[A /CN.4/]ILC(LVI)/SG/FIL/CRD.1
7 May 2004
Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Fifty-sixth session
Geneva, 3 May-4 June and 5 July-6 August 2004

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

Study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'": Preliminary report by Mr. Martti Koskenniemi, Chairman of the Study Group*

Contents

* The author wishes to thank Ms Anja Lindroos, DES, researcher at the Erik Castrén Institute of International law and Human Rights, University of Helsinki, for assistance in the compilation of this study.

1. General: *Lex specialis* as an aspect of legal reasoning - its relationship to the idea of a legal system;
2. *Lex specialis* in international law;
    (a) Legal Doctrine;
    (b) Case-law
    (c) An Informal Hierarchy: the point of *lex specialis*

3. The Two Types of *lex specialis* reference
    (a) *Lex specialis* as an application of *lege generali;*
    (b) *Lex specialis* as an exception to the general rule;
4. Prohibited *lex specialis;*
5. The Relational Character of the general/Special Distinction;
6. Conclusion: The Omnipresence of General Law

Introduction

1. At its fifty-second session in 2000, the International Law Commission decided to include the topic "Risks ensuing from the fragmentation of international law" into its long-term programme of work. In the following year, the General Assembly requested the Commission to give further consideration to the topics in that long-term programme. At its fifty-fourth Session in 2002 the Commission decided to include the topic, renamed Fragmentation of international law: difficulties arising from the diversification and expansion of international law, in its current work programme and to establish a Study Group.

2. In 2002 the Study Group adopted a number of recommendations on topics to be dealt with and requested its then Chairman, Mr.Bruno Simma to prepare a study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".[1] At its fifty-fifth session in 2003, the Commission appointed Mr. Martti Koskenniemi as Chairman of the Study Group due to Mr. Simma's election to the International Court of Justice. The Study Group also decided on a time-table and distributed work among its members on the five topics that had been chosen in 2002. The Group requested its Chairman to prepare a prepare a study on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" for submission to the Commission at its fifty-sixth session in 2004.

3. The Commission took note of the decision of the Study Group that a study on the matter should be undertaken by its Chairman on the basis of the outline he had produced in 2003 and the discussion of the Study Group. This was to include the general conceptual framework against which the issue of fragmentation has arisen and is perceived. The study might also include draft guidelines to be proposed for adoption by the Commission at a later stage of its work.

---

[1] The five topics were: (a) The function and scope of the *lex specialis* rule and the question of "self-contained regimes"; (b) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (d) the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); (e) hierarchy in international law: *jus cogens*, obligations *erga omnes*, article 103 of the Charter of the United Nations, as conflict rules.

4. The present is the preliminary report on the function and scope of the *lex specialis* rule and the question of 'self-contained regimes'. The report is in three parts. Section A reproduces a framework of analysis for the Study Group's approach to the question of fragmentation. It was already informally discussed and received general approval in 2003. Section B outlines the role and nature of the *lex specialis* rule as a pragmatic mechanism for dealing with situations where two rules of international law that are both valid and applicable deal with the same subject-matter differently.[2] Section C is an overview of the case-law and academic discussion on "self-contained regimes" and is produced as an addendum to the present report.

A. A typology of fragmentation: a framework for analysis

1. Fragmentation and normative conflicts

5. The study on "fragmentation of international law" by the International Law Commission focuses on normative conflicts that illustrate the expanding scope of international law but are sometimes thought to challenge the coherence of the international legal system. The issue has arisen owing to the emergence of closely integrated sets of rules of international law pertaining to particular subject-areas such as human rights, the environment, trade, international crimes, and so on. Such sets often combine specific primary rules (rules laying down particular rights and obligations) with specific secondary rules (rules about rule-creation and change, responsibility and dispute settlement) that claim autonomy from principles of general international law.[3] This autonomy has sometimes led to conflicts between such specialised sets of rules and the general law as well as between different sets of specialised rules.

---

[2] To say that a rule is "valid" is to point to its being a part of the ("valid") legal order. To say it is applicable means that it provides rights, obligations or powers to a legal subject in a particular situation.

[3] The distinction between primary and secondary rules in the text is taken from H.L.A. Hart, *The Concept of Law* , (1961), (Oxford, Clarendon) p. 78-79. It should not be confounded with the related, though narrower primary/secondary distinction that the Commission used after Special Rapporteur Ago introduced it in 1970 to characterise the difference between rules that lay down substantive obligations and rules that provide for the consequences of the breach of those obligations. See Roberto Ago, Report on State Responsibility, *Yearbook of the InternationalLlaw Commission,* 1970, Vol. II p. 179, para. 11 and *Report of the Commission to the General Assembly, ibid.* p. 306, para 66 (c). See also James Crawford, *First Report on State Responsibility*, A/CN.4/490, pp. 4-6, paras. 12-18.

6. Analytically, it is possible to distinguish between three types of normative conflict, namely:

(1) conflicts between general law and a particular, unorthodox interpretation of general law;
(2) conflicts between general law and a particular rule that claims to exist as an exception to it, and
(3) conflicts between two types of special law.

7. Fragmentation appears differently in each of such three types of conflict. While the first type is really about the effects of differing legal interpretations in a complex institutional environment, and therefore falls strictly speaking outside the Commission study, the latter two denote genuine types of conflict where the law itself (in contrast to some putative interpretation of it) appears differently depending on which normative framework is used to examine it.[4] Each of the three types of conflict is illustrated briefly below.

2. Fragmentation through conflicting interpretations of general law

8. In the *Tadic* case in 1999, the Appeals Chamber of the International Criminal Tribunal of Former Yugoslavia (ICTY) considered the responsibility of Serbia-Montenegro over the acts of Bosnian Serb militia in the conflict in the Former Yugoslavia. For this purpose it examined the jurisprudence of the International Court of Justice in the *Nicaragua* case of 1986. In that latter case, the United States had not been held responsible for the acts of the Nicaraguan *contras* merely on account of organising, financing, training and equipping them. Such involvement failed to meet with the test of "effective control".[5] The ICTY, for its part, concluded that the "effective control" test set too high a threshold for holding an outside power legally accountable for domestic unrest. It was sufficient that the power have "a role in organising, coordinating, or planning the military actions of the military group", that is to say

[4] I have discussed the dependence of normative conflict of different conceptual frameworks in Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties"', *15 Leiden Journal of International Law* (2002), pp. 553-579

[5] *Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *ICJ Reports* 1986, pp. 64-65 (para. 115).

that it exercised "overall control" over them for the conflict to be an "international armed conflict".[6]

9. The contrast between *Nicaragua* and *Tadic* is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law.[7] *Tadic* does not suggest "overall control" to exist alongside "effective control" either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to *replace* that standard altogether.

10. The point is not to take a stand in favour of either *Tadic* or *Nicaragua*, only to illustrate the type of normative conflict where two institutions faced with analogous facts interpret the law in differing ways. This is a common occurrence in any legal system. But its consequences for the international legal system which lacks a proper institutional hierarchy might seem particularly problematic. Imagine, for example, a case where two institutions interpret the general (and largely uncodified) law concerning title to territory differently. For one institution , State A has validly acquired title to a piece of territory that another institution regards as part of State B. In the absence of a superior institution that could decide such conflict, States A and B could not undertake official acts with regard to the territory in question with confidence that those acts would be given legal effect by outside powers or institutions. Similar problems would emerge in regard to any conflicting interpretations concerning a general law providing legal status.

11. Differing views about the content of general law create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. Second, it puts legal subjects in an unequal position vis-à-vis each other. The rights they enjoy depend on which jurisdiction is seized to enforce them. Most domestic laws deal with these problems through the instrumentality of the appeal. An authority (usually a court) at a higher

---

[6] See *Prosecutor v. Dusko Tadic*, Judgment, Case No. IT-94-1-A, A.Ch., 15 July 1999. See also *38 ILM* (1999) p. 1540-1546 (paras 115, 116-145).

[7] This need not be the only – nor indeed the correct – interpretation of the contrast between the two cases. As some commentators have suggested, the cases can also be distinguished from each other on the basis of their facts. In this case, there would be no normative conflict. Whichever view seems more well-founded, the point of principle remains, namely that it cannot be excluded that two tribunals faced with similar facts may interpret the applicable law differently.

hierarchical level will provide a formally authoritative ruling.[8] Such authority is not normally present in international law. Conflicts between interpretations of the general law by different institutions cannot be submitted to a constitutional system of review involving an ultimately highest authority. To the extent that such conflicts emerge, and are considered a problem (which need not always be the case), they can only be dealt with through legislative or administrative means. Either States adopt a *new law* that settles the conflict. Or then the institutions will seek to co-ordinate their jurisprudence in the future.

3. Fragmentation through the emergence of special law as exception to the general law

12. A different case is one where an institution makes a decision that deviates from how situations of a similar type have been decided in the past because the new case is held to come not under the general rule but to form an *exception* to it. This may be illustrated by the treatment of reservations by human rights organs. In the 1988 *Belilos* case the European Court of Human Rights viewed a declaration made by Switzerland in its instrument of ratification as in fact a reservation, struck it down as incompatible with the object and purpose of the Convention, and held Switzerland bound by the Convention "irrespective of the validity of the declaration".[9] In subsequent cases, the European Court has pointed out that the normal rules on reservations to treaties do not as such apply to human rights law. In the Court's view:

> "... a fundamental difference in the role and purpose of the respective tribunals [i.e. of the ICJ and the ECHR], coupled with the existence of a practice of unconditional acceptance [...] provides a compelling basis for distinguishing Convention practice from that of the International Court". [10]

13. Again, the point is neither to endorse nor to criticise the European Court of Human Rights but to point to a phenomenon which, whatever one may think about it, has to do with the emergence of exceptions or patterns of exception in regard to some subject-matter, that

---

[8] From a systems-theoretical perspective, the position of courts is absolutely central in managing the functional differentiation - i.e. fragmentation - within the law. Coherence here is based on the duty to decide even "hard cases". See in this regard especially Niklas Luhmann, *Law as a Social System* (transl. by K.A. Zeigert, ed. by F. Kastner, R. Nobles, D. Schiff and R. Zeigert, (2004) (Oxford University Press) , especially pp. 284-296.

[9] *Belilos v. Switzerland*, Judgment of 29 April 1988, 1988 ECHR (Ser. A), No. 132, p. 28, (para 60).

[10] *Loizidou v. Turkey*, Preliminary Objections of 23 March 1995, 1995 ECHR (Ser. A) No. 310, p. 29 (para 67).

deviate from the general law and that are justified because of the special properties of that subject-matter.

14. Exceptions are a standard legislative technique to deal with complex subjects. Sometimes exceptions may become institutionalised as clusters of rules that claim to exist as special or even sometimes "self-contained" regimes alongside the general law (see Section C of the present Report). In the above quoted cases the European Court of Human Rights may be understood to suggest precisely that "human rights law" includes a special regime of treaty reservations. Other subjects that have sometimes claimed self-containedness in some regard include for example a regime of river management, diplomatic law, trade law, humanitarian law, and environmental law.

4. Fragmentation as differentiation between types of special law

15. Finally, a third case is a conflict between different types of special law. This may be illustrated by reference to debates on trade and environment. In the 1998 *Beef Hormones* case, the Appellate Body of the World Trade Organization (WTO) considered the status of the so-called "precautionary principle" under the WTO covered treaties. It concluded that whatever the status of that principle "under international environmental law", it had not become binding for the WTO.[11] This approach suggests that "environmental law" and "trade law" might be governed by different principles. Which rule to apply would then depend on how a case would be qualified in this regard. This might seem problematic as denominations such as "trade law" or "environmental law" have no clear boundaries. For example, maritime transport of oil links to both trade and environment, as well as to the rules on the law of the sea. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity? The responses are bound to vary depending on which one chooses as the relevant frame of legal interpretation.

*****

[11] *European Communities – Measures Concerning Meat and Meat Products (Hormones)*-AB-1997-4-Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 13 February 1998, para 125.

16. The framework of analysis sketched above points to three different ways in which the phenomenon of fragmentation may appear to threaten the coherence of international law. Each has some particular aspects to it. It may, for example, seem less problematic if a new rule or an interpretation claims to be valid as an exception alongside old general law than if it claims to have overtaken old law altogether. On the other hand, the fragmentation of the law into special areas, each following its own rules and principles, applied within its own specialised institutions, does create problems of coherence, predictability and, perhaps, of justice. It is clearly less than ideal if the rights and obligations of a legal subject depend on which institution is seized to recognise them or how a legal problem is classified in regard to informal limitations between branches of legal specialization. It is not the purpose of this report to suggest how such problems could be avoided - if indeed they can or should be avoided. Fragmentation reflects the expansion of international law and it is still to be proven that its consequences are in practice as negative as might be conceived in theory. The above classification only intends to help in thinking about the phenomenon and in seeing problems that arise in connection with the overall structure of international law.

5. The purpose of the present report

17. The present report is a descriptive overview of its two subjects, *lex specialis* and the question of "self-contained regimes". The assumption from which the present report emerges - indeed the rationale of the Commission's treatment of fragmentation - is that *lex specialis* and "self-contained regimes" contribute to the erosion of cohesion of international law. At the outset this might seem natural. To invoke the presence of *lex specialis* or a self-contained regime is to seek to justify a deviation. When deviations become general and frequent, the unity of the law suffers.

18. But deviations do not emerge by accident, or as legal-technical "mistakes". They reflect the diversity of the social world which the law aims to regulate. In conditions of social complexity, it is pointless to insist on formal unity. A law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and

totalitarian simultaneously.[12] But if fragmentation is in this regard a "natural" development (indeed, international law was always relatively "fragmented" due to the diversity of national legal systems that participated in it) then it is not obvious why the Commission should deal with it.[13] The starting-point of this report is that this is useful for two reasons.

19. First, it is desirable to provide a conceptual frame within which what is perhaps inevitable can still be grasped and assessed in a legal-professional way. Thus this report seeks to situate *lex specialis* arguments and the alleged emergence of self-contained regimes within the frame of general international law. The ambition is, in other words, to describe fragmentation through a discussion of the functioning of two well-known but perhaps insufficiently analysed legal techniques against the background and within the confines of a general "system" of international law.

20. It must, second, be borne in mind that the Commission should seek to contribute to the codification and progressive development of international law. Thus it must be assumed that the study will end up in conclusions that provide a groundwork for recommendations or guidelines to be adopted by the Commission in due course on how international institutions should deal with the invocation of *lex specialis* or self-contained regimes with a view in particular to applying the Vienna Convention on the Law of Treaties (VCLT).[14]

B. THE FUNCTION AND SCOPE OF THE *LEX SPECIALIS* MAXIM

1. General: *Lex specialis* as a technique of legal reasoning - its relationship to the idea of a legal system

[12] The emergence of a legal pluralism - that is, a plurality of relatively autonomous normative orders - has long been recognised as a key aspect of late modernity. For an ambitious review, see Boaventura de Sousa Santos, *Toward a New Common Sense. Law, Science and Politics in the Age of the Paradigmatic Transition* (1995) (New York: Routledge, , especially p. 114 *et seq.*

[13] "Fragmentation" is a very frequently treated topic of academic writings and conferences today. For two overviews with slightly different emphases, see L.A.N.M. Barnhoorn & K.C. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International* Law (1995) (The Hague: Nijhoff,) and "Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle", *31 New York Journal of International Law and Politics* (1999), pp. 679-993. For more references, see Koskenniemi & Lehto, *supra* note 4

[14] In this regard, the outcome of the Commission's work on fragmentation might resemble the set of guidelines produced under the topic of "Reservations to Treaties".

21. The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.[15] As an interpretative principle, it suggests that if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former. The relationship between the general standard and the specific rule may, however, be conceived in two ways. One is the case where the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter.[16] In such case, the specific and the general point, as it were, in the same direction.

22. Sometimes *lex specialis* is, however, understood more narrowly to cover the case where two legal provisions that are both valid and applicable, and have no express hierarchical relationship vis-à-vis each other, provide incompatible direction on how to deal with the same set of facts. In such case, *lex specialis* appears as a conflict-solution technique. It suggests that instead of the (general) rule, one should apply the (specific) exception.[17] In both cases, however, priority falls on the provision which is "special", that is, the rule with a more precisely delimited scope of application.[18]

23. Nonetheless, the maxim does not admit of automatic application. In particular two sets of difficulties may be highlighted. First, it is often hard to distinguish what is "general" and what is "particular" and whether one pays attention to the substantive coverage of a provision or to the number of legal subjects to whom it is directed one may arrive at different conclusions. An example would be provided by a relationship between a territorially limited

---

[15] The principle *lex specialis derogat lege generali* has a long history. The principle was included in the Corpus Iuris Civilis. See Papinian, Dig. 48, 19,41 and Dig. 50, 17,80. The latter states: "in toto iure generi per speciem derogatur et illud potissimum habetur, qoud ad speciem derectum est" (Transl. "in the whole of law, special takes precedence over genus, and anything that relates species is regarded as most important"). (The Digest of Justinian vol. IV 1985, University of Pennsylvania Press, Philadephia, Latin text edited by T. Mommsen and P. Kruger). Some of its alternative formulations are '*Generalibus specialia derogant*', '*Generi per speciem derogatur*', '*specialia generalibus, non generalia specialibus*'. This report does not deal with another, close variant, namely the *ejusdem generis* rule, that is the rule of interpretation according to which special words control the meaning of general ones. For a discussion, see Lord McNair, *The Law of Treaties* (1961) (2nd edn., Oxford: Clarendon), pp. 393-399.

[16] This understanding appears e.g. in Jan B. Mus, "Conflicts between Treaties in International Law", Netherlands *International Law Review* vol. XLV (1998), p. 218. Fitzmaurice, too, thinks there is *lex specialis* when "a specific provision…is thereby taken out of the scope of a general provision", Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points", *BYIL* vol. XXXIII (1957), p. 236.

[17] Alexander Peczenik, *Juridikens metodproblem* (Stockhol,: Gebers, 1980) p. 106.

[18] That is, when the description of the scope of application in one provision contains at least one quality that is not singled out in the other. Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer, 1975), p. 251-252.

general regime and a universal treaty on some specific subject.[19] Second, the principle also has an unclear relationship to other maxims of interpretation or conflict-solution techniques such as, for instance, the principle *lex posterior derogat legi priori* (later law overrides prior law) and may be offset by normative hierarchies or informal views about "relevance" or "importance".[20]

24. Its non-automatic or "deliberative" character and the fact that there is no specific legislative definition of the *lex specialis* maxim, highlight its role as an informal part of *legal reasoning,* that is, of the pragmatic process through which lawyers go about interpreting and applying formal law. In this process, legal rules rarely if ever appear alone, without relationship to other rules. Typically, even single (primary) rules that lay down individual rights and obligations presuppose the existence of (secondary) rules that provide for the powers of legislative agencies to enact, modify and terminate such rules and for the competence of law-applying bodies to interpret and apply them.

25. But even substantive primary rules usually appear in clusters, together with exceptions, provisions for technical implementation and larger interpretative principles. The commonplace distinction between "rules" and "principles" captures one set of typical relationships, namely those between norms of a lower and higher degree of abstraction. A "rule" may thus sometimes be seen as a specific application of a "principle" and understood as *lex specialis* in regard to it, and become applicable in its stead. In such case, the special/general distinction does not work as a conflict-solution technique but as an interpretative guideline indicating that the special should be interpreted in view of the general of which it is only an instance or an elaboration.[21] Alternatively, the general principle may be

---

[19] Such conflicts, Jenks suggests, can only be decided on their merits. See C. Wilfried Jenks, "The Conflict of Law-Making Treaties", *BYIL* vol. XXX (1953), p. 447.

[20] For different possibilities, see Hannu T. Klami, "Legal Heuristics: A Theoretical Skeleton", *Oikeustiede-Jurisprudentia* 1982, pp. 46-53. See also Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (2003) (Leiden: Nijhoff,), pp. 189-191. For examples of cases where a more general treaty overrides a more specific one because of its "relevance" or "overriding character", see ibid. p. 114-125 and 125-131 and passim. Ian Sinclair speaks of a mixture of techniques and maxims in *The Vienna Convention on the Law of Treaties* (1984), (2nd edn. Manchester University Press), pp. 95-98.

[21] See Neil McCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, (1978), p. 156 and generally pp. 152-194. There are many understandings of the nature of the difference between "rules" and "principles". For these, see Martti Koskenniemi, "General Principles: Reflections on Constructivist Thinking in International Law", in Martti Koskenniemi, *Sources of International Law* (2000) (London: Ashgate), pp. 359-402. For a recent discussion of the operation of the rule/principle dichotomy in international law (of self-determination), see Karen Knop, *Diversity and Self-Determination* (2002)(Cambridge University Press) , pp. 20-39.

understood to articulate a rationale or a purpose to the specific rule. Thus, for instance, the "freedom of the High Seas" may be seen as a background principle of which the provisions concerning marine scientific research could be seen as instances. As *lex specialis* the latter could then be interpreted as specific application of that larger principle or rationale.[22] However, none of this takes away the difficulty of appreciating when a *lex specialis* may be understood as a "development" or "application" of a general law and when it is intended to be an exception or a limitation thereto. Any technical rule that purports to "develop" the freedom of the high seas is also a limitation of that freedom to the extent that it lays down specific conditions and perhaps institutional modalities that must be met in its exercise.

26. The Commission has traditionally been aware of the difficulty to make a clear distinction between "progressive development" and "codification". An analogous difficulty affects any attempt to distinguish clearly between "application" of a general rule and "limitation" or "deviation" from it. All this is dependent on how one interprets the general law to which the specific seeks to add something. Care should thus be taken not to infer that a special law need automatically be interpreted "widely" or "narrowly". Whichever way interpretation goes depends on how the relationship between the general and the special law is conceived ("application" or "exception"?). This, again, requires seeing the relationship as part of some "system".

27. It is often said that law is a "system". By this, no more need be meant than that the various decisions, rules and principles of which the law consists are not randomly related to each other.[23] Although there may be disagreement among lawyers about just how the systemic relationship between the various decisions, rules and principles should be conceived, there is seldom disagreement that it is one of the tasks of legal reasoning to establish it.

28. This cannot be understood as reaffirming something that already "exists". There is no single legislative will behind international law. Treaties and custom come about as a result of

---

[22] This seems also affirmed in article 87 of the United Nations Convention on the Law of the Sea, UN Publications No. E.83.V.5.

[23] The view that holds international law a "primitive" structure bases itself on the claim that the rules of international law do not form a "system" but merely an aggregate of (primary) rules that States have contracted. See Hart, *supra* note 3, pp. 208-231.

conflicting motives and objectives - they are "bargains" and "package-deals" and often result from spontaneous, reactions to events in the environment. But if legal reasoning is understood as a *purposive* activity, then it follows that it should be seen not merely as a mechanic application of apparently random rules, decisions or behavioural patterns but as the operation of system that is directed at some human objective. Again, lawyers may disagree about what the objective of a rule or a behaviour is. But it does not follow that no such objective at all can be envisaged. Much legal interpretation is geared to linking an unclear rule to a purpose and thus, by showing its position within some system, to providing a justification for applying it in one way rather than in another. Thus, while the conclusion of a general treaty may sometimes be intended to set aside previously existing scattered provisions in some area - for example, the 1982 United Nations Convention on the Law of the Sea explicitly set aside the 1958 Law of the Sea conventions[24] - sometimes no such intention can be inferred. The adoption in 1966 of the two universal human rights covenants (the Covenants for Civil and Political Rights and for Economic, Social and Cultural Rights) did not imply any setting aside or overriding of the (more specific) provisions of the 1951 European Convention on Human Rights and Fundamental Freedoms.[25] Whether the later regulation intends to preserve or push aside previous legislation cannot, again, be decided *in abstracto*. This can only be decided through interpretation.

29. Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles. Far from being merely an "academic" aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators.[26] This results precisely from the "clustered" nature in which legal rules and principles appear. But it may also be rationalised in terms of a *political obligation* on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer.[27]

---

[24] See article 311 of the United Nations Convention on the Law of the Sea.

[25] See article 44 of the International Covenant on Civil and Political rights. UN Publications E.88.XIV.1 and comment in Karl Zemanek, "General Course on Public International Law", *266 Recueil des Cours* (1977) pp. 227-8. See also Sadat-Akhavi, *supra* note 20, pp. 120-124.

[26] For "systematization" - that is, the establishment of systemic relationships between legal rules - as a key aspect of legal reasoning. See e.g. Aulis Aarnio, *Denkweisen der Rechtswissenschaft* (1979)(New York, Springer), pp. 50-77 and generally Joseph Raz, *The Concept of a Legal System* (1979)(Oxford, Clarendon). For a treatment of international law through a sociologically oriented ("Luhmannian") systems theory, see Andreas Fischer-Lescano, 'Die Emergenz von Globalverfassung', *63 ZaÖRV* (2003), pp. 717-760.

[27] This view is famously articulated in Ronald Dworkin, *Taking Rights Seriously*, (1977)(Harvard University Press).

30. It is a preliminary step to any act of applying the law that a *prima facie* view of the matter is formed. This includes, among other things, an initial assessment of what might be the applicable rules and principles. The result will often be that a number of standards may seem *prima facie* relevant. A choice is needed, and a justification for having recourse to one instead of another. Moving from the *prima facie* view to a conclusion, legal reasoning will either have to seek to harmonise the apparently conflicting standards through interpretation or, if that seems implausible, to establish definite relationships of priority between them. Here interpretative maxims and conflict-solution techniques such as the *lex specialis derogat lege generali* become useful. They enable seeing a systemic relationship between two or more rules, and may thus justify a particular choice of the applicable standards, and a particular conclusion. They do not do this mechanically, however, but rather as "guidelines",[28] suggesting a pertinent relationship between the relevant rules in view of the need for consistency of the conclusion with the perceived purposes or functions of the legal system as a whole.[29] The fact that this takes place in an indeterminate setting takes nothing away from its importance. Through it, the legal profession articulates, and gives shape and direction to law. Instead of a random collection of directives, the law begins to assume the shape of a purposive (legal) system.

2. *Lex specialis* in international law

(a) Legal doctrine

31. The idea that special enjoys priority over general has a long pedigree in international jurisprudence as well. Its rationale is well expressed already by Grotius:

> "*What rules ought to be observed in such cases* [i.e. where parts of a document are in conflict]. Among agreements which are equal…that should be given preference which

[28] As suggested by the United States comments to the Waldock draft of what became articles 30 and 31 VCLT. See Humphrey Waldock, *Sixth Report on the Law of Treaties*, *Yearbook*…1966, vol. II, p. 94.
[29] For the techniques of "second order justification" that enable the solution of hard cases (i.e. cases where no "automatic" decisions are possible) and that look either to the consequences of one's decision or to the systemic coherence and consistency of the decision with the legal system (seen as a purposive system), see McCormick, *supra* note 21, pp 100-128.

is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general."[30]

32. This passage refers to two reasons why the *lex specialis* rule is so widely accepted. A special rule is more to the point ("approaches most nearly to the subject in hand") than a general one and it regulates the matter more effectively ("are ordinarily more effective") than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances. The need to comply with them is felt more acutely than is the case with general rules.[31] They have greater clarity and definiteness and are thus often felt "harder" or more "binding" than general rules which may stay in the background and be applied only rarely. Moreover, *lex specialis* may also seem useful as it may provide better access to what the parties may have willed.[32]

33. It is therefore no wonder that literature generally accepts the *lex specialis* as a valid maxim of interpretation or conflict-solution technique in public international law, too, although it is seldom given lengthy treatment. The classical writers (Pufendorf, Vattel) accepted it among other techniques as a matter of course.[33] Anzilotti gave it a rather absolute formulation: "*in toto jure genus per speciem derogatur*; la norme de droit particulière l'emporte sur la norme générale". As was consistent with his voluntarism, a treaty between two States would prevail over a multilateral treaty just like the latter would have priority over customary law.[34] For Georges Scelle, by contrast, a special rule would only rarely be allowed to override what he called "l'économie d'ensemble" of the general law. It followed from his sociological anti-voluntarism that general regulation, expressive of an objective sociological interest would always prevent contracting out by individual States.[35]

---

[30] Hugo Grotius, *De Jure belli ac pacis. Libri Tres*, (Ed. by James Brown Scott, The Classics of International Law) Book II Chapt. XVI Sect. XXIX. p. 428.

[31] For the reasoning behind the need to prefer "special" over "general", see also Pierre Marie Dupuy, "L'unité de l'ordre juridique internationale. Cours général de droit international public", *207 Recueil des Cours* (2002), pp. 428-9.

[32] See also Joost Pauwelyn, *Conflict of Norms in Public International Law*, (2003)(Cambridge University Press), p. 388. For the voluntarist understanding of *lex specialis*, rebuttable in view of other evidence, see Nancy Kontou, *The Termination of Treaties in Light of New Customary International Law* (1994)(Oxford: Clarendon), p. 142 and the references therein.

[33] Samuel Pufendorf, *Le droit de la nature et des gens ou système général des principes les plus importants de la morale, de la jurisprudence, et de la politique* (Trad. par J. Barbeyrac, Basle, Thouirneisen, 1732), Bk, V, Ch. XII, pp.138-140; Emmerich de Vattel, *Le droit des gens ou principes de la Loi Naturelle, appliqués à la conduite et aux affaires des nations et des Souverains* (1758)(2 vols, Londres), Tome I, Livre II, Ch. XVII, para 316, p. 511.

[34] Dionisio Anzilotti, *Cours de droit international*, tôme I (1929)(Paris: Sirey), p. 103.

[35] Georges Scelle, *Cours de droit international public* (1948)(Domat, Montchrestien), p. 642.

34. It seems clear, however, that both approaches are too absolute - either too respectful of the wills of individual States or then not respectful enough of the need to deviate from abstract maxims. Later lawyers stress the relativity of the *lex specialis* principle, the need to balance it with the *lex posterior* as well as the hierarchical status that the more general provision may enjoy.[36]

35. The International Law Commission has outlined its application in some length in the commentary to article 55 of the Draft articles on responsibility of States for internationally wrongful acts:

"Article 55

Lex specialis

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

36. This provision establishes a normative priority for any special rules in its field of application. Or, as the Commission explains in the Commentary, it means "that the present articles operate in a residual way".[37] The provision expresses clearly the wish of the Commission to allow States to develop, apply and to derogate from the general rules of State responsibility by agreements between themselves. Yet, of course, such power cannot be unlimited: the rules that derogate must have at least the same rank as those they derogate from. It is hard to see how States could, for example, derogate from those aspects of the general law on State responsibility that define the conditions of operation of "serious breaches of obligations under peremptory norms of general international law".[38]

---

[36] See e.g. Cavaglieri, "'Régles générales de droit de la paix", *26 Recueil des Cours* (1929-I), p. 334; Gerald Eulalio do Nascimento e Silva, "Le facteur temps et les traités", *154 Recueil des Cours* (1977-I), p. 246.

[37] Article 55, Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, *Official records of the General Assembly, Fifty-sixth session, Supplement* No. 10 (A/56/10) p. 356 para (2)..

[38] Articles 40-41, 48, *Ibid.*

37. In doctrine, *lex specialis* is usually discussed as one factor among others in treaty interpretation (articles 31-33 VCLT) or in dealing with the question of successive treaties (article 30 VCLT, especially in relation to the principle of *lex posterior*).[39] Although the principle did not find its way into the text of the VCLT, it was still observed during its drafting process that among the techniques of resolving conflicts between treaties it was useful to pay attention to the extent to which a treaty might be "special" in relation to another treaty.[40]

38. But there is no reason to limit the operation of *lex specialis* to relationships between treaties. Jennings and Watts, for instance, indicate that the principle "has sometimes been applied to resolve apparent conflicts between two differing and potentially applicable rules" and specifically point out that its scope of application is not limited to treaty law. Like many others, they stress its indicative role as a "discretionary aide" that is "expressive of common sense and normal grammatical usage".[41] As such, it is often held to regulate the relationship between treaty (as *lex specialis*) and custom (as "general law").[42]

39. Uncertainties about the nature of legal interpretation are equally applicable to the role of the *lex specialis*. As O'Connell has put it: "Writers have divided into those who believe it is possible to formulate definite rules for interpretation and those who believe that this is a delusion".[43] This is probably why a number of manuals do not mention the principle at all. If one thinks that legal interpretation is rather "art than a science", then, of course, there seems

---

[39] In addition to sources already cited, see e.g. Charles Rousseau, "De la compatibilité des normes juridiques contradictoires dans l'ordre international" *RGDIP* vol. XXXIX (1932),133-192, especially pp. 177-8, 188-9; Jenks, *supra* note 19 pp. 401-453, especially pp. 446-447; Manfred Zuleeg, "'Vertragskonkurrenz im Völkerrecht. teil I: Verträge zwischen souveränen Staaten", *20 GYIL* (1977), pp. 246-276, especially pp. 256-259; V. Czaplinski & G. Danilenko, "Conflict of Norms in Internatioinal Law", *NYIL* vol. XXI (1990), pp. 20-21; Kontou, *supra* note 21, pp. 141-144. See also Myres McDougal, Harold Lasswell & James C. Miller, *The Interpretation of International Agreements and World Public Order* (reissue 1994)(New Haven), pp. 199-206; Sinclair, *supra* note 20, p. 98. Anthony Aust, *Modern Treaty Law and Practice* (2000)(Cambridge University Press) p. 201. See also Patrick Daillier - Alain Pellet, *Droit international public* (2002)(7e édition), p. 271 (discussing *lex specialis* in the context of article 30 (3) of the Vienna Convention). Very few commentators expressly reject the principle. See, however, Ulf Lindefalk, *Om tolkning av traktater* (2001)(Lunds universitet,), pp. 353-4 (thinking it is covered by some techniques, overridden by others).

[40] Statement of the Expert Consultant (Waldock), United Nations Conference on the Law of Treaties, Second Session, *Official Records*, p. 270. See also Paul Reuter, *Introduction au droit des traités* (1985)(2nd edn., Paris: PUF) , p. 112.

[41] Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* (1993)(9th edn., 2 Vols., London: Longman's), vol I, p. 1270, 1280.

[42] See e.g. Mark Villiger, *Customary International Law and Treaties* (1985) (The Hague: Nijhoff) , p. 161.

[43] D.P. O'Connell, *International Law* (1970) (2 vols., London: Stevens and Sons), Vol I, p. 253.

little point to tie it down to technical rules or maxims.[44] Nevertheless, dismissing the principle may follow from an excessive expectation of the normative power of interpretative guidelines. There is little doubt that the merits that lead interpreters to prefer special law to general law, outlined already by Grotius above, provide a reason to include it among the pragmatic considerations that lawyers should take account.

40. Schwarzenberger sees this whole branch of the law - namely interpretation - as an aspect of what he calls *jus aequum* - i.e. the rule that "enjoins the parties to apply each treaty in a spirit of reasonableness and good faith".[45] It does articulate a number of important practical concerns: the need to ensure the practical relevancy and effectiveness of the standard as well as to preserve what is often a useful guide to party intentions. These need, of course, to be balanced against countervailing ones: the hierarchical position of the relevant standard and other evidences of State intent. But whatever the technique referred to and however the "balance" is conceived, all of this takes place within an argumentative practice that seeks to justify its outcomes less in terms of technical applications than as contributions to a purposive system of law.

(b) Case-Law

41. Also international case-law appears to accept the *lex specialis* maxim although again normally without great elaboration. Four different situations may be distinguished. The maxim may operate (1) within a single instrument; (2) between two different instruments; (3) between a treaty and a non-treaty standard and (4) between two non-treaty standards.

42. The *Beagle Channel Arbitration* had to do with the relation of articles II and III of a Boundary Treaty of 1881 both of which dealt with the drawing of the borders. According to the Arbitral tribunal, article II did not specify in detail the delimitation of the *Tierra del Fuego* and of certain disputed islands. Instead, this was left for article III. While the two

---

[44] See Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (1989) (Helsinki: Finnish Lawyers' Publishing) , p. 298.

[45] Georg Schwarzenberger, *International Law* (1957), (4 vols., 3rd edn. London: Stevens and Sons) , vol I, pp.474, 477 et seq. See also Pauwelyn, *Conflict of Norms, supra note* 32 p. 388.

articles dealt with the same territories, they did not duplicate each other or create anomalies or redundancies:[46]

> "...all conflicts or anomalies can be disposed of by applying the rule *generalia specialibus non derogant*, on which basis Article II (*generalia*) would give way to Article III (*specialia*), the latter prevailing;..." [47]

43. This is the standard case where *lex specialis* appears within one and the same instrument, regulating the relations between two of its provisions.[48] The rationale for its use may be received alternatively from the principle of "normal meaning" in article 31 (1) VCLT or then from the need to respect party intention.

44. The European Court of Human Rights has frequently applied *lex specialis* in articulating the nature of the relationship between provisions in the European Convention of Human Rights. The Court has for instance, considered the relation between article 13 that provides a right for an "effective remedy before a national authority" and article 5 (4) that stipulates that anyone deprived of his liberty shall "be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". It has seemed to follow that:

> "since the requirements of Article 13 are less strict than those of Article 5 para. 4 , [the latter] must be regarded as the *lex specialis* in respect of complaints under Article 5."[49]

45. Likewise, the European Court of Human Rights has considered article 6 of the Convention, providing a right to fair trial, as *lex specialis* in relation to the provision for

---

[46] *Beagle Channel Arbitration, (Argentina v. Chile) 52 International Law Reports* (1979) p. 97, at p. 141 (paras 36, 38).
[47] *Ibid.* p. 97, at p. 142 (para 39).
[48] See also the discussion of the European Court of Justice, of the relationship of articles 5(1) and 13 of the Brussels Convention of 1968 on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters. As the former provision related to "contractual matters in general" and the latter "specifically cover[ed] various types of contracts concluded by consumers," the latter constituted *lex specialis* in regard to the former, and it was sufficient to apply that provision, if it was applicable. In such case it became "unnecessary to examine whether [the claim] is covered by article 5(1)". ECJ, Case C-96/00, judgment of 11 July 2002, paras 35-36, 59 [to be published].
[49] *Brannigan and McBride v. the United Kingdom*, 28 October May 1993, ECHR (*Ser. A*) *No. 258, p. 57* (para. 76). See also De *Jong, Baljet and Van den Brink v. the Netherlands*, 22 of May 1984, ECHR (*Ser. A*) *No. 77*, p. 27 (para. 60); *Murray v. the United Kingdom*, 28 October 1994, ECHR (Ser. A). no. 300, p. 37 (para. 98) and *Nikolova v. Bulgaria*, 25 March 1999, ECHR 1999-II, p. 25 (para. 69).

"effective remedy" in article 13.[50] And it has held that article 11 granting freedom of assembly and association may take precedence as *lex specialis* over freedom of expression provided in article 10.[51]

46. These articles are not necessarily always in strict conflict and it might be possible to apply them concurrently. In fact, article 5(4) may also be seen as an *application* of article 13 in a particular case. This is also true when two provisions are closely connected as is the case of freedom of expression and freedom of assembly. In a particular case freedom of assembly may indeed appear as *lex specialis* in relation freedom of expression. But the relationship may also be reversed. There is no reason why article 10 providing freedom of expression may be seen as *lex specialis* in relation to article 11 granting freedom of peaceful assembly.

47. A second case is where the *lex specialis* comes to regulate the relationship between *different* instruments. In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice was faced with two instruments that had a bearing on its jurisdiction, the 1922 Mandate for Palestine and the 1923 Protocol XII of the Treaty of Lausanne. The Court concluded that "in cases of doubt, the Protocol, being a special and more recent agreement, should prevail".[52] That view seemed to endorse both the *lex posterior* and the *lex specialis* maxims without entering into the question of their relationship.

48. This matter has been treated in a general way within the World Trade Orgnization where Panels and the Appellate Body have occasionally resorted to *lex specialis* in the interpretation of the covered treaties.[53] In the *Turkey-Restrictions on Imports of Textile and Clothing Products* the panel emphasised that WTO Agreement is a "Single Undertaking" and the obligations of the members are cumulative. Thus a special provision may only prevail

---

[50] Yankov v. *Bulgaria,* 11 of December 2003, para *150* [to be published]. *See* also, *Brualla Cómez de la Torre v. Spain,* 19 December 1997, ECHR 1997-VIII p. 2957 (para 41); *Vasilescu v. Romania,* 22 May 1998, ECHR 1998-III p. 1076 (para 43). Cf. *Kudla v. Poland, 26* October 2000, ECHR 2000-XI, p. 234-236 (paras 164-148).

[51] *Ezelin v. France,* 26 April 1991, ECHR (Ser. A) No. 202, p. 20 (para. 35) and *Djavit An v. Turkey,* 20 February 2003,[to be published] para 39.

[52] PCIJ, *Mavrommatis Palestine Concessions* case, (1924) Ser A. No. 2 p. 31.

[53] These interpretations have taken place both between provisions in single instruments as well as between provisions in two different "covered treaties". There appear to have been no cases of *lex specialis* reference between a WTO and a non-WTO treaty. See *Brazil – Export Financing Programme for Aircraft,* 14 April 1999, WT/DS46/R, para. 7.40; *Turkey – Restrictions on Imports of Textile and Clothing Products,* 31 May 1999, WTO/DS34/R, para 9.92 and *Indonesia-Certain Measures Affecting the Automobile Industry,* 2 July 1998, WT/DS54/, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras 14.28-14.34.

over another provision if it is impossible to apply these two provisions simultaneously.[54] In *Indonesia-Certain Measures Affecting the Automobile Industry* the panel similarly explained that there is a presumption against conflicts and for a conflict to exist, it must be between the same parties, deal with the same subject matter and the provisions must be mutually exclusive.[55] In the WTO, *lex specialis* appears to have a limited role as a subsidiary means in conflict resolution.[56]

49. When *lex specialis* is applied in a particular institutional context, then of course it is affected by the relevant (though not necessarily formal) institutional hierarchy. The Court of First Instance of the EU was in 2000 called upon to determine the relationship between a regulation from 1981 that treated information obtained in customs investigations as confidential and a Commission decision of 1994 that provided public access to Commission documents. The Court observed that the regulation

> "...as far as it is to be applied as a *lex specialis*, cannot be interpreted in a sense contrary to [the decision] whose fundamental objective is to give citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers...".[57]

50. The normative hierarchy between the earlier Council Regulation and the later Commission decision that incorporated a Code of Conduct concerning public access to Commission and Council documents may not have been quite clear. Nonetheless, in this case, the Court interpreted a prior *lex specialis* which, if anything, was at least not of inferior status than the subsequent Commission decision, so as to be in conformity with the latter.[58] It is not

---

[54] *Turkey – Restrictions on Imports of Textile and Clothing Products,* 31 May 1999, WT/DS34/R, para 9.92.
[55] *Indonesia-Certain Measures Affecting the Automobile Industry*, 2 July 1998, WT/DS54/, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.28.
[56] *India-Qualitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* 6 April 1999, WT/DS90/R, para. 4.20.
[57] *JT's Corporation Ltd v. Commission, of the European Communities,* Court of First Instance, judgement 12 October 2000, ECJ, Case T-123/99, [2000) ECR II-3269, p. 3292 (para 50).
[58] A similar type of argument was employed in a recent case that dealt with the relationship between two directives, one dealing with waste (75/442 EEC of 15 July 1975) and the other, much more recent one, with packaging of waste (94/62 EC of 20 December 1994). The provisions of the latter were identified by the ECJ as *lex specialis* vis-à-vis the former "so that its provisions prevail over" those if that earlier directives "in situations which it specifically seeks to regulate". No full setting aside was involved however: "Nevertheless", the Judgement reads, "Directive 75/442 remains very important for the interpretation and application of Directive 94/62". ECJ, Case C-444/00, judgement of 19 June 2003, paras 57 and 52 [to be published].

difficult to understand why considerations of transparency might in 1999 be overriding against a Regulation from 1981. But this relationship was neither an "automatic" result of a formal hierarchy nor of *lex specialis* as a conflict-solution rule.

51. A third case is the one where the *lex specialis* is resorted to in order to privilege a treaty standard to a non-treaty standard. In the *INA Corporation v. Government of the Islamic Republic of Iran,* the corporation sought compensation for the expropriation of its 20% share in an Iranian insurance company. The claimant argued that on the basis of international law and the Iran-United States Treaty of Amity (1955), compensation should be "prompt, adequate and effective." The respondent held that the compensation was to be calculated on the basis of the net book value of the nationalised shares. The Tribunal considered that in cases of large-scale lawful nationalisations general international law no longer provided for full compensation. It did not, however, attempt to establish the exact content of the customary norm as it considered that for the purposes of the case:

> "we are in the presence of a *lex specialis* in the form of the Treaty of Amity, which in principle prevails over general rules".[59]

52. That treaty rules enjoy priority over custom is merely an incident of the fact that most of general international is *jus dispositivum* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour. As the International Court of Justice has pointed out "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties".[60] This approach, together with the practical priority of treaty over custom was also affirmed by the Court in the *Nicaragua* case:

> "In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim".[61]

---

[59] Iran-United States Claims Tribunal, INA Corporations, Case No. 161, 8 July 1985, Iran-U.S. CTR 1985-I vol. 8 p. 378.

[60] *North Sea Continental Shelf* cases, *ICJ Reports* 1969, p. 42 (para 472). See, however, also *ibid.* p. 38-39 (paras 61-65), ("general customary law rules and obligations...by their very nature, must have equal force for all members of the international community").

[61] *Nicaragua* case, *ICJ Reports* 1986 p. 137 (para 274).

53. In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court suggested that States might be able to opt out from the development of general law by this means. It had been authorised by the Special Agreement to take into the "new accepted trends" in the Third UN Law of the Sea Conference. In this regard, the Court noted that:

> "it would no doubt have been possible for the Parties to identify in the Special Agreement certain specific developments in the law of the sea [...], and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*".[62]

54. In these cases the Court accepted that general international law may be subject to derogation by agreement and that such agreement may be rationalised as *lex specialis*. These cases illustrate the practice of international tribunals to give precedence to treaty law in matters where there is customary law as well - a practice than highlights the dispositive nature of custom and the tribunals' deference to agreements as the "hardest" and presumably most legitimate basis on which their decisions can be based. Thirlway summarises the jurisprudence as follows:

> "It is universally accepted that - consideration of *jus cogens* apart - a treaty as *lex specialis* is law between the parties to it in derogation of the general customary law which would otherwise have governed their relations."[63]

55. None of this means that the general customary law would become thereby extinguished. It will continue to apply in the background and become fully applicable for instance when the treaty no longer is in force or, as in *Nicaragua*, if the jurisdiction of the relevant law-applying organ fails to cover the treaty.[64]

56. An untypical use of *lex specialis* may be found in a case from 1981 in which the Iran-United States Claims Tribunal concluded that "it is a well-recognised and universal principle of interpretation that a special provision overrides a general provision". The Tribunal here invoked *lex specialis* so as to argue that "the terms of the Claims Settlement Declaration are

---

[62] *Case concerning the Continental Shelf merits* (Tunisia v. Libya), judgment, *ICJ Reports* 1982, 18 at p. 38 (para. 24).

[63] Hugh Thirlway, "The Law and procedure of the International Court of Justice" *BYIL* vol. LX (1989), p. 147. Similarly for example Alfred Verdross & Bruno Simma, *Universelles Völkerrecht* (1984) (3rd edn., Berlin: Duncker & Humblot) , pp. 414, 415.

[64] See *Nicaragua* case, *ICJ Reports* 1986 p. 96 (para. 179).

so detailed and so clear that they must necessarily prevail over the purported intentions of the parties, whatever they could have been".[65] As such, the principle seems to have coalesced with the rule in favour of the "ordinary" meaning under article 31 (1) VCLT.

57. A fourth case is where the same reasoning - though not necessarily the expression *lex specialis* - is applied to two non-treaty standards. This was so in the *Right of Passage* case. After having determined that the practice which had been accepted by the States concerned (India and Britain/Portugal), established a right of transit over Indian territory, the Court no longer felt it necessary to investigate what the content of general law on transit passage may have been. For it was evident to the Court that in any case "such a particular practice must prevail over any general rules".[66] Though express practice is not abundant, it is hard to see why *lex specialis* - or at least the reasoning behind it - would not be applicable to the relations between general and special custom. What is interesting in *Right of Passage* is the Court's use of what Thirlway calls the "perfectly recognized and respectable judicial technique" of setting aside any examination of the content of the general law once the special custom had been found in a way that leaves open whether the special rule was an elaboration or an exception to that general law or whether there was any general law in the matter in the first place.[67]

(c) An informal hierarchy: the point of *lex specialis*

58. There is no formal hierarchy between the sources of international law. A number of writers have - correctly, it is submitted - nonetheless suggested that there is a kind of informal hierarchy between them. Inasmuch as "general law" does not have the status of *jus cogens,* treaties generally enjoy priority over custom and particular treaties over general treaties.[68] In the same vein, it may be assumed (as is indeed suggested by the *Right of Passage* case) that local customs (if proven) have primacy over general customary law and, perhaps, the body of customary law has primacy over the general principles of law under article 38 (1)(c) of the ICJ Statute.[69] This informal hierarchy follows from no legislative enactment but, emerges as

---

[65] Iran-United States Claims Tribunal, Case No. A/2 (DEC 1-A 2-FT), 13 January 1982, I Iran-US CTR, p. 104.
[66] *Right of Passage over Indian Territory (merits)* (Portugal v.India), *judgment, ICJ Reports* 1960 p. 44.
[67] Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", *BYIL* vol.LXI (1990), pp. 104-106.
[68] Verdross-Simma, *Universelles Völkerrecht, supra* note 63, pp. 413, 414; Thirlway, *supra* note 63, p. 143-144.
[69] In French doctrine, this result is sometimes achieved by distinguishing between *acte* and *norme,* or formal source and the (substantive) rule encompassed by it so that while there may be no hierarchy between the former, there must

a "forensic"[70] or a "natural"[71] aspect of legal reasoning. Any court or lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem. "Empirically", Serge Sur writes, "the Court has given precedence to rules that have the highest degree of specialty, and the clearest and most objective manifestation".[72] The secondary source is not extinguished thereby but plays a "residual part" in directing the interpretation of that special law and becoming applicable in its stead where the former cannot, for one reason or another, be applied.

59. Such informal hierarchy is an aspect of the pragmatics of legal reasoning that makes a difference between "easy" and "hard" cases. As the special law's speciality reflects its relevance to context and its status as evidence of party will, its application seems often self-evident. In such "easy" case, the speciality of the standard or instrument does not even emerge as an object of argument. The need to look "behind" or "around" the *prima facie* standard or instrument arises only in "hard" cases, when its application is contested and another standard or instrument is invoked in its stead. Only then the *lex specialis* maxim receives express relevance but even then it does so only in relation to countervailing constructions about how the context should be understood (e.g. is the case one of "integral" or "interdependent" obligation), deviating evidence of party intention (e.g. *lex posterior*) or hierarchy (e.g. *jus cogens*).

60. When a "hard" case does emerge, then it is the role of *lex specialis* to point to a set of considerations with practical relevance: the immediate accessibility and contextual sensitivity of the standard. Now these may not be decisive considerations. They may be overweighed by countervailing ones. Reasoning about such considerations, though impossible to condense in determining rules or techniques, should not, however, be understood as arbitrary.[73] The reasoning may be the object of criticism and whether it prevails will depend on how it succeeds in condensing what may be called, for instance, the "genuine shared expectations of

---

be rules for solving overlaps and conflicts between the latter. See e.g. Daillier-Pellet, *supra* note 39, p. 114-116; Georges Abi-Saab, "Cours général de droit international public", *207 Recueil des Cours* (1999), p. 188.

[70] Jennings-Watts, *supra* note 41, p. 26(n2).

[71] Villiger, *supra* note 42, p. 161. Likewise, Hersch Lauterpacht, *International Law. Being the Collected papers of Sir Hersch Lauterpacht* (1970-1978)(4 vols. ed. by Eli Lauterpacht, Cambridge University Press), vol I, p. 86-88.

[72] Serge Sur, *L'interpretation en droit international public* (1974), (Paris: LGDJ), p. 164. Czaplinski and Danilenko speak of "priority of obligation", *supra* note 39, p. 8.

[73] Pace strict positivists such as Kelsen. See Hans Kelsen, *Introduction to Problems of Legal Theory* (Int. and ed. by Paulson & Paulson, Oxford: Clarendon 1992) [1934]), p. 81-84.

the parties, within the limits established by overriding community objectives",[74] as reflected and tested against the various sources mentioned in article 38 (1) of the Statute of the ICJ, legal precedent and doctrine. In such debates, all parties assume that the justifiability of what they say depends on how it links to such larger views about the purposes of the international legal system.

3. The Two Types of lex specialis reference

61. There are two ways in which law may take account of the relationship of a particular rule to general one. A particular rule may be considered an *application* of a general standard in a given circumstance. The special relates to the general as does administrative regulation to law in domestic legal order.[75] Or it may be considered as a *modification, overruling* or a *setting aside* of the latter.[76] The first case is sometimes seen as not a situation of normative conflict at all but is taken to involve the *simultaneous* application of the special and the general standard.[77] Thus, only the latter is thought to involve the application of a genuine *lex specialis*. This seems to be the position within the Dispute Settlement Body of the World Trade Organization. While there appears to be a strong emphasis on interpreting WTO obligations so that there would be no conflict between them, the *lex specialis* principle is assumed to apply if "harmonious interpretation" turns out to be impossible, that is, to overrule a general standard by a conflicting special one.[78]

62. Something like this may have been the assumption within the International Law Commission during the drafting of article 55 of the draft articles on responsibility of States for internationally wrongful acts. In the Commentary, the Commission explained that:

---

[74] McDougal-Lasswell, Miller, *supra* note 39, p. 83.
[75] This is how Scelle describes the functioning of *lex specialis* in international law, *supra* note 35 p. 642.
[76] Jenks distinguishes between "conflict" and "divergence", supra note 19 p. 425-7. Likewise, Pauwelyn, *supra* note 32 p. 6.
[77] This appears to be the way Pauwelyn treats the matter. While he accepts that it may not be easy to appreciate whether a case belongs to one or the other of the two categories, he holds to the analytical distinction and deals with the *lex specialis* only "as a rule to resolve conflict in the applicable law", *supra* note 32 p. 386.
[78] See *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, para 9.92-9.96. See also above at para X. On the presumption against conflict in WTO law generally, see Pauwelyn, *supra* note 32 p. 240-244.

> "(4) For the lex specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other".

63. The Commission supported its view by reference to the *Neumeister* case from the European Court of Human Rights. In that case the Court had observed that the provision on compensation in case of unlawful arrest in article 5(5) of the Convention was not *lex specialis* in relation to the general rule on compensation in article 50. The former did not set aside the latter. Instead, the two provisions worked concurrently. The latter was to be "taken into account" when applying the former.[79] More recently, however, the Court has frequently characterised similar cases as *lex specialis*. Thus in the cases referred to in paragraph 44 that juxtapose the "effective remedy" rule of article 13 of the European Convention with the right to have one's detention speedily dealt with by a court under article 5 (4) have been dealt with by reference to *lex specialis*:

> "According to the Court's established case-law, Article 5 (4) of the Convention constitutes a *lex specialis* in relation to the more general requirements of Article 13. In the present case the facts underlying the applicant's complaint under Article 13 of the Convention are the same as those examined under Article 5 (4). Accordingly, the Court need not examine the allegation of a violation of Article 13 in the view of its finding a violation of Article 5 (4)."[80]

64. In these as well as in many other cases the European Court of Human Rights has thought the *lex specialis* applicable even in the absence of direct conflict between two provisions and where it might be said that both apply concurrently. This is the proper approach. There are two reasons for why it is useful to consider the case of "application" in connection with the case where the *lex specialis* sets up an exception or involves a "setting aside". First, it follows from the definition of the *lex specialis* adopted above that this case is also included: the norm of application is more specific because it contains the general rule itself as one element in the definition of its scope of application. Second, and more important, though the distinction is analytically sound, it is in practice seldom clear-cut. It may often be difficult to say whether a rule "applies" a standard, "modifies" it or "derogates from" it. An "application" or "modification" involves also a degree of "derogation" and "setting aside". To

---

[79] *Neumeister* case, 7 May 1974, ECHR (Ser. A) No. 17 p. 13 (para 29).
[80] *Nikolova v. Bulgaria*, Judgment of 25 March 1999, ECHR 1999-II, p. 25 (para 69).

decide which expression is appropriate requires an interpretation of both rules, and such interpretation, as follows from articles 31 and 32 VCLT, may also reach beyond a scrutiny of the expressions used in those rules. This ambivalence was evident in the *Gabcikovo-Nagymaros Project* case. Here the International Court of Justice referred to *lex specialis* in the following way:

> "... it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed above all by the applicable rules of the 1977 Treaty as a *lex specialis*."[81]

65. In this case, the Court left open what the relationship between the *lex specialis* - the 1977 Treaty - and the rest of the law might have been.[82] Whether or not that general law might have provided for a similar or a different directive was immaterial. It sufficed to apply the treaty. In the language adopted here: the informally superior position of the 1977 Treaty led to its *setting aside* every other treaty and the general law without there ever having been a determination of any "conflict". In this as well as in innumerable other cases there is no need (indeed, no possibility) to decide whether the *lex specialis* is used as an "interpretative maxim" or a "conflict-solution technique", whether it merely "applies" some more general standard or derogates from it.[83] Indeed, even to ask this question may be beside the point. In accordance with the informal hierarchy discused above, the relevant special law applies, and that is all - unless another party raises the question of *jus cogens* or a prior obligation that might enjoy precedence for example under articles 30 or 41 VCLT.

66. Sometimes a *lex specialis* relationship has been identified between two norms which, far from being in conflict with each other, point in the same direction while the relation "special"/"general" is associated with that of "means"/"ends". As noted in paragraph 45 above, the European Court of Human Rights characterised the relation between article 10 of the European Convention on the freedom of expression and article 11 dealing with the freedom of assembly and movement by conceiving the latter as *lex specialis* in relation to the former.

---

[81] *Case concerning the Gabcikovo-Nagymaros Project* (Hungary v.Slovakia), *ICJ Reports* 1997, p. 76 (para 132).
[82] See also the discussion of the *Right of Passage* above at para 57.
[83] For discussion, see Jenks, *supra* note 19 p. 408-420.

> "The Court notes that the issues of freedom of expression cannot in the present case be separated from that of freedom of assembly. The protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of the freedom of peaceful assembly as enshrined in Article 11 of the Convention ... Thus, observing that the applicant's grievances relate mainly to alleged refusals of the "TRNC" authorities to grant him permits to cross over the "green line" and meet with Greek Cypriots, the Court considers that Article 11 of the Convention takes precedence as the *lex specialis* for assemblies, so that it is unnecessary to examine the issue under Article 10 separately. The Court will, however, have regard to Article 10 when examining and interpreting Article 11."[84]

67. There not only is no "conflict" between articles 10 and 11 but both point in the same direction: their relationship is one of means/ends. Yet why would "expression" be the purpose of "assemblies"; might not meaningful "assemblies" (as expression of democracy and self-determination, for example) rather sometimes be understood as the purpose towards which a right of expression is only a means? The relation of general and particular may often be complex and two-sided so that even as the particular sets aside the general, the latter - as the Court has noted - will continue to provide interpretative direction to the former.

68. This example shows that fixing a definite relationship between two standards one which should be seen either as an application or an exception to the other may often be quite impossible. It might, for example, be said that the "inherent right of self-defence" in article 51 of the Charter of the United Nations is *lex specialis* in relation to the principle of non-use of force in article 2 (4). The two rules have a very similar (though not identical) scope of application (they apply to inter-State use of armed force). Because article 51 is more specific than article 2(4), it is applicable when its conditions are fulfilled. In this sense, article 51 may sometimes "replace" or "set aside" the prohibition in article 2 (4). But article 51 may also be seen as an "application" of article 2 (4) inasmuch as self-defence covers action against a State that has *violated* 2 (4). In this case, article 51 strengthens and supports 2 (4) and provides instructions on what to do in some cases (namely those involving "armed attack") in case of breach of article 2 (4). Both rules are now rationalised under the same purpose - the protection of the territorial integrity and political independence of States - of which they appear as particular applications. article 51 now appears not so much an exception as a supplement to article 2 (4).

---

[84] *Djavit An v. Turkey*, 20 February 2003, ECHR [to be published], para 39.

69. It follows that whether a rule is seen as an "application", "modification" or "exception " to another rule, depends on how we view those rules in the environment in which they are applied, including what we see as their object and purpose. Because separating "application" from "setting aside" would be artificial and distort the context in which the question of *lex specialis* emerges, it is proposed to include all of these questions under the *lex specialis* study.

(a) *Lex specialis* as an *application* or *elaboration* of *lege generali*

70. A rule may thus be *lex specialis* in regard to another rule as an application, updating or development thereof, or, which amounts to the same, as a supplement, a provider of instructions on what a general rule requires in some particular case. A regional instrument may thus be *lex specialis* in regard to a universal one, and an agreement on technical implementation *lex specialis* in regard to a general "framework" instrument.[85] Despite the way the particular rule now "applies" the general rule, it also sets aside the latter in a way that is not devoid of normative consequences.

71. For example, many provisions in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer are special law in relation to the 1985 Vienna Convention on the Protection of the Ozone Layer.[86] When States apply the emission reduction schedule in article 2 of the Montreal Protocol, they give concrete meaning to the general principles in the Vienna Convention. Though it may be said that in such case they apply *both* the Protocol *and* the Convention, there is a sense in which the Protocol has now set aside the Convention. In case of a dispute of what the relevant obligations are, the starting-point and focus of interpretation will now be the wording of the Protocol, and no longer of the Convention. The

---

[85] Examples of such relationships are included in Jenks, *supra* note 19 p. 408-420 and Sadat-Akhavi, *supra* note 20, *passim*. See also the Arbitral Tribunal in the *Southern Bluefin Tuna* case, *39 ILM* (2000), where the Tribunal noted the frequent parallelism between treaties and that "the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon parties to the implementation convention", p. 1388 (para 52). The Tribunal did not state whether this was a special appluication of the *lex specialis* or a setting aside of lex specialis because Japan had argued it replaced the obligations of the framework convention by those of the implementing convention fully.

[86] Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, *26 ILM* (1987)1516; Montreal Protocol on Substances that Deplete Ozone Layer, 16 September 1987, ibid.,p.1550; Adjustments to the Montreal Protocol on Substances that Deplete Ozone Layer, 29 June 1990, *30 ILM* 539 (1991) and Amendment to the Montreal Protocol on Substances that Deplete Ozone Layer, 29 June 1990, ibid., p.541.

special rule in the Protocol has become an independent and authoritative representative of what the Convention *means* in terms of the obligations it provides. And yet, the Convention continues to express the principles and purposes that also affect the interpretation and application of the Protocol. In other words, in "easy" cases, the Protocol is applied without controversy about how this should be done while in "hard" cases, a dispute about the Protocol's interpretation and application arises and will need to be resolved by recourse to, *inter alia*, the standards of the Convention.

72. Similar thinking applies even if the special law is intended completely to replace the general law. As the Iran-US claims tribunal stated in the *AMOCO International Finance Corporation v. Iran*:

> "As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provision."[87]

73. This is no different from the above-mentioned *Neumeister* case where the European Court of Human Rights refused to hold article 5(5) of the Convention as *lex specialis* in regard to article 50 because of its *a priori* view that *lex specialis* must involve a conflict. The Court distinguished the two provisions by the fact that article 5(5) was a rule of "substance" while article 50 dealt with the competence of the Court. The latter was nonetheless to be "taken into consideration" when applying the former.[88] Though the Court here refrained from invoking *lex specialis*, in its later jurisprudence, it has done this.[89]

---

[87] AMOCO International Finance Corporation v. Iran, Iran-U.S. CTR 1987-II vol. 15, p. 222.

[88] *Neumeister v. Austria*, 7 May 1974, ECHR (Ser.A). No. 17 p. 13 (para 30).

[89] Somewhat parallel was the situation of a United Nations Tribunal in Libya which, in 1955, faced a challenge to its jurisdiction under articles VII and X of its founding General Assembly Resolution (388(V) of 15 December 1950). It was stated by Libya that as the question of confiscation had been dealt with under the former article, and not in the latter which provided for the Tribunal's jurisdiction, such jurisdiction did not cover it. Libya formulated this point as follows "[I]l est un principe juridique universel, en matière d'interprétation, qu'en cas de conflit entre un texte général et un texte spécial, c'est le dernier qui doit l'emporter". The Tribunal rejected this objection, stating that article VII merely "specified" the fact that the Tribunal would have jurisdiction - which it exercised generally under article X - also in regard to confiscated properties. See United Nations Tribunal in Libya, Institutions, Corporations and Associations Concerned by article 5 of the 1951 Anglo-Italian Agreement (Italy/Libya), Award of 27 June 1955, *UNRIAA* vol. XII, p. 388.

74. In both cases – that is, either as an application of or a derogation from the general law – the point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to become applicable instead of the general. Such replacement remains, however, always only partial. The more general rule remains in the background providing interpretative direction to the special one.

(c) *Lex specialis* as an exception to the general rule

75. As pointed out above, most of general international law is dispositive and can be derogated from by way of exception. But an "exception", too, works only in a relative sense so that whatever is being "set aside" will continue to have an effect on the interpretation and application of the exception. It is often stated that the laws of war are *lex specialis* in relation to rules laying out the peace-time norms relating to the same subjects.[90] In the *Legality of threat or use of nuclear weapons* case, the ICJ discussed the relationship between the International Covenant on Civil and Political Rights and the laws applicable in armed conflict. Article 6 of the Covenant established the right not arbitrarily to be deprived of one's life. This right, the Court pointed out, applies also in hostilities. However:

> "The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[91]

76. The example of the laws of war focuses on a case where the rule itself identifies the conditions in which it is to apply, namely the presence of an "armed conflict". Owing to that condition, the rule appears more "special" than if no such condition had been identified. To regard this as a situation of *lex specialis* draws attention to an important aspect of the operation of the principle. Even as it works so as to justify recourse to an exception, what is being set aside does not vanish altogether.[92] The Court was careful to point out that human

---

[90] E.g. Jenks, *supra* note 19 p. 446; Wolfram Karl, "Treaties, Conflicts between", in *Encyclopaedia of Public International Law*, (2000) (Amsterdam: Elsevier), Vol. IV. p. 937.

[91] *Legality of the threat or use of nuclear weapons*, Advisory opinion, *ICJ Reports* 1996 p. 240 (para 25).

[92] Though the marginal role left for human rights law in the opinion is perceptively criticised in Vera Gowland-Debbas, "The Right to Life and Genocide: The Court and International Public Policy", in Laurence Boisson de Chazournes & Philippe Sands, *International Law, the International Court of Justice and Nuclear Weapons* (1999) (Cambridge University Press), pp. 321-326.

rights law *continued to apply* within armed conflict. The exception - humanitarian law - only affected one (albeit important) aspect of it, namely the relative assessment of "arbitrariness". The use of the *lex specialis* maxim did not intend to suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of the Court's reasoning. However desirable it might be to discard the difference between peace and armed conflict by abolishing the latter altogether, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances.

77. *Legality of Nuclear Weapons* was a "hard case" to the extent that a choice had to be made by the Court between different sets of rules none of which could be granted absolute priority, or fully extinguish the others. *Lex specialis* did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the reality and, especially, the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, bearing in mind the overriding need to ensure "the survival of a State".[93]

78. The important point to retain here is that when *lex specialis* is invoked as an exception to the general law then what is being suggested is that the special nature of the facts justifies a deviation from what otherwise would be the "normal" course of action. The suggestion is, in other words, that there is something about the facts that makes the case "special" and distinguishes it from the fact-situations envisaged as the background for the application of general law.

79. This highlights again the nature of *lex specialis* as a pragmatic aspect of legal reasoning in which at issue are judgements of relative "generality" and "speciality", assumptions of what is the "normal case" and what the "exceptional case". Sometimes these distinctions are made in an instrument itself. Thus, article 4 of the International Covenant on Civil and Political Rights provides for a right to derogate from certain clauses in the Covenant "[i]n time of public emergency which threatens the life of the nation". When that fact-condition is fulfilled, a situation emerges that is not unlike the "armed conflict" that

---

[93] *Legality of Threat and Use of Nuclear Weapons, ICJ Reports* 1996, p. 267 (para 105 E).

justified the application of laws of war as referred to by the ICJ in the *Legality of Nuclear Weapons* opinion. And like in the latter, in times of public emergency, either a modicum of legality will continue to apply or what takes its place is in fact a wholly unconstitutional legal vacuum.

80. Often the fact-condition that makes a case "special" is not laid out in a treaty, however but must be ascertained through the normal means through which the presence of a tacit agreement, estoppel, effectivités, historic title, *rebus sic stantibus*, or, say, local custom (*Right of Passage* case) is identified. That assessment is dependent on and makes constant reference to evaluative judgements of what is central and what marginal to a case, what aspects of it should be singled out and what aspects may be glossed over. Do *effectivités* or "historical consolidation", for instance ground a kind of exception that is prior to formal "title", or vice-versa? Sometimes (as in the *Pulau Ligitan and Pulau Sipadan* case) *effectivités* may in fact ground title, sometimes a pre-existing title may turn any *effectivités* into an illegality (*Bakassi Peninsula* case). No clear-cut, *a priori* solution seems applicable.[94]

81. Arguments from *effectivités*, like those from e.g. estoppel (*Temple of Preah Vihear*) and historical title (Anglo-*Norwegian Fisheries*) express the same justification that *lex specialis* is based on.[95] They, too, seek to make the law reflect the complexity of particular situations. They, too, create informal hierarchies that seek to distinguish the special case from its general (and formal) background by pointing to some relevant aspect of the fact-description that should be decisive. What they leave open, like the opinion in the *Legality of Nuclear Weapons* case, is on what basis the relevant facts are singled out, what justifies the choice of the interpretative framework. To what extent does fact-description "armed conflict" influence the sense of the expression "arbitrary deprivation of life" in article 6 of the International Covenant on Civil and Political Rights? Here there is no single formula.[96] A weighing of different considerations must take place and if that weighing is to be something

---

[94] See *Case concerning sovereignty overPulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), *ICJ Reports* 2002, paras 134 and 145 (*effectivités* as basis of Malaysia's title) and *Case concerning the Land and Maritime Boundary* (Cameroon v. Nigeria) *ICJ Reports* 2002, p. 112 (para 223) and p. 44-46 (paras, 52, 54-55) (*effectivités* illegal). See also *Case concerning the Frontier dispute* (Burkina Faso v. Mali) *ICJ Reports* 1986 p. 564 (para. 18) ("in fact the concept of title may also, and more generally, comprehend any evidence that may establish the existence of a right, and the actual source of that right").

[95] *Case concerning the Temple of Preah Vihear* (merits) (Cambodia v. Thailand), *ICJ Reports* 1962 p. 23; *Fisheries Case,* (United Kingdom v. Norway), *ICJ Reports* 1951 p. 130-131.

[96] As stressed e.g. by McDougal-Lasswell and Miller, *supra* note 39, p. 206.

else than the expression of a preference, then it must seek reference from what may be argued as the systemic objectives of the law, providing its interpretative basis and *milieu*.

4. Prohibited *lex specialis*

82. Most of general international law is dispositive and can be derogated from by *lex specialis*. But sometimes general law either expressly prohibits a deviation or such prohibition must be derived from the nature of the general law. Aside from jus cogens, there may be other types of general law that may not permit derogation through *lex specialis*.

83. In regard to conflicts between human rights norms, for instance, the one that is more favourable to the protected interest is usually held overriding.[97] At least derogation to the detriment of the beneficiaries would seem precluded.

84. It follows that whether or not derogation by way of *lex specialis* is permitted will remain a matter of interpreting the relevant general law. Concerns that may seem pertinent include at least the following: the normative status of the general law (is it *jus cogens*?), who the beneficiaries of the obligations are (prohibition to deviate from law benefiting third parties, including individuals or non-State entities); whether non-derogation may be otherwise inferred from the terms of the general rule (for instance its "integral" or "interdependent" nature, its *erga omnes* character, or subsequent practice creating an expectation of non-derogation).[98] Sometimes derogation - but equally application or of modification - may be forbidden as it were to "disrupt the balance established under the general treaty between the rights and obligations of States parties thereto".[99] Apart from

---

[97] Karl, *supra* note 90 p. 939; Sadat Akhavi *supra* note 20 p. 213-231. See also the Separate Opinion of Judges Eysinga and Schücking in PCIJ, *Oscar Chinn* case, Ser A/B No. 63 p. 132-135, 149.

[98] For the distinction between normal ("reciprocal") and "integral" and "interdependent" obligations, see Sir Gerald Fitzmaurice, *Third Report on the Law of Treaties*, Yearbook ...1958, vol. II p. . For the treatment of the distinction at the last stages of the State Responsibility project within the ILC, see James Crawford, *Third Report on State Responsibility*, document A/CN.4/507, p. 44-48 (paras 99-108). The issue of normative hierarchy in international law (beyond *jus cogens* and article 103 of the Charter of the United Nations remains open. It is not possible to deal with it here.

[99] Sadat-Akhavi, *supra* note 20, 131.

treaties of a public law nature (however that category is defined), this would apply to constituent instruments of international organizations.[100]

85. In practice, these considerations may sometimes raise a question about what is a "derogation" in contrast to "application", "updating" or "modification". Views on this may differ and such differences are bound to reflect divergent understandings of the general law. Does a technical application seem to threaten a fragile package-deal, for example? Such problems cannot be resolved by looking at the special law alone but only in forming a view of the nature and reasonable purposes of the general law.

5. The relational character of the general/special distinction

86. One of the difficulties in the *lex specialis* rule follows from the absence of clarity about the distinction between "general" and "special". For every general rule is particular, too, in the sense that it deals with some particular substance, that is, includes a certain fact-description as a *general* condition of its application. For example, the Convention on Anti-Personnel Landmines (Ottawa Treaty) lays down general law on the use of landmines.[101] Yet this is also a "special" aspect of the general rules of humanitarian law. On the other hand, all special law is general as it is a characteristic of rules that they apply to a class "generally". Every rule may be expressed in the following format: "for every p, it is true that the rule q applies". No rule applies to a single case. Even where the occasions for the application of a rule are few, in order for the standard to be a *rule* (instead of an *order* to somebody) it must be generally defined. This is reflected in the distinction made by many domestic laws between laws and acts, or *loi* and *acte*, *Gesetz* and *Massnahme*.

87. Generality and speciality are thus relational. A rule is never "general" or "special" in the abstract but in relation to some other rule. This relationality functions in two registers. A rule may be general or special in regard to its *subject-matter* (fact-description) or in regard to the *number of actors* whose behaviour is regulated by it.[102] Thus, the use of anti-personnel

---

[100] See e.g. Ignaz Seidl-Hohenveldern, "Hierarchy of Treaties", in: Jan Klabbers & René Lefeber, *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag* (1998) (The Hague: Nijhoff), Pp. 15-16; Karl, *supra* note 90. p. 940.

[101] Convention on the Prohibition of the Use, Stockpoling, Production and Transfer of Anti-Personnel Mines and on Their Distruction, 18 September 1997, *36 ILM* (1997)1507.

[102] Villiger, *supra* note 42 p. 36; Kontou, *supra* note 27 pp. 19-20.

mines is a *special subject* within the *general subject* of humanitarian law. The distinction between general and local custom, again, provides an example of the register of number of actors covered. The registers may overlap. Thus, there may be a rule that is general in subject-matter (such as a good neighbourliness treaty) but valid for only in a special relationship between a limited number (two) of States.

(a) Speciality in regard to parties

88. In considering *lex specialis* as a conflict-solution technique it is necessary to distinguish between cases where differing obligations are valid and applicable between the *same States* (A/B + A/B) and cases where the fulfilment of an obligation in one relationship (A/B) makes it impossible to fulfil an obligation in another relationship (A/C). These cases are usually discussed in terms of subsequent treaties (article 30 VCLT) and though it is unnecessary to deal with that set of issues here, it may still be useful to say how, if at all, *lex specialis* functions in these relationships.

89. In the first case (A/B + A/B) *lex specialis* does have a narrow field of application, A and B being entitled to amend their prior treaty or deviate from most general law as they wish. However, it cannot be automatically excluded that when two States conclude a generally worded treaty, for example, they thereby wish to abolish a prior, more specific treaty. In such cases, *lex specialis* may have some value as an indication of party will:[103] the *lex posterior* will not abrogate a prior treaty obligation if the speciality of that prior obligation may be taken as indication that the parties did not envisage this outcome. The case where a limited number of parties to a multilateral treaty establish a special regime among themselves is, again, regulated as "modification" under article 41 of the VCLT and cannot be discussed here in any detail.

90. The hard case is the one where a State (A) has undertaken conflicting obligations in regard to two (or more) different States (B and C) and the question arises which of the obligations shall prevail. Here the *lex specialis* appears largely irrelevant. Each bilateral (treaty) relationship is governed by *pacta sunt servanda* with effect towards third parties

---

[103] As observed by Rousseau, *supra* note p. 177, Zuleeg, *supra* note 39 p. 256. See further McNair, *supra* note, 15 p. 219-220. This corresponds to article 30(4) of the VCLT. See also Mus, *supra* note 16 p. 217-219.

excluded. Such conflict remains unregulated by article 30 of the Vienna Convention.[104] The State that is party to the conflicting instruments is in practice called upon to choose which treaty it will perform and which it will breach, with the consequence of State responsibility for the latter.[105]

(b) Speciality in regard to subject-matter

91. As pointed out above, whether a rule is "special" or "general" requires a relational assessment: Special *in what sense*? General *in what regard*? Because only those that are in some respect similar can be compared - and indeed can enter into conflict - it must be assumed, together with Fitzmaurice, that *lex specialis* "can only apply where both the specific and general provision concerned deal with the same substantive matter".[106] Also the commentary to article 55 of the Draft articles on responsibility of States for internationally wrongful acts requires that for *lex specialis* to apply, the rules must deal with the same subject matter.[107] But when do two rules relate to the "same subject-matter"? There is no in-depth analysis of this issue anywhere.[108] As pointed out by Vierdag in his discussion of this criterion in regard to subsequent agreements under article 30 VCLT:

> "the requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted simultaneous application of two rules to one set

---

[104] Lauterpacht originally proposed that the later treaty should be held void unless it possessed "a degree of generality which imputes to [it] the character of legislative enactment[]", Report on the Law of Treaties, *Yearbook...*, 1953, vol. II p. 156-159. Later Special Rapporteurs (Fitzmaurice and Waldock), however, thought that this set the innocent party to the latter treaty at an unjustified disadvantage.

[105] Zuleeg calls this the "principle of political freedom", *supra* note 39 p. 267-268. See also Mus, *supra* note 16 p. 227-231. The genesis and critique of article 30 of the VCLT is well expressed in Sur, *supra* note 72, p. 167-171 and Sadat-Akhavi, *supra* note 20 p. 59-84. The most comprehensive discussion of the matter is Gyuora Binder, *Treaty Conflict and Political Contradiction. the Dialectic of Duplicity* (1988) (New York: Praeger).

[106] Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points", *BYIL* vol. XXXIII (1957) p. 237.

[107] Commentaries on the draft articles on Responsibility of States for internationally wrongful act, *Official Records of the General Assembly, Fifty-sixth session,* Supplement No. 10, (A/56/10) p. 358.

[108] Fitzmaurice criticises the dissenting opinion of the Judge Hsu Mo in the first phase of the *Ambatielos* case from the perspective of the "same subject matter". Judge Hsu Mo claimed that both article 29 and the Declaration covered issues of arbitration or adjudication, i.e., the same subject matter. In Fitzmaurice's view the provisions did not relate to the same class of disputes. The Declaration did not cover its own interpretation or application. Instead it provided that disputes arising under the 1886 Treaty (followed by the Anglo-Creek Commercial Treaty of 1926) should be submitted to arbitration. Article 29 of the Treaty provided provisions of disputes about its interpretation or application. Hence, there was no conflict between the Declaration and article 29. Fitzmaurice, *supra* note 106, p. 237.

of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied".[109]

92. This seems right. The criterion of "same subject-matter" seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter: the relationship between human rights law and humanitarian law in the *Legality of Nuclear Weapons* case, for example. Then the question emerges, which of them is more "relevant" to the case.

93. This might not be easy to ascertain. For any set of facts may be amenable to classification under varying rules or rule-systems. The carriage of chemicals at sea, for instance, may be understood as a trade law problem, an issue in the law of the sea (innocent passage, for instance) or environmental protection. The application of a bilateral arbitration treaty limited to "environmental" or "commercial" matters" to a dispute over such carriage would then depend on how its substance is defined. Because there are no definite rules on the classification of particular situations, it is often possible to avoid the appearance of conflict by distinguishing the new case by reference to its subject-matter: it is not a trade problem because what is relevant to it is that the carriage takes place at sea; or alternatively, it is not a law of the sea problem as the key aspect of it is the environmental danger involved.

94. Such arguments may always be made in *lex specialis* terms because each points to a special aspect of the case (its being about "trade", "maritime passage" or "hazardous materials") that it invokes as a justification for dealing with it through some specialised set of rules. Here *lex specialis* becomes a name for the qualification of facts, based on some dominant understanding of such facts.

95. This may be illustrated by the above-mentioned case from the European Court of Human Rights of *Djavit An v. Turkey* where the applicant was prevented by Turkish Cypriot authorities to cross the 'green line' in order to participate in bi-communal meetings. The Court held that article 11 regulating the freedom assembly and association of the European Convention was applicable as *lex specialis* instead of article 10 providing for freedom of

---

[109] Bert Vierdag, "'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions" *BYIL* vol. LIX (1988) p. 100.

expression.[110] In the Court's view "the protection of personal opinions, secured by article 10 is one of the objectives of freedom of peaceful assembly as enshrined in article 11".[111] In this case, the relationship between a "general" and "special" provision coalesced with a relationship between what was the "objective" (freedom of expression) and what the instrument (freedom of assembly). This relationship was, not visible on the surface of the provisions which, as noted above, could be interpreted so as to reverse the means/ends relationship. It resulted from a certain teleological interpretation projected by the Court over the meaning of the relevant provisions.

96. But such single teleology is more difficult to discern in the hypothetical example of carriage of chemicals at sea. Depending on what the interpreter sees as the relevant consideration in the situation is, the case comes under one or another set of rules: is the point of the law to advance trade, flag or coastal State jurisdiction, or environmental protection? While all of these are valid objectives of different types of international regulation, none of them enjoys intrinsic priority over the others. This is why, in a hard case, a justifiable decision would have to take all of these into account by articulating some systemic relationship between them. None can be simply brushed aside for the same reason that the ICJ in the *Legality of the threat or use of nuclear weapons* case did not brush aside human rights law or any of the other branches of the law (environmental law, humanitarian law, the law on the use of force) that had been invoked. They were all in some regard *lex specialis.* This does not mean that its decision - that it "cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"[112] - would have been beyond reproach. Perhaps the systemic unity that the Court canvassed and that peaked in the ultimate value of the "very survival of a State" could be submitted to critique. But the point is not whether this decision was correct but that in arriving to it none of the laws were "automatically" set aside. They all contributed to bringing relevant considerations into the advisory opinion whose authority lies precisely in the plausibility of what it then came to suggest as the law's determining purpose.

---

[110] *Ezelin v. France,* 26 April 1991, (Ser. A) No. 202, p. 20 (para. 35) and *Djavit An v. Turkey,* 20 February 2003, ECHR [to be published] para 39. For the quote of the relevant passage, see above paragraph 66 and note 84.
[111] *Ezelin v. France,* 26 April 1991, (Ser. A) no. 202, p. 20 (para 37).
[112] *Legality of Threat or Use of Nuclear Weapons,* Advisory opinion, *ICJ Reports* 1996, p. 266, para 105 E (*dispositif*).

6. Conclusion: The omnipresence of "general law"

97. The maxim *lex specialis derogat lege generali* refers to a standard technique of legal reasoning, operative in international law as in other fields of law understood as systems. It has no automatic field of application and its power is entirely dependent on the normative considerations for which it provides articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness. Its functioning cannot be assessed independently of the role of considerations of the latter type in specific context of legal reasoning. How does a particular agreement relate to the general law around it? Does it implement or support the latter, or does it perhaps deviate from it? Is the deviation tolerable or not? *No general, context-independent answers can be given to such questions.* In this sense, the *lex specialis* maxim cannot be meaningfully codified.

98. It may, however, be useful to say a few words about the role of such considerations in the four situations where it may apply. If the *lex specialis* argument is made within a single treaty, then its power is relatively straight-forward. The special provisions are *ex hypothesi* assumed to emerge as much from party will as the general standards, and represent the same purposes or the same balance of interests within the treaty, as they do, albeit in a more definite and context-sensitive form. If the treaty is intended to provide benefits to third parties (human rights treaties), then deviations should respect the overall teleology of the treaty - unless, of course, it can be demonstrated that they were intended as exceptions to it.

99. In the case of two different treaties, then the personal and material scope of the treaties become important. Between the same parties, *lex specialis* may point to a specific intention whereas between different parties, it is hard to see what role it could play. Here the question of whether the treaties are part of the *same regime* seems significant. Between treaties within a single "treaty-regime" (say, human rights law, humanitarian law, law of the sea), *lex specialis* has more power than across such regimes. In the former case, its interpretation is received from the regime's teleology while in the latter, no single teleology may be presumed. Applying the *Legality of nuclear weapons* principle, a specific provision in a human rights treaty might have to yield to a general principle in a humanitarian law convention. A general principle in the law on the use of force may have more power than

specific provision in a commercial treaty (sometimes this may be construed through article 103 of the Charter of the United Nations). Not least of the difficulties here is the definition and hierarchical relationship between the relevant treaty-regimes.[113] Whatever that relationship is, however, it can only be construed by reference to a standard outside the two - that is to say, on the basis of general law or any teleology imputed for such general law.

100. In regard to relationships between treaties and non-treaty standards, the application of *lex specialis* is usually unproblematic. The informally superior position of treaties over custom is only affected when there is reason to believe that the non-treaty standard might not permit of deviation. Here as elsewhere, however, it is good to bear in mind that what may seem a "deviation" from one perspective, may appear an "application" or an "updating" from another. In any case, the general law continues to fill aspects of the treaty-regime not expressly provided in it.

101. Finally, the question of the application of *lex specialis* within non-treaty standards seems to coalesce largely with the conditions of the use of doctrines such as those of estoppel and acquiescence, historic right, local custom, *effectivités* and so on which, on the one hand, seek contextual sensitivity and closeness to State will while, on the other, expressing considerations of good faith, equity and reasonableness.

*****

102. The role of *lex specialis*, surveyed above, cannot be dissociated from assessments about the nature and purposes of the general law that it proposes to modify, replace, update or deviate from. This highlights the systemic nature of the reasoning of which arguments from "special law" are an inextricable part. No rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum. Its normative environment includes not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the forms through which those rights and duties may be supplemented, modified or extinguished. Principles such as "sovereignty", "non-intervention", "self-determination", "sovereign equality", "non-use of force", *audiatur et altera pars,* "no-one may prohibit from his wrong",

[113] This matter will be discussed at more length in Section C of the present report.

and so on, as well as interpretative maxims such as *lex specialis* and *lex posterior*, together with a host of other techniques of legal reasoning all are part of this framework.

105. The relationship between general law and particular rules is ubiquitous. One can always ask of a particular rule of international law how it relates to its normative environment. This may not always be visible. States sometimes create particular rights and obligations where there appears to be no general law on the matter at all. In such cases, these rights and obligations do not seem, on the face of them, to have the character of *leges speciales*. They are not contrasted to anything more "general". The normative area "around" such rules appears to remain a zone of no-law, just like the matter they now cover used to be before such new regulation entered into force.

106. The foregoing reflections suggest, however, that whatever logical, conceptual or political problems there are around the old problem of "gaps" in international law,[114] there is at least one sense in which the idea of a zone of no-law as regards *lex specialis* is a conceptual *impossibility*. If a legal subject invokes a right based on "special law", then the validity of that claim can only be decided by reference to the whole background of a legal system that tells how "special laws" are enacted, what is "special" about them, how they are implemented, modified and terminated. It is impossible to make legal claims only in a limited sense, to opt for a part of the law, while leaving the rest out. For legal reason works in a closed and circular system in which every recognition or non-recognition of a legal claim can only be decided by recognising the correctness of other legal claims. This can be illustrated in the matter of so-called "self-contained regimes".

[114] The present discussion is not intended to take sides in the debate about the permissibility or desirability of "*non liquet*", as discussed between Hersch Lauterpacht and Julius Stone and elaborated in the writings of Lucien Siorat, Gerald Fitzmaurice, or Ulrich Fastenrath, among others.