Chapter XII

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

A. Introduction

233. The Commission, at its fifty-fourth session (2002), decided to include the topic "Risks ensuing from fragmentation of international law" in its programme of work;[963] it established a Study Group and subsequently decided to change the title of the topic to "The fragmentation of international law: difficulties arising from the diversification and expansion of international law".[964] The Commission also agreed on a number of recommendations, including recommendations on five studies to be undertaken,[965] 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'".

234. From the fifty-fifth (2003) to the fifty-seventh (2005) sessions of the Commission, the Study Group was successively reconstituted under the chairpersonship of Mr. Martti Koskenniemi and carried out several tasks. In 2003, it set a tentative schedule for work to be carried out for the remainder of the quinquennium (2003–2006), distributed among its members work on the other studies agreed upon in 2002, and decided upon the methodology to be adopted for that work.[966] In 2004, the Study Group held discussions on the study by its Chairperson 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.[967] In 2005, the Study Group held discussions on (*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" (article 31, paragraph 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 (article 30 of the 1969 Vienna Convention); (*d*) a study on the modification of multilateral treaties between certain of the parties only (article 41 of the 1969 Vienna 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. It also held discussion on an informal paper on the "disconnection clause".[968]

235. The Study Group decided to approach the various studies by focusing on the substantive aspects of fragmentation in the light of the 1969 Vienna Convention, while leaving aside institutional considerations pertaining to fragmentation. It sought to attain an outcome that would be concrete and of practical value especially for legal experts in foreign offices and international organizations. Accordingly, it decided to prepare, as the substantive outcome of its work: (*a*) 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 Study Group, and (*b*) a single collective document containing a set of conclusions emerging from the studies and the discussions in the Study Group. The latter was to be a concrete, practice-oriented set of brief statements that would serve, 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 think about and deal with the issue of fragmentation in legal practice.[969]

236. At its 2859th, 2860th and 2864th meetings, on 28 and 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.

B. Consideration of the topic at the present session

237. At the current session, the Study Group was reconstituted and it held 10 meetings on 17 and 26 May, on 6 June, on 4, 11, 12, 13 and 17 July 2006. The Study Group had before it a study finalized by the Chairperson of the Study

---

[963] The topic was included on the Commission's long-term of work at its fifty-second session, held in 2000 (see *Yearbook … 2000*, vol. II (Part Two), p. 131, para. 729), following its consideration of a feasibility study by G. Hafner ("Risks ensuing from fragmentation of international law", *ibid*., Annex, p. 143).

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

[965] The topics for further study agreed in 2002 were:

"(*a*) The function and scope of the *lex specialis* rule and the question of 'self-contained regimes';

"(*b*) The interpretation of treaties in the light of 'any relevant rules of international law applicable in the relations between the parties (article 31, paragraph 3 (*c*), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community;

"(*c*) The application of successive treaties relating to the same subject matter (article 30 of the Convention);

"(*d*) The modification of multilateral treaties between certain of the parties only (article 41 of the Convention);

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

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

[967] *Yearbook ... 2004*, vol. II (Part Two), pp. 112–119, paras. 303–358.

[968] *Yearbook ... 2005*, vol. II (Part Two), pp. 84–91, paras. 449–493.

[969] *Ibid*., paras. 447–448. See also *Yearbook … 2002*, vol. II (Part Two), chap. IX; *Yearbook … 2003*, vol. II (Part Two), pp. 96–97, paras. 416–418; and *Yearbook ... 2004*, vol. II (Part Two), pp. 111–112, paras. 301–302.

Group, Mr. Martti Koskenniemi, as well as a set of draft conclusions based on that study (A/CN.4/L.682 and Corr.1 and Add.1). The document summarized and analysed the phenomenon of fragmentation on the basis of the studies prepared by the various members of the Study Group and taking into account the comments made by members of the Study Group. The addendum to the document incorporated the draft conclusions of the Study Group's work between 2002 and 2005, as well as additional draft conclusions and a section on background. The substantive work of the Study Group during the present session was focused on finalizing these conclusions. At its meeting on 17 July 2006, the Study Group completed its work and adopted its report containing 42 conclusions (see section D.2 below). The Study Group stressed the importance of the collective nature of its conclusions. It also emphasized that these conclusions had to be read in connection with the analytical study, finalized by the Chairperson, on which they are based.

