Introduction

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It has been observed that 'much of the action in international law [has] shifted to specialized regimes'.[1] Indeed, 'international law has evolved into an elaborate, but fragmented, structure':[2] what was once regulated by 'public international law' is now governed by specialist systems such as, for instance, 'international humanitarian law', 'international environmental law', 'diplomatic law', 'human rights law', 'European Union law', 'the law of the World Trade Organization (WTO)'. Such regimes 'emerge from the informal activity of lawyers, diplomats, pressure groups, more through shifts in legal culture and in response to practical needs of specialization than as conscious acts of regime-creation'.[3] This fragmentation of international law has met with increasing academic interest and, often, concern. As observed in the Report of the International Law Commission (ILC)'s Study Group on the Fragmentation of International Law, fragmentation entails the risk of conflicting and incompatible rules, principles and institutions as between the general and specialized systems and between the specialized systems.[4]

The specialization of legal sources and processes and their adaptation to the needs of regulation of different areas of societal interaction is not a

[1] D. Bodansky and J. R. Cook, 'Introduction and Overview to Symposium: The ILC's State Responsibility Articles', *American Journal of International Law*, 96 (2002), 774.

[2] B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', *European Journal of International Law*, 17 (2006), 485.

[3] 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, p. 84 (hereinafter ILC Report). As it has been observed, 'the history of fragmentation is also a story of professional specialization': A.-C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', *Leiden Journal of International Law*, 22 (2009), 2.

[4] ILC Report, para. 14. The report was completed by the Chairman, Martti Koskenniemi, in April 2006 and is accompanied by forty-two conclusions. http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf.

phenomenon exclusively witnessed in international law. Indeed, it is a phenomenon which has long been observed and considered in domestic legal systems.[5] As Gunther Teubner and Andreas Fischer-Lescano persuasively argue, fragmentation and the appearance of subject-specific specialized regimes in any legal system are not primarily legal phenomena. Rather, they are essentially social phenomena which are only reflected epiphenomenally in the law.[6] Special regimes tend to evolve organically, through the efforts of communities of experts both inside and outside of state governments. These expert communities identify areas of social and political interaction they perceive to be in need of articulated and particularized regulation through legal sources. Different subject areas of such interaction will also frequently be perceived as implicating differing sets of political or other values and principles which should underpin and order the legal sources applicable to them. Vaughan Lowe has very usefully identified these extra-legal principles which 'direct the manner in which competing or conflicting norms . . . should interact in practice' as 'interstitial norms'.[7] By reference to these interstitial norms reflecting the values specific to the issue area, special rules emerge through both formal (hard law) and informal (soft law) legal sources. In many cases, special dispute settlement forums are also created for the substantive rules.

Special regimes, then, are designed better to take into account the peculiarities of the specific subject area involved and are generally perceived to regulate the area of social/political interaction more effectively than general international law.[8] However, in so doing, the formal and informal rules of special regimes, underpinned by their interstitial norms, will often come into conflict both with general international legal rules, procedures and principles, as well as with the rules, procedures and principles of other special regimes.

Again, the phenomena of legal fragmentation and the emergence of special legal regimes are ones common to domestic legal systems as well.

[5] R. Dworkin, 'Hard Cases', *Harvard Law Review*, 88 (1975), 1057, repr. in R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978); F. W. Maitland, 'A Prologue to a History of English Law', *Law Quarterly Review*, 14 (1898), 13.

[6] G. Teubner and A. Fischer-Lescano, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, 25 (2004), 1999.

[7] V. Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2000), pp. 207, 216.

[8] M. Koskenniemi and P. Leino, 'Fragmentation of International Law?: Postmodern Anxieties', *Leiden Journal of International Law*, 15 (2002), 553–579.

