reads:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

"self-contained regimes" by reference to the examples of the two cases, it thereby imported, as we have seen, two different meanings into the draft: (1) the view of a self-contained regime as a special set of consequences for wrongfulness (*Hostages*) and (2) the view of a self-contained regime as a set of primary and secondary rules governing the administration of a problem (*S.S. Wimbledon*). Neither of these is necessarily any "stronger" (at least "stronger" in the sense of more binding, or less amenable to derogation) than a "specific treaty provision [ ] on a single point".

152. The following conclusions may be made of the treatment of "self-contained regimes" by the Commission in the context of State responsibility:

(1) *Definition*. The concept of "self-contained regimes" was constantly used by the Special Rapporteurs in a narrow and a wide sense and both were imported into the Commission's commentary on article 55. As a self-contained regime qualifies (a) a special set of secondary rules that determine the consequences of a breach of certain primary rules (including the procedures of such determination) as well as (b) any interrelated cluster (set, regime, subsystem) of rules on a limited problem together with the rules for the creation, interpretation, application, modification, or termination - in a word, administration - of those rules. In addition, academic commentary and practice make constant reference to a third notion - "branches of international law" - that are also assumed to function in the manner of self-contained regimes, claiming to be regulated by their own principles;

(2) *Establishment*. States are entitled to set up self-contained regimes that have priority over the general rules in the draft articles. The only limits to this entitlement are the same that apply to *lex specialis*. This means, among other things, that "States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law … the special rules in question [must] have at least the same legal rank as those expressed in the articles";[207]

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[207] Draft Articles on State Responsibility, Commentary on Article 55, para. 2 in *Official Records of the General Assembly, Fifty-sixth Session*, *Supplement No. 10* (A/56/10), p. 357.

(3) *Relationship between self-contained regime and general law under normal circumstances*. The relationship between a self-contained regime and the general law on State responsibility should be determined principally by interpreting the instrument(s) that established the regime. However, no self-contained regime is a "closed legal circuit". While a special/treaty regime has (as *lex specialis*) priority in its sphere of application, that sphere should normally be interpreted in the way exceptions are, that is, in a limited way. In any case, the rules of the general law on State responsibility - like the rest of general international law - supplement it to the extent that no special derogation is provided or can be inferred from the instrument(s) constituting the regime;

(4) *Failure of the self-contained regime*. The question of residual application of the general rules in situations not expressly covered by the "self-contained regime" or possible "fall-back" to the general rules of State responsibility in case of the failure of that regime is not expressly treated in the draft or in the commentary. However, it is dealt with by Special Rapporteurs Riphagen and Arangio-Ruiz both of whom hold it self-evident that once a self-contained regime fails, recourse to general law must be allowed. What such failure might consist in has not been explicitly treated by the Commission. However, an analogy could be received from the conditions under which the exhaustion of local remedies rule need not be followed. These would be cases where the remedy would be manifestly unavailable or ineffective or where it would be otherwise unreasonable to expect recourse to it;

(5) *Inappropriateness of the term "self-contained"*. None of the Special Rapporteurs and none of the cases discussed by them implies the idea of special systems or regimes that would be fully isolated from general international law. To this extent, the notion of a "self-contained regime" is simply misleading. Although the degree to which a regime or responsibility, a set of rules on a problem or a branch of international law needs to be supplemented by general law varies, there is no support for the view that anywhere general law would be fully excluded. As will become apparent below, such exclusion may not be even conceptually possible. Hence, it is suggested that the term "self-contained regime" be replaced by "special regime".

(c) The relationship between self-contained regimes outside State responsibility and general international law

153. In regard to fragmentation, the main questions of interest concern the relations between the self-contained (special) regime in each of its three meanings, as discussed above, and general law, namely (a) the conditions for the establishment of a special regime; (b) the scope of application of the regime vis-à-vis general international law under normal circumstances; and (c) conditions of "fall-back" to general rules owing to the regime's failure.

(i) Establishment of self-contained (special) regimes

154. As to the first question, there is little doubt that most international law - and not only the law of State responsibility - is dispositive and that contracting out by establishing a regime is possible and limited only to the extent that such limitation may be received from the *jus cogens* nature or otherwise compelling character of general law. Aside from peremptory norms, at least the following limitations should be considered:

(1) The regime may not deviate from the law benefiting third parties, including individuals and non-State entities;

(2) The regime may not deviate from general law if the obligations of general law are of "integral" or "interdependent" nature, have *erga omnes* character or practice has created a legitimate expectation of non-derogation;[208]

(3) The regime may not deviate from treaties that have a public law nature or which are constituent instruments of international organizations.[209]

155. However, different considerations may apply to the establishment of self-contained (special) regimes in each of the three senses of that expression.

156. Setting up a special regime of State responsibility - that is, special consequences for breach - is normally possible only by treaty that identifies the primary rules to which it applies,

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[208] See the discussion on *erga omnes* obligations in section E below.

[209] See the section on *lex specialis* above.

the nature, content and form of the (special) responsibility, and the institutions that are to apply it. Though it is not conceptually inconceivable that such regime might emerge tacitly, or by way of custom (e.g. a regime of collective countermeasures by non-injured States as foreseen under article 56 of the draft articles on responsibility of States for internationally wrongful acts), this would seem exceptional.

157. The establishment of a special regime in the wider sense (*S.S. Wimbledon*, any interlinked sets of rules, both primary and secondary) would also normally take place by treaty or several treaties (e.g. the WTO "covered treaties"). However, it may also occur that a set of treaty provisions develops over time, without conscious decision by States parties, perhaps through the activity of an implementing organ, into a regime with its own rules of regime-administration, modification and termination. It took until 1963 before the European Court of Justice defined the (then) European Economic Community as a "new legal order of international law".[210] The development of European law into a self-contained regime has to a very large extent - including the principles of direct effect, supremacy and the doctrine of fundamental rights - taken place through the interpretative activity of the European Court of Justice, and not always with the full support of all Member States. As we have seen, the same is largely (though in a much narrower sense) true of human rights law as well. Though the States Parties have, of course, established the implementing organs, and thus taken the first step towards self-containedness, the extent of the autonomy of the regimes has been largely determined by those organs. The standard example here is the development of a doctrine on the separability of reservations to the European Convention on Human Rights.[211]

158. The widest of special regimes - denominations such as "international criminal law", "humanitarian law", "trade law", "environmental law" and so on - emerge from the informal activity of lawyers, diplomats, pressure groups, more through shifts in legal culture and in response to practical needs of specialization than as conscious acts of regime-creation. Such

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[210] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Judgment of 5 February 1963, ECR, English special edition, p. 2.

[211] See *Belilos v. Switzerland*, Judgment of 29 April 1988, ECHR (1988) Series A, No. 132, p. 24, para. 50 and p. 28, para. 60.

notions mirror the functional diversification of the international society or, more prosaically, the activities of particular caucuses seeking to articulate or strengthen preferences and orientations that seem not to have received sufficient attention under the general law. The application of special "principles" by specialized implementation organs is a visible feature of such regimes.

(ii) The relationship of the self-contained (special) regime vis-à-vis general international law under normal circumstances

159. The relationship between the special regime and the general law - that is to say, the degree to which a regime is self-contained in the first place - will be predominantly a matter of interpreting the treaties that form the regime. To what extent does a general law come in to fill the gaps or to assist in the interpretation of application - that is, in the administration - of the regime? Once it is clear that no regime is completely isolated from general law, the question emerges as to their relationship *inter se*.

160. It is possible to illustrate the linkages in practice by reference to the operation of the supervisory bodies in human rights and trade law, two regimes specifically mentioned in the Commission's Commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts.

(1) Example: human rights regimes

161. Human rights organs such as the European and the Inter-American Courts of Human Rights regularly refer to rules and principles of general international law concerning not only treaty interpretation but matters such as statehood, jurisdiction and immunity as well as a wide variety of principles of procedural propriety.[212] The Inter-American Court has used its wide advisory jurisdiction to interpret not only other human rights instruments (such as the European Convention or the 1966 International Covenants) but also instruments such as the Vienna Convention on Consular Relations of 1963.[213] In an opinion from 1988 it expressly referred to

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[212] See on this especially the review by Caflisch and Cancado Trindade, "Les conventions americaine et européenne des droits de l'homme et le droit international général".

