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REPORT OF THE WORKING GROUP ON LONG-TERM PROGRAMME OF WORK

Addendum

Annex I

Syllabi on topics recommended for inclusion in the long-term programme of work of the Commission

CONTENTS

GE.00-62436 (E)

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

(Alain Pellet)

I. Need to include the topic in the Commission's agenda

1. Section IX of the General Scheme prepared by the Working Group on the Long-Term Programme of Work in 1996 and annexed to the report of the International Law Commission on the work of its forty-eighth session (General Assembly, Official Records, fifty-first session, Supplement No. 10, A/51/10) is entitled "Law of international relations/responsibility" (p. 333).

2. This section is particularly well supplied in topics already completed and topics under consideration, since it includes:

In heading 1 ("Topics already completed"), the three Vienna Conventions on Diplomatic Relations, Consular Relations and Special Missions, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons and the Commission's draft articles on the status of the diplomatic courier and the diplomatic bag;

In heading 2 ("Topics under consideration by the Commission"), State responsibility and international liability for injurious consequences of acts not prohibited by international law; and

In heading 3 ("Possible future topics"), diplomatic protection and functional protection, which have now been included in the Commission's agenda (since it appears to have been agreed that functional protection will, at some point or another, be considered jointly with diplomatic protection *stricto sensu*), the international representation of international organizations and the international responsibility of international organizations.

3. The latter topic thus appears to come, by definition, within the sphere of competence of the Commission, which has successfully been carrying out the tasks of the progressive development and codification of international law in this field.

4. Moreover, the topic is the logical and probably necessary counterpart of that of State responsibility, the consideration of which will be completed by the end of the present quinquennium in 2001. It is therefore particularly appropriate that it should follow on from the topic of State responsibility, just as the topic of treaties between States and international organizations or between international organizations followed on from that of the law of treaties (between States) in 1969. Otherwise, the general topic of responsibility, which is, together with the law of treaties, one of the pillars of the Commission's work and probably its "masterpiece", would be incomplete and unfinished.

5. The question of the responsibility of international organizations has, moreover, been dealt with by the Commission a number of times during its study of State responsibility (cf. ILC, *Yearbook ... 1973*, vol. II, p. 169, and ILC, *Yearbook ... 1975*, vol. II, p. 87).

6. The topic of the responsibility of international organizations also appears in every respect to meet the criteria that the Commission identified in 1997 and reiterated in 1998 for the selection of topics to be included in its long-term programme of work (cf. *Report of the International Law Commission on the work of its forty-ninth session*, General Assembly, Official Records, fifty-second session, Supplement No. 10, A/52/10, para. 238, p. 154 and *Report of the International Law Commission on the work of its fiftieth session*, General Assembly, Official Records, fifty-third session, Supplement No. 10, para. 553, p. 219):

It reflects the needs of States (and of international organizations), as shown by the statements along these lines made by several representatives in the Sixth Committee at the fifty-second session of the General Assembly; in addition, many specific problems arise in this regard and they should become increasingly numerous in view of the resumption of the operational activities of international organizations and, in particular, activities by the United Nations to maintain international peace and security, the implementation of the operational part of the Montego Bay Convention on the Law of the Sea and the space activities of some regional international organizations; recent cases (including the collapse of the International Tin Council in 1985: cf. Ilona Cheyne, "The International Tin Council", I.C.L.P., 1989, pp. 417-424 and 1990, pp. 945, 952, Pierre-Michel Eisemann, "Crise du Conseil international de l'Étain et insolvabilité d'une organisation intergouvernementale", A.F.D.I. 1985, pp. 730-746, and "L'épilogue de la crise du Conseil international de l'Étain", A.F.D.I. 1990, pp. 678-703; E.J. McFadden, "The Collapse of Tin: Restructuring a Failed Commodity Agreement", A.J.I.L. 1986, pp. 811-830; Philippe Sands, "The Tin Council litigation in the English Courts", N.I.L.R. 1987, pp. 367-391; Ignaz Seidl-Hohenveldern, "Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the English Court of Appeals", G.YB.I.L. 1989, pp. 43-54; and Ralph Zacklin, "Responsabilité des organisations internationales", in S.F.D.I., Le Mans Colloquium, *La responsabilité dans le système international*, Pédone, Paris, 1991, pp. 86-100) clearly confirm this "need for codification";

It is "sufficiently advanced in stage in terms of State practice", which is not well known, but now quite abundant (the United Nations Juridical Yearbook nevertheless provides some interesting leads in this regard);

It is entirely concrete and its consideration will be facilitated by the work carried out on State responsibility, which provides a conceptual framework into which it will have to be fitted; in addition, as shown in the brief bibliography to this note, there is now a considerable body of legal writings on this topic.

7. In conclusion, the topic of responsibility of international organizations seems to be one that is particularly well-suited to speedy inclusion in the Commission's agenda. This was also the position of the Working Group on Long-Term Programme of Work in 1998 which the Commission took note of. (*Report of the International Law Commission on the work of its fiftieth session*, op. cit., para. 554, p. 218). This should be stated in the report to the General Assembly this year to enable the Commission to know the reactions of States and decide whether to set up a working group or to appoint a special rapporteur in 2000 so that the preliminary work may be completed by the end of the present quinquennium and the consideration of draft articles may begin in the first year of the next quinquennium.

II. Preliminary general scheme

Note: My starting principle is that, "in addition to the general rules in force in the field of State responsibility, the international law of responsibility as it applies to international organizations includes other special rules required by the particular features of these topics (with regard, *inter alia*, to categories of acts, limits to responsibility resulting from the functional personality of organizations, the combination of wrongful acts and responsibilities and settlement machinery and procedures in respect of responsibility as it affects organizations") (Manuel Pérez González, "Les organisations internationales et le droit de la responsabilité", *R.G.D.I.P.* 1988, p. 99; and, along the same lines, R. Zacklin, op. cit., p. 92). The Commission's draft articles on State responsibility are thus a legitimate starting point for the discussion, which will also have to deal with the adaptations that those draft articles will require.

Note: One of the problems of the topic is that the draft on State responsibility is silent on the rights of an international organization injured by an internationally wrongful act of a State. This gap should be filled during the consideration of the responsibility of international organizations. This might be done either in a separate part or, as I am now proposing, in connection with questions relating to the "passive responsibility" of international organizations. Both of these solutions offer advantages and disadvantages.

(1) Origin of responsibility

(i) General principles

Principle of the responsibility of an international organization for its internationally wrongful acts;

Elements of an internationally wrongful act;

Exclusion of liability;

Exclusion of conventional regimes of responsibility.

Note: Conventional regimes of responsibility of international organizations are relatively numerous (cf. the example, which has been commented on extensively, of article XXII of the 1972 Convention on International Liability for Damage Caused by Space Objects); their "exclusion" obviously does not mean that such special mechanisms must not be carefully studied in order to determine whether general rules can be derived from them.

Exclusion of the organization's internal law (responsibility of the organization in respect of its officials).