One need only look to the first-year curriculum of a law school to see the special substantive rules, procedures and principles present in the law of contract, the law of tort, the law of property, constitutional law, administrative law and criminal law. The material difference between domestic legal systems and the international legal system in terms of the manner in which they deal with this phenomenon is to be found in the lack of both substantive and procedural hierarchies in international law, which do typically exist in domestic law, to bring both procedural and substantive unity to the legal system.[9]

In international law, however, there are a number of legal tools, discussed at length in the ILC Study Group Report and elsewhere, for dealing with the phenomenon of fragmentation and preserving a sense of unity and wholeness in the international legal system. As the Report concludes:

> [o]ne principal conclusion of this report has been that the emergence of special treaty-regimes . . . has not seriously undermined legal security, predictability or the equality of legal subjects. The techniques of *lex specialis* and *lex posterior*, of *inter se* agreements and of the superior position given to peremptory norms and the (so far under-elaborated) notion of 'obligations owed to the international community as a whole' provide a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems.[10]

The ILC Report thus argues that international law currently possesses instruments which can serve in most cases to resolve conflicts, both as between special regimes and general international law and as between different special regimes. Similarly, a 1995 Study concludes that 'on balance, the relative autonomy of special fields has been used by different actors involved, as far as the secondary rules are concerned, in a way which, at the same time, promoted and guaranteed the growing effectiveness of their own particular set of primary rules, *without putting in jeopardy the unity or coherence of the international legal order*'.[11] One

[9] ILC Report, para. 26: 'Conflicts between rules are a phenomenon in every legal order. Every legal order is also familiar with ways to deal with them. Maxims such as *lex specialis* or *lex posterior* are known to most legal systems, and . . . to international law. Domestic legal orders also have robust hierarchical relations between rules and rule-systems (in addition to hierarchical institutions to decide rule-conflicts). In international law, however, . . . there are much fewer and much less robust hierarchies.'

[10] ILC Report, para. 492 (emphasis in original).

[11] K. C. Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends', in L. A. N. M. Barnhoorn and K. C. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (The Hague: Martinus Nijhoff Publishers, 1995), p. 28 (emphasis added).

might share this conclusion or not. To a large extent, the answer to the question whether fragmentation is a 'beneficial antioxidant'[12] or a threat to the systemic unity of international law rests on the perspective that is adopted: to borrow a famous metaphor, '[d]epending on whether we choose a universalistic or a particularistic perspective, whether we first see the universe or the planets, the analysis tends to yield different results'.[13]

The doctrine of fragmentation is based on the existence of 'special' (or 'specialized') regimes.[14] A 'regime' is a system of interrelated norms addressing some problem. In a broader sense, such a system might comprise an entire substantive area of international law (e.g., international human rights law, international humanitarian law), while in a narrower sense it could be limited to a particular treaty or to certain provisions contained within a particular treaty. The latter might, however, better be seen as a special regime within a special regime, or, to borrow Riphagen's language, as a 'sub-system'.[15]

'Special' means 'not general': it does not necessarily entail uniqueness but implies a diversity from, yet also a common systemic nature with, general rules. We see special regimes essentially as a form of *lex specialis*. Different types of *leges speciales* can be identified according to (a) their special subject-matter, i.e., their primary rules (e.g., international humanitarian law with respect to international human rights law in situations of armed conflict);[16] (b) their special secondary rules, i.e., rules administering primary rules (e.g., the 'special rules' referred to in Article 55 of the 2001 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles)); or (c) the limited number of subjects addressed by the rules (e.g., regional treaties).

[12] M. Craven, 'Unity, Diversity and the Fragmentation of International Law', *Finnish Yearbook of International Law*, 14 (2003), 4–5.
[13] Simma and Pulkowski, 'Of Planets and the Universe', 506.
[14] The expression 'special regime' was first used by the Special Rapporteur Roberto Ago in his Fifth Report on State Responsibility (UN Doc. A/CN.4/291 and Adds. 1 and 2). It was then used by the Special Rapporteur Willem Riphagen (Fourth Report, UN Doc. A/CN.4/366 and Add. 1 and Add. 1/Corr. 1, para. 127), who, however, also used other expressions, such as 'objective regimes' and 'peremptory subsystems'.
[15] Third Report on the Content, Forms and Degrees of International Responsibility (Pt. II of the Draft Articles), UN Doc. A/CN.4/354 and Corr. 1 and Adds. 1 and 2, para. 35.
[16] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 25.

'Special regimes', in a technical sense, then, are only those forms of *lex specialis* where special primary rules on a certain subject-matter are supplemented by secondary rules specific to the regime in question.[17] Special secondary rules aim at enhancing the efficacy of primary rules and are often accompanied by functionally specialized institutions that contribute to the administration of the special rules, such as, in non-proliferation law: the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), the International Atomic Energy Agency (IAEA), the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Organismo para la Proscripción de las Armas Nucleares en la América Latina y el Caribe (OPANAL)) and the Organization for the Prohibition of Chemical Weapons (OPCW).

