CONFLICT OF NORMS IN A FRAGMENTED INTERNATIONAL LEGAL SYSTEM: A CRITICAL ANALYSIS

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DECLARATION

I declare that the dissertation entitled "*Conflict of Norms in a Fragmented International Legal System: A Critical Analysis*" submitted by me for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other University.

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ABBREVIATIONS

AA	-	WTO Agreement on Agriculture
AB	-	WTO Appellate Body
ACHR	-	African Convention on Human and Peoples' Rights
ASEAN	-	Association of Southeast Asian Nations
ATC Agreement	-	WTO Agreement on Textiles and Clothing
ATCA	-	Alien Torts Claims Act
BH	-	Bosnia and Herzegovina
BITs	-	Bilateral Investment Treaties
CACJ	-	Central American Court of Justice
CAFTA	-	Central America Free Trade Agreement
CARICOM	-	Caribbean Community (Caribbean Common Market)
CBD	-	Convention on the Biological Diversity
CCSBT	-	Convention for the Conservation of Southern Bluefin Tuna
CERDS	-	Charter of Economic Rights and Duties of States
CFC	-	Chlorofluorocarbons
CFI	-	Court of First Instance
CIC	-	Centre for International Co-operation
CIEL	-	Centre for International Environmental Law
CITES	-	Convention on International Trade in Endangered Species
COP	-	Conference of Parties
CSD	-	Commission on Sustainable Development
CTBT	-	Comprehensive Test Ban Treaty
CU	-	Customs Union
DSB	-	WTO Dispute Settlement Body
DSS	-	WTO Dispute Settlement System
DSU	-	WTO Dispute Settlement Understanding
EC	-	European Community
ECHR	-	European Court of Human Rights
ECHR	-	European Convention on Human Rights

ECJ	-	European Court of Justice
EEZ	-	Exclusive Economic Zone
EU	-	European Union
FRY	-	Federal Republic of Yugoslavia
FTA	-	Free Trade Agreement
GA	-	UN General Assembly
GATT	-	General Agreement on Tariffs and Trade
GSP	-	Generalised System of Preference
IACHR	-	Inter-American Court of Human Rights
ICC	-	International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ	-	International Court of Justice
ICSID	-	International Centre for Settlement of Investment Disputes
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for Yugoslavia
IFOR	-	Implementation Force
ILC	-	International Law Commission
ILM	-	International Legal Materials
ILO	-	International Labour Organisation
ILR	-	International Law Review
IMF	-	International Monetary Fund
IO	-	International Organisation
Iran-US CTR	-	Iran-US Claims Tribunal Reports
ITLOS	-	International Tribunal for Law of the Sea
ITU	-	International Telecommunication Union
KFOR	-	Kosovo Force
MEA	-	Multilateral Environmental Agreements
MERCOSUR	-	*Mercado Común del Sur* (Southern Common Market)
MFN Principle	-	Most Favoured Nation Principle

MOX	-	Mixed Oxide
NAFTA	-	North American Free Trade Agreement
NATO	-	North Atlantic Treaty Organisation
NGO	-	Non-Governmental Organisation
NIEO	-	New International Economic Order
NPT	-	Nuclear Non-Proliferation Treaty
NT Principle	-	National Treatment Principle
NYU	-	New York University
OCED	-	Organisation for Economic Co-operation and Development
ONUC	-	United Nations Operation in Congo
OPEC	-	Organization of the Petroleum Exporting Countries
PCA	-	Permanent Court of Arbitration
PCIJ	-	Permanent Court of International Justice
PICT	-	Project on International Courts and Tribunals
PSNR	-	Permanent Sovereignty over Natural Resources
QR Principle	-	Quantitative Restriction Principle
RTA	-	Regional Trade Agreements
SAARC	-	South Asian Association for Regional Cooperation
SAFTA	-	South Asian Free Trade Area Agreement
SC	-	UN Security Council
SCM Agreement	-	WTO Agreement on Subsidies and Countervailing Measures
SER	-	Self-Enforcing Regimes
SOFA	-	Status of Force Agreement
SPS Agreement	-	WTO Agreement on Sanitary and Phytosanitary Measures
TCC	-	Transnational Capitalist Class
TRIMS	-	WTO Trade Related Investment Measures
TRIPS	-	WTO Trade Related Aspects of Intellectual Property Rights
TRNC	-	Turkish Republic of Northern Cyprus
UK	-	United Kingdom
UNAMIR	-	United Nations Assistance Mission for Rwanda

UNCLOS	-	United Nations Convention on the Law of the Sea
UNCTAD	-	United Nations Conference on Trade and Development
UNEF	-	United Nations Emergency Force
UNEP	-	United Nations Environment Programme
UNESCO	-	United Nations Educational, Scientific and Cultural Organisation
UNFCC	-	United Nations Framework Convention on Climate Change
UNFICYP	-	United Nations Peacekeeping Force in Cyprus
UNO	-	United Nations Organisation
UNPROFOR	-	United Nations Protection Force
UNTSO	-	United Nations Truce Supervision Organization
USA	-	United States of America
USSR	-	Union of Soviet Socialist Republic
VCLT	-	Vienna Convention on the Law of Treaties
VRS	-	*Vojska Republike Srpske* (Bosnian Serb Army)
WB	-	World Bank
WHO	-	World Health Organisation
WIPO	-	World Intellectual Property Organisation
WMO	-	World Meteorological Organisation
WTO	-	World Trade Organisation

CHAPTER - I

INTRODUCTION

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INTRODUCTION

1. BRIEF DESCRIPTION OF THE STUDY

From the beginning of the twenty-first century the international community started addressing the issue of fragmentation of international law. In 2000, the International Law Commission (ILC) decided to include the topic "[r]isks ensuing from the fragmentation of international law" into its long-term programme of work.[1] This initiative raises some basic questions: is international law a fragmented system? If it is so, what is the problem with the fragmentation? and how can the problem be resolved? This dissertation mainly revolves around these three major issues. It assumes that today's fragmented international law is part of historical evolution or process.

In contemporary times, the term 'fragmentation' is commonly used to refer to the slicing up of international law 'into regional or functional regimes that cater for special audiences with special interests and ethos' (Koskenniemi 2007: 2).[2] The most notable functional regimes are international trade law, environmental law, human rights law, humanitarian law, law of the sea and so on – when there is a collision between these regimes – than the conflict of norms becomes an unavoidable consequence – because each regime seeks favorable treatment towards its own. The absence of normative and institutional hierarchy in international law means that the evolution of such regimes is perceived by some as posing a threat to the coherence, effectiveness and predictability of

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[1] In 2002, the Commission renamed "[f]ragmentation of international law: difficulties arising from the diversification and expansion of international law" and established a Study Group under the Chairmanship of Bruno Simma. In 2003, the Commission appointed Martti Koskenniemi as Chairman of the Study Group and finally, the Study Group submitted the Report in 2006 (ILC Report on Fragmentation 2006: 8, para. 1).

[2] 'The notion of functional differentiation has been developed notably by Niklas Luhmann to explain the evolution of late modern societies... Fischer-Lescano and Teubner were among the first to transpose this conceptual framework to international law' (Martineau 2009: 4, fn. 8).

international law. Others see these regimes as contributing to the development of international law.[3]

To respond to the problem of fragmentation, the ILC examined the regimes in detail and tentatively concluded that these specialized legal regimes are merely informal labels with no normative value *per se* – hence, it viewed that they are all within or part of broader territorial domain of general international law – and codified some of existing conflict resolving techniques to solve the problem of conflict of norms (ILC Report on Fragmentation 2006: 17, para. 21; 129-130, paras. 253-254).[4] However, the proposed techniques solve the conflict of norms only within regimes but not across regimes. The question remains as to how to solve the norm conflict across regimes?

2. OBJECTIVE OF THE STUDY

This study has several objectives:

First, the objective of the study is to identify the historical reasons for today's fragmentation of international law.

Second, the objective of the study is to study the conflict between different international legal regimes, for instance: (i) liberalizing trade may jeopardize respect for the environment or human rights - equally enforcing respect for human rights or environmental standards may sometimes require the imposition of trade barriers; and (ii) the states can intervene in the domestic jurisdiction of any state to protect human rights in the name of humanitarian intervention – in such a case, there will be a clash not only between the human rights law and humanitarian law but also between humanitarian law and the general principles of international law (state sovereignty/non-intervention).

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[3] 'A contestant of the (old) unity will tend to work *for* fragmentation, whereas a supporter of the (old) unity will work *against* fragmentation' (ibid.: 4).

[4] The ILC's codified conflict resolving techniques are: (i) the *lex superior derogate legi inferiori* (peremptory (*jus cogens*) norms, obligations *erga omnes*, Article 103 of the UN Charter obligations), (ii) *lex posterior derogate legi priori* (Articles 30/59, Articles 41/58 of the VCLT), (iii) *lex specialis derogate legi generali* (Article 55 of the Draft Article on State Responsibility), (iv) hierarchy of sources (Article 38(1) of the ICJ Statute), (v) systemic integration (through Article 31(3)(c) of the VCLT), etc.

Hence, the conflict of norms is a field of study of both systemic and practical importance in post-modern international law.

Third, the objective of the study is to identify the problems in the harmonization of international laws and its impact on the developing countries. Since it cannot be argued that there should not be any harmonization at all, since it is the key in resolving the conflict of norms, the study will look to what extent and on the basis of which approach/mechanism/theory should harmonization take place.

Thus the objectives of the study include: (i) to expose the historical reasons for the fragmentation of international law; (ii) to analyse the conflict of norms between the regimes; (iii) to highlight the harmonization of regimes and its possible effect upon the developing countries; and (iv) to find out a genuine, practically workable solution for the problem of conflict of norms between regimes.

3. Scope of the Study

In fact, the international law has been fragmented into private and public international law. Both the laws are further fragmented into different laws and regimes – for instance, private international law has different national laws and the public international law has different specialized legal regimes. Among the two systems of law, the study is concerned with only the fragmented nature of public international law. And the conflict of norms refers only to conflict of norms between public international law regimes. States often refuse to co-operate with one another to resolve such norm conflict on account of their fundamental policy and interest difference in the regimes. Hence, what is needed at present is a mechanism to facilitate co-operation among states.

In this respect, the ILC codified conflict resolving techniques, which include: (i) the *lex superior derogate legi inferiori* (peremptory norm/*jus cogens*, obligations*erga omnes*, Article 103 of the UN Charter obligations); (ii) *lex posterior derogate legi priori* (Articles 30/59, Articles 41/58 of the VCLT); (iii) *lex specialis derogate legi generali* (Article 55 of the Draft Article on State Responsibility); (iv) hierarchy of sources (Article

38(1) of the ICJ Statute); (v) systemic integration (through Article 31(3)(c) of the VCLT); etc., to harmonize or integrate the regimes.

On the other hand, the scholars have proposed various other possible solutions to harmonize the regimes, which include: (i) make the ILC as a supervisory body to review the treaties of a regime by taking into consideration of other regimes, whenever the states are engaged in a new treaty formation; (ii) make the ICJ as an appellate and also an advisory body in civil matters, whenever the conflict of norms occur before any court or tribunal; (iii) make the ICC as an appellate and also an advisory body in criminal matters, whenever the conflict of norms occur before any court or tribunal; and (iv) the courts or tribunals of each regime should take into consideration the interest of other regime(s), whenever the dispute involves the conflict of norms. The study will analyse the efficiency of these possible means at a practical level.

However, the study would not address the following issues as being beyond its scope: conflict of norms within regimes, conflict within or between regimes in regional forums, conflict with bilateral treaty arrangements, and vertical conflict between international law and municipal law.

4. Research Questions

The study addresses the following research questions:

1. Is the contemporary international legal system a fragmented system?
2. Is the fragmented international legal system a reason for norm conflicts?
3. How does the harmonization or integration of regimes take place and possibly affects the developing countries?
4. How does the fragmented international legal system deal with norm conflicts?
5. Is there any hierarchy of norms in the international legal system?
6. Do existing international legal instruments address norm conflicts sufficiently?
7. Do we need any unified system of procedure to solve such conflicts?

5. Hypotheses

The study is based on the following hypothesis:

1. A fragmented international legal system has emerged in the era of globalization.
2. A fragmented international legal system is an obstacle in realising the interests of developing countries.
3. A unified set of principles is needed to bring efficiency within a fragmented international legal system.

6. Research Methods

The study is based on primary and secondary sources of international trade law, environmental law, human rights law, humanitarian law, law of the sea and other related areas. The primary sources include various international conventions, legislative guides, legal principles, etc., that have been adopted by international and regional institutions (specifically, the ILC Report on Fragmentation of International Law 2006, the UN Charter 1945, the Vienna Convention on Law of Treaties 1969 and 1986, the ILC Draft Articles on State Responsibility 2001, WTO Final Act, Bill of Human Rights, UNCLOS, CITES, Montreal Protocol, CBD, UNFCC, and some case laws of the ICJ, ITLOS, WTO Panels and Appellate Body, ECJ, ICC, ICTY, etc.). The *travaux preparatoires* of these international and regional instruments have been used extensively. The secondary sources include books, journals, and internet sources.

7. Scheme of the Study

The study has four further chapters:

Chapter-2 traces the historical reason for the fragmentation of international law.

Chapter-3 identifies the meaning of norm, the definition of conflict, the reasons and the problems of norm conflict and the different levels in which the norm conflict occur.

Chapter-4 analyses the debate surrounding the integration of regimes, the conflict resolving and conflict avoidance techniques proposed by the ILC to solve norm conflict. It also reviews the alternative solutions proposed by the scholars to solve such conflict and to harmonize the regimes.

Chapter-5 contains the conclusions of the present study.

CHAPTER - II

A FRAGMENTED INTERNATIONAL LEGAL SYSTEM

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A FRAGMENTED INTERNATIONAL LEGAL SYSTEM

International law has been broadly fragmented into private and public international law. Both the laws are further fragmented into different laws and regimes – for instance, private international law has different laws and public international law has different specialized legal regimes. Among the two systems of law, the study is concerned with only the fragmented nature of public international law. Therefore, the focus of the study is: whether public international is a fragmented system?[1] Answering positively that 'it is a fragmented international legal system' ever since its evolution: the scholars contend that it was on 'no occasion a unified system'.

First, even in early times, natural law was followed differently by different states, that is, in a fragmented way.

Second, when secular law emerged in the sixteenth century, it was fragmented on ideological grounds among the Europeans themselves (Friedman 1964).

Third, when the European international law emerged at the end of eighteenth century, since then the 'mainstream' has what Kennedy calls a 'counterpoint' (Martineau 2009: 3). 'Say that a mainstream expressing confidence is accompanied by a counterpoint criticizing that confidence' (ibid.) – that is, European international law had always fragmented view from different states.

Fourth, when the universality of international law started flourishing, some US and Soviet Scholars questioned the existence of a single unified system. For one skeptical American writer, the antagonism between the great powers cast doubt on the idea of

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[1] Classic understanding of 'universality of international law means that there exists on the global scale an international law which is valid for and binding on all states. Universality thus understood as global validity and applicability excludes the possibility neither of regional (customary) international law nor of treaty regimes which create particular legal sub-systems, nor does it rule out the dense web of bilateral legal ties between states... But all of these particular rules remain 'embedded', as it were, in a fundamental universal body, or core, of international law. In this sense, international law is all-inclusive' (Simma 2009: 267).

international law as a 'single, universally valid legal system': being confronted with 'Communist Soviets, the universal validity of international law appears no longer as an existing phenomenon...but as a debatable assumption' (quoted in ibid.: 18). And a Soviet scholar argued that there were 'three systems of international law [exist]: one for the capitalist system, one for the socialist system, and finally one for the relations between the two systems' (quoted in ibid.).

Fifth, the twentieth century international law has been universalized by fragmenting the international law through regional subsystems or approaches (ILC Report on Fragmentation 2006: 102-114, paras. 195-219).[2] The regional approaches include European, American, Asian, African, and Latin-American approaches to international law (ibid.: 104, para. 200). And the regional subsystem varied on functional basis, which include trade, environment, human rights, security issues and so on (ibid.: 105, para. 204).

Sixth, the normative differentiation of peremptory norms and other ordinary norms was made by the ILC in its Draft Articles on State Responsibility in 1976 viewed by some scholars as "fragmentation of international law". Weil (1983) in his much debated essay on the "relative normatively in international law" argued that 'the theory of *jus cogens*, with its distinction between peremptory and merely binding norms, and the theory of international crimes and delicts, with its distinction between norms creating obligations essential for the preservation of fundamental interest [obligations *erga omnes*] and norms creating obligations of a less essential kind are both leading to the fission of th[e] unity' of international law (Weil 1983: 421).

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[2] For Kelsen, 'norms of general international law are inferior in terms of number and importance as compared to local norms [including] norms of particular international law' (quoted in Martineau 2009: 14, fn. 48). Scelle acknowledged the existence of 'particular international legal orders', since these orders were 'conditioned and absorbed by larger international legal orders (international regionalism), these larger orders being themselves part of the global international legal order' (quoted in ibid.). The international law has been fragmented on geographical (regional) basis, for instance Article 8 of the ILC Statute requires 'that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured'. Article 23(1) of the UN Charter requires the UN General Assembly to elect ten non-permanent members of the Security Council on the basis of "equitable geographical distribution". The UN General Assembly also highlighted the importance of this principle through one of its resolution in 2002 – which 'encourage[d] States parties to the United Nations human rights instruments to establish quota distribution systems by geographical region for the election of the members of the treaty bodies' (GA Res. A/RES/56/146 (2002)).

Seventh, when the globalization started at the end of the twentieth century, it has been realized that the international law has been fragmented by different perspectives, (which include, third world perspective, 'legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics') (Ratner and Slaughter 1999: 2). What Simma calls 'post-modern' challenges to the universality of international law stemming from 'critical legal studies, Marxist theory, theory of Empire, and Feminist theory' (Simma 2009: 269).

Eight, at the end of the twentieth and the beginning of the twenty-first century (as a result of globalization process), the international community views that the international law has been fragmented into various specialized legal regimes on functional basis which include international trade law, environmental law, human rights law, humanitarian law, law of the sea, and so on.[3] Such ''global legal pluralism' which sees the emergence of many autopoietic functional systems on a global scale to eventually substitute for the States' (ibid.: 269-270).

In this chapter, the study contends that international law changes when there is a change in international relations; international law has been developed in different ways according to the needs of the international society. Therefore the contemporary international law seems fragmented system, because it has also been developed according to the "objective" necessity of the international society.

1. International Relations and International Law

International law and international relations are co-related, in which former regulates the latter, hence the former changes when there is a change in the latter. As Friedmann (1964) rightly observes, since 'the purpose of law is the ordering of social relations, every legal system must reflect the principles of the social order that it seeks to regulate'. Hence, law cannot remain immune to all changes, in order to be effective, it

[3] But it has been contended that the international law has been developed on various functional basis ever since mid-nineteenth century itself, that is, when the Universal Telegraph Union (1865), Universal Postal Union (1874), the International Bureau of Industrial Property (1883), the International Bureau of Literary Property (1886), the International Union of Freight Transportation (1890) and so on (Martineau 2009: 11).

must constantly justify and readjust itself according to the needs of the changing society. 'Only a dynamic law can preserve the rule of law in a dynamic society' (Anand 1972: 2-3). To satisfy the said view, the international law is constantly changing to accommodate the changes in international practice, attitudes of states, and the changing needs and requirements of the international community (Czaplinski and Danilenko 1990: 4; Elias 1980; Weil 1983). In this regard, the ICJ held that, 'the possibility of law changing is ever present'.[4]

2. NATURAL LAW

The early civilizations had begun in the valleys of the Nile, Tigris-Euphrates, Indus, and in Yellow rivers about 5000 BC (Huntington 1996: 49, 68). As a result, the Hindu, Chinese, Egyptian, Jewish, Greek, and Roman civilizations had evolved. No civilization had clear cut boundaries, precise beginnings and endings. They have defined 'both by common objective elements, such as language, history, [culture], religion, customs, institutions, and by the subjective self-identification of people' (ibid.: 43). Among the elements, the culture and religion were identified as central defining characteristics of civilizations. In ancient and even in medieval period, there was no nation-state exist, instead each civilization had one or many constituent political units (such as dynasties and kingdoms) and they were either ruled by the kings or by the religious leaders (ibid.).[5]

At some point of time, each civilization had realized the existence of law of nature and law of god. Later, the civilizations had formed their own system of laws and institutions to protect their cultural, religious, moral, and natural values. Huntington (1996) writes that the civilizations had their own system of 'values, norms, institutions, modes of thinking to which successive generations in a given society have attached primary importance'. For instance, Hindu civilization had Manu's *code*, Manava *Dharmasastra*, and Kautilya's *Arthasastra* (350-283 BC); Islamic civilization had

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[4] *Fisheries Jurisdiction case (United Kingdom v. Iceland), Merits*, (1974), ICJ Reports, 19.

[5] The ancient period (since early origin to seventh century AD), and the medieval period (from seventh century to fifteenth century AD).

Koranic laws; the Greek civilization had formulated the idea of Natural law in third century BC; the Roman civilization had followed *jus civile*, then *jus gentium*, and finally *jus naturale*; the Chinese and Jewish civilization had also their own system of laws (Alexandrowicz 1967: 28-29; Anand 1972: 12; Shaw 2007: 13-18; Chimni 2010: 28-35). Those laws were used to regulate social conduct of all persons in an ethical way and they had universal relevance. Such laws regulated various issues ranging from drawing up of boundary line, modes of acquiring territory, diplomatic privileges and immunities, sanctity of treaties, rules of war and peace, criminal penalties, right of asylum, treatment of aliens and foreign nationals, environmental protection, and even glimpse of the law of the sea and maritime belt and so on (Anand 1972: 11).

Until the medieval period, there was no inter-civilizational contacts, and only intra-civilizational (i.e., contacts between the dynasties within a civilization) existed. Huntington (1996) says that '[f]or more than three thousand years after civilization first emerged, the contacts among [the civilizations] were, with some exceptions, either non-existent or limited or intermittent and intense'.[6] The historians used to describe the nature of these contact as "encounters" (Huntington 1996: 48). The most dramatic and significant contact between civilizations had happened only in the beginning of the seventh century AD, when the Islamic civilization had conquered, and eliminated or subjugated the people of the Western, Asian, and African civilizations (ibid.: 50).[7] Leben (1997) writes that 'the traditional doctrine of Islam, which divides the world into *dar al islam* (the Muslim world) and *dar al harb* (all other countries), over which Muslim supremacy was to be exercised through *Jihad*'. On the other hand, there was also some commerce by sea in the Mediterranean and Indian ocean, 'steppe-traversing horses, not ocean-traversing sailing ships, were the sovereign means of locomotion by which the separate civilizations of the world [...] were linked together – to the slight extent to which they did maintain contact with each other' (Huntington 1996: 49). Finally, the interaction between the western Christian civilization and the Hindu civilization has

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[6] Even 'the early civilizations in the valleys of the Nile, Tigris-Euphrates, Indus, and Yellow rivers also did not interact' (Huntington 1996: 49). In the same way, 'the Andean and Mesoamerican civilization had no contact with other civilizations or with each other' (ibid.: 48-49).

[7] In the medieval period (approximately between seventh century AD to fifteenth century AD), the Islamic countries dominated or subjugated and ruled the non-Islamic countries.

started at the end of the fifteenth century, when the Portuguese officer Vas-co-da-gama reached the Southern part of India in 1498.

During the pre-modern times (since early origin to fifteenth century), the law of nature and law of god has been well established and appreciated in every civilization of the world and it was based purely on religion and had universal relevance. The thirteenth century philosopher St. Thomas Acquinas said that 'Natural law formed part of law of God, and, was the participation by rational creatures in the Eternal Law' (Shaw 2007: 21). Maine (1861) wrote that 'the birth of modern international law was the grandest function of the law of nature' (ibid.: 22).

3. SECULAR LAW

In the late medieval times, the divine law was gained primary importance and the pope exercised universal jurisdiction in Europe.[8] In 1514, the Pope Alexander VI made Papal Bull demarcation, which divided the world into Spanish and Portuguese spheres. Later, as a result of the declain of the authority of the Roman Catholic church and also due to 'the long struggle between the Pope and the Emperor, Christendom disintegrated' – '[o]ut of this chaos emerged nation-states' (Anand 1986:23). However, the Treaty of Westphalia (1648), which terminated the thirty years of religious war (1618-1648), *Catholics v. Protestants* in Europe, brought a beginning for modern international law and paved a way for the establishment of the political and legal supremacy of the sovereign national state (Friedmann 1964: 6, fn. 2).[9] Since then there was no international relations on religious allegiance, diplomatic relations, and wars were essentially conducted between sovereigns (ibid.).

The concept of sovereignty has been analyzed in various ways by Machiavelli, Bodin, Hobbes, Locke, Rousseau, Austin, Hume, etc., they postulated the legal as well as the political omnipotence of the modern sovereign, as against the political, legal, and

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[8] The medieval period was between the seventh century to fifteenth century AD (in which the early medieval was approximately between seventh to thirteenth century AD, and the late medieval between thirteenth to fifteenth century AD).

[9] With the end of the religious war in Europe, both the concept of sovereignty and equality of states emerged (Anand 1986: 23, 52).

social power of groups, such as churches, guilds, merchants' associations, as well as the "over-mighty subjects" within the King's realm (Anand 1986: 22-51; Shaw 2007: 18-22).[10] The secular law can be found especially in the works of Vitoria, Gentli, Grotius, Suarez, Pufendorf, Wolf, are all based principles of international law on the law of nature, though some of them derived natural law from the law of God, and others from the law of reason (Friedmann 1964: 75; Shaw 2007: 22-26). Vitoria created a new system of international law to hold Spanish title, which essentially displaces divine law and its administrator (the Pope), and replaces it with natural law administrated by a secular sovereign (Anghie 2005: 17-18).[11] Grotius said that natural law would be valid even if there were no God (Shaw 2007: 23). He deeply influenced by the rationalist term of natural law, used principles of universal reason to establish basic principles of international law (Friedmann 1964: 75).[12]

Later in the eighteenth century, Vattel and Hegel, who analyzed and proposed the doctrine of the will of the state (Shaw 2007: 28-29; Friedmann 1964: 76-77; Koskenniemi 2004: 231-235). They said that '[a]ll real international law is derived from the will of the nations whose presumed consent express itself in treaties and customs' (Friedmann 1964: 76). Hegal made a fundamental critique of religion and gave much

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[10] Though Machiavelli did not expound the theory of sovereignty, but he dealt with the theory of state (Shaw 2007: 20).