238. At the 2901st and 2902nd meetings of the Commission, on 27 and 28 July 2006, the Chairperson of the Study Group introduced the report of the Study Group.

239. At its 2902nd, 2911th and 2912th meetings, on 28 July, 9 and 10 August 2006, the Commission considered the report of the Study Group (see section D below). A proposal by a member to make a distinction between positive and negative fragmentation was not endorsed by the Commission. After an exchange of views, the Commission at its 2902nd meeting decided to take note of the conclusions of the Study Group (see section D.2 below), and at its 2912th meeting commended them to the attention of the General Assembly. At its 2911th meeting, the Commission requested that, in accordance with the usual practice, the analytical study finalized by the Chairperson of the Study Group be made available on the website of the Commission and also be published in its *Yearbook*.

C. Tribute to the Study Group and its Chairperson

240. At its 2911th meeting, on 9 August 2006, the Commission adopted the following resolution by acclamation:

The International Law Commission,

Having taken note of the report and the conclusions of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law,

Expresses to the Study Group and its Chairperson, Mr. Martti Koskenniemmi, its deep appreciation and warm congratulations for the outstanding contribution made in the preparation of the report on fragmentation of international law and for the results achieved in the elaboration conclusions, as well as the accompanying study on "The fragmentation of international law: difficulties arising from the diversification and expansion of international law finalized" by the Chairperson.

D. Report of the Study Group

1. Background

241. In the past half-century, the scope of international law has increased dramatically. From a tool dedicated to the regulation of formal diplomacy, it has expanded to deal with the most varied kinds of international activity, from trade to environmental protection, from human rights to scientific and technological cooperation. New multilateral institutions, regional and universal, have been set up in fields such as commerce, culture, security and development. It is difficult to imagine today a sphere of social activity that would not be subject to some type of international legal regulation.

242. However, this expansion has taken place in an uncoordinated fashion, within specific regional or functional groups of States. Focus has been on solving specific problems rather than attaining general, law-like regulation. This reflects what sociologists have called "functional differentiation", the increasing specialization of parts of society and the related autonomization of those parts. It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation—that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.

243. The fragmentation of the international social world has acquired legal significance, as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice. What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such highly specialized forms of knowledge as "investment law" or "international refugee law"—each possessing its own principles and institutions.

244. While the reality and importance of fragmentation cannot be doubted, assessments of the phenomenon have varied. Some commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, "forum shopping" and loss of legal security. Others have seen here a predominantly technical problem that has emerged naturally with the increase of international legal activity and may be controlled by the use of technical streamlining and coordination.[970] It is in order to assess

[970] "Fragmentation" is a very frequently treated topic of academic writings and conferences today. Out of the various collections that discuss the diversification of the sources of international regulation, see for example E. Loquin and C. Kessedjian (eds.), *La mondialisation du droit*, Paris, Litec, 2000; and P. S. Berman (ed.), *The Globalization of International Law*, Aldershot, Ashgate, 2005. The activity of traditional organizations is examined in J. E. Alvarez, *International Organizations as Law-makers*, Oxford University Press, 2005. Different perspectives of non-treaty law-making today are also presented in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty-making*, Berlin, Springer, 2005, pp. 417–586, and R. D. Lipschutz and C. Fogel, "'Regulation for the rest of us?' Global civil society and the privatization of transnational regulation", in R. B. Hall and T. J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge University Press, 2002, pp. 115–140. See also "Symposium issue: the proliferation of international tribunals: piecing together the puzzle", *New York University Journal of International Law and Politics,* vol. 31, No. 4 (1999) pp. 679–933; A. Zimmermann and R. Hofmann (eds.), *Unity and Diversity of International Law—Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law, November 4–7, 2004*, Berlin, Duncker & Humblot, 2006; and K. Wellens and R. Huesa Vinaixa (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international*, Brussels, Bruylant, 2006. A strong plea for unity is contained in P.-M. Dupuy, "L'unité de l'ordre juridique internationale: cours général de droit international public", *Recueil des cours: Collected Courses of the Hague Academy of International Law,* vol. 297 (2002). For more references, see M. Koskenniemi and P. Leino, "Fragmentation of international law? Postmodern anxieties", *Leiden Journal of International Law*, vol. 15, No. 3 (2002), pp. 553–579.

the significance of the problem of fragmentation and, possibly, to suggest ways and means of dealing with it, that in 2002 the Commission established the Study Group to deal with the matter.

