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INTERNATIONAL LAW BETWEEN FRAGMENTATION AND INTEGRATION: CHALLENGES FOR LEGAL THEORY AND PRACTICE

The author basing on the findings of the International law commission on the development of international law and defragmentation considers the practical and theoretical aspects of the two parallel processes in the international law: fragmentation and integration. Given the evolving jurisprudence he evaluates the manifestation of these trends in branches of international law: diplomatic law, international criminal law, human rights law, international humanitarian law, international environmental law, law of arms control and disarmament, as well as WTO rules.

Key words: fragmentation, integration, international law, International law commission, UN, international courts

I. Introduction

International law, as a normative system[1], is part of a living process that is interest-driven and open for further development. While any special regulation must respect the UN Charter and binding values shared by the international community as a whole, significant diversification has led to a fragmentation of applicable rules which created problems for legal theory and State practice. The excellent analytical study, together with a practice-oriented set of conclusions which was prepared by the International Law Commission (ILC) on the issue[2], provides scholarly guidance and a welcome assessment of relevant jurisprudence, following earlier discussion in the Sixth Committee of the General Assembly[3], and seeking to provide an outcome that would be concrete and of practical value especially for legal experts in foreign ministries and international organizations. While no formal follow-up has been given to that work so far[4], its findings deserve to be evaluated both in doctrine and practice.

A comprehensive consideration of this issue requires an examination of pertinent aspects of relevant branches of international law, including diplomatic law, international criminal law, human rights law, international humanitarian law, international environmental law, arms control and disarmament law, and the law of the World Trade Organization, with a view to explore the impact of fragmentation on current international law and its further development. Not only functional specialization but also certain regional differences are at issue here. In the latter context the ILC had considered certain aspects of regionalism as being developed in European law, Anglo-American or European traditions of international law, former Soviet doctrines, and Third World approaches, but it was agreed that these should not focus in the final substantive report[5], which accordingly treated regional customary behaviour under the more general question of the relationship between general and special law and the principle of subsidiarity[6]. The question whether and to what extent different legal systems are supportive or exclusive of one another was left subject to legal reasoning in a more or less *ad hoc* form[7]. It remains to be seen whether theory and practice will go any further.

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Due to the wide range of relevant problems any assessment must necessarily be selective. Yet it appears essential at this stage to revisit the starting point of discussion, i. e. the question whether and to what extent different rules that may be both valid and applicable in respect of a situation may assist in the interpretation of the respective other applicable norms or whether a choice must be made between them to avoid incompatible decisions[8]. The ILC Study forthcomingly emphasised the importance of interpretation and it did so by using both 'a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem'[9], and a wide notion of interpretation as a technique that may be used 'to apply, clarify, update or modify as well as set aside' a conflicting rule[10]. The result will then be one of overcoming fragmentation, and a prevailing conflict is to be seen as a failure of such legal exercise which would be a failure of those applying the law rather than a failure of the law as such.

It will be likewise important to reconsider legal disputes in which 'self-contained' regimes in international law have been evoked. For those regimes which may be intended 'totally to exclude the application of the general international law on state responsibility' a sound critical evaluation is available: it persuasively shows that '"[c]onceptual" arguments for so-called self-contained regimes are unconvincing', as any analysis 'tends to yield different results' depending on whether it is undertaken with a universalist or a particularistic perspective, i. e. 'whether we first see the universe or the planets'[11]. It will be useful to broaden this debate to include other special regimes in international law that are characterised and informed by their own rules, principles and institutions relating to a special subject matter or a certain problem area[12], and may still need to be harmonised with rules and principles of general international law or of other special regimes.

For all relevant problems it will be useful to first seek solutions within the Conclusions presented by the ILC Report, thus putting them to test. Focusing on a practice-oriented approach, a distinction shall be made between alternative solutions that may have been available at the time of adoption of the particular rule and an assessment from today's perspective. In case of disputes over existing rules or facts available mechanisms of pacific settlement need to be examined and assessed in their interrelationship.

II. Functional and regional specifications challenging the universal legal order

A distinction between functional and regional specifications may have the advantage of presenting issues of fragmentation in a systematic form, yet it should be noted at the outset that certain legal regimes may have both functional and regional characteristics and that there may be even further specifications that would hardly qualify under either of these two headings.