[11] 'Vitoria focuses on the social and cultural practices of the two parties, the Spanish and the Indians' (Anghie 2005: 15). For him, 'sovereignty doctrine emerges through...the problem of cultural difference' (ibid.: 16). '[T]he rule of the sovereign was legitimate only if sanctioned by religious authority' (ibid.: 17). He argues that 'what natural reason has established among all nations is called *jus gentium*' (ibid.: 20). 'The universal system of divine law administered by Pope is replaced by the universal natural law system of *jus gentium* whose rules maybe ascertained by the use of reason' (ibid.). Here, the '*jus gentium*, naturalizes and legitimates a system of commerce and Spanish penetration' (ibid.: 21). For him, opposing the work of the missionaries in the territories was a just reason for war (ibid.). Hence, Vitoria's concept of sovereignty is developed primarily in terms of the sovereign right to wage war (ibid.: 23). He bases his conclusion that the 'Indians are not sovereign on the simple assertion that they are pagans' – 'Indians lack rights under divine law because they are heathens' (ibid.: 29). Anghie (2005) presumes that 'an idealized form of particular Spanish practices become universally binding, Indians are excluded from the realm of sovereignty, and Indian resistance to Spanish incursions becomes aggression which justifies the waging of a limitless war by a sovereign Spain against non-sovereign Indians' ((ibid.: 30). Therefore, we can say, Vitoria 'reintroduces Christian norms within this secular system; proselytizing is authorised now, not by divine law, but the law of nations' (ibid.: 23)

[12] Hugo Grotius was considered as founding father of modern international law. He introduced the concept 'freedom of the sea' in his work *Mare Liberum*, which means 'sea is open for all and belong to none'. And he opposed the closed sea concept which was introduced by the Portuguese (which was later dealt by John Seldon). The most fundamental of his principle is "*pacta sunt servanda*", the respect for promises given and treaties signed (Friedmann 1964: 75).

importance to state and said that the individual was subordinate to the state, because the later enshrined the 'wills' of all citizens and had evolved into a higher will, and on the external scene the state was sovereign and supreme (Shaw 2007: 28-29).[13] Vattel introduced the doctrine of the equality of states into international law irrespective of their strength or weakness (Anand 1986: 53; Shaw 2007: 25-26).

After the entry of Portuguese, the Dutch and then English and French entered the East Indies in the sixteenth century.[14] The Crown of Portugal dealt with the East Indian Rulers directly through its officials, but the Dutch, English and French dealt through the East India companies with delegated sovereign power, started operating in the seventeenth century (Alexandrowicz 1967: 15).[15] When the mediate sovereigns (i.e., European officers and the companies) with their quasi-sovereign power entered into treaties, the East Indian Rulers reluctant to conclude the treaties with them (ibid.: 149).[16] Since sixteenth century to the end of the eighteenth century, the East Indian Rulers were treated as equal sovereigns and Europeans entered into equal treaties (ibid.: 149-184).[17]

When the European powers contacted with the East Indian sovereigns, they found many similarity of ideas and principles in their inter-state relations (ibid.: 1-2). 'Failing similarity, they [European powers] tried to impose on them [East Indian sovereigns] their [Europeans'] own ideas and whenever they [East Indian sovereigns] were not able or

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[13] Hegel, who was often considered as the father of an ideology that was ultimately lead to Fascism, Nazism, Capitalism, Liberalism, and state Communism. Friedmann said that 'the unmitigated nationalism of Hegelian philosophy contrasted with the internationalist and humanitarian conception of Kant. It fount its logical culmination in modern fascism, national socialism and, combined with certain aspects of Marxism, in modern state Communism' (Friedman 1964: 42, fn. 3)

[14] The term 'East Indies' covers India as well as 'Further India' including Ceylon, Burma, Siam, Indonesian Islands, Persia, China, Japan, etc.

[15] 'The Portuguese in Asia were primarily servants of the Crown of Portugal and not merchants' (Alexandrowicz 1967: 26). The Dutch, English, and French entered into East Indies as a merchant and established commercial organizations – 'for the purpose of giving support and lending security to trading activities that the companies received in their charters quasi-sovereign powers' from the Crown – 'which comprised the active and passive right of legation, the right to conclude treaties, to acquire territory and if necessary to wage war' (ibid.: 27). Westlake (1914) calls them as 'mediate Sovereigns' (ibid.: 15).

[16] '[C]ertain Asian Sovereigns such as the Moghul Emperor (prior to the eighteenth century) and the King of Burma (Ava) were reluctant to deal with the Company as not being a full sovereign entity' (ibid.: 165).

[17] Alexandrowicz (1967) quotes many equal treaties between European and East Indian rulers from the Grotius and Freitas works. In the beginning itself, Alexandrowicz proves the East Indian sovereign power to make treaties, through ICJ judgment on *Right of Passage over Indian Territory* case.

ready to do so, they [European powers] accepted certain legal concepts from Eastern tradition' (ibid.: 2). In this way, without their (Europeans and East Indians) knowledge the international law has been developed out of their international relations. Most of their trade and diplomatic relations were carried out through treaties, such treaty practice finally turned as a base for positive law.

4. EUROPEAN INTERNATIONAL LAW

When the European powers spread all over the world with an increased military might, they started colonizing the non-European countries, by entering into unequal treaties. Said (1978) says that the "Orientalism" has started roughly in late eighteenth century and which connotes 'the high-handed executive attitude of nineteenth and early twentieth century European colonialism'.[18] The term "orient" and "occident" are "man-made", which is 'an idea that has a history and a tradition of thought, imagery, and vocabulary that have given it reality and presence in and for the West' (Said 1978: 5).[19]

The Congress of Vienna came into force in 1815 to end up the Napoleonic wars, and to create and maintain the balance of power among the European powers.[20] It formed the 'family of nations' with all states engaged in the war, the conditions to join in the family were: the state should be civilized and the constituent recognition must be made by the fellow member countries; and they also determined that the circle within which the law of nations will apply. As a result the international relations had been changed, the Europeans declared themselves as civilized and they considered the non-Europeans are uncivilized. Further, they said that civilized state can only be a sovereign; as a result there

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[18] The term "Orientalism" has two elements, namely "Orient" (Easterners and Bible lands), and "Occident" (Westerners). '[T]he Orient is an integral part of European *material* civilization and culture' (Said 1978: 2). The French and the British – less so the Germans, Russians, Spanish, Portuguese, Italians, and Swiss – have had a long tradition of "Orientalism" (ibid.: 1). Said (1978) says that ' Orientalism derives from a particular closeness experienced between Britain and France and the Orient, which until the early nineteenth century had really meant only India and the Bible lands'.

[19] "Orientalism" as a Western style for dominating, restructuring, and having authority over the "Orient". 'In brief, because of Orientalism the orient was not (and is not a free subject of thought or action' (ibid.: 3).

[20] The principal allied powers were Austria, Great Britain, Prussia and Russia – recognized themselves as the only parties qualified to make and keep the peace and assumed the responsibility for European security (Anand 1986: 60)

was an increasing number of unequal or capitulation treaties in the nineteenth centuries.[21] Anand writes that especially after the Congress of Vienna, sovereign states means only, the European states and the states from other regions 'were considered not "subjects" but merely "objects" of international law, whatever might be their status under classical international law'. Hence they 'were not admitted into the charmed circle of sovereign States' (ibid.).[22] Further he writes that the '"civilization" required not only an effective government over a defined territory but willingness and ability to accept the obligations of European international law, particularly the obligations relating to protection of the life, liberty and property of foreigners' (ibid.: 56). Apart from that, he says 'the chief criterion or standard of civilization was power' (ibid.). As a result, international law became geographically internatioanlised through the expansion of the European empires, it became less universalist in conception and more, theoretically as well as practically, a reflection of European values' (Shaw 2007: 27).

On the other hand, '[t]he greater expansion of Europe overseas between the sixteenth and the eighteenth centuries had led to remarkable economic growth of Europe, which, in turn, enabled the great industrial revolution to take place there in the second half of the nineteenth century (Anand 1986: 58). As a result of industrial revolution in Europe led to increasing internationalization of industry, commerce and trade in the late nineteenth and early twentieth centuries.[23] Shaw (2007) says that '[t]he Industrial

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[21] Even the powerful Asian nation China was forced by Great Britain to accept the illegal opium trade by a war in 1839 (ibid.: 58). In the Treaty of Nanking 1842 that followed the "Opium War", not only was Hong Kong annexed, but four other Chinese ports were opened to foreign commerce (ibid.). Several other Asian countries were similarly humbled and even annexed in the name of free trade (ibid.)

[22] It was only in the Treaty of Paris 1856 that a non-Christian oriental country, Turkey, was formally admitted to the family of nations to participate in the public law and concert of Europe (ibid.: 56). And Japan was admitted to the group of "civilized nations" in 1906, only after it defeated China (1894) and Russia in war (1904) (ibid.). In the same way, even the powerful countries of Africa such as Egypt, Ethiopia, etc. were not included in the "family of nations" – they all joined in the charmed circle of sovereign states only in the League of Nations (Anand 1972: 18). In fact, seven Asian-African countries were included among the fourty-five original members of the League, which included Ethiopia, Turkey, Iraq, Afghanistan, Egypt, India, etc. (ibid.: 24). Though the League gave the first opportunity to these countries to represent in the "family of nations", but the centre of gravity throughout its existence continued to remain with Western Europe (ibid.).

[23] The internationalization of economic interest occurred both in the financial and in the industrial sphere. In the course of the nineteenth and early twentieth centuries, some of the major Western (especially British, French, or later German capitalist) lent money, on short, medium and long-term conditions, through international banking houses, all over the world (Friedman 1964: 21-22). The Western investment in major

Revolution mechanized Europe, created the economic dichotomy of capital and labour and propelled Western influence throughout the world'.[24] When the large scale migrants of industrialized European states' citizens and capital moved into the countries of the underdeveloped world, then the institution of protection of citizens abroad as a principle of international law was developed (Anand 1972: 39). As a result, the Great powers intervened and used force in the underdeveloped states to protect their citizens' properties and contend that it was their duty to extend such protection (ibid.: 39-41). Against such intervention, especially the Latin-American states used Calvo and Drago doctrines, according to which 'the public dept cannot occasion armed intervention nor even the actual occupation' of the territory of Latin-American nations by the European powers (Friedmann 1964: 22, fn. 2; Anand 1972: 41).[25] Consequently, Second Hague Peace Conference in 1907 adopted the Porter Convention which prohibited the use of armed force in the collection of any contract debts (Anand, ibid.).[26]

The techniques and technologies used for suppression was the concept of "civilizing mission" or what we call "the White Man's Burden" (Anand 1986: 59; Anghie and Chimni 2003: 80; Anghie 2005: 37-38). 'The Civilizing Mission operates by characterizing the non-European peoples as the "other" – the barbaric, the backward, the violent – who must be civilized, redeemed, developed, pacified' (Anghie and Chimni,

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sectors were: 'the controlling interest of the US-owned American and Foreign Power and Mexican Light and Power Corporations in the development and ownership of electric power in a number of Latin American countries; the predominant control of the Canadian-owned Brazilian Traction Company in Brazilian Transport and Power; the controlling influence enjoyed by the United Fruit Company in the banana and agricultural production of the Central American Republics; British railway interest in South America; and the oil concessions owned by American, British, French, and Dutch interest in the oil producing countries of the Middle East' (ibid.: 23, fn. 5). Many of these investments have also been made in the former colonies, such as India, Indonesia, French Indo-China, the Belgian Congo, etc. (ibid.: 23, fn. 4).

[24] As a result of the industrial revolution and the expansion of international trade and commerce, the term "civilized nation" began to mean 'advanced nation' or 'industrial and commercial nation' or a state which 'was able and willing to protect adequately the life, liberty, and property of foreigners' (Anand 1972: 23).

[25] Although Latin-American countries were generally protected by the US from European political subjugation through the Monroe doctrine, but since the last quarter of the nineteenth century intervention in their internal affairs and invasion of their territories have been common features of the history of Latin-American countries – because, they increasingly subject to almost exclusive exploitation by the United States (ibid.: 34)

[26] Convention on the Employment of Force for the Recovery of Claims (Porter Convention) was adopted in the Second Hague Peace Conference in 1907.

ibid.).[27] Race has played a crucially important role in constructing and defining the "other" (ibid.). Anand (1986) says that '[i]t was said to be the duty of the "superior races" to civilize the inferior races'.[28] Consequently Anghie and Chimni (2003) puts that '[t]his concept of the "civilizing mission" justified the continuous intervention by the West in the affairs of the third world societies and provided the moral basis for the economic exploitation of the third world that has been an essential part colonialism'.

However, when the whole continent of Asia proved insufficient for raw materials of European industries and their need of still larger markets, 'Europeans penetrated into the vast continent of Africa' (Anand 1986: 58). Led by Belgians, the French, Germans, Portuguese and the British went to the African continent at the end of the nineteenth century, and colonized them (ibid.: 58-59). Anand (1986) writes that '[i]n 1884-1885, an international conference was held in Berlin to provide for a European code for territorial aggrandizement in Africa.[29] Within less than two decades, the whole of Africa was partitioned by the European industrial powers to be fully exploited for their economic and political interests' (ibid.: 59).

The modern international law of nineteenth century was fully dominated by the positivism which was based on the doctrine of sovereignty, equality of states, and they arose out of the distinction of civilized and uncivilized and the constituent recognition of state.[30] The major proponents of positivism were the Zouche, Bynkershoek, Vattel, Austin, etc., who ignored virtually traditional doctrines of natural law and they said positivism could be identified from the actual behavior of states and the institutions and laws which they created. Anghie (2005) puts that:

> 'In the naturalist scheme, the sovereign administered a system of natural law by which it was bound. Positivism, by way of contrast, asserts not only that the

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[27] 'French and Germans devoutly believed in their civilizing mission in Africa, even if this had to be achieved by force' (Anand 1986: 59).

[28] The French statesman Jules Ferry wrote that 'the superior races have a right as regards inferior races. They have a duty of civilizing the inferior races' (ibid.)

[29] In 1885, fifteen European states assembled at Berlin and acted as "quasi-world-legislators" in the matter of Africa. They laid down 'rules of the game amongst themselves for the grab of Africa' (Anand 1972: 21).

[30] Koskenniemi (2004) considers nineteenth century is a period of progressivism, because from which international law and the major ideologies of Liberalism and Marxism arose.

> sovereign administers and enforces the law, but that law itself is the creation of sovereign will'.

Further he says that:

> 'The naturalist international law which had applied in the sixteenth and seventeenth centuries asserted that a universal international law deriving from human reason applied to all peoples, whether European or non-European. By contrast, positivist international law distinguished between civilized and non-civilized states and asserted further that international law applied only to the sovereign states which comprised the civilized 'family of nations'' Anghie 2005: 35).

Further, the '[n]nineteenth century international law...excluded non-European states from the realm of sovereignty, upheld the legality of unequal treaties between European powers and non-European powers, and ruled that it was completely legal to acquire sovereignty over non-European societies by conquest' (Anghie and Chimni 2003: 80). Therefore, it is viewed often that the 'colonialism is central to the formation of international law' and international law achieved universality only through colonial expansion (ibid.: 84).

In brief, Bedjaoui puts that:

> 'This classic international law thus consisted of a set of rules with a geographical basis (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)' (Bedjaoui 1979: 50).

On the other hand Alexandrowicz's thesis that 'colonization during the eighteenth and nineteenth centuries *eclipsed* rather than extinguished the international legal personality of the colonized countries' (Anand 1986a: xvii). Anand says that '[i]n international law, the term "colonization" merely meant temporary legal incapacity of the once sovereign actors' (ibid.). As a result of above changes both in relations and law, the international lawyers often considered the nineteenth century as a "period of anxiety".

5. UNIVERSAL INTERNATIONAL LAW

Due to increasing civil wars and external aggression among the European powers led to the First World War.[31] As a result, the international relations has started changing from independence of sovereign state system to interdependence, consequently the international law has started changing from law of co-ordination to law of co-operation (Friedman 1964). The Treaty of Versailles 1919 paved a way for the establishment of the League of Nations, which represented the first important step in the direction of building an enduring structure of co-operation among states (Anand 1986: 33; Shaw 2007: 30).[32]

During the formation of the League of Nations, no country ready to limit the sovereign right towards an international institution, hence unanimity rule was adopted[33] and the war only restricted and not prohibited.[34] Than after in the Treaty of Paris (Kellogg-Briand), 1928 – 'renunciation of war as an instrument of national policy' was recognized by a group of states.[35] Due to inherent weakness in the League, it failed to prevent the Second World War.[36] Consequently, the United Nations Organization was established,[37] where the member states agreed to limit their sovereignty[38] and to prohibit

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[31] The First World War started in 1914 and ended in 1918. In the war, the 'Allied powers' (the United States of America, the British Empire, France, Italy and Japan) defeated the 'Central powers' led by Austro-Hungarian, German, and Ottoman Empires.

[32] As a result of the First World War, the US President Woodrow Wilson prepared 14 points to form an international organization, which led to the formation of the League of Nations and the adoption of the League Covenant. The League of Nations came into existence on 10 January 1920 with 42 founding members and was dissolved on 18 April 1946.

[33] Article 5(1) of the League Covenant.

[34] Article 12(1) of the League Covenant.

[35] Originally the Treaty of Paris (Kellogg-Briand), 1928 was adopted by Germany, the United States, Belgium, France, the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, and the Dominion of New Zealand.

[36] League of Nations failed because it had weak executive organ (i.e., the League council). As a result, Japan invaded China in 1931; German often made internal and external aggressions; the Soviet Union invaded Finland in 1939. Finally, the Second World War broke out in 1939 and ended in 1945. In the war, the 'Allied powers' led by the United States of America, the United Kingdom, the Union of Soviet Socialist Republic, China and France defeated the 'Axis powers' led by Japan, Germany and Italy.

[37] During the Second World War itself, the 'Great powers' (initially the UK and the US had started making efforts to establish a new 'International Organization'. Their efforts led to the formation of several international conferences, such as London Declaration 1941, Atlantic Charter 1941, United Nations Declaration 1942, Moscow Declaration 1943, Tehran Conference 1943, Dumbarton Oaks Conference 1944, Yalta Conference 1945, and San Francisco Conference 1945. Consequently, the United Nations

the war.[39] Due to divesting effect of the two world wars, the European domination came to an end and the US domination started flourishing.[40]

The second half of the twentieth century brought a tremendous change both in the international relations and in the international law. The major changes are: (i) horizontal expansion of states, (ii) diversification of international tribunals and courts, (iii) growing number of international, transnational and supranational organizations, (iv). Increasing number of subjects of international law, (v) growing density of international law, (vi) application of international law in municipal sphere, and (vii) emergence of globalization.

5.1. Horizontal Expansion of States

One of the most important changes since the establishment of the UNO is: 'the vast horizontal expansion of the international society' (Anand 1972: 1). In the beginning of the twentieth century, there were only few states joined in the family of nations and after the First World War, some of the colonial countries were kept under the League's mandate system,[41] which was later transferred to the UN trusteeship council.[42] Kay

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Organization was established on 24 October 1945 and the UN Charter was adopted. It established with 51 original members and presently it has 192 member states.

[38] As per Article 24(1) of the UN Charter, the members of the UN have limited their sovereignty towards the Security Council, and the Council acts on their behalf, and as per Article 25, the decisions of the Security Council binding upon the members of the UN.

[39] Article 2(4) of the UN Charter prohibits the threat or use of force, but it is subject to certain exception – that is, in case of self-defence (Article 51), collective enforcement action (Chapter VII) and regional agencies may take enforcement action with the authorization of the Security Council (Article 53(1)) – in such cases the states can use force under the United Nations system.

[40] Since the end of the eighteenth century to the early part of the twentieth century the Europeans (especially the Britain, France, and Spain) colonized and dominated the world in all respects.

[41] The League mandate system applied only to the former colonies of Germany and Turkey and completely failed to touch more numerous colonial territories of the victorious Allied powers. The League Covenant divided the mandated territories into three categories (namely class A mandates, class B mandates and class C mandates) and imposed different obligations on the mandatory powers according to the category of its mandate (For more discussion, see Kay 1996: 143-145).

[42] Chapters XII and XIII of the UN Charter says that the trusteeship system is the direct successor of the League's mandate system. As per Article 77(1), the trusteeship system covers: '(a) territories now held under mandate; (b) territories which may be detached from enemy states as a result of the Second World War; and (c) territories voluntarily placed under the system by states responsible for their administration'. In only eleven territories were the provisions of Chapters XII and XIII ever applied. There were more than eight times as many non-self-governing territories, containing over ten times as many people, outside the trusteeship system (For more discussion, see ibid: 145-148).

(1996) says '[a]t the beginning of the Second World War there were more than eighty separate colonial territory, including approximately one-third of the population and covering one-third of the land area of the world'[43] when the heated Cold War between the two super powers started on the ideological grounds, the colonial countries were influenced from either side.[44] Knowing the danger of either side, the colonial (especially the Asian and African) countries met at first time in Bandung Conference in 1955, and declared themselves as 'Non-aligned'.[45] Later the movement was further strengthened by the Accra Conference of 1958 and the Addis Ababa Conference of 1960 in order to get independence from the colonial domination (Kay 1996: 150; Aanad 1972: 53, 57). However in 1960, the UN General Assembly passed a resolution – Declaration on Granting of Independence to Colonial Countries and Peoples.[46] Consequently colonialism

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[43] In 1939, there were seven countries – Great Britain, the Netherlands, France, Belgium, Portugal, Italy, and Spain – with a combined population of only 200 million people controlled almost 700 people in their colonial possessions (ibid: 143).

[44] The Cold War between the USA and the USSR started in 1945 and ended in 1989. It was a war of two ideologies, namely democracy and socialism.

[45] "Non-aligned" in the sense, the colonial countries aligned neither with the "First World" (i.e., Western European countries) nor with the "Second World" (i.e., Eastern European countries) and represented separately as "Third World" countries. North American countries started nationalist struggle and gained independence and they joined in the family of nations even in the nineteenth century itself. Some of the Latin-American and even some of the European countries gained independence only in 1950s and 1960s and they follows the policy of "Non-aligned" along with the Afro-Asian states (Anand 1972: 4).

[46] GA Res. (1960), 1514 (XV), 14 December 1960 (the resolution recognized that 'all peoples have an inalienable right to complete freedom' and solemnly proclaimed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'). In the fifteenth session, there were seventeen colonial territories were scheduled to gain their independence and to join the organization – in which only Cyprus was a non-African country.

In fact, the USSR made a request in the UN General Assembly to include an additional item for the – fifteenth session of 1960 – a 'declaration on granting of independence to colonial countries and peoples'. The Afro-Asian states decided not to go with the USSR and prepared a separate draft based upon the resolution previously approved in the Asian-African conferences at Bandung in 1955, Accra in 1958, and Addis Ababa in 1960. The Afro-Asian draft differed from the Soviet draft in both tone and substance. The Soviet draft was both anti-colonial and anti-western, whereas the Afro-Asian draft was only anti-colonial and strenuously avoided attacks on specific Western countries. While the Soviet text had demanded that all colonial countries 'must be granted forthwith complete independence and freedom', but the Afro-Asian draft spoke of 'immediate steps' to be taken to transfer power, implying that the transfer could proceeded according to an orderly timetable. In contrast to the Soviet draft, no mention is to be found in the Afro-Asian draft of any prohibition upon foreign bases (For more discussion, see Kay 1996: 148-154)

has ended and there were mushrooming growth of "new states" in the international sphere.[47]

Shortly become independent, the new states realized that not only political – they need an economic freedom from the clutches of colonial powers. Hence the newly independent states started nationalization and expropriation of foreign property,[48] which raised anxiety from the European and Americans.[49] To solve this problem and to develop their economy, the UN General Assembly passed the resolutions: the Permanent Sovereignty over Natural Resources (1962),[50] the New International Economic Order

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[47] Anand (1972) says that '[b]y "new" states all we mean is newly independent states. Several of these states are quiet ancient and existed long before the so-called "older" states of Europe or America were ever founded'. Kay (1996) says that 'twenty seven of the fifty-one founding members of the United Nations had won their independence after some form of colonial rule'.

[48] The Mexican expropriation of the United States oil and land properties shortly before the Second World War, the confiscation of the Anglo-Iranian oil properties in Iran (1951), the take-over of the United Fruit Company in Guatemala (1953), the Suez Canal nationalization by Egypt in 1956, the expropriation of Dutch properties by Indonesia (1958), the take-over of Chilean copper industry (1972), and the Libyan oil industry (1971-74). These events marked unprecedented political process, such as the struggle of colonial peoples for political self-determination and the efforts of developing states to pursue economic self-determination and to establish a New International Economic Order (For more detail, see Schrijver 1997: 3-4: Friedmann 1964: 22, fn.3).

[49] The Great Britain and France took military action against Egypt after the Suez Canal nationalization in 1956. In some of the cases, such as 'the Mexican oil expropriation leading to a settlement between Mexico and the US in the early forties, and the Iranian Oil Agreement of 1954, a partial satisfaction was eventually reached as a result of prolonged international negotiations' (For more discussion, see Friedmann 1964: 22-23, fn. 3). Further, the European and American states put forth the "Cordell Hull" formula, which urges that any expropriation of foreign property requires "prompt, adequate and effective" compensation. Against which, the newly independent states argued for "just, faire and equitable" compensation, based on the principle of "appropriate compensation".

The *Calvo doctrine* – under one version: 'international liability with respect to contracts entered into with alien private contractors by the State party is excluded'; another formulation describes, 'it as a stipulation in a contract in which "an alien agrees not to call upon his State of nationality in any issues arising out of the contract"'. 'This used to be inserted (or suggested) as a clause in investment contracts but has also been argued as a specific rule of South American regional law'. 'The *Drago doctrine* sought to exempt State loans from general rules of State responsibility'. 'The *Tobar doctrine*, again, has to do with the alleged duty of non-recognition of governments that have arisen to power by non-constitutional means' (for reference to all these doctrines, see ILC Report on Fragmentation 2006: 110, fn. 275).

[50] GA Res. (1962), 1803 (XVII), 14 December 1962 (Declaration on the Permanent Sovereignty over Natural Resources (PSNR)). The PSNR evolved as a new principle of international economic law in the post-Second World War period. Schrijver (1997) writes that '[s]ince the early 1950s this principle was advocated by developing countries in an effort to secure, for those peoples still living under colonial rule, the benefits arising form the exploitation of natural resources within their territories and to provide newly independent States with a legal shield against infringement of their economic sovereignty as a result of property rights or contractual rights claimed by other States or foreign companies'. Further, he says the PSNR gets importance, because it 'touches on such controversial topics as expropriation of foreign

(1974),[51] the Charter of Economic Rights and Duties of States (1974),[52] and some of the cardinal principles of international law was adopted in the Friendly Relations Declaration (1970).[53] Anand (1972) writes that:

> 'With the decay and destruction of colonialism, scores of new nations...which had so far no voice and no status and had been considered as no more than "objects" of international law, have emerged as full-fledged members of the international society'.

5.2. Diversification of International Tribunals and Courts

On the one hand, since the beginning of the twentieth century, due to the emergence of new states and their reluctance to accept some of the international law rules,[54] made a strong base for the creation of new tribunals and courts. Wright said that

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property and compensation of such acts, standards of treatment of foreign investors (the national standard versus the international minimum standard) and State succession' (Schrijver 1997: 3-4).

[51] GA Res. (1974), 3201 (S-IV), 1 May 1974 (Declaration on the Establishment of a New International Economic Order (NIEO)). The NIEO gives a '[f]ull permanent sovereignty of every State over its natural resources and all economic activities', which include 'the right to nationalization or transfer of ownership to its nationals'. Further it says '[t]he right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to the natural resources and all other resources of those States, territories and peoples'.

[52] GA Res. (1974), 3281 (XXIX) (Charter of Economic Rights and Duties of States (CERDS)). The CERDS stresses that '[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities'. Further it says that '[e]ach State has the right: (a) to...exercise authority over foreign investment within its national jurisdiction... No State shall be compelled to grant preferential treatment to foreign investment'. However, '[e]ach State has the right: (c) to nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid', if any controversy arise over the compensation than 'it shall be settled under the domestic law of nationalizing State and by its tribunals', unless otherwise freely and mutually agreed by the concerned parties.

[53] GA Res. (1970), 2625 (XXV), 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration)). The Friendly Relations Declaration has dealt with seven basic/cardinal principles of international law, namely, prohibition of force, peaceful settlement of international disputes, non intervention, international co-operation, equal rights and self-determination of peoples, sovereign equality of States, good faith (Mani 1993).

[54] Anand writes that '[n]one of these [new] States has in fact ever denied the binding force of international law and they accept a large part of it without any question. They are in favour of all those rules and principles which do not put them in a position of subordination and which give them equality in law. They whole-heartedly accept principles concerning sovereignty, recognition, territorial integrity, non-aggression, non-intervention, sovereign-equality, reciprocity, peaceful settlement of disputes, and diplomatic and consular relations. There is also no need for them to reject principles on state succession and several other branches of international which are vague and flexible enough to give them wide latitude'. And the new states opposed 'the traditional and much abused law relating to responsibility of states and hesitation in

'the Orient generally, there has been preference to settle disputes by negotiation, mediation or conciliation rather than by courts applying positive law' (quoted in Anand 1972: 49). The reason for such preference was that '[a] vast majority of "new" countries ha[d] different cultural, social, religious, ethical, and legal traditions' (Anand 1972).

On the other hand, 'the rapidly growing complexity and intensity of international relations, international law has witnessed prodigious developments, not only in updating its traditional fields, but also in expanding into new and more specialized ones. This has been accompanied by a proliferation of specialized judicial organs, on both the universal and regional levels' (Abi-Saab 1999: 923).

However, 'the expansion of international law in the age of globalization through formal and informal sources, and the access being granted to non-State actors to the international legal procedures and tribunals, created a functional need to establish more than one international tribunal to administer the various legal regimes that it encompasses' (Rao 2004: 944).

As a result, an almost explosive expansion of independent and globally active, yet sectorally limited, courts, quasi-courts, and other forms of conflict-resolving bodies did occur (ibid.; Fischer-Lescano and Teubner 2004: 1000; Guillaume 1995: 848-862; Burke-White 2004: 963-979). The Project on International Courts and Tribunals has identified, there are around 125 international institutions exists at present, in which independent authorities reach final legal decisions.[55] For instance, the International Court of Justice (1945)[56] and the International Criminal Court (1998) have general jurisdiction over civil and criminal matters, respectively; the International Tribunal for the Law of the Sea

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accepting the old concept of the right to compensation for expropriation of alien property' (Anand 1972: 60). Finally, he says that the '[t]raditional international law has been concerned only with the question of how to protect foreign capital. They [new States] want new law which would not only take into account the interest of the lenders, but also the rights, and needs of the borrowers' (ibid.: 61).

[55] The "Project on International Courts and Tribunals" (PICT) was founded in 1997 by the Center on International Co-operation (CIC), New York University. From 2002 onwards, PICT has been a common project of the CIC and of the Centre for International Courts and Tribunals, University College London.

[56] The ICJ was established under the United Nations Organization in 1945 and started functioning in 1946 and it succeeded the Permanent Court of International Justice (PCIJ), which was established under the League of Nations in 1920 and started functioning in 1921. Before the establishment of PCIJ, the Permanent Court of Arbitration (PCA) was established under the Hague Peace Conference of 1899 and subsequently strengthen by the Hague Peace Conference of 1907; and even today the PCA exists and functions in Hague.

(1996) deals specifically the Law of the Sea issues; the International Chamber of Commerce (1919)[57] and the International Centre for Settlement of Investment Disputes (1965) concerned mainly commercial and investment disputes; the WTO Dispute Settlement System (1995) deal specifically the trade issues; the war crimes tribunals namely the Nuremberg Tribunal (1945) and Tokyo Tribunal (1945); the *ad hoc* tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (1993), and International Criminal Tribunal for Rwanda (1994); there are some hybrid panels and courts have constituted, which include Special Panels established by the United Nations Transitional Authority in East Timor (2000), Special Court for Sierra Leone (2001); there are some administrative tribunals have been established to deal with disputes arising between international organizations and their staff, which include the ILO Administrative Tribunal, the United Nations Administrative Tribunal, the World Bank Administrative Tribunal, etc.; other than this, there are various tribunals for reparations and committees on Terrorism were formed under the United Nations mandate.

Apart from this, the international human rights conventions have established a number of Committees for their implementation, which include: United Nations Committee on Human Rights, United Nations High Commissioner for Refugees, Committee against Torture, Committee on Rights of the Child, Committee against Racial Discrimination, Committee on Discrimination against Women, etc. However, the environmental treaties and conventions have their own compliance mechanism procedures.

The regional courts and tribunals include the European Court of Justice, American Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights, African Court of Human and Peoples' Rights, etc. and further various tribunals and committees created within NATO, OECD, or the Council of Europe. All the above

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[57] Infact, the history of arbitration has started ever since the Jay Treaty was first formed in 1794, following the American War of Independence, which introduced binding decisions by joint mixed commissions; then again in the Alabama Arbitration of 1872 after the American Civil War, which can be considered the real beginning of modern international arbitration, in the technical sense (Abi-Saab 1999: 922). Further, in the twentieth century, the Trial Smelter Arbitration (1941) and Lake Lanoux Arbitration (1957) was formed and become considered as major arbitrations in the environmental field.

said courts and tribunals decides and renders judgments in their own ways, which subsequently led to fragmentation of international law.

5.3. Growing Number of International/Transnational/Supranational Organizations

As a result of changed international situation on both European and non-European sides and growing interdependence among themselves in the twentieth century led to the establishment of various international, transnational, and supranational organizations. Amerasinghe (2005) said that '[w]hen bilateral relationships based on the existence of diplomatic embassies or missions were found to be inadequate to meet more complex situations arising from problems concerning not just two but many states, a means had to be found for representation in the same forum of the interest of all the states concerned'. As a result the international conferences and organizations have evolved.

In this regard, especially, the nineteenth century has been described as 'the era of *preparation for* international organization' (between 1815 and 1914), and the twentieth century has been regarded as 'the era of *establishment* of international organization' (especially the year of 1914 and after) (Amerasinghe 2005: 5). In fact, the present structure of international relations can be found in all the above said concepts, such as "international, transnational, and supranational" organizations, but these institutions are represented by the traditional system of interstate diplomatic relations.

The international conferences and organizations include apart from Congress of Vienna (1815), and Congress of Berlin (1885), the Hague Conferences came into force in 1899 and 1907. Followed by that the League of Nations was established in 1919 and the United Nations Organization was established in 1945. Apart from this there were many organizations has kept under the UN System as "specialized agencies" (which include, UNESCO, WMO, WHO, UNTAD, and so on).

The transnational society is primarily represented by the governments (i.e., the states) and the non-governmental international organizations (which includes individuals and corporate associations). However, these transnational relations is carried and promoted by semi-public and private groups dealing directly with each other. It covers

wide spectrum of relations ranging from cultural, scientific, political, social and economic activities. Perhaps the first conference of a private nature was the World Anti-Slavery Convention of 1840. Since then there have been a number of private associations or unions established, which include the International Committee of the Red Cross (1863), the International Law Association (1873), the Inter-Parliamentary Union (1889), and the World Council of Churches, various rival international organizations of Labour, the International Chamber of Commerce, the International Rubber Research Board, the International Tea Committee, the International Air Transport Association, or the International Institute of Administrative Science, the World Economic Conference (1927) (Amerasinghe 2003: 3; Friedmann 1964: 37-38).[58]

Because of the proliferation of these private unions, in 1910 the Union of International Associations was formed to co-ordinate their activities, among other things (Amerasinghe, ibid.). The public international union was formed not on political but for technical activities, which include: the International Telegraphic Union (1865); the International Postal Union (1874); the International Union of Railway Freight Transportation (1890); the International Bureau of Industrial Property (1883); the International Bureau of Literary Property (1886); and the International Office of Public Health (1907) (Amerasinghe 2005: 4; Shaw 2007: 27-28).[59]

The "supranational society", that is, a society in which the activities and functions of states or groups are merged in permanent international institutions. They drive their status from international treaties, and they carried by the agreement and the contributions of member states. The European Coal and Steel Community (1952), the European Economic Community and Euratom (1957), and further the IMF, WB and GATT (now WTO) are all considered to be a supranational organizations (Friedmann 1964: 35-39). There are various regional organizations have been established for many issues. They include, the Pan-American System of 1826, the Washington Conference of 1885, Organization of American States, European Community, the Organization on Security

[58] At present, there are more than 3000 NGOs have been registered under the UN Secretariat.

[59] The Congress of Vienna (1815) established the principle of freedom of navigation with regard to international waterways and set up a Rhine Commission to regulate its use; European Danube Commission was created in 1856 and a number of other European rivers such as Elbe, Po, etc were also become the subject of international agreements and arrangements.

and Cooperation in Europe, North Atlantic Treaty of Arab States, Organization of the Islamic Conference, Organization of African Unity, North Atlantic Treaty Organization, Warsaw pact, and there were many regional trade organization was formed Council for Mutual Economic Assistance, NAFTA, SAFTA, ASEAN, CAFTA, OCED, OPEC, etc (Amerasinghe 2005: 3; Prost and Clark 2006: 344; Friedmann 1964: 35-37).

The international organizations are mostly treaty based and sector specific (the UN is the only exception, which has general competence to deal with all matters through its specialized agencies). Prost and Clark (2006) says that '[n]ormally, IOs [International Organizations] are designed to deal with some specific class of issues, limited sometimes by region, sometimes by subject-matter, and sometimes by both'. At present, there are more than 500 International Organizations exist, which may possibly lead to the overlapping of activities (Prost and Clark 2006: 344). Friedmann (1964) rightly puts that '[i]t is the interplay and the tensions between these various levels of international activities that characterize the structures of contemporary international relations and determines the structure of international law'. Amerasighe (2005) says that:

> 'The institutionalization...of inter-state relations [today] has led to international organizations influencing far more than in the past the shaping of international relations and the development of international law intended for their regulation'.

5.4. Increasing Number of Subjects of International Law

Modern international law suggested that the states alone are the subjects of international law, but in post-modern times, there are some new subjects had evolved – that is, the physical or legal persons to a limited extent become a subject of international law (Friedmann 1964: Chapters 13-15). Paust (2004) said that:

> 'Some British positivists in early 1900s had preferred a "states alone" view, but such a conception was radically opposed to traditional eighteenth and nineteenth century Western – and American views and was also seriously and widely opposed even at the start of the twentieth century'.[60]

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[60] 'The very purpose of the Alien Tort Claims Act (ATCA), first adopted in 1789, was to assure that aliens had a right of access to federal courts for their claims concerning violations of customary international law or treaties of the United States' (Paust 2004: 1232-1233).

Today, the non-state actors (such as international organizations, non-governmental organizations, individuals and the corporations) 'have unprecedented access to the international legal system, often without the traditional requirement of diplomatic protection whereby states would espouse the claims of their citizens in international courts' (Berke-White 2004: 969). On the other hand, Friedmann says that the increasing preoccupation with position of the non-state actors (most notably, the individuals and the private corporations) have further widened the horizons of international law from still another perspective (Friedmann 1964: 67).

International organizations: the ICJ held in the *Reparation* case that the UNO as a legal entity, which can sue and be sued.[61] Since then the international organizations have gained the status as subject of international law, irrespective their nature.

Companies: Friedman's analyses cover the whole problem of international investment and the development of agreements between states and private enterprises. He notes that private companies clearly do not have the same status vis-a-vis intergovernmental organizations, but that to the extent that their activities are subject to public international law and they acquire a limited status in the international legal order (Friedmann 1964: 375).[62] Usually the corporations had access to the international system through their states, because their claims can be espoused only by states not by themselves. But today the corporations 'play an even more direct role in advising governments in WTO dispute settlement and can sometimes brings claims directly under NAFTA Chapter XI' (Berke-White 2004: 969). Further:

> 'In the post-war period, private corporations have become increasingly active participants in international transactions, mainly as investors concluding agreements on the exploitation of natural resources, or on industrial activities, with the governments of underdeveloped states, *i.e.*, with sovereigns and, through their participation in certain international multilateral transactions, with governmental organizations or international public institutions such as the World Bank' (Friedmann 1964: 67).

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[61] *Reparation for Damages suffered in the Services of the United Nations, Order*, (1949), ICJ Reports.

[62] '...it does mean that they participate in the international legal process and that they acquire a limited status in public international law, to the extent that their activities are controlled by public rather than private international law' (Friedmann 1964: 375).

Individuals: the physical persons (i.e., individuals) are become a subject of international law, when the Nuremberg and Tokyo tribunals established for the prosecution of war criminals and those guilty of crimes against humanity and peace.[63] Later, the ICTY (1993), the ICTR (1994), special panels for East Timor (2000), special court for Sierra Leone (2001) were also established to punish the war criminals. Paust identifies that:

> 'Today, the number of specific international crimes that can be committed by private individuals has increased from earlier categories to include, among others, the following: genocide; other crimes against humanity; apartheid; race discrimination; hostage-taking; torture; forced disappearance of persons; terrorism; terrorist bombings; financing of terrorism; aircraft hijacking; aircraft sabotage and certain other acts against civil aviation; certain acts against the safety of maritime navigation, including boat jacking; murder, kidnapping, or other attacks on the person or liberty of internationally protected persons; trafficking in certain drugs; slavery; and mercenarism' (Paust 2004: 1239-1240).

The international criminal responsibility of the individual is for Friedmann the first expression of the constitution of an international status of the individual: if the individual can be directly prosecuted for infringements of international law, then the individual ought also to be able directly to benefit, he argues, from rights conferred by international law (Friedmann 1964: 245-249).[64] In this regard, Friedmann argues that,

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[63] The responsibility of individual actors was stressed by the International Military Tribunal at Nuremberg in opposition to defense claims 'that international law is concerned [merely] with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible... That international law imposes duties and liability upon individuals as well as States', the Tribunal affirmed, "has long been recognized". The Tribunal also recognized that 'crimes against international law are committed by men, not by abstract entities....[and] individuals have international duties which transcend the national obligations of obedience imposed by the individual State....' Apart from this, the Tribunal also imposed individual responsibility against the customary international law principle of state authority or sovereign immunity, it rightly declared that: 'the principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position... He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law' (quoted in Paust 2004: 1234-1235).

[64] 'Although there has been no organic connection between the movement for an international recognition of human rights, mainly through the United Nations Declaration of Human Rights and the subsequent draft Covenants of the United Nations, and the imposition of individual criminal responsibility on prominent individuals of the German and Japanese nationalities, in the Nuremberg and Tokyo trials of war criminals, there should be a general correlation between rights and duties. To the extent that the individual is held entitled to assert certain claims to human dignity and the protection of vital human interest on an international level, he can also be fairly held to assume a corresponding degree of responsibility for actions that directly interfere with such values' (Friedmann 1964: 234).

'the philosophy of international law is beginning to more away from poisonous Heglian and neo-Hegelian doctrines which postulate the state as the total integration of the individual and the necessary repository of both his freedom and his responsibility' (ibid.: 247). Burke-White (2004) says that today the individuals 'have unprecedented access to the international legal system, often without the traditional requirement of diplomatic protection whereby states would espouse the claims of their citizens in international courts'.

For example, the United Nations Declaration on Human Rights of 1948, and the two Covenants on Human rights (1966) and, perhaps more significantly the European Convention on Human Rights (1954), 'which for the first time enables an individual to bring an action against his own state before an impartial supranational forum, give increasing substance to an international law of human rights' (Friedmann 1964: 67). Citizens of European Union member states can bring claim against his own state before the European Court of Human Rights; citizens of the America can petition the Inter-American Human Rights Committee; similarly citizen of the African Union can sue directly before the African Court of Human and Peoples' Rights; '[l]ikewise the US Alien Tort Claims Act opens the US legal system for individuals to bring international claims for money damages rooted in international law' (Burke-White 2004: 969). Further, Slaughter (1995) has argued in contemporary times – 'it is possible to imagine individuals as monitors of government compliance with agreed rules, whether arrived at through a domestic or an international legislative process'.

Non-governmental organizations: in post-modern times there were numerous NGOs have been established on wide range of issue, in which some of them are general and many of them are issue specific nature. They concern the issues ranging from human rights, environment, economic, humanitarian and so on, which have often direct and indirect access in the international courts and tribunals. For instance, NGOs make indirect communications to the International Criminal Court and mostly recently, they submitted the environmental brief and accepted by the WTO Appellate Body in the *Shrimp-turtle* case. Hence, often the NGOs are considered as subjects of international law.

These changes only mean that 'the non-State actors can no longer be denied their due and direct role in shaping goals and value of the world public order. They, together with the customary process by which law continue to evolve, play a dominant role in the codification and progressive development of international law' and contributes indirectly for the fragmentation of international law (Rao 2004: 944).

5.5. Growing Density of International Law

As a result of the horizontal expansion of states and their social and economic backwardness, led to the "objective" or "necessary" aspect of the development of international law: 'states were, whether they liked it or not, drawn into a co-operation movement because in both economic and technical terms they had become objectively interdependent' (Leben 1997: 401). To attain the object, the new states and also the older states (especially after decolonization) entered into many "technically" equal bilateral, multilateral, and international treaties on various issues ranging from investment, trade, environment, human rights, commerce, and so on, on regional and international level.[65]

The period between the end of the First World War and the mid-thirties – that is, during the period of Great Depression – there were many powerful international cartel arrangements – in such vital commodities oil, tin, copper, or rubber, or on a more limited geographical scale, steel and in such important manufactured products as electric lamps or various chemical products (Friedmann 1964: 25). On the other hand, the producer countries of primary commodities entered into many international commodity agreements – on the major commodities: tin, cocoa, natural rubber and coffee – for stabilization of price and income and long-term equalization of supply and demand (Chimni 1987: chapters I, and II; Gariepy 1976: 677-684). Than after, the General Agreement on Tariff and Trade was adopted in 1947. There were many Bilateral Investment Treaties (BITs) were adopted, especially in 1960-1980s.

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[65] 'In the twentieth century, about 6,000 multilateral treaties were concluded of which around 30 per cent were general treaties, open for all States to participate' (ILC Report on Fragmentation 2006: 10, fn. 10). 'Over 50,000 treaties are registered in the United Nations system' (ibid.).

The human rights and humanitarian issues gained importance under the United Nations: the Universal Declaration of Human Rights (1948) and its two Covenants (1966) and the International Conventions include the Convention on Rights of the Child, Discrimination against Women, Racial Discrimination, Torture, Enforced Disappearance, etc.; the four Geneva Conventions (1949) and the two Additional Protocols (1977) were adopted.

The concern over environment was also gradually arisen since 1970s and there were many Conferences and Conventions were adopted – particularly, the Stockholm Conference (1972), the Brandt Land Commission (1987), the Rio Declaration (1992), the Johannesburg Declaration 2002, etc. Indeed, the United Nations Environment Programme (UNEP) and the Commission on Sustainable Development (CSD) plays a major role in the international environmental rule formation. The major Conventions on environment are CITES, Montreal Convention and its Protocol, UNFCC and its Protocol, CBD and its Protocol, and so on.

Apart from this, the Law of the Sea negotiation was a major issue between the developed and developing countries, in this regard the UNCLOS I (1958), UCLOS II (1960) and UNCLOS (1982) and finally the United Nations Convention on the Law of the Sea entered into force in 1994.

On the other hand, the international criminal law was developed to make the criminals individually responsible, for instance, many terrorism conventions were adopted and the Rome Statute on ICC (1998) was the major development in that regard. To curtail and to regulate the nuclear weapons or the weapons of mass destruction, there were many conventions such as NPT, CTBT, etc., were adopted.

With regard to air regulations, there were many bilateral, multilateral and international instruments were adopted, which include Warsaw Convention, Chicago Convention 1944, etc. The outer space issues have been covered under the Outer Space Treaty, Liability Convention, Registration Convention, Moon Treaty, etc. And finally, the goods (GATT), services (GATS), investment measures (TRIMS) and intellectual property issues (TRIPS) dealt under the WTO (1995).

As a result, Anand (1986) puts that, '[n]o State could survive today without the benefit of treaties; for, without them, it would be almost impossible to have international trade, communication, diplomatic intercourse, travel, and all other normal features of life'. Further, Friedmann (1964) says that:

> '[T]he negotiation of treaties, not only those affecting war and peace or the acquisition or cession of territories, the adjustment of territorial waters and other matters immediately affecting sovereign integrity, but also such matters as prohibition of forced labour or genocide, the international regulations of labour standards or even the protection of migratory birds may be made impossible'.

However, the traditional status of the international legal system had been 'the exclusive realm of states' and that 'the traditional view of international law' had considered international law 'as purely interaction of sovereign states'. Paust (2004) says, '[n]either claim is correct'. The reason is, in contemporary times, the international law development has been taking in two ways: (i) horizontally, out of interaction between two public entities (i.e., states); and (ii) vertically, out of interaction between the public entity (i.e., state) and the private entity (i.e., non-state actors, such as: individuals, multinational corporations, and NGOs).

Often the individuals play an effective role in various political, diplomatic, economic, juridical, and power-coercive sanction processes. Paust (2004) writes that the 'individuals participation in normative formation and modification allows one to avoid myths that individuals are mere objects of international law or that international law is made by state elite practice and expectations'. Indeed, the multinational corporations enter into investment agreements with the states and often the MNCs advices the states in the WTO rule formation, thereby the corporations involve in the development of international law. Further, the NGOs by submitting brief in a case participate in the rule formation on various issues. Apart from this, the international organizations contribute many ways for the development of international law by convening conferences and creates as many as conventions. In this regard, Fischer-Lescano and Teubner (2004) says that 'rapid growth in the numbers of non-statal private legal regimes...give birth to "global law without the state", which is primarily responsible for the multi-dimensionality of global legal pluralism'. However:

> '"Transnational communities", or "autonomous fragments of society", such as, the globalized economy, science, technology, the mass media, medicine, education and transportation, are developing an enormous demand for regulating norms which cannot, however, be satisfied by national or international institutions. Instead, such autonomous societal fragments satisfy their own demands through a direct recourse law. Increasingly, global private regimes are creating their own substantive law. They have recourse to their own source of law, which lie outside spheres of national law-making and international treaties' (Fischer-Lescano and Teubner 2004: 1010).

The most prominent contemporary legal regimes are 'the *lex mercatoria* of the international economy and the *lex digitalis* of the internet' (ibid.: 1010-1011).[66]

Apart from this, the International Law Commission (ILC) has also contributed for the development of international law by codifying the customary rules and the general principles.[67] The major contribution of the ILC include: the Vienna Convention on Consular Relations (1961), the Vienna Convention on Diplomatic Immunities and Privileges (1963), the Vienna Convention on Law of Treaties (1969), the Vienna Convention on Law of Treaties between States and International Organizations and between International Organizations (1986), the Draft Articles on State Responsibilities (2001), the Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006), and so on.

Briefly, Burke-White rightly puts that:

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[66] There are numerous other private or private-public instances of regulation, which are making autonomous law with a claim to global validity. For example, 'the Apparel Industry Partnership, a joint undertaking of non-governmental organizations, international clothing manufacturers, and American universities, has established its own quasi-governmental (but non-state regulatory regime to help safeguard public values concerning international labor standards. The partnership has adopted a code of conduct on issues such as child labor, hours of work, and health and safety conditions, along with a detailed structure for monitoring compliance (including a third-party complaint procedure). In internet context, the "TRUSTe" coalition of service providers, software companies, privacy advocates, and other actors has developed (and monitors) widely adopted privacy standards for websites. Similarly, the Global Business Dialogue on Electronic Commerce has formed a series of working groups to develop uniform policies and standards regarding a variety of e-commerce issues. And, of course, the Internet Corporations for Assigned Names and Numbers...is a non-state governmental body administering the domain name system' (Fischer-Lescano and Tuebner 2004: 1011).

[67] As per Article 13(1) of the UN Charter, '[t]he General Assembly shall initiate studies and make recommendations for the purpose of: (a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification'. To carry out such an obligation, the General Assembly established the ILC in 1946, which is represented by the states on "equitable geographical" basis and its major function is to codify the existing rules and principles on a particular issue and to contribute for the development of international law.

> 'For most of the past four hundred years, international law provided a very thin set of rules, regulating, for example, the conduct diplomats, the law of the seas, or the territorial integrity of States. While the number of such rules expanded slowly throughout the twentieth century, since the end of the WWII [World War II] and particularly in the last two decades, the number of international legal rules has increased sharply. A wealth of new bilateral and multilateral treaties, often in very specific substantive areas ranging from the environment and trade to human rights and international crime, places States under an ever-larger number of obligations. In effect, the international legal system is "thicker" than it has ever been before' (Burke-White 2004: 967-968).

Bourquin (1947) pointed that on the one hand, the 'rapidly expanding number of fields affected by international regulation, such as labour, human rights, education, science, refugee assistance, civil aviation, communications, agriculture, international money and banking matters'; and on the other hand, the 'increasing participation of technical, scientific and other experts in the process of international law and diplomacy' shows 'one of both quantitative and qualitative renovation of international law'.

5.6. Application of International Law in Municipal Sphere

Since the twentieth century beginning, the democratization of political system has happened increasingly both in European and non-European world – which means that 'the conduct of international relations is no longer the unimpeded preserve of monarchs or small group of aristocrats but becomes linked with the internal constitutional and political process of the participating states' (Friedmann 1964: 7).[68] Consequently, the relation of international law to internal law becomes, in every post-modern state, a major political and legal problem (ibid.). As a result, the theory of transformation and adoption on the one hand, and monoism and dualism debate on the other, gained much importance in 1950s. Often the constitution of every state lays down the bases on which the state's foreign policy should be constructed and its international obligations respected. At the same time, it is universally admitted that in case of conflict between municipal laws and international law, the later prevails over the former.[69]

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[68] 'The conduct of foreign affairs becomes part of the politics of a country and, in democracies, part of the process of political debate, in parliament, in the press, and in other media of public opinion' (Friedmann 1964: 7).

[69] As the Permanent Court of International Justice stated in the *Greco-Bulgarian Communities* case: 'It is a generally accepted principle of international law that in the relations between powers who are contracting

5.7. Emergence of Globalization

Indeed the actual globalization has been taking place since the end of the Cold War. At the end of the Cold War, on the one hand, due to the acceleration of the decolonization process, the break up of the former Soviet Union[70] and the former Yugoslavia[71] and the admission of several European microstates,[72] the membership of the United Nations has reached 192 and gained universality.[73] On the other hand, the nature of war has been changed from inter-state to intra-state, due to poverty; infectious disease; environmental degradation; developmental problems; and the spread and possible use of nuclear, radiological, chemical and biological weapons (Mani 2005: 489-490; Murphy 2007: 6).[74] It led to huge number of war crimes such as mass murder (i.e., genocide);

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parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty' (quoted in Anand 1986: 34-35). Again, in the *Treatment of Polish Nationals in Danzing* case, the court observed: 'According to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's constitution, but only on international law and international obligations duly accepted...and, conversely, a State cannot adduce, as against another State, its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force' (quoted in ibid.: 35).

[70] On 24 December 1991, the Russian Federation, with the consent of the other Republic of the Former Soviet Union, took over the Soviet seat at the United Nations, including the permanent seat on the Security Council. The three republics (Estonia, Latvia, and Lithuania) had already been admitted to the United Nations on 17 September 1991 upon their secession from the Soviet Union. The Ukraine and Byelorussia (now Belarus) – two founding members of the Organization – were later admitted to the United Nations in 1991. The other Former Soviet Union Republics: Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan were admitted on 2 March 1992. Georgia was admitted on 31 July 1992 (see generally Blum 1992: 354; UN Basic Facts 2004: 297-303).

[71] Bosnia-Herzegovina, Croatia, and Slovenia were admitted to the United Nations on 22 May 1992 and Macedonia (admitted as "the Former Yugoslavia Republic of Macedonia") on 8 April 1993. The Federal Republic of Yugoslavia was readmitted on 1 November 2000, following the downfall of Yugoslavia President Slobodan Milosevic, and changed its name to Serbia and Montenegro on 4 February 2003. Since the declaration of independence by Montenegro on 3 June 2006, the membership of Serbia and Montenegro in the UN has been continued by Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro. Montenegro was admitted to the UN on 28 June 2006 (Blum 1992: 830; UN Basic Facts, ibid.).

[72] Liechtenstein was admitted to the Organization on 18 September 1990, San Marino on 2 March 1992, Monaco on 28 May 1993, and Andorra on 28 July 1993. Further, a large number of newly independent microstates (mostly Island states) of the Caribbean as well as of the Indian and Pacific Oceans, some of which displayed lesser qualification of statehood than the above mentioned European microstates (Blum 2005: 638).

[73] Montenegro was admitted to the Organization on 28 June 2006, which brought the membership of the UN General Assembly to 192.

[74] After the post-war period 1945, the nature of the war has been considerably changed, especially in Middle East problem (1956) and in Congo crisis (1960) the inter-state disputes become intra-state (i.e.,

raps; ethnic cleansing by forcible expulsion and ill-treatment against war prisoners; more number of displaced persons and refugees (Harroff-Tavel 1999: 339-340).[75] They can quickly become international because of arms flow, terrorism, drug trafficking, illicit trade and money laundering, refugee flows, and so on (UN Basic Facts 2004: 73).

Especially, at the end of the twentieth and the beginning of twenty-first century, there were number of cultural, ethnic and political tensions have taken place mostly in Africa and also in rest of the world. For example, the major human rights violations were in: Liberia (1990), Somalia (1992), Yugoslavia (1993), Bosnia-Herzegovina (1993), Rwanda (1994), Haiti (1994), Albania (1997), Central African Republic (1997), East Timor (1999), Kosovo (1999), Sierra Leone (1997 and 2000), Democratic Republic of Congo (1998 and 2003), Darfur (2003), Burundi (2004), Sudan (2005), Lebanon (2006), etc. Huntington (1996) writes that there is a clash of civilization on cultural grounds in the post-Cold War era.

Indeed, the object and purpose of the UN is to maintain peace and security, and in this regard the primary responsibility is rest with the Security Council. In the beginning, due to misuse of veto power, the Council turned as an ineffective and impartial organ under the UN System. As a result, the power of the General Assembly was strengthened by the *Uniting for Peace Resolution* in 1950;[76] and the regional security systems or alliances outside the United Nations, such as NATO, Warsaw Treaty Organization, etc were emerged. At the end of the Cold War, due to inefficient financial and military contribution for collective enforcement action from the member states, the Security

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internal) disputes. Hence, the UNO, at first time, in Congo crisis 1960-1964, the functions of the Security Council has been expanded to use force even against the "intra-state disputes" because it was also considered as a threat to the maintenance of international peace and security (Mani 2005: 489-490; Murphy 2004: 6).

[75] Such conflicts of today are a complex mix. 'Their roots may be essentially internal, but they are complicated by cross-border involvement, either by states or by economic interests and other non-state actors. Recent conflicts in Africa have shown the deadly mix of civil strife and illegal export of natural resources – primarily diamonds – to fuel arms purchases' (UN Basic Facts 2004: 73).

[76] In the special circumstance of the Korean conflict, with the absence of the USSR, the *Uniting for Peace Resolution*, 1950 was adopted by the UN General Assembly. The Resolution provides that, if, because of the lack of unanimity of the permanent members of the Security Council (i.e., China, France, the USSR, the UK, and the USA), the Council fail to maintain international peace and security where there is a 'threat to the peace, breach of peace or act of aggression', the General Assembly 'shall consider the matter immediately' and 'recommend action by Members including the use of armed forces'

Council often fails to secure its mandate against the new threats.[77] It led to the development of UN peace operations under either Chapter VI or Chapter VII of the Charter, using limited military forces, voluntarily contributed by the member states.[78] The peace operations include: conflict prevention, conflict mitigation, peacemaking, peacekeeping, peace enforcement, and post-conflict peace building. The major peace operations are: UNTSO (1948), UNEF (1956-1967), ONUC (1960-1964), UNFICYP (1964), UNPROFOR (1992-1995), UNAMIR (1993-1996), UNMIK (1999), UNMEE (2000), ONUB (2004) and so on (Pearson Peacekeeping Centre Website; UN Basic Facts 2004: 307-312).[79]

Most of the occasion, the Security Council, has authorized the coalitions of member states to use "all necessary means" including military action under Chapter VII to deal with a conflict and most of the time their actions were partial.[80] Further, it is

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[77] Because of the lack of financial and military contribution, the UN and the international system seemed unprepared and ill-prepared for the potential consequences of the 'new world order'. Subsequent events have highlighted the deficiencies in the UN system, in particular the controversy over the UN action and policy in Somalia (1992), and Rwanda (1994), and the failure to secure peace and protect Bosnia in the former Yugoslavia (1993), and Kosovo in the Serbia (1999).

[78] Usually, the Peacekeeping Operations are conducted under Chapter VI of the UN Charter, which deals with the 'Pacific Settlement of Disputes'. The Secretary-General plays a vital role in the conduct of Peacekeeping Operations but the exact nature and extent of this role has not been defined in the UN Charter (Murphy 2007: 6). Normally, the UN Peacekeeping Operations are established by the Security Council and directed by the Secretary General, often through a special representative. The UN has no military force of its own, and member states provide, on a voluntary basis, the personnel, equipment and logistics required for an Operation (For general discussion, see UN Basic Facts 2004: 73).

And these Operations fell short of enforcement action since they could not apply military force, the UN Personal were allowed to use force only in self-defence. Hence, the UN Secretary-General Dag Hammarskjold famously referred to them as belonging to "Chapter Six and a Half". Further, the legality of a "peacekeeping force" on any country's territory should be guaranteed in a legal instrument known as the "Status of Forces Agreement (SOFA)" (Murphy 2007: 7). However, the role of Peacekeeping Forces received the "Nobel Peace Price" (UN Basic Facts 2004: 72). Operations are financed through the Peacekeeping budget and include troops from many countries. But the expanses of Peacekeeping Operations was contested in the *Certain Expenses* case (1962), the ICJ held that Article 17, Paragraph 2 of the UN Charter include the expenses incurred for Peacekeeping Operations.

[79] Since 1948 there are 63 UN Peacekeeping Operations have been created under the UN mandate. And in which 13 were established in the forty years between 1948-1988, and remaining 50 have all been set up since 1988 to 2007 (For details UN website; Pearson Peacekeeping Centre website; UN Basic Facts 2004: 307-312).

[80] The coalitions of member states has used force to restore the sovereignty of Kuwait after its invasion by Iraq (1991); to establish a secure environment for humanitarian relief operations in Somalia (1992); to contribute to the protection of civilians at risk in Rwanda (1994); to restore the democratically elected government in Haiti (1994); to protect humanitarian operations in Albania (1997); to restore peace and security in East Timor (1999); and to address the cross-border conflict between the state (Israel) and a non-

apparent that, in case of humanitarian intervention, the principle of non-intervention has been undermined in the era of globalization. However, the principle of pre-emptive self-defence by the developed Western world also increased in the post-cold war period.

In the post-Cold War era, the WTO was established with an expanded trade activities, which include trade in goods, services, property rights and also investment measures – which often considered to be a globalization era. But in reality, the globalization has been started emerging since when the co-existence of inter-state relations to co-operation of states or else when the interdependence on various fields, such as economic, social, cultural, political, etc. were emerged. Sassen views that the 'globalization' may happen in two ways:

> 'One of these involves, such as the World Trade Organization, global financial markets, the new cosmopolitanism, the war crimes tribunals'; 'Other instances are cross-border networks of activities engaged in specific localized struggles with an explicit or implicit global agenda, as is the case with many human rights and environmental organizations' – in this regard she illustrates that 'particular aspects of the work of states, e.g., certain monetary and fiscal policies critical to the constitution of global markets that are hence being implemented in a growing number of countries; the use of international human rights instruments in *national* courts; non-cosmopolitan forms of global politics and imaginaries that remain deeply attached to or focused on localized issues and struggles yet are part of global lateral networks containing multiple other such localized efforts' (Sassen 2004: 1143).

In brief, as result of dramatic changes in the international relations in the twentieth century, especially since end of the second World War, the inadequacy of old terms prompted Jessup to use the expression "transnational law" in 1956 to refer to all laws which regulate acts and events which take place across frontiers. Both aspects of civil and criminal law and parts of national public and private law and also private international law were included (Sorensen 1983: 561; Friedmann 1964: 37). Thereby, he convincingly demonstrated that the customary concepts of international law were no longer sufficient theoretically to cover all new phenomena in international legal relations. Further, Pescatore used the term "law of integration" to indicate the characteristic features of the law of the European Communities. It is a 'legal system in which new organizational structures, independent of the individual States, make it possible to viewed

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state militia (Hezbollah) (2006). Other than this the NATO-led Force (IFOR) in the former Yugoslavia (1992) and the recently deployed Kosovo Force (KFOR) in Kosovo (1999).

real powers and in which the common legal power is autonomous, that is to say, outside the power of sovereignty of the Member States' (Sorensen 1983: 561-562).

However, the scholars argue that the post-modern international is no more Eurocentric but universal in nature because it secures the interest and aspirations of all the states in almost all the sphere ranging from trade, economic, human rights, environment, and so on.[81] Pahuja writes that 'after decolonization took place, international law become truly universal and a real community of states came into being' (Pahuja 2005: 461). An-na'im observes that:

> 'Although there have been several parallel systems for regulating inter-state relations throughout human history until the mid-20th century, there can now be only one system of international law in the present globally integrated, and interdependent, world. But international law cannot be limited to European system of inter-state relations that has evolved since the 18th century, and which was simply a regional system, like the Chinese, Hindu, Roman and Islamic system that preceded it' (An-na'im 2006: 787).

Though it could be argued that 'international law had already become *universally* applicable [even] during the period of colonization' itself, and 'this shift was not a shift toward universality as such, but instead from one universalism to another' (Pahuja 2005: 462).

Though the Third world scholars like Chimni, Anghie, etc., while agreeing with the emergence of universal international law have criticized the Western developed

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[81] 'The extent of the universality of this new co-operative international law is of course related to the nature of the subject matter' (Friedmann 1964: 68). 'Almost all of it is found in international conventions, i.e., in articulate law-making, rather than in the slow growth of custom or judicial interpretation' (ibid.). Friedmann says that, '[m]uch of this new, and constantly expanding body of international law is less than universal in dimension and character'. 'In certain fields there is a universal community of interest; in others, agreement on the formulation of common standards depends upon a community of interest, values, and institutions confined to a more closely knit and limited community' (ibid.).

For example, '[i]n the field of international communications and transportations,...there is generally a universal interest in common standards and a corresponding universality of international conventions. In matters of labour, differences of political organization as well as of economic and social standards make universality far more difficult to attain. Effective international co-operation in cultural and educational matters or in the protection of human rights against arbitrary interference depends on a correspondence of values unattainable at this time in the world community but realizable within more limited groups of nations. The acceptance of bilateral, multilateral, regional and other international conventions of less than universal scope as sources of modern international law is therefore no longer a matter of doubt' (ibid.: 68-69).

It is universal in a sense, in the post UN phase, all states represents as sovereign equal under the General Assembly and having one vote equally.

countries' influence in such law's creation and policing making – for example, the IMF conditionality, WB policies and their voting procedures and the increasing influence of TNCs in the policy formation especially in the IPR issues, services, under the WTO, etc. According to them, such policies are the major reason for the poverty, civil wars, and other atrocities within third world states and consequently affect the third world peoples. Hence, they viewed that neo-colonialism or neo-imperialism or re-colonization of Western world taking place even today in the name of universalism.

On the other hand, there are some general critiques over post-modern universal international law is that, whether it is ruled by states or by international organizations. Because most of the organizations are treaty based, by which the state sovereignty has been waived towards international organizations. And even some of them raises the issues that whether international law theory exist even today – because there is no state interaction only organizational interaction exist.[82]

Therefore, the law in the era of globalization is not limited to ordering the coexistence of different states but relates also to economic, social, cultural, scientific and technological co-operation of states (Anand 1972: 62). Further, most nations passing through different phases of political, economic, and social developments, hence, they modify 'their attitudes towards various rules of international law not as a matter of basic values but according to the national interest prevailing at a particular period' (Friedmann 1964: 322).

Due to these changes, the international lawyers declared that emergence of "international legal community" (Rao 2004: 939-944); and considered the "twentieth century" as "post-modern anxiety" (Prost and Clark 2006: 342-343); or what Koskenniemi and Leino (2002) calls "post-modernity".

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[82] But this argument is refuted by saying that state is playing a central role in all most all the international relations even in the era of globalization.

6. Fragmented International Law

Though the twentieth century international law secured the universal value, but its fragmented nature has been debated since from the beginning and concern over it, has flourished finally in the twenty-first century. The issue arose: whether the post-modern universal international law unified or fragmented system?

Half a century ago, in 1953, Jenks has talked about the conflict between treaty regimes, thereby, at first time, showed the fragmented nature of international law. For this, he founds two reasons: First, the international world lacked a general legislative body, as a result, '...law making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law' (Jenks 1953: 403); Second reason he found with the law itself, '[o]ne of the most serious sources of conflict between law-making treaties is the important development of the law governing the revision of multilateral instruments and defining the legal effects of revision' (ibid.).

In 1971, while theorizing on the concept of world society, Luhmann gave 'a "speculative hypothesis" that global law would experience a radical fragmentation, not along territorial, but along social sectoral lines' (Fischer-Lescano and Tuebner 2004: 1000). The reason for this would be 'a transformation from normative (politics, morality, law) to cognitive expectations (economy, science, technology); a transformation that would be effected during the transition from nationally organized societies to a global society' (ibid.). Therefore, as per his view, '[l]egal fragmentation is mere an ephemeral reflection of a more fundamental, multidimensional fragmentation of global society itself' (ibid.: 1004).

In 1983, Weil also gave an early warning about the fragmentation in his much-debated essay on the "relative normativity in international law". He noted that the normative differentiation made by the ILC in its Draft Articles on State Responsibility (1976) shattered the unity of international law. In his words the 'unity of the normative

regime is shattered by the *jus cogens* theory and the distinction between international crimes and international delicts' (Weil 1983: 423).[83] Further:

> '[T]he unity of *jus cogens*, with its distinction between peremptory and merely binding norms, and the theory of international crimes and delicts, with its distinction between norms creating obligations essential for the preservation of fundamental interest [obligation *erga omnes*] and norms creating obligations of a less essential kind, are both leading to the fission this unity' (ibid.: 421)

He says that the 'peremptory norms may originate in any of the formal sources of international law: conventions, custom, general principles of law – some even say, resolutions of international organizations (which, by some alchemy, would magically transmute non-normative acts into supernormative acts)' (ibid.: 425). Such norms should be recognized and accepted by 'all the essential components of the international community' (quoted in ibid.: 426-427). As a result, 'some norms are now held to be of greater specific gravity than others, to be more binding than others' (ibid.: 421). Here, he finds 'the replacement of the monolithically conceived normativity of the past by graduated normativity' (ibid.). And he compares, traditionally there exists "norms and non-norms", but now along with such distinction, even within the "normative domain itself" – there are "norms and norms" (ibid.). Such "norms and norms" distinction made by the ILC, he considered as "fragmentation of normativity in international law".

On the other hand, he says the 'normativity is also tending towards dilution'. Because '[t]raditionally, every international norm has had clearly specifiable passive and active subjects: it creates obligations incumbent upon certain subjects of international law, and rights for the benefit of others' (ibid.: 422). But in contemporary times, international law has been diluted into two categories: 'the few [norms] that create obligations "the observance of which is of fundamental importance to the international community as a whole"' – 'their violation should be sanctioned as an international crime'; 'then, below them, the great mass of norms that create obligations "of less and less general importance"' – 'whose violation merely constitute an international delict'

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[83] 'The international normative system has traditionally been characterized by its unity: whatever their formal (custom or conventions, for example), whatever their object or importance, all norms are placed on the same plane, their interrelations ungoverned by any hierarchy, their breach giving rise to an international responsibility subject to one uniform regime' (Weil 1983: 423).

(ibid.: 424). Weil views such distinction as "the pathology of the international normative system".

In 1985, Simma in his famous article "self-contained regimes" talked about the existence of sub-systems with the international legal domain. He draws the concept of "self-contained regime" from the Riphagen report on the Draft Articles on State Responsibility.[84] According to Riphagan, international law is not modeled on one system but on a variety of interrelated "sub-systems" within each of which primary rules and secondary rules are closely intertwined and are inseparable.[85]

Further he says that 'the concept of a "self-contained regime" should not be used as a synonym of "subsystem"' and it should be 'be reserved to designate a certain category of subsystems, namely those embracing, in principle, full (exhaustive and definite) set of secondary rules'. According to him:

> 'A "self-contained regime" would then be 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 the countermeasures normally at the disposal of an injured party' (Simma 1985: 117).

On the other, Roa says that:

> 'Associated with the concept of self-contained regimes is the operation of *lex specialis*. These are legal regimes more specific in content and thus seen as differing from the more general category of law on the subject. *Lex specialis* may provide their own set of rights and obligations, and even the consequences for failure to perform them. In that sense these regimes could exclude the application of the general international law and state responsibility for wrongful acts as provided there under. Diplomatic law, international human rights law, international humanitarian law, international environmental law, and international trade law...are some of the examples of *lex specialis* or self-contained regimes' (Rao 2004: 933-934).

There could be some difference between *lex specialis* and self-contained regimes, hare the latter is perhaps to be seen as a more developed and complete form of the former. On the other hand,

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[84] Riphagen introduced the concept of "self-contained regime" 'for the first time in connection with the *Tehran* case to prove the necessity of the proposed saving clause' (Simma 1985: 117). He further uses the terms "special regimes", "objective regimes", "peremptory subsystems" or "peremptory objective regimes". "Regime" is apparently intended to have the same meaning as "subsystem" (ibid.: 115).

[85] According to the Special Rapporteur, '[a] theoretical answer might be that a system was an ordered set of conduct rules procedural rules and status provisions, which formed a *closed legal circuit* for a particular field of factual relationships. A subsystem, then, was the same as a system, but not closed in as much as it had an interrelationship with other subsystems' (quoted in ibid.: 115).

> '"Objective regimes" similarly designate a particularized set of rules for an area but not necessarily fully disconnecting that regime from the general or other such regimes. For example, proposals for nuclear free zones or peace zones fall into this category' (ibid. 934).

In 1996, the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case,[86] the international law has been conceived as a set of discrete and relatively autonomous fields, such as international human rights law, international environmental law, and international humanitarian law. Throughout the opinion, the treaties embodying these various corpuses are seen not as instruments of a general and unitary international legal spectrum; rather, they are envisaged as forming relatively separate spheres of their own special law. For example, the court points out that the Hague Conventions of 1899, and 1907, the St. Petersburg Declaration of 1868 and the Brussels Conference of 1874, as well as the Geneva Conventions of 1864, 1906, 1929 and 1949 are all exist as multilateral treaties within the corpus of general international law. And at the same time 'they are considered to have gradually formed one single complex system, known today as international humanitarian law' (Nuclear Weapons case 1996: 226, para. 75). The International Covenant on Civil and Political Rights of 1966 and other human rights instruments forms international human rights law (ibid.: para. 24 and 25). On the other hand, Convention on the prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977, Stockholm Declaration of 1972 and Rio Declaration of 1992 are all make the international environmental law as a separate regime (ibid.: para. 27).

In 2000, the ILC conducted a preliminary survey in preparation of its future work programme on "Risks Ensuing from Fragmentation of International Law". Hafner, who was a Special Rapporteur of the Work Programme, said that, 'particularly since the end of the Cold War, international law has become subject to greater fragmentation than before'. He identifies two major factors for the fragmentation: one factor is the 'increasing number of international regulations'; another factor is the 'increasing political fragmentation juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction' (Hafner 2000: 143). Hence, he views that:

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[86] *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion,* (1996), ICJ Reports, 226.

> '[P]resently, there exists no homogenous system of international law. 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' – '[a]ll these parts interacting with one anther create what may paradoxically be called an "unorganized system", full of intra-systematic tensions, contradictions and frictions' (Hafner 2004: 850; Hafner 2000: 143-144).

In 2004, the Michigan Journal of International Law came up with a symposium on the "fragmentation of international legal system". It was specifically intended to 'examine one of the defining problems for the future of international law: the interplay between the current fragmentation of the international legal system and the simultaneous move of that system away from its traditional status as the exclusive realm of states'. In the symposium, Hafner described international law as consisting 'mostly of erratic blocks and elements as well as different partial systems'. For Pauwelyn, international is 'a universe of inter-connected islands'. Koch noted a 'judicial dialogue' with prospects for 'legal multiculturalism'. Burke-White says 'international law is not fragmenting, but rather is being transformed into a pluralist system'. Fischer-Lescano and Teubner said that '[l]egal fragmentation is merely an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself'.

In 2006, the ILC Study on the Fragmentation of International Law suggests that: on the one hand, the globalization has led to increasing uniformization of social life around the world vis-à-vis 'has also led to its increasing fragmentation – that is, to the emergence of specialized and relatively autonomous spheres of social action and structure' (ILC Report on Fragmentation 2006: 11, para. 7); on the other hand, '[t]he fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice'. As a result, 'once appeared to be governed by "general international law" has become the field of operation for such specialist system as "trade law", "human rights law", "environmental law", "law of the sea", "European law"... "investment law" or "international refugee law", etc. each possessing their own principles and institutions' (ibid.: para. 8).

There are various factors have been identified for the fragmentation of international law. They are: (i) Horizontal expansion of States – emerged basically from

different civilization – hence interest of civilization may differ – as a result of heterogeneous society, heterogeneous system of international law or what the "post-modernist" call the fragmented system of international law has emerged; (ii) Growing regional and global interdependence on various fields on economic, environment, energy, resources, health and the proliferation of weapons of mass destruction led to fragmentation – in the sense of divergent approaches in the manner in which international law is sought to be interpreted and applied among different states and regions of the world (Pauwelyn 2003; Hafner 2004: 849-850; Rao 2004: 930-931); (iii) Simple, multiplication of international, transnational, and supranational organizations on specific issues and their engagement in the formulation of international regulations weakens the unity and integrity of international law (Prost and Clark 2006: 341 and 343; Hafner 2004: 850); (iv) Diversification of international and regional courts and tribunals 'without any overall plan' has generated much concern for the coherence of the international legal order (Prost and Clark 2006: 344-345); (v) Increasing number of subjects, as along with states, the non-state actors (such as: individuals, organizations, corporations, NGOs, etc.) and their participation in the norm creation, are contributes for the fragmentation (Burke-White 2004: 969-970; Paust 2004: 1230-1249; Friedmann 1964: 67); (vi) Growing specialization of international regulation or expansion and diversification of subject-matter is also a reason for fragmentation (Hafner 2004: 850); (vii) Proliferation of international regulation or more and more international treaties of a law-making type contributes for fragmentation (Hafner 2004: 849); and (viii) Fragmentation also occurs, due to deliberate act of powerful states to promote their self-interest or dominance (Benvenisti and Downs 2007: 3-4). Briefly, Prost and Clark (2006) puts that:

> 'Faced with the contemporary explosion of legal norms, increasing normative specificity, the proliferation of international organizations and the multiplication of international tribunals, some have highlighted the risk of "fragmentation" of international law into a more or less coherent set of "normative islands" constituted by partial autonomous and perhaps even "self-contained" legal sub-systems'.

Other reasons for fragmentation are: (i) Decentralized method of norm creation, application of different regulations in different situations, or resort to different systems for the regulation of the same situation (Brownlie 1987); (ii) Law-making treaties entered into by states to promote their self-interest and to become an exception from general

regulations (Benvenisti and Downs 2007); (iii) Proliferation of regulatory laws and institutions often signals incapacity and ineffectiveness as institutions generate new bodies and mandate in respects to the failure of existing ones (ibid.).

Generally, it is often argued that the fragmentation is not always accidental but sometimes it is a deliberate act of powerful states to promote their self-interest and dominance. Benvenisti and Downs (2007) says that:

> 'In recent years, as hierarchical strategies have become increasingly contested and deligitimized, powerful states have increasingly relied on fragmentation strategies as an alternative means of achieving the same end in a less visible and politically costly way'.

To maintain its hegemony and powerful status among the countries the powerful states practice the following four fragmentation strategies (ibid.: 6, 19-29): (i) Creating a large number of narrowly focused agreements rather than a small number of broad agreements (i.e., a single agreement that regulates trade, or environment, or labour standards); (ii) Limiting the political co-ordination among the weaker states in creating multinational treaties, with little prospect for renegotiation and amendment – actually doing so is rarely possible without the support of the powerful states; (iii) Try to avoid the creation of strong legislature or judicial mechanism whenever possible, and to carefully circumscribe their authority when their creation is unavoidable; (iv) If weaker states are successful from overcoming all the above strategies, so that the agreement or institution better reflects their interest, then the powerful states try to withdraw from it or switching to a competing venue. As Koskenniemi states that in his essay "what is international law for?":

> '...the proliferation of autonomous or semi autonomous normative regimes is an unavoidable reflection of a postmodern social condition and a beneficial prologue to a pluralistic community in which the degree of homogeneity and fragmentation reflects shifts of political preference and the fluctuating successes of hegemonic pursuits' (quoted in Benvenisti and Downs 2007: 10).

Further, fragmentation of international law happens not due to under creation but because of over creation of norms. Rao (2004) says that '[f]ragmentation of international law' is nothing but a 'competing normative orders'. Martineau (2009) notes that 'fragmentation has referred to the elaboration of highly detailed treaties, to the establishment of regional institutions, to the setting up of specialized jurisdictions, etc.'

Benvenisti and Downs (2007) says that '[t]he term fragmentation denotes a degree of isolation and lack of coordination'. For sociologists such as Fischer-Lescano and Teubner (2004) fragmentation is nothing but 'a legal reproduction of collisions between the diverse rationalities within global society'. Koskenniemi (2005) says that '[f]ragmentation is about a hegemonic conflict: which institution will be entitled to take the voice of general law? What vocabularies and forms of expertise will rule us in the future?' (Koskenniemi 2005: 6). Simma (2009) says that:

> ''[F]ragmentation' of international law is nothing but the result of a transposition of functional differentiations of governance from the national to the international plane: which means that international law today increasingly reflects the differentiation of branches of the law which are familiar to us from the domestic sphere. Consequently, international law has developed, and is still developing; its own more or less complete regulatory regimes which may at times compete with each other'.

'From the perspective of third world peoples, fragmentation results in an alienated international law, produced by the separate and different logic of specialized regulatory spheres' (Chimni 2007: 508).

However, in contemporary times:

> 'The term 'fragmentation' is commonly used to refer to the slicing up of international law 'into regional or functional regimes that cater for special audiences with special interests and special ethos'. Yet this is not the only possible meaning: in addition to fragmentation as a process ('international law is being sliced up'), the term has been used to refer to the so-called primitive character of international law ('international law is still fragmented')' (Martineau 2009: 4).[87]

'[T]echnically speaking, fragmentation has referred to the elaboration of highly detailed treaties, to the establishment of regional institutions, to the setting up of specialized jurisdictions, etc.' (ibid.)

Two opposing views prevail on the issue of fragmentation of international law: on the one side, the scholars, such as Jenks, Hafner, Fischer-Lescano and Tuebner, Koch, Kelly, Trachtmann, etc., argue that there is no homogenous, only heterogeneous systems of law exist on various issues and they act as specialized self-contained regimes; on the

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[87] Here, the term "fragmentation" refers 'both to a result (international law is fragmented) and to a process (it is fragmenting). The two meanings are mutually exclusive: if the law is fragmented or primitive, then it cannot be disintegrating (we assume that it is already so); if the law is disintegrating, then it cannot yet be fragmented (we fear that it might become so)' (Martineau 2009: 4, fn. 9).

other hand, the scholars, such as Simma, Koskenniemi, Pauwelyn, Rao, Burke-White, etc., while agreeing the fragmented nature of international law, they argue that the regimes are not self-contained and they are inter-connected with each other and all of the regimes partially or fully acts under the banner of general international law.

As a result, two approaches prevails on the post-modern international law – on the one hand, 'Constitutionalist approach to the international [legal] order advocate some form of systemic unity, with an agreed set of basic rules and principles to govern the global realm'. It 'assume the existence of an international community, posit the need for common norms and principles for addressing conflict, and emphasize the possibility of universalization' (Burca 2010: 12); on the other, 'Pluralist approaches...emphasize the existence of multiplicity of distinct and diverse normative systems, and the likelihood of clashes of authority-claims and competition for primacy amongst these'. It denies 'the possibility of a shared, universally-oriented system of values and question the meaningfulness of an international community' (ibid.).

The next major issue about the fragmentation of international law is: whether such a system contributes to the development of international law or poses a threat to efficacy of international law? The concern over the problem of fragmentation, conflict of norms and special regimes has arisen only after the end of the Cold War (Koskenniemi and Leino 2002: 559). For instance, a study conducted in 1995 by the Netherlands Yearbook of International Law reviewed several such fields, including diplomatic law, law of war, human rights law, environmental law, GATT/WTO law, space law, European community law (ibid.: 561; Wellens 2004: 1-2; Marschik 1998: 212-239). The study focused on the "secondary rules" (concerning rule creation, amendment and interpretation) within special regimes and sought to find out '*whether they would become a potential risk, constituting a threat to the global unity, coherence and efficacy of the international legal order*' (emphasis added) (ibid.). Although the study highlighted many ways in which regime-specific rules deviated from general rules, the conclusion was not too negative:

> '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' (quoted in Koskenniemi and Leino 2002: 561).

The study shows that the branches remain 'an integral part of general international law...as far as their secondary rules are concerned' (Wellens 2004: 2). In this regard, 'fully self-contained regimes may seem to pose less of a threat than semi-autonomous ones that apply concepts of general law but do this from a special perspective' (Koskenniemi 2002: 561). Here, the core problem is: perhaps, 'not so much in the emergence of new sub-systems but in the use of general law by new bodies representing interests or views that are not identical with those represented in old ones' (ibid.).

In his 1998 Hague Lectures, Charney explored the question '*whether the coherence of international law was threatened by the increasing number of third party forums that decide disputes in accordance with international law?*' He concluded that 'an increase in the number of international tribunals appears to pose no threat to the international legal system' and said that cross-fertilization promotes uniformity of international law and constitutes an improvement in the quality of the law (quoted in Wellens 2004: 2).

Further in 1998, the *New York University Journal of International law and politics* convened a symposium to consider the implications of the recent proliferation of international courts and tribunals.[88] The question posed before the contributors was: '*whether the proliferation of international courts and tribunals in a horizontal legal arrangement lacking in hierarchy and sparse in any formal structure of relations among these bodies, is fragmenting or system-building in its effects on international law or is the proliferation of international courts and tribunals a systemic problem?*' (Kingsbury 1999: 680). The symposium looked into many issues; the emergence of treaty based international and regional *ad-hoc* and permanent tribunals;[89] conflicting and overlapping

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[88] The symposium was organized jointly by the NYU Law School, with the support of the Global Law School programme, and the Project on International Courts and Tribunals (PICT), itself a joint venture between NYU's Center on International Co-operation and the Foundation for International Environmental Law and Development in London (Kingsbury 1999: 679). Even before this symposium, there was another symposium was convened by the American Society of International Forum co-sponsored with the Graduate Institute of International Studies in 1995 (Romano 1999: 709, fn. 2)

[89] Ranging from Joy treaty (1794), based three Mixed Claims Commissions, American-Mexican Claims Commission (1868), Alabama Claims Arbitration (1872), Permanent Court of Arbitration (1899 and 1907),

jurisdictions; forum shopping issues; parties (status and non-state actors) to the disputes; procedural and substantive law issues (including applicable laws, sources, etc.); advisory jurisdiction of ICJ and some regional courts (such as ECJ, CACJ, etc.) and original jurisdictions; provisional measures, orders and recommendations; and so on.

In the symposium, while examining the legal opinions of a variety of tribunals, Charney found a general conformity of doctrine on such systemic matters as 'the law of treaties, sources of international law, state responsibility, compensation for injuries to aliens, exhaustion of domestic remedies, nationality, and international maritime boundary law' (Charney 1999: 699). Hence, he says 'the variety of international tribunals functioning today do not appear to pose a threat to the coherence of an international legal system...although risks do exist' (ibid.: 700). Further, he says '[t]he lack of a strictly hierarchical system provides international tribunals with the opportunity to contribute collectively ideas that might be incorporated into general international law' (ibid.). However, '[a]n overly strict hierarchal structure for international decisions could place undesirable constraints on the development of general international law and specialized law for specific areas' (ibid.).

Further, Romano (1999) concludes that such proliferation of courts and tribunals 'depicts the beginning of a process towards the construction of a coherent international order based on justice'.[90] Pinto (1999) notes that coordination has been less effective

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the Permanent Court of International Court of Justice (1922), the International Court of Justice (1946), the two *ad-hoc* criminal tribunals International Criminal Tribunal for former Yugoslavia (1993), International Criminal Tribunal for Rwanda (1994), the WB Dispute Settlement System (1995), the International Tribunal for the Law of the Sea (1996), the International Criminal Court (1998), proposal for International Court for Environment, the regional tribunals such as European Court of Justice (1951) and together with its Court of First Instance (1988), Central American Court of Justice (1995), European Court of Human Rights (1950), Inter-American Court of Human Rights (1969), African Court of Human and Peoples' Rights (1998), Court of Justice of the European Free Trade Association (1992), Court of Justice of the Benelux Economic Union (1958), Court of Justice of the Common Market for Eastern and Southern Africa (1993), Common Court of Justice and Arbitration of the Organization of the Harmonization of Corporate Law in Africa (1993), Court of Justice of the Arab Maghreb Union (1989), Judicial Board of the Organization of Arab Petroleum Exporting Countries (1968); there are some hybrid courts and tribunals, such as Special Panels and Courts for East Timor (2000), Special Court for Sierra Leone (2002); Administrative tribunals, namely UN Administrative Tribunals, ILO Administrative Tribunals, Administrative Tribunal for World Bank; there are some claims tribunals, namely Iran-USA Claims Tribunal, proposals to establish such tribunals for Cambodia, Iraq; etc. were discussed.

[90] Because in these international tribunals and courts, 'where all participants (sovereign states, individuals, multinational corporations, etc.) can be held accountable for their actions or seek redress through an impartial, independent, objective, and law based judicial institution' (Romano 1999: 751).

between international human rights institutions, because quite often petitions by the same individual have been addressed by both the Human Rights Committee and the Inter-American Commission on Human Rights, which was one fact, in addition to delays in these bodies. Dupuy (1999), by illustrating the decision of the WTO Appellate Body on *Beef Hormones* case – the rejection of "precautionary principle" defense of the EU for the alleged violation of international trade rules – it took account of the non-adoption by the ICJ of the "precautionary principle" when it had been specifically pleaded in the *Hungry-Slovakia* case, he says such approach posses threat not only to the environment and/or health but also the development of international law.

Abi-Saab (1999) noted that '[w]hat these judicial organs have in common, in spite of their diversity, is that they belong to the same legal system and derive their legitimacy and physiognomy from it'. In fact, the multiplication of such uncorrelated adjudicative organs poses threat to the development and risks the unity, coherence and efficacy of the international law. He says that:

> 'These dangers arise from: the possibility of conflict of jurisdiction, either active or passive, between these organs; and the risk of contradiction or conflict of findings and interpretations undermining the substantive unity of the legal order and increasing rather than decreasing the indetermination of law through the exercise of the judicial function' (Abi-Saab 1999: 922).

Further, 'the proliferation of specialized tribunals, which necessarily...exercising plenary jurisdiction (e.g., the law of the sea)...as do the threats to the cohesion and unity of international law (ibid.: 924).

Such concerns have sometimes been expressed also by the judges and presidents of the International Court of Justice. In 1995, before his appointment to the ICJ, Judge Oda was questioned about the creation of ITLOS and the problem of multiple international judicial forums. He replied that:

> 'The creation of judicature in parallel with the International Court of Justice...will prove to have been a great mistake. [Because]...the law of the sea always has been, and always will be, an integral part of international law as a whole. [Hence it]...must be interpreted in the light of the uniform development of jurisprudence within the international community and must not be dealt with in a fragmentary manner... If the development of the law of the sea were to be separated from the general rules of international law and placed under the jurisdiction of a separate judicial authority, this could lead to the destruction of the very foundation of international law' (Oda 1995: 863-864).

In 1999, President Schwebel noted that, despite the generally encouraging development of new tribunals, the recent mushrooming of tribunals 'might produce substantial conflict among them, and evisceration of the docket of the [ICJ]'. And he proposed that:

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

In 2000, Judge Guillaume speaking as President of the ICJ at the UN General Assembly expressed his concern about the possibility of forum shopping and 'unwanted confusion', noting that the development 'give rise to a serious risk of conflicting jurisprudence as the same rule of law might be given different interpretations in different cases' (Judge Guillaume speech 2000). Further, he stressed that '[t]he proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations' (Judge Guillaume speech 2001). However, like Schwebel, Guillaume also proposed enabling international courts or tribunals to request rulings from the ICJ in cases where they 'encounter serious difficulties on a question of public international law' (ibid.; Guillaume 1995: 861-862).

In 2006, President of the ICJ judge Higgins has also expressed a concern for prioritizing the resolution of issues arising from the fragmentation of international law (Plenary address in AJIL Annual Meeting 2006). But she does not agree with the 'call of successive Presidents [...] for the ICJ to provide advisory opinions to other tribunals on points of international law', because this 'seeks to re-establish the old order of things and ignores the very reasons that have occasioned the new decentralization' (quoted in Koskenniemi and Leino 2002: 554, fn. 3).

In response to such growing anxieties, in 2000, the ILC decided to include the topic "[r]isks ensuing from the fragmentation of international law" into its long-term programme of work. And in 2002 the Commission decided to include the topic, renamed "[f]ragmentation of international law: difficulties arising from the diversification and expansion of international law" and established a Study Group and appointed Bruno Simma as its Chairman. In 2003, the Commission appointed Martti Koskenniemi as

Chairman of the Study Group. The Study Group focused five major issues on the topic: (i) function and scope of the *lex speicalis* rules and the question of 'self-contained' regimes (Article 55 of the Draft Articles on State Responsibility), (ii) modification of multilateral treaties between certain of the parties only (Article 41 of the VCLT), (iii) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 UN Charter Obligations, (iv) interpretation of treaties in the light of 'any relevant rules of international law applicable in relations between parties' (Article 31(3)(c) of the VCLT), and (v) application of Successive Treaties relating to the same subject-matter (Article 30 of the VCLT) (ILC Report on Fragmentation 2006: 9-10, para. 4). The report is mainly about "legal reasoning" (ibid.: 16-17, para. 20). The Commission completed its work in 2006.

According to the Commission, the issue of fragmentation has both "positive and negative sides": 'On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices. On the other hand, it reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques' (ibid.: 14, para. 14). Further, it rationalizes that:

> '[T]he emergence of new and special types of law, "self-contained regimes" and geographically or functionally limited treaty-systems creates problems of coherence in international law. New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. The emergence of "environmental law" is a response to growing concern over the state of the international environment. "Trade law" develops as an instrument to regulate international economic relations. "Human rights law" aims to protect the interests of individuals and "international criminal law" gives legal expression to the "fight against impunity". Each rule complex or "regime" comes with its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighboring specialization... In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations or become general and frequent, the unity of the law suffers' (ibid.: 14, para. 15).

The Commission understands that these new regimes reflect 'the differing pursuits and preferences that actors in a pluralistic (global) society have. In conditions of social complexity, it is pointless to insist on formal unity' (ibid.: 15, para. 16).

On the other hand, Koskenniemi concluded in his report to the ILC that the 'the present use of the *lex specialis* maxim or the emergence of special treaty-regimes...have not seriously undermined legal security, predictability or the equality of legal subjects' (quoted in Lindroos 2005: 32). Finally, the ILC says '[i]n an important sense, "fragmentation" and "coherence" are not aspects of the world but lie in the eye of the beholder' (ILC Report on Fragmentation 2006: 16, para. 20). That is, '[u]nity and diversity are matters of normative judgments': 'where one sees peaceful unity, another may experience monotony or suffers oppressive domination; what seems to one like chaos may appear to another as healthy pluralism' (Martinueau 2009: 8). Further, '[t]here is no meta-level from which one could ascertain whether, there is unity or diversity; there are only interpretation narratives' (ibid.).

In overall historical scenario, it is apparent that the international law has been continuously changing along with the changes in the international relations. While changing, its nature alone changes (as general or special rules) and its function has never been changed. Indeed, the collapse in western Europe at the end of the Middle Ages of all higher authority – be it Pope or Emperor – resulted in a further heterogeneity as between the new state entities that made their appearance in the Christian world. 'From there modern international law, with its specifically inter-state character was to take its rise...without losing the essential features it owed to its remotest prestate origins' (Weil 1983: 418). International law came for twofold necessity:

> '[F]irst, to enable these heterogeneous and equal states to live side by side, and to that end to establish orderly and, as far as possible, peaceful relations among them; second, to cater to the common interest that did not take long to surface over and above the diversity of states' (ibid.).[91]

These dual functions had arisen especially from the Treaty of Westphalia 1648. The dual function of classic international law (i.e., coexistence and common aims) –

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[91] This has been stated in the *Tehran* case, where the court held that '[t]he rules of diplomacy...had proved "essential for the maintenance of peaceful *relations* between States" and where "accepted throughout the world by nations of all creeds, cultures and political complexions"... The institutions of diplomacy had proved to be "an instrument essential for effective *cooperation*...enabling States, irrespective of their *differing* constitutional and social systems, to achieve mutual understanding"; the obligations thus laid upon states "are of cardinal importance for the maintenance of good *relations*...in the interdependent world of today...for the security and well-being of the...international community..., to which it is more essential than ever that the rules developed to ensure the *ordered progress of relations* between its members should be ... respected"' (quoted in Weil 1983: 420, fn. 23).

inherited from the *jus inter gentes* of prestate times – was to find expression in the *Lotus dictum*: 'International law governs relations between States...in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims' (quoted in ibid.: 419).[92]

Despite the profound transformations that international society has undergone, especially since the end of the Second World War, and the nature of international law as well changed, as a result of its expansions to diversified specialized fields, its functions remain the same. Today international society is founded on the "sovereign equality of states", whose "fundamental importance" is emphasized by the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations – a revealing expression of "modern" international law if ever there was one (ibid.). And the

> '[I]nternational society rendered more diverse than ever by the emergence of a hundred new States, the traditional dual function of international law turns out to be more vital than ever. The 1970 declaration provides telling evidence of this continuity between the functions of "classic" international law and those of "new" international law... [I]t is the key concept of "relations" and "coexistence" (now called respectively "friendly" and "peaceful"), on the one hand, and "common aims" (now translated into "cooperation"), on the other, that define the function of international law as an instrument for the regulation of a pluralistic, heterogeneous society' (ibid.: 419-420). Weil (1983) says '[t]he [*Tehran* case] enabled the International Court of Justice to highlight and forcefully underline the permanence of this traditional dialectic between difference, on the one hand, and relations and cooperation on the other'.

He says, the terms it employed in 1979 and 1980 were a significant echo of the Permanent Court's formulae (ibid.: 420).[93]

The fragmentation of international law has become a strong base for the conflict of norms between the regimes and how such conflict and integration affects the developing countries will be discussed in the succeeding chapters.

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[92] *S.S. Lotus Case*, (1927), PCIJ Reports, series A, No. 10, at 18.

[93] *Case Concerning United States Diplomatic and Consular Staff in Tehran, order,* (1979), ICJ Reports, 7, 19; and (1980) ICJ Reports, 3, 24, 42, 43.

CHAPTER - III

CONFLICT OF NORMS

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1. MEANING OF NORM

International law consists of norms to regulate inter-state relations. Kelsen notes that 'international law is a complex of norms regulating the mutual behaviour of states' (Translated by Knight 1967: 320). Higgins states that '[i]nternational law is not rules. It is a normative system...harnessed to the achievement of common values' (quoted in Pauwelyn 2003: 7). From this the issue arises: what is a "norm" and how are norms created?

Norm may be a rule, principle, order, guideline, etc.[1] The international legal system has no centralised legislator. A result, norms are created by the subjects of international law themselves in a variety of fora, and therefore the norms are often disconnected and independent from each other. Traditionally, only the states were the creators and the addressees of the norms of international law. Later, the sovereign power was delegated to the companies (e.g. East India companies) and with their quasi-sovereign power entered into treaties. In contemporary times, especially after the end of the Second World War, there have emerged new subjects of international law – as a result non-state actors (such as individuals, non-governmental organizations and multinational companies) have also become norm creators and addressees of international law. Even then the states are the prime creators and addressees of norms in contemporary times. In applying and interpreting international law, the adjudicating bodies also participate in norm creation. As Jennings remarked in respect of both judicial decisions and commentators: 'it is these two sources which are most likely to bring certainty and clarity in the places where the mass of material evidences is so large and confused as to obscure

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[1]Higgins expressed that '[i]nternational law is not just 'rules' or ...'accumulated past decisions' – but rather a continuous 'process' – from the formation of rules to their refinement by means of application in specific cases, with multiple actors, institutions and legally relevant instruments and conduct at play' (Pauwelyn 2003: 7).

the basic distinction between law and proposal' (quoted in Pauwelyn 2003: 93).

Therefore, it is generally recognised that norms of international law may derive from the following six sources: treaties, customs, general principles of law, judicial decisions, unilateral acts of states and acts of international organisations.[2] Such legal norms 'dictate what its subjects must do (prescriptive norms), must not do (prohibitive norms), or may do (permissive norms), and constitute for them a source of legal rights and obligations (Weil 1983: 413).[3] According to Kelsen, '[n]orm is the meaning of an act by which a certain behavior is commanded, permitted or authorized' (Translated by Knight 1967: 5).[4] In this regard, he makes an ideal structure of a norm-pyramid, with a transcendental *Grundnorm* (basic norm) at the apex of the pyramid (ibid.: 8-9). In such an ideal normative world, it is always possible to determine the relationship between two or more norms by either establishing the superiority of a higher norm over a lower norm, or by giving priority on the grounds such as *lex posterior* or *lex specialis* (Lindroos 2005: 27). 'Domestic legal systems may to some extent operate on these premises, but the international legal system is far removed from such an ideal world' (ibid.: 27-28).

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[2]Article 38(1) of the ICJ Statute explicitly confirms that treaties, customs and general principles of law are primary means and the judicial decisions and the writings of the highly qualified publicists are subsidiary means, for the determination of rules of law. And other sources of norms, such as unilateral acts of states and the acts of international organizations are not mentioned in the list of sources, but these sources gets more importance in contemporary times. Hence, it has been criticized that the sources of international law mentioned under the Article is not an exhaustive list and it needs to be amended.

[3] Both "hard law" and "soft law" consists of norms, which forms the international normative system – in which the former creates precise legal rights and obligations and the violation of which led to state responsibility and it helps to strengthen the international normative system – whereas the later does not do so (Weil 1983: 413-415). At the same time, the "soft laws" 'convey the sub-legal value of some non-normative acts, such as certain resolutions of international organizations' (e.g., 'the Helsinki Final Act, and the Stockholm Declaration on Environment') – therefore the term "soft law" reserves 'for the rules that are imprecise and not really compelling, since sub-legal obligations are neither "soft law" nor "hard law": they are simply not law at all' (ibid.: 414-415, fn. 7). Therefore, here two basically different categories are involved: on the one hand, 'there are legal norms that are not in practice compelling, because too vague'; on the other hand, 'there are provisions that are precise, yet remain at the [pre-normative] or sub-normative stage' (ibid.). Therefore, Weil (1983) says '[w]hether a rule is "hard" or "soft" does not, of course, affect its normative character. A rule of treaty or customary law may be vague, "soft"... [which] does not thereby cease to be a legal norm'.

[4]Kelsen views that '[t]he norm, as the specific meaning of an act directed toward the behaviour of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an *ought,* but the act of will is an *is*'. Hence, he says '[t]he one individual wills that the other individual ought to behave in a certain way. The first part of this sentence refers to an *is*, the existing fact of the first individual's act of volition; the second part to an *ought*, to a norm as the meaning of the act. Therefore it is incorrect to assert – as is often done – that the statement: "An individual ought" merely means that another individual wills something; that the *ought* can be reduced to an *is*' (Translated by Knight 1967: 5).

On the other hand, Pauwelyn says a norm of international law may perform either one of the following four functions: 1. it may be a 'command' which impose an *obligation* on states *to do something* (i.e. 'prescriptive norms': 'must/shall do' norms or norms imposing a 'positive obligation'); 2. it may be a 'prohibition', which impose an *obligation* on states *not to do something* (i.e. 'prohibitive norms': 'must/shall not do' norms or norms imposing a 'negative obligation'); 3. it may be an 'exemption', which grants a *right* to states *not to do something* (i.e. 'exempting norms' or 'need not do' norms); and 4. it may be a 'permissive', which grants a *right* to states *to do something* (i.e. 'permissive norms' or 'may do' norms) (Pauwelyn 2003: 158-159).

In addition, he says: 1. it may *empower* an organ, institution or individual (other than states), with legal capacity under international law;[5] and 2. it may *regulate other norms*,[6] by addressing the creation, application, interplay, suspension, termination, breach or enforcement of other norms of international law (many of such norms fall also under types (1) to (4)), since these norms regulate other norms, which can be referred to as 'secondary norms' (ibid.: 159).

However, '[n]orms of international law, whatever their function, may interact in two ways. They either (i) accumulate, or (ii) conflict. If two norms do not conflict, they necessarily accumulate (and vice versa). Two norms accumulate when they can be applied together and without contradiction in all circumstances. Two norms conflict when this is not the case' (ibid.: 161).

Accumulation: A norm may accumulate with other norms in two different ways. 'It may either: (i) *add* rights or obligations to already existing rights or obligations (without contradicting any of these rights or obligations) and hence form a complement to other norms ('complementary' relationship); or (ii) *confirm* already existing rights or obligations, without either adding to or detracting from these rights or obligations' (ibid.)

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[5] 'Such as treaty provisions establishing an international organisation, committee or body and related provisions regulating their functions (e.g. Arts. I-IV of the Marrakesh Agreement and DSU Art. 2.1. providing that '[t]he Dispute Settlement Body is hereby established'). WTO committee decisions appointing a committee chairman also fall under this type of norms' (Pauwelyn 2003: 159, fn. 3).

[6] 'As most norms in the Vienna Convention and the ILC Draft Articles on State Responsibility do' (ibid.: fn. 4). Such type of norms may also include individual norms terminating one other specific norm or convention. For example, 'the WTO General Council decision to terminate the International Diary Agreement and the International Bovine Meat Agreement', etc. (ibid.: fn. 6).

In the first instance, the accumulation of norms takes place by means of a norm simply adding rights or obligations to another norm without contradiction. For example, 'when one norm regulates trade in goods and another trade in services, both dealing with trade, but one simply adding rights and obligations to the other without detracting from them' (ibid.: 162). In the same way one norm says that 'when navigating on the high seas one may not dump oil and another norm adds to this that when navigating on the high seas one must also emit certain signals' (ibid.).

In the second instance, the accumulation of norms takes place by means of 'one norm simply 'confirming' a pre-existing norm'. For example, 'DSU Article 3.2 ...merely 'confirms' pre-existing rules of general international law when stating that WTO covered agreements must be interpreted 'in accordance with customary rule of interpretation of public international law' (ibid.). In the same way, GATT 1994 incorporates and hence confirms GATT 1947 (ibid.).

In the above said circumstances, implementing or relying on one norm cannot lead to breach of the other. Hence both norms accumulate and must be complied with at the same time.

Conflict: A norm to be in conflict with another norm, when they cannot be applied together. The definition of conflict is further defined below:

2. Definition of Conflict

The next major issue is: what is conflict? Or when are two norms said to be in conflict? There is no proper definition of conflict in international law. Some of them give a very vague or general definition. Others, in contrast, give a very strict or technical definition.

2.1. Strict/Narrow Definition

Jenks (1953) first adopted a very strict or technical definition of conflict in international law and viewed that '[a] conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its

obligations under both treaties'.[7] Karl (1984) observes that '[t]echnically speaking, there is a conflict between treaties when two or more treaty instruments contain obligations which cannot be complied with simultaneously'.

Klein (1962) adopted a strict definition that 'only those constellations of parallel treaties are practically relevant in which the provisions, in particular the obligations, of two or more international treaties formally contradict each other in a manner which cannot be resolved' (quoted and Translated in Vranes 2006: 403, fn. 48). And more recently, Marceau (2001) submits that a conflict may be defined narrowly or broadly 'depending on one's conception of the international legal order'. She supports Jenk's strict definition, by stating that 'since the main objective of interpretation rules is to identify the intention of the parties, it is suggested that "conflict" should be interpreted narrowly, in order to keep as much as possible of the agreement of the parties' (Marceau 2001: 1086). To take into account explicit permission provided in another treaty, one should, in her view, refer to the *lex specialis* principles (ibid.).[8] And she argues that '[i]n the area of trade and environment, where MEAs may authorise (and not oblige) the use of trade restriction otherwise prohibited by GATT, we would not be faced with a conflict *stricto sensu*' (ibid.).

Initially Kelsen (1960) viewed that 'a legal system *cannot* have conflict of norms'. He argued that 'any legal system is founded on one *Grundnorm* which explains and justifies all other norms. For this *Grundnorm* to be the genuine foundation of the legal system, it cannot simultaneously accord validity to two norms which are contradictory without threatening the unity of the legal system' (Pauwelyn 2003: 172). Later, he changed his mind and acknowledged the existence of conflict of norms in a

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[7]Further, he says that '[a] conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible... There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another' (Jenks 1953: 451).

[8]The *lex specialis derogat legi generalis* principle of interpretation favours the application of a more specific provision over a general one. As per this principle, 'a State may exercise an express and more specific right provided for in an earlier or later treaty, albeit inconsistent with a subsequent treaty provision drafted in general terms' (Marceau 2001: 1086).

legal system.[9] In his essay on *Derogation*, where Kelsen held that '[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated' (quoted in Vranes 2006: 402, fn. 47). And he further categorised conflict into various kinds:

> '[A] conflict is bilateral if in obeying or applying each of the two norms, the other one is (possibly or necessarily) violated. The conflict is unilateral if obedience to or application of only one of the two norms violates the other one. The conflict is a total one if one norm prescribes a certain behaviour which the other forbids (prescribes the omission of the behaviour). The conflict is a partial one if the content of one norm is only partially different from the other one' (quoted in ibid.: 414; Ramanujam 2009: 188).

2.2. Wider/Broader Definition

On the other hand, in 1935, Engisch adopted a wider definition of conflict, according to whom there is a conflict '1) if conduct of a given type is at the same time prohibited and *permitted*, or prohibited and prescribed, or prescribed and not prescribed in a given legal order. Or if incompatible ways of conduct are prescribed at the same time... 2) if a concrete conduct appears at the same time to be prohibited and *permitted* etc in a given legal order' (quoted in Vranes 2006: 406, fn. 67). Lauterpacht (1937) also adopted a broader definition and viewed that the word 'inconsistency' as it was used in Article 20 of the Covenant of the League of Nations was meaning that 'not only patent inconsistency appearing on the face of the treaty... but also what may be called potential or latent inconsistency... [such treaties] may become inconsistent and therefore abrogated, as soon as it becomes clear that their continued validity or operation is incompatible with the negative or positive obligations of the Covenant'. Aufricht (1952) stated that '[a] conflict between an earlier and a later treaty arises if both deal the same subject matter in a different manner'.

Waldock (1964) in the preparation of the VCLT adopted a broader view of

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[9] 'He did so because a conflict of norms is a conflict of will or intent, not a logical contradiction where only one of the propositions can be valid... Indeed, a conflict of norms takes the form, for example, of state A being obliged to do and not to do X at the same time (as a result of different expressions of intent in two different norms), but state A can, in principle, do or not do X. In contrast, a logical contradiction takes the form of, for example, saying that the door is open and the same door is closed. Here, only one of the two can be correct' (Pauwelyn 2003: 172, fn. 40).

conflict and noted that '[t]he idea conveyed by that term [conflict] was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another' (quoted in Pauwelyn 2003: 168). Czaplinski and Danilenko (1990) also adopted a wider perspective on conflict suggesting that 'conflict arise at the stage of application of the agreements when the later treaty in a particular situation violates the rights of any other party to the earlier treaty, or when the provision of the later treaty seriously infringes provisions of the earlier treaty which are indispensable for the effective implementation of the object or aim of that treaty'.

Pauwelyn has criticized recently the classic narrow definition of conflict and opted for a broader definition. He defines conflict of norms 'as a situation where one norm breaches, has led to or may lead to breach of another norm' (Pauwelyn 2003: 199).[10] On that basis, he subdivides the conflict of norms into (1) inherent normative conflicts: that is, one norm breaching, in and of itself, another norm, by its mere conclusion or emergence.[11] For example 'a multilateral treaty explicitly prohibiting the conclusion of certain *inter se* agreements or a norm in breach of *jus cogens*' (ibid.: 176). Here, one norm constitutes an inherent breach of the other; and (2) conflicts in the applicable law: that is, where the implementation or reliance on a norm lead to conflict with another norm.[12] 'In some cases, such breach will occur *necessarily*, whenever either of the two norms is complied with as required (as in the case of mutually exclusive obligations)' (ibid.). He refers this situation as *necessary conflict*. 'In other instances, there is a margin of discretion and only if a state actually decides to exercise a right (permission or exemption) will the breach materialise' (ibid.). He refers this situation as *potential conflict*. For example, 'state B will sue state A for breach of norm 1 whereas state A will invoke norm 2 in defence of the alleged breach' (ibid.: 177). This raises the question of *necessary or potential* conflict of norms. In this regard, he makes a further

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[10] The word 'breach' is used, by Pauwelyn, interchangeably with 'violation', 'incompatibility' or 'inconsistency'.

[11] 'Inherent conflicts may arise in abstract, that is, without there being a question of any state conduct other than the two conflicting norms, or in a more concrete dispute on the legality of certain state behaviour (in which case the defendant could claim, for example, that the norm which it has allegedly breached is an 'illegal' one under another norm' (Pauwelyn 2003: 177).

[12] It results from the exercise or implementation of a norm granting certain rights or imposing certain obligations which is, allegedly, in breach of another norm (ibid.: 176-177).

distinction of conflict of norms into 'apparent conflicts' and 'genuine conflicts'. He views that in the case of an apparent conflict 'there is no real conflict since the divergence can, for example, be 'interpreted away'. A genuine conflict will then arise only in case all of the conflict-avoidance techniques...have proven to be unsuccessful' (ibid.: 178).[13]

However, by focusing on the four main functions of norms in international law (i.e. command, prohibition, exemption and permission) the following questions arise: 'whether, in particular, the definition of norm conflict should cover incompatibilities between obligation and prohibitions only, as is apparently the preponderant view in the field of international law; or whether it should also extend to incompatibility of obligations, prohibitions, and permissions or whether a 'unilateral' incompatibility between two obligations should also be recognised as constituting conflict' (Vranes 2006: 398).

To solve such questions, Pauwelyn finds that in case of 'inherent normative conflict', an allegation that one norm constitutes, in and of itself, a breach of another norm, hence the question as to whether there is conflict, depends exclusively on the requirements set out in the first norm. Therefore, the content of the primary obligation in the first norm determines whether there is breach. If there is breach, there is normative conflict (Pauwelyn 2003: 178). But in respect of 'conflicts in the applicable law' the situation is different and more complex, here an allegation that there is conflict of norms because compliance or invocation of one norm has lead, or would lead, to breach of the other norm (ibid.). As a result of the above said four functions of norms in international law, possibly any one out of four types of conflicts in the applicable law may arise:

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[13] The conflict avoidance technique may include co-ordination *ex ante* (conflict prevention), treaty interpretation (Article 31 to 33 of the VCLT) and so on.

Conflicting situation	Norm 1	Norm 2
1	**Command:** state A *shall do* X	**A. Command:** state A *shall do* Y, where X and Y are merely different/divergent. **B. Command:** state A *shall do* Y, where Y is mutually exclusive of X
2	**Command:** state A *shall do* X	**Prohibition:** state A *shall not do* X
3	**Command:** state A *shall do* X	**Right (Exemption):** State A *need not do* X (it may, for example, do Y)
4	**Prohibition:** state A *shall not do* X	**Right (Permission):** state A *may do* X

(Source of table, see Pauwelyn 2003: 179).

Pauwelyn refers situation 1 and 2 as 'necessary conflicts', that is compliance of an obligation under one norm breaches or conflicts an obligation under another norm conflict situation 3 and 4 referred to as 'potential conflicts', the exercise of an explicit right (may be a permission or an exemption) under one norm breaches or conflicts an obligation under another norm (ibid.: 180, 200).[14] Therefore, as per his view:

> 'A norm granting certain right, that is, allowing a state to do, or not to do, something (a permission or an exemption) cannot be breached. Hence, no conflict can arise in case of norm 1 (the norm allegedly breached) which is an exemption or a permission. Conflict can arise only in case of norm 1, which is either a command or a prohibition' (ibid.: 178)

As per the ILC Report on Fragmentation (2006): 'A strict notion would presume

[14] In this regard, Pauwelyn quotes the WTO Panels and Appellate Body reports on Indonesia–Automobiles and Turkey–Textiles disputes to prove the strict definition of conflict, and the EC–Bananas and US–FSC disputes to prove the broader definition of conflict (Pauwelyn 2003: 188-200). For reference, see *Indonesia – Certain Measures Affecting the Automobile Industry*, (23 July 1998), WTO Panel Report, WTO Doc. WT/DS54/R, WT/DS59/R, WT/DS64/R; *Turkey – Restrictions on Imports of Textile and Clothing Products*, (31 May 1999), WTO Panel Report, WTO Doc. WT/DS34/R; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, (25 September 1997), WTO Panel Reports, WTO Doc. WT/DS27; *United Stats – Tax Treatment for 'Foreign Sales Corporations'*, (20 March 2000), WTO Appellate Body Report, WTO Doc. WT/DS108/AB/R.

that conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule. This is the basic situation of incompatibility'. (ILC Report 2006: 19, para. 24). It also finds 'there are other, looser understandings of conflict as well. A treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions' (ibid.). For instance:

> 'Two treaties or set of rules may posse different background justifications or emerge from different legislative policies or aim at divergent ends. The law of State immunity and the law of human rights,... illustrate two sets of rules that have very different objectives. Trade law and environment law, too, emerge from different types of policy' (ibid.).

While such 'policy-conflicts' do not lead into logical incompatibilities between obligations, nevertheless they may also make conflict. Finally, the ILC adopted a wide notion of conflict 'as a situation where two rules or principles suggests different ways of dealing with a problem' (ibid.: para. 25). The reason it gave for such adoption is:

> 'Focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption. In fact, any decision will involve interpretation and choice between alternative rule-formulations and meanings that cannot be pressed within the model of logical reasoning'. (ibid.).

It is clear from the above discussion that, a conflict may be defined narrowly or broadly. On the one hand, the strict definition does not recognise that a permissive norm may conflict with an obligation or a prohibition and it is being limited only to 'conflict of obligations'. According to Jenks, there is no conflict if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another. For example, in the area of trade and environment, where MEAs may authorise (and not oblige) the use of trade restrictions otherwise prohibited by GATT, in such a case there is no conflict arises between them, according to Jenk's strict definition of conflict. Here, the permissive/exemptive norm (i.e. MEAs) have to give way for the prescriptive norm (i.e. WTO) in *stricto sensu* (Vranes 2006: 395-396). Marceau (2001) supports the strict definition of conflict by stating that 'since the main object of interpretation rule is to identify the intention of the parties, it is suggested that "conflicts" should be interpreted narrowly, in order to keep as much as possible of the agreement of

the parties' (Marceau 2001: 1086).[15] She views that only the strict definition will bring the coherence in the international legal order, in her words, '[i]f one believes that international commitments should be understood in the light of some coherent international order, one favours narrow definitions of conflict...' (ibid.: 1082).

On the other hand, the broader definition recognizes not only 'conflict between obligations' but also conflict between 'a permissive norm and an obligation or a prohibition'. According to Pauwelyn, quoted above, conflict of norms 'as a situation where one norm breaches, has led to or may lead to breach of another norm', making clear in the accompanying argumentation, though not in the definition itself, that this definition is meant to cover incompatibilities between permissive norms and obligations (Pauwelyn 2003: 199). For example, in the area of trade and environment, where MEAs may authorize (not oblige) the use of trade restrictions otherwise prohibited by GATT, in such a case there is an existence of conflict between them, according to Pauwelyn's broader definition of conflict. Here Pauwelyn views that if strict definition invoked, then it will suffice even the very existence of conflict because it considers only the conflict between mutually exclusive obligations. As a result, the adjudicators do not need to examine whether the MEAs would provide a right or permission and the very definition of conflict may, indeed, influence the outcome of a dispute. But if wider definition of conflict is invoked, then there will be a conflict between an obligation (under GATT) and an explicit right/permission (under MEAs). In such a case, he does not give solution to the conflict, by invoking the broader definition itself or implies the exemption or permission should always prevail and what he does is, after establishing the conflict, he leaves it to the relative conflict rule to solve the issue (Pauwelyn ibid.: 175-200). Then the conflict could be solved by applying the principle of *lex posterior* and *lex specialis* and the adjudicator can possibly find whether a permissive norm is later in time and more specific or not (ibid.: chapters. 6 and 7). He views that the coherence of international law

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[15] The strict definition of conflict often adopted in the WTO Panel and Appellate Body decisions. 'Since the notion of *conflict* is being interpreted so narrowly it allows each of the different legal terms set out in either the GATT 1994 or in the Annex 1A Agreement to have their full meaning, which should be considered a positive development for the effectiveness of the system. If a wide interpretation had been given to the notion of *conflict*, certain provisions could have lost their legal effect, thereby diminishing the context of the 'package' agreed upon in Marrakesh' (Montaguti and Lugard 2000: 476-477).

could be secured only through broader definition of conflict.[16]

3. Reasons for the Conflict of Norms

Why and how does the conflict of norms in international law arise? The problem of conflict of norms is not an *anomaly* and it is inherent in any legal system. The conflict in the domestic legal system is very less, due to its centralized legislative and adjudicatory mechanisms and also the possibility of hierarchy of norms. Scholars have identified various factors responsible for the conflict of norms in the international legal system.

3.1. Decentralised Global Law-Making

International law does not have one central legislator and has essentially as many law-makers as there are states. This multitude of law-makers and legal relationships, especially in the context of proliferation of international organisations, obviously increases the risk of conflict of norms. Pauwelyn (2003) states that '[t]he *equality* between states and the resulting equality between the law they create, as well as the *neutrality* of international law (other than *jus cogens*) resulting in all norms being of the same legal value', as a result norm conflict occur'.[17]

On the other hand, '[t]he problem, as lawyers have seen it, is that...[the] specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules

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[16] Pauwelyn (2003) views that the WTO is not a self-contained regime and often it fall back to general international law for many issues ranging from negotiation of the WTO agreement, state responsibility, customary rules of treaty interpretation, etc. Hence, the WTO has to take into consider other regimes of international law to secure the coherence in international legal order. By this way, he refutes Marceau's strong presumption of 'WTO is a self-contained regime'.

[17] In this regard, there are two major problem arise: first, '[t]he need for consensus among a wide variety of states for norms to be enacted, combined with an often heavy time pressure for conclusion of a treaty, may, indeed, explain a great number of the inconsistencies in international law'; second, 'the more states join a particular treaty regime (as is the case, for example, with the WTO), the more difficult it becomes to arrive at a consensus within that regime and the higher the risk for vague and open-ended rules that are potentially in conflict with other rules, either within or outside that treaty regime'.

or rule systems' (ILC Report on Fragmentation 2006: 11, para. 8).

3.2. Law Changes over Time

International law may change over time, as a result, conflict of norms possibly arise. For example, the principle of *lex posterior derogat legi priori* says any later norm can overrule an earlier one. Pauwelyn (2003) notes that, 'the potential for conflict to arise must be multiplied by a time factor: an earlier norm may conflict with a later one (even if created by the same states), the same way an older norm may need to be interpreted and applied in the background of a newer norm'.[18]

3.3. Domestic Factors

Domestic factors also create conflict of norms. For instance although the state is considered as a single entity but often represented by a multitude of domestic actors in the international law-making process. Treaties in international level are normally negotiated by the diplomats or civil servants and 'the delegates representing a state in the WTO context are mostly not the same as those representing the same state in UNEP, the WHO, or WIPO' (Pauwelyn 2003: 15). In addition, different private groups also participate in the treaty-making process, for instance, '[i]n the WTO – it may be predominantly industry; in UNEP – it may be predominantly environmental interest groups' (ibid.). Therefore, 'the multitude of actors at play in the construction of one and the same state's 'consent' is...another factor that increases the risk of inconsistencies

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[18] States are constantly changing their minds, that is the main reason for conflicts of norms – why states may change their minds over time – there are multitude of reasons: (i) 'Realist theories would posit that states will change their positions depending on how they perceive their own national interests at any given point in time. Since realists believe that states constantly struggle to achieve and maintain power, they would submit that the international legal system and the norms it produces over time arise from balancing state interests, preservation and mutual quests for power' (Pauwelyn 2003: 14); (ii) 'Liberal theories, in contrast, do not so much focus on a constantly changing power struggle as between states, but envision rather than state acts as agents for the benefit of their domestic constituencies and are therefore subject to change through the liberal functioning of the *domestic* system. As a result, in their view international norms will change over time mainly as a consequence of domestic evolution' (ibid.); (iii) '[C]onstructivism would add that states may change their mind also as a result of their experiences in the international arena, their national interest being influenced over time either by the expectations and understandings of *other states* or by the international *institutions* that they have joined' (ibid.: 14-15); and so on.

arising as between *different* norms or expressions of the same state's consent' (ibid.: 16).

3.4. Law of Co-existence to Co-operation

International law has witnessed a shift from being a law of 'co-existence' between sovereign states – dealing with issues such as a territorial sovereignty, diplomatic relations, the law on war and peace treaties – to a law regulating the 'co-operation' between states in pursuit of common goals, such as the law created under the auspices of international trade, environmental and human rights organisations (ibid.: 17; Friedmann 1964). Though the change from the co-existence to co-operation started since First World War but the deeper co-operation between states, was spearheaded in particular by the end of the Cold War (Reisman 1990: 859; Hafner 2000: 321). It led to an exponential increase in the number of international law norms created; hence, an increase in the potential for conflict between these norms.

For instance, 'under the traditional law on co-existence between states, composed mainly of bilateral agreements, hence conflict arose in the form of conflicting obligations held *by one state towards two or more different states*' (e.g. under different peace, neutrality or mutual assistance agreements) (Pauwelyn 2003: 18).[19] On the other hand, under the contemporary law on co-operation, 'constituted increasingly of multilateral treaties dealing with different common goals, hence additional types of conflict arose' (ibid.). 'Today the typical conflict between norms is, indeed, that between norms deriving from different treaty-based sub-systems (say a conflict between a WTO rule and a rule on environment)' (ibid.).[20]

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[19] Pauwelyn (2003) refers this type of conflict as 'AB/AC conflict' - hare, '[t]he two contracts are only common to person A and conflict arises because A promised something to B that is not consistent with what he promised to C: for example, the cession by A of sovereignty over the same piece of land to both B and C or a promise is made by A to assist B in case he is at war with C when the same promise is made towards C in the event that he is at war with B'.

[20] Here, 'both conflicting norms are binding on states A and B but state A invokes one norm in its favour, whereas state B relies on the other, contradictory norm' (Pauwelyn 2003: 18).

3.5. Diversified Global Problems

The need for co-operation between states so as to tackle today's global problems – of protecting the environment, human rights or stimulating economic development – the ever-increasing interdependence between states, as well as between regulatory areas, has resulted the potential for conflict between norms of international law in different sectors. Pauwelyn (2003) writes that:

> 'In today's highly interdependent world a great number...[of] state regulations in one way or another affect trade flows between states. Hence, WTO rules, essentially aimed at liberalising trade, have a potential impact on almost all other segments of society and law. For example, liberalising trade may sometimes jeopardise respect for the environment or human rights. Equally, enforcing respect for human rights or environmental standards may sometimes require the imposition of trade barriers. Moreover, trade restrictions are resorted to increasingly in pursuit of all kinds of non-trade objectives, ranging from respect for human rights and environment to confirmation of territorial borders'.

As a result, the potential for interplay and conflict between WTO rules and other rules of international law is huge.

3.6. Emergence of *Jus Cogens* and Obligations *Erga Omnes*

The emergence of the concept of *jus cogens*, from the ILC Draft Articles on State Responsibility, with its distinction between peremptory and merely binding norms, and theory of international crimes and *delicts*, with its distinction between norms creating obligations essential for the preservation of fundamental interest (obligations *erga omnes*) and norms creating obligations of a less essential kind,[21] and further, the distinction made between bilateral or reciprocal obligations on the one hand, and multilateral or integral obligations on the other – all brings conflict of norms in the international legal sphere (Weil 1983: 421; Pauwelyn 2003: 21-22).

Especially, the shift from all norms of international law being equal towards the

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[21] '[I]t is not easy to envisage a conflict between a *jus cogens* obligation and an obligation *erga omnes*. The former is a principle that sets out the peremptory character of the obligation usually cited for non-derogability of obligations, while the later denotes a wider standing even for the States not directly affected by a wrongful act involving an *erga omnes* obligation to invoke State responsibility and seek appropriate remedies. One is a substantive principle of law and the other is an important principle of procedure. [As a result,] [t]he two may be interconnected, but may not necessarily come into conflict' (Rao 2004: 934-935).

recognition that some norms, based on their substantive content are more important than others, has contributed to the potential for conflict between norms. In this regard, Pauwelyn (2003) quotes the example from human rights treaties – he says increasingly hierarchy of norms takes place – some being 'normal' human rights, others being 'non-derogable' human rights or human rights from which state parties to the convention in question cannot deviate even in time of public emergency. For example, Article 4(1) of the International Covenant on Civil and Political Rights allows for derogations in emergency situations. But a selected group of enumerated rights, such as the right to life or freedom from torture or slavery, may never be suspended or limited, even during the times of national emergency.

3.7. Increased Reliance on Soft Law

The increased reliance on soft law, that is, on declarations of international conferences or resolutions of the UN General Assembly, which may become a customary law of international law and gets normative value, certainly may conflict with the earlier custom, or with treaties and even with the peremptory norms of international law.[22]

The ICJ in its advisory opinion on the *Certain Expenses* case declared that the resolutions of the UN are not merely "hortatory".[23] In the *Nicaragua* case, the ICJ recognised that *opinio juris* could be deduced from the circumstances surrounding the adoption and application of the resolutions of the UN General Assembly.[24] And in its advisory opinion on the *Nuclear Weapons* case, the ICJ examined and held that:

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[22] Some of the important soft law contribution of UN General Assembly are: UNGA Res. 1514 (XV) of 14 December 1960 on the Declaration on the Granting of Independence to Colonial Countries and Peoples; UNGA Res. 1803 of 14 December 1962 on the Permanent Sovereignty over Natural Resources; UNGA Res. 2625 (XXV) of 24 October 1970 on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN; other UN General Assembly resolutions with significant prescriptive value include the definition of aggression (UNGA Res. 3314 (XXIX) of 1975); the declaration of the international seabed area as the common heritage of mankind (UNGA Res. 2749 (XXV) of 1971); the preservation of outer space for the common interest of the international community (UNGA Res. 68 (XXIV) of 1979) and so on. For more discussion, see Rao (2004: 939-944).

[23] *Certain Expenses of the United Nations, Advisory Opinion*, (1962) ICJ Reports, 13.

[24] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Order*, (1986), ICJ Reports, 14 at 99-100.

> 'The Court notes that General Assembly resolutions even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolution may show the gradual evolution of the *opinio juris* required for the establishment of a new rule'.[25]

3.8. Decentralised Global Decision-Making

International law does not have a centralised court system with general and compulsory jurisdiction. Of course, the ICJ is the 'principal judicial organ of the United Nations'.[26] But it has only compulsory jurisdiction as between some states and in respect of certain subject matters.[27] In addition, international law knows a multitude of international enforcement mechanisms, most of them treaty-based (such as the WTO dispute settlement system under the WTO treaty), others being set up on an *ad hoc* basis (such as ICTY, ICTR). The proliferation of such courts and tribunals led to two major problems: (i) conflicting jurisdiction (which raises the issue of overlapping jurisdiction, forum shopping, etc.) (ii) conflicting judgements (which raises the issue of conflicting interpretation over the same norm). As a result, conflict of norms arise, when a norm being resolved in favour of one norm by one adjudicatory and in favour of the other norm by another tribunal (Koskenniemi & Leino 2002: 553-579; Pauwelyn 2003: 16-17, 22-23).

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[25] *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion*, (1996), ICJ Reports, 33, para. 70.

[26] Article 92 of the UN Charter.

[27] According to Article 36(1) of the ICJ Statute, the Court has jurisdiction of 'all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force'.

Further, Paragraph 2 of the Article says, the state parties to the Statute 'may...declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes'. So far only 63 out of 192 states have recognized the compulsory jurisdiction of the ICJ , in which 9 of them (Bulgaria, Cameroon, Estonia, Greece, Hungary, Malagasy Republic, Poland, Spain and Georgia) have done so since 1990s (Han 2006: 104; Guillaume 1995: 850).

The ICJ as per Article 36(2) decides only the 'legal disputes concerning a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation'.

4. Problems of Conflict of Norms

4.1. Institutional Conflicts

As noted earlier, international law has become more specialised and fragmented into various regimes and systems, such as law of the sea, environmental law, human rights law, trade law and so on. Each such system or regime functions in its own normative environment, with distinct particularities and often on the basis of differing institutional and legal rationales (Lindroos 2005: 31). As a result, an almost explosive expansion of independent and globally active yet sectorally limited, courts, quasi-courts, and other forms of conflict-resolving bodies did occur (Abi-Saab 1999: 923); Fischer-Lescano and Teubner 2004: 1000; Guillaume 1995: 848-862; Burke-White 2004: 963-979). Such proliferation of courts and tribunals poses three major problems, namely: (i) conflicts of jurisdiction, (ii) forum shopping, and (iii) conflicts of jurisprudence.

Judge Guillaume (2000) speaking to the General Assembly Sixth (Legal) Committee, stated that although the creation of judicial bodies shows the increased willingness of states in peaceful settlement, but had 'certain unfortunate consequences' namely forum-shopping, overlapping jurisdictions, and the 'serious risk of inconsistency within the case law' and finally which creates 'a serious risk: namely loss of overall control'.

a. Conflict of Jurisdiction

Increasing number of courts and tribunals poses primarily the risk of conflicting/overlapping jurisdiction or parallel proceedings (Simma 2009: 284; Treves 1999: 810; Guillaume 2000). Conflicting jurisdiction is a situation where one party refers a case to one international judicial body and the other party refers the same case to a different international judicial body. In other words, the initiation of litigation in different international courts on the same substantive dispute. And it creates confusion and uncertainty as to who ought to adjudicate the case and also raises the issue of conflicting interpretations. For instance, UNCLOS leaves some room for the possibility of

conflicting jurisdiction.[28] As a result, the possibility of overlapping jurisdiction between the ICJ and the ITLOS or between the WTO and the ITLOS or between the ECJ and the ITLOS or between other different judicial bodies occur (Han 2006: 109-117; ILC Report on Fragmentation 2006: 12, para. 10-12, 30; Simma 2009: 284-285). The following three examples of *Southern Bluefin Tuna, Swordsfish* dispute, and *MOX Plant* may portray the risk of conflicting jurisdiction.

Southern Bluefin Tuna case (SBT):[29] SBT pitted jurisdiction of the ITLOS against jurisdiction of a dispute resolution regime under Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), 1993. When Australia and New Zealand brought their fellow CCSBT party (Japan) before the ITLOS seeking provisional measure against Japan, the ITLOS deemed *prima facie* jurisdiction existed. However, a subsequent UNCLOS Arbitral Tribunal overturned the decision based on a jurisdictional point as it held that Article 16 of the CCSBT implicitly excludes any further dispute resolution procedure outside the CCSBT.

Swordfish dispute:[30] The Swordfish dispute was about a potential confrontation between jurisdiction of the ITLOS and jurisdiction of the WTO Dispute Settlement Body. Chile had closed its ports to Spanish ships which – as Chile contended – had overfished Swordfish in the High Seas adjacent to Chile's Exclusive Economic Zone (EEZ). Hence, in April 2000, the EU brought Chile before the WTO Dispute Settlement Body claiming

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[28] The ITLOS jurisdiction and applicable law derives primarily from Articles 288 and 293 of the UNCLOS. As per Article 288 the court or tribunal shall have jurisdiction over any dispute concerning (1) 'The interpretation or application of th[e] Convention' which is submitted to it in accordance with Part XV; (2) 'Interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement'; and (3) 'In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal'. And according to Article 293, the court or tribunal shall (1) 'apply th[e] Convention and other rules of international law not incompatible with th[e] Convention'; or (2) 'decide a case *ex acquo et bono*, if the parties so agree'. Hence, the ITLOS is capable of dealing not only with the Law of the Sea but also other rules of international law.

Further, the ITLOS provides some safeguards against this concern. Article 287 of the UNCLOS grants jurisdiction to an arbitral tribunal unless the parties agree an another forum, and Articles 290 and 292 vest the ITLOS with residual compulsory jurisdiction with respect to provisional measures and prompt release of cases (Noyes 1998: 177; Rao 2004: 947).

[29] *Southern Bluefin Tuna case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility,* (4 August 2000), ITLOS Reports.

[30] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, (20 December 2000), ITLOS Reports, Case no. 7.

that a Chilean statute, which prevents a ship from docking in Chilean ports when it catches exceed what is allowed under Chilean law, is discriminatory. In December 2000, Chile brought the EU before the ITLOS claiming that the EU breached the UNCLOS. The confrontation was avoided when Chile and the EU reached a settlement in January 2001 and both hearings were subsequently cancelled.

MOX Plan case:[31] The *MOX Plant* case has recently been raised at three different institutional procedures: 'an Arbitral Tribunal set up under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), the compulsory dispute settlement procedure under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) as well as under the European Community and Euratom Treaties within the European Court of Justice (ECJ)' (ILC Report on Fragmentation 2006: 12, para. 10). These '[t]hree rule-complexes all appear to address the same facts: the (universal) rules of the UNCLOS, the (regional) rules of the OSPAR Convention, and the (regional) rules of EC/EURATOM. Which should be determinative?' (ibid.). Finally, *MOX Plant* pitted at the jurisdiction of the ITLOS against the jurisdiction of the European Court of Justice (ECJ).

This case concerns a Mixed Oxide Fuel Plant (MOX Plant) in Sellafield, United Kingdom (UK), on the eastern shores of the Irish Sea.[32] Mixed Oxide or MOX is a nuclear fuel – produced by reprocessing spent nuclear waste – that can itself be used by nuclear power plants for energy production. A decision by the British government in 2001 opened the way for commissioning and operation of the MOX Plant. In response to the United Kingdom's plan to build a MOX plant, which may be hazardous to the environment, on a coast adjacent to Ireland, Ireland brought the UK before the ITLOS for

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[31] *MOX Plant case (Ireland v. United Kingdom), Request for Provisional Measures*, (3 December 2001), ITLOS Reports, Case No. 10. *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom and Northern Ireland)*, Final Award, (2 July 2003), Arbitral Tribunal; *Commission v. Ireland*, (30 May 2006), ECJ Reports, Case No. C-459/03.

[32] In fact, '[t]he MOX Plant at issue is a recent addition to Sellafield a British nuclear precessing site that has been operating since 1947 on the eastern shores of the Irish Sea. The site was originally the Royal Ordinance Factory, used for production of plutonium piles for defense purposes. In 1957, the site was the location of the Windscale Fire, the "first major accident in the history of nuclear power", which released a still-unknown quantity of radioactive isotopes into the atmosphere. Current activities at the site include reprocessing spent nuclear fuel in Magnox and Thermal Oxide Reprocessing Plants (THORP), and the manufacture of MOX' (Volbeda 2006: 214-215).

the alleged violations of its obligations under UNCLOS,[33] and asked a provisional measure that would prevent the UK from authorising the MOX plant.[34] On the other hand, the EU Commission initiated proceedings against Ireland in the European Court of Justice for breach of EU law committed through bringing a case against the United Kingdom under the Law of the Sea Convention.[35] Initially, the ITLOS deemed *prima*

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[33] 'The OSPAR Quality Status Report 2000 estimates that 200 kgs of plutonium currently pollute the sea, and that "discharge of huge volumes of low level liquid waste from the Sellafield pipeline" has deposited at least '1/4 of a tonne of plutonium...in the Irish Sea which has become the most radioactive sea in the world" (ibid.: 214). Ireland invoked this Report and said that '[i]t relies upon the Irish Sea for "fishing, transport, recreation, gravel, extraction, renewable energy...tourist trade...[and] water sports", among other uses, and is naturally sensitive to any further degradation of the resources' (ibid.).

On the other hand, '[a]ccording to the UK Radioactive Substances (Basic Safety Standards) Direction 2000, emissions from any new sources of radiation must not exceed 0.3 millisieverts per year' (ibid.: 216-217). Based upon this direction, the UK invoked the Environmental Agency report, '[as per the report,] "the estimated dose to the most exposed UK group...to gaseous discharges from the MOX plant to be 0.000002 millisieverts per year (two thousandths of a millionth of a sievert)", whereas the "average radiation dose to Members of the United Kingdom population is 2.2 millisieverts per year from natural background sources". The exposure to any "critical group" in Ireland from MOX Plant discharges is calculated to be 0.000000024 millisieverts per year (2.4 hundred thousandths of a millionth of a sievert). Further, in a worst-case scenario analysis, the United Kingdom calculated that the largest considered discharge would expose a very narrow group of the Irish population to 1.98 microsieverts of radiation, which "would not be significant from the health point of view" according to the European Community opinion' (ibid.).

But Ireland argued for evaluating both MOX Plant and THORP emissions together. Here, the relationship between these is significant, because the Sellafield operation seeks to retain existing customers of THORP reprocessing (such as Japan, Germany, Switzerland, Sweden, and the Netherlands) by also offering MOX processing, which allows such customers to have their plutonium residue from spent nuclear waste returned to them in the form of MOX fuel. Hence, impending MOX Plant development and the existing THORP plant as integral parts of a single problem (ibid.: 215, 217).

[34] Ireland argued, as per Article 288(2) of the UNCLOS, the tribunal has jurisdiction to hear the UNCLOS claims, and according to Article 293(1) of the UNCLOS, the Tribunal has authority to apply 'th[e] Convention' and has a kind of supplemental jurisdiction to apply 'other rules of international law not incompatible with th[e] Convention' (ibid.: 219-220). In this regard, the Ireland invoked along with the UNCLOS more than twenty different non-UNCLOS agreements, in which the United Kingdom, alleged to be, has obligation – that may be applied and enforced under UNCLOS (ibid.).

On the other hand, the United Kingdom argued that, as per Article 288(2) of the UCLOS, the enlargement of the jurisdiction of a tribunal only when the parties so agree and when the extra-Convention rules permit it. But none of the twenty or more international agreements which the Ireland invoked does not refer such enlarged jurisdiction (ibid.: 227). Further, the UK viewed that the Article 293(1) of the UNCLOS invoked by Ireland – '[t]hrough the prism of applicable law...the jurisdiction of the Tribunal is thus dramatically enlarged. The Dispute is no longer about the interpretation or application of UNCLOS and no other agreement. Rather, it is about the interpretation or application of a much wider body of international law said to be incorporated into and applicable as part of UNCLOS' (quoted in ibid.: 225).

[35] The United Kingdom, by quoting European Community Treaty Article 292 and EURATOM Treaty Article 193, contended that, it is established practice that member states of the European Community Treaty and the EURATOM Treaty will 'undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein' (ibid.: 227). And a large portion of Ireland's case draws heavily from European Community and EURATOM law,

facie jurisdiction existed and in a subsequent hearing by the UNCLOS Arbitral Tribunal, the Tribunal confirmed a previous provisional order of the ITLOS but refused to issue any more provisional orders. Because, the Tribunal was concerned about the potential jurisdictional conflict with the ECJ and decided to wait for the ECJ decision on this point.[36]

In may 2006, the ECJ held that jurisdiction of the case belongs to the ECJ, not to the ITLOS. The ECJ explained that the EU Council, not individual European states, approved the UNCLOS, and exclusive competence with regard to the UNCLOS provisions on the prevention of marine pollution to the extent to which those provisions affect existing EU rules was transferred from the UNCLOS to the EU at the time of the EU's formal confirmation of the UNCLOS. Hence, the relevant provisions formed a part of the European Community Treaty and legal order. Given that under the EC Treaty only the ECJ is to adjudicate a dispute concerning the interpretation or application of Community law, Ireland breached European Community law by submitting a case to the ITLOS. The ECJ emphasised the importance of 'the jurisdictional order laid down in the [EC] Treaties and, consequently the autonomy of the Community legal system...' (quoted in Han 2006: 116). As the *MOX Plant* case is the first of its kind to raise such questions about jurisdiction and applicable law under the UNCLOS.

***Georgia's Racial Discrimination* case:**[37] The most recent examples of parallel proceedings are probably the cases brought by Georgia against Russia in relation to the war in the Caucasus last summer. Georgia initiated proceedings before both the ICJ and the European Court of Human Rights. The ICJ issued an urgent communication to the

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hence 'Ireland's claims are more properly brought under the Community Treaties [and] this Tribunal lacks jurisdiction' (quoted in ibid.).

[36] The Tribunal stated that '[i]n the circumstances, and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to [i.e. internal jurisdictional issues of the European Community]. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties' (quoted in Han 2006: 116).

[37] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Urgent Communication*, (15 August 2008), ICJ Reports.

parties (pursuant to Article 74(4) of the ICJ Rules of Court),[38] while the ECHR indicated provisional measures (under Rule 39 of the ECHR Rules of Court) (Simma 2009: 285).[39] 'As a state party to the ICC Statute, Georgia also could have a state referral to the ICC under Articles 13(a) and 14 of its Statute' (ibid.).

There are several rules exists to resolve the problem of conflicting/overlaping jurisdictions or parallel proceedings on the same dispute. The most important rules are: (i) principle of *lis alibi pendens*,[40] (ii) principle of *res judicata*,[41] (iii) principle of *comity*,[42] (iv) conflict clause,[43] (v) preliminary ruling procedure[44] and so on (Simma 2009: 285-286). Therefore, it is often considered that an occurrence of conflicting jurisdictions or parallel proceedings between different judicial bodies or dispute resolution regimes as a result of proliferation is not such a threatening risk to international law.

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[38] On 15 August 2008, the ICJ issued an Order on Provisional Measures directed at both parties to the conflict.

[39] ECHR, Press Release 2008/581 of 12 August 2008.

[40] 'The principle of *lis alibi pendens* requires a court to abstain from exercising jurisdiction where the same parties have already instituted proceedings before another court on the same subject-matter' (Simma 2009: 285). And '[it] forms part of international procedural law as a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute' (ibid.).

[41] The principle of *res judicata* bars a court from deciding a dispute, which has already decided in some other court or tribunal.

[42] The principle of comity says a tribunal should respect for the competence of other tribunals. For example, '[i]n the *MOX Plant* case, the Hague arbitral tribunal suspended its proceedings in order to wait for the decision of the ECJ, invoking 'considerations of mutual respect and comity which should prevail between judicial institutions'' (quoted in Simma 2009: 285-286). In contrary 'the Inter-American Court on Human Rights in its advisory opinion on the *Right to Information on Consular Assistance*...refused to suspend proceedings with a view to a (albeit contentious) case on similar legal questions before the ICJ (*Breard*), insisting on its status as an 'autonomous judicial institution'' (ibid.: 286).

[43] The conflict clause in international treaties specifically confer the jurisdiction upon a court/tribunal, by excluding others. For example, 'Article 292 of the EC Treaty, Article 23 of the WTO Dispute Settlement Understanding, Article 55 of the European Convention on Human Rights, Article 282 of the UNCLOS', etc. (ibid.). In contrary, 'the practice of international courts and tribunals shows that the instruments described for the prevention of parallel proceedings are hardly coordinated or effective' (ibid.).

[44] The preliminary ruling procedure is a procedure by which the courts and tribunal may decide its own jurisdiction before proceeding to decide or take up the dispute. For example, 'the Arbitral Tribunal in the *Iran Rhine* case between Belgium and Netherlands, in which the Tribunal saved its turf in matters of EC law vis-a-vis European Court of Justice and MOX-type problems by resorting to...a preliminary ruling procedure in accordance with Article 234 of the EC Treaty...in so doing arrived at the conclusion that the questions of EC law arising in connection with the track of the Iron Rhine were not to be referred to Luxembourg because they were not relevant...for the decision of the case, and then went on to decide the case itself' (ibid.).

b. Forum Shopping

The idea of forum-shopping is nothing but selecting a court or tribunal according to the states' convenient and special area in which the issue arose. In other words, 'forum shopping may mean more diversity and options available for its users, and the prospect of a series of legal battles in different forums' or between different judicial bodies (Han 2006: 111). Treves (1999) says that 'forum shopping' in the sense that 'the disputing party that takes the initiative has the advantage of choosing, as between the Court and the Tribunal, the forum that it prefers'. Judge Guillaume (2000) spoke about the emerging prospect of forum-shopping that may 'generate unwanted confusion' and 'distort the operation of justice'. All this, he felt, 'exacerbates the risk of conflicting judgments' and 'give rise to a serious risk of conflicting jurisprudence as the same rule of law might be given different interpretations in different cases'.

Infact, the problem of forum shopping is quiet common in transnational litigation (Han 2006: 110). However, on the issue of forum-shopping, it is reasonably often expected that the relevant tribunal would refuse to hear the case if the case has already been adjudicated by another tribunal or given significant weight to that particular tribunal's opinion (ibid.: 111). Therefore, it may not necessarily have a negative impact as long as the relevant judicial bodies keep their views on law coherent and intact.

c. Conflict of Jurisprudence

The most important or serious problem of the proliferation of judicial bodies is issuing multiple interpretations on the same legal point (Koskenniemi 2005: 6-7). The problem lies in the fact that proliferation has occurred without any structure guiding the relationship between these entities (Spelliscy 2001: 143). Each tribunal exists formally distinct from each other without any hierarchy or form of relationship (ibid.: 144-145; Kingsbury 1999: 679-680). Fischer-Lescano and Teubner (2004) says that '[t]he establishment of hierarchies within global law is clearly require dependent'. Further, the ICTY Appeals Chamber has remarked that '[i]n international law every tribunal is a self-

contained system (unless otherwise provided)'.[45] Each system may create solutions entirely opposite to the solutions of another system, and where general international law may be interpreted and applied in different ways (Lindroos 2005: 31).[46] As a result, the special tribunals on human rights, law of the sea, environmental law, WTO law had given rise to special normative regimes that not only deviated from general law but also claimed priority in regard to it (Guillaume 1995: 848). Judge Guillaume (2000) stated that, 'special courts...are inclined to favour their own disciplines'. Because they are designed primarily to solve conflict between norms within one sub-system (except ICJ, which has general jurisdiction) (Lindroos 2005: 33). And often 'these judicial bodies may or may not be able or willing to take into account the norms found in other normative orders' (ibid.). Further, the international legal order has no appellate authority or supreme body to say a final verdict on the disputes concerning the interpretations of law (ibid.; Spelliscy 2001: 144-145)).[47] In this regard, 'if each tribunal interprets or enunciates the law differently from each other, the very essence of a normative system of law may be lost' (Han 2006: 111). Therefore, often it is considered that 'the substantive fragmentation of international law...seems less problematic than the institutional proliferation that has accompanied it' (Lindroos 2005: 32).

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[45] *Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, (2 October 1995), ICTY Appeals Chamber, Case No. IT-94-1-AR72, para. 11.

[46] For example, '[i]f a human rights body or a WTO Panel interprets the 1969 Vienna Convention on the Law of Treaties...so as to reinforce that body's jurisdiction or the special nature of the relevant treaty and in so doing deviates from the standard interpretation, then this is bound to weaken the authority of that standard interpretation and to butress the interests or objectives represented by the human rights body or the WTO Panel. The interpretations express institutional moves to advance human rights or free trade under the guise of legal technique. In the language of political theory, the organs are engaged in a *hegemonic* struggle in which each hopes to have its special interests identified with the general interest' (Koskenniemi and Leino 2002: 561-562).

[47] It is subject to certain exception, how both the international criminal tribunals (such as the ICTY and ICTR) have a common Appellate Chamber with three members; and the WTO establishes the Appellate Body with three members but the authoritative interpretation of the WTO treaty is lies with the DSB; and so on.

4.2. Substantial Conflict

Indeed, the problem of conflict of norms occur, only when the disputes come before the court/tribunal and while interpreting the applicable laws. The conflict of norms in applicable laws may occur possibly in three different ways: (i) conflict within general law, (ii) conflict between general and special law, and (iii) conflict between special laws (ILC Report 2006: 30-31, para. 47).

a. Conflict within General Law

The conflict of norms within general law arise out of 'differing legal interpretations [of general law] in a complex institutional environment' (ibid.: 31, para. 48). In other words, 'two institutions faced with analogous facts interpret the [general] law in differing ways', as a result norm conflicts arise within general law (ibid.: 32, para. 51). When the ICTY and the ICJ interpreted the same general law principle of state responsibility in two different ways, led to conflict of norms within general law. For example, the ICTY in the *Tadic* case[48] contrasted the interpretation made by the ICJ in the *Nicaragua* case[49] on the question of the level of control necessary by a state for the attribution of acts of paramilitary forces present in another state.

In *Nicaragua* case the ICJ decided that, the United States had not been held responsible for the breaches of humanitarian law committed by "contras" merely an account of organising, financing, training and equipping them (*Nicaragua* case 1986: para. 114-115). For these acts to be attributable, the United States had to exercise "effective control" over such paramilitaries (ibid.: para. 115).[50] In *Tadic* case, the ICTY Appeals Chamber found this reasoning unpersuasive and stressed that the 'degree to which the whole body of international law on State responsibility is based on a realistic

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[48] *Prosecutor v. Dusko Tadic, Judgment,* (15 July 1999), ICTY Reports, Case No. IT-94-1-A, A.Ch.: para. 115-145.

[49] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, (27 June 1986), ICJ Reports, 14, 64-65: para. 115.

[50] Therefore, responsibility would have been entitled only had it been demonstrated that the US would have issued 'specific instructions concerning the commission of the unlawful acts in question' (*Nicaragua* case 1986: para. 115).

concept of accountability, which disregards legal formalities' (Tadic case: 49, para. 121). In this regard, it distinguished between the imputation of the acts of unorganised individuals to a state and the imputation of those of an organised military group. The *Nicaragua* requirement of 'acting under the specific instructions' could be reasonably applied to the former, but not to the latter. Because an organised military group acts in a relatively autonomous way – hence to create accountability, it is sufficient that the group is under the overall control of a state irrespective of whether each of its activities was done under specific instructions (ibid.: 50, para. 122).[51] Therefore, what it demonstrated that the state had a 'role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group' – in short, the state should have exercised "overall control" over them is sufficient for the conflict to be an "international armed conflict" (ILC Report on Fragmentation 2006: 31, para. 49; 59, paras. 115-145 at 137).

The ICJ used the 2007 *Genocide* judgement to give its response to the ICTY ruling in *Tadic* case.[52] In the *Genocide* case, the Bosnian Serb armed forces (VRS) had perpetrated genocide in Srebrenica and the issue is whether the acts of genocide carried out at Srebrenica by Bosnian Serb armed forces must be attributed to the Federal Republic of Yugoslavia (FRY), as claimed by Bosnia. After establishing that General Mladic and other officers, authors of the Srebrenica genocide, were not *de jure* organs of the FRY, nor could they be equated with such organs an account of possible 'complete dependence' on the FRY (*Genocide* case: para. 386-394). The court discussed the question whether those officers could nevertheless be regarded as *de facto* organs of the FRY.

For this purpose, the court applied the 'effective control' test enunciated in

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[51] 'The Appeals Chamber held that this was confirmed by international practice and referred to decisions by Mixed Arbitration tribunals, national courts as well as the decision by the ECHR in *Loizidou* in which Turkey had been held responsible for acts by the authorities of the Turkish Republic of Northern Cyprus ('TRNC') as they had been under its "effective overall control"' (Koskenniemi and Leino 2002: 565, fn. 50). For reference, *Loizidou v. Turkey, Merits,* (18 December 1996), ECHR Reports, Case No. 1996(VI), para. 56.

[52] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, (26 February 2007), ICJ Reports.

Nicaragua. In the opinion of the court, this test substantially coincided with the standards required in Article 8 of the ILC Draft Articles on State Responsibility and reflects customary international law. As per the said Article, the conduct of a person or group of persons shall be considered an act of state, if they acting 'on the instructions' or 'under the direction' or 'under the control' of that state in carrying out the conduct (ibid.: para. 398). As stated in the ILC commentary that these three tests are not cumulative and they are disjunctive.

The court then considered the test propounded by ICTY Appeals Chamber in *Tadic* case and rejected it on two grounds: First, the ICTY, in touching upon questions of state responsibility, 'addressed an issue which was not indispensable for the exercise of its jurisdiction'. Therefore, the court was free not to take into account the rulings of the Tribunal concerning 'issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it' (ibid.: para. 403);[53] Second, according to the court, the 'overall control' test resorted to in *Tadic*, if it can possibly be applicable when determining whether an armed conflict is international is 'unpersuasive' if used to establish whether a state is responsible for acts performed by armed forces and paramilitary units that are not among its official organs. For the court, the reason why the test is 'unpersuasive' is twofold: (i) 'logic does not require the same test to be adopted in resolving the two issues, which are very different in nature', with the consequence that

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[53] In fact, the court implicitly took up to a large extent the point made by Judge Shahabuddeen in his separate opinion in *Tadic* case. He viewed that the issue of whether the conflict was international was different from that of state responsibility. The ICTY was called upon to rule only on the former issue and therefore no need to go into the latter. In his words, 'the Appeals Chamber considered that *Nicaragua* was not correct and reviewed the general question of the responsibility of a state for the *delictual* acts of another. It appear to me, however, that question does not arise in this case. The question, a distinguishable one, is whether the FRY was using force through VRS against BH, not whether the FRY was responsible for any breach of international humanitarian law committed by the VRS. To appreciate the scope of the question actually presented, it is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law: it is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation of international humanitarian law goes beyond what needs to be proved in order to establish a use of force. This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an "armed conflict" had arisen between BH and the FRY acting through the VRC, not that the FRY committed breaches of international humanitarian law through the VRS' (*Tadic* case (separate opinion of Judge Shahabuddeen) 1999: paras. 17-18) (quoted in Cassese 2007: 649-668, fn. 4).

the degree of a state's involvement in an armed conflict may well differ from that required for state responsibility to arise (ibid.: para. 405); and (ii) the 'overall control' test overly broadens the scope of state responsibility because it goes beyond the three standards set out by the ILC in Article 8 of the Draft Articles on State Responsibility (ibid.: para. 406).[54] It seems from the above discussion that, the ICTY may possibly in the near future contrast the decision made in the *Genocide* case as well.[55]

The contrast between *Nicaragua* and *Tadic* as well as *Genocide* case is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law. Here, the *Tadic* case does not suggest "overall control" to exist alongside "effective control" either as an exception to the general law or as a special (local) regime governing the Yugoslavia conflict. It seeks to replace that standard altogether.[56] The scholars argue that this is a common occurrence in any legal system

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[54] Some scholars have criticized the ICJ's *Genocide* decision, and upheld the 'overall control' test adopted in the *Tadic* case. They criticized the ICJ's assumption on Article 8 of the ILC Draft Articles on State Responsibility as customary international law, because '(1) [t]he court in *Nicaragua* enunciated the test...; (2) the ILC upheld the same test (based only on Nicaragua); (3) hence the test is valid and reflects the customary international law' (Cassese 2007: 651). Further, it has been contested that 'the court should have proved that...[the] 'overall control' test was unsupported by state practice and *opinio juris*' (ibid.).

[55] Already, 'in the *Lubanga* case, an ICC Pre-Trial Chamber, about one month before the ICJ delivered its judgment in the *Genocide* case in early 2007, held – without discussing *Nicaragua* – that the overall control test as established in *Tadic* was also valid for the purpose of determining the nature of the conflict under the ICC Statute' (Simma 2009: 280). For reference, *Prosecutor v. Tomas Lumbanga Dyilo, Decision on the Confirmation of Charges,* (29 January 2007), ICC Pre-Trial Chamber, ICC-01/04-01/06, para. 210-211.

[56] A member of the ICTY Appeals Chamber which had decided the *Tadic* case, Cassese stated that the Yugoslavia Tribunal actually intended to replace the *Nicaragua* standard developed by the ICJ at the level of general international law and posit two different tests or degrees of control leading to attribution: one for acts performed by private individuals, in case of which attributability would require 'effective control', and one for acts of organized and hierarchically structured groups, such as military or paramilitary units, in case of which 'overall control' would suffice. And he emphasized that contrary to what the ICJ found in its *Genocide* judgments, the Appeals Chamber did in fact hold that the legal criteria for these two tests reflected the state of international law both for international humanitarian law and the law of state responsibility. Further, he said that the ICJ should pay attention to state practice and case law instead of simply and uncritically restating its previous views (Cassese 2007: 657, 663 and 668).

In fact, the "overall control" test set up in *Tadic* case was challenged in *Celebici* case 'where the appellants argued that the ICTY was bound by the decisions of the ICJ because of the latter's position as the "principal judicial organ of the UN"' (Koskenniemi and Leino 2002: 565). The Tribunal dismissed the appellant's arguments and upheld the "overall control" test set up in *Tadic* – by stating that 'the Tribunal was an "autonomous judicial body" and that there was no "hierarchical relationship" between it and the ICJ' (ibid.). For reference, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Decision*, (20 February 2001), ICTY Appeals Chamber Reports, Case No. IT-96-21-A, A.Ch.

The same questions were also discussed in another case in 2000, when one of the accused (Zigic) made an appeal to suspend the procedure at the Trial Chamber while the *Bosnian Genocide* case was still pending

whenever two tribunals faced with similar facts may interpret the applicable law differently. The domestic legal systems solve such problem through the instrumentality of appeal and an authority (usually Supreme Court) at a higher hierarchical level will provide a formally authoritative ruling (ibid.: 32-33, para. 52). But the international legal system lacks a proper institutional hierarchy and the appellate authority. This was held in *Celebici* case by the ICTY Appeals Chamber that the Tribunal was an 'autonomous judicial body' and that there was no 'hierarchical relationship' between it and the ICJ (Koskenniemi and Leino 2002: 565). As a result, the conflicting interpretation in general law makes a major problem. The ILC explains the problem with an illustration that:

> '[A] case where two institutions interpret the general (and largely uncodified) law concerning title to territory differently. For one institution, State A has validly acquired title to a piece of territory that another institution regards as part of State B. In the absence of a superior institution that could decide such conflict, State A and B could not undertake official acts with regard to the territory in question with confidence that those acts would be given legal effect by outside powers or institutions. Similar problems would emerge in regard to any conflicting interpretation concerning a general law providing legal status' (ILC Report on Fragmentation 2006: 32, para. 51).

But this sort of conflicting jurisprudence happens only in rare occasions and not always be the case in international level and the ILC suggests it could possibly be dealt 'through legislative or administrative means' – that is '[e]ither States adopt a *new* law that settles the conflict' or 'the institutions will seek to coordinate their jurisprudence in the future' (ibid.: 33, para. 52). The co-ordination among the institutions already happens in the ECJ, ECHR, IACHR, ITLOS, ICTY, ICC, ICSID, WTO Appellate Body, etc. they often referred to not only the decisions of the ICJ but also the decisions of the national courts (Simma 2009: 282-284; Berke-White 2004: 971-973, 975-977).[57] Therefore,

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before the ICJ. The argument was that the two tribunals 'should not hold opposing views on the same factual or legal questions and that the Tribunal should follow the decision of the ICJ because the ICJ is the principal judicial organ of the United Nations while the tribunal is a subsidiary organ' (ibid.: 565-566). The Trial Chamber dismissed the argument and viewed that 'the ICJ dealt with state responsibility while the ICTY dealt with individual responsibility' (ibid.: 566). For reference, *The Prosecutor v. Kvocka, Kos, Radfic, Zigic, Pscac, "Omarska, Keraterm and Trnopolje Camps", Decision*, (5 December 2000), ICTY Trial Chamber, Case No. IT-98-30/1, T.Ch., On the Defence '*Motion regarding Concurrent Procedures before the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice on the Same Questions*'.

[57] But the ICJ 'has until recently carefully refrained from referring to the case law of other existing international courts (while having no problems with citing old arbitral decisions and the like)' (Simma 2009: 284). And '[its] attitude changed fundamentally in the *Genocide* case, in which the ICJ followed the jurisprudence of the ICTY on various fundamental issues as a matter of practical necessity' (ibid.).

conflict within general law often considered not as a serious problem in the conflicting jurisprudence of the courts and tribunals.

b. Conflict between General and Special Law

The conflict of norms may possibly occur between, on the one hand, general law (say a general customary international law or general principle of international law) and, on the other hand, special law (say, a specific treaty norm or special (local) customary international law). Here, the special law has been approached in two ways: (i) the treaty based regimes, such as trade law, environmental law, human rights law, humanitarian law, law of the sea, etc. are considered as special laws, and (ii) the regional laws on human rights (ECHR, IACHR, ACHR), trade (NAFTA, SAFTA, ASEAN), security issues (NATO, Warsaw Pact), etc. are also considered as special laws. Here, for our discussion, the former approach is considered as special law and the later approach is beyond the scope of the study but to a little extent discussed in the succeeding section.

In fact, '[a]ll special norms are created in the background of already existing norms, in particular norms of general international law' (Pauwelyn 2003: 201). There are two ways in which the general and special law may interact: 'one is the case where special rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specialization of the later' (ILC Report on Fragmentation 2006: 35-36, para. 56). Here, the special and general law operates in the same direction. For example, '[t]he special relates to the general as does administrative regulation to law in domestic legal order' (ibid.: 49, para. 88); another is the case where the special law may be considered 'as a modification, overruling or a setting aside' of the general law (ibid.: 35, para. 57). Here, the special and general law are operates in the incompatible direction on how to deal with the same set of facts. For example, 'instead of the (general) rule, one should apply the (specific) exception' in case of conflict (ibid.). In the above said situations, the first case is sometimes seen as not a situation of normative conflict at all, and only in the second case the norm conflict arise. In both cases, the priority falls on the provision which is "special", that is, the rule with a more precisely delimited scope of application.

For example, general law on the immunity of state may conflict with human rights law (Convention Against Torture). In the *Pinochet* case[58] – the question arose 'whether immunity of a former Head of State could be upheld against an accusation of his having committed torture while in office' (ibid.: 186, para. 370). Referring to relevant passages in the *Furundzija* case,[59] the Lords held that 'the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed' (quoted in ibid.). And it found the 'Pinochet could not plead immunity against a request for extradition to Spain' (ibid.). The *Pinochet* is an historic judgement, where for the first time a local domestic court denied immunity to a former head of state on the ground that there cannot be any immunity against prosecution for breach of *jus cogens* (ibid.: 187, para. 371).

In contrast, the ECHR in *Al-Adsani* case[60] decided the question 'whether Britain had violated the European Convention on Human Rights as British Court had upheld the immunity of the State of Kuwait in a civil matter that concerned liability that it was alleged to owe to a person (Al-Adsani) who had been tortured by Kuwait agents' and held that 'the prohibition of torture as part of *jus cogens*, but did not find a violation of Articles 1 and 3 of the ECHR in the way UK courts had been applying the State Immunity Act 1978' (ibid.: 187, para. 372). The court stated that while it accepts

> 'that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the court of another State where acts of torture are alleged' (quoted in ibid.).

Thus, the court, 'while noting the growing recognition of the prohibition of torture

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[58] *Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), (24 March 1999), House of Lords Reports, Case No. 119 ILR, 136.

[59] *Prosecutor v. Anto Furundzija, Judgment,* (10 December 1998), Trial Chamber II, Case No. IT-95-17/1, 121 ILR (2002): 260, para. 153.

[60] *Al-Adsani v. The United Kingdom, Judgment,* (21 November 2001), ECHR Reports, Case No. 2001-XI, 79.

as part of *jus cogens,* but could not find in international practice that the States are not entitled immunity in respect of civil claims for damages for alleged torture committed outside the forum State' (ibid.: 187-188, para. 373). As a result, the court did not override the *jus cogens* norms upon the rights of States under customary international law (ibid.).[61]

Further, the emergence of exceptions in regard to same subject matter, that deviate from the general law and that are justified because of the special properties of that subject-matter. For example, 'the general regime of reservations always had a subjective bias. Even if Article 19(c) of the VCLT holds reservations going against the object and purpose test as inadmissible Article 20 recapitulates the ICJ's *Reservations* [judgement][62] to the effect of leaving the conduct of that test to the state parties each of which is to conduct it "individually and from its own standpoint"' – that is, the test holds that the states have the sovereign right to take the obligations voluntarily by making reservations on a particular point but such reservations should not affect the object and purpose of the Convention.

In the 1988 *Belilos* case,[63] the ECHR struck down an interpretative declaration concerning Article 6(1) on fair trial that the Swiss Government had made when depositing its ratification instrument (Koskenniemi 2002: 567). The court first interpreted the declaration as in fact a reservation and then went on to discord its legal validity as it was 'couched in terms that are too vague or broad for it to be possible to determine their exact meaning or scope' (quoted in ibid.). The validity, however, affected only the reservation but not Switzerland's becoming party to the Convention (ibid.). *Belilos* case

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[61] In his dissenting opinion in the *Al-Adsani* case, Judge Ferrari Bravo expressed that 'the Court...had a golden opportunity to issue a clear and forceful condemnation of all acts of torture. To do so, it need only have upheld the thrust of the House of Lords' judgment in [*Pinochet* case]...to the effect that the prohibition of torture is now *jus cogens*, so that torture is a crime under international law. It follows that every State has a duty to *contribute* to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment. But it is precisely one of those old formalist arguments which the Court endorsed when it said...that it was unable to discern any rules of international law requiring it not to apply the rule of immunity from civil suit where acts of torture were alleged [...] There will be other such cases, but the Court has unfortunately missed a very good opportunity to deliver a courageous judgment' (For reference, see ibid.; Dissenting ppinion of Judge Ferrari Bravo: 14) (quoted in ILC Report on Fragmentation 2006: 188, fn. 517).

[62] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, (1951), ICJ Reports, 26.

[63] *Belilos v. Switzerland, Judgment,* (29 April 1988), ECHR Reports, Series A (1988) No. 132, paras. 54-55, and 60

was a much-debated departure from the law concerning the effect and severability of reservations. In the *Loizidou* case,[64] the ECHR has pointed out that the normal rules on reservations to treaties do not as such apply to human rights law. And it viewed that, '...a fundamental difference in the role and purpose of the respective tribunals [i.e. of the ICJ and the ECHR], coupled with the existence of a practice of unconditional acceptance [...] provides a compelling basis for distinguishing Convention practice from that of the International Court' (quoted in ILC Report on Fragmentation 2006: 33, para. 53). Following the Strasbourg line of argumentation, the Human Rights Committee set aside the *Reservations* jurisprudence of the ICJ, as well as the relevant provisions of the VCLT. According to its view, they were:

> '[I]nappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights [....]. Because of the special character of human rights treaty law, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task' (ICCPR General Comment 1994: paras. 17 and 18).[65]

Though this sort of conflicting jurisprudence happens more frequently and it could possibly be resolved through the conflict resolving techniques, such as *lex specialis, lex posterior, lex superior*, etc. or through systemic integration under Article 31(3)(c) of the VCLT or through the hierarchy of sources mentioned under Article 38(1) of the ICJ Statute (the next Chapter deals these issues in detail) (ILC Report on Fragmentation 2006). Therefore, the conflict between general and special law often considered not as a serious problem in the substantial conflict.

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[64] *Loizidou v. Turkey, Preliminary Objections*, (23 March 1995), ECHR Reports, Series A (1995) No. 310: 29, para. 67.

[65] *CCPR General Comment* 24(52) of 2 November 1994, 52nd Session, UN Doc. CCPR/C/21/Rev.1/Add.6, paras. 17 and 18.

c. Conflict between Special Laws

Conflict of norms increasingly also arise before the international courts and tribunals, when the two special regimes conflict with each other in a dispute. It may possibly happen in the fallowing four ways: First, substantive laws (i.e. primary rules) of two specialised legal regimes may conflict with one another, when the different regimes applied for the regulation of the some situation (ILC Report on Fragmentation 2006: 34, para. 55; Hafner 2004: 854-855). For example, the conflict between the substantive provisions of: (i) trade and environment, (ii) trade and human rights, (iii) human rights and humanitarian law, (iv) environment and law of the sea, (v) environment and bilateral investment treaties (BITs), (vi) UN Charter obligations and obligations under other international treaties, (vii) international conventions on immunity of states and human rights conventions, (viii) WTO trade regulations and WHO health regulations, (ix) WTO trade regulations and ILO labour regulations, (x) UNESCO principles and the International Telecommunication Union (ITU) regulations, (xi) law of the sea conventions and international fisheries treaties and so on.

Second, competing regulations within a single regime, that is, different regulations deal with same subject-matter could lead to conflicting results (Hafner 2004: 855). For example, the overlap among the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Draught and/or Desertification, particularly in Africa (1994), the United Nations Framework Convention on Climate Change (1992), the Vienna Convention for the Protection of the Ozone Layer (1985), and so on.

Third, parallel regulations on the universal or regional level relating to the same subject-matter lead to the conflict (ibid.). For example, the United Nations Convention on the Non-Navigational Uses of International Water Courses of 1998, as opposed to the European Convention in International Water Courses of 1972; Universal Declaration of Human Rights on the one hand, the European convention on Human Rights, Inter-American Convention on Human Rights, African Convention on Human and Peoples' Rights on the other hand; the WTO agreements on the one hand, NAFTA, SAFTA, CAFTA, ASEAN, on the other hand; and so on.

Fourth, procedural laws (i.e. secondary rules) of two specialised legal regimes may conflict with one another (ibid.).[66] That is, specialization also entails different regimes of secondary rules, including the consequences for the breach, enforcement and compliance mechanism, which lead to the conflict of jurisdictions between the regimes and the problem of which consequences of the regimes for the breach will follow or do they fall-back to general international law remedies. For example, competing jurisdiction on environmental issues between the WTO Dispute Settlement System and compliance mechanisms under Environmental Agreements; on human rights issues between the WTO Dispute Settlement System and the Human Rights Committees (which include Committee on Rights of the Child, Committee on Discrimination Against Women, Committee on Racial Discrimination, Committee on Torture); and so on.

Out of the four ways of conflict between special laws, the work deal only with the first issue – that is, conflict of norms arise out the substantive law of different regimes. Further, even within the first issue, as many as conflicting areas mentioned above, it deals only: (i) trade and environment, (ii) trade and human rights, (iii) human rights and humanitarian law.

(i) *Trade and Environment*

At present, there are hundreds of treaties deals with the environmental issues, in which many of them have trade implications. Here, the trade activities heavily depend on the natural environment and on the other hand, the environmental agreements use specific trade measures to address the environmental harm. The WTO Committee on Trade and Environment identified, there are some 20 Multilateral Environmental Agreements (MEAs) contains trade provisions to implement and enforce their objectives.[67] For

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[66] According to Hart, the secondary rules could be viewed in two ways: (i) the secondary rules dealing with the amendment, modification, termination, etc.; and (ii) the secondary rules dealing with the state responsibility (consequences for the breach) enforcement and compliance mechanism, etc. (Hart 2002).

[67] There are more than 180 MEAs existing, of which over 20 incorporate trade measures; see the WTO Matrix on MEAs containing trade measures, WTO Doc. WT/CTE/W/160/Rev. 1. On the other hand, the United Nations Environment Programme (UNEP) commissioned the Center for International Environmental Law (CIEL) to evaluate the trade-related provisions of several multilateral environmental agreements for consistency with GATT rules. The UNEP has also proposed a further study to investigate

example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973, the Montreal Protocol on Substance that Deplete the Ozone Layer (Montreal Protocol) 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) 1989, imposes an obligation on its parties to ban the import of various substances or items from countries that are not parties to these treaties (Wold 1996: 844; Marceau 2001: 1095-1096). In this way, the MEAs rely on trade measure to achieve their environmental goals to enforce the treaties' provisions against parties and non-parties alike. In addition, the Convention on Biological Diversity (Biodiversity Convention) 1992, the United Nations Framework Convention on Climate Change (UNFCC) 1992, Kyoto Protocol to the UNFCC (Kyto Protocol) 1997, Cartagena Protocol on Biosafety (Cartagena Protocol) 2000, etc. incorporates or envisions the use of trade measures.

However, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (hereinafter the Final Act) also contains some of the provisions specifically dealing with the environmental issues. Infact, the case laws, such as – the *US-Tuna Dolphin* case,[68] *US-Reformulated Gasoline* case,[69] *US-Shrimp Turtle* case,[70] *EC-Beef Hormones* case,[71] etc. – mainly dealt with the conflict of norms between trade and environment before the WTO Panels and Appellate Body. From these cases, it is clear that the following provisions relates/in conflict with the trade and environmental issues under the WTO. For instance, the Preamble of the WTO Agreement reads that the goal of WTO is '...optimal use of the world's resources in accordance with the objective of sustainable development...' The most-favoured-nation (MFN) principle under Article I of GATT states that a party should not discriminate among products on the basis of their

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the economic efficiency of trade measures of multilateral environmental agreements (Wold 1996: 844, fn. 8).

[68] *United States – Restriction on Imports of Tuna, Unadopted*, (3 September 1991), GATT Doc. DS21/R *United States – Restriction on Imports of Tuna, Unadopted* (June 1994), GATT Doc. WT/DS29/R.

[69] *United States – Standard for Reformulated and Conventional Gasoline,* (29 May 1996), WTO Appellate Body Reports, WTO Doc. WT/DS2/9.

[70] *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* (6 November 1998), WTO Appellate Body Reports, WTO Doc. WT/DS/58/AB/R.

[71] *European Communities – Measures Affecting Livestock and Meat (Hormones)*, (13 February 1998), WTO Appellate Body Reports, WTO Doc. WT/DS26/AB/R and WT/DS48/AB/R.

national origin, such obligation prohibits a party from providing greater trade benefits to some, rather than all, of its GATT trading partners. The national treatment (NT) principle under Article III of the GATT requires parties to treat foreign products the same as "like" domestic products, once they have met tariff and other import requirements. Article XI of the GATT prohibits quantitative restrictions (QR) such as quotas, bans, and licences on imported and exported products. And it includes limited exceptions to this rule for critical shortages of products essential to the exporting party, restrictions necessary for international commodities trade, and agricultural and fisheries products. If a measure violates a core GATT obligation (i.e. Article I, III, and XI) then a party may justify it under any one of the environmental exceptions of Article XX. Article XX provides that:

> '[S]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures... (b) necessary to protect human, animal, or plant life or health; [or].... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption...'[72]

Besides the preamble and the core obligations, the Final Act also contain a number of agreements which deal with trade and environmental issues. These include the Agreement on Agriculture (AA), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Subsidies and Countervailing Measures (SCM), the Agreement on Technical Barriers to Trade (TBT), and the Agreement on Sanitary and Phytosanitary Measure (SPS).

Among the MEA mentioned above, the conflict between GATT and CITES, between TRIPS and the Montreal Protocol/Biodiversity/UNFCC is more controversial.

GATT and CITES: The conflict of norm arise between the GATT and CITES in the following illustration:

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[72] Other exceptions address public morals (Article XX(a)); importation or exportation of gold or silver (Article XX(c)); customs, monopolies, and intellectual property (Article XX(d)); prison labour (Article XX(e)); artistic, historic and archaeological national treasures (Article XX(f)); international commodity agreements (Article XX(h)); essential quantities of domestic materials under a government stabilization plan (Article XX(i)); and products in short supply (Article XX(j)). The corresponding provision in the General Agreement on Trade in Services (GATS) is Article XIV, the terms of which are almost identical to Article of XX of GATT.

> 'Country X a western, wealthy relatively powerful and a once protectionist nation, joined [GATT] in 1955, which evolved into the [WTO]. In 1994, Country X signed the [CITES]. Country Y, a lesser developed and protectionist nation, joined the WTO in 1995, but resolved not to sign CITES. Signatories to CITES are obliged to prohibit trade in products on Appendix I of CITES. Because Country X's constitution requires it to enact domestic legislation in order to comply with treaty obligations, Country X passed a law prohibiting the importation of articles listed in Appendix I, which includes the Patholops hodgsonii (the Tibetan Antelope). Country X's ban prohibits products made from the Tibetan Antelope, including "shahtoosh;" a fine wool made from the hair of the Tibetan Antelope. As a non-signatory to CITES, Country Y began to export shahtoosh which, is not allowed entry into Country X. The WTO generally prohibits the discrimination of "like products" by members. Problematically, both countries are members of the WTO, and shahtoosh wool is arguably "like" every other type of wool given unrestricted access into Country X. When Country X tries to Comply with its obligations under CITES to the detriment of Country Y's rights under the WTO,' in such a case the conflict of norms between the regimes (i.e. GATT and CITES) occur (Kelly 2001: 674-675).

Infact, 'CITES regulates international commercial trade in endangered and other species. When a species reaches a certain level of vulnerability, the parties to CITES list it in one of three appendices to CITES. This placement determines the extent to which trade is permitted in the species' (Wold 1996: 870). In this regard, the permit system established 'to monitor and regulate in species that are or may be threatened with extinction is central to CITES ability to prevent the loss of species due to commercial trade' (CITES Article III, IV and V) (ibid.).

'The CITES permit requirements for trade in a species depend on the Appendix in which the species are listed' (ibid.: 871). The criteria for listing a species in Appendices I and II are related to a species' biological status, such as population size and geographic range (CITES Article II(1) and (2)). Appendix I species are those that 'are threatened with extinction [and] which are or may be affected by trade' (CITES Article II(1)).[73] Appendix II species are those that 'although not necessarily now threatened with extinction may become so unless trade in specimens of such species subject to strict regulation in order to avoid utilization incompatible with their survival' (CITES Article II(2)).[74] Appendix III includes species that a country has identified as 'subject to

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[73] Appendix I has a list of approximately eight hundred species, which include the African elephant, block rhinoceros, orangutan, monkey-puzzle tree and so on.

[74] Appendix II contains more than 35,000 species, which includes the hippopotamus, American alligator, and several hundred genera of orchids.

regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade' – hence, this Appendix based solely on the basis of a decision by the country of origin (CITES Article II(3)). Unlike species in Appendices I and II, these species do not require a vote of the Conference of Parties (COPs) to be listed (CITES Article II(2)(d)).

Therefore, whether a species is permitted to be traded depends on a finding related to the purpose of trade for Appendix I species and a biological finding for an Appendix II species. Generally, trade in Appendix I species is prohibited for commercial purposes (CITES Article III(3)). Trade in Appendix I species requires both an import and export permit.[75] Trade in Appendix II species is prohibited if it will be 'detrimental to the survival of the species' (CITES Article IV). Trade in Appendix II species requires export permit and does not require import permit (CITES Article III(2)).[76] Trade in Appendix III species does not require a finding concerning the species' biological condition and it requires only the presentation of appropriate export documents at the time of importation (CITES Article V).

Often the above mentioned two threshold tests under Appendix I and II conflicts with the core obligations of GATT (especially Articles I, III and XI) and also faces difficulties with the tests imposed by GATT Panels for the Article XX exceptions.

> 'In this regard, the "primarily commercial purposes" finding is the most important one for implementing the provisions of CITES. Because of the significant role that trade has played in driving many species toward extinction, the parties have interpreted "primarily commercial purposes" very broadly to include "any transaction which is not wholly non commercial"' (Wold 1996: 873).

TRIPS and Montreal Protocol/UNFCC/Biodiversity Convention: Another important area in which the conflict of norms between the regimes are more controversial

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[75] Before exporting an Appendix I species, an exporter first must obtain an import permit from the country of import (CITES Article III(2)(d)). Before issuing an import permit, the country import must determine that (i) the import will be for purposes that are not detrimental to the survival of the species for which the permit is sought; (ii) the proposed recipient of a living specimen is suitably equipped to house and care for it; (iii) the specimen is not to be used for primarily commercial purposes (CITES Article III(3)).

[76] To obtain an export permit for Appendix II species, the country of export must determine that (i) the export will not be detrimental to the survival of the species; (ii) the specimen was not obtained in contravention of the law of the state; (iii) any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health, or cruel treatment; and (iv) an import permit has been granted for an Appendix I species (CITES Article IV(2)).

– between developed and developing countries is: conflict between TRIPS and Montreal Protocol/UNFCC/Biodiversity Convention. In fact, the participation of both developed and developing countries are essential for the long-term resolution of ozone depletion; global warming, and biodiversity loss. For these reasons, the Montreal Protocol, the UNFCC, and the Biodiversity Convention, among others require developed countries to transfer technology and financial resources to developing countries.

(i) *Montreal Protocol*: 'The Montreal Protocol requires parties to take "every practicable step" to ensure "expeditions" transfer of "the best available, environmentally safe substitutes and related technologies" to developing countries with per capita consumption of chlorofluro carbons (CFCs) and other controlled substances below a certain level' (Montreal Protocol Article 10A) (Wold 1996: 903). The developing countries receive 'a ten-year grace period for fulfilling their obligations under the Protocol, but only if developed countries effectively implement the provisions for technology transfer and for financial co-operation' (Montreal Protocol Article 5(1)) (ibid.).[77] In addition, the developing countries can also obtain funding through Multilateral Fund established under the Protocol (Montreal Protocol Article 10) (ibid.).[78]

(ii) *UNFCC and Biodiversity Convention*: 'The provisions for technology transfer and funding under the UNFCC and Biodiversity Convention require developed countries to help developing countries implement the Convention by promoting and facilitating the transfer of, or access to, technologies' (ibid.). The UNFCC says that 'the technologies must be "environmentally sound"' (UNFCC Article 4(5)) (ibid.). And the Biodiversity Convention says that 'the technologies must either utilize genetic resources or relate to biodiversity "conservation and sustainable use"' (Biodiversity Convention Article 16(1))

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[77] London Amendments to the Montreal Protocol adopted Article 10A (Wold 1996: 903, fn. 440). The technology transfer provisions focuses on those countries operating under Article 5(1). These are developing countries parties that maintain a consumption of CFCs and other controlled substance below 0.3 kilograms per capita (Montreal Protocol Article 5(1)).

[78] The Multilateral Fund finances the 'incremental costs' that developing countries incur by using technology that is more 'ozone friendly' (ibid.: 903). These include 'the cost of converting or retiring production facilities and establishing new facilities for manufacturing substitute chemicals and cost resulting from either the elimination of controlled substances in the manufacturing of intermediate goods or from the modification or replacement of end-use equipment' (ibid.).

(ibid.: 903-904).[79]

Further, both the UNFCC and the Biodiversity Convention require 'developed country parties to provide financial resources to cover the "agreed full incremental costs" of implementing any obligations to abate greenhouse gases under the Convention' (UNFCC Article 4(3) and Biodiversity Convention Article 20) (ibid.: 904). Both, parties to Biodiversity Convention and UNFCC can chose the Global Environmental Facility as the interim financing mechanism to disburse the funds (UNFCC Article 21(1)) (ibid.).

Infact, the technology transfer and financing provisions under the above said Conventions do not directly conflict with the TRIPS, rather they posse severe questions. For example, TRIPS agreement establishes rules for intellectual property rights and licensing that affect the technology transfer. Further, the TRIPS also includes the most-favored-nation and national treatment obligations. In this regard, the Biodiversity Convention demands that the developing countries must be provided access to and transfer of biotechnology 'under fair and most favorable terms, *including on concessional and preferential terms where mutually agreed*' (emphasis added) (Biodiversity Convention Article 16(2)) (ibid.: 905).[80] Therefore, the technology transfer provisions might be inconsistent with the MFN and NT obligations of the TRIPS agreement.[81]

On the other hand, many of the financing provisions assists in implementing treaty obligations, such as land management activities or scientific research, and they also attempt to develop new industries and technologies in developing countries (ibid.). For example, Article 10 of the Montreal Protocol sets up a Multilateral Fund to supply funding for new facilities and technologies. A country which is not a party to the environmental agreement but a party to the WTO, and that is struggling to develop new

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[79] Article 16(2) of the Biodiversity Convention reads that '[a]ccess to and transfer of technology' to developing countries 'shall be provided and/or facilitated under fair and most favorable terms, including on concessional and preferential terms where mutually agreed...'.

[80] The Biodiversity Convention addresses the equitable distribution of all biotechnology, not just the biotechnology from developing countries' biological resources (Article 16(1)).

[81] Infact, the environmental agreements do not require countries to provide technology in a manner inconsistent with the TRIPS Agreement. As a result, no developed country willing to compel their industries to transfer technology without adequate protection of intellectual property rights.

industries and technologies, might challenge the provisions of subsidies (ibid.).[82]

(ii) Trade and Human Rights

Indeed, the conflict of norms between trade and human rights arise essentially on (labour standards and health issues). As a result, often also the institutional/organizational conflict between WTO and ILO, WTO and WHO arise. If we look at the health issues – the conflict often arise between counterfeiting life saving medicines for the protection of human rights and patent protection under TRIPS. Indeed most of the human rights specialist argues that all most all the human rights are non-derogable and often considered as peremptory norms of international law (Meron 1986: 1-3; Koji 2001: 917-920). It has been supported by many committees and sub-committees of human rights. But the human rights regime does not have strong compliance mechanism. On the other hand, those who favours trade, argues that the intellectual property right is itself a human right and moreover, it is assert of the patent holder. TRIPS is part of the WTO regime, which has strong compliance mechanism. In such a situation which norm will prevail over the other? These issues have been dealt by the WTO DSB in two cases: (i) *Canada – Patent Protection of Pharmaceutical Products;*[83] and (ii) *Brazil – Measure Affecting Paten Protection.*[84]

In the *Canadian Generic Medicine* case (2000), the panel rejected the Canada's contention of 'early working exception' was granted by the Canadian Patent Law for 'regulatory testing' and for 'stockpiling for marketing' of life saving medicine – three

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[82] Article XVI of the GATT deals with Subsidies. But the financing provisions of these multilateral environmental agreements are not considered as subsidies, hence GATT Article XVI does not cover. Because the subsidies are subject to sanctions only if they target a 'specific...enterprise or industry or group of enterprises or industries' (GATT Article XVI(1)). 'The large number of enterprises that must reduce the use of CFCs and other ozone