Note: The latter problem probably warrants in-depth discussion.

(ii) Attribution of an internationally wrongful act to an organization

Attribution to an organization of the conduct of its organs;

Attribution to an organization of the conduct of organs placed at its disposal by States or by international organizations;

Attribution to an organization of acts committed *ultra vires*.

Note: This question, which is the subject *mutatis mutandis* of article 10 of the draft articles on State responsibility, is of particular importance in connection with the responsibility of international organizations, particularly because of the principle of speciality, which limits their powers.

(iii) Violation of an international obligation

Note: The provisions of chapter III of Part One of the Commission's draft articles on State responsibility (arts. 16 to 26) could be transposed without too many difficulties, except for the former article 22 (which is to be included, on second reading, in Part Two *bis* of the draft) on the exhaustion of local remedies, a problem for which solutions involving the progressive development of international law would probably have to be found (see also (3) (ii) below).

Note: It might be asked whether this chapter (or a separate chapter (iii) *bis*) would be the right place in which to consider the activities of an organization which are liable to give rise to

responsibility (operational activities; acts taking place at the organization's headquarters or in another territory where the organization acts; activities giving rise to technological damage; normative activities; international agreements, etc.; this list is taken from the above-mentioned article by Manuel Pérez González, pp. 85-92). In my opinion, the answer to this question should be categorically negative: such an intrusion into primary rules would inevitably lead to the breakup of the regime of responsibility and give the draft an entirely different connotation from that of the draft on State responsibility.

(iv) Combination of responsibilities

Note: This is probably one of the aspects of the topic on which the differences with State responsibility (cf. chapter IV of Part One of the draft) are the most marked because of the particular nature of international organizations.

Implication of an international organization in an internationally wrongful act of another international organization;

Implication of a State in an internationally wrongful act of an international organization;

Responsibility of an international organization for an internationally wrongful act of a State committed pursuant to its decisions;

Responsibility of a member State or States for an internationally wrongful act of an international organization.

Note: The last two points give rise to difficult problems of joint and joint and several responsibility, which were not dealt with in the draft articles on State responsibility adopted by the Commission on first reading, but probably will be on second reading.

(v) Circumstances precluding wrongfulness

Note: Here again, the transposition of the principles embodied in chapter V of Part One of the draft articles on State responsibility (arts. 29 to 35) should not give rise to any particularly sensitive problems, except, however, with regard to countermeasures (art. 30).

(2) Consequences of responsibility

(i) General principles

Note: The principles embodied in chapter I of Part Two of the draft articles on State responsibility can probably also be transposed (subject to the far-reaching changes in some of them that are expected on second reading).

(ii) Obligations of an international organization which commits an internationally wrongful act and rights of an international organization injured by an internationally wrongful act of a State or of another international organization

Cessation of the wrongful conduct;

Assurances and guarantees of non repetition;

Obligation of reparation;

Forms and modalities of reparation (*restitutio in integrum*, compensation, satisfaction);

Beneficiaries of reparation (another international organization, a member State, a non-member State, private individuals).

(iii) Consequences of a combination of responsibilities

Note: The consequences of a combination of responsibilities (referred to above, (1)(iv)) may be so complicated that it will probably be necessary to devote an entire chapter to them; this may, moreover, turn out to be necessary in the case of State responsibility.

(iv) Reactions to an internationally wrongful act of an international organization and reactions of an international organization to an internationally wrongful act of a State

Countermeasures by an injured non-member State or by another international organization which has been injured;

Possible reactions by a member State of the organization;

Countermeasures by an international organization injured by an internationally wrongful act of another international organization or a non-member State;

Possible reactions by an international organization to an internationally wrongful act of a member State.

Note: The problem of countermeasures is delicate in itself and is certainly all the more so in the case of international organizations. It is obvious that, if the draft on State responsibility provides for the possibility of resorting to countermeasures, there is no reason to pass over the problem in silence in the case of the present topic: non-member States must be able to react to internationally wrongful acts of international organizations in the same way as to the internationally wrongful acts of other States and, reciprocally, an international organization (an integration organization, in particular) must be able to take countermeasures in response to an internationally wrongful act of a State or another international organization. However, it must also be asked whether the draft should include the question of relations between the organization and its members (when the constituent instrument does not regulate them).

[(v) International crimes

Note: This is indicated by way of a reminder. It is not ruled out that, like a State, an international organization may commit a crime within the meaning of article 19 of the draft on State responsibility as it now stands. There is no need to reopen the lengthy debate on this point to which the question has already given rise. The solution that will be adopted for States will probably be able to be transposed in the case of international organizations, with any adaptations required by the regime ultimately adopted.]

(3) Implementation of responsibility

(i) Protection of private individuals and officials of the organization

The functional protection exercised by an organization vis-à-vis a State or another international organization which has committed an internationally wrongful act causing harm to one of its officials;

Diplomatic protection exercised by a State vis-à-vis an international organization which has committed an internationally wrongful act causing harm to one of its nationals.

Note: This heading is not necessary if these questions are considered and decided in connection with the topic of diplomatic protection.

(ii) Settlement of disputes

Note: Just as there might be serious doubts about the justification for including a section on the settlement of disputes in the draft articles on State responsibility, so this may be advisable in the case of the responsibility of international organizations, which do not have access to the International Court of Justice and do not offer internal settlement mechanisms that are equivalent to those that exist within States, although, in principle, their immunities protect them against proceedings instituted against them in national courts. This will, in any event, only help to develop the international law in force.

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THE EFFECT OF ARMED CONFLICT ON TREATIES

(Ian Brownlie)

A. General comment

This element was set aside by the Commission in its work on the law of treaties and forms part of the savings clause in the Vienna Convention (article 73). The topic was examined by the *Institut de droit international*, 1981-85; see the *Annuaire*, 59 (1981) i, 59 (1982) ii, 61 (1985) i, and 61 (1986) ii. A resolution was adopted at the Helsinki Session in 1985.

The topic has not been the subject of comprehensive study with the exception of the work of the *Institut de droit international*.

The resolution adopted by the *Institut* is not comprehensive and did not fully reflect the helpful studies produced by the Special Rapporteur, Mr. Bengt Broms. In any case the literature on the subject is less than satisfactory. The subject is surely ideal for codification and/or progressive development. On the one hand there is considerable State practice and experience and, on the other hand, there are elements of uncertainty. As the editors of the ninth edition of *Oppenheim's International Law* observe (at p. 1310): "The effect of the outbreak of hostilities between the parties to a treaty upon the validity of that treaty is far from settled …".

The law remains to a considerable degree unsettled. The transition from the use of "war" or a "state of war" as relevant categories to the use of the locution "armed conflict" has not resulted in a mature alternative legal regime. The practice of States as to the effects of armed conflicts on treaties varies.

These uncertainties in the legal sources and in the practice of States are compounded by the appearance of new phenomena including different forms of military occupation of territory and new types of international conflict.

The topic received a wide range of support in the Working Group. It was generally recognized that there is continuing need for the clarification of the law in this area.