Our definition of 'special regime' includes both the first and second notions identified in the ILC Study Group Report, i.e., 'a special set of secondary rules that determine the consequences of a breach of certain primary rules (including the procedures of such determination)' and 'any interrelated cluster (set, regime, subsystem) of rules on a limited problem together with the rules for the creation, interpretation, application, modification, or termination – in a word, administration – of those rules'.[18] There is, however, a difference. The ILC Report seems to suggest that only the rules on state responsibility are secondary rules, while those on the creation, interpretation, application, modification or termination of rules are primary ones.[19] In his famous article on self-contained regimes, Simma also adopts a definition of 'self-contained regime' based on a narrow notion of secondary rules, i.e., 'a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of countermeasures normally at the disposal of an injured party'.[20]

[17] Approaching the matter from the opposite perspective, that of unity, Dupuy distinguishes between the formal unity of the international legal order, based on the identity of secondary rules whatever the content of primary rules, and substantial unity, based on a set of unifying primary rules of customary nature, some of which even attain a peremptory status: P.-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', *New York University Journal of International Law and Politics*, 31 (1998–1999), 793–795.

[18] ILC Report, p. 81. [19] *Ibid.* See also the ILC Study Group conclusions, para. 12.

[20] B. Simma, 'Self-Contained Regimes', *Netherlands Yearbook of International Law*, 16 (1985), 117.

The identification of secondary rules with the law of state responsibility in the debate on special/self-contained regimes, accepted almost as a dogma by several commentators,[21] probably originates from the fact that the perspective from which the issue was approached was that of determining whether special regimes affected the right of the parties to take countermeasures under general international law.[22] This narrow approach, however, does not fully take into account what secondary rules are about.

In his *The Concept of Law*, Hart famously distinguished between primary and secondary rules. Although they have features in common, secondary rules differ from primary rules in that

> they are all about such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.[23]

Such secondary rules can be classified into 'rules of recognition' (those that lead to the identification of the primary rules containing obligations and regulate possible conflicts), 'rules of change' (specifying how new primary rules are introduced) and 'rules of adjudication' (regulating the consequences of the violation of primary rules).[24] Whereas a primitive social structure is characterized by primary rules only, more

[21] For a different view, see A. Marschik, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System', *European Journal of International Law*, 9 (1998), 212: 'Regimes of international law which combine certain primary norms with a distinct set of secondary norms designed to ensure the operation of those primary norms have since been termed "subsystems" of international law', where 'secondary norms' are those that 'regulate the primary rules: creation, modification, extinction, interpretation and operation'. See also J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2003), p. 159.

[22] It has, however, been doubted that certain rules contained in the Articles on State Responsibility, in particular those on circumstances precluding wrongfulness, are secondary rules. See E. David, 'Primary and Secondary Rules', in J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility* (Oxford University Press, 2010), pp. 29–33. This author argues that '[t]he so-called secondary rules may become primary rules and vice-versa: the implementation of responsibility through mechanisms for dispute settlement refers to rules of conduct, and therefore primary rules, which are no less secondary rules, given that they are triggered by the violation of primary rules' (*ibid.* 32).

[23] H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford University Press, 1994), p. 94.

[24] *Ibid.* 94–97.

sophisticated legal systems supplement the primary rules with secondary rules.[25] While acknowledging that '[p]erhaps international law is at present in a stage of transition ... which would bring it nearer in structure to a municipal system',[26] Hart eventually concludes that, in the absence of a legislature, courts with compulsory jurisdiction and organized sanctions, international law is similar to primitive societies, as it lacks rules of recognition, change and adjudication.[27]

Pierre-Marie Dupuy has, however, persuasively argued that international law is indeed provided with secondary rules.[28] In particular, Hart's secondary rules correspond, in the international legal order, to the rules on sources, responsibility and dispute settlement.[29] Not only the law of state responsibility, then, is of secondary nature, but also the law of treaties, which contains rules of recognition and rules of change[30] and also rules that determine certain consequences of wrongful acts.[31] This is implicitly confirmed by Article 56 of the Articles on State Responsibility, where it states that '[t]he applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles'. According to its Commentary, Article 56 has to be interpreted in the sense that the Articles on State Responsibility 'are not concerned

[25] *Ibid.* 91–94. [26] *Ibid.* 236.