245. At the outset, the Commission recognized that fragmentation raises both institutional and substantive problems. The former have to do with the jurisdiction and competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission has decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission has instead wished to focus on the substantive question—the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law. What are the substantive effects of specialization? How should the relationship between such "boxes" be conceived? More concretely, if the rules in two or more regimes conflict, what can be done about such conflicts?

246. Like the majority of academic commentators, the Commission has understood the subject to have both positive and negative sides, as attested to by its reformulation of the title of the topic: "The fragmentation of international law: difficulties arising from the diversification and expansion of international law". On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices. On the other hand, it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques. Fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world. At the same time, it may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation. Although fragmentation may create problems, they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that may have arisen in the past.

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

248. It is quite important to note that such deviations do not emerge as legal-technical "mistakes". They reflect the differing pursuits and preferences of actors in a pluralistic (global) society. A law that would fail to articulate the experienced differences between the interests or values that appear relevant in particular situations or problem areas would seem altogether unacceptable. But if fragmentation is a "natural" development (indeed, international law was always relatively "fragmented" due to the diversity of national legal systems that participated in it), there have likewise always been countervailing, equally natural processes leading in the opposite direction. For example, general international law has continued to develop through the application of the 1969 Vienna Convention, customary law and "general principles of law recognized by civilized nations". The fact that a number of treaties reflect rules of general international law, and in turn, certain provisions of treaties enter into the corpus of general international law, is a reflection of the vitality and synergy of the system and the pull for coherence in the law itself.

249. The justification for the Commission's work on fragmentation has been in the fact that although fragmentation is inevitable, it is desirable to have a framework through which it may be assessed and managed in a legal-professional way. That framework is provided by the 1969 Vienna Convention. One aspect that unites practically all of the new regimes (and certainly all of the most important ones) is that they claim binding force from and are understood by the relevant actors to be covered by the law of treaties. This means that the 1969 Vienna Convention already provides a unifying frame for these developments. As the organ that once prepared that Convention, the Commission is in a privileged position to analyse international law's fragmentation from that perspective.

250. In order to do that, the Commission's Study Group held it useful to have regard to the wealth of techniques in the traditional law for dealing with tensions or conflicts between legal rules and principles. What is common to these techniques is that they seek to establish meaningful relationships between such rules and principles so as to determine how they should be used in any particular dispute or conflict. The following conclusions lay out some of the principles that should be taken into account when dealing with actual or potential conflicts between legal rules and principles.

2. Conclusions of the work of the Study Group

251. The conclusions reached in the work of the Study Group are as follows:

(a) *General*

(1) *International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against

the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.

(2) In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[971] For that purpose the relevant relationships fall into two general types:

— *Relationships of interpretation*. This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating or modification of the latter. In such a situation, both norms are applied in conjunction.

— *Relationships of conflict*. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the 1969 Vienna Convention.

(3) *The Vienna Convention on the Law of Treaties*. When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with, or analogously to, the Vienna Convention, and especially the provisions in its articles 31–33 having to do with the interpretation of treaties.

(4) *The principle of harmonization*. It is a generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.

(b) *The maxim* lex specialis derogat legi generali

(5) *General principle*. The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, and between a treaty and a non-treaty standard, as well as between two non-treaty standards.[972] The source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard. However, in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.[973]

(6) *Contextual appreciation*. The relationship between the *lex specialis* maxim and other norms of interpretation or conflict solution cannot be determined in a general way. Which consideration should be predominant—i.e. whether it is the speciality or the time of emergence of the norm—should be decided contextually.

(7) *Rationale of the principle*. That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.

(8) *Functions of* lex specialis. Most of international law is dispositive. This means that special law may be used to apply, clarify, update or modify, as well as set aside, general law.

(9) *The effect of* lex specialis *on general law*. The application of the special law does not normally extinguish the relevant general law.[974] That general law will remain valid and applicable and will, in accordance with the principle of harmonization under conclusion (4) above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[975]

---

[971] That two norms are *valid* in regard to a situation means that they each cover the facts of which the situation consists. That two norms are *applicable* in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.

