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

Report of the Study Group of the International Law Commission

Addendum

Appendix

Draft conclusions of the work of the Study Group

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A. INTRODUCTION

1. At its fifty-fourth session (2002), the International Law Commission established a Study Group to examine the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[1] At its fifty-fifth session (2003), the Commission adopted a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003-2006) and allocated to five of its members the task of preparing outlines on the following topics:

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

(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 (Mr. Mansfield);

(c) The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties) (Mr. Melescanu);

(d) The modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties) (Mr. Daoudi); and

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

2. During its fifty-sixth (2004) and fifty-seventh session (2005), the Study Group received a number of outlines and studies on these topics. It affirmed that it was its intention to prepare, as the substantive outcome of its work, a single collective document consisting of two parts. One would be a "relatively large analytical study" that would summarize the content of the various individual reports and the discussions of the Study Group. This is the bulk of the Report

[1] *Report of the International Law Commission of its Fifty-fourth Session, Supplement No. 10* (A/57/10), chap. IX.A, paras. 492-494.

prepared by the Chairman in 2006. The other part would be "a condensed set of conclusions, guidelines or principles emerging from the studies and discussions in the Study Group".[2] As the Study Group itself held, and the Commission endorsed, these should be "a concrete, practice-oriented set of brief statements that would work, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help thinking about and dealing with the issue of fragmentation in legal practice".[3]

3. This Appendix sets out a draft for those "conclusions, guidelines, or principles". The draft reproduces the result of the extensive deliberations the Study Group had undertaken in 2004 and 2005. They are a collective product by the members of the Study Group.

4. It should be noted, however, that:

(a) Only the formulation of conclusions 1-23, based on the studies referred to in paragraphs (a)-(c) above, have been so far provisionally agreed to by the Study Group;

(b) Draft conclusions 24-32, dealing with the topic (d) above under the general title of "Conflicts between successive norms" have been neither been neither presented to nor discussed in the Study Group. They have been formulated by the Chairman as a proposal to be discussed during the fifty-eighth session (2006);

(c) Draft conclusions 33-43 are based on the report referred to in paragraph (e) above. They were distributed to the Study Group in 2005 but have not been subjected to in-depth discussion. It is proposed that they be discussed and adopted in the course of the finalization of the Study Group's work during the Commission's fifty-eighth session in 2006.

5. The Chairman of the Study Group wishes to reproduce all the draft conclusions below. The suggestion is that the conclusions would be adopted by the Study Group and submitted to the Commission for appropriate action.

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[2] Ibid., *Official Records, Sixtieth Session, Supplement No. 10* (A/60/10), p. 207 (para. 448).

[3] Ibid.

B. DRAFT CONCLUSIONS OF THE WORK OF THE STUDY GROUP ON "FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

1. General

1. *International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.

2. In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[4] For that purpose the relevant relationships fall into two general types:

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

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

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

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

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

2. The maxim *lex specialis derogat lege generali*

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

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

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

8. *Dispositive nature of most international law*. Most of international law is dispositive. This means both that it may be applied, clarified, updated or modified as well as be set aside by special law.

9. *The effect of lex specialis on general law*. The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and

applicable and will, in accordance with the principle of harmonization under paragraph 4 above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.

10. *Non-derogability*. Certain types of general law[5] may not, however, be derogated from by special law. *Jus cogens* is expressly non-derogable. Other considerations that may provide a reason for concluding that a general law is non-derogable include the following:

- Whether the general law was intended to be non-derogable;
- Whether non-derogability may be inferred from the form or the nature of the general law;
- Whether derogation might frustrate the *purpose* of the general law;
- Whether third party beneficiaries may be negatively affected by derogation; and
- Whether the balance of rights and obligations, established in the general law would be negatively affected by derogation.

A norm that purports to set aside or derogate from a norm that is non-derogable will be invalid.

3. Special (self-contained) regimes

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

[5] [The notion of "general law" may need to be yet clarified.]

12. Three types of special regime may be distinguished:

- Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the ILC's Draft Articles on State Responsibility.

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

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

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

14. *The relationship between special regimes and general international law*. A special regime may derogate from general law under the same conditions as *lex specialis* generally (see paragraphs 6 and 8 above).

15. *The role of general law in Special regimes I: Gap-filling*. The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will be applicable.

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

4. Article 31 (3) (c) VCLT

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

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

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

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

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

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

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

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

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

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

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

22. *Inter-temporality*. International law is a dynamic legal system. Whether in applying article 31 (3) (c) the interpreter should refer to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law depends generally on the meaning of the treaty, as ascertained on the basis of articles 31 and 32 VCLT.

However, the meaning of a treaty provision may also be affected by subsequent developments irrespective of the original will of the parties, especially where these subsequent developments are reflected in customary law and general principles of law.

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

5. Conflicts between successive norms

24. *The basic rule*. The question of successive treaty norms covering the same subject matter is dealt with by article 30 VCLT.

25. *Lex posterior derogat lege priori*. According to article 30 (3) VCLT, when all the parties to the later treaty are also parties to the earlier treaty, and the earlier treaty is not suspended or terminated, then it applies only to the extent its provisions are compatible with those of the later treaty. This is an expression of the principle according to which "later law supersedes earlier law". The same principle is also expressed in the way treaties generally speaking enjoy priority to earlier customary law.

26. *Limits of the "lex posterior" principle*. The applicability of the *lex posterior* principle is, however, limited. It cannot, for example, be automatically extended to the case where the parties to the subsequent treaty are not identical to the parties of the earlier treaty. In such cases, as provided in article 30 (4) VCLT, the State that is party to two incompatible treaties is bound vis-à-vis both of its treaty parties separately. In case it cannot fulfil its obligations under both treaties, it will remain responsible for its violation of one of them. In such case, also article 60 VCLT may become applicable. The question which of the incompatible treaties should be implemented and the breach of which should be sanctioned by State responsibility cannot be answered by a general rule.

27. *The distinction between treaty provisions that belong to the same "regime" and provisions in different "regimes"*. The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives. This is typically the case of the relationship between "framework treaties" and "implementation treaties". In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time cannot be taken to express any intrinsic priority between them.

28. *Mutual accommodation and protection of rights*. In case of conflicting or overlapping treaties within different "regimes", both of the treaties should be implemented as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization. This applies above all to the procedural provisions in such treaties and to provisions set up in implementation programmes and schedules. However, this may not lead to undermining the substantive rights of treaty parties or third party beneficiaries. The violation of rights entails State responsibility.

29. *The case of special treaties*. Some treaty provisions enjoy a special normative character so that they shall prevail irrespective of whether they are earlier or later in time. These include:

(a) Provisions of the United Nations Charter;

(b) Provisions embodying *jus cogens;*

(c) Provisions that otherwise might be understood as non-derogable because they were so intended, because non-derogability may be inferred from their nature or from the object and purpose of the treaty or for any other reason referred to in paragraph 10 above.

30. *Settlement of disputes within and across regimes*. Questions regarding priority between conflicting treaty provisions should be resolved by negotiation between parties to the relevant treaties. However, when no negotiated solution is available, recourse ought to be had to mechanisms of dispute settlement. When the conflict concerns provisions within a single regime (as defined in paragraph 4 above), then its resolution may be appropriate in the regime-specific

mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, then care should be taken to guarantee that the dispute settlement body is independent from both of the regimes.

31. *Inter se agreements*. The case of agreements to modify multilateral treaties by certain of the parties only (*inter se* agreements) is covered by article 41 VCLT. Such agreements are an often used technique for the more effective implementation of the original treaty between a limited number of treaty parties that are willing to take more effective or more far-reaching measures for the realization of the object and purpose of the original treaty. *Inter se* agreements may be concluded if this is provided for by the original treaty or it is not specifically prohibited and it "(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole" (article 40 (1)).

32. *Conflict clauses*. It is advisable that when States enter into treaties that might conflict with other treaties, they settle the relationship between such treaties by adopting appropriate clauses in the treaties themselves. When adopting such clauses, it should be borne in mind that:

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

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

(c) For this purpose, they should not be open-ended or otherwise such that it is unclear what, in fact, the obligations parties have undertaken are;

(d) They should be linked with appropriate dispute settlement mechanisms.

6. Hierarchy in international law: *Jus cogens*, Obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules

33. *Hierarchical relations between norms of international law*. The sources of international law (treaties, custom, general principles of law) are not in a hierarchical relationship *inter se*.

Drawing analogies from the hierarchical nature of domestic legal system is not generally appropriate owing to the absence of a well-developed or authoritative hierarchy of values in international law. Nevertheless, some rules of international law are more important than other rules and for this reason enjoy a superior position or special status in the international legal system. This is sometimes expressed by the designation of some norms as "fundamental" or some breaches as "grave". What effect such designations may have is usually determined by the relevant instrument in which that designation appears.

34. *Recognized hierarchical relations by the substance of the rules I: jus cogens*. A rule of international law may be superior to other rules on account of its content. This is the case of peremptory norms of international law (*jus cogens*, article 53 VCLT), that is, norms "accepted and recognized by the international community as a whole from which no derogation is permitted".

35. *The content of jus cogens*. Accepted rules of *jus cogens* include rules prohibiting genocide and torture as well as rules protecting the basic rights of the human person. The right of self-determination as well as the prohibition of the use of force are likewise rules of *jus cogens*. Also other rules may have a *jus cogens* character inasmuch as they are "accepted and recognized by the international community as a whole".

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

37. *Rules recognized by their scope of application*: *Obligations erga omnes* and the United Nations Charter. Some norms enjoy a special status owing to their scope of applicability. This is the case of obligations *erga omnes*, that is obligations of a State towards the international community as a whole. These rules concern all States and all States can be held to have a legal

interest in their protection. Every State may invoke the responsibility of the State violating such norms. It is also recognized that the United Nations Charter itself enjoys special status owing to its virtually universal acceptance.

38. *The content of obligations erga omnes.* Accepted *erga omnes* norms include rules concerning diplomatic relations … [See State responsibility.] Likewise the right of peoples to self-determination and the rights and duties enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide …

39. *The relationship between jus cogens norms and obligations erga omnes.* It is recognized that while all *jus cogens* norms also have the character of *erga omnes* obligations, the reverse is not necessarily true. Not all *erga omnes* obligations have the character of peremptory rules of international law.

40. *The scope of Article 103 of the Charter*. Article 103 of the United Nations Charter provides for the priority on the obligations under the Charter not only vis-à-vis "any other international agreement" but also customary international law. The scope of Article 103 reaches not only to the Articles of the Charter but also to binding decisions made by United Nations bodies such as the Security Council or the International Court of Justice.

41. *The relationship between hierarchy and fragmentation*. The purpose of normative hierarchies is to resolve conflicts between rules of international law by indicating which rule is to prevail in case of conflict. A hierarchy between two rules or norms operates in a relational and not fixed fashion. If there is a conflict between two hierarchically superior norms such as *jus cogens* and Article 103 of the Charter, their relationship can only be determined in a contextual fashion bearing in mind, inter alia, the principle of harmonization, that is, that in the event of a prima facie conflict, the two norms should be interpreted as compatible.

42. *The operation and effect of jus cogens norms and Article 103 of the Charter*:

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

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

43. *The principle of harmonization*. Irrespective of the special status or the designation ("fundamental") enjoyed by some norms, conflicts between rules of international law should be resolved in accordance with the principle of harmonization, that is, by bearing in mind that in the event of a conflict, the norms should be interpreted as compatible to the extent possible. Hierarchical relations appear often in the context of other conflict-resolution rules such as those in articles 30 (1), 31 (3) (c) and article 41 VCLT or in applying the *lex specialis* or *lex posterior* principles.