[213] See "*Other Treaties" Subject to the Consultative Jurisdiction of the Court*, Judgment of 24 September 1982, OC-1/82, Int-Am CHR Series A, No. 1.

the international law principle of continuity of the State according to which State responsibility persists despite changes of government.[214] In a series of recent cases, the European Court of Human Rights has clarified the relationship between the rights in the European Convention and State immunities recognizing the validity of the latter for instance, over the right of access to courts under article 6 (1) of the European Convention. In particular, it has pointed out that:

> [t]he Convention … cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms a part, including those relating to the grant of State immunity.[215]

162. There was no *a priori* assumption that the rules of the Convention would override those of general law. On the contrary, the Court assumed the priority of the general law on immunity, making the point that:

> measures taken by a High Contracting Party which reflect recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right to access to a court as embodied in Article 6 (1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.[216]

163. That the Convention should not be treated as if it existed in a legal vacuum has also been affirmed by the Court in regard to the rules of State jurisdiction and State responsibility. In the *Bankovic* case (1999), it made this point:

> the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing

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[214] *Velásquez Rodríquez* case, Judgment of 29 July 1988, OC-4/88, *Inter-American Yearbook on Human Rights* (1988) p. 990, para. 184.

[215] *McElhinney v. Ireland,* Judgment of 21 November 2001, ECHR 2001-XI, para. 36. Similarly, *Al-Adsani v. the United Kingdom,* Judgment of 21 November 2001, ECHR 2001-XI, p. 100, para. 55.

[216] *Fogarty v. the United Kingdom,* Judgment of 21 November 2001, ECHR 2001-XI, para. 36.

> principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part.[217]

164. In other words, the European Convention on Human Rights is not, and has not been conceived as a self-contained regime in the sense that recourse to general law would have been prevented. On the contrary, the Court makes constant use of general international law with the presumption that the Convention rights should be read in harmony with that general law and without an *a priori* assumption that Convention rights would be overriding.

(2) Example: WTO law

165. Though perhaps more controversial, the matter in the WTO system is not significantly different. Although, as we have seen, it has sometimes been suggested that the WTO covered treaties formed a closed system, this position has been rejected by the Appellate Body in terms that resemble the language of the European Court of Human Rights, noting that WTO agreements should not be read "in clinical isolation from public international law".[218] Since then, the Appellate Body has frequently sought "additional interpretative guidance, as appropriate, from the general principles of international law".[219] More recently a WTO panel has had occasion to specify this as follows:

> We take note that Article 3 (2) of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary international law rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent

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[217] *Bankovic v. Belgium and others,* Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57 (references omitted).

[218] *United States - Standards of Reformulated and Conventional Gasoline* (20 May 1996) WT/DS2/AB/R, DSR 1996:I, p. 16.

[219] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/AB/R, DSR 1998:1, p. 2755, para. 151.

> that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[220]

166. Nonetheless, academic opinion is divided as to how far this actually goes, with focus especially on the use by WTO organs of law from other special regimes, especially environmental law, or under non-WTO treaties. But whatever view one takes on the *competence* of WTO panels and the Appellate Body, that position is neither identical to nor determinative of the question of whether "WTO law" (or more exactly, "WTO covered agreements") is also *substantively* self-contained.[221]

167. The starting-point of analysis are usually articles 3 (2) and 19 (2) of the Dispute Settlement Understanding (DSU) according to which WTO dispute-settlement is intended to preserve the rights and obligations of Members under the covered agreements.[222] This has been sometimes interpreted to mean that non-WTO law cannot be used in any way to effect whatever "rights and obligations" are provided under WTO law.[223] An extreme interpretation might view this as a complete setting aside of all non-WTO law. However, this is countered by the further language of article 3 (2) DSU according to which the panels and the AB are to apply the "customary rules of interpretation of public international law" - a provision that incorporates

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[220] *Korea - Measures Affecting Government Procurement* (19 January 2000) WT/DS163/R, para. 7.96.

[221] This point is made with emphasis in Joost Pauwelyn, *Conflict of Norms* … supra note 21, pp. 460-463.

[222] Article 3 (2) provides:

> "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements"

Article 19 (2) provides that:

> "In their findings and recommendations panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

[223] Thus Joel Trachtman has argued that "WTO dispute resolution panels and the Appellate Body are limited to the application of substantive WTO law and are not authorized to apply general substantive international law or other conventional law", Joel Trachtman, "The Domain of WTO Dispute Resolution", supra note 46 p. 342. Trachtman allows, of course, the application of the Vienna Convention rules of interpretation as well as any other rules specifically incorporated. These, he understands, would mainly deal with procedural, not substantive law.

not only the Vienna Convention on the Law of Treaties but, through its articles 31-32 any other rules of treaty interpretation including, for example, article 31 (3) (c) under which an interpretation should take into account "any relevant rules of international law applicable in the relations between the parties".[224]

168. The VCLT rules on treaty interpretation - articles 31 and 32 - are recognized as customary law and widely applied in the WTO system.[225] But the Appellate Body has frequently discussed and applied also other public international law standards. There has been considerable debate on the relation between the WTO covered treaties and environmental agreements.[226] The Panel in the *Shrimp-Turtle* case (1998) had defined the notion of "exhaustible natural resources" in article XX (g) of GATT so as to include only "finite resources such as minerals, rather than biological or renewable resources". The Appellate Body did not share this view. The notion needed to be interpreted in view of recent developments: "the generic term 'natural resources' in article XX (g) is not 'static' in its construct but is rather 'by definition evolutionary'". In order to seek such an up-date meaning, it referred, among other instruments, to the 1992 Rio Declaration and Agenda 21, the Biodiversity Convention of 1992, and the United Nations Convention on the Law of the Sea and thereby reached the interpretation that all natural resources, living and non-living were included.[227]

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[224] See section F below.

[225] In noting this, the AB used the ICJ as authority for determining the customary law nature of the VCLT rules on interpretation. See *United States - Standards of Reformulated Gasoline* (20 May 1996) WT/DS2/AB/R, DSR 1996:I, pp. 15-16. The customary law nature of article 32 is affirmed in *Japan - Taxes on Alcoholic Beverages* (4 October 1996) WT/DS8/AB/R, DSR 1996:I, p. 104. For further discussion, see Anja Lindroos and Michael Mehling, "Dispelling the Chimera …", supra note 42, pp. 857-877.

[226] See J. Cameron & J. Robinson, "The Use of Trade Provisions in International Environmental Agreements and the Compatibility with GATT", YBIEL vol. 2 (1991) p. 3. For a good overview of the case-law until *Shrimp/Turtle* (1998), see Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* (London: Routledge, 1999) 2nd ed. pp. 397-420. See further Gabrielle Marceau, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAS and other Treaties", Journal of World Trade vol. 35 (2001) pp. 1081-1131.

[227] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/AB/R, DSR 1998:VII, pp. 2794-2797, paras. 127-131. Also, it viewed their exhaustibility by reference to the fact that all seven sea turtles were listed in Appendix 1 of the CITES Convention, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/AB/R, DSR 1998:VII, pp. 2797-8, paras. 132-3.

169. Though many views have been taken in the question concerning applicable law within the WTO, two major positions seem to have emerged. One holds the WTO as part of international law, operating within the general system of international law rules and principles. This position may be rationalized, for example, by presuming that when the States adopted the Marrakesh agreements they were doing that in accordance with and under the rules and principles of international law and that there was no reason to assume - absent express agreements to the contrary - that these rules and principles would not continue to govern the administration of those agreements. The other position focuses on the provisions in the DSU that require that the panels and the AB neither add to nor diminish the obligations under the covered treaties. In practice, however, the two positions may not be altogether difficult to reconcile with almost any practice under the WTO. The latter view may accept even a wide use of international customary law and other treaties by viewing them as incorporated into the WTO either specifically (through article 3 (2) DSU) or implicitly by reference to the context in which the WTO agreements were made. In any case, both positions can accommodate a very wide-ranging practice (somewhat like the "monist" and "dualist" positions within domestic law), including statements such as that by the Panel in the 2000 *Korea - Measures Affecting Government Procurement* case quoted above. There seems, thus, little reason of principle to depart from the view that general international law supplements WTO law unless it has been specifically excluded and that so do other treaties which should, preferably, be read in harmony with the WTO covered treaties.[228]

170. This does not exclude the emergence of a specific "WTO ethos" in the interpretation of the WTO agreements - just like it is possible to discern a "human rights ethos" in the work of the human rights treaty bodies. Nor does it prevent the setting aside of normal State responsibility rules in the government of the WTO treaties. Indeed, this was the *raison d'être* of the WTO system and receives normative force from the *lex specialis* rules of general law itself. Even as it is clear that the competence of WTO bodies is limited to consideration of claims under the covered agreements (and not, for example, under environmental or human rights treaties), when

[228] A recent work taking the latter position is Pauwelyn, *Conflict of Norms* … supra note 21.

elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties).

171. Nor is this any idiosyncrasy of the WTO but extends to the practices under regional trade agreements. For example, in *Feldman v. Mexico*, a NAFTA Arbitration Tribunal needed to determine the meaning of the expression "expropriation" under article 1110 of the NAFTA. The Tribunal found that the article was "of such generality as to be difficult to apply in specific cases". Accordingly, it read it against the "principles of customary international law" in order to clarify whether it applied to State action against grey market cigarette exports.[229]

(3) Conclusions on the relationship of the self-contained (special) regimes vis-à-vis general international law under normal circumstances

172. None of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded. On the contrary, treaty bodies in human rights and trade law, for example, make constant use of general international law in the administration of their special regimes. Though States have the *faculté* to set aside much of the general law by special systems of responsibility or rule-administration, what conclusions should be drawn from this depends somewhat on the normative coverage or "thickness" of the regime. The scope of a special State responsibility regime is normally defined by the relevant treaty. No assumption is entailed that general law would not apply outside of the special provisions. In the case of interlocked set of rules on regime-creation, administration, amendment and termination, general law may have been excluded in a more extensive way. The very set of rules may be governed by special principles of interpretation, reflecting the object and purpose of the regime. This may affect in particular the competence of the interpreting organs tasked to advance the purposes of the regime.

173. Finally, the widest of a self-contained regime - "environmental law", "space law" etc. - interacts with other such denominations or clusters indicating special principles that should be

[229] *Feldman v. United Mexican States*, Award of 16 December 2002, ICSID Case No. ARB(AF)/99/1, ILR vol. 126 (2003) pp. 58, 65, para. 98.

taken account of. It is typical of this third sense that it has neither clear boundaries nor a strictly determined normative force. It brings to legal decision-making considerations and elements that claim relevance and need to be balanced against other considerations. No firm exclusion is implied; the significance of this being that it points to factors and practices that may have more or less relevance depending on how the problem at issue is described (is it a "trade law" problem; it is a problem in "humanitarian law" or in "human rights law"?).

174. As Bruno Simma has suggested in his leading article on the question of self-contained regimes, the main question of interest here is "*Under what circumstance, if any, can there be a fall-back on the general legal consequences of internationally wrongful acts*".[230] As pointed out above, the Special Rapporteurs never considered self-contained regimes or subsystems as "closed legal circuits" in the sense that they would completely and finally exclude the application of the general law. A minimal conclusion that one can draw from practice and literature is that articles 31 and 32 of the VCLT are always applicable unless specifically set aside by other principles of interpretation. This has been affirmed by practically all existing international law-applying bodies.[231] Because these articles - and in particular article 31 (3) (c) - already situate treaty interpretation within the general context of the rights and obligations of the parties, the question of the application of general international law (that is, general customary law and general principles of law) may seem to become somewhat academic. That they are always applicable is very strongly suggested by practice and doctrine alike - but especially

[230] Simma, "Self-Contained Regimes", supra note 199, p. 118, italics in original.

[231] For some recent affirmations, see *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) I.C.J. Reports 2002* p. 645-646, para. 37 (with a list of references to the Court's previous affirmations of the same). For similar recent affirmations by other tribunals, see e.g. *Japan - Taxes on Alcoholic Beverages* (4 October 1996) WT/DS8/AB/R, point D, DSR 1996:I, pp. 104-6; *Restriction of the Death Penalty*, Judgment of September 8, 1983, OC-3/83, Int-Am. CHR Series A, No. 3, p. 76; *Ethyl Corp. v. Canada* (28 November 1997) NAFTA Arbitral Tribunal, ILR vol. 122 (2002) pp. 278-9, paras. 50-52 (noting that also the United States had accepted their status as custom); *Waste Management Inc. v. Mexico* (2 June 2000) ICSID, ILR vol. 121 (2002) p. 51, note 2. The European Court of Human rights has also stated, already early on, that it was "prepared to consider … that it should be guided by Articles 31 to 33 of the Vienna Convention", *Golder v. the United Kingdom,* Judgment of 21 February 1975, ECHR Series A, No. 18, p. 14, para. 29. It affirmed this recently ("the Convention must be interpreted in light of the rules set out in the Vienna Convention …") in *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 350-351, para. 55. For the rather wider formulation of the Iran-US Claims Tribunal ("the task of the Tribunal is to interpret the relevant provisions of the Algiers Accord on the basis of then Vienna Convention on the Law of Treaties") see *Sedco, Inc. v. NIOC*, Iran-US C.T.R., vol. 9, 1985-I, p. 256 (with references to earlier formulations of the same).

by writings of public international law generalists.[232] The position recently taken by Antonio Cassese is representative. Discussing the special procedures inscribed in human rights treaties to supervise the administration of the relevant treaties and reacting to breaches, he points out:

> It would be contrary to the spirit of the whole body of international law on human rights to suggest that the monitoring systems envisaged in the Covenant and the Protocol should bar States parties from 'leaving' the self-contained regime contemplated in the Covenant and falling back on the customary law system of resort to peaceful countermeasures.[233]

175. The same position is taken in numerous academic writings in regard to human rights treaties. Pauwelyn summarizes the position succinctly:

> [I]n their treaty relations states can "contract out" of one, more or, in theory, all rules of international law (other than those of *jus cogens*), but they cannot contract out of the *system* of international law.[234]

176. There are, as Pauwelyn notes, policy reasons for this. But there is also a logical point to make. States cannot contract out from the *pacta sunt servanda* principle - unless the speciality of the regime is thought to lie in that it creates no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie). Overall, the claim (almost never heard) that self-contained regimes are completely cocooned outside international law resembles the views by late-nineteenth century lawyers about the (dualist) relation between national and international law.[235]

177. Under this view, general international law would be applicable only if specifically incorporated as part of the special regime. Whatever the validity of this view under national

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[232] For review of positions, see Arangio-Ruiz, Fourth Report, supra note 200, pp. 36-38, paras. 99-106.

[233] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001) p. 208.

[234] Pauwelyn, Conflict of Norms … supra note 21, p. 37.

[235] In fact, this analogy is made in Joel Trachtman, "Institutional Linkage: Transcending Trade and …", AJIL vol. 96 (2002) pp. 89-91.

law, it is very hard to see how it could be applied to relations between international legal "regimes" and general international law. In the first place, the regime undoubtedly receives - or possibly fails to receive - binding force under general international law. The conditions of validity and invalidity of regime-establishment acts are assessed by general law. But this means also that most of the VCLT - at least its customary law parts - including above all articles 31 and 32 - automatically, and without incorporation, *is* a part of the regime: indeed, it is only by virtue of the VCLT that the regime may be identified as such and delimited against the rest of international law. Thus, in a recent case, the International Court of Justice held that a provision in a *compromis* where it was authorized to apply the "rules and principles of international law" was superfluous if principles of treaty interpretation were meant:

> … the Court would in any event have been entitled to apply the general rules of treaty interpretation for the purpose of interpreting the [relevant] treaty.[236]

178. In fact, there is no evidence of *any* rule-regime that would claim to be valid or operative independently of the VCLT.

179. In the second place, and unlike national law, international law regimes are always partial in the sense that they regulate only some aspects of State behaviour while presuming the presence of a large number of other rules in order to function at all. They are always situated in a "systemic" environment. That, after all, is the *very meaning of the generality* of certain customary law rules of general principles of law. As the Permanent Court of Arbitration pointed out in the *Georges Pinson* case:

> Toute convention internationale doit être repute s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon differente.[237]

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[236] *Case concerning Kasikili/Sedudu Island (Botswana/Namibia) I.C.J. Reports 1999* p. 1102, para. 93.

[237] "Every international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way." *Georges Pinson* case (*France/United Mexican States*) Award of 13 April 1928, UNRIAA, vol. V, p. 422.

180. Or, as stated more recently by the OSPAR Arbitral tribunal:

> Our first duty is to apply the OSPAR Convention. An international Tribunal will also apply customary international law and general principles unless and to the extent that the parties have created a *lex specialis*.[238]

181. This is also reflected in the wide-ranging jurisprudence concerning State contracts. Initially, there may have been a sense that these existed in a legal vacuum. However, since the *Saudi Arabia v. ARAMCO* award (1958), it has become a standard practice to refer to international law as the governing legal order. The Tribunal stated there as follows:

> It is obvious that no contract can exist *in vacuo*, without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the parties. It is necessarily related to some positive law which gives legal effect to the reciprocal and concordant manifestations of intent made by the parties.[239]

182. Even as the proper legal order for such contracts may remain a matter of some controversy, most lawyers would accept the statement of the sole arbitrator in *TOPCO/CALASIATIC* (1977) that this is "a particular branch of international law: the international law of contract".[240] The consequences of this were, again, stated as follows by the Iran-US Claims Tribunal:

> As a *lex specialis*, in relations between the two countries, the treaty supersedes the *lex generalis*, namely customary international law … however … the rules of customary international law may be useful in order to fill in possible lacunae of the law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.[241]

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[238] Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Final Award 2 July 2003) para. 84, ILR vol. 126 (2005) p. 364.

[239] *Saudi Arabia v. ARAMCO*, ILR vol. 27 (1963) p. 165.

[240] *Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Libya*, ILM vol. 17 (1978) p. 13, para. 32. For an overview of the development and present status of the "international law of investment", see e.g. Andreas Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2002) pp. 387-493.

[241] *Amoco International Finance Corporation v. Iran*, Iran-US C.T.R, vol. 15, 1987-II, p. 222, para. 112. I am grateful to Carlos Lopez Hurtado for this and some other references and arguments.

183. These rules and principles include at least those concerning statehood, jurisdiction, State representation, State succession, creation and transfer of sovereignty, privileges and immunities of diplomats, territorial status (e.g. freedom of the High Seas), rules on nationality, concept of "crimes against humanity", not to mention of all the various rules that not only become applicable but are hierarchically superior to the regime-rules by virtue of Article 103 of the Charter of the United Nations. In their review of the practice of the European and Inter-American Courts of Human Rights, a member of the former and the President of the latter highlighted in detail the use of international law of State responsibility, immunity, jurisdiction and the "general principles of law recognized by civilized nations" (not always distinguished from general principles of *international law*) by their treaty bodies. They concluded that:

> les systèmes en cause font partie intégrante du droit international général et conventionnel. Cela signifie que l'idée du fractionnement du droit international … n'a guère de pertinence pour les systémes internationaux de protection des droits de l'homme.[242]

184. To press upon a perhaps self-evident point, there is no special "WTO rule" on statehood, or a "human rights notion" of transit passage, as little as there is a special rule about State immunities within the European Court of Human Rights or a WTO-specific notion of "exhaustible resources". Moreover, the general rules operate unless their operation has been expressly excluded. This was the view of the Chamber of the ICJ concerning the applicability of the local remedies rule in the *ELSI* case. It had no doubt that:

> … the parties to a treaty can therein either agree that the local remedies rule should apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law could be held to have been tacitly dispensed with, in the absence of any words making clear the intention to do so.[243]

185. It is in the nature of "general law to apply generally" - namely inasmuch as it has not been specifically excluded. It cannot plausibly be claimed that these parts of the law - "important principles" as the Court put it - have validity only as they have been "incorporated"

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[242] Caflisch & Cancado Trindade, "Les conventions americaine et européenne des droits de l'homme …", supra note 157, pp. 60-61.

[243] Elettronica Sicula S.p.A. (ELSI) (*United States of America v.* Italy) *I.C.J. Reports 1989* p. 42, para. 50.

into the relevant regimes. There never has been any act of incorporation. But more relevantly, it is hard to see how regime-builders might have agreed *not* to incorporate (that is, opt out from) such general principles. The debate about new states' competence to pick and choose the customary law they wish to apply ended after decolonization without there having been much "rejection" of old custom. Few actors would care to establish relations with a special regime that claimed a blanket rejection of all general international law. Why, in such case, would anyone (including the regime's establishing members) take the regime's engagements seriously?

(iii) Fall-back onto general rules due to the failure of self-contained regimes

186. The third case - the "failure" of the self-contained regime - is one that most commentators would agree brings the general law into operation. However, it is far from clear what may count as "failure". In assessing this, the nature of the regime must clearly be taken into account.[244] For most special regimes, their *raison d'être* is to strengthen the law on a particular subject-matter, to provide a more effective protection for certain interests or to create a more context-sensitive (and in this sense, more "just") regulation of a matter than what is offered under the general law. Reporting and individual applications to human rights treaty-bodies as well as the non-compliance mechanisms under environmental treaties clearly seek to attain precisely this. The same is true of the rapid and effective WTO dispute settlement system.

187. Now sometimes the risk may emerge that the special regime in fact waters down the relevant obligations. This may be caused, for instance, by the accumulation of an excessive backlog in the treatment of individual applications, a non-professional or biased discussion of national reports, or any other intentional or non-intentional malfunction in the institutions of the regime. A dispute-settlement mechanism under the regime may function so slowly or so

[244] See e.g. Arangio-Ruiz, Fourth Report, supra note 200, pp. 40-41, paras. 115-116; Simma, "Self-Contained Regimes", supra note 199, pp. 111-131; Denis Alland, *Justice privée et ordre juridique international. Etude théorique des contre-mesures en droit international public* (Paris: Pedone, 1994) pp. 278-291; Christian Sano Homsi, "Self-Contained Regimes - No Cop-out for North Korea", Suffolk Transnational Law Review, vol. 24 (2000) pp. 99-123 and the various essays in Barnhoorn & Wellens, *Diversity in Secondary Rules* … supra note 12. The idea that a special regime such as the WTO legal order "falls back" on general international law while the degree of "contracting out" remains a matter of interpretation, is also usefully discussed in Pauwelyn, *Conflict of Norms,* supra note 21, pp. 205-236.

inefficiently that damage continues to be caused without a reasonable prospect of a just settlement in sight. At some such point the regime will have "failed" - and at that point it must become open for the beneficiaries of the relevant rights to turn to the institutions and mechanisms of general international law.

188. No general criteria can be set up to determine what counts as "regime failure". The failure might be either substantive or procedural. A substantive failure takes place if the regime completely fails to attain the purpose for which it was created - members of a free trade regime persist in their protectionist practices, pollution of a watercourse continues unabated despite pledges by riparian States parties to a local environmental treaty. Inasmuch as the failure can be articulated as a "material breach" under article 60 of the VCLT, then the avenues indicated in that article should be open to the members of the regime. It cannot be excluded, either, that the facts relating to regime failure may be invoked as a "fundamental change of circumstances" under article 62 of the VCLT.

189. The other alternative is a procedural failure - the institutions of the regime fail to function in the way they should. For instance, they have provided for a reparation but that reparation is not forthcoming.[245] When it is a question about how far must the States parties to the special regime continue to have resort to the special procedures, analogous considerations would seem relevant as in the context of the requirement of exhaustion of local remedies in the law of diplomatic protection. In this regard, the main principles are enunciated in draft articles 8 to 10 of the Commission's present draft on Diplomatic Protection. According to article 10, local remedies need not be exhausted when:

> (a) The local remedies provide no reasonable possibility of an effective redress;
> (b) There is undue delay in the remedial process which is attributable to [the State alleged to be responsible].[246]

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[245] This is the example mentioned in Arangio-Ruiz, Fourth Report, supra note 200, p. 40, para. 115a.

[246] *Official Records of the General Assembly, Fifty-eighth Session*, *Supplement No. 10* (A/58/10) Article 10 [14], p. 84.

190. This would seem to apply when the State suffering the damage is itself a member in the regime. For regime-outsiders, of course, general law continues to prevail. But what might be the situation in cases where the injury is not suffered by a formal member of the regime - but the regime nonetheless fails to bring about the objective set. For instance, the non-compliance mechanism under article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer fails to bring any of the parties in routine breach of their emission reduction obligations under article 2 of the Protocol into order. A number of States parties to the 1966 Covenant on Civil and Political Rights continue to engage in massive human rights violations irrespective of the Human Rights Committee's opinions and conclusions. When may the other parties take countermeasures against the State in breach of its obligations under articles 49 or 54 of the draft articles of State responsibility for internationally wrongful acts? There are no clear answers to these questions but it seems evident that at some point there must be a "fall-back" on general rules of State responsibility, including countermeasures and general mechanisms of dispute settlement (e.g. recourse to the International Court of Justice under a compulsory jurisdiction declaration made by two members of the special regime).[247]

4. Conclusions on self-contained regimes

191. The rationale of special regimes is the same as that of *lex specialis*. They take better account of the particularities of the subject-matter to which they relate; they regulate it more effectively than general law and follow closely the preferences of their members. Where the application of the general law concerning reactions to breaches (especially countermeasures) might be inappropriate or counterproductive, a self-contained regime such as, for instance, the system of *persona non grata* under diplomatic law, may be better suited to deal with such breaches. However, as the Commission observes, it is equally clear that if the general law

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[247] See further Simma, "Self-Contained Regimes", supra note 199, pp. 118-135 and Alland, *Justice privée et ordre juridique* … supra note 244, pp. 290-291. This would also seem to apply to the failure of the special regime of the EU. See also Laurence Boisson de Chazournes, *Les contre-mesures dans les relations economiques internationales* (Geneve: Pedone, 1992) p. 185.

has the character of *jus cogens*, then no derogation is permitted. In fact, the assumption seems to be that in order to justify derogation, the special rules "have at least the same legal status as those expressed in this article".[248]

192. But no regime is self-contained. Even in the case of well-developed regimes, general law has at least two types of function. First, it provides the normative background that comes in to fulfil aspects of its operation not specifically provided by it. In case of dissolution of a State party to a dispute within the WTO dispute settlement system, for instance, general rules of State succession will determine the fate of any claims reciprocally made by and as against the dissolved State. This report has illustrated some of the ways in which this supplementing takes place. Second, the rules of general law also come to operate if the special regime fails to function properly. Such failure might be substantive or procedural, and at least some of the avenues open to regime members in such cases are outlined in the Vienna Convention itself. Also the rules on State responsibility might be relevant in such situations.

193. Third, the term "self-contained regime" is a misnomer. No legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside it*. In previous debates within the Commission over "self-contained regimes", "regimes" and "subsystems", there never was any assumption that they would be hermetically isolated from the general law. It is useful to note that article 42 of the VCLT contains a "Münchausen-provision" that is directly relevant here for it expressly situates every legal regime within its framework. According to it:

Article 42

Validity and continuance in force of treaties

> 1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

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[248] Draft Articles on State Responsibility, Commentary on Article 55, para. 2 in *Official Records of the General Assembly, Fifty-sixth Session*, *Supplement No. 10* (A/56/10) p. 357.

194. This, it could be said, is the "minimum-level" at which the Vienna Convention regulates everything that happens in the world of regime-building and regime-administration. Through it - as well as through the reasoning above - every special regime links up with general international law in three ways:

(1) The conditions of validity of a special regime, including the validity of its establishment, are determined by principles of general international law;

(2) Because a special regime is "special", it does not provide all the conditions of its operation. General law provides resources for this purpose. This is not a matter of general law having been incorporated into the special regime but follows from the "generality" of that general law - or in other words, from international law's systemic nature. General international law influences the operation of a special regime above all in three distinct ways:

(a) General international law (that is, general custom and general principles of law) fulfils gaps in the special regime and provides interpretative direction for its operation;

(b) Most of the VCLT (including, above all, article 31 and 32) is valid as customary law and applicable in the sense referred to in (a);

(c) General international law contains principles of hierarchy that control the operation of the special regime above all in determining the peremptory norms of international law but also in providing resources for determining in case of conflict what regime should be given priority or, at least, what consequences follow from the breach of the requirements of one regime by deferring to another (usually State responsibility);

(3) Finally, general international law provides the consequences of the "failure" of the special regime. When a special regime "fails" cannot always be determined from within that regime, however. Inability to attain an authoritative determination of failure may be precisely one aspect of such failure - e.g. when a special dispute settlement system ceases to function.

5. Regionalism

(a) What is "regionalism"?

195. "Regionalism" does not figure predominantly in international law treatises and when it does, it rarely takes the shape of a "rule" or a "principle". It does not denote any substantive area of the law, either, on a par with "human rights" or "trade law". When the question of regionalism is raised this is usually done in order to discuss the question of the universality of international law, its historical development or the varying influences behind its substantive parts. Only rarely it appears in an openly normative shape, as a kind of regional *lex specialis* that is either intended as an application of modification of a general rule or, perhaps in particular, as a deviation of such a rule.

196. Regionalism is a well-established theme of foreign policy debates. Discussions about the best approaches for regulating matters of, say, economic policy or collective security habitually take up the advantages of institutional frames that are narrower than the universal. As the United Nations were being debated between the Great Powers at the end of the Second World War, the choice between regionalism and universalism weighted heavily on the planning of the post-war collective security system. Churchill, for example, originally preferred a set of regional systems - "a Council of Europe and a Council of Africa under the common roof of the world organization".[249] As debates turned to prefer a single system under the supervision of the Security Council, concern was expressed in San Francisco over the way this opened the door for intervention by outside powers in the management of regional security (especially in Latin America).[250]

197. Sometimes particular orientations of legal method - for example an "Anglo-American approach" - or policies adopted by or typical to particular groups of States - say, "third world approaches" - also raise questions of regionalism. Debates over human rights and cultural

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[249] W.G. Grewe, "The History of the United Nations" in Bruno Simma (ed.), *The Charter of the United Nations. A Commentary* (Oxford: Oxford University Press, 1995) p. 7.

[250] See e.g. Ruth Russell and Jeannette E Muther, *A History of the United Nations Charter. The Role of the United States 1940-1945* (Washington: Brookings, 1958) pp. 688-712. Stephen C. Schlesinger, *Act of Creation. The Founding of the United Nations* (Boulder: Westview, 2003) pp. 175-192.

relativism, too, occasionally highlight those tensions. In such debates, the focus is on the question whether some rules or principles - including notions of human right - should automatically be applied in a universal fashion. What is the scope of regional variation in a system intended as universal?

198. The varying uses of the expression "regionalism" as part of legal and political rhetoric call for an analysis of the actual impact of that notion for the question of fragmentation of international law now under study within the Commission. For that purpose, it is suggested that there are at least three distinct meanings for "regionalism" that refer specifically to international law and that should be taken account of.

(b) "Regionalism" as a set of approaches and methods for examining international law

199. A first - and the most general - use of the term refers to particular orientations of legal thought and culture. It is, for example, sometimes said that there is an "Anglo-American" or "continental" tradition of international law - although frequently the distinctiveness of such traditions is denied.[251] More recently, it has been habitual to claim that there are distinct "Soviet" doctrines or "Third World Approaches" to international law.[252] To some extent, the notion of different legal cultures has been enshrined, for example, in the Statute of the International Law Commission itself as Article 8 of the Statute requires "that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". The composition of many other international law bodies is also expected to conform to this pattern reflected in the standard - though usually informal - practice in United Nations elections to follow the principle of "equitable geographical distribution". The United Nations General Assembly has occasionally highlighted the importance of this principle -

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[251] See especially, Hersch Lauterpacht, "The So-Called Anglo-American and Continental Schools of Thought in International Law", BYBIL vol. 12 (1931) pp. 31-62. See also e.g. Edwin D. Dickinson, "L'interprétation et l'application du droit international dans les pays anglo-américains", *Recueil des cours* … vol. 129 (1970) pp. 305-395.

[252] Antony Anghie & B.S. Chimni, "Third World Approaches to International law and Individual responsibility in International Conflicts" in Steven R. Ratner & Anne-Marie Slaughter, *The Methods of International Law* (Washington: ASIL, 2004) pp. 185-210. On "Soviet" and "Russian" doctrines, see K. Gryzbowski, *Soviet Public International law: Doctrines and Diplomatic Practice* (Leiden: Sijthoff, 1970); Tarja Långström, *Transformation in Russia and International Law* (The Hague: Nijhoff, 2002).

for example in 2002 as it "*encourage[d]* States parties to the United Nations human rights instruments to establish quota distribution systems by geographical region for the election of the members of the treaty bodies".[253]

200. No doubt, there have always existed regional and local approaches to or even "cultures" of international law, and much of the relevant literature traces their influence on general international law. Thus, for instance, there is today again much talk about the role of a "European tradition" of international law.[254] Historical studies also canvass the "American Tradition of International Law"[255] and debate the role of Africa or Asia to the development of international law.[256] Since the nineteenth century, the special nature and influence of Latin America on international law has often been stressed.[257]

201. It is no doubt possible to trace the sociological, cultural and political influence that particular regions have had on international law. However, these studies do not really address the issue of fragmentation. They do not claim that some rules should be read or used in a special way because of their having emerged as a result of "regional" inspiration. On the contrary, these regional influences appear significant precisely because they have lost their originally geographically limited character and have come to contribute to the development of universal international law. They remain historical or cultural sources or more or less continuing political influences behind international law.

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[253] See A/RES/56/146 (2002).

[254] See especially the series of Symposia on the "European Tradition in International Law" in the EJIL since 1990.

[255] See e.g. Mark W. Janis, *The American Tradition of International Law* (Oxford: Oxford University Press, 2004).

[256] See T.O. Elias, *Africa and the Development of International Law* (Leiden: Sijthoff, 1972); R.P. Anand, "The Role of Asian States in the Development of International Law" in R-J. Dupuy (ed.), *The Future of International Law in a Multicultural World* (The Hague: Nijhoff, 1983) p. 105. Many articles in the *Journal of the History of International Law,* published since 1999, have been geared to examining regional influences and developments in a historical way.

[257] See *Asylum* case (*Colombia/Peru*) *I.C.J. Reports 1950* (dissenting opinion of Judge Alvarez) pp. 293-294. For an overview of the nineteenth century debates, see Hector Gros Espiel, "La doctrine du Droit international en Amérique Latine avant la première conférence panaméricaine", Journal of the History of International Law, vol. 3 (2001) pp. 1-17. See also Liliana Obregón, *Completing Civilization: Nineteenth Century Criollo Interventions in International Law* (SJD Diss. Harvard, mimeo, on file with author). The main advocate of this idea in the twentieth century was undoubtedly Alejandro Alvarez. See e.g. his "Latin America and International law", AJIL vol. 3 (1909) pp. 269-353.

202. There is a very strong presumption among international lawyers that notwithstanding such influences, the law itself should be read in a universal fashion. As Sir Robert Jennings pointed out in 1987:

> … the first and essential general principle of public international law is its quality of universality; that is to say, that it be recognized as valid and applicable in *all* countries, whatever their cultural, economic, socio-political, or religious histories and traditions.[258]

203. And yet, as Jennings himself notes,

> … this is not to say, of course, that there is no room for regional variation, perhaps even in matters of principle … Universality does not mean uniformity. It does mean, however, that such a regional international law, however variant, is part of the system as a whole, and not a separate system, and it ultimately derives its validity from the system as a whole.[259]

204. If regionalism itself thus is not automatically of normative import, its significance is highlighted as it mixes with functional differentiation. That is to say, where previously the moving forces behind international law may have been geographical regions, today those forces are often particular interests that are globally diversified: trade interests, globalization lobbies, environmentalist or human rights groups and so on. The language of the "Third World" already reflected this change. Although the States in this group are sometimes identified in geographic terms - e.g. as "the South" - this is not intended to refer to a special geographical property (such as climate for example) they share but to a certain homogeneity based on a convergence of interests, values or political objectives. Functional differentiation - the emergence of special types of law that seek to respond to special types of ("functional") concern such as "human rights law" or "environmental law" etc. - is certainly at the (sociological) root of the phenomenon of fragmentation and diversification of international law. This is, however, treated in the other parts of this report and need not be specifically discussed here.

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[258] Robert Jennings, "Universal International law in a Multicultural World" in Maarten Bos & Ian Brownlie, *Liber Amicorum for Lord Wilberforce* (Oxford: Oxford University Press, 1987) also published in *Collected Essays of Sir Robert Jennings* (The Hague: Kluwer, 1998) p. 341.

[259] Jennings, ibid., p. 342.

(c) "Regionalism" as a technique for international law-making

205. A second sense for regionalism is that of a privileged forum for international law-making. It is often assumed that international law is or should be developed in a regional context because the relative homogeneity of the interests or outlooks of actors will then ensure a more efficient or equitable implementation of the relevant norms. The presence of a thick cultural community better ensures the legitimacy of the regulations and that they are understood and applied in a coherent way. This is probably the reason for why human rights regimes and free trade regimes have always been commenced in a regional context - despite the universalist claims of ideas about human rights or commodity markets.

206. This is an aspect of the general argument in favour of contextualization and has already been discussed in the section on *lex specialis* above: closeness to context better reflects the interests and consent of the relevant parties. As a matter of legal policy, it may often be more efficient to proceed by way of taking a regional approach.[260] Both human rights and economic integration constitute examples of this type of reasoning. More broadly, regionalism emerges sometimes in connection with sociological theories about international law, especially views that emphasize a natural tendency of development from States to larger units of international government.

207. In the sociological ("objectivist") theory of international law presented by Georges Scelle, for example, regionalism appears as an incident of what he called the "federal phenomenon", a process leading from the individual State to larger normative units gradually and in successive stages as a result of expanding circles of "solidarity". This may happen, he wrote, as a result of natural affinities between neighbouring States (common history, language, religion etc.) but also through the need for division of labour (as in regional economic integration) or in view of a common threat (as through the development of systems of

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[260] For one rather thorough overview of regional cooperation between African, American, former socialist and West European States, together with a discussion of the regional commissions of the United Nations and regional development banks, see Rudolf Bernhardt (ed.), *Encyclopaedia of International Law* (Amsterdam: Elsevier, 2000) vol. IV, pp. 100-161.

regional security).[261] More recently, theories of interdependence and international regimes in international relations studies as well the sociology of globalization point to the advantages of governance through units wider than States, including regional units.

208. Such studies have given rise to varying political assessments. Hedley Bull, for instance, points to the attractions of Third World regionalism: it has the advantages of functionality and solidarity for weak States and it may be used to avoid the danger of great power domination that may result from participating in global or otherwise wider spheres of cooperation.[262] Other theorists, for their part, have taken the exactly opposite view and have seen regionalism is an instrument of hegemony. Under this view, regionalism would often signify the creation of large spaces or hegemonic "blocks" - the Monroe doctrine might perhaps serve as an example - by a great power in order to ensure supremacy or to redress the balance of power disturbed by the activities of another power elsewhere in the world.[263]

209. There is of course an enormous amount of writing on the nature, advantages and disadvantages of regionalism as an instrument of the politics of cooperation and hegemony.[264] It is, however, doubtful whether such sociological views and historical speculations - whatever their merits - have much to contribute to an examination of the fragmentation of international law. They, too, tend to see regional cooperation from a functional perspective, as a particular

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[261] Scelle, Cours de droit … supra note 69, p. 253.

[262] Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* (London: Macmillan, 1977) pp. 305-6. For a consideration of the advantages and disadvantages of regional security "complexes", situated in a mid-level between States and global security systems, see e.g. Barry Buzan, *People, States, & Fear. An Agenda for International Security Studies in the Post-Cold War Era* (New York, Harvester, 1991) 2nd ed. pp. 186-229. For the mutually reinforcing but also challenging forces of economic globalization and regionalization, see e.g. Charles Oman, "Globalization, Regionalization and Inequality" in Andrew Hurrell & Ngaire Woods (eds.), *Inequality, Globalization, and World Politics* (Oxford: Oxford University Press, 2000) pp. 36-65.

[263] See in particular, Carl Schmitt, *Der nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot1950). To the same effect, see Wilhelm Grewe, *The Epochs of International Law* (Berlin: De Gruyter, 2000) pp. 458 et seq.

[264] See e.g. Richard Falk & Saul Mendlowitz (eds.), *Regional Politics and World Order* (San Francisco: Freeman, 1973); Winfried Lang, *Die internationale Regionalismus* (Springer: Wien, 1982) and the essays collected in Joseph S. Nye, *International Regionalism. Readings* (Boston: Little & Brown 1968).

case of the more general need for States either to collaborate for the attainment of common aims or to enlist partners so as to create, maintain or oppose hegemony. As an incident of theories about the logic of cooperation and rational choice, regionalism loses its specificity as a problem and should be rather dealt with in connection the functional diversification of the international society in general, in particular the problem of special regimes, dealt with in the previous section of this report.

210. Nevertheless, one aspect deserves mention here, namely regionalism in regard to trade law. Despite the strong pull for a global trade regime within the GATT/WTO system, the conclusion of Regional Trade Agreements (RTAs) has not diminished, on the contrary. During the last stages of the Uruguay Round, in 1990-1994, for example, 33 RTAs were notified to the GATT Secretariat while in the period between January 2004 and February 2005 altogether 43 RTAs were notified - "making it the most prolific RTA period in recorded history".[265] Technically speaking, while such agreements obviously liberate trade between their partners, they also limit trade to the outside world. The specific justification for RTAs is found in article XXIV GATT and although there has been endemic controversy about the scope of the provision the (understandable) view within the WTO system, as articulated by the Appellate Body, has been to interpret it restrictively.[266] Nevertheless, in view of the difficulties and controversies in developing the universal trade system, there appears presently to be no end in sight to the conclusion of RTAs.

(d) "Regionalism" as the pursuit of geographical exceptions to universal international law rules

211. But regionalism might have a stronger sense if it is meant to connote a rule or a principle with a regional sphere of validity or a regional *limitation* to the sphere of validity of a universal rule or principle. In the former (positive) sense, the rule or principle would be binding only on

[265] Friedl Weiss, "Coalitions of the Willing: The Case for Multilateralism vs. Regional and Bi-lateral Arrangements in World Trade" in C. Calliess, G. Nolte & P-T. Stoll, *Coalitions of the Willing. Avant-garde or Threat* (Cambridge: Cambridge University Press, 2006, forthcoming). See also section D. 4. (a) (i) below.

[266] See *Turkey - Restrictions on Imports of Textile and Clothing Products*, 31 May 1999, WTO/DS34/R, para. 9.92.

States identified as members of a particular region.[267] In the latter (negative) sense, regionalism would exempt States within a certain geographical area from the binding force of an otherwise universal rule or principle.

212. There are many problems in such suggestions, not the least of which is the identification of the relevant "region" and especially the imposition of that identification on a State not sharing it. For *normative* regionalism must be clearly distinguished from the regular case of a multilateral treaty between States in a region or a set of converging practices among States that amount to a regional custom. In the latter two cases the conventional or customary rule becomes binding on the relevant States on the basis of their consent to it. The fact that the States come from the same region is only a factual ingredient of their relationship and of no greater consequence to the binding force or interpretation of that rule than their ethnic composition or economic system.[268] Instead of illustrating the independently normative power of regional linkages, these cases come under the discussion of *lex specialis* above.[269]

213. A separate, much more difficult case is the one where it is alleged that a regional rule (either on the basis of treaty practice or custom) is binding on a State even when the State has not specifically adopted or accepted it. This is the claim dealt with (albeit inconclusively) by the International Court of Justice in the *Asylum* (1950) and *Haya de la Torre* (1951) cases. Here, Colombia argued inter alia that there had emerged an "American" or a "Latin-American" law concerning the matter of diplomatic asylum.[270] According to Judge Alvarez, this had been based

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[267] This is the understanding in e.g. Dietrich Schindler, "Regional International Law", in Bernhardt, Rudolf Bernhardt (ed.), *Encyclopaedia of International Law* (Amsterdam: Elsevier, 2000) vol. IV, pp. 161, 161-165.

[268] This does not of course mean that it would be of no consequence at all. In the *Haya de la Torre* case, for instance, the International Court of Justice felt entitled to interpret Article 2 of the relevant (Havana) Convention "in conformity with the Latin American tradition in regard to asylum", *Haya de la Torre* case *(Colombia v. Peru) I.C.J. Reports 1951* p. 81.

[269] Many regional organizations are like this. Their "regional" character does not distinguish them from other multilateral organizations. This means, for instance, that not all of the States of the relevant region always participate in them and that their competence does not even in such case extend to the non-participating ones. Schindler, "Regional International Law", p. 161.

[270] See especially the "Observations du gouvernement du Colombie sur l'existence du droit international américain. Réplique de gouvernement Colombien (20 IV 50) ICJ, *Asylum* case (*Colombia/Peru*) *Pleadings* vol. I, pp. 330-334.

on the "wish" of Latin American States "since their independence" to "modify the law in order to bring it to harmony with the interests and aspirations of their continent".[271] Here both the purpose and the justification of regionalism are clearly outlined: the purpose is to *deviate* from the general law while the justification for this is received in part from consent ("wish"), in part on a sociological argument about regional appropriateness. The normative force of this law was as clear to Colombia as it was to Alvarez. A regional law was applicable in the Colombian view even on States of the region that did not accept it.[272] Alvarez, too, argued not only that it was "binding upon all States of the New World" as well as on all other States "in matters affecting America",[273] but also that it was "binding upon all the states of the New World" though it "need not be accepted by all [of them]".[274]

214. The question of regionalism has often arisen in connection with rules alleged to have a specifically South American origin or sphere of applicability, such as the famous Calvo, Drago and Tobar doctrines.[275] Nevertheless, none of these doctrines has ever received general

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[271] *Asylum* case (*Colombia/Peru) I.C.J. Reports 1950* (dissenting opinion of Judge Alvarez) p. 293. Likewise, Judge Read pointed to the existence of a "body of conventional and customary law, complementary to universal international law, and governing inter-state relations in the Pan-American world", *Asylum* case (*Colombia/Peru*) *ICJ Reports 1950* (dissenting opinion of Judge Read) p. 316.

[272] "Mémoire du Gouvernement Colombien", *Haya de la Torre* case *(Colombia v. Peru) Pleadings 1951* pp. 25-27.

[273] "Universal international law finds itself to-day within the framework of continental and regional law, and all such systems adopt new trends in accordance with those indicated in the Preamble and Chapter I of the United Nations Charter; such trends reflect entirely American, international spirit", *Asylum* case (*Colombia/Peru) I.C.J. Reports 1950* (dissenting opinion of Judge Alvarez) p. 294.

[274] *Asylum* case (*Colombia/Peru*) *I.C.J. Reports 1950* (dissenting opinion of Judge Alvarez) p. 294.

[275] Under one version of the Calvo Doctrine, international liability with respect to contracts entered into with alien private contractors by the State party is excluded. Another formulation describes it as a stipulation in a contract in which "an alien agrees not to call upon his state of nationality in any issues arising out of the contract". This used to be inserted (or suggested) as a clause in investment contracts but has also been argued as a specific rule of South American regional law. See e.g. D. P. O'Connell, *International Law,* supra note 77, vol. II, pp. 1059-1066 and Eduardo Jiménez de Aréchaga, "International Responsibility" in Max Sorensen, *Manual of Public International Law* (London: Macmillan, 1968) pp. 590-593. For its (contested) relevance today, see Christopher K. Dalrymple, "Politics and Foreign Investment: The Multilateral Investment Guarantee and the Calvo Clause", Cornell International Law Journal vol. 29 (1996) p. 161 and Denise Manning-Cabrol, "The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors", Law & Policy in International Business, vol. 26 (1995) p. 1169. The Drago doctrine sought to exempt State loans from general rules of State responsibility, O'Connell, *International Law,* supra note 77, vol. II, pp. 1003-4. The Tobar doctrine, again, has to do with the alleged duty of non-recognition of governments that have arisen to power by non-constitutional means. O'Connell, supra note 77, vol. I, p. 137.

endorsement and their importance today seems doubtful. In the *Asylum* case, the Court itself did not specifically pronounce on the conceptual possibility of there being specifically regional rules of international law in the above, strong sense (i.e. rules binding automatically on States of a region and binding others in their relationship with those States).[276] It merely stated that the cases cited by Colombia in favour of the existence of a regional rule of diplomatic asylum may have been prompted by considerations of convenience or political expediency. No evidence had been produced that they would have arisen out of a feeling of legal obligation.[277] The more important point, however, is perhaps that the Court treated the Colombian claim as a claim about customary law and dismissed it in view of Colombia's failure to produce the required evidence. There was, in other words, no express discussion of "regionalism" in the judgment and even less an endorsement of the strong sense of regionalism as outlined above.

215. In fact, there is very little support for the suggestion that regionalism would have a normative basis on anything else apart from regional customary behaviour, accompanied, of course, with the required *opinio juris* on the part of the relevant States. In such case, States outside the region would not be automatically bound by the relevant regional custom unless there is specific indication that they may have accepted this either expressly or tacitly (or perhaps by way of absence of protest). This would also render any specific normative (in contrast to historical, sociological or legislative-technical) debate about regionalism superfluous. However, two specific issues might still require being singled out.

216. One is the question of the universalism vs. regionalism opposition in human rights law. Although this goes deep into the philosophical question of cultural relativism - and as such falls outside the ILC project on fragmentation - one approach to it might be noted. This is to think of "regionalist challenges" not in terms of exceptions in universal norms but, as Andrew Hurrell has put it "principally in terms of implementation".[278] This would mean understanding regional

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[276] Though it did hint in this direction by referring to "one of the most firmly established traditions of Latin America, namely non-intervention, *Asylum* case (*Colombia/Peru*) *I.C.J. Reports 1950* p. 285.

[277] *Asylum case (Colombia/Peru) I.C.J. Reports 1950* pp. 276-277.

[278] Andrew Hurrell, "Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World" in Tim Dunne & Nicholas J. Wheeler (eds.), *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999) pp. 294-297.

variety not in terms of exceptions but the varying, context-sensitive implementation and application of shared standards. If so, then this matter, too, would fall under the more general question of the relationship between general and special law, no different from the general problem of the applicability and limits of *lex specialis*.

217. Another instance concerns the question of the relationship between universalism and regionalism within the collective security system of the United Nations or, in other words, the relations between Chapters VII and VIII of the Charter. Here, open questions have included the definition of what may count as regional "arrangements" or "agencies" as well as when may action be "appropriate" under Article 52 (1). The most important question, however, appears to concern the priority of competence between regional agencies and arrangements to take enforcement action and the Security Council.[279] Under Article 52 (2) the members of regional agencies or arrangements shall make every effort to settle their disputes before submitting them to the Council. Whatever the disagreements over the right marching order here, it seems evident that action by a regional agency or arrangement cannot be considered an "exception" to the competence of the Security Council which at all times may be seized of an issue in case it feels it appropriate to do so because, for example, the regional action has not been or is not likely to be "appropriate" or effective. In this regard, Chapter VIII should be seen as a set of functional provisions that seek the most appropriate level for dealing with particular issues with due regard to issues of "subsidiarity".[280]

(e) European integration

218. A brief mention should finally be made of the European Union. As is well-known, the EU began as a customs union with the conclusion in 1957 of the Treaty of Rome on the European Economic Community. Since then, the founding treaties have been amended several times so that the instrument presently in force - The Treaty on the European Union (done at Maastricht in 1992 and amended in Amsterdam in 1997 and Nice 2001) - goes way beyond an

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[279] For a useful overview, see Hummer & Schweitzer, "Article 52", in Bruno Simma (ed.), *The Charter of the United Nations. A Commentary* (Oxford: Oxford University Press 1995) pp. 683-722.

[280] Ibid., pp. 709-710.

economic arrangement. The Union's activities are said to consist of three "pillars", one dealing with the most heavily supranational rules on "Community" activities, the other two more "intergovernmental" fields of common foreign and security policy (CFSP) and Co-operation in justice and internal affairs. European integration has profoundly transformed the nature of the legal relations between EU members. As the European Court of Justice famously pointed out, the founding treaties are more than international agreements - they are a kind of "constitutional charter" of the EU.[281] They have set up a special kind of legal order between the Member States and thus they are interpreted and applied in a manner that does not necessarily correspond to the way "ordinary" agreements are interpreted and applied.

219. There is no reason to dwell into the special nature of the legal relations between EU members. One phenomenon that does contribute to fragmentation is the way the Union as an international actor is present in a number of different roles on the international scene. First, the European Community, acting under the "first pillar" of EU competencies is a subject of international law and for practical purposes may be treated towards the outside world as an intergovernmental organization, with whatever modification its specific nature brings to that characterization.[282] At the same time, especially when dealing with foreign policy matters as well as cooperation in justice and home affairs, the EC acts alongside its Member States. The distinction between matters of exclusive EC competence and shared competencies between the EU and Member States is an intricate part of EC law that is often very difficult to grasp. This is particularly so in regard to the "mixed agreements" in which both the Community and the Member States are parties but in which their respective competencies develop as a function of the development of (internal) EC law.[283] It has of course been stressed on the part of the EU that none of this will have any effect on the rights of third States - and indeed, no such effect could ensue from legal developments that from the perspective of the latter are strictly *inter alios acta*.

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[281] Case 294/83, *Parti écologiste "Les Verts" v. European Parliament,* Judgment of 23 April 1986, ECR (1986) 01339, p. 1365, para. 23.

[282] See Jan Klabbers, "Presumptive Personality: The European Union in International Law" in Martti Koskenniemi, *International Law Aspects of the European Union* (The Hague: Nijhoff, 1997) pp. 231-254.

[283] For useful analysis, see Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (The Hague: Brill, 2001).

Nevertheless, the question of divided competences remains a matter of some concern from the perspective of the coherence treaty rights and obligations - including the responsibility for any breach that may occur. A particular aspect of EC action - the so-called “disconnection clauses” - bears a direct linkage to the Vienna Convention and will therefore be discussed separately in section D below.

6. Conclusion on conflicts between special law and general law

220. All legal systems are composed of rules and principles with greater and lesser generality and speciality in regard to their subject-matter and sphere of applicability. Sometimes they will point in different direction and if they do, it is the task of legal reasoning to establish meaningful relationships between them so as to determine whether they could be applied in a mutually supportive way or whether one rule or principle should have definite priority over the other. This is what in section F below will be called “systemic integration”.

221. Many rule-systems contain, in addition to special primary rules, also special secondary rules having to do with responsibility or settlement of disputes. Although these institutions are sometimes called “self-contained”, they are never “clinically isolated” from the rest of the law. In fact, as we have seen, they owe their validity, receive their limits and are constantly complemented by legal rules and principles neither established by nor incorporated by any specific acts into them. Nor has the sociological phenomenon of “regionalism” meant the emergence of isolated legal systems on a regional basis. What role specialized or regional rule-complexes enjoy is a factual and historical matter that can only be ascertained on a case-by-case basis, again by bearing in mind the “systemic” nature of the law of which they all form a part.

222. This section has highlighted the pragmatic role of the “speciality” and the “generality” of normative standards in the process of legal reasoning. It has stressed the *relational* character of these attributes and the way in which their specific operation is always dependent on the context in which they are applied. *To make or defend a claim of “speciality” is only possible in “general” terms*. In this regard, the fragmentation of the substance of international law - the object of this study - does not pose any very serious danger to legal practice. It is as normal a part of legal reasoning to link rules and rule-systems to each other, as it is to separate them and

to establish relations of priority and hierarchy among them. The emergence of new "branches" of the law, novel types of treaties or clusters of treaties is a feature of the social complexity of a globalizing world. If lawyers feel unable to deal with this complexity, this is not a reflection of problems in their "tool-box" but in their imagination about how to use it.

D. CONFLICTS BETWEEN SUCCESSIVE NORMS

223. The relationship between special law and general law is often cut across by another relationship, namely that between prior and subsequent law, and it may in such cases be hard to say whether this modifies the operation of the *lex specialis* principle in any of its many permutations. Generally speaking, it may often be the case that when States enact a subsequent general law, this is intended to set aside the prior law even if the latter were in some sense more "special". Again, it seems inadvisable to lay down any general rule in regard to how to manage the two types of relationship.

224. The most basic case is the adoption of a treaty in an area that was previously covered by customary law: "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties".[284] However, as explained in section C above, this does not automatically mean the full extinction of that prior customary law.[285] It will normally remain valid for those States that have not become parties to the (codifying) treaty and may occasionally be applicable also between treaty partners if, for one reason or another, the treaty remains inapplicable or covers the subject-matter only partially.[286] Nor does the fact that agreements often set aside prior customary law translate into

[284] *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) I.C.J. Reports 1969* p. 42, para. 72. See also *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits) I.C.J. Reports 1982* p. 38, para. 24.

[285] See especially Hugh Thirlway, *International Customary law and Codification* (Leiden: Sijthoff, 1972) pp. 95-108. See also Karl Zemanek, "The Legal Foundations of the International Legal System …" supra note 31, pp. 220-221.

[286] In the words of the International Court of Justice, "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content", *Nicaragua case* p. 96, para. 179. This situation is also presupposed by article 43 of the VCLT that provides that a denunciation of a treaty has no effect on the obligation that is binding on the State "independently of the treaty". Again, it is dangerous to generalize, however. The situation cannot be a priori excluded where it is the intention of the parties to a convention specifically to abrogate the prior custom in their relations *inter se*. Vienna Convention on the Law of Treaties, United Nations, *Treaty series,* vol. 1155 p. 331.