[972] For application in relation to provisions within a single treaty, see *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), pp. 53 *et seq.*, at pp. 99–100 (or ILR, vol. 52 (1979), pp. 97 *et seq.*, at p. 141); Case C-96/00, *Rudolf Gabriel, Judgment of 11 July 2002, Reports of Cases before the Court of Justice and the Court of First Instance, Section I, Court of Justice*, (2002-7), pp. 6367 *et seq.*, at pp. 6398–6399, paras. 35–36 and p. 6404, para. 59; *Brannigan and McBride* v. *the United Kingdom, Judgement of 26 May 1993*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 258 (1993), pp. 34 *et seq.*, at p. 57, para. 76; *De Jong, Baljet and van den Brink* v. *the Netherlands, Judgment of 22 May 1984, ibid.*, vol. 77 (1984), pp. 6 *et seq.*, at p. 27, para. 60; *Murray* v. *the United Kingdom, Judgment of 28 October 1994, ibid.*, vol. 300 (1995), pp. 34 *et seq.*, at p. 37, para. 98; and *Nikolova* v. *Bulgaria, Application no. 31195/96, Judgment of 25 March 1999, Grand Chamber, idem., Reports of Judgments and Decisions 1999-II*, pp. 203 *et seq.*, at p. 225, para. 69. For application between different instruments, see *Mavrommatis Palestine Concessions* (footnote 26 above), p. 31. For application between a treaty and non-treaty standards, see *INA Corporation* v. *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. For application between particular and general custom, see *Case concerning Right of Passage over Indian Territory, Merits, Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 44. In that case, the Court said: "Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules."

[973] In *Military and Paramilitary Activities in and against Nicaragua* (see footnote 887 above), the ICJ said: "In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim" (p. 137, para. 274).

[974] Thus, in *Military and Paramilitary Activities in and against Nicaragua* (see footnote 887 above), the ICJ noted: "It will … be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content" (p. 96, para. 179).

[975] In the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, the ICJ described the relationship between human rights law and the laws of armed conflict in the following way: "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant … . The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the

(10) *Particular types of general law*. Certain types of general law[976] may not, however, be derogated from by special law. *Jus cogens* is expressly non-derogable as set out in conclusions (32), (33), (40) and (41) below.[977] Moreover, there are other considerations that may provide a reason for concluding that a general law would prevail, in which case the *lex specialis* presumption may not apply. These include the following:

— Whether such prevalence may be inferred from the form or the nature of the general law or intent of the parties, wherever applicable;

— Whether the application of the special law might frustrate the *purpose* of the general law;

— Whether third party beneficiaries may be negatively affected by the special law; and

— Whether the balance of rights and obligations established in the general law would be negatively affected by the special law.

(c) *Special ("self-contained") regimes*

(11) *Special ("self-contained") regimes as* lex specialis. A group of rules and principles concerned with a particular subject matter may form a special regime ("self-contained regime") and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.

(12) Three types of special regime may be distinguished:

— Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the draft articles on responsibility of States for internationally wrongful acts.[978]

— Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a treaty on the protection of a particular river) or some substantive matter (e.g. a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties or a treaty and treaties plus non-treaty developments (subsequent practice or customary law).[979]

— Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law" give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety.

(13) *Effect of the "speciality" of a regime*. The significance of a special regime often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.

(14) *The relationship between special regimes and general international law*. A special regime may prevail over general law under the same conditions as *lex specialis* generally (see conclusions (8) and (10) above).

(15) *The role of general law in special regimes*: *gap filling*. The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply.[980]

conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself" (p. 240, para. 25).

[976] There is no accepted definition of "general international law". For the purposes of these conclusions, however, it is sufficient to define what is "general" by reference to its logical counterpart, namely what is "special". In practice, lawyers are usually able to operate this distinction by reference to the context in which it appears.

[977] In the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom, Final Award, Decision of 2 July 2003*, UNRIAA, vol. XXIII (Sales No. E/F.04/V.15) p. 59, the tribunal observed: "[e]ven then, [the OSPAR Convention] must defer to the relevant *jus cogens* with which the Parties' *lex specialis* may be inconsistent" (p. 87, para. 84); for this case see also ILR, vol. 126 (2005), p. 364.

[978] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 140–141. In *United States Diplomatic and Consular Staff in Tehran*a (see footnote 190 above), the ICJ said: "The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse" (p. 40, para. 86).