The very first reference to a 'self-contained' regime in international law is a case in point, as it was made to explain the relationship between two different sets of rules in one and the same treaty. In 1921 Germany had refused the passage through the Kiel Canal of the English steamship Wimbledon which had been chartered by a French company to transport munitions and artillery stores to the Polish Naval Base in the then Free City of Danzig (Gdansk). While the Treaty of Versailles had provided for an unimpeded transit through the Kiel Canal[13], Germany's denial of passage was based upon neutrality orders issued in connection with the Russo-Polish war in 1920. As diplomatic negotiations remained without success, Germany suggested bringing the issue to the new Permanent Court of International Justice (PCIJ). This happened to be the PCIJ's first contentious case. The Court held that under the Versailles Treaty the Kiel Canal and its approaches had ceased to be an internal navigable waterway, different from other German waterways for which freedom of navigation was granted only to the Allied and Associated Powers as regulated

in the preceding provisions of the same part of the Treaty[14]. This reading was based on art. 380 of the Treaty which expressly included warships in its free passage regulation and opened the Canal for all nations at peace with Germany[15]. The Court went on to state:

'The provisions relating to the Kiel Canal in the Treaty of Versailles are... self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII they would lose their "raison d'être". The idea which underlines article 380 and the following articles of the Treaty is not to be sought by drawing an analogy from these provisions but rather by arguing a contrario, a method of argument which excludes them'[16].

The contentious issue at that time is no longer relevant today, as the Kiel Canal is now again a national waterway under German sovereignty[17]. It may even be disputed, whether it was correct in 1921 to assume that there was a 'conflict or overlap between two sets of rules — the Versailles Peace Treaty and the right of a neutral power in time of war to control access to belligerent territory'[18]. The relevant treaty provisions could have been interpreted consistent with the rights and obligations under neutrality law. What is still interesting is the coinage of a term that was, however, not clearly defined from the beginning: What was exactly meant by 'self-containment' and why should there be a difference in legal consequences to be drawn from the different treaty provisions referred to by the Court? It may be noted in this context that Judges Anzilotti and Huber in their joint dissenting opinion have denied the applicability of the invoked treaty provisions, considering that a duty stemming from neutrality should take precedence over contractual obligations in favour of the shipping of States at peace with Germany; they also underlined that different from treaties on internationalised waterways, e. g. the Suez and Panama Canal, no specific regulation for passage through the Kiel Canal at times of war was to be found in the Versailles Treaty[19]. This is all the more relevant, since in the Versailles Treaty, different from the aforementioned cases, no binding obligation to refrain from any act of war was introduced in respect of the Kiel Canal. Considering these arguments the reference to the pertinent provisions as a 'self-contained regime' was as questionable as it was imprecise, the more so since the difference between the regimes established by the Versailles Treaty for the various waterways, at least as far as ships flying the flag of one of the Allied and Associated Powers were concerned, remained unclear and no consideration was given to the fact that even on the Suez Canal and the Panama Canal the right of passage during armed conflict is not unlimited[20].

The discussion that followed in international legal doctrine was thus initiated on flawed premises and the term coined was open for misunderstandings from the beginning. Hence it may be useful to re-evaluate the meaning and consequences of 'self-containment' in legal theory and practice and include in this consideration some other effects of special regimes in international law.

1. Diplomatic law

When the International Court of Justice (ICJ) in the *Tehran Hostages case* referred to diplomatic law as a '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 disposa1 of the receiving State to counter any such abuse'[21], it was to remind the Islamic Republic of Iran who had chosen not to file any pleadings and not to participate in proceedings, that before allowing a group of militants to attack and occupy the United States Embassy by force and seizing the diplomatic and consular staff as hostages it had not taken means at its disposal under diplomatic law, i. e. to declare any member of the United States diplomatic or consular staff *persona non grata* or even break

off diplomatic relations. As such means had not been exhausted, the Court saw no reason for going into the issue of further counter-measures.

Not in any sense qualifying the importance of obligations under diplomatic law, the dissenting opinions appended by Judges Morozov and Tarazi as well as the separate opinion by Judge Lachs have addressed circumstances of the case that should have cautioned the Court's reference to that branch of law as a self-contained regime, circumstances that may have been neglected during the proceedings. Judge Morozov had stressed that 'the Islamic Republic of Iran had violated several obligations owed by it under the Vienna Conventions of 1961and 1963' and he strongly criticized that the United States, pending the Judgment of the Court, had taken 'unilateral economic sanctions and many other coercive measures against Iran' which 'culminated in a military attack on the territory of the Islamic Republic of Iran'. Judge Tarazi was 'pleased to note that the Judgment took particular account of the traditions of Islam, which contributed along with others to the elaboration of the rules of contemporary public international law on diplomatic and consular inviolability and immunity', yet he insisted 'that the present proceedings are only a marginal aspect of a wider dispute dividing Iran and the United States'. Judge Lachs declared that 'sound judicial economy' should have led to confine the res judicata to the treatment of diplomatic and consular personnel and 'conclude with the reservation for further decision, failing agreement between the Parties, of any subsequent procedure necessitated in respect of a claim to reparation'[22].

The use of the term 'self-contained regime' thus again suffered from a lack of clear definition of its meaning and of the consequences to be drawn for lawful behaviour. It appears unnecessary as the judgment would still stand and perhaps be even more convincing without what was later referred to as 'a jurisprudential overkill (or, to put it mildly, an unnecessarily broad statement)'[23].

2. International criminal law

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) has introduced the concept of international tribunals as 'self-contained systems' in a very particular context. Dismissing an appeal against the jurisdiction of the *ICTY* by which the defence had claimed the invalidity of the Tribunal's establishment by the Security Council, the Appeals Chamber described the nature of jurisdiction in international law in the following terms:

'A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself'[24].

This particular understanding of the Tribunal as a 'self-contained system' was invoked while the Appeals Chamber was examining a finding of the Trial Chamber which had assumed that the *ICTY* had no authority to investigate the legality of its creation by the Security Council. It was not meant to exclude any special legal system from application, but to ensure full examination of defence pleas as to their substance. In fact

the Appeals Chamber confirmed that the Tribunal 'has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council'[25]. While this decision and the main arguments developed by the Appeals Chamber are convincing, the use of the term 'self-contained system' and its vague limitation 'unless otherwise provided' is not. No international tribunal could neglect the founding decision which has led to its establishment, yet it has to find its judgments in an independent and professional manner which fully includes a legal examination of that decision. If this was meant by use of the term 'self-contained system', it includes recourse to other legal branches (which is not typical for a 'self-contained system') and excludes any limitation of such objective and comprehensive legal activity to ensure professional jurisprudence.

The Appeals Chamber's judgment on merits in the same case[26] has introduced a concept of 'overall control', to describe the legal criteria for establishing when in a non-international armed conflict armed forces may be regarded as acting on behalf of a foreign power. The *ICTY* has applied this concept in declared deviation from a stricter 'effective control' test that was used by the *International Court of Justice (ICJ)* before[27] to examine whether the United States had legal responsibility for certain acts which were contrary to human rights and international humanitarian law. In that context the Court declared that 'it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'[28].

Although the general point of departure was the same for both courts, i. e. to ascertain the conditions on which under international law an individual may be held to act as a *de facto* organ of another State, both decisions were made in very different context. The *ICJ* had decided with the view to determine the international responsibility of the Respondent, whereas the *ICTY* had to establish the necessary precondition for the grave breaches regime of the Geneva Conventions to apply[29]. The purpose for the *ICTY* Appeals Chamber to qualify the armed conflict in Bosnia-Herzegovina was not to decide on a matter of State responsibility, but to determine whether the appellant was guilty of grave breaches[30]. The *ICTY*, when critically discussing the 'effective-control test' used by the *ICJ*, did not acknowledge that difference; but the *ICJ* has later observed that while the 'overall-control test' may be applicable and suitable to a determination of the nature of a conflict, it was not suitable for making determinations on State responsibility, as 'a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'[31].

This again shows that the meaning of the same abstract term may be different depending from the purpose it is used for and the circumstances to which it is applied, a fact that may obscure discussion and should warn against using terms without clear definition.

3. Human rights law

Human rights conventions have provided a variety of special norms to secure protection of the individual against the State at global and regional level. None of these regimes would prevent an individual from invoking his or her rights under more than one legal regime. While this might become a practical problem of concurrence between global and regional human rights treaties, any bearer of human rights is free to claim more than one right *vis-à-vis* the responsible government and also to choose complementing procedures in pursuing such claim.

During armed conflicts human rights obligations do not cease to exist. On the contrary, some human rights which are not dealt with by the special legal regime of international humanitarian law clearly remain unaffected by any legitimate military consideration[32]. Other rights may be limited during the armed conflict under the *lex specialis* principle, as to be shown below. Again other human rights may be derogated, but practice shows that deroga-

tions are hardly declared in armed conflicts[33]. Cases of derogation remained singularised and highly controversial[34].

As far as the interpretation of specific rights is concerned, it should be made with due concern to other relevant rules of international law[35]. There is no 'containment' here whatsoever. Other States may intervene in cases of gross human rights violations by taking lawful measures to end the violations and ensure reparation for the victims[36]. In such cases the lawfulness of the measure to be taken may well derive from legal branches other than human rights.

4. International humanitarian law

The principles and provisions of international humanitarian law, too, are to be applied in context with other relevant branches of international law. This consideration starts with the definition of armed conflicts which determines the field of application of the *jus in bello*[37] and it does not end with issues of counter-measures and reparation. While the notion of armed conflict has become a matter of uncertainty if not controversy today, there is increasing consensus on the relevance of various branches of the law of peace even in the conduct of hostilities. Any party to an armed conflict will be interested to avoid allegations of acting in conflict with the prohibition of the use of force under art. 2 (4) of the UN Charter. Peacekeepers, including those acting under a Chapter VII mandate, will consider the post-conflict effects of their mission and conduct even the most robust operations accordingly.

There are, however, *lex specialis* rules to be applied for the conduct of hostilities. Parties to an armed conflict may kill enemy fighters without warning and detain them without trial, while in principle individuals have their right to life, their right to a trial, and other fundamental rights which continue to apply in armed conflict. This was acknowledged by the *ICJ* in its Advisory Opinion on *Nuclear Weapons*:

'In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. 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 that is designed to regulate the 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 [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'[38].

More recently, in its Advisory Opinion on the *Wall in the Occupied Palestinian Territory*, the Court asserted that in armed conflicts some rights are governed exclusively by international humanitarian law, while others are governed exclusively by human rights, and still others are governed by both bodies of law. The Court expressly confirmed that in the latter case "both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law" must be considered[39], and it concluded that international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories[40]. This jurisprudence was confirmed in *Democratic Republic of the Congo v. Uganda*[41]. In the dispute between *Georgia v. Russia* the Court confirmed that the 1966 International Convention on the Elimination of All Forms of Racial Discrimination applies without limitation during an armed conflict[42].

It has been widely neglected that in all three cases the *ICJ* very clearly refrained from characterising the relationship between the two branches of law as such. Rather it dealt with specific rights: In *Nuclear Weapons* the Court referred to the prohibition of an arbitrary deprivation of life rather than addressing the question of whether human rights obligations in general are absolute or relative to considerations of special rules laid down in the law of

armed conflict. In the *Wall* Case the Court expressively referred to 'some' rights that may be governed by both branches of international law, while others are exclusively governed by one of the two branches. In *Democratic Republic of the Congo v. Uganda* the Court pronounced itself on the relationship between human rights and international humanitarian law in more broader terms, but it did so in the clear context of the right to life (art. 6, par. 1, ICCPR), the prohibition of torture (art. 7 ICCPR), and the protection of children in armed conflicts (art. 38, par. 2 and 3 of the Convention on the Rights of the Child). Hence it is fully consistent with the Court's opinions to conclude that, while international humanitarian law and human rights law are complementary, the *lex specialis* concept must be used to determine whether and to what extent the application of a specific human rights provision is limited in a particular situation of armed conflict[43].

Typical examples for human rights obligations that appear to be more limited under *lex specialis* rules of international humanitarian law are the treatment of detainees and investigations into the reasons of any loss of live as a result of force: in armed conflict *habeas corpus* cannot be guaranteed in the same way as in peacetime, although the legal protection of detainees remains important. Also the way in which investigations on the use of deadly force are to be conducted will be different under battlefield conditions: While full application of art. 6 (1) ICCPR and relevant regional human rights conventions will require in peacetime to conduct an independent formal investigation in each individual case, this may become simply impossible in armed conflict[44].

The *lex specialis* principle thus remains important for the application of international humanitarian law, but it must be also be acknowledged that in armed conflict there is frequently a need to apply rules and procedures deriving from other branches of international law whereas no specific rule of international humanitarian law applies. Activities to ensure compliance are a case in point. Article 1 common to the Geneva Conventions and art. 1 (1) of Additional Protocol I stipulate an obligation not only to respect but also to ensure respect of international humanitarian law. This obligation has now developed into customary international law[45]. States and international organizations acting under this obligation are by no means limited to measures specifically designated by international humanitarian law. Rather they will use procedures regulated under diplomatic law, and also base their initiatives on other legal branches and the Charter itself.

In the same sense optional rules of international humanitarian law, such as art. 90 of Additional Protocol I on the International Humanitarian Fact-Finding Commission do not prevent States and international organizations to use fact-finding mechanisms such as those available under human rights law or international criminal law for investigating alleged breaches of international humanitarian law.

5. International environmental law

There is a significant need for using principles and rules from other branches of law in the application of environmental law. This is due to the fact that the protection of the natural environment is a multifaceted task for which no coherent regulation does exist. Special conventions, such as those protecting certain areas of the natural environment or specific natural resources may be seen as *lex specialis* for their particular purpose, but this does not exclude the application of general international law which may be relevant in this context.

A typical example is the use of general clauses in environmental agreements, such as 'due regard', or 'proportionality', without specific definition in the agreement itself. Where this is the case, interpretation of the meaning of a particular term must consider its use in other international agreements and compare it with the object and purpose of the present one. Difficulties arising with such terms in other international agreements may also arise when the same term is used in the specific context of environmental law. A case in point

is the frequent use of the principle of proportionality which calls for balancing military advantages against collateral civilian losses in the law of armed conflict; the protection of innocents in law enforcement; or sustainable efforts to ensure the protection of the natural environment. Although different standards will apply for measures of balancing in those different branches of international law, the underlying common problem is the difficulty to compare the different values to be considered — i. e. military advantage and civilian losses; prosecution of illegal acts and protection of innocents; economic use of natural resources and protection of the natural environment — and clearly decide how much of advantage for one goal is to be sacrificed in the interest of the other. 'Cognitive biases' inherent in such deliberations can hardly be solved in an abstract manner and sound application of legal principles faces additional challenges where terms are used which may look similar or even identical, but do have different facets or even a different meaning in different circumstances. This will lead decision-makers to seek *ad hoc* solutions rather than applying general formula; yet a critical comparison with other branches of law may be helpful for enlightened and sound decision-making.

In certain cases a comparison with other branches of international law is not only useful but even necessary to ensure convincing results. Thus it would be misleading to conclude from art. 88 of the 1982 UN Convention on the Law of the Sea (UNCLOS) under which '[t]he high seas shall be reserved for peaceful purposes', that even normal maritime warfare activities, regardless of the extent of harm to the environment, would be prohibited. Such unrealistic result may be avoided by the argument that UNCLOS is *lex generalis* that would yield to the *lex specialis* law of armed conflict[46]. This argument does not lose its force, if UNCLOS is deemed to be *lex specialis* in relation of international environmental law, as the specialty of a norm is to be judged from its contents, not from the larger branch of international law it belongs to. But art. 88 UNCLOS needs to be interpreted in the light of other international treaties, even beyond the attempt which was made within UNCLOS (art. 301) itself to clarify its meaning. Article 2 (4) of the UN Charter and a comparison between the 1959 Antarctic Treaty, the 1967 Outer Space Treaty, and the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies leads to the conclusion that the term 'peaceful use' which is meant as 'non-military use' in the Antarctica, on the Moon and other celestial bodies, has a more limited meaning in the high seas and in outer space where it is to be understood as 'non-aggressive use'[47].

6. Arms control and disarmament law

The question whether there are specific rules in arms control and disarmament law which differ from general rules of public international law is even more difficult to answer. Almost exclusively treaty-based as this branch of international law is, interpretations of its rules very often escape attempts of generalisation. Each arms control obligation must be interpreted and applied in the light of the specific security interests of the States involved.

There are, however, general principles and rules which form the basis of law application also in this special branch of international law. The norms of treaty law as codified in the 1969 Vienna Convention on the Law of Treaties (VCLT) may provide a common basis, even if that Convention has entered into force only on 27 January 1980, has no retroactive effect, and the number of formal State Parties is still limited: Most of its provisions may be considered as a codification of existing customary international law. Under art. 42 (2) VCLT any termination of, or denunciation or withdrawal from a treaty or its suspension may take place only as a result of the application of the provisions of that treaty or of the VCLT. Articles 54—59 VCLT provide that termination or withdrawal from a treaty must take place in conformity with the provisions of the treaty or at any time by consent of the Parties. Any denunciation or withdrawal must either be foreseen in the treaty, or it must be established

that the parties intended to admit this possibility, or it must be implied by the nature of the treaty. Unilateral withdrawal or suspension may be declared in the event of material breaches (art. 60 VCLT), irrespective whether this possibility was expressly foreseen or at least implied when the treaty was concluded. Even when unilateral withdrawal was not explicitly provided for in the treaty text, a party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it (art. 61 VCLT), or it may base its withdrawal on a fundamental change of circumstances (*rebus sic stantibus*) that was not foreseen by the parties before, *if* '(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty' (art. 62 VCLT).

While these principles and provisions may help to solve problems occurring in regard of the implementation of arms control and disarmament agreements, lasting solutions will require a specific assessment of the security environment in which the pertinent arms control obligation is to operate. In most if not all cases it will be essential to find a cooperative solution. Unilateral denunciation, termination, or withdrawal from existing obligations, even as a last resort, cannot really work in matters related to peace and security. In particular the potentially harmful effect of weapons of mass destruction makes it imperative to consider further legal consequences. It may be accepted today that there is a general legal obligation for States to avoid transboundary harm in their activities[48], whereas precise conditions and limitations of such obligation are still to be specified. Even after withdrawal from relevant treaty obligations the withdrawing State continues to bear responsibility for any violation committed prior to withdrawal and continuing implications for safeguards must be observed. Furthermore, there is a special responsibility for Member States and competent organs of the United Nations to support activities of pacific settlement of disputes (art. 2, par. 3, UN Charter).

7. The law of the world trade organization

The Dispute Settlement Understanding (DSU), annexed to the 1994 WTO Agreement, provides for an 'inventive admixture of conciliation, negotiation and adjudication, with an interesting follow-up of enforcement, and traditional arbitration as a final and *extrema ratio* mode of resolution'[49]. This not only brought one of the most effective dispute settlement mechanisms in the world, but also led to the question, whether, in the event that mechanism fails, countermeasures as addressed in the 2001 ILC Articles on State Responsibility may be resorted to as *ultima ratio*[50]. Similar questions arise for the International Centre for Settlement of Investment Disputes (ICSID)[51]. As this question in the first place must be seen as a challenge for the particular dispute settlement mechanism and has not led to more severe problems so far, it may be too early for drawing a general conclusion[52].

There is not only functional but also regional specification which may be relevant in this respect. Regional trade agreements today cover the largest amount of world trade and while it may not be fully correct to conclude that these agreements 'limit trade to the outside world'[53], an assumption that may apply also to 'plurilateral' agreements on aircraft and government procurement, but would deserve critical review and a realistic consideration of the relationship between trade interests and trade regulation.

8. Regional approaches

As globalization progressively develops, regional specifications will lose importance and even tend to diminish in international law. This can best be demonstrated in reviewing functional specifications and examining the relevance of regional differences[54]. The present

discussion has identified but few regional peculiarities which are focusing on procedural and institutional aspects, as in human rights law, and factual rather than legal differences, as is the case in international trade law. It may be expected that this trend continues.

III. Conclusions

While it may be still too early to draw final conclusions on a debate that is now lasting for quite a long time, literally affecting a considerable number of branches of international law and the effectiveness of the international legal order as such, a few general observations may be in order. Important elements have emerged which could strengthen the unity of law and its cohesiveness under both substantive and procedural aspects, thus contributing to the pacific settlement of disputes. It may fairly be stated that special regimes are not fully exclusive from one another. Specialisation did not prevent that principles and procedures from other regimes remained or became relevant for interpretation and for closing existing gaps. Thus there may be more need and in fact also more room for supplementing specific provisions by relevant rules existing in other legal branches rather than disputing the applicability of those provisions within any special regime of international law. Conflicting norms are an exception for international practice, not the rule. They may tend to escape attempts for general legal regulation. But while doctrinal discussions may help to inform the practice of States and international organizations and thus support solutions of conflicts, practice may be more successful in opening new alternatives and even overcoming problems that have not been solved in legal doctrine so far.

The phenomenon of norm fragmentation in international law as a result of specialised rules and organizations is not to be disputed. But it may be acknowledged that many discussions on the issue were based on ill-defined terms. The existence of self-contained regimes has been presumed without clear understanding as to the nature of self-containment and its limitations. Exaggerated theoretical conclusions have been developed, without fully considering the practice of States, without due regard to policy needs, and without objectively evaluating the interests of the parties involved. This may have obscured the task of seeking coordination between different norms, despite the fact that a professional tool-box is available for its accomplishment: The Roman law principles of *lex specialis* (although not expressly referred to in the VCLT), *lex posterior* (on which art. 30, par. 3, VCLT is based), and *lex superior* (e. g. *jus cogens*, *erga omnes* obligations, art. 103 of the UN Charter) provide basic principles that may facilitate that task. The principle of 'systemic integration' expressed in art. 31 par. 3 (c) VCLT should, indeed, be understood as an imperative for making full use of these tools[55]. None of these principles is confined to existing treaty law and no formal rule of procedure limits their application. It is one of the advantages of the ILC Report that it considers the different types of special regimes and evaluates the applicability of relevant rules in context with their purpose and intention.

The ILC Report is to be supported in its conclusion that the emergence of special treaty regimes has not seriously undermined 'legal security, predictability or the equality of legal subjects' and that fragmentation problems are to be solved in a flexible way[56]. It also appears fully convincing to look at globalization as a potential incentive for further development of international law and an effective obstacle for its fragmentation[57]. Yet it still remains open for discussion whether a comprehensive legal theory would be possible or even desirable for more systematic solutions in the light of relationships that are part of a living process.

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[1] Cf. R. Higgins, *Problems & Process. International Law and How We Use it* (Oxford: Clarendon, 1994), 1—16.

[2] 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, A/CN.4/L.682 (13 April 2006) and

Corr 1 (11 August 2006). The Report is complemented by an Appendix containing the proposed set of Conclusions of the Work of the Study Group (A/CN.4/L.682/Add.1).

[3] The discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session had voiced the need of focusing on substantive rather than institutional aspects of fragmentation on the basis of State practice and judicial decisions; there was also certain consensus that the topic did not lend itself to the development of draft articles or draft guidelines: see topical summary prepared by the Secretariat, A/CN.4/549 (31 January 2005), paras. 114 and 118.

[4] The General Assembly (Res. 61/64 of 4 December 2006, para. 4) just took note of the Conclusions and the analytical study on which they were based. Four years later in the Sixth Committee the topic 'Hierarchy in international law' and the related issue of *jus cogens* were suggested for consideration by the ILC, yet without reference to the Report which had focused extensively on these issues and made them part of the final part of its Conclusions (nos. 31—42): see 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, prepared by the Secretariat', A/CN.4/620 (26 January 2010), para. 102.

