

Chapter XI

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

A. Introduction

439. Following its consideration of a feasibility study³¹⁷ that had been undertaken at its fifty-second session (2000) on the topic “Risks ensuing from fragmentation of international law”, the Commission decided to include the subject in its long-term programme of work.³¹⁸ At its fifty-fourth session (2002), the Commission included the topic in its programme of work and established a Study Group. It also decided to change the title to “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”.³¹⁹ 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 entitled “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

440. At its fifty-fifth session (2003), the Commission appointed Mr. Martti Koskenniemi as Chairperson of the Study Group. The Study Group 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 studies agreed upon in 2002,³²⁰ and decided upon the methodology to be adopted for that work. The Study Group also held a preliminary discussion of an outline produced by the Chairperson of the Study Group on the subject “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

441. At its fifty-sixth session (2004), the Commission reconstituted the Study Group. It held discussions on the study on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”, as well as discussions on the outlines prepared in respect of the other remaining studies.³²¹

B. Consideration of the topic at the present session

442. At the current session, the Study Group was reconstituted and held 8 meetings on 12, 17 and 23 May, 2 June, 12, 18 and 27 July and 3 August 2005. It had before it the following: (a) a memorandum on regionalism in the context of the study on “The function and scope of the *lex specialis* rule and the question of self-contained regimes”; (b) a study on the interpretation of treaties in the light of “any relevant rules of international law applicable in the relations between the parties” (art. 31, para. 3 (c) of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community; (c) a study on the application of successive treaties relating to the same subject matter (art. 30 of the Convention); (d) a study on the modification of multilateral treaties between certain of the parties only (art. 41 of the Convention); and (e) a study on hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules. The Study Group also had before it an informal paper on the “Disconnection clause”.³²²

443. At its 2859th, 2860th and 2864th meetings, on 28–29 July and on 3 August 2005, the Commission held an exchange of views on the topic on the basis of a briefing by the Chairperson of the Study Group on the status of work of the Study Group.

444. At its 2865th meeting, on 4 August 2005, the Commission took note of the report of the Study Group (A/CN.4/L.676 and Corr.1), reproduced in section C below.

C. Report of the Study Group

1. GENERAL COMMENTS AND THE PROJECTED OUTCOME OF THE WORK OF THE STUDY GROUP

445. Following the pattern of the previous year, the Study Group commenced its discussions with a general review of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session (A/CN.4/549, sect. E).

446. The Study Group took note of the broad endorsement of its work thus far in the deliberations of the Sixth Committee. The Group confirmed its wish to complete its task on the basis of the schedule, programme of work and

³¹⁷ G. Hafner, “Risks ensuing from fragmentation of international law”, *Yearbook ... 2000*, vol. II (Part Two), annex, p. 143.

³¹⁸ *Ibid.*, p. 131, para. 729.

³¹⁹ *Yearbook ... 2002*, vol. II (Part Two), p. 97, paras. 492–494.

³²⁰ See *Yearbook ... 2003*, vol. II (Part Two), p. 98, para. 427.

³²¹ (a) The interpretation of treaties in the light of “any relevant rules of international law applicable in the relations between the parties” (art. 31, para. 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 (art. 30 of the Convention); (c) the modification of multilateral treaties between certain of the parties only (art. 41 of the Convention); and (d) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules (*ibid.*).

³²² The documents are available from the Codification Division of the Office of Legal Affairs.

methodology agreed upon during the 2003 session of the Commission.³²³

447. The Study Group reaffirmed its intention to focus on the substantive aspects of fragmentation in the light of the 1969 Vienna Convention, while leaving aside institutional considerations pertaining to fragmentation. Taking note of the deliberations in the Sixth Committee, it reiterated its intention to attain an outcome which would be concrete and of practical value, especially for legal experts in foreign offices and international organizations. Its work should thus contain critical analyses of the experience of fragmentation in various international organs and institutions and it should yield an outcome that would be helpful in providing resources for judges and administrators coping with questions such as conflicting or overlapping obligations emerging from different legal sources. This would require a description of the actual problems in their social context.

448. The Study Group reaffirmed its intention to prepare, as the substantive outcome of its work, a single collective document consisting of two parts. One part would be a relatively large analytical study on the question of fragmentation, composed on the basis of the individual outlines and studies submitted by individual members of the Study Group during 2003–2005 and discussed in the Group. This would consist of a description and analysis of the topic from the point of view of, in particular, the 1969 Vienna Convention. The other part would consist of a condensed set of conclusions, guidelines or principles emerging from the studies and the discussions in the Study Group. This would be a concrete, practice-oriented set of brief statements that would work, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help in thinking about and dealing with the issue of fragmentation in legal practice. In 2006 a draft of both documents would be submitted by the Study Group for adoption by the Commission.

2. DISCUSSION OF A MEMORANDUM ON "REGIONALISM" IN THE CONTEXT OF THE STUDY ON "THE FUNCTION AND SCOPE OF THE *LEX SPECIALIS* RULE AND THE QUESTION OF 'SELF-CONTAINED REGIMES'"

449. The Study Group continued its substantive discussion on the study of the function and scope of the *lex specialis* rule and the question of "self-contained regimes" with a review of a memorandum on regionalism by its Chairperson.

450. It was noted in the memorandum that the expression "regionalism" did not figure predominantly in treatises of international law and in the cases where it was featured it rarely took the shape of a "rule" or a "principle". It was often raised in discussions concerning the universality of international law, in the context of its historical development and the influences behind its substantive parts. It arose only in rare cases in a normative sense as a claim about regional *lex specialis*.

451. There were at least three distinct ways in which "regionalism" was usually understood, namely: (a) as a set of distinct approaches and methods for examining international law, (b) as a technique for international law making, and (c) as the pursuit of geographical exceptions to universal rules of international law.

452. The first—regionalism as a set of approaches and methods for examining international law—was the most general and broadest sense. It was used to denote particular orientations of legal thought or historical and cultural traditions. Such is the case with the "Anglo-American" tradition or the "continental" tradition of international law,³²⁴ or "Soviet" doctrines³²⁵ or "Third World approaches"³²⁶ to international law.

453. Although it is possible to trace the sociological, cultural and political influence that particular regions have had on international law, such influences do not really address aspects of fragmentation such as come under the mandate of the Study Group. These remain historical or cultural sources or more or less continuing political influences behind international law. There is a very strong presumption among international lawyers that, notwithstanding such influences, the law itself should be read in a universal fashion.³²⁷ There is no serious claim that some rules should be read or used in a special way because they emerged as a result of a "regional" inspiration.

454. Very often regional particularity translates itself or becomes apparent as a functional one: a regional environmental or a human rights regime, for example, may be more important because of its environmental or human rights focus than as a regional regime. This type of differentiation does not need further separate treatment since it already forms the gist of the study on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" that was exhaustively debated in the Study Group last year.³²⁸

455. The second type of regionalism—a regional approach to international law-making—conceives

³²⁴ See generally H. Lauterpacht, "The so-called Anglo-American and Continental schools of thought in international law", *British Year Book of International Law*, 1931, vol. 12, pp. 31–62. See also, for example, E. D. Dickinson, "L'interprétation et l'application du droit international dans les pays anglo-américains", *Collected Courses of The Hague Academy of International Law*, 1932 (The Hague, Martinus Nijhoff), vol. 40, pp. 305–395.

³²⁵ See K. Grzybowski, *Soviet Public International Law: Doctrines and Diplomatic Practice* (Leiden, Sijthoff, 1970); and T. Långström, *Transformation in Russia and International Law* (Leiden, Martinus Nijhoff, 2003).

³²⁶ See A. Anghie and B. S. Chimni, "Third world approaches to international law and individual responsibility in international conflict", in S. R. Ratner and A.-M. Slaughter, eds., *The Methods of International Law* (Washington, D.C., American Society of International Law, 2004), pp. 185–210.

³²⁷ See generally R. Y. Jennings, "Universal international law in a multicultural world", in M. Bos and I. Brownlie, eds., *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (Oxford, Clarendon Press, 1987), pp. 39–51.

³²⁸ For distinctions of special regimes, in particular those based on functional specialization, see the preliminary report by Mr. M. Koskeniemi, Chairperson of the Study Group, on the study on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

³²³ *Yearbook ... 2003*, vol. II (Part Two), p. 98, paras. 424–428.

regions as privileged forums for international law-making because of the relative homogeneity of the interests and actors concerned. It is sometimes suggested, for example, that international law should be developed in a regional context, since its implementation would thus be more efficient and equitable and the relevant rules would be understood and applied in a coherent manner. Regionalism in this sense is often propounded by sociological approaches to international law.³²⁹ No doubt it is sometimes advisable to limit the application of novel rules to a particular region. Much of international law has developed in this way, as the gradual extension of originally regional rules to areas outside the region. However, this sociological or historical perspective, too, falls largely outside the focus of the Study Group. Moreover, the legislative concern in such cases is also often more significant by virtue of the nature of the rules being propounded (that is to say, as rules about “trade” or “environment”) than owing to whatever regional linkage is being proposed.

456. The third situation—regionalism as the pursuit of geographical exceptions to universal rules of international law—seems more relevant in this context. It could be analysed: (a) in a positive sense, as a rule or a principle with a regional sphere of validity in relation to a universal rule or principle, or (b) in a negative sense, as a rule or a principle that imposes a limitation on the validity of a universal rule or principle. In the former case, the rule in question would be binding only on the States of the particular region, while in the latter sense, States concerned would be exempted from the application of an otherwise universal rule or principle. As far as this second (“negative”) sense is concerned, it does not seem to have any independence from the more general question, debated by the Study Group last year, of the possibility and consequences of (a regional) *lex specialis*: the conditions under which a regional rule may derogate from a universal one seem analogous with or identical to the problems dealt with last year.³³⁰

457. Doubtless, States in a region may, by treaty or otherwise, establish a special law applicable in their mutual relations. In this regard, the “positive sense” merely describes a truism. However, there is a stronger claim to the effect that there may also come into existence types of regional law which are binding on all the States of the region, or other States in their relations with the States of the region, independently of the consent of the latter.

458. Such a claim was dealt with, albeit inconclusively, by ICJ in the *Asylum*³³¹ case, as well as in the *Haya de la Torre* case,³³² where Colombia contended *inter alia* that a “regional law” had emerged on diplomatic protection,³³³

with the purpose of deviating from the general law. Such law was applicable, in the view of Colombia, even to States of the region that did not accept it.³³⁴ In his dissenting opinion in the *Asylum* case, Judge Alvarez asserted that such rule was not only “binding upon all the States of the New World”, although it “need not be accepted by all [of them]”, but also on all other States “in matters affecting America”.³³⁵ However, ICJ did not pronounce on the theoretical possibility of the existence of rules binding automatically on States of a region and binding other States in their relationship with those States. It treated the claim by Colombia as a claim about customary law and dismissed it on account of Colombia’s having failed to produce evidence of its existence. However, it is very difficult to accept—and there are no uncontested cases on this—that a regional rule might be binding on States of a region, or on other States, without the consent of the latter. Apart from other considerations, there are no unequivocal ways of determining whether or not particular States belong to particular geographical regions.

459. Attention was also drawn to two specific issues in the context of regionalism as the pursuit of geographical exceptions to universal rules, which may still require separate treatment, namely: (a) the question of universalism and regionalism in the context of human rights law, and (b) the relationship between universalism and regionalism in the context of the collective security system under the Charter of the United Nations. The former—universalism and regionalism in human rights—raised philosophical questions of cultural relativism which fall outside the scope of the Study. In any case, regional human rights regimes may also be seen as the varying, context-sensitive implementation and application of shared standards, and not as exceptions to general norms. This would imply that such matters would fall under the more general question of the relationship between the general and the special law in the study on the function and scope of the *lex specialis*.

460. The latter—collective security under Chapter VIII of the Charter of the United Nations—raised the question of the priority of competence between regional agencies and arrangements and the Security Council in taking enforcement action. In view of Article 52, paragraph 2, of the Charter, any action by such agencies or arrangements may not be considered an “exception” to the competence of the Security Council. Chapter VIII of the Charter should therefore be seen as a set of functional provisions that seek to deal at the most appropriate level with particular issues relevant to notions of “subsidiarity”.

461. The Study Group expressed support for the general orientation of the memorandum. While members noted that “regionalism” generally fell under the problem of *lex specialis*, some still felt that this was not all that could be said about it. In some fields such as trade, for example, regionalism was influencing the general law in such great measure that it needed special highlighting.

³²⁹ See M. G. Scelle, *Cours de droit international public* (Paris, Domat-Montchrestien, 1948), p. 253. See also H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 1st ed. (London, Macmillan, 1977), at pp. 305–306.

³³⁰ See the preliminary report by Mr. M. Koskenniemi, Chairperson of the Study Group, on the study on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

³³¹ *Asylum, Judgment, I.C.J. Reports 1950*, p. 266.

³³² *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 71.

³³³ See the comments of the Government of Colombia on the existence of American international law, Judgments of 20 and 27

November 1950, *I.C.J. Pleadings, Asylum*, Vol. I, p. 316, at pp. 330–334.

³³⁴ See the allegations of the Government of Colombia in Judgment of 13 June 1951, *I.C.J. Pleadings, Haya de la Torre*, p. 17, at pp. 25–27.

³³⁵ *Asylum* (see footnote 331 above), p. 294.

Practices by the European Union as well as States of the Latin American region were especially emphasized. Although the opinion was expressed that a study on the role and nature of European law would be worthwhile, most members felt that this could not be accomplished in the time available.

462. It was pointed out that human rights law, for example, had always been fragmented into different compartments: political rights, economic rights, rights of the third generation, and so on. It was agreed, however, that the Study Group should not embark upon a discussion of problems of cultural relativism in human rights. In regard to security issues, the opinion was expressed that although the principle of non-intervention was more entrenched in the Western hemisphere than elsewhere, there might be a need to mention recent activities of regional organizations such as the African Union in peacekeeping and peace enforcement. However, others expressed the view that the regional approaches under Chapter VIII of the Charter of the United Nations did not emerge as “fragmentation” but concerned the application of specific Charter provisions.

463. The Study Group held a separate discussion, on the basis of a paper by one of its members, Mr. Economides, of the so-called “disconnection clause” that had been inserted in many multilateral conventions, according to which in their relations *inter se* certain of the parties to the multilateral convention would not apply the rules of the convention but specific rules agreed among themselves. This clause had often been inserted at the request of the members of the European Union. In particular, three types of such clauses had typically been created. As a general rule, the exclusion of the provisions of the relevant treaty was complete;³³⁶ in exceptional cases, it was partial,³³⁷ or optional.³³⁸ The objective of such clauses was to ensure that European law takes precedence over the provisions of the multilateral convention in the relations among States members of the Community and between those States and the Community itself. The clause had no effect on the rights and obligations of States not members of the Community, nor on those of States members of the Community towards those States, nor on the rights and obligations of the Community itself.

³³⁶ For example, article 27, paragraph 1, of the European Convention on transfrontier television provides:

“In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.”

See also article 25, paragraph 2, of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

³³⁷ Article 20, paragraph 2, of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters provides:

“In their mutual relations, Parties which are members of the European Community shall apply the relevant Community rules instead of articles 15 and 18.”

³³⁸ Article 13, paragraph 3, of the UNIDROIT Convention on stolen or illegally exported cultural objects provides:

“In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.”

464. Some members felt that the proliferation of such clauses was a significant negative phenomenon. The opinion was even expressed that such clauses might be illegal inasmuch as they were contradictory to the fundamental principles of treaty law. Others, however, observed that whatever their political motives or effects, such clauses were still duly inserted into the relevant conventions and their validity thus followed from party consent. It was difficult to see on what basis parties might be prohibited from consenting to them. The Study Group agreed, however, that such clauses might sometimes erode the coherence of a treaty. It was important to ensure that they would not be used to defeat the object and purpose of the treaty. Nonetheless, it was felt impossible to determine their effect *in abstracto*.

465. It was also pointed out that in some situations the result may not be as problematic, particularly if the obligations assumed by the parties under the disconnection clause were intended to deal with the technical implementation of the provisions of the multilateral convention or are more favourable than those of the regime from which the disconnection clause departs.

466. On the basis of the discussion, the Study Group agreed that “regionalism” should not have a separate entry in the final substantive report. Rather, various aspects of the memorandum and the debate would be used as examples in the overall schema of the topic, especially in connection with the *lex specialis* rule. Mention of regionalism as a factor contributing to fragmentation should also be included in the introduction to the final report. It should be borne in mind, however, that its role was not only negative. It was often useful as a form of implementing general law (as in the United Nations Convention on the Law of the Sea, for instance). The question of the disconnection clause as a special treaty technique used by the European Union would be dealt with in the context of the analyses of understanding various relationships between the general law and the special law in the study on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.

3. DISCUSSION ON THE STUDY ON THE INTERPRETATION OF TREATIES IN THE LIGHT OF “ANY RELEVANT RULES OF INTERNATIONAL LAW APPLICABLE IN THE RELATIONS BETWEEN THE PARTIES” (ART. 31, PARA. 3 (C), OF THE 1969 VIENNA CONVENTION), IN THE CONTEXT OF GENERAL DEVELOPMENTS IN INTERNATIONAL LAW AND CONCERNS OF THE INTERNATIONAL COMMUNITY

467. The Study Group also discussed a revised paper by Mr. Mansfield on “The interpretation of treaties in the light of ‘any relevant rules of international law applicable in the relations between the parties’ (art. 31, para. 3 (c), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community.”³³⁹ It was recalled that according to article 31, paragraph 3 (c), of the Convention, treaties were to be interpreted within the context of “any

³³⁹ See also C. McLachlan, “The principle of systemic integration and article 31(3)(c) of the Vienna Convention”, *International and Comparative Law Quarterly*, vol. 54, part 2 (April 2005), pp. 279–319.

relevant rules of international law applicable in the relations between the parties". The provision thus helped to place the problem of treaty relations in the context of treaty interpretation. It expressed what could be called a principle of "systemic integration", that is to say, a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law—in other words, international law understood as a system. The negotiation of individual treaties usually took place as separate diplomatic and practical exercises, conducted by experts in the particular field of regulatory substance covered by the treaty. It was the objective of article 31, paragraph 3 (c), to connect the separate treaty provisions that followed from such exercises to each other as aspects of an overall aggregate of the rights and obligations of States. As an interpretative tool, the principle expresses the nature of a treaty as an agreement "governed by international law".³⁴⁰

468. The provision was not a panacea in reducing fragmentation, however. Indeed, article 31, paragraph 3 (c), of the 1969 Vienna Convention was not equipped as a technique to resolve conflicts or overlaps between rules of international law—it merely called upon lawyers to interpret treaties so as to ensure consistency with their normative environment. As such, the provision takes its place alongside a wide set of provisions in the Convention and pragmatic techniques of conflict resolution.³⁴¹

469. In the past, article 31, paragraph 3 (c), of the 1969 Vienna Convention has not often been resorted to. Indeed, the article has been sometimes criticized for providing little guidance as to when and how it is to be used, what to do about overlapping treaty obligations, whether it also took account of customary rules and whether the "relevant rules of international law applicable in the relations between the parties" referred to the law in force at the conclusion of the treaty or otherwise.³⁴² However, recent practice has showed a considerably increased recourse to the provision. It has been resorted to, for example, by the Iran-United States Claims Tribunal,³⁴³ ECHR,³⁴⁴ arbitral tribunals established pursuant to

multilateral agreements,³⁴⁵ and the Appellate Body within the WTO Dispute Settlement Understanding,³⁴⁶ as well as ICJ.³⁴⁷ Suggestions aiming to "operationalize" article 31, paragraph 3 (c), have been: (a) to reinstate the central role of general international law in treaty interpretation, (b) to locate the relevance of other conventional international law in this process, and (c) to shed light on the position of treaties in the progressive development of international law over time ("inter-temporality"). In this connection, the revised report by Mr. Mansfield offered a series of propositions for consideration.

470. First, according to the principle of "systemic integration", attention should, in the interpretation of a treaty, also be given to the rules of customary international law and general principles of law that are applicable in the relations between the parties to a treaty. This principle could be articulated as a negative as well as a positive presumption:

(a) *Negative*, in that entering into treaty obligations, the parties would be assumed not to have intended to act inconsistently with customary rules or with general principles of law; and

(b) *Positive*, in that parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way".³⁴⁸

471. The importance of custom and general principles is highlighted whenever a treaty provision is unclear or open-textured or when the terms used in the treaty have a recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer.³⁴⁹ The process may on occasion involve extensive investigation of sources outside the treaty in order to determine the content of the applicable rule of custom or

³⁴⁰ 1969 Vienna Convention, art. 2, para. 1 (a).

³⁴¹ These include the other techniques being discussed by the Study Group.

³⁴² See the separate opinion of Judge Weeramantry in the case concerning the *Gabčíkovo-Nagymaros Project* (footnote 175 above), p. 114. See also H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Three)", *British Year Book of International Law*, 1991, vol. 62, p. 58.

³⁴³ See *Esfahanian v. Bank Tejarat* (1983) IUSCTR (Cambridge, Grotius, 1984), vol. 2, p. 157. See also Case No. A/18 (1984), *ibid.*, vol. 5, p. 251, at p. 260. The provision was also relied upon in a dissent in *Grimm v. Iran* (1983), *ibid.*, vol. 2, p. 78, at p. 82, on the question of whether a failure by Iran to protect an individual could constitute a measure affecting "property rights" of his wife. See also *Amoco International Finance Corporation v. Iran* (1987), *ibid.*, 1988, vol. 15, p. 189, at p. 222.

³⁴⁴ *Golder v. United Kingdom*, Judgment of 21 February 1975, ECHR, Series A: Judgments and Decisions, vol. 18, and *Loizidou v. Turkey* (see footnote 250 above). See also *Fogarty v. United Kingdom*, ECHR, application No. 37112/97, Grand Chamber, Judgment of 21 November 2001, *Reports of Judgments and Decisions*, 2001–XI, p. 157; *McElhinney v. Ireland*, ECHR, application No. 31253/96, *ibid.*, p. 37; *Al-Adsani v. United Kingdom*, ECHR, application No. 35763/97, *ibid.*, p. 74; *Banković and Others v. Belgium and Others*, ECHR, application No. 52207/99, Judgment of 12 December 2001, 2001–XII, p. 333.

³⁴⁵ 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.V.15), p. 59. See also ILM, vol. 42 (2003), p. 1118. See further the International Tribunal for the Law of the Sea, *Mox Plant case* (Ireland v. United Kingdom), Request for Provisional Measures Order, 3 December 2001, *ITLOS Reports 2001*, p. 95; and Order No. 3 (24 June 2003), ILM (see above), p. 1187. See also *Pope and Talbot Inc v. Government of Canada* before the North American Free Trade Agreement Tribunal, Award on the merits (10 April 2001), *ICSID Reports*, vol. 7 (2005), p. 102; and award in respect of damages (31 May 2002), *ibid.*, p. 148. See also ILM, vol. 41 (2002), p. 1347.

³⁴⁶ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report (WT/DS58/AB/R), of 12 October 1998; and *European Communities: Measures Concerning Meat and Meat Products (Hormones)*, (WT/DS26/AB/R, WT/DS48/AB/R), of 16 January 1998.

³⁴⁷ *Oil Platforms* (see footnote 175 above). See also the separate opinion of Judge Weeramantry in the *Gabčíkovo-Nagymaros Project* case (see footnote 175 above), p. 88, at p. 114.

³⁴⁸ *Pinson* case, Franco-Mexican Commission (Verzija President), in A. D. McNair and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases 1927–1928* (London, Longman, 1931): "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way." See also UNRIAA, vol. V (Sales No. 52.V.3), p. 422.

³⁴⁹ For example, as in the construction of the terms "fair and equitable treatment" and "full protection and security" in *Pope and Talbot Inc. v. Government of Canada* (see footnote 345 above).

general principle (as in *Al-Adsani*³⁵⁰ and *Oil Platforms*³⁵¹). The significance of rules of customary international law and general principles of law in this process is in the fact that they perform a systemic or constitutional function in describing the operation of the international legal order.³⁵²

472. Secondly, where another treaty is applicable in the relations between the parties, this raises the question as to whether it is necessary that all the parties to the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes. Four answers to this question may be considered:

(a) That all parties to the treaty under interpretation should also be parties to any treaty relied upon for its interpretation.³⁵³ This is a clear but very narrow standard. The resulting problems might be alleviated by making a distinction between using the other treaty for the purposes of *interpretation* or *application*. In any case, such other treaty may always be used as evidence of a common understanding between the parties;

(b) That the parties in the *dispute* are also parties to the other treaty. This approach would broaden the range of treaties potentially applicable for interpretation purposes. However, it would run the risk of inconsistent interpretations depending on the circumstances of the particular treaty partners in dispute;

(c) That the rule contained in a particular treaty be required to possess the status of customary international law.³⁵⁴ This approach has the merit of rigour, but it might be inappropriately restrictive with regard to treaties which have wide acceptance in the international community (including by the disputing States) but are not in all respects stating customary international law (such as the United Nations Convention on the Law of the Sea);

(d) That although the complete identity of treaty parties would not be required, the other rule relied upon could be said to have been implicitly accepted or tolerated by all parties to the treaty under interpretation.³⁵⁵

³⁵⁰ See footnote 344 above

³⁵¹ See footnote 175 above.

³⁵² Examples of customary rules include: the criteria of statehood (see *Loizidou v. Turkey* (footnotes 250 and 294 above)); the law of State responsibility (which has influenced both the reach of human rights obligations (see *Loizidou v. Turkey* and *Issa and Others v. Turkey*, application No. 31821/96, decision of 16 November 2004). See also the reliance on the public international law rules of jurisdiction in *Banković and Others v. Belgium and Others* (footnote 344 above), at pp. 351–352, paras. 59–60; and the law of economic countermeasures in the WTO Dispute Settlement Understanding; the law of State immunity; the use of force; and the principle of good faith (*United States: Import Prohibition of Certain Shrimp and Shrimp Products* (footnote 346 above)).

³⁵³ This was the approach adopted by the GATT Panel Report, *United States: Restrictions on Imports of Tuna* (DS29/R of 16 June 1994), reproduced in ILM, vol. 33 (1994), p. 839, at p. 892, para. 5.19.

³⁵⁴ See, for example, the emphasis placed in *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (footnote 346 above) on the fact that, although the United States had not ratified United Nations Convention on the Law of the Sea, it had accepted during the course of argument that the relevant provisions for the most part reflected international customary law.

³⁵⁵ Pauwelyn supports this approach in the case of the WTO Covered Agreements. See J. Pauwelyn, *Conflict of Norms in Public International*

473. The third problem left open by the formulation of article 31, paragraph 3 (c), concerned inter-temporality, that is, the question as to whether, with regard to the other rules of international law in the interpretation of a treaty, the interpreter is limited to international law applicable at the time the treaty was adopted, or whether subsequent treaty developments may also be taken into account.³⁵⁶ Here a distinction might be made between subsequent treaties which may affect the *application* of the treaty to be interpreted (the process of bringing the latter treaty *up to date*)³⁵⁷ and those that may affect the *interpretation* of the treaty itself, that is to say, cases where the concepts in the treaty are themselves “not static but evolutionary”.³⁵⁸ Although there was support for the principle of contemporaneity (that is, that only provisions contemporaneous to the treaty under interpretation should be taken into account), it could not be excluded *a priori* that the parties might intend the interpretation and application of a treaty to follow subsequent developments.

474. However, a safe guide to a decision on the matter may not be found in the imputed intention of the parties alone. Rather, the interpreter must find concrete evidence of the parties’ intentions in this regard in the material sources referred to in articles 31 and 32 of the 1969 Vienna Convention, namely, in the terms themselves, the context, the object and purpose of the treaty and, where necessary, the *travaux préparatoires*.³⁵⁹

475. The Study Group welcomed the revised paper by Mr. Mansfield, in general endorsing in general terms the adoption of an interpretative approach to article 31, paragraph 3 (c) of the 1969 Vienna Convention, which may be of practical use to judges and administrators. The approach taken towards achieving systemic integration was felt to be consistent with the approach taken by the Study Group the previous year in its discussion of the Chairperson’s report on the *lex specialis* and the question of “self-contained regimes”.³⁶⁰ Some members still felt that there was, perhaps, a need for a grounding of such a principle in the Convention itself. Accordingly, the Study Group preferred to refer, not to the “principle”, but to the “objective” of systemic integration. According

Law: How WTO Law Relates to Other Rules of International Law (Cambridge University Press, 2003), pp. 257–263.

³⁵⁶ In the title to Mr. Mansfield’s study, the reference to interpretation “in the context of general developments in international law and concerns of the international community” refers to inter-temporality, a problem which was not expressly resolved by the Commission at the time when it framed the 1969 Vienna Convention.

³⁵⁷ *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland* (see footnote 345 above), p. 91, para. 103; or ILM (*ibid.*), p. 1138, para. 103.

³⁵⁸ Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim’s International Law*, 9th ed. (Harlow, Longman, 1992), p. 1282.

³⁵⁹ ICJ has, on several occasions, accepted that this process may be permissible where the parties insert provisions into their treaty which by *their terms or nature* contemplate evolution. This was done most recently in the *Gabčíkovo-Nagymaros Project* case (see footnote 175 above), at pp. 76–80. See also the separate opinion of Judge Weeramantry, *ibid.*, pp. 113–115. See further, for example, the advisory opinion given by ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 16, at p. 31; and its decision in *Aegean Sea Continental Shelf*, *Judgment*, I.C.J. Reports 1978, p. 3, at p. 32.

³⁶⁰ *Yearbook ... 2004*, vol. II (Part Two), pp. 112–115, paras. 303–330.

to this objective, whatever their subject matter, treaties are a creation of the international legal system, and their operation is predicated upon that fact.

476. The Study Group accepted that there was a need to put into effect article 31, paragraph 3 (c). However, it was also widely felt that the relationship between subparagraphs (a) and (b) of article 31, paragraph 3 and its subparagraph (c) needed to be clarified. Article 31, paragraph 3 (c), was not to be used outside the general context of article 31. Some doubt was also expressed regarding the possibility of getting very far in determining rules of treaty interpretation. Such interpretation was a rather “artistic” activity that could scarcely be grasped by firm rules or processes.

477. The Study Group highlighted the flexibility built into article 31, paragraph 3 (c). It accepted that the rules referred to in article 31, paragraph 3 (c), included not only other treaty rules but also rules of customary law and general principles of law. Concerning the role of custom and general principles, it was noted that in addition to the situations mentioned in paragraph 471 above, custom and general principles may be equally relevant where the treaty regime collapses. If several rules from different sources (treaty, custom, general principles) might be applicable, the view, also expressed last year, was reiterated that although there was no formal hierarchy between the legal sources, lawyers tended to look first at treaties, then at customary rules and then at general principles in seeking answers to interpretative problems.

478. Regarding other applicable conventional international law, the Study Group felt that it did not need to take a definite position on the four solutions suggested in paragraph 472 above. The task for determination rested upon the judge or the administrator on the basis of the nature of the treaty under interpretation and the concrete facts in each case. It was also suggested that a fifth solution might be considered, namely that all relevant rules of international law applicable in relations between the parties be taken into account and given whatever weight might be appropriate under the circumstances.

479. Regarding inter-temporality, there was support for the principle of contemporaneity as well as the evolutive approach. Again the Study Group felt that it should not make a choice between the various positions. It saw its role as limited to indicating the possible options available to the judge or administrator charged with answering the question as to whether the reference to “other relevant rules” in article 31, paragraph 3 (c), was limited to rules in force when the treaty was adopted or could be extended to cover subsequent treaties also.

4. DISCUSSION OF THE PRELIMINARY REPORT ENTITLED “HIERARCHY IN INTERNATIONAL LAW: *JUS COGENS*, OBLIGATIONS *ERGA OMNES*, ARTICLE 103 OF THE CHARTER OF THE UNITED NATIONS, AS CONFLICT RULES”

480. The Study Group also considered a revised report by Mr. Z. Galicki entitled “Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules”. The report outlined relevant aspects to be considered with

respect to the concept of hierarchy in international law, gave a brief description of *jus cogens*, obligations *erga omnes* and the nature of obligations under Article 103 of the Charter, and practical examples in which some of these categories have been addressed,³⁶¹ and also raised issues concerning possible relationships between them. The report also considered the potential impact of the three categories as conflict rules on the process of fragmentation of international law, particularly on other norms of international law, and highlighted the connection between this study and the other studies relating to fragmentation of international law.

481. It was suggested that in the main the concept of hierarchy in international law should be approached and discussed by the Study Group from the point of view of hierarchy of norms and obligations, without *a priori* excluding other possible concepts of hierarchy. It was also pointed out that the concept of hierarchy in international law was especially developed by doctrine.

482. It was also noted that norms of *jus cogens*, obligations *erga omnes* and obligations under the Charter of the United Nations (Article 103) should be treated as three parallel and separate categories of norms and obligations, taking into account their sources, their substantive content, territorial scope and practical application. All three categories were also characterized by certain weaknesses: (a) norms of *jus cogens* lacked a definitive catalogue and the concept as such was not entirely uncontested, (b) obligations *erga omnes* were often of a very general nature, both in substance and in their application, and they involved “the legal interests of all States”, which may develop over time, and (c) unlike norms of *jus cogens* and obligations *erga omnes*, obligations under Article 103 of the Charter were formally limited to States which are members of the United Nations.

483. Although the three categories raised a wide range of theoretical and practical questions, it was reiterated that the Study Group should examine them only as “conflict rules” in the context of difficulties arising from the diversification and expansion of international law. The objective should be to come up with guidelines of a general character, bearing in mind the difficulty of identifying hierarchical structures between norms.

484. The report further highlighted the close connection between the study on hierarchy in international law and the other four studies. The conclusions by the Study Group on this study would thus depend on the conclusions emerging from the other studies, and the former would in

³⁶¹ For example, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 3, at p. 32; *East Timor (Portugal v. Australia), Judgment*, I.C.J. Reports 1995, p. 90, at p. 102; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment*, I.C.J. Reports 1996, p. 595, at p. 616; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 243 above), at p. 23; and the separate opinion of Judge Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, I.C.J. Reports 1993, p. 325, at p. 440, para. 100. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 175 above).

turn have consequences for the results of the latter. In this connection, it was suggested that conclusions could be further developed around a number of clusters concerning (a) the general concept of hierarchy in international law, (b) the acceptance and rationale of hierarchy in international law, (c) the relationship between the various norms under consideration, and (d) the relationship between hierarchy and fragmentation of international law. As regards the relationship between the various norms under consideration, the paper by Mr. Galicki suggested the necessity of recognizing the principle of harmonization.

485. In the ensuing discussion, it was noted that the current study was the most abstract and academic among the five selected studies. It was therefore necessary to bear in mind the views expressed in the Sixth Committee and to proceed in as concrete a fashion as possible. In this connection, it was stressed that the Study Group should focus on hierarchy and other possible relationships between norms of international law in the context of fragmentation. It should seek to employ the technique, followed in the other studies, of setting the subject of legal reasoning within an international legal system in relation to the three categories, as conflict rules.

486. It was considered essential to study how hierarchy served as a tool to resolve conflicts, the acceptance and rationale of the hierarchy in relation to practical examples concerning the three categories, and the context in which hierarchy operated to set aside an inferior rule and the consequences of such setting aside.

487. While there was no hierarchy as such between sources of international law, general international law recognized that certain norms have a peremptory character. Certain rules were recognized as superior or having a special or privileged status because of their content, effect or scope of application, or on the basis of consent among parties. The rationale of hierarchy in international law found its basis in the principle of the international public order, and its acceptance is reflected in examples of such norms of *jus cogens*, obligations *erga omnes*, as well as treaty-based provisions such as Article 103 of the Charter of the United Nations.³⁶² The notion of public order is a recognition of the fact that some norms are more important or less important than others. Certain rules exist to satisfy the interests of the international community as a whole. Some members of the Study Group, however, felt that the metaphor of hierarchy in international law was not analytically helpful, and that it needed to be contextualized within specific relationships between norms of international law. It was stressed that hierarchy operated in a relational and contextual manner.

488. It was clearly understood that while norms of *jus cogens* and obligations arising under Article 103 of the Charter of the United Nations addressed aspects of hierarchy, obligations *erga omnes* were more concerned with the area of application of norms, rather than hierarchy. The qualification of norms as *erga omnes* did not

imply any hierarchy. In exploring such relationships, the Study Group could also survey other provisions in multilateral treaty regimes of a hierarchical nature similar to Article 103, as well as take into account the special status of the Charter in general. Inasmuch as obligations *erga omnes* did not implicate normative hierarchy, it was suggested that it would be better to take account of this fact by adopting the title “norms with special status in international law”.

489. The concept of *jus cogens* has been widely accepted by the doctrine and is reflected in the 1969 Vienna Convention.³⁶³ The Commission has previously resisted the effort of compiling a catalogue of norms of *jus cogens*, deciding “to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals”.³⁶⁴ On this basis, the Study Group agreed that it would not seek to produce a catalogue of norms of *jus cogens*.

490. While hierarchy may solve conflicts of norms, it was acknowledged that conflicts between norms of *jus cogens*, obligations *erga omnes* and obligations under Article 103 of the Charter of the United Nations could also emerge. In regard to the complex relationship between obligations *erga omnes* and norms of *jus cogens*, it was observed that while all *jus cogens* obligations had an *erga omnes* character, the reverse was not necessarily true. This had also been the view of the Commission in its draft articles on responsibility of States for internationally wrongful acts.³⁶⁵ The Study Group would retain such a position. It was also noted that the recent ICJ advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was pertinent to this relationship.³⁶⁶

491. As regards the relationship between norms of *jus cogens* and obligations under Article 103 of the Charter of the United Nations, some members highlighted its complex nature, while others stressed the absolute priority of the former over the latter.

492. The Study Group identified the need to address the effects of the operation of norms of *jus cogens*,

³⁶³ According to article 53 of the 1969 Vienna Convention: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” And according to article 64: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

³⁶⁴ *Yearbook ... 1966*, vol. II, p. 271, document A/6309/Rev.1, part II (Report of the Commission on the work of its eighteenth meeting, para. (3) of the commentary to article 50 of the draft articles on the law of treaties).

³⁶⁵ According to article 40, paragraph 1, of the draft articles on State responsibility for internationally wrongful acts: “This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.” (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29). And according to article 48, paragraph 1 (b): “the obligation breached is owed to the international community as a whole” (*ibid.*).

³⁶⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 175 above).

³⁶² For example, the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third meeting (see footnote 78 above).

obligations *erga omnes* and obligations under Article 103 of the Charter of the United Nations (or similar treaty provisions). Norms of *jus cogens* were non-derogable and the effect of this operation was to produce the invalidity of the inferior norm. By contrast, obligations *erga omnes* related to the opposability of the obligations to all States, in particular to the right of every State to invoke their violation as a basis for State responsibility. It was also observed that a distinction should be made between the invalidity of the inferior rule that resulted from the presence of *jus cogens* and the inapplicability of the inferior rule resulting from the operation of Article 103.

493. Some members of the Study Group doubted that the principle of harmonization had a particular role to play in the relationship between norms of *jus cogens* and other norms. The Study Group nevertheless recognized that the principle of harmonization should be seen as a cross-cutting interpretive principle, applicable in hierarchical relations also, as far as possible.³⁶⁷

³⁶⁷ See the study by the Chairperson on “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’”.