[979] See *S.S. "Wimbledon", Judgments, 1923, PCIJ, Series A, No. 1*, noting that the provisions on the Kiel Canal in the 1919 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) "differ on more than one point from those to which other internal navigable waterways of the [German] Empire are subjected … the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways … is limited to the Allied and Associated Powers alone … . The provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained" (pp. 23–24).

[980] Thus, in *Banković and others* v. *Belgium and others, Application no. 52207/99*, *Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2001-XII*, the Court canvassed the relationship between the European Convention on Human Rights and general international law as follows: "the Court reiterates that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part" (p. 351, para. 57).

Similarly, in *Korea–Measures Affecting Government Procurement*, Report of the Panel of 1 May 2000 (WT/DS163/R), the Appellate Body of the WTO noted the relationship between the WTO-covered agreements and general international law as follows: "We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO" (para. 7.96).

(16) *The role of general law in special regimes*: *failure of special regimes*. Special regimes or the institutions set up by them may fail. Failure might be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime's institutions to fulfil the purposes allotted to them, persistent non-compliance by one or several of the parties, desuetude, or withdrawal by parties instrumental for the regime, among other causes. Whether a regime has "failed" in this sense, however, would have to be assessed above all by an interpretation of its constitutional instruments. In the event of failure, the relevant general law becomes applicable.

(d) *Article 31 (3) (c) of the Vienna Convention on the Law of Treaties*

(17) *Systemic integration*. Article 31, paragraph (3) (*c*) of the Vienna Convention on the Law of Treaties provides one means within the framework of the Convention through which relationships of interpretation (referred to in conclusion (2) above) may be applied. It requires the interpreter of a treaty to take into account "any relevant rules of international law applicable in the relations between the parties". The article gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.

(18) *Interpretation as integration in the system*. Systemic integration governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of articles 31–32 of the 1969 Vienna Convention. These paragraphs describe a process of legal reasoning in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation. In many cases, the issue of interpretation will be capable of resolution with the framework of the treaty itself. Article 31, paragraph (3) (*c*) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law.[981]

(19) *Application of systemic integration*. Where a treaty functions in the context of other agreements, the objective of systemic integration will apply as a presumption with both positive and negative aspects:

(*a*) the parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms;[982]

(*b*) in entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.[983]

Of course, if any other result is indicated by ordinary methods of treaty interpretation, that should be given effect, unless the relevant principle were part of *jus cogens*.

(20) *Application of custom and general principles of law*. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31, paragraph (3) (*c*), especially where:

(*a*) the treaty rule is unclear or open-textured;

(*b*) the terms used in the treaty have a recognized meaning in customary international law or under general principles of law;

(*c*) the treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19) (*a*) above, to look for rules developed in another part of international law to resolve the point.

(21) *Application of other treaty rules*. Article 31, paragraph (3) (*c*) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

(22) *Inter-temporality*. International law is a dynamic legal system. A treaty may convey whether in applying article 31, paragraph (3) (*c*) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law.[984]

---

[981] In the *Oil Platforms* case (*Islamic Republic of Iran* v. *United States of America*), *Judgment, I.C.J. Reports 2003*, p. 161, the Court spoke of the relations between a bilateral treaty and general international law by reference to article 31 (3) (*c*) as follows: "Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Art. 31, para. 3 (*c*)). The Court cannot accept that Article XX, paragraph 1 (*d*), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law … . The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by … the 1955 Treaty" (p. 182, para. 41).

[982] *Georges Pinson*, French–Mexican Claims Commission, UNRIAA, vol. V (Sales No. 1952.V.3), p. 327, at p. 422. It was noted that parties are taken to refer to general principles of international law for questions which the treaty does not itself resolve in express terms or in a different way.

[983] In the *Case concerning Right of Passage over Indian Territory, Preliminary Objections, Judgment of 26 November 1957, I.C.J. Reports 1957*, p. 125, the Court stated: "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it" (p. 142).