B. Schema

1. The Definition of Armed Conflict
   - (i) Issue of magnitude;
   - (ii) Relevance of declaration of war;
   - (iii) Effect of military occupation in absence of a state of war.
2. The Definition of a Treaty for present purposes.
3. Is a classification of Treaties necessary?

4. The Incidence of the Right of Suspension or Termination
   (i) Not an *ipso facto* consequence of armed conflict;
   (ii) Treaties which by their nature and purpose operate in respect of an armed conflict;
   (iii) The Indicia of Susceptibility of Bilateral Treaties to Suspension or Termination;
   (iv) The Indicia of Susceptibility of Multilateral Treaties to Suspension or Termination.
5. Factors affecting the Right of Suspension or Termination other than the nature and purpose of the Treaty concerned
   (i) The effect of non-forcible countermeasures;
   (ii) The incompatibility *ex post facto* of a treaty with the right of individual or collective self-defence;
   (iii) The existence of provisions involving *jus cogens*;
   (iv) The incompatibility of a treaty with resolutions of the Security Council adopted by virtue of Chapter VII of the Charter.
6. The modalities of suspension and termination and the reinstatement of a Treaty subsequent to suspension.
7. Certain collateral issues
   (i) The illegality of the use or threat of force by the suspending or terminating State;
   (ii) The relation of the topic to the status of neutrality.
8. The relation of the topic to other grounds of termination or suspension already specified in the Vienna Convention of 1969. This relates in particular to impossibility of performance and fundamental change of circumstances.
9. The separability of treaty provisions in cases of suspension or termination.

SHARED NATURAL RESOURCES OF STATES

(Robert Rosenstock)

The Commission could usefully undertake a topic of "Shared Natural Resources" focused exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas.

The effort should be limited to natural resources within the jurisdiction of two or more States. The environment in general and the global commons raise many of the same issues but a host of others as well.

There can be no doubt that sustainable development requires optimal use of resources. The finite nature of natural resources, combined with population growth and rising expectations, is a potential threat to the peace unless clear guidelines are developed and followed with regard to shared natural resources.

The work of the International Law Commission on Watercourses and Liability underscores its capacity to produce norms or guidelines assuming a general instrument is envisaged rather than a resource specific approach (e.g. water, oil and gas, minerals, living resources). The latter approach would perhaps be better undertaken by bodies with technical expertise.

It would seem prudent for the Commission to consider involving States and other relevant organizations, intergovernmental and non-governmental, in the decision whether to proceed with the exercise. The Secretary-General should be asked to consult with the relevant United Nations bodies and report. The landscape is full of excellent proposals by UNEP bodies and others to which too little heed has been paid not to mention the ongoing work of the United Nations Commission on Sustainable Development and other bodies. The function of these suggestions is to decrease the risk of the final product being irrelevant and/or ignored and to avoid contributing to what Professor E. Brown Weiss calls "treaty congestion". It is moreover a reflection of the belief that the Commission may be in a position to benefit in this exercise from cooperation with other bodies and to encourage the potential early involvement of the latter.

Requesting Government and other comments by 1 January 2000 may further focus attention on the exercise *ab initio*.

All of this having been said, the question remains whether the Commission should consider taking on both the topic of General Principles of Environmental Law and a topic on Shared Natural Resources?

Outline

1. Scope: In order to contain and focus the effort, it should be limited to natural resources within the jurisdiction of two or more States. The global commons raises many of the same issues but a host of others as well.
2. Form: Whether the final product should take the form of guidelines, a declaration, a convention or whatever should be decided at a much later stage but could feature as one of the questions to be asked of Governments and others.
3. Applicable Principles:
   - (a) The duty to cooperate;
   - (b) Equitable and reasonable utilization and participation
     - (i) factors relevant to equitable and reasonable utilization;
     - (ii) unitization;
     - (iii) examples of regimes for shared resources.
   - (c) Prevention and abatement of significant harm, procedure for situations in which harm is caused;
   - (d) Exchange of data and information;
   - (e) Management
     - A joint management mechanism;
   - (f) Non-discrimination.
4. Issues specific to situations where no boundary exists (Libya-Malta).
5. Settlement of disputes.

Additional possibilities:

6. Technology transfer.
7. Financial mechanisms.
8. Possible alternative regimes for distribution
   - Suggested criteria for distributing the shares resources among the States in whose territory it exists and whose boundary it crosses.

All three of these “additional possibilities” are probably too political for independent experts and probably too situation or substance specific.

Selected documents

GA Res. 3129 (1973) ILM XVII 232

> "... necessary to ensure effective cooperation between countries through the establishment of adequate international studies for the conservation and harmonious exploitation of natural resources common to two or more States …"

UNEP/GC/44 Corr.1 and 2 and Add.1

GA Res. 3281 (1974) ILM XIV 251

UNEP. "Draft Principles", UNEP, ILM XVII: 1098

The Rio Declaration on Environment and Development, 14/6/92, A/Conf.151/5/Rev.1 31 ILM 874 (1992)

The Stockholm Declaration of the United Nations Conference on the Human Environment

Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development UNST/DPCSD 05/B2/3 (1996)

Report of the Working Group on Sustainable Liability for Injurious Consequence Arising out of Acts not Prohibited by International Law. Report of the ILC (1996) at 235 et seq.

Rio Declaration on Environment and Development: Application and Implementation, Report of the Secretary-General, E/CN17/1997/8 (10/2/97).

EXPULSION OF ALIENS

(Emmanuel A. Addo)

Introduction

The right of States to expel aliens has never been in doubt. States are generally recognized as possessing the power to expel aliens. Just like the power States have to refuse admission to aliens, this is regarded as an incident of sovereignty. In 1869, the United States Secretary of State, Mr. Fish observed that: "the control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State are too clearly within the essential attributes of sovereignty to be seriously contested." (See Whiteman's Digest volume 8, p. 620) Shigeru Oda in the manual of Public International Law (1968 p. 469 at 482, edited by Sorensen), stated the common view that:

> "the right of a State to expel, at will, aliens whose presence is regarded as undesirable, is like the right to refuse admission of aliens, considered as an attribute of sovereignty of the State … The grounds for expulsion of an alien may be determined by each State by its own criteria. Yet the right of expulsion must not be abused".

This principle is also accepted in the Literature on Public International Law. The current edition of Oppenheim accepts this principle and says thus:

> "On the other hand, while a State has a broad discretion in exercising its right to expel aliens, its discretion is not absolute" (See Oppenheim's International Law 9th Edition Vol. 1, p. 940).

So therefore although the expulsion of aliens rests solely with municipal law, the decisive influence of international law is apparent.

The State, which is in possession of a wide discretionary power, is prohibited by customary international law from expelling an alien if there is not sufficient reason to fear that public order is endangered. The rule of non-discrimination and the prohibition of the abuse of rights are additional restrictions on expulsion. An expulsion which encroaches upon the human rights protected by the International Covenant on Civil and Political Rights of 1966 or regional instruments such as the African Charter of Human and Peoples' Rights, the European Convention on Human Rights, of 1950 and the American Convention on Human Rights might be unlawful for the respective signatory or ratifying State.

Where the procedure for expulsion itself constitutes an encroachment upon Human Rights, the expulsion itself, although it may be reasonably justified, would be categorized as contrary to International Law.

An alien admitted to the territory of a State and having been granted asylum cannot be expelled without regard to the principle of non-refoulement, which is a general principle of Public International law as adopted by article 33 (1) of the Geneva Convention relating to the Status of Refugees of 1951, which prohibits a refugee who has already gained access to a State from being returned to a country persecuting him or her on the basis of race, creed, nationality or political opinion.

International law also prohibits collective or mass expulsion which is expressly precluded by article 4 of the Fourth Protocol to the European Convention on Human Rights of 1963, article 22 of the American Convention on Human Rights of 1969 and article 12 (5) of the African Charter of Human and Peoples' Rights of 1981.

General Scope

Definition

Expulsion refers to the order a Government of a State gives advising an alien or a stateless person to leave the territory of that State within a fixed and invariably short period of time. Such an order is generally combined with the announcement that it will be enforced, if necessary by deportation. Simply put, expulsion means the prohibition to remain inside the territory of the ordering State; it does not matter whether the alien concerned is passing through the territory, or is staying only for a brief period, or has established residence in the territory of the said State.

These differences may be of importance however, regarding the legality of the expulsion in a given case since provisions of treaties could be of influence here.

Distinction between expulsion and non-admission

Expulsion differs from non-admission or refusal of entry, in that in the case of non-admission the alien is prevented from entering the territory of the State whereas expulsion concerns aliens whose entry, and in a given case residence, has been permitted initially. Where an alien has entered the territory of a State illegally without the awareness of this by the State authorities, and is afterwards deported, it may raise a doubt whether this action by the State constitutes an expulsion or a refusal of entry. This however may be a distinction without a difference, since the result legally speaking in both cases could be coercive deportation.

Purpose of Expulsion

To preserve the public security of the State (Ordre public).

Expulsion must be distinguished from extradition in this case. Extradition is mainly carried out in the interest of the requesting State, whereas expulsion is performed in the exclusive interest of the expelling State. Extradition does need the consensual cooperation of at least two States, whereas expulsion is a unilateral act.

Lawfulness of Expulsion

Whether or not a foreign national may lawfully be expelled rests within the discretionary power of the Government of the expelling State.

A duty not to expel and a duty to give reasons for expulsion may arise from international treaties e.g. the United Nations Covenant on Civil and Political Rights or regional treaties e.g. European and American Conventions and the African Charter of Human and Peoples' Rights.

If the alien's expulsion constitutes an abuse of rights, the alien's State of nationality is entitled to exercise diplomatic protection. And in the implementation of the expulsion order, States are under an obligation not to violate human rights.

Mass or Collective Expulsion

1. Expulsion of a large group of people is not as such prohibited under international law.
2. Such an expulsion is prohibited, however, when it is tainted with discrimination or arbitrariness.
3. The American and the European Conventions on Human Rights put a stress on the prohibition of arbitrariness with respect to mass expulsions. The term used is collective expulsion. The aforementioned conventions also contain a general prohibition of discrimination.
4. The African Charter of Human and Peoples' Rights puts the emphasis on the prohibition of discrimination with respect to mass expulsions. The African Charter also contains a general provision of arbitrariness.
5. Universal human rights law also contains a prohibition of mass expulsion as a discriminatory and arbitrary measure.

Consideration of specific cases of mass or collective expulsion

Post World War II

The grounds on which refugees or stateless persons can be expelled are limited by treaty. These grounds are likely to be ignored when refugees or stateless persons become involved in mass expulsion.

Migrant workers

Consideration and discussion of the United Nations Convention on

(a) the Protection of the Human Rights of All Migrant Workers and Members of Their Families.

Does Article 22 of the above Convention contain a correct statement of current international law with regard to mass expulsion of legal and illegal aliens, migrant workers, etc.

(b) Treaties specifically applicable to migrant workers prohibit arbitrary expulsion and limit the grounds upon which such expulsion can be based.

RISKS ENSUING FROM FRAGMENTATION OF INTERNATIONAL LAW[1]

(Gerhard Hafner)

CONTENTS

[1] This paper was elaborated with assistance of Ms. Isabelle Buffard and Messrs. Axel Marschik and Stephan Wittich.

A. ISSUE

In recent time, particularly since the end of the cold war, international law has become subject to a greater fragmentation than before. A major factor generating this fragmentation is the increase of international regulations; another factor is the increasing political fragmentation juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction.

It can therefore easily be assumed that, presently, there exists no homogeneous system of international law. As it has been noted at several occasions even during recent discussions in the International Law Commission, *inter alia* on State responsibility, existing international law does not consist of one homogenous legal order, but mostly of different partial systems, producing an "unorganized system".

Hence, the system of international law consists of erratic parts and elements which are differently structured so that one can hardly speak of a homogeneous nature of international law.[2] This system is full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different levels of legal integration.[3]

This nature of international law resulting from separate erratic legal subsystems undoubtedly has a positive effect insofar as it enforces the rule of law in international relations; nevertheless, it is exposed to the risk of generating frictions and contradictions between the various legal regulations and creates the risk that States even have to comply with mutually exclusive obligations. Since they cannot respect all such obligations, they inevitably incur State responsibility.

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[2] Cf. Raza Mooms, "Citizens of a Wounded Earth in a Fragmented World", in: Gangrade K.D., Misra R.P. (ed.), *Conflict Resolution through Non-Violence,* New Delhi, 1990, vol. 2, pp. 11-23 (22); Camilleri Joseph A., "Fragmentation and Integration: The Future of World Politics", in: Ibid., pp. 45-63 (45).

[3] As to the increase of fragmentation in particular after the end of the cold war see: Reisman Michael W., "International Law after the Cold War", in: *AJIL* vol. 84, 1990, pp. 859-866 (864); Fry Earl H., "Sovereignty and Federalism: U.S. and Canadian Perspectives. Challenges to Sovereignty and Governance", *Canada-United States Law Journal* vol. 20, 1994, pp. 303-317 (303); Delbruck Jost, "A More Effective International Law or a 'New World law'", *Indiana Law Journal* vol. 68, 1993, pp. 705-725 (705).

The primordial task of the ILC is the codification and progressive development of international law (Art. 13 United Nations Charter) in the interest of the stabilization of international law and, consequently, international relations. Since the fragmentation of international law could endanger such stability as well as the consistency of international law and its comprehensive nature, it would fall within the purview of the objectives to be attained by the ILC to address these problems. Hence, the ILC should seek for ways and means to overcome the possible detrimental effects of such fragmentation. As will be shown, the ILC already possesses the necessary means for this purpose.

Certain examples may illustrate the risks which this situation of existing international law could entail.

B. ILLUSTRATIVE CASES

1. The Charter of the United Nations and other Obligations under International Law

A striking example may be construed as follows: The Ad-hoc Tribunal for former Yugoslavia, which is only bound by the Charter of the United Nations, requests a State to take certain measures which are not in conformity with the obligations incumbent upon this State by virtue of human rights conventions. Article 103 of the Charter of the United Nations, which enshrines the prevalence of obligations under the Charter of the United Nations over any other treaty, deprives the State of the right to invoke those conventions, irrespective of the fact that the individual concerned may bring the matter before the relevant human rights bodies. With regard to the standard of human rights protection, a comparison of the procedural guarantees contained in the Statute of the ICTY[4] (including the rules of procedure and evidence) with generally accepted standards of fair trial, in particular with those embodied in the International Covenant on Civil and Political Rights, reveals two serious shortcomings of the Statute:[5] First, the Statute does not contain a clear guarantee of *nullum crimen sine lege*; and, second, the Statute lacks an

[4] International Criminal Tribunal for former Yugoslavia.

[5] A. Reinisch, "Das Jugoslawien-Tribunal der Vereinten Nationen und die Verfahrensgarantien des II. VN-Menschenrechtspaktes. Ein Beitrag zur Frage der Bindung der Vereinten Nationen an nicht-ratifiziertes Vertragsrecht", *ÖZÖRV* 47 (1995), pp. 173-213, at pp. 177-182. The hypothetical case mentioned in the text is detached from the problem scrutinized by *Reinisch*, i.e. the question of whether the Tribunal is bound by treaty or customary law.

explicit *ne bis in idem* provision. Thus, if a State party to the Covenant conforms to the request of the Tribunal and the Tribunal does not adhere to one of these basic standards of fair trial the State will have to breach its obligations owed to the individual under the Covenant. Furthermore, if the individual concerned refers this matter to the relevant human rights body, the latter will be confined to examining only whether the State has or has not violated the respective human rights convention. The treaty body will not be competent to review the obligations stemming from the request of the ICTY and, eventually, from SC Res 827. Existing international law does not provide a clear guidance for solving this problem.[6]

2. Immunity and Human Rights Obligations

Similarly, the question has already arisen whether immunity based on international agreements or general international law can be invoked by States parties as exceptions to their obligations under the Human Rights Conventions before Human Rights bodies. In a recent case, the European Commission of Human Rights took the view that the immunity from jurisdiction accorded to international organizations or members of diplomatic or consular missions of foreign States cannot be regarded as delimiting the very substance of substantive rights under domestic law. The Commission *inter alia* stated that to confer on large groups or categories of persons immunities from civil liability would run counter to article 6, paragraph 1 ECHR.[7] The Commission, nevertheless, concluded that in the case in question no violation of article 6, paragraph 1 of the Convention had occurred because a reasonable relationship of proportionality can be said to have existed between the rules on international immunity and the legitimate aims

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[6] See G. Hafner, "Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?", in L. Caflisch (ed.), *The Settlement of Disputes between States: Universal and European Perspectives*, 1998, pp. 25-41; see also the symposium on "Proliferation of International Tribunals: Piecing Together the Puzzle", *NYU Journal of International Law and Politics* 31 (1999), pp. 679-970.

[7] European Commission of Human Rights, Application No. 26083/94 *Richard Waite and Terry Kennedy v. Germany*, Report of the Commission adopted on 2 December 1997, § 53 and §54. See also *Beer and Regan v. Germany*, Application No. 28934/95, Report of the Commission adopted on 2 December 1997.

pursued by the European Space Agency (ESA) as an international organization.[8] The European Court of Human Rights came to the same conclusion.[9] The organs of the ECHR stated at the same time that it would be incompatible with the purpose and object of the Convention if the contracting States were absolved from their responsibility under the Convention in relation to the field of immunities.[10]

3. International Trade Regulations and International Environmental Regulations

Another example of this kind might also be seen in the relationship between international regulations dealing with international trade and the protection of the environment and sustainable development.[11] Whereas the international trade regime, established by the WTO, *inter alia*, aims at the "substantial reduction of tariffs and other barriers to trade"[12] and prohibits quantitative restrictions,[13] some environmental conventions make use of trade measures in order to ensure

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[8] See I. Seidl-Hohenveldern, "Functional Immunity of International Organizations and Human Rights" in W. Benedek, H. Isak and R. Kicker (eds.), *Development and Developing International and European Law*, Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday, 1999, pp. 137-149.

[9] *Case Waite and Kennedy v. Germany*, 18 February 1999, § 73, *Case Beer and Regan v. Germany*, same date: "Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German Courts with regard to ESA impaired the essence of their 'right to a court' or was disproportionate for the purposes of article 6 § 1".

[10] Ibid, § 67. In their dissenting opinion to the report on the case of *Richard Waite and Terry Kennedy v. Germany*, 15 members of the European Commission of Human Rights stated that immunities of international organizations could not be considered as a kind of general unwritten exception to the scope of application of the ECHR.

[11] Cf. e.g. the works undertaken by the GATT Working Party on Environmental Measures and International Trade (now WTO: Trade and Environment Committee) or the OECD Trade and Environment Expert Committee; cf. further C. Stevens, OECD Trade and Environment Programme, 1 RECIEL (1992), 55s; UNEP Doc. UNEP/GC.20/INF/16 of 19 January 1999, Study on Dispute Avoidance and Dispute Settlement in International Environmental Law, Ch. IV.B.1.a, 56s.

[12] General Agreement on Tariffs and Trade, Preamble, para. 3, reprinted in WTO (ed.), The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts (1994), 486ss.

[13] Article XI GATT.

their effectiveness.[14] This may give rise to certain tensions between the various norms of international law.

4. International Regulations on Broadcasting

A further striking example could be found in the various attempts to regulate satellite broadcasting: On the one hand, the International Telecommunication Union (ITU) tried to solve this problem by means of the World Administrative Radio Conference (WARC) in 1977, on the other hand UNESCO became involved through its "Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education, and Greater Cultural Exchange" of 1972. Finally, the matter was discussed in the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space where the final declaration governing these activities was elaborated.[15] Nevertheless, certain doubts concerning compatibility of these principles and the relevant regulations elaborated under the auspices of the ITU are even today not yet totally removed.

5. The Law of Sea Convention and International Fisheries Treaties

A recent case before the United Nations Law of the Sea Tribunal clearly demonstrates the problems incurred by the applicability of more than one regulation to a given case. Certain activities of Japan with regard to bluefin tuna in the Southern Pacific led to the question of whether the dispute settlement mechanism embodied in the Convention on the Regulation of Bluefin Tuna Fisheries in the Southern Pacific 1993 or that in the United Nations Law of the Sea Convention could be resorted to. The Tribunal decided by majority:

> "55. Considering that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea."

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[14] Cf. GATT, International Trade 90-91, Vol. I (1992), 45ss; in this study 17 environmental conventions containing trade provisions for reasons of environmental protection are listed; this list, i.a., includes the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

[15] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, GA RES 27/92 of 10 December 1982.

Without disputing the correctness of the finding of the Tribunal, the fact that this question came before the Tribunal already sufficiently proves that existing general international law does not contain a clear regulation of the priority of conflicting treaty obligations. Consequently, clear legal devices are needed to ensure harmonious regulations.

C. CAUSES

The fragmented nature of international law has been generated by a multitude of reasons creating different layers and subsystems of international law which could conflict one with another.

1. Lack of centralized organs

Fragmentation stems from the nature of international law as a law of coordination instead of subordination as well as from the lack of centralized institutions which would ensure homogeneity and conformity of legal regulations.

2. Specialization

According to Brownlie, fragmentation resulting from specialization poses the most dangerous threat to the coherence of international law;[16] he mentions in this respect human rights, the law of the sea, the law of development and environmental law. This development leads to "topic autonomy" with strange results (environmentalists neglecting State responsibility, human rights advocates being unaware of the rules concerning the treatment of aliens etc.). Accordingly, two principal threats to the unity of international law surface: the type of irregular specialization and political divisions on particular issues (in particular according to the north/south conflict).

3. Different structures of legal norms

This tendency is enhanced by the difference of the structures of legal norms. Existing international law faces at least three different legal structures: (1) classical international law consisting mainly of reciprocal norms of synallagmatic nature, i.e. norms creating bilateral reciprocal relations among States which leads to a splitting of the universal legal order in bilateral legal relations; (2) new developments of international law imposing duties on States

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[16] Brownlie I., "Problems concerning the Unity of International Law", in *Le droit international à l'heure de sa codification*. Etudes en l'honneur de Roberto Ago, Volume I (Università di Genova, Istituto di Diritto Internazionale e della Navigazione della Facoltà di Giurisprudenza, Giuffrè Milano, ed. 1987), p. 156.

owed to individuals such as norms protecting human rights; or (3) duties owed to the community of States as such participating in a given legal system.

4. Parallel regulations

A further threat to the unity of international law stems from the parallel regulation on the universal or the regional level relating to the same matter. One example is the United Nations Convention on the non-navigational use of international watercourses of 1998[17] which is

[17] Cf. e.g. the relevant articles of the United Nations Convention:

"Article 3

Watercourse agreements

1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.

2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.

3. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.

4. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or any part thereof or a particular project, programme or use except insofar as the agreement adversely affects, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse, without their express consent.

5. Where a watercourse State considers that adjustment and application of the provisions of the present Convention is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

6. Where some but not all watercourse States to a particular international watercourse are parties to an agreement, nothing in such agreement shall affect the rights or obligations under the present Convention of watercourse States that are not parties to such an agreement.

opposed to the European Convention in international watercourses of 1972 elaborated by the ECE. Both have to be combined with other conventions relating to specific watercourses such as the Rhine or the Danube. Solutions to the question which of them is applicable in a given case is mostly found by a reference to the provisions in these treaties attaching priority to the more specific conventions and to the *lex specialis* rule. Nevertheless, even these legal devices cannot always solve issues, in particular if non-riparian States are involved. Furthermore, the provisions regulating the precedence among these treaties very often escape a clear interpretation; so, for instance, a similar clause in the United Nations Convention on the Law of the Sea, namely article 132, which preserves agreements granting greater transit facilities than those accorded in the Convention requires first a weighing of the scope of transit facilities before a decision can be made whether a certain agreement remains in force.

5. Competitive regulations

Generally, this situation could also be engendered by the elaboration of different legal regimes in different international negotiation bodies, both addressing the same group of States: Suffice it to say that there is a competition of regulations concerning certain outer space activities (e.g. distribution of frequencies, resp. common use) between UNCOPUOS and the ITU (both already made attempts to harmonize their respective approach to this matter). Similar conflicts arise between regimes relating to trade matters and protection of the environment. The matter is even worse in the field of environment where different international bodies try to

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Article 4

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected."

promote the elaboration of relevant regimes. Examples which belong even to the same field of international law are for instance the Conventions on Desertification, on Climatic Changes and on the Ozone Layer.

6. Enlargement of scope of international law

On a more general level, this fragmented nature of international law, according to P.M. Dupuy, is due to the enlargement of the material scope of international law, a multiplication of actors, and an effort to improve the efficiency of public international obligations, with the establishment of some conventional and sophisticated "follow-up" machinery, in particular in the fields of human rights, international economic law, international trade law, and international environmental law.[18] Sergio Salinas Alcega and Carmen Tirado Robles, confirming this view, believe that this fragmentation is due to the expansion of the matters regulated by international law, the progressive institutionalization of the international society and the existence of parallel regulations.[19]

The process of the expansion of international law goes, as Shaw notices, hand in hand with the upsurge in difficulties faced and the proliferation in the number of participants within the system[20] as well as the differences among them. One cannot say that States generally apply international law:[21] They apply certain rules to a given case in relation to a certain other subject or group of subjects of international law. As early as 1928, the British Government criticized general arbitration treaties on the ground that, in the case of every country, "obligations which it may be willing to accept towards one State it may not be willing to accept towards another".[22]

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[18] P-M. Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", *Journal of International Law and Politics*, 31 (1999), pp. 791.

[19] Sergio Salinas Alcega, Carmen Tirado Robles, Adaptabilidad Y Fragmentacion del Derecho Internacional: La Crisis De La Sectorializaciòn, Zaragoza, 1999, 161.

[20] Shaw M.N., International Law, 39.

[21] Ford Christopher A., "Judicial Discretion in International Jurisprudence: Article 38 (2) (c) and 'General Principles of Law', *Duke J Comp and Int'l Law*, vol. 5, 1994, pp. 35-86 (77).

[22] Ibid., p. 196.

This disintegrated nature of international law is still aggravated by the divergence of the legal and political cultures to which States adhere,[23] and the decreasing platform of universally shared values.

7. Different regimes of secondary rules

Developments in the past 30 years, however, have demonstrated that the mere existence of a multitude of primary norms does not automatically and necessarily improve international and regional cooperation. Indeed, the growing number of international primary norms has even resulted in increasing problems in regard to the implementation of the norms.

In order to avoid possible conflicts ensuing therefrom, the States chose to equip the primary norms with special secondary norms which would have precedence over the general secondary norms of international law.[24] These special secondary norms should ensure that the primary norms were respected, properly administered and violations of the norms adequately met.[25]

International Courts have also addressed the issue, focusing generally on the question of precedence of the secondary norms of such mechanisms or subsystems over the general secondary norms of international law.[26]

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[23] Cf. Franck Thomas M., "Legitimacy in the International System", in: *AJIL* vol. 82, 1988, pp. 705-759 (706), in whose view the perception of legitimacy will vary in degree from rule to rule and time to time.

