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## Pros and Cons Ensuing from Fragmentation of International Law

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# PROS AND CONS ENSUING FROM FRAGMENTATION OF INTERNATIONAL LAW

Gerhard Hafner\*

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## I. FRAGMENTATION

The system of international law has become increasingly fragmented, particularly since the end of the Cold War. This paper intends to present the main features of this development and its implications. Various factors are responsible for the increased fragmentation:

- The proliferation of international regulations;

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- Increasing political fragmentation (juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction);
- The regionalization of international law due to a rise in the number of regional *fora* engaged in the formulation of international regulations;
- The emancipation of individuals from States;<sup>1</sup> and
- The specialization of international regulations.<sup>2</sup>

Presently, there exists no homogeneous system of international law.<sup>3</sup> International law consists of erratic blocks and elements; different partial systems; and universal, regional, or even bilateral subsystems and sub-subsystems of different levels of legal integration.<sup>4</sup> All these parts interacting with one another create what may paradoxically be called an “unorganized system,”<sup>5</sup> full of intra-systematic tensions, contradictions and frictions.

In theory, fragmentation could have either positive or negative effects on the rule of law in international relations:

- On the one hand, fragmentation could have the positive effect<sup>6</sup> of inducing States to comply more strictly with international law. States would more inclined to comply with norms of a

1. This emancipation could lead to differentiated regulations and, consequently, norms with different obligations.

2. See Ian Brownlie, *Problems Concerning the Unity of International Law*, in LE DROIT INTERNATIONAL À L'HEURE DE SA CODIFICATION: ÉTUDES EN L'HONNEUR DE ROBERTO AGO 153, 156 (Dott. A. Giuffrè ed., 1987).

3. Cf. Joseph A. Camilleri, *Fragmentation and Integration: The Future of World Politics*, in 2 CONFLICT RESOLUTION THROUGH NON-VIOLENCE 45 (K.D. Gangrade & R.P. Misra eds., 1990); Moonis Raza, *Citizens of a Wounded Earth in a Fragmented World*, in 2 CONFLICT RESOLUTION THROUGH NON-VIOLENCE 11, 22 (K.D. Gangrade & R.P. Misra eds., 1990).

4. On the increase of fragmentation, in particular after the end of the Cold War, see Jost Delbruck, *A More Effective International Law or a New “World Law?”—Some Aspects of the Changing Development of International Law in a Changing International System*, 68 IND. L.J. 705 (1993); Earl H. Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives: Challenges to Sovereignty and Governance*, 20 CAN.-U.S. L.J. 303 (1994); Michael W. Reisman, *International Law after the Cold War*, 84 AM. J. INT'L L. 859, 864 (1990).

5. Karl Zemanek, *The Legal Foundations of the International System: General Course on Public International Law*, 266 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INT'L L. 62 (1997).

6. See SERGIO SALINAS ALCEGA & CARMEN TIRADO ROBLES, ADAPTABILIDAD Y FRAGMENTACIÓN DES DERECHO INTERNACIONAL: LA CRISIS DE LA SECTORIALIZACIÓN (97 ZARAGOZA, 1999); see also Stefan Kirchner, *Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?*, 5 GERMAN L.J. (2004), at [http://www.germanlawjournal.com/article.php?id=361#\\_edn1](http://www.germanlawjournal.com/article.php?id=361#_edn1).

regional nature that better reflect the particular political situation of the States in that region.

- On the other hand, fragmentation could generate negative effects by exposing the frictions and contradictions between the various legal regulations and imposing on States mutually exclusive obligations.

## II. ILLUSTRATIVE CASES

Before exploring its benefits and drawbacks, it is useful to identify several examples of the fragmentation of international law and the potential for conflict among different subsystems.

### A. *International Criminal Tribunal for Former Yugoslavia*

The ICTY could require a State to take certain measures that are not in conformity with the same State's obligations under human rights conventions. Article 103 of the Charter of the United Nations deprives States of the right to invoke such conventions, irrespective of the fact that the individual concerned may bring the matter before the relevant human rights bodies.<sup>7</sup> Furthermore, if the individual concerned does refer the matter to a relevant human rights body, it will be confined to examining whether or not the State has violated the related human rights convention. Existing international law does not provide a clear guidance for solving this problem.<sup>8</sup>

Similar situations occur as a result of the application of targeted sanctions adopted by the Security Council, and instances of judicial intervention in this issue, such as that by the European Court of Human Rights or the European Court of Justice, have failed to generate a satisfactory solution.<sup>9</sup> In the *Dorsch* case, the ECJ wrote that, in light of "the

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7. See Johan G. Lammers, *Challenging the Establishment of the ICTY before the Dutch Courts: The Case of Slobodan Milosevic v. The Netherlands*, in *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES* 107 (Erika de Wet & André Nollkaemper eds., 2003).

8. See August Reinisch, *The UN Tribunal for Yugoslavia and the Procedural Guarantees of the ICCPR: In Re Binding Effect of Non-Ratified Treaty Law for the UN*, 47 *AUSTRIAN J. PUBL. INT'L L.* 173 (1995); Gerhard Hafner, *Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?*, in *THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES: UNIVERSAL AND EUROPEAN PERSPECTIVES* 25 (Lucius Caflisch ed., 1998); see also Symposium, *Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 *N.Y.U. J. INT'L L. & POL.* 679 (1999).

9. See Erika de Wet, *The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View*, in *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES* 7, 24 (Erika de Wet & André Nollkaemper eds., 2003).

objective of general interest so fundamental for the international community of bringing to an end the invasion and occupation of Kuwait by Iraq and maintaining international peace and security in the region, the damage alleged by the applicant, even if it were capable of being classified as substantial cannot render the Community liable in this case."<sup>10</sup>

### B. Immunity and Human Rights Obligations

Similar to the issue of potential conflict between the ICTY and human rights conventions is the question of whether immunity based on international agreements or general international law may be invoked before human rights bodies by States as exceptions to their obligations under human rights conventions. In the case of *Richard Waite and Terry Kennedy*,<sup>11</sup> the European Commission of Human Rights concluded that no violation of Article 6, paragraph 1 of the Convention had occurred because a reasonable relationship of proportionality existed between the rules of international immunity and the legitimate aims pursued by the European Space Agency (ESA) as an international organization. This conclusion was confirmed by the European Court of Human Rights.<sup>12</sup>

### C. International Trade Regulations and International Environmental Regulations

Another example of potential conflict between different rules of international law is the relationship between international regulations dealing with international trade and international regulations intended to promote the protection of the environment and sustainable development.<sup>13</sup> Clearly certain tensions between various norms of international

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10. See Case T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Comm'n of the European Comtys.*, 1998 E.C.R. II-667, *aff'd*, C-237/98 P, *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Comm'n of the European Comtys.*, 2000 E.C.R. I-4549.

11. Eur. Comm. H. R., *Richard Waite and Terry Kennedy v. Germany*, App. No. 26083/94 Report of the Commission adopted on 2 December 1997, paras. 53-54; see also Eur. Comm. H. R., App. No. 28934/95 *Beer and Regan v. Germany*, Report of the Commission adopted on 2 December 1997.

12. See Eur. Comm. H.R., *Waite and Kennedy v. Germany*, App. No. 26083/94 Report of the Commission adopted on 18 February 1999, para. 73; Eur. Comm. of H.R., App. No. 28934/95 *Beer and Regan v. Germany*, Report of the Commission adopted on 18 February 1999.

13. Cf. e.g., the works undertaken by the GATT Working Party on Environmental Measures and International Trade (now the Trade and Environment Committee of the WTO) or the OECD Trade and Environment Expert Committee. Cf. also Candice Stevens, *OECD Trade and Environment Programme*, 1 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 55 (1992).

law may arise in this relationship.<sup>14</sup> Similar situations can occur in the relations between international trade regulations, in particular within the framework of the World Trade Organization, and human rights.<sup>15</sup>

#### D. *International Regulations on Broadcasting*

Attempts to regulate satellite broadcasting—by the International Telecommunication Union (ITU) on the one hand and UNESCO on the other—also exhibit the potential for conflict. Doubts remain about the compatibility of UNESCO principles and the relevant regulations elaborated by the ITU.<sup>16</sup>

#### E. *The Law of the Sea Convention and International Fisheries Treaties*

A recent case before the United Nations Law of the Sea Tribunal, the *Southern Bluefin Tuna Case*, clearly demonstrates the problems incurred by the applicability of more than one regulation to a given case.<sup>17</sup> A similar problem arose in connection with the *MOX Plant* case where the regime under the United Nations Convention on the law of the Sea of 1982 conflicted with the system under EC law.<sup>18</sup> Consequently, clear legal devices are needed to ensure harmonious regulations.

#### F. *The Application of the General Legal System to Special Regimes and Regulations*

The fragmentation or specialization of international regimes and regulations also raises questions of whether and how to apply general international law, in particular that of a secondary nature, to special

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14. See, e.g., *Appendix I: Multilateral Agreements with Trade Provisions*, 90–91 INTERNATIONAL TRADE 45 (1992). This study lists 17 environmental conventions containing trade provisions for reasons of environmental protection; this list includes, among others, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

15. See Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 757 (2002).

16. Cf. Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, at 15, U.N. Doc. A/5515 (1964).

17. See *Southern Bluefin Tuna Case* (Australia & New Zealand v. Japan), Award on Jurisdiction and Admissibility, ICSID (W. Bank) (Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea 2000), at <http://www.worldbank.org/icsid/bluefintuna/award080400.pdf>.

18. See *The MOX Plant Case* (Ir. v. U.K. & N. Ir.) (Perm. Ct. Arb. 2003) transcript of proceedings, June 13, 2003, available at <http://www.pca-cpa.org/PDF/MOX%20%20-%20Day%204.pdf>.

regimes. For example, does general international law apply to the legal regimes of the European Union? If so, how? And does it matter whether European law still qualifies as international law? A related, but more fundamental, question concerns the accountability of international organizations: to what extent are international organizations bound by general international law?<sup>19</sup> In particular, given that international human rights regimes exhibit a tendency to specify specific features of the applicable legal system,<sup>20</sup> to what extent can general international law be applied to the judicial functions of international organizations?

### III. CAUSES

Most legal systems provide legal means and devices to solve possible conflicts of norms<sup>21</sup> and ensure their harmonious application. However, the international legal system cannot avoid normative conflicts and inhomogeneous application because it lacks clear legal guidance for the resolution of conflicts of norms. This situation threatens the unity of the international legal system.

The absence of such rules regarding conflicting regulations can be traced back to:

- Lack of centralized organs. In the decentralized system of international law, the members of the system are individually responsible for the enforcement of international law, making it impossible to guarantee the homogeneous application of international law.<sup>22</sup>
- The specialization of regulations. Due to a decentralized method of norm creation, different regulations are applied in different situations. Any resort to different systems for the regulation of the same situation could lead to conflicting results.

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19. See, e.g., de Wet, *supra* note 9, at 8; August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, at 854 (2001).

20. See Alain Pellet, 'Droits-de-l'Hommeisme' et Droit International ["Human rightism" and International Law], Gilberto Amado Memorial Lecture at the Palace of Nations (July 18, 2000), available in translated and updated form in X THE ITALIAN YEARBOOK OF INTERNATIONAL LAW 3 (2000).

21. For the definition of a normative conflict, see Wolfram Karl, *Conflict Between Treaties*, in 4 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 467 (Rudolf Bernhardt ed., 2000); MARCEAU, *supra* note 15, at 792.

22. See Brownlie, *supra* note 2.

Specialization also entails different regimes of secondary rules, including enforcement and compliance mechanisms.<sup>23</sup>

- The different structures of legal norms.
- Classical international law consists of reciprocal norms of a synallagmatic nature, i.e. norms creating bilateral reciprocal rights and obligations among States;
- New developments of international law impose duties on States owed to individuals such as norms protecting human rights;
- Further developments created duties owed to the community of States participating in a given legal system.

These different structures are favorable to the creation of different normative regimes that could entail incompatible legal obligations for the individual actors. Such regimes include:

- Parallel regulations on the universal or the regional level relating to the same matter,<sup>24</sup> which require a normative solution to possible conflicts;
- Competing regulations<sup>25</sup> where different regulation could become applicable to the same situations or facts;
- Enlargement of the scope of international law,<sup>26</sup> which is conducive to specialized regulations with even more disparate compliance mechanisms; and
- Different regimes of secondary rules.<sup>27</sup>

23. The existence of different mechanisms leads to a proliferation of dispute settlement mechanisms. See Hafner, *supra* note 8.

24. The best examples are the different conventions regarding the use of international watercourses such as the United Nations Convention on the Non-Navigational Use of International Watercourses of 1998, as opposed to the European Convention in international watercourses of 1972 elaborated by the ECE.

25. For example, the overlap among: United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 1954 U.N.T.S. 3; United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293.

26. See SALINAS ALCEGA, ADAPTABILIDAD Y FRAGMENTACION DEL DERECHO INTERNACIONAL: LA CRISIS DE LA SECTORIALIZACION 161, n.6 (1999); MALCOLM N. SHAW, INTERNATIONAL LAW 39 (1986); Paul-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U.J. INT'L L. & POL. 791 (1999); Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(2)(c) and "General Principles of Law,"* 5 DUKE J. COMP. & INT'L L. 35, 77 (1994-96).

27. See IAN BROWNLIE, STATE RESPONSIBILITY 1 (1983); Robert Jennings, *The Judicial Enforcement of International Obligations*, 47 Z. AUSL. ÖFF. RECHT VOLKERR. 3 (1987); G.M.



#### IV. THE EFFECTS OF FRAGMENTATION

##### A. *The Negative Effect: A Threat to the Reliability and Credibility of International Law*

The disintegration of the legal order jeopardizes the credibility, reliability, and, consequently, the authority of international law.

##### 1. Substantive Law (Primary Rules)

As far as substantive law (in the sense of primary rules) is concerned, we now face different regimes relating to the same issue. In this regard, legal regimes of a general nature compete with regimes of a more specific nature, requiring rules such as *lex specialis* to resolve contradictions.

Growing sectionalism and regionalism around the globe has led to the creation of new regional legal regimes, often more specific than global regimes, geographically and otherwise, and more general than national regimes. Such new legal regimes increase the opportunities for friction. Thus, sectionalism and regionalism are powerful agents of international cooperation but are not necessarily unmitigated blessings for the development of international law.<sup>28</sup>

As shown above, multiple sets of international regulations may apply to a given situation. This diversity of applicable regulations necessitates complex arguments about which regulation to apply, and may give rise to more conflicts than were solved by the creation of each individual legal regime.<sup>29</sup> Diversity of primary rules could address specific problems better than a few global, universal regimes, leading to increased attempts at compliance by States if they feel that compliance will actually achieve results. However, regardless of any positive as-

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White, *Legal Consequences of Wrongful Acts in International Economic Law*, 16 NETH. Y.B. INT'L L. 137, 172 (1985); Karl Zemanek, *The Unilateral Enforcement of International Obligations*, 47 Z. AUSL. ÖFF. RECHT VOLKERR. 32 (1987). Regarding the relationship between general international law and subsystems, see generally AXEL MARSCHIK, *SUBSYSTEME IM VÖLKERRECHT* (1997). The core of the dispute regarding "self-contained regimes" is whether case law may exclude the application of general secondary norms. See Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985); Max Sorensen, *Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organizations in the World Legal Order*, 32 INT'L & COMP. L.Q. 575 (1983).

28. See William Elliott Butler, *Regional and Sectional Diversities in International Law*, in *INTERNATIONAL LAW: TEACHING AND PRACTICE* 46 (Bin Cheng ed., 1982).

29. The most illustrative examples are presented by the question of whether human rights or humanitarian law applies to the activities of the United Nations. See, e.g., *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, U.N. Secretariat, 54th Sess., at 1-3, U.N. Doc. ST/SGB/1999/13 (1999); de Wet, *supra* note 9, at 8; Reinisch, *supra* note 19, at 854.

assessment of multiplicity, it inevitably risks conflicts of obligations incumbent on a State.

## 2. Secondary Rules

Fragmentation among the various regimes of international procedural law, regimes intended to ensure the observance of primary international law, is even more evident than fragmentation in primary international law. The focus of international law has moved away from the elaboration of substantive law of a general nature, and towards the creation of special regimes and methods of enforcement (dispute avoidance and dispute settlement mechanisms). Dispute settlement institutions have proliferated.<sup>30</sup> Unfortunately, major problems arise when a State could resort to different mechanisms of enforcement (ranging from dispute settlement to compliance mechanisms) in attempting to resolve one problem.

Each enforcement mechanism considers itself committed first of all to applying only its own system or subsystem of standards. Because most organs, in particular the treaty bodies, may only apply their own substantive law to disputes or situations brought before them (except, for instance, the ICJ), States may engage in forum shopping, resorting to the mechanism that corresponds best to their State interests.<sup>31</sup> Classical cases of such forum shopping include the *Matthews* case before the European Court of Human Rights,<sup>32</sup> the case of *Richard Waite and Terry Kennedy*

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30. See Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999); Hafner, *supra* note 8.

31. This term is used in the field of international private law. Cf. Roger M. Baron, *Child Custody Jurisdiction*, 38 S.D. L. REV. 479, 492 (1993); Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 96 (1992).

32. See *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361 (1999). This case dealt with the exclusion of Gibraltar from the franchise for the European parliamentary elections. The exclusion was based on EC legislation, but the applicant claimed that the exclusion breached Article 3 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." See *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, May 18, 1954, at <http://www.echr.coe.int/Convention/webConvenENG.pdf>. The Court declared that there was:

[N]o difference between European and domestic legislation, and no reason why the United Kingdom should not be required to "secure" the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be "secured" in respect of purely domestic legislation. In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the

before the same court,<sup>33</sup> and the *Tadic* and *Nicaragua* cases and the debate they sparked.<sup>34</sup>

Furthermore, a settlement reached by one organ will only resolve a dispute within that system and not necessarily for the purpose of another or the universal system. This fact could therefore undermine any tendency towards a homogeneous international law and system and could engender an additional uncertainty of the standards to be applied to a given case.

This fragmented nature of judicial activity is exacerbated by the lack of exchange of information between and among dispute settlement bodies. It is difficult for one institution to become acquainted with all the ramifications of the judicial reasoning of another body, in particular if the activity is not made public.

Thus the recent proliferation of secondary rules entails the risk of divergent solutions, which could undermine the authority and credibility of such institutions and of international law in general. While the system of secondary norms underlying the primary norms of international law does have a common core that helps define the normative nature of international law,<sup>35</sup> the diversity of the system tends to maintain or aggravate the disintegrated nature of international law and the international system as a whole.

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applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act.

*Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361, para. 34 (1999). For this reason, the court declared that the United Kingdom had breached its human rights obligations.

33. See *Waite v. Germany*, 6 Eur. Ct. H.R. 499, para. 73 (1999). In this case, the Court had to decide the human rights of staff members of an international organization. The Court came to the following conclusion:

Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German Courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of article 6 § 1."

*Id.* at para. 73.

34. The ICJ and the ICTY came to different conclusions on the legal effects of third party involvement (specifically third party control of paramilitary forces), on armed conflicts, and on the attributability of the use of force. *Cf. Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 64–65 (June 27); *Prosecutor v. Tadic*, 38 I.L.M. 1518, 1540–46 (Int'l Crim. Trib. for Former Yugo. 1999).

35. See *ALLEGA & ROBLES*, *supra* note 6, at 63.

### B. *The Positive Effect: Tailored Laws Are Worth Following*

Counterpoint to the preceding parade of drawbacks regarding the fragmentation of international law is the idea that fragmentation also reflects a growing specialization of international regulations and regimes. Specialization accommodates various needs and concerns of the States engaged in international law-making, and States perceive that their individual positions are better respected in these special regimes than in the global one. One may reasonably expect that, under such circumstances, States will be more induced to comply with these regulations and regimes.

Fragmentation reflects the necessity of offering different institutions with different structures, which permits people to resort to the institutions that is the best fit for a given dispute.<sup>36</sup> Special regulations can better accommodate the special needs of certain situations. For instance, dispute settlement mechanisms may be tailored according to the special circumstances, such as the International Law of the Sea Tribunal or the Court of Conciliation and Arbitration within the Organization for Security and Co-operation in Europe (OSCE).<sup>37</sup> The latter requires the conciliation commission to take into address specific commitments under the OSCE documents. Additional examples of such laboratories of international law are the so-called self-contained regimes, designed as such by the International Court of Justice in the *Hostages* case.<sup>38</sup>

A less-than-global approach seems particularly necessary when different States clearly hold different beliefs about what basic values should be preserved by international regulation. Illustration of these different perceptions need not refer to the clash of civilizations; the simple fact of reservations to human rights treaties suffices. Another example is in the attempt to regulate the combat of terrorism; it is far easier to find common ground for a regulation, particularly a regulation defining terrorism, within a region than in the universal context.<sup>39</sup> Such specialized regimes

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36. See Gerhard Hafner, *The Physiognomy of Disputes and the Appropriate Means to Resolve Them*, in INTERNATIONAL LAW AS A LANGUAGE FOR INTERNATIONAL RELATIONS 559 (1998).

37. See Gerhard Hafner, *Das Streitbeilegungsübereinkommen der KSZE: Cui bono?*, in VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT 115 (Konrad Ginther et al. eds., 1994).

38. See Diplomatic and Consular Staff (U.S. v. Iran), 1980 I.C.J. 4 (May 24); MARSCHIK, *supra* note 27, at 172; Axel Marschik, *Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*, 9 EUR. J. INT'L L. 212, 238 (1998); ALCEGA & ROBLES, *supra* note 6, at 131.

39. See Gerhard Hafner, *Certain Issues of the Work of the Sixth Committee of the 56th General Assembly in 2001*, 97 AM. J. INT'L L. 147, 157-58 (2003).

could even be used to progressively develop international law and serve as a precedent for a global regime.

Although problems inevitably result from the proliferation of special regimes and regulations, just as indubitable is the potential for positive effects on compliance with international law as well as on the stability and predictability of international relations.

## V. FURTHER PROBLEMS

### A. *The Problem of Lex Specialis*

Although the Vienna Convention of the Law of Treaties (VCLT) provides certain basic rules on the issue of priority when successive treaties relate to the same object, they may not be entirely satisfactory (e.g. the discussion of *lex specialis*).

Various solutions to the problem of conflicting treaty norms may be found in Articles 30, 40, 41 and 59 of the VCLT, and particularly in Article 30.<sup>40</sup> However, Article 30 reflects the general rule of *lex posterior*

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40. Article 30 reads:

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
  - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
  - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

*derogat priori*, not the principle of speciality<sup>41</sup> (*lex specialis derogat generali* or *in toto iure genus per speciem derogatur*). Furthermore, it is generally recognized that the VCLT does not offer a solution to the problem of conflicting obligations owed by one State to different other subjects of international law (e.g. if a State concludes two treaties with two different States and one treaty cannot be observed without a violation of the second). The only rules that clearly determine the priority of one regime are Article 103 Charter and norms of an imperative nature (as far as they could be defined).<sup>42</sup>

One possible way to solve the problem of priority is to include in treaties explicit provisions regulating the possible conflict with other treaties. This solution, however, suffers from at least two deficiencies. First, such a treaty provision will apply only if the States involved are parties to all relevant treaties. Second, most treaties already enacted do not include such clauses, and when treaties conflict and one or more lacks such a clause, the precise legal relationship or priority of the treaties will be unclear.

In light of the growing integration of the world community (“globalization”) on the one hand, and the proliferation of subsystems on the other, the need to take measures to ensure the unity of the international legal order will increase.

## VI. PRESENT WORK ON THIS ISSUE

This particular problem does not lend itself to a solution through regulation; at least not yet. Several authors refer to the possibility of endowing the ICJ with some sort of monitoring authority in order to ensure the coherence and harmony of the international legal order.<sup>43</sup> Such an approach would bring the international legal order closer to an authoritative legal system with public law elements than it is now. Seen in this perspective, the ICJ would become a central legal authority with the power to review decisions of other international tribunals. The ICJ, however, does not yet possess this competence, other tribunals have more specialized

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41. It is particularly for this reason that one of the issues that the Working Group on Fragmentation in the ILC will discuss is the issue of the function and scope of the *lex specialis* rule and the question of “self-contained regimes.” See *Report of the International Law Commission*, U.N. GAOR, 54th Sess., Suppl. 10, at 241, U.N. Doc. A/57/10 (2002).

42. See *id.* This issue will be discussed under the title: *Hierarchy in international law: jus cogens, obligations erga omnes, and Article 103 of the Charter of the United Nations as conflict rules.*

43. On the question of whether the judicial function should be centralized, see Rosalyn Higgins, Presentation of the Topic, in *Proceedings of the United Nations Congress of Public International Law*, in *INTERNATIONAL LAW AS A LANGUAGE FOR INTERNATIONAL RELATIONS* 111 (1998).

competences, and installing the ICJ as a central legal authority would only produce harmony in international law *ex post*, i.e. after a conflict has already arisen.

The ILC has begun work on this topic, first under the chairmanship of Judge Simma, then, after his election as judge of the ICJ, under Judge Koskenniemi. The working group has issued a preliminary report entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law." In it, the working group proposed to deal first with the following items:

- The function and scope of the *lex specialis* rule and the question of "self-contained regimes;"
- 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 contemporary concerns of the community of nations;
- The application of successive treaties relating to the same subject matter (Article 30 of the Vienna Convention on the Law of Treaties);
- The modifications of multilateral treaties between certain of the parties only (Article 41 of the Vienna Convention on the Law of Treaties);
- Hierarchy in treaty law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.<sup>44</sup>

## VII. CONCLUSIONS

Although the discussion of the fragmentation of international law has only just begun, it has already engaged many different groups and bodies. What can be derived from the discussion is the following:

- International law is not a homogeneous body;
- The problem of diversification arises with relation to primary and secondary rules;
- Fragmentation reflects the present multilayer situation of international law (including the emancipation of the individuals),

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44. See Report of the International Law Commission, *supra*, note 41, at 241.

may induce States to comply with international law more rigorously, and may contribute to a progressive development of international law, but

- Fragmentation also creates problems.

There is no one single solution to the problem of conflict among the fragments of international law. Different solutions are needed for primary rules and for secondary rules, in particular in designing mechanisms of conflict avoidance and conflict solution. Although the international legal system already provides certain solutions to the problems discussed above, only when the international community is made fully aware of such problems can the disintegrative effect of fragmentation be eliminated.