[984] The traditional rule was stated by Judge Huber in the *Island of Palmas* case *(the Netherlands/United States of America)*, UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, in the context of territorial claims: "a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard

(23) *Open or evolving concepts*. Rules of international law subsequent to the treaty to be interpreted may be taken into account, especially where the concepts used in the treaty are open or evolving. This is the case, in particular, where: (*a*) the concept is one which implies taking into account subsequent technical, economic or legal developments;[985] (*b*) the concept sets up an obligation for further progressive development for the parties; or (*c*) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances.[986]

(e) *Conflicts between successive norms*

(24) *Lex posterior derogat legi priori*. According to article 30 of the 1969 Vienna Convention, when all the parties to a treaty are also parties to an earlier treaty on the same subject, and the earlier treaty is not suspended or terminated, then it applies only to the extent its provisions are compatible with those of the later treaty. This is an expression of the principle according to which "later law supersedes earlier law".

(25) *Limits of the* lex posterior *principle*. The applicability of the *lex posterior* principle is, however, limited. It cannot, for example, be automatically extended to the case where the parties to the subsequent treaty are not identical to the parties of the earlier treaty. In such cases, as provided in article 30, paragraph (4) of the of the 1969 Vienna Convention, the State that is party to two incompatible treaties is bound *vis-à-vis* both of its treaty parties separately. If it cannot fulfil its obligations under both treaties, it risks being responsible for the breach of one of them unless the concerned parties agree otherwise. In such a case, article 60 of the Convention may also become applicable. The question which of the incompatible treaties should be implemented and the breach of which should attract State responsibility cannot be answered by a general rule.[987] Conclusions (26)–(27) below lay out considerations that might then be taken into account.

(26) *The distinction between treaty provisions that belong to the same "regime" and provisions in different "regimes"*. The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e. that form part of the same regime). In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization. However, the substantive rights of treaty parties or third party beneficiaries should not be undermined.

(27) *Particular types of treaties or treaty provisions*. The *lex posterior* presumption may not apply where the parties have intended otherwise, which may be inferred from the nature of the provisions or the relevant instruments, or from their object and purpose. The limitations that apply in respect of the *lex specialis* presumption in conclusion (10) may also be relevant with respect to the *lex posterior*.

(28) *Settlement of disputes within and across regimes*. Disputes between States involving conflicting treaty

---

to it arises or falls to be settled. … The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law" (p. 845).

[985] In *Gabčíkovo–Nagymaros Project* (see footnote 363 above), the Court observed: "By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan" (pp. 67–68, para. 112).

In the arbitral award in the *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)* of 24 May 2005 (UNRIAA, vol. XXVII (Sales No. E/F.06.V.8), p. 35), at issue was not a conceptual or generic term, but a new technical development relating to the operation and capacity of a railway. Evolutive interpretation was used to ensure the effective application of the treaty in terms of its object and purpose. The Tribunal observed that: "The object and purpose of the 1839 Treaty of Separation was to resolve the many difficult problems complicating a stable separation of Belgium and the Netherlands: that of Article XII was to provide for transport links from Belgium to Germany, across a route designated by the 1842 Boundary Treaty. This object was not for a fixed duration and its purpose was 'commercial communication'. It necessarily follows, even in the absence of specific wording, that such works, going beyond restoration to previous functionality, as might from time to time be necessary or desirable for contemporary commerciality, would remain a concomitant of the right of transit that Belgium would be able to request. That being so, the entirety of Article XII, with its careful balance of the rights and obligations of the Parties, remains in principle applicable to the adaptation and modernisation requested by Belgium" (p. 38, para. 83).

[986] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (footnote 51 above). The Court said that the concept of "sacred trust" was by definition evolutionary. "The parties to the Covenant must consequently be deemed to have accepted [it] as such. That it is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (p. 31, para. 53).

In *Gabčíkovo–Nagymaros Project*, (see footnote 363 above), the ICJ noted that "the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them … [in] … the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan" (p. 67, para. 112).

[987] There is not much case law on conflicts between successive norms. However, the situation of a treaty conflict arose in *Slivenko and others* v. *Latvia, Application no. 48321/99, Decision as to the admissibility of 23 January 2002, Grand Chamber, European Court of Human Rights, Reports of Judgments and Decisions 2002-II*, p. 467, in which the Court held that a prior bilateral treaty between Latvia and the Russian Federation could not be invoked to limit the application of the European Convention on Human Rights: "It follows from the text of Article 57 § 1 of the [European Convention on Human Rights], read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention. … In the Court's opinion the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions" (pp. 482–483, paras. 60–61).

provisions should be normally resolved by negotiation between parties to the relevant treaties. However, when no negotiated solution is available, recourse ought to be had, where appropriate, to other available means of dispute settlement. When the conflict concerns provisions within a single regime (as defined in conclusion (26) above), then its resolution may be appropriate in the regime-specific mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, special attention should be given to the independence of the means of settlement chosen.