[5] ILC, Report of the Fifty-Seventh Session (2005), A/60/10, paras. 449—66.

[6] *Supra* (n. 2), para. 199 and paras. 215—7 where regional differences are considered under the more general question of the relationship between general and special law and the argument is made that regional arrangements under Chapter VIII of the UN Charter should be seen under the principle of subsidiarity.

[7] *Ibid.*, paras. 220.

[8] *Ibid.*, paras. 21—26; Conclusions of the Work of the Study Group, para. 2.

[9] *Ibid.*, para. 25.

[10] Conclusions of the Work of the Study Group, paras. 2, 8.

[11] B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 no.3 *European Journal of International Law* (2006), 483—529 [483, 495, 506].

[12] Cf. Conclusions of the Work of the Study Group, para. 12.

[13] Treaty of Versailles of 28 June 1919, Part XII, Art. 380—386.

[14] *Ibid.*, Art. 321—379.

[15] *Ibid.*, Art. 380: 'The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.'

[16] *PCIJ, Case of the SS Wimbledon (Government of His Britannic Majesty v German Empire)*, Judgment of 17 August 1923, *PCIJ Series* A No 1, 23—24; see E. Klein, 'Self-Contained Regime', *Max-Planck Encyclopedia of Public International Law*, www.mpepil.com.

[17] See R. Lagoni, 'Kiel Canal', *Max-Planck Encyclopedia of Public International Law*, www.mpepil.com.

[18] This assumption is made in the ILC Report (*supra,* n.2), para. 486.

[19] *Loc. cit.* (*supra,* n. 12), *Dissenting Opinion Anzilotti and Huber*, 35—42 [38, 40].

[20] See M. Arcari, 'Suez Canal', MN 7, and 'Panama Canal', MNs 16-18, both in *Max-Planck Encyclopedia of Public International Law*, www.mpepil.com.

[21] *ICJ, United States Diplomatic and Consular Staff in Tehran, ICJ Reports* 1980, 3, 40.

[22] *Loc. cit.*, 48.

[23] B. Simma and D. Pulkowski, supra (n. 8), at 512; see the same authors, '*Leges Speciales* and Self-Contained Regimes', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), Chapter 13, 139—171 [150].

[24] *ICTY, The Prosecutor v. Tadić*, case no. IT-95-1-AR72, Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 11.

[25] *Ibid.*, para. 22.

[26] *ICTY, The Prosecutor v. Tadić*, case no. IT-95-1-AR72, Appeals Chamber Judgment of 15 July 1999, paras. 98—145 [145].

[27] *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), ICJ Reports 1986, 14.

[28] *Ibid.*, para. 115.

[29] Meanwhile, war crimes committed in non-international armed conflicts are penalised under Art. 8 (2) (c) and (e) of the Rome Statute of the International Criminal Court of 17 July 1998 which is, however, not applicable to the *ICTY*.

[30] See ILC, Report on the work of its fifty-third session, Chapter IV 'Responsibility of states for internationally wrongful acts, UN Doc A/56/10 (2001), 106—107.

[31] *ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, paras. 402—406. For a differing view see A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia', 18 *EJIL* (2007), 649—668.

[32] Examples are the prohibition of slavery (Art. 8 ICCPR, Art. 4 ECHR), freedom of opinion and religion (Art. 18 ICCPR, Art. 9, 10 ECHR).

[33] T. Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in: L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* (New York: Columbia University

Press, 1981), 72; *R. Higgins*, 'Derogations under the Human Rights Treaties' 48 *British Yearbook of International Law* (1976—77), 281; *P. Rowe, The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006), 118—121.

[34] *Rowe, Ibid.*, 159—161. A recent example is the British Anti-terrorism, Crime and Security Act (2001). It remains questionable, however, whether the material conditions for derogation under Art. 15 ECHR and Art. 4 ICCPR are met in this case, see *J. Black-Branch*, 'Powers of Detention of Suspected International Terrorists under the United Kingdom Anti-Terrorism, Crime and Security Act 2001: dismantling the cornerstones of a civil society', in: 27 *European Law Review Human Rights Survey* (2002), 19 [26]; *V.H. Henning*, 'Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights?', 17 *American University Law Review* (2002), 1663 [1677].

[35] See *European Court of Human Rights (ECtHR), McElhinney v. Ireland,* Judgment of 21 November 2001, ECHR 2001-XI, para. 36: 'The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms a part…'.

[36] See Art. 54 of the Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC, 53rd Session, *ILC Yearbook 2001*, Vol. II (2), 26; General Assembly, Official Records, 55th Session, Supplement No. 10 (A/56/10).

[37] See International Law Association. *Report of the Seventy-Fourth Conference*, The Hague, 2010, Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law' (London. ILA, 2010).

[38] *ICJ, Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, 226, para. 25.

[39] *ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004, 178, paras. 102—142 [106].

[40] *Ibid.*, paras. 107—113.

[41] *ICJ, Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda),* Judgment of 19 December 2005, *ICJ Reports 2005, 168,* paras. 215—220.

[42] *ICJ, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination,* Decision of 15 October 2008, 2008 *ILM,* 1013, 134, para. 112.

[43] See *J. A. Frowein*, 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation', in 28 *Israel Yearbook on Human Rights* (1999), 1. At p. 12 the author convincingly argues that the *lex specialis* argument cannot solve all situations, as it cannot be inferred from the *Nuclear Weapons* Opinion that human rights treaties in general would have to be interpreted in the light of international humanitarian law. He also underlines that certain human rights, such as the prohibition of torture or slavery, or the right to legal personality are not open to derogation, but formulated in absolute terms without any limitations in times of armed conflict.

[44] Regrettably, the legal differences of individual protection in peacetime and during armed conflicts have been neglected by the *ECtHR* so far. See e. g. *Medka Isayeva, Yusopova and Bazayeva v. Russia* (Applications nos. 57947/00, 57948/00 and 57949/00), Judgment of 24 February 2005; *Goncharuk v. Russia* (Application no. 58643/00), Judgment of 4 October 2007; *Tangiyeva v. Russia* (Application no. 57935/00), Judgment of 29 November 2007. It is evident that an application of human rights in armed conflict which ignores *lex specialis* norms of international humanitarian law may lead to less than convincing results.

[45] See J. M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2005): while the commentary to Rule 139 only refers to a State's obligation 'to ensuring respect by other persons or groups acting in fact on its instructions' (*id.*, Vol I p. 496), Rule 144 stipulates that States 'must exert their influence, to the degree possible, to stop violations of international humanitarian law' and the commentary underlines that 'the ICRC has repeatedly stated that the obligation to "ensure respect" is not limited to behavior by parties to a conflict, but includes the requirement that States do all in their power to ensure that international humanitarian law is respected universally'(*id.*, pp. 509—510).

[46] L. C. Green, 'The environment and the law of conventional warfare', 29 *Canadian Yearbook of International Law* (1991), 221—226.

[47] See R. Wolfrum, 'Military Activities on the High Seas: What Are the Impacts of the U.N. Convention on the Law of the Sea?' in M. N. Schmitt & L. C. Green, *The Law of Armed Conflict: Into the Next Millenium*, Vol. 71 International Law Studies (Newport, R. I.: Naval War College, 1998), 501—513 [502—505].

[48] See M. Koskenniemi, 'Doctrines of State Responsibility', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), Chapter 5, 45—51 [50]; A. Boyle, 'Liability for Injurious Consequences of Acts Not Prohibited by International Law', in *op. cit.*, Chapter 10, 95—104.

[49] A. Cassese, *International Law,* 2nd ed. (Oxford: Oxford University Press, 2005), 291.

[50] C. Tomuschat, 'International Law as a Coherent System: Unity or Fragmentation?', in M.H. Arsanjani *et al.* (eds.), *Looking to the Future. Essays on International Law in Honour of W. Michael Reisman* (Leiden: Brill, 2011), *323—354 [346].*

[51] *See CMS v. Argentine Republic, ICSID Case No. ARB/01/8, 46 ILM (25 September 2007), 1136 (limiting resort to necessity as a ground precluding wrongfulness).*

[52] I. Van Damme, 'ILC Study Group Report on the Fragmentation of International Law: WTO Treaty Interpretation against the Background of Other International Law', 17 Finnish Yearbook of International Law (2006), 21, 23; *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009).

[53] ILC Report (*supra*, n.2), para. 210.

[54] See *supra* (n. 6).

[55] See ILC Report (*supra*, n. 2), para. 479; C. Tomuschat, *supra* (n. 45), 344—353.

[56] *Supra* (n. 2), para. 492: '*One principal conclusion of this report has been that the emergence of special treaty-regimes (which should not be called "self-contained") has not seriously undermined legal security, predictability or the equality of legal subjects*. The techniques of *lex specialis* and *lex posterior*, of *inter se* agreements and of the superior position given to peremptory norms and the (so far under-elaborated) notion of "obligations owed to the international community as a whole" provide a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems.' (emphasis in original).

[57] S. Y. Marochkin, 'On the Recent Development of International Law: Some Russian Perspectives', 8 No. 3 *Chinese Journal of International Law* (2009), 695—714 [707] (citing R. A. Kolodkin).