Chapter X

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

A. Introduction

296. Following its consideration of a feasibility study[582] that had been undertaken on the topic entitled "Risks ensuing from fragmentation of international law" at its fifty-second session, held in 2000, the Commission decided to include the topic in its long-term programme of work.[583] Two years later, at its fifty-fourth session, in 2002, the Commission included the topic in its programme of work and established a Study Group. It also decided to change the title of the topic to "The fragmentation of international law: difficulties arising from the diversification and expansion of international law".[584] In addition, the Commission agreed on a number of recommendations, including on a series of studies to be undertaken, commencing with a study by the Chairperson of the Study Group on the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

297. At its fifty-fifth session, in 2003, the Commission appointed Mr. Martti Koskenniemi as Chairperson of the Study Group. It set a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003–2006), distributed among members of the Study Group work on the other topics agreed upon in 2002[585] and decided upon the methodology to be adopted for that work. The Commission likewise held a preliminary discussion of an outline produced by the Chairperson of the Study Group on the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

B. Consideration of the topic at the present session

298. At the current session, the Commission reconstituted the Study Group, which held eight meetings on 12 and 17 May, on 3 June, and on 15, 19, 21, 26 and 28 July 2004. It also had before it the preliminary report on the Study on the Function and Scope of the *lex specialis* rule and the question of self-contained regimes by Mr. Martti Koskenniemi, Chairperson of the Study Group, as well as outlines on: the Study on the Application of Successive Treaties relating to the same subject matter (article 30 of the 1969 Vienna Convention) by Mr. Teodor Viorel Melescanu; the Study 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 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community by Mr. William Mansfield; the Study concerning the modification of multilateral treaties between certain of the parties only (article 41 of the 1969 Vienna Convention) by Mr. Riad Daoudi; and the Study on Hierarchy in International Law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules by Mr. Zdzislaw Galicki.[586]

299. At its 2828th meeting, held on 4 August 2004, the Commission took note of the report of the Study Group (A/CN.4/L.663/Rev.1), in section C below.

C. Report of the Study Group

1. General comments and the projected outcome of the Study Group's work

300. The Study Group commenced its discussion by a review of the report of the 2003 Study Group[587] as well as of the topical summary, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session (A/CN.4/537, section G).

301. The Study Group affirmed its mandate as essentially encapsulated in the full title of the Study Group. The intention was to study both the positive and negative aspects of fragmentation as an expression of diversification and expansion of international law. The Study Group decided to carry out its task on the basis of the tentative schedule, programme of work and methodology agreed upon during the 2003 session.[588]

302. The Study Group welcomed the comments made in the Sixth Committee during the fifty-eighth session of the General Assembly in 2003. It observed that the decisions concerning the direction of its work had been broadly endorsed. In particular, the decision to concentrate on the substantive questions and to set aside the institutional implications of fragmentation as well as the decision to focus work on the 1969 Vienna Convention had seemed acceptable to the members of the Sixth Committee. The Study Group also took note of the wish to attain

[582] G. Hafner, "Risks ensuing from fragmentation of international Law", *Yearbook… 2000*, vol. II (Part Two), Annex, p. 143.

[583] See footnote 238 above.

[584] *Yearbook… 2002*, vol. II (Part Two), p. 97, paras. 492–494.

[585] (*a*) The interpretation of treaties in the light of "[a]ny relevant rules of international law applicable in the relations between the parties" (article 31 (3) (*c*) of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community; (*b*) the application of successive treaties relating to the same subject matter (article 30 of the Convention); (*c*) the modification of multilateral treaties between certain of the parties only (article 41 of the Convention); (*d*) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules, *Yearbook… 2003*, vol. II (Part Two), p. 53, para. 427.

[586] The documents are available from the Codification Division of the Office of Legal Affairs.

[587] *Yearbook… 2003*, vol. II (Part Two), pp. 96–99, paras. 415–435.

[588] *Ibid.*, paras. 424–428.

practical conclusions from its work. In this connection, the Study Group also discussed the question concerning the eventual result of its work. While some members saw the elaboration of guidelines, with commentaries, as the desired goal, others were sceptical of aiming for a normative direction. There was agreement, however, that the analytical exercise would already be useful and that at the least the Study Group should give its own conclusions, based on the studies, as to the nature and consequences of the phenomenon of "fragmentation" of international law. The Study Group confirmed that its intention was to develop a substantive, collective document as the outcome of its work. This document would be submitted to the Commission in 2006. It would incorporate much of the substance of the individual reports produced by the members of the Study Group, as supplemented and modified in the discussions in the Study Group. It would consist of two parts: (*a*) a substantive study on the topic as well as (*b*) a concise summary containing the proposed conclusions and, if appropriate, guidelines on how to deal with fragmentation.

2. Discussion of the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes"

303. The Study Group began its substantive discussions on the study produced by the Chairperson on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'". The study was prefaced by a typology of fragmentation, based on the Study Group's decision in 2003. That typology made a distinction between three types of fragmentation: (*a*) through conflicting interpretations of general law; (*b*) through emergence of special law as exception to the general law; and (*c*) through conflict between different types of special law. As these distinctions had already been endorsed in 2003, there was no need to have a discussion on them now. Instead, the Study Group decided to go directly to the substance of the study. The study was in two parts. The first part contained a discussion of the *lex specialis* maxim while the second part focused on "self-contained regimes".

(*a*) Lex specialis

304. In introducing the part of the study concerning the function and scope of the *lex specialis* rule, the Chairperson stressed several points. First, he emphasized that recourse to the *lex specialis* rule was an aspect of legal reasoning that was closely linked to the idea of international law as a legal system. The *lex specialis* maxim sought to harmonize conflicting standards through interpretation or establishment of definite relationships of priority between them. In fact, he said, it was often difficult to distinguish between these two aspects of the functioning of the technique: the interpretation of a special law in the light of general law, and the setting aside of the general law in view of the existence of a conflicting specific rule. He underlined the relational character of the distinction between the general and the special. A rule was never "general" or "special" in the abstract but always in relation to some other rule. A rule's "speciality" might follow, for instance, from the scope of the States covered by it, or from the width of its subject matter. A rule (such as a good neighbourliness treaty) might be special in the former but general in the latter sense. The adoption of a systemic view was important precisely in order to avoid thinking of *lex specialis* in an overly formal or rigid manner. Its operation was always conditioned by its legal-systemic environment.

305. Secondly, the Chairperson noted that the principle that special law derogated from general law was a traditional and widely accepted maxim of legal interpretation and technique for the resolution of conflict of norms. There was vast case law that had recourse to the technique of *lex specialis*. The Commission, too, had endorsed it in article 55 of the draft articles of responsibility of States for internationally wrongful acts.[589] The Chairperson attributed the acceptance of the *lex specialis* rule to its argumentative power: it was pragmatic and provided greater clarity and definiteness, thus considered "harder" or more "binding" than the general rule. Further, it regulated the matter at hand more effectively and efficiently and its usefulness lay in providing better access to the will of parties.

306. Thirdly, the Chairperson distinguished between four situations in which the *lex specialis* rule has arisen in case law: (*a*) it may operate to determine the relationship between two provisions (special and general) within a single instrument as was the case, for example, in the *Beagle Channel Arbitration*;[590] (*b*) between provisions in two different instruments as it was in the *Mavrommatis Palestine Concessions* case[591] and more typically in a systemic environment such as within the WTO;[592] (*c*) between a treaty and a non-treaty standard as was the case in *INA Corporation* v. *The Government of the Islamic Republic of Iran*;[593] and (*d*) between two non-treaty standards as shown by the *Right of Passage over Indian Territory* case[594] in which analogous reasoning was applied although it was not expressed in the language of *lex specialis*.

307. Fourthly, the Chairperson suggested that while there was no formal hierarchy between sources of international law, there was a kind of informal hierarchy which emerged pragmatically as a "forensic" or "natural" aspect of legal reasoning, preferring the special standard to the more general one. This pragmatic hierarchy, he suggested,

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[589] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 140.

[590] *Dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), p. 53. See also ILR, vol. 52 (1979), p. 97.

[591] *Mavrommatis Palestine Concessions* case (see footnote 31 above), at p. 31.

[592] See for example WTO, *Turkey—Restrictions on Imports of Textile and Clothing Products*, Report of the Panel (WT/DS34/R), 31 May 1999, para. 9.92; *Indonesia—Certain Measures Affecting the Automobile Industry*, Report of the Panel (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R), 2 July 1998, para. 14.28; and *India—Qualitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Report of the Panel (WT/DS90/R), 6 April 1999, para. 4.20. See also, for instance, within the European Union, *JT's Corporation Ltd* v. *Commission of the European Communities* (case T-123/99), *Judgment of 12 October 2000, Reports of Cases before the Court of Justice and the Court of First Instance 2000-9/10*, section II, Court of First Instance, p. 3269, at p. 3292, para. 50.

[593] See *INA Corporation* v. *The Government of the Islamic Republic of Iran*, Case No. 161, 12 August 1985, Iran–United States Claims Tribunal, *Iran–United States Claims Tribunal Reports*, vol. 8, p. 373, at p. 378.

[594] *Case concerning Right of Passage over Indian Territory (Merits), Judgment, I.C.J. Reports 1960*, p.6, at p. 44.

expressed the consensual basis of international law: preference was often given to a special standard because it not only best reflects the requirements of the context, but because it best reflected the intent of those who were to be bound by it.

308. Fifthly, the Chairperson pointed out that there were two ways in which the law took account of the relationship of a particular rule to a general one. In the first instance, a special rule could be considered to be an *application*, *elaboration* or *updating* of a general standard. In the second instance, a special rule is taken, instead, as a *modification*, *overruling* or *setting aside* of the general standard (i.e. *lex specialis* is an exception to the general rule). The Chairperson emphasized that it was often impossible to say whether a rule should be seen as an "application" or "setting aside" of another rule. To some extent, this distinction—and with it, the distinction between *lex specialis* as a rule of interpretation and a rule of conflict solution—was artificial. Both aspects were therefore relevant in the study of *lex specialis*. He stressed that even where the rule is used as a conflict solution technique, it does not totally extinguish the general law, but that the latter will remain "in the background" and affect the interpretation of the former.

309. Sixthly, the Chairperson pointed out that most of general international law was dispositive—that is to say, that it could be derogated from by *lex specialis*. There were, however, cases where the general law expressly prohibited deviation or such prohibition is derived from the nature of the general law. The best known of such cases was that of *jus cogens*. However, there were also other situations where no derogation was allowed. Pertinent considerations included, for instance, who the beneficiaries of the obligation were, and whether derogation might be prohibited, for instance, if it might disrupt the balance set up under a general treaty between the rights and obligations of the parties.

310. Finally, the Chairperson observed that there was one aspect of the *lex specialis* issue that he had not dealt with in his report—namely the question of regional regimes and regionalism. He would produce a supplementary report on that issue for the Study Group in 2005. The Study Group welcomed this suggestion.

311. The Study Group endorsed the "systemic" perspective taken in the study and the conclusion that general international law functioned in an omnipresent manner behind special rules and regimes. Even as a special law did sometimes derogate from general law, cases such as the *Right of Passage over Indian Territory* and *Gabčikovo-Nagymaros Project*[595] demonstrated that the general law was not thereby set aside but continued to have an effect "in the background". Some members of the Study Group wondered, however, whether it might be possible to outline more clearly what this meant in practice. It was stated that the survey of case law threw welcome light on the role and functioning of the *lex specialis* maxim as a technique of legal reasoning in international law. The Study Group agreed, however, that there was no reason—indeed no possibility—to lay down strict or formal rules for the use of the maxim. Sometimes the maxim operated as an interpretative device, sometimes as a conflict solution technique. How it was to be used depended on the situation, including the normative environment. It was pointed out that in addition to what had been stated in the study, a distinction existed between the use of the maxim in derogation of the law and in the *development* of the law and that the closeness of these two aspects highlighted its informal and context-dependent nature. The same was true of a related distinction, namely that between the permissibility of a derogation and the determination of the content of the rule that derogates. For example, even as derogation might be prohibited, *lex specialis* might still have applicability as a "development" of the relevant rule.

312. The discussion in the Study Group largely endorsed the conclusions of the study. Certain special aspects were, however, highlighted. It was stated that the time dimension—in other words, the relationship between the *lex specialis* and the *lex posterior*—had not been discussed extensively within the study. It was agreed, however, that how this should be dealt with was also dependent on the context, including by reference to the will of the parties.

313. Some members of the Study Group doubted the suggestion that the *lex specialis* maxim denoted an informal hierarchy. In their view, there was no hierarchy, formal or informal, between the sources of international law. If a treaty was normally given priority to a general custom this was not due to a hierarchy in law but merely to the need to give effect to the will of the parties—it was not inconceivable that a special custom might have priority over a general treaty for that same reason. In any case, there was reason to distinguish between priority between legal sources and priority between legal norms. There was also some criticism of the Chairperson's treatment of the question of the ability to derogate from general law. Aside from the issue of *jus cogens*, the question of permissibility to derogate remained still an unclear matter.

(*b*) *Self-contained (special) regimes*

314. In introducing the part of his study concerning self-contained regimes, the Chairperson observed that the general thrust of his study was to accentuate the continued importance of general law. This was natural, he stated, as the rationale for the two was the same. Self-contained regimes were a subcategory of *lex specialis*.

315. The Chairperson noted that there were three somewhat different senses in which the term "self-contained regimes" had been used. The starting point of his analysis was article 55 of the draft articles on State responsibility adopted by the Commission in 2001[596] that gave two examples of this: the judgment of the PCIJ in the *Wimbledon* case[597] and the judgment of the ICJ in the *United States Diplomatic and Consular Staff in Tehran* case.[598] The cases referred, however, to somewhat different situations. The former (a broad sense) referred to a set of treaty

[595] See footnote 404 above.

[596] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 140.

[597] *Case of the S.S. "Wimbledon"*, *P.C.I.J., Series A*, No. 1, 1923, pp. 23–24.

[598] *United States Diplomatic and Consular Staff in Tehran* (see footnote 175 above), at p. 40, para. 86.

points on a single issue (namely provisions of the Treaty of Peace between the Allied and Associated Powers (Treaty of Versailles) on navigation on the Kiel Canal). The latter (a narrower sense) denoted a special set of secondary rules (namely rules of diplomatic law) claiming primacy to the general rules of State responsibility concerning consequences of a wrongful act. The broader sense denoted a special set of rules and principles on the administration of a determined problem; the narrower sense had to do with a special regime—a *lex specialis*—of State responsibility. He noted that some of the language used was problematic. Especially the distinction the Commission made in its Commentary between "weaker" and "stronger" forms of *lex specialis*, and associating self-contained regimes with the latter was unfortunate. Self-contained regimes were neither stronger nor weaker than other forms of *lex specialis*.

316. In a third sense, which was raised in order to stimulate debate on the matter, the term self-contained (special) regimes was sometimes employed in academic commentary and practice to describe whole fields of functional specialization or teleological orientation in the sense that special rules and techniques of interpretation and administration were thought to apply (i.e. a special branch of international law with its own principles, institutions and teleology, such as "human rights law", "WTO law", "humanitarian law", etc.). For example, the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* had recourse to such distinctions.[599] The three senses of "self-contained regime" were not, however, always clearly distinguishable from one another.

317. The notion of "self-contained regimes" had been constantly used by the Commission's Special Rapporteurs on the topic of State responsibility in a narrow and a broader sense, as outlined above. Although the Special Rapporteurs had held that States were entitled to set up self-contained regimes on State responsibility, there had never been any suggestion that such regimes would form "closed legal circuits". The question of residual application of the general rules in situations not expressly covered by the self-contained regime had not been treated by the Commission in any detail. However, the question of possible "fall-back" in case the regime failed to operate as it was supposed to had been discussed by Special Rapporteurs Riphagen and Arangio-Ruiz, both of whom held it self-evident that in such cases, recourse to general law must be allowed. The main conclusion from the Commission's earlier debates was that neither the Commission nor the Special Rapporteurs—nor any of the cases regularly discussed in this connection—implied that the special rules would be fully isolated from general international law.

318. The Chairperson suggested that in fact the term "self-contained regime" was a misnomer in the sense that no set of rules—whether in the narrower or the broader sense—was isolated from general law. He doubted whether such isolation was 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*.

319. The Chairperson concluded that general law had a twofold role in respect of any special regime. First, it provided the normative background to, and came in to fulfil, aspects of the operation of a special regime that had not been provided for by the latter. For example, whether or not some entity was a "State", or exercised sovereignty over a territory, were questions that would almost always need to be treated by reference to the general law. Second, the rules of general law also come to operate if the special regime failed to function properly. He therefore suggested that in further work on special regimes the main questions of interest concerned: (*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 for a "fall-back" to general rules owing to the regime's failure.

320. Concerning the conditions for the establishment of special regimes, it was suggested that the rules on derogation in respect of *lex specialis* should also apply to special regimes. Thus, notwithstanding peremptory norms and certain other cases of non-derogation, contracting out was generally permissible.

321. Concerning the relationship of the special regime *vis-à-vis* general international law under normal circumstances, this was normally to be determined by an interpretation of the treaties that formed the regime. Drawing on examples offered by human rights regimes[600] and WTO law,[601] the Chairperson observed that in none of the existing treaty regimes was the application of general international law excluded. On the contrary, the treaty bodies made constant use of general international law. This was not, the Chairperson pointed out, because of any specific act of "incorporation". As it had been stated by the ICJ in the *ELSI* case,[602] it was in the nature of important principles of general custom to apply in the absence of express

[599] *Legality of the threat or use of nuclear weapons, Advisory opinion, I.C.J. Reports 1996*, p. 226, at pp. 239, 241, 243–244 and 247, paras. 24, 27, 34, 37 and 51.

[600] See *Velásquez Rodríguez* v. *Honduras, Judgment of 29 July 1988*, Inter-American Court of Human Rights, Series C, No. 4. para. 184; *McElhinney* v. *Ireland*, European Court of Human Rights, Application No. 31253/96, Grand Chamber, *Judgment of 21 November 2001, Reports of Judgments and Decisions, 2001-XI*; and *Al-Adsani* v. *The United Kingdom*, European Court of Human Rights, Application No. 35763/97, Grand Chamber, *Judgment of 21 November 2001, ibid.*, p. 100, para. 55. See also *Loizidou* v. *Turkey*, European Court of Human Rights, Application No. 15318/89, *Judgment of 18 December 1996, Reports of Judgments and Decisions, 1996-VI*, para. 43; *Fogarty* v. *The United Kingdom*, European Court of Human Rights, Application No. 37112/97, Grand Chamber, *Judgment of 21 November 2001, Reports of Judgments and Decisions, 2001-XI*; and *Banković* v. *Belgium and Others*, European Court of Human Rights, Application No. 52207/99, *Judgment of 12 December 2001*, I.L.R., vol. 123 (2003), p. 94, at pp. 108–109. See also L. Caflisch and A. A. Cançado Trindade, "Les conventions américaine et européenne des droits de l'homme et le droit international général", *Revue générale de droit international public*, vol. 108 (2004), p. 10 *et seq.*, at pp. 11–22.

[601] WTO, *United States—Standards of Reformulated and Conventional Gasoline*, Report of the Appellate Body (WT/DS2/AB/R), of 20 May 1996; *Korea—Measures Affecting Government Procurement*, Report of the Panel (WT/DS163/R), of 1 May 2000, para. 7.96; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (WT/DS58/AB/R), of 6 November 1998, paras. 127–131.

[602] *Elettronica Sicula S.p.A. (ELSI)* (see footnote 140 above), p. 42, para. 50.

clauses of derogation. There was no support in practice to the suggestion that general international law would apply to special regimes only as a result of incorporation. In fact, it was hard to see how regime builders might agree *not* to incorporate (that is, opt out from) general principles of international law. From where would the binding nature of such an agreement emerge?

322. Concerning the fall-back onto general rules taking place due to the failure of the special regime, it was pointed out that what counted as "failure" was far from clear. No general criteria could be set up to determine what counts as "regime failure" *in abstracto*. At least some of the avenues open to members of the special regime are outlined in the 1969 Vienna Convention itself, and also the rules on State responsibility might be relevant in such situations.

323. The Chairperson stated that the main conclusion of his study was that the present use of the *lex specialis* maxim or the emergence of special treaty regimes had not seriously undermined legal security, predictability or the equality of legal subjects. These techniques gave expression to concerns about economic development, protection of human rights and the environment, and regionalism that were both legitimate and strongly felt. The system was not in a crisis.

324. He also noted that no homogenous, hierarchical system was realistically available to do away with problems arising from conflicting rules or legal regimes. The demands of coherence and reasonable pluralism will continue to point in different directions. This might necessitate increasing attention to the way the 1969 Vienna Convention might be used to deal with collision of norms and regimes. It might, he suggested, also be useful to elucidate the notion of "general international law" and its operation in regard to particular rules and regimes.

325. In regard to future work on the latter item, the Chairperson therefore proposed to focus on the operation of the special regimes in each of the three senses that special regimes were understood. A future study on this might set out: (*a*) the conditions of their establishment; (*b*) their manner of autonomous operation; (*c*) the role of general international law in regimes, including the solution of inter-regime conflicts; and (*d*) the conditions and consequences of regime failure.

326. In the ensuing discussions, the Study Group took note of the terminological insecurity to which the Chairperson had drawn attention. It agreed that the notion was constantly used in the narrower sense (i.e. special secondary rules of State responsibility) and a broader sense (i.e. special primary and secondary rules on a specific problem). The members observed that "special regime", as understood in the third sense (i.e. whole fields of functional specialization), presented an intriguing phenomenon that ought to be studied further in order to fully understand the relationship it engenders to the general law and to the other two forms of special regime discussed in the report.

327. It was agreed that the notion of "self-containedness" did not intend to convey anything more than the idea of "speciality" of the regime. The Study Group also noted that the distinction between a "strong form" and a "weak form" of special regime ought to be abandoned. There was broad agreement that general law continued to operate in various ways even within special regimes. The relationship between the regime and the general law could not, however, be settled by any general rules.

328. Some members of the Study Group suggested that rather than interpreting the *Elettronica Sicula S.p.A. (ELSI)* case as setting out a general principle that required derogation from the general law to be made expressly, it might be more in line with reality to read it in terms of a presumption against derogation.

329. The Study Group emphasized that whether or not regime failure occurred ought to be interpreted by reference to the treaties constitutive of the regime itself. Here, again, it was impossible to provide any general rules. However, it might also be useful to study further the different permutations in which such failure may occur. It was also suggested that it was up to the parties to the special regime to decide whether that regime had failed and what the consequences should be.

330. The Study Group noted that the difficulties presented by the relationship between the general and the special were relative, with differences arising depending on the circumstances of each case. There was some scepticism about the effort to elucidate the notion "general international law". It was stressed that any such effort should focus on the operation of general law in regard to particular rules and regimes. In this connection it was emphasized that while the 1969 Vienna Convention did constitute a general framework, its rules were residual in character and might often be superseded by agreement.

3. Discussion of outline concerning the Study on the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties)

331. In its discussion of the topic, the Study Group proceeded on the basis of an outline and an oral presentation by Mr. Teodor Melescanu. The outline considered, *inter alia*, the preparatory work leading to the adoption of article 30 of the Vienna Convention[603] and analysed the main provisions of that article,[604] including the basic prin-

[603] For the work of Special Rapporteurs Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock, see *Yearbook … 1953*, vol. II, document A/CN.4/63, pp. 90 *et seq.*, at pp. 156–159; *Yearbook ... 1954*, vol. II, document A/CN.4/87, pp. 123 *et seq.*; *Yearbook ... 1958*, vol. II, document A/CN.4/115, pp. 20 *et seq.*; and *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3, pp. 36 *et seq.*

[604] Article 30 of the 1969 Vienna Convention reads as follows:

"Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

ciples relevant in its application, namely, the principle of hierarchy in paragraph 1, the principle of the *lex prior* in paragraph 2 and the principle of the *lex posterior* in paragraphs 3 and 4 (*a*). The emergence of successive treaties on the same subject matter was a consequence of growth of international cooperation in response to novel needs arising in a changing environment.

332. Article 30 is mainly based on relevant concerns and did not create serious problems of fragmentation. Only paragraph (4) (*b*) of article 30 (i.e. governing the relations between a State that was party to two or more conflicting treaties and a State party to only one of them) did set off a situation of relevance for future consideration. Three points were noted. First, the mere conclusion of a subsequent inconsistent treaty would not *per se* give rise to a breach of international law. This would take place only through its *application.* Secondly, article 30 did not expressly address the question of the *validity* of the two inconsistent treaties, only of their relative *priority*.

333. Also, the provision did not address questions concerning suspension or termination nor address the legal consequence of violation of one treaty by the other. Thirdly, the provisions of article 30 were residual in character and in that sense not mandatory. Ultimately, it was left for the will of States to establish priority among successive treaties in accordance with their interests. In this connection, it was suggested that one focus of the study could be to what extent the will of States could be curtailed—in particular the will of the State that was party to two inconsistent treaties to pick and choose which of the treaties it would fulfil and which it would choose to violate with the consequence of State responsibility for violation. Further study on this was to be based on State practice, case law and doctrine, including consideration of principles such as *pacta tertiis nec nocent nec prosunt* (a treaty cannot create rights or obligations for a third party without its consent, article 34 of the 1969 Vienna Convention) and *prior tempore potior jure* (first in time, preferred in right).

334. In its discussion, the Study Group focused attention on the future orientation of the study. It was acknowledged that most of article 30 did not pose dramatic problems of fragmentation. The only situation where an unresolved conflict of norms would ensue was that addressed by paragraph 4 (*b*).

335. In regard to paragraph 4 (*b*), the Study Group suggested that it may be useful to consider the treatment of the matter and the choices made by successive Special Rapporteurs on the law of treaties. The Study Group endorsed the focus to be given on whether limits could be imposed on the will of a State to choose, between the inconsistent treaties to which it was a party, which it would comply with and which it would have to breach. It was wondered whether criteria arising from the distinction based on reciprocal, interdependent and absolute obligations such as discussed in relation to the *inter se* modification of treaties under article 41 could provide some guidelines in the implementation of article 30 as well.

336. In addition to paragraph 4 (*b*), two other instances of possible relevance were identified, namely: (*a*) the case of successive bilateral treaties relating to the same subject matter; and (*b*) the case of a treaty, multilateral or bilateral, which differs from customary international law. In relation to fragmentation, the Study Group's view was that the former situation was normally quite unproblematic. With regard to the latter, it was suggested that although this situation might create problems, these were of a general nature and did not need to be dealt with in this connection.

337. The Study Group agreed that the provisions of article 30 had a residual character. Some members wondered, however, whether it was correct to say that they were not mandatory. The provisions reflected largely accepted and reasonable considerations. The Group also agreed that conflicts would generally arise only at the time of the application of the subsequent treaty, but it was also suggested that at least in some cases a conflict might also emerge already at the moment of conclusion of the later treaty.

4. Discussion of the outline concerning the Study on the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties)

338. The Study Group proceeded on the basis of an outline and an oral presentation by Mr. Riad Daoudi. The outline considered, *inter alia*, the context in which an *inter se* agreement under article 41 of the 1969 Vienna Convention[605] applied, giving rise to two types of legal relations: "general relations" applicable to all parties to a multilateral treaty and "special" relations applicable to

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) as between States Parties to both treaties the same rule applies as in paragraph 3;

(*b*) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

[605] Article 41 of the 1969 Vienna Convention reads as follows:

"Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

two or more parties to the *inter se* agreement. The *inter se* agreement thus *modifies* the operation of the original treaty without *amending* it. The relationship between the general and the particular is analogous to the relationship between the *lex generalis* and the *lex specialis.*

339. It was the principal concern of article 41 to allow *inter se* agreements but to make sure they preserved the coherence of the original treaty. The conditions for concluding *inter se* agreements include: (*a*) the preservation of the rights and interests of the parties to the original multilateral treaty;[606] (*b*) the non-imposition of additional obligations or burdens on parties to the multilateral agreement; and (*c*) the preservation of the object and purpose of the multilateral treaty. In addition, there were conditions concerning the notification of the *inter se* agreement to their other parties and their reaction to it.

340. Concerning incompatibility with the object and purpose of the treaty (art. 41 (1) (*b*) (ii)), the situation with respect to an *inter se* agreement appeared to be no different from rules applicable in respect of reservations. It was suggested that an objective criterion would be useful to determine the permissibility of an *inter se* agreement. A modification was unproblematic in case of treaties laying down reciprocal obligations, that is, when the treaty consisted essentially of a network of bilateral relations.[607] The power of modification was limited in regard to treaties containing interdependent[608] and absolute[609] obligations.

341. The outline also discussed the question of sanctions for breach of the multilateral treaty by the parties to an *inter se* agreement. The text of article 41 left open two questions, namely, the legal effect of a violation of paragraph 1 constituting a material breach and the legal effect of an objection made after notification had been given under article 41 (2). Article 60 of the 1969 Vienna Convention sets out the conditions of reaction to material breach by the parties without defining what constituted "material breach". The law of State responsibility would cover the case of violation of the original treaty by the *inter se* agreement.

342. The Study Group noted that article 41 reflected the understandable need for parties to allow the development of the implementation of a treaty by *inter se* agreement. The relationship between the original treaty and the *inter se* agreement could sometimes be conceived as those between a minimum standard and a further development thereof. It did not, then, normally pose difficulties by way of fragmentation. The conditions of permissibility of *inter se* agreements reflected general principles of treaty law that sought to safeguard the integrity of the treaty. However, it was also pointed out that the conditions of *inter se* agreements were not always connected to the nature of the original agreement but also to the nature of a *provision* thereof (article 41 (1) (*b*) (ii)). The consequences of impermissible *inter se* agreements were not expressly dealt with in article 41 and should be further analysed.

343. Attention was drawn to the semantic differences between *modification, amendment* and *revision* in the application of article 41. Although these expressions were technically different, those differences were not always clearcut. A modification, for instance, might sometimes be understood as a proposal for amendment. It was suggested that some attention should be given to this in subsequent studies. It was likewise suggested that it might be useful to review the relationship between the different principles of coherence, including the relations between article 30 (subsequent agreements), article 41 (*inter se* modification) and Article 103 of the Charter of the United Nations (priority of the Charter obligations).

344. It was also considered useful to explore further the role that "notification" of the *inter se* agreements can in practice play in reducing incidences of fragmentation. If possible, a review of the practice of notifying other States and of other States reacting to such notifications should be undertaken.

5. Discussion on the outline concerning the interpretation of treaties in the light of "any relevant rules of international law applicable in 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

345. The Study Group proceeded on the basis of an outline and oral presentation by Mr. William Mansfield. The outline addressed *inter alia* the function of article 31 (3) (*c*),[610] in particular its textual construction, noting that it refers to *rules* of international law; that it is not restricted to customary international law; that it refers to rules that are both *relevant* and *applicable*; and that it is not restricted by temporality. It also analysed article 31 (3) (*c*) against a background reference to its consideration by the Commission[611] and its use in several cases before the Iran–United States Claims Tribunal,[612]

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[606] See, for example, article 311 (3) of the United Nations Convention on the Law of the Sea.

[607] For example, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.

[608] A disarmament treaty is an interdependent treaty inasmuch as the performance by one party of its obligations is a prerequisite for the performance by the other parties of theirs. A breach by one party is in effect a breach *vis-à-vis* all the other parties.

[609] A human rights treaty gives rise to absolute obligations: the obligations it imposes are independent and absolute, and performance of them is independent of the performance by the other parties of their obligations.

[610] Article 31 (3) (*c*) of the 1969 Vienna Convention reads as follows:

"Article 31

General rule of interpretation

[…]

3. There shall be taken into account, together with the context:

[…]

(*c*) Any relevant rules of international law applicable in the relations between the parties.

[…]"

[611] Third report on the law of treaties by Special Rapporteur Sir Humphrey Waldock, *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 5, at pp. 52–65. See also the report of the Commission to the General Assembly on the work of its sixteenth session, *ibid.*, document A/5809, p. 173.

[612] *Esphahanian* v. *Bank Tejarat* (1983) and *Case No. A/18* (1984) (see footnote 77 above). The provision was also relied upon in a dissent in *Grimm* v. *Iran* (1983), *ibid.*, 1984, vol. 2, p. 78, on the question of whether a failure by Iran to protect an individual could constitute a measure "affecting property rights" (p. 81) of his wife.

the European Court of Human Rights[613] and the International Court of Justice.[614] It further considered three concrete examples of its application in the *Mox Plant Case* before the International Tribunal for the Law of the Sea, the Arbitral Tribunal of the Convention for the protection of the marine environment of the North-East Atlantic (OSPAR Convention); and the Arbitral Tribunal of the United Nations Convention on the Law of the Sea;[615] in *Pope and Talbot Inc* v. *Government of Canada* before the North American Free Trade Agreement (NAFTA) Tribunal;[616] in the *United States—Import Prohibition of Certain Shrimp and Shrimp Products*[617] and *EC Measures Concerning Meat and Meat Products (Hormones)*[618] cases in the context of the WTO dispute settlement procedures.

346. The outline reached some preliminary conclusions concerning issues which the formulation of article 31 (3) (*c*) did not resolve and offered suggestions for future work. The outline pointed to the inherent limits of the technique of treaty interpretation as a means of reducing the incidence of fragmentation in relation to article 31 (3) (*c*). It was noted that such limits arise from: (*a*) the different context in which other rules of international law may have been developed and applied; and (*b*) the progressive purpose of many treaties in the development of international law.

347. As a general rule, there would be no room to refer to other rules of international law unless the treaty itself gave rise to a problem in its interpretation. A need for the use of article 31 (3) (*c*) specifically would arise normally if: (*a*) the treaty rule is unclear and the ambiguity appears to be resolved by reference to a developed body of international law; (*b*) the terms used in the treaty have a well-recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer; or (*c*) the terms of the treaty are by their nature open-textured and reference to other sources of international law will assist in giving content to the rule.[619]

348. Secondly, inter-temporality was discussed as it related to the determination of the point in time at which other rules of international law ought to apply and the relevance of evolving standards, Thirdly, the outline singled out certain problems in the application of article 31 (3) (*c*) that had not been resolved by the formulation of its reference to other treaties applicable in relations between the parties. In particular, the question was raised whether it was necessary that all the parties to the treaty being interpreted should be parties to the other treaty to which reference was being made or whether it was sufficient that only some of them were.

349. The Study Group emphasized that article 31 (3) (*c*) became applicable only when there was a problem of interpretation. In such case, the provision pointed to certain rules that should be "taken into account" in carrying out the interpretation. It did not, however, indicate any particular way in which this should take place. In particular, there was no implication that those other rules should determine the interpretation. The various rules would have to be weighed against each other in a manner that was appropriate in the circumstances. It was observed that the fact that article 31 (3) (*c*) was rarely expressly cited should not obscure its importance as a rule of treaty interpretation. It was quite essential for promoting harmonization and guaranteeing the unity of the international legal system. Therefore it deserved a careful study.

350. The Study Group discussed at length the question of what rules were covered by the reference in article 31 (3) (*c*). While it was clear that provision referred to other *treaty* rules that were relevant and applicable, it did not exclude the application of other sources of international law, such as customary law and general principles recognized by civilized nations. In the future study, attention might be given to how customary law and other relevant rules were to be applied. Again, though the reference was to be understood as wide, it was useful to bear in mind that the interpretation would need to come about as a process of weighing all the relevant rules.

351. The Study Group also discussed the relationship of article 31 (3) (*c*) to other rules of treaty interpretation—for instance those referring to good faith and the object and purpose of the treaty—and suggested that attention might be given to its relationship in general with article 32. It was likewise stressed that the existence of "mobile" concepts and the emergence of standards generally accepted by the international community should be taken into account. It was wondered whether the way inter-temporal law was seen at the time of adoption of the 1969 Vienna Convention continued to remain valid in view of the many transformations in the international system since.

6. Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules

352. In its discussion on this topic, the Study Group proceeded on the basis of an outline and oral presentation by Mr. Zdzislaw Galicki. The outline addressed the

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[613] *Golder* v. *United Kingdom, Judgment of 21 February 1975, European Court of Human Rights, Series A*, vol. 18. See also *Fogarty* v. *United Kingdom* (footnote 600 above); *McElhinney* v. *Ireland (ibid.)*; and *Al-Adsani* v. *United Kingdom (ibid.)*.

[614] *Oil Platforms (Islamic Republic of Iran* v. *United States), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 (the text of the decision is also available in ILM, vol. 42, No. 6 (November 2003), p. 1334). See also separate opinion of Judge Weeramantry in *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* (footnote 404 above), p. 114.

[615] International Tribunal for the Law of the Sea: *The MOX Plant Case (Ireland* v. *United Kingdom), Request for Provisional Measures*, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95; Permanent Court of Arbitration: *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award*, Decision of 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V15), p. 59 (see also ILM, vol. 42 (2003), p. 1118); and *The MOX Plant Case (Ireland* v. *United Kingdom), Order No. 3*, of 24 June 2003, ILM, vol. 42 (2003), p. 1187.

[616] *Award on the merits of phase 2*, 10 April 2001, *ICSID Reports*, vol. 7 (2005), p. 102; award on damages, 31 May 2002, *ibid.*, p. 148; the latter award can also be found in ILM, vol. 41 (2002), p. 1347.

[617] See footnote 601 above.

[618] WTO, Report of the Appellate Body (WT/DS26/AB/R, WT/DS48/AB/R), of 16 January 1998.

[619] This was the position in the construction of article XX of the GATT discussed in the *United States—Import Prohibition of Certain Shrimp and Shrimp Products* and *EC Measures Concerning Meat and Meat Products (Hormones)* cases (see footnotes 601 and 618 above).

nature of the topic in relation to fragmentation of international law, beginning with a brief description of *jus cogens*,[620] obligations *erga omnes*[621] and the nature of obligations concerning Article 103 of the Charter of the United Nations as well as their acceptance and rationale, noting that contemporary international law accords such norms and obligations priority over other norms. It was suggested that future work would analyse these categories of norms and obligations. The intention was not, then, to establish any hierarchy of legal sources.

353. Secondly, the outline offered a brief perspective on the concept of hierarchy in international law. It was recalled that there was agreement in the Study Group that it may not always be appropriate to draw hierarchical analogies from the domestic legal system. There was no well-developed and authoritative hierarchy of values in international law and thus no stable hierarchy of techniques by which to resolve conflicts, either.[622] Accordingly, hierarchy reflected a process of the law's development. Sometimes such hierarchies would contribute to the law's fragmentation, sometimes to its unification. It was suggested that future work would describe aspects of that evolution with a focus to the emergence of normative hierarchies.

354. Thirdly, the outline alluded to the need to address *jus cogens,* obligations *erga omnes* and Article 103 of the Charter of the United Nations *as conflict rules.* This would mean focusing on: (*a*) their priority *vis-à-vis* other norms of international law in general; (*b*) their hierarchical relationship with each other; and (*c*) the hierarchical relationships within these categories (e.g. conflicting *jus cogens* norms).

355. The Study Group concentrated on the future orientation of the Study. It was emphasized that the study should be practice-oriented and refrain from identifying general or absolute hierarchies. Hierarchy should be treated as an aspect of legal reasoning within which it was common to use such techniques to set aside less important norms by reference to more important ones. This was what it meant to deal with such techniques as *conflict rules*. It was advisable not to overstretch the discussion on hierarchy but to limit it to its function in resolving conflicts of norms. On the other hand, it might be useful to illustrate the manner in which the evolutionary nature of these hierarchical concepts appeared in practice.

356. The Study Group recognized that an overly theoretical discussion on this topic would raise issues which are complex and controversial. Focus should be on giving examples of the use of hierarchical relationships in practice and doctrine in order to solve normative conflicts. Those cases might then enable an articulation of typical situations where hierarchical relationships have been established.

357. It was also held useful to analyse the differences between *jus cogens* and *erga omnes* obligations. Some members wondered whether obligations *erga omnes* implicated hierarchical relationships in the manner that *jus cogens* did. Likewise, it was felt that attention should be given to the consequences of the use of a hierarchical relationship: what would happen to the inferior rule set aside by the superior one? Might State responsibility be implicated?

358. While hierarchy might sometimes bring about fragmentation, the Study Group emphasized that in most situations it was used to ensure the unity of the international legal system. The Group supported the suggested focus on the possible conflicts among the three hierarchical techniques, as well as on the eventual conflicts within each category. Support was also expressed for the consideration of the relationship between the present study and the interpretative techniques explored in the other studies.

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[620] See article 53 of the 1969 Vienna Convention. See also articles 41 and 48 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 113–114 and 126.

[621] See *Barcelona Traction, Second phase, Judgment* (footnote 40 above), at p. 32. See also *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 23; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 507 above), at p. 616.

[622] See *Yearbook… 2002*, vol. II (Part Two), p. 98, para. 506.