(29) Inter se *agreements*. The case of agreements to modify multilateral treaties by certain of the parties only (*inter se* agreements) is covered by article 41 of the 1969 Vienna Convention. Such agreements are an often-used technique for the more effective implementation of the original treaty between a limited number of treaty parties that are willing to take more effective or more far-reaching measures for the realization of the object and purpose of the original treaty. *Inter se* agreements may be concluded if this is provided for by the original treaty or it is not specifically prohibited and the agreement "(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" (article 41, paragraph (1) (*b*) of the 1969 Vienna Convention).

(30) *Conflict clauses*. When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses. When adopting such clauses, it should be borne in mind that:

(*a*) they may not affect the rights of third parties;

(*b*) they should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty;

(*c*) they should, as appropriate, be linked with means of dispute settlement.

(f) *Hierarchy in international law:* jus cogens*, obligations* erga omnes*, Article 103 of the Charter of the United Nations*

(31) *Hierarchical relations between norms of international law*. The main sources of international law (treaties, custom and general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*.[988] Drawing analogies from the hierarchical nature of domestic legal systems is not generally appropriate owing to the differences between the two systems. Nevertheless, some rules of international law are more important than other rules and for this reason enjoy a superior position or special status in the international legal system. This is sometimes expressed by the designation of some norms as "fundamental" or as expressive of "elementary considerations of humanity"[989] or "intransgressible principles of international customary law".[990] What effect such designations may have is usually determined by the relevant context or instrument in which that designation appears.

(32) *Recognized hierarchical relations by the substance of the rules*: jus cogens. A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, Article 53 of the 1969 Vienna Convention), that is, norms "accepted and recognized by the international community of States as a whole from which no derogation is permitted".[991]

(33) *The content of* jus cogens. The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict and the right to self-determination.[992] Also, other rules may have a *jus cogens* character inasmuch as they are "accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted".

(34) *Recognized hierarchical relations by virtue of a treaty provision*: *Article 103 of the Charter of the United Nations*. A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the United Nations Charter by virtue of which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the … Charter and their obligations under any other international agreement, their obligations under the … Charter shall prevail".

(35) *The scope of Article 103 of the Charter of the United Nations*. The scope of Article 103 of the Charter of the United Nations extends not only to the Articles of the Charter but also to binding decisions made by United Nations organs such as the Security Council.[993] Given the

[988] In addition, Article 38, paragraph (1) (*d*) mentions "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[989] *Corfu Channel* (see footnote 197 above), p. 22.

[990] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 975 above), p. 257, para. 79.

[991] 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."

[992] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 112–113 (commentary to article 40 of the draft articles on State responsibility, paras. (4)–(6)). See also *ibid.*, p. 85 (commentary to article 26, para. (5)). See also *Armed Activities on the Territory of the Congo (New Application: 2002)* (footnote 637 above), pp. 31–32, para. 64.

[993] See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 114, at p. 126, para. 42; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, ibid.*, p. 3, at p. 15, paras. 39–40.

character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations may also prevail over inconsistent customary international law.

(36) *The status of the Charter of the United Nations*. It is also recognized that the Charter of the United Nations itself enjoys special character owing to the fundamental nature of some of its norms, particularly its principles and purposes and its universal acceptance.[994]

(37) *Rules specifying obligations owed to the international community as a whole: obligations* erga omnes. Some obligations enjoy a special status owing to the universal scope of their applicability. This is the case of obligations *erga omnes*, that is obligations of a State towards the international community as a whole. These rules concern all States and all States can be held to have a legal interest in the protection of the rights involved.[995] Every State may invoke the responsibility of the State violating such obligations.[996]

(38) *The relationship between* jus cogens *norms and obligations* erga omnes. It is recognized that while all obligations established by *jus cogens* norms, as referred to in conclusion (33) above, also have the character of *erga omnes* obligations, the reverse is not necessarily true.[997] Not all *erga omnes* obligations are established by peremptory norms of general international law. This is the case, for example, of certain obligations under "the principles and rules concerning the basic rights of the human person",[998] as well as of some obligations relating to the global commons.[999]