[24] Brownlie, *State Responsibility* I (1983), 1; Jennings, "The Judicial Enforcement of International Obligations", *ZaöRV* 47 (1987), 16; White, "Legal Consequences of Wrongful Acts in International Economic Law", *NYIL* 16 (1985), 172; Zemanek, "The Unilateral Enforcement of International Obligations", *ZaöRV* 47 (1987). Regarding the relationship between general international law and subsystems and to further references see A. Marschik, Subsysteme im Völkerrecht - Ist die Europäische Union ein 'self-contained regime'? (1997). The question whether "precedence" can go so far as to exclude the application of general secondary norms is the core of the dispute regarding "self-contained regimes"; see Simma, "Self-Contained Regimes", 16 *NYIL* (1985).

[25] Sorensen, "Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organizations in the World Legal Order", *ICLQ* 32 (1983), 575.

[26] See especially the Teheran Hostages Case, ICJ-Reports 1980, paras. 83 and 85-87. Cf. also the Barcelona-Traction Case, ICJ-Reports 1970, paras. 36, 62 and 90; ELSI-Case, ICJ-Reports 1989, para. 50; Nicaragua-Case, ICJ-Reports 1986, paras. 267 and 274.

Whereas conflicts of primary norms could perhaps be attempted to be solved by recourse to the general secondary norms of *lex specialis* and *lex posterior*, this remedy is not always helpful in dealing with subsystems: each subsystem always claims for itself to be the lex specialis and applies its own rules irrespective of another subsystem. Practice shows that two subsystems with overlapping competencies can demand contradictory action. In this case the State involved has to decide to comply with one subsystem and to violate the other. This brings us full circle back to the original dilemma where States have to choose for themselves which norms they fulfill. Since subsystems increasingly involve the individual, bestowing material and procedural rights onto him/her and, in some cases, even obligations, the problem concerns private parties as well.

D. EFFECT: THREAT TO RELIABILITY AND CREDIBILITY OF INTERNATIONAL LAW

The disintegration of the legal order is conducive to jeopardizing the authority of international law. Doubts could be raised as to whether international law will be able to achieve one of its primary objectives, dispute avoidance and the stabilization of international relations and, thus, achieve its genuine function of law. The credibility, reliability and, consequently, authority of international law would be impaired. The effect can be distinguished according to its effect for primary or secondary rules.

1. Substantive law (primary rules)

As far as substantive law (in the sense of primary rules) is concerned, we now face different regimes relating to the same issue.

In this regard legal regimes of a more general nature very often compete with regimes of a more special nature where the possible contradictions can only be overcome by the resort to rules such as *lex specialis*. However, even where the more general regime contains special provisions defining the priority of rules (providing for instance priority of the general over the special provisions) it is often rather difficult to determine precisely which regulation should precede or be applied to a concrete case.

Despite the merits regional and subregional regulations could have with regard to the solving of regional disputes and conflicts, it has also been noted that “the underlying diversity of nations and the tendency to regionalism even in respect of areas, such as human rights, where universal values would appear to be at stake, raises significant tensions for international law and may ever call in question its claim to ‘universality’”. Likewise was it even observed that

"sectionalism and regionalism are powerful agents of international cooperation but not necessarily an unmitigated blessing for the development of international law".

As has been shown by concrete cases, the diversity of the applicable regulations necessitates complex arguments as to the regulation to be applied and could even give rise to more conflicts instead of resolving them. Despite these positive assessments of the multiplicity, a certain likelihood of a detrimental effect cannot be overlooked.

2. Secondary rules

As far as regulations on procedures to ensure the observance of international law are concerned, the fragmentation becomes even more evident. Major problems arise where a State could resort to different mechanisms of enforcement (ranging from dispute settlement to compliance mechanisms) relating to one and the same incident. Since most mechanisms, in particular the treaty bodies, are restricted only to their own substantive law as a legal basis for the legal evaluation of the dispute (except for instance the ICJ) States could then resort to the mechanism that corresponds best to their own individual interests. This possibility entails the risk of divergent solutions, a situation which certainly could undermine the authority and credibility of these instruments and of international law.

The diversity tends to maintain, if not strengthen, the disintegrated nature of international law and the international system as a whole. Each of these organs considers itself committed first of all to apply only its own system or subsystem of standards so that States would be induced to select that forum from which a favorable settlement can be expected ("forum shopping"[27])[28]. Likewise, the settlement reached by one of these organs would only have a certain relative effect as it would resolve a dispute only within one given system and not necessarily for the purpose of another or the universal system. This fact could therefore undermine any tendency towards a homogeneous international law and system and could engender an additional uncertainty of the standards to be applied to a given case.

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[27] This term is used in the field of International Private Law; cf. Baron Roger M., "Child Custody Jurisdiction", *S.D. L. REV.* vol. 38, 1993, pp. 479-498 (492); Borchers Patrick J., "Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform", *Wash. L. Rev.*, vol. 67, 1992, pp. 55-111 (96).

[28] States could benefit from this "forum shopping" insofar as they could select not only the forum most favorable to them but also the cheapest one.

This dispersed nature of judicial activity in a broader sense is still intensified by the lack of mutual information as it could be difficult for one institution to become acquainted with all the ramifications of the judicial reasoning of another body, in particular if the activity is not divulged, but kept secret[29].

The then President of the ICJ referred to the effect of fragmentation in the field of secondary norms, namely in the system of peaceful settlement of disputes where a multitude of courts, tribunals and similar instances were not only beneficial, but could eventually also create a risk to the homogeneity of international law:

> "The entry of actors onto the international stage other than States, who also influence the processes of international law-making and administration, has among other factors fostered the creation of specialized international tribunals. This development ... makes international law more effective by endowing legal obligations with the means of their determination and enforcement. Concern that the proliferation of international tribunals might produce substantial conflict among them, and evisceration of the docket of the International Court of Justice, have not materialized, at any rate as yet."

Other possibilities of uncertainties concerning the applicable legal regulation still exacerbate this situation. Presently, international law undergoes a change insofar as emphasis is placed no longer on the elaboration of substantive law of a general nature, but on more special regimes and the law of enforcement (dispute avoidance and dispute settlement mechanisms).

E. URGENCY

The cases cited above warrant the need to deal with this matter.

Although the Vienna Convention of the Law of Treaties (VCLT) provides certain basic rules on this issue of priority and the situation of successive treaties relating to the same object, it might, however, be doubted whether they are satisfactory (e.g. the discussion about the *lex specialis*).

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[29] It is one of the common features of arbitration that proceedings are not published, but only the award.

As far as conflicting treaty norms are concerned, a solution could indeed be sought in the VCLT (cf. arts. 30, 40, 41 and 59), in particular in article 30.[30] However, this provision only reflects the general rule of *lex posterior derogat priori*, but not the principle of specialty (*lex specialis derogat generali* or *in toto iure genus per speciem derogatur*). Furthermore, it is generally recognized that the VCLT does not offer a solution to the problem of conflicting obligations owed by one State to different other subjects of international law. In such a case, the obligated State necessarily has to assume State responsibility. The only rules of a more general scope which clearly determine the priority of one regime are article 103 Charter and norms of an imperative nature (as far as they could be defined).

Another possibility to solve this problem could consist in explicit provisions of the treaties regulating the possible conflict with other treaties. This solution suffers by at least two deficiencies: first, it can become applicable only if the States involved are parties to all relevant

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[30] Article 30 reads:

Application of successive treaties relating to the same subject matter

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

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

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

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

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

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

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

treaties, second, the States are not always aware of the precise legal relationship among the treaties or remain silent on the priority of the treaties involved.

In light of the growing factual integration of world community on the one hand, and the proliferation of subsystems on the other, it is to be expected that the need to take measures to ensure the unity of the international legal order will increase.

It is therefore necessary first to become aware of this situation and tendency and to identify the different problems resulting therefrom as well as the lack of adequate legal solutions. Only on the basis of this survey of the situation and the problems, attempts can be made to find the necessary legal solution.

F. ENVISAGED SOLUTION

This particular problem does not lend itself to a solution through a regulation, at least not as yet.

President of the International Court of Justice, Schwebel, already proposed certain means to overcome the risk of fragmentation:

> "At the same time, in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law."

Other authors too, referred to the possibility of endowing the ICJ with some sort of monitoring authority in order to ensure consistency and harmony of the international legal order. However, one has to bear in mind that on the one hand, as yet, the ICJ does not possess this competence, on the other this means could only produce this effect *ex post*, i.e. after a conflict has arisen.

It could be the task of the ILC to raise the awareness of the States, which are and remain the main authors of international regulations, to this problem so that they can take it into account in the course of the elaboration of new regimes. The Commission could eventually elaborate certain guidelines addressing the issue of compatibility of different regimes; in this respect, the conclusions regarding reservations which the Commission has already adopted could serve as a useful model.

At the outset, the work of the ILC in this respect could be threefold, either in an alternative or in a combined manner: a report, a compilation of materials and proposals for operative work of the Commission.

1. Report

It could draw up a report to single out and identify the different problems relating to this issue and to categorize them in order to raise the awareness of the States.

In this respect, the Secretariat has already drawn the attention to former cases which could serve as precedents:

> "6. So far with the exception of two cases, the outcome of the Commission's work on the topics that was studied have taken the form of draft articles for adoption as conventions, model rules, declarations, etc. The two exceptions are the work of the Commission in connection with issues related to treaties. In these two instances the Commission considered a particular topic in the form of a study accompanied by conclusions and included in the Commission's report to the General Assembly.
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> 7. The first exception was in 1950. The General Assembly, by resolution 478 (v) invited the Commission, in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions in general, both from the point of view of codification and from that of the progressive development of international law, and to report to the Assembly at its sixth session, in 1951. The request was made by the General Assembly to provide guidance with respect to reservations for the Secretary General of the United Nations as the depository of multilateral treaties.
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> 8. In pursuance of this resolution, the Commission, in the course of its third session, gave priority to a study of the question of reservations to multilateral conventions. The Commission had before it a "Report on Reservations to Multilateral Conventions" (A/CN.4/41) submitted by Mr. Brierly, Special Rapporteur on the topic of the law of treaties, as well as memoranda presented by Messrs. Amado (A/CN.4/L.9 and Corr.1) and Scelle (A/CN.4/L.14). The Commission's debate focused on Brierly's report, paragraph by paragraph, in the plenary. It was finally adopted with several

modifications and included in the Report of the Commission to the General Assembly.[31] The report was also accompanied by six conclusions of the Commission on the topic.

9. The second exception was in 1962. By resolution 1766 (XVII) of 20 November 1962, the General Assembly requested the International Law Commission to study the question of participants of new States in certain general multilateral treaties, concluded under the auspices of the League of Nations, which by their terms authorized the Council of the League to invite additional States to become parties but to which States that had not been so invited by the League Council before dissolution of the League were unable to become parties to for want of our invitation. This problem had originally been brought to the attention of the Assembly by the International Law Commission[32].

10. The Commission considered this report in two plenary meetings and adopted it with some modifications, including it also on its report to the General Assembly. As in the previous case, the Commission report to the General Assembly was accompanied by a number of conclusions."

The Secretariat therefore reaches the conclusion that:

"[nothing] in the Statute or in the Commission's practice would prevent the Commission from initially preparing a study on legal questions that the Commission thinks would make contributions to the codification and progressive development of international law in the forms other than texts of draft articles. In two instances, the Commission had prepared studies, at the request of the General Assembly, accompanied by conclusions. The work in these two instances was practical and provided guidance to States and the Depositories of the Multilateral Treaties. In practice, the Commission, however, has always informed the General Assembly about its intention to embark on a topic."

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[31] *Yearbook ... ILC*, 1951, p. 125-131.

[32] *Yearbook ... ILC*, 1963, vol. II, p. 217-223

The report drawn up according to these precedents could take two forms:

(a) it could contain more concert statements of law and policy, closer to the model of the 1951 report on reservations to treaties, that can be discussed paragraph by paragraph by the Commission and amended if necessary;

(b) it could also take the form of a usual report to be discussed either in the Commission or in the context of a Working Group which could then be taken note of by the Commission itself.

Both versions could then be submitted to the General Assembly either as adopted by the Commission or as an annex to the Report of the Commission.

2. Compilation of materials

The Commission could try to illustrate this matter by compiling relevant materials in respect of specific matters and the insufficiency of the international legal order to cope with this problem. The result of the work would then consist likewise in a report which, however, does not contain any conclusions, but only draws the attention to the great diversity of the legal regulations governing such situations and, consequently, makes States more aware of the possible risks resulting from this problem.

3. Operative work of the Commission

With reference to article 17 of its Statute,[33] the Commission, perhaps on the basis of reports mentioned above, could also stimulate the States (and international organizations) to

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[33] Article 17 reads as follows:

> "1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General.
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> 2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow in general a procedure on the following lines:
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> (a) The Commission shall formulate a plan of work, and study such proposals or drafts, and compare them with any other proposals and drafts on the same subjects;
>
> (b) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned

submit draft conventions first to the ILC before negotiations are concluded in order to identify the possible frictions with other already existing regulations and to avoid discrepancies among the relevant regulations, which States should take into consideration, for instance, during the process of negotiating a new legal framework. The ILC could be asked to devise a general "check-list" to assist States in preventing conflicts of norms, negative effects for individuals and overlapping competencies with regard to existing subsystems that could be affected by the new regime. In the course of reviewing on-going negotiations, the ILC could even issue "no-hazard"-certificates indicating that the creation of a specific new subsystem has no negative legal effects on existing regimes.

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above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

(c) The Commission shall submit a report and its recommendations to the General Assembly. Before doing so, it may also, if it deems it desirable, make an interim report to the organ or agency which has submitted the proposal or draft;

(d) If the General Assembly should invite the Commission to proceed with its work in accordance with a suggested plan, the procedure outlined in article 16 above shall apply. The questionnaire referred to in paragraph (e) of that article may not, however, be necessary."