[27] For Hart, then, international law is 'not "binding", and so not worth the title of "law"' (*ibid.* 214).

[28] P.-M. Dupuy, 'The Danger of Fragmentation', 793.

[29] Wellens, 'Diversity in Secondary Rules and the Unity of International Law', p. 8. Dupuy qualifies 'rules of international responsibility for wrongful acts' and rules that 'establish the conditions under which an injured State may have recourse to countermeasures' as 'norms of adjudication'. P.-M. Dupuy, 'The Danger of Fragmentation', 793.

[30] In the *Gabčíkovo-Nagymaros* case, the ICJ noted that the law of treaties determines 'whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced'. *Gabčíkovo-Nagymaros Project* (*Hungary* v. *Slovakia*), ICJ Reports 1997, para. 47.

[31] J. Verhoeven, 'The Law of State Responsibility and the Law of Treaties', in Crawford, Pellet and Olleson, *Law of International Responsibility*, p. 108. The author refers in particular to Arts. 49–52, 60 and, to the extent that they prevent the state responsible for the impossibility or the change of circumstances from invoking them as a ground for terminating its participation in the treaty, 61–62 of the 1969 Vienna Convention on the Law of Treaties. Verhoeven also notes that the ICJ's conclusion in para. 47 of the *Gabčíkovo-Nagymaros* judgment that the law of treaties and the law of state responsibility have distinct scopes 'does not preclude certain consequences of wrongful acts being drawn from the law of treaties, principally the invalidation or termination of certain engagements' (*ibid.*).

with any legal effects of a breach of an international obligation which . . . stem from the law of treaties or other areas of law.'[32]

The degree of 'specialness' of a special regime can of course vary. It could go from departure from general secondary rules (as intended above) on only one aspect to total replacement of such rules. Simma and Pulkowski note that, for the universalists, there is a presumption against the total exclusion of general rules, while for the particularists, rules outside the special regime can be resorted to only exceptionally.[33] Qualifying regimes replacing a single or few provisions of the general secondary rules as 'weak' and those excluding the application of secondary rules *in toto* as 'strong', as the two authors do, is, however, misleading:[34] the two types of regimes do not have different legal force but are, quite simply, more or less special. In any case, '[i]t is in the nature of "general law to apply generally" – namely inasmuch as it has not been specifically excluded'.[35] Contracting out of general rules might be explicit (by expressly stating that the special rules derogate from general international law) or result implicitly from an interpretation of the treaty in the light of its object and purpose.[36] There is of course some circularity: the special secondary rules have to be interpreted according to the general secondary rules on interpretation in order to ascertain whether they are intended as special, that is, as replacing the general ones, and whether general international law allows derogation.[37] This is so unless specific rules on interpretation are provided in the special regime.[38]

Special regimes are often confused with so-called 'self-contained regimes'. The expression was first used by the Permanent Court of

[32] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), p. 309. The examples given in the Commentary are Arts. 52, 62 (2) (b) and 60 (1) of the 1969 Vienna Convention on the Law of Treaties.

[33] Simma and Pulkowski, 'Of Planets and the Universe', 501.

[34] *Ibid.* 490–491. The distinction between 'strong' and 'weak' forms of *lex specialis* is also contained in the Commentary to Art. 55 of the ILC Articles on State Responsibility. Crawford, *International Law Commission's Articles on State Responsibility*, p. 308.

[35] ILC Report, p. 96.

[36] Pauwelyn, *Conflict of Norms in Public International Law*, pp. 215–218.

[37] Several provisions of the 1969 Vienna Convention on the Law of Treaties are dispositive (see *ibid.* 392) and Art. 55 of the ILC Articles on State Responsibility provides that the Articles 'do not apply when 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'.

[38] The possible existence of special rules on the interpretation of non-proliferation law is discussed by Nigel White in Chapter 3.

International Justice (PCIJ) in the *S.S Wimbledon* case with regard to the relationship between two sets of primary rules.[39] The International Court of Justice (ICJ) employed it in the context of the remedies available for violations of the law of diplomatic relations.[40] The International Criminal Tribunal for the former Yugoslavia (ICTY) also noted that '[i]n international law, every tribunal is a self-contained system (unless otherwise provided)', without specifying what 'self-contained' means.[41] An accurate definition of 'self-contained regime' sees it as an extreme case of special regimes where *all* secondary rules are special *and* totally exclude any fall-back on general rules. It has been correctly argued that no special system in existence today is 'self-contained' and thus fully isolated from general international law.[42] Indeed, there is a difference between a far-reaching special regime, that is, a regime with a high number of special secondary rules, and a 'self-contained' regime which excludes any fall-back on general international law.[43] If the former are rare,[44] the latter do not exist: they are 'a phantom with no legal basis in international law, a notion which, despite its persistent appearance in jurisprudential debate, is best confined to the lively world of myth and fable'.[45] The ICJ itself did not intend the expression 'self-contained

[39] *S. S. Wimbledon*, 1923 PCIJ, Ser. A, No. 1, 23–24. The Court had to establish whether the general provisions on German waterways contained in the 1919 Versailles Peace Treaty also applied to the Kiel Canal in spite of the existence of specific provisions in the same treaty on that canal.

[40] *US Diplomatic and Consular Staff in Teheran* (*US* v. *Iran*), Judgment of 24 May 1980, ICJ Reports 1980, para. 86. According to the Court, '[t]he rules of diplomatic law ... constitute a self-contained regime which, on the one hand, lays down the receiving State's obligation regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious.' See also *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *US*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, paras. 267–268 (with regard to human rights law, but without using the expression 'self-contained regime').

[41] *Prosecutor* v. *Tadić*, Case No. IT-94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 11.

[42] See, e.g., ILC Report, para. 91; Simma and Pulkowski, 'Of Planets and the Universe', 492; G. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', *New York University Journal of International Law and Politics*, 31 (1998–1999), 926.

[43] Indeed, 'contracting out of *some* rules of international law does not mean contracting out of *all* of them, let alone contracting out of the system of international law'. Pauwelyn, *Conflict of Norms in Public International Law*, p. 40.

[44] An example is EU Law.

[45] A. Lindroos and M. Mehling, 'Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO', *European Journal of International Law*, 16 (2005), 877.

regime' to exclude any resort to general international law, but rather to emphasize that the remedies for violations of diplomatic law are those available under diplomatic law itself when they are 'entirely efficacious', without, however, ruling out the general remedies in case they are not.[46]

General international law then continues to apply, without a need for an explicit *renvoi*, from at least three points of view.[47] First, special regimes imply general notions such as 'statehood', 'jurisdiction', 'state succession', 'immunities', etc., the meaning of which is determined by general rules. Second, general international law would also apply to all substantial and procedural aspects not regulated by the special regime.[48] Finally, fall-back on general law would occur whenever the special regime fails, e.g., when it is violated by the parties and the remedies provided therein are not efficacious or when the regime institutions do not function as they were supposed to.[49]

The question that this book will address, then, is not whether non-proliferation law is a self-contained regime in 'splendid isolation'[50] from general international law, but rather whether it is a special regime containing specific secondary rules and principles that differ from rules and principles of general international law and with those of other special regimes. The point is one of degree, that is, how much of the non-proliferation regime is special: this could go from one to, at least in theory, all its secondary rules. But, as noted above, in neither case would fall-back on general international law be entirely ruled out.

As already noted, whenever a special regime, however limited, comes to existence, a potential normative conflict arises. The ILC Conclusions define a normative conflict as 'the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them'.[51] The maxim *lex specialis derogat legi*

[46] *US Diplomatic and Consular Staff in Teheran*, para. 86.
[47] See ILC Report, pp. 92 ff.
[48] See, for instance, the Iran–US Claims Tribunal: '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 law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.' *Amoco Int. Finance Corp.* v. *Iran* (1987), 15 Iran–US CTR 189, para. 112.
[49] ILC Report, p. 98. The failure might be substantive (if the regime fails to achieve its purpose) or procedural (if, for instance, reparation was envisaged but has not been secured through the regime mechanisms).
[50] Simma and Pulkowski, 'Of Planets and the Universe', 492.
[51] ILC Conclusions, para. 2.