(39) *Different approaches to the concept of obligations* erga omnes. The concept of *erga omnes* obligations has also been used to refer to treaty obligations that a State owes to all other States parties (obligations *erga omnes partes*)[1000] or to non-party States as third party beneficiaries. In addition, issues of territorial status have frequently been addressed in *erga omnes* terms, referring to their opposability to all States.[1001] Thus, boundary and territorial treaties have been stated to "represent[] a legal reality which necessarily impinges upon third States, because they have effect *erga omnes*".[1002]

(40) *The relationship between* jus cogens *and the obligations under the Charter of the United Nations*. The Charter of the United Nations has been universally accepted by States and thus a conflict between *jus cogens* norms and Charter obligations is difficult to contemplate. In any case, according to Article 24, paragraph (2) of the Charter, the Security Council shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as *jus cogens*.

(41) *The operation and effect of* jus cogens *norms and Article 103 of the Charter of the United Nations*:

(*a*) a rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void;

(*b*) a rule conflicting with Article 103 of the Charter of the United Nations becomes inapplicable as a result of such conflict and to the extent of such conflict.

---

[994] See Article 2, paragraph (6) of the Charter of the United Nations.

[995] In the words of the ICJ, "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*" (*Barcelona Traction, Second Phase* (see footnote 35 above), p. 32, para. 33). Or, in accordance with the definition by the Institute of International Law, an obligation *erga omnes* is "an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action" (*Yearbook of the Institute of International Law*, Session of Krakow 2005—Second Part, vol. 71-II (2006), p. 297, resolution I ("Obligations *erga omnes* in the International Law"), art. 1 (*a*)).

[996] See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 126 (article 48, paragraph (1) (*b*) of the draft articles on responsibility of States for internationally wrongful acts). This would include common article 1 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II), the Geneva Convention relative to the Treatment of Prisoners of War (Convention III), and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), all of 12 August 1949.

[997] According to the ICJ, "[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … ; others are conferred by international instruments of a universal or quasi-universal character" (*Barcelona Traction (Second Phase), Judgment,* (footnote 35 above), p. 32, para. 34). See also *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 950 above), pp. 199 and 200, paras. 155 and 159 (including as *erga omnes* obligations "certain … obligations under international humanitarian law" as well as the right of self-determination). For the prohibition of genocide as an *erga omnes* obligation, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (footnote 904 above), pp. 615–616, para. 31, and *Armed Activities on the Territory of the Congo (New Application: 2002)* (footnote 637 above), pp. 31–32, para. 64. In the *Furundžija* case, torture was defined as both a peremptory norm and an obligation *erga omnes*, see *Prosecutor* v. *Anto Furundžija*, *Case No. IT-95-17/1-T, Trial Chamber II, Judgement of 10 December 1998*, ILR, vol. 121 (2002), p. 260, para. 151.

[998] *Barcelona Traction (Second Phase), Judgment* (footnote 35 above), p. 32, para. 34.

[999] The obligations are illustrated by article 1 of the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies and article 136 of the United Nations Convention on the Law of the Sea.

[1000] See *Yearbook of the Institute of International Law* (footnote 995 above), resolution I, article 1 (*b*).

[1001] "In my view, when a title to an area of maritime jurisdiction exists—be it to a continental shelf or (*arguendo*) to a fishery zone—it exists *erga omnes*, i.e., is opposable to all States under international law" (separate opinion of Vice-President Oda, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 100, para. 40). See also the separate opinion of Judge De Castro in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)* (footnote 51 above): "a legal status—like the *iura in re* with which it is sometimes confused—is effective *inter omnes* and *erga omnes*" (p. 177). See also the dissenting opinion of Judge Skubiszewski, in *East Timor* (footnote 997 above), at p. 248, paras. 78–79.

[1002] *Government of the State of Eritrea* v. *the Government of the Republic of Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)*, Arbitration Tribunal, 9 October 1998, ILR, vol. 114 (1999), p. 1, at p. 48, para. 153.

(42) *Hierarchy and the principle of harmonization*. Conflicts between rules of international law should be resolved in accordance with the principle of harmonization, as laid out in conclusion (4) above. In the case of conflict between one of the hierarchically superior norms referred to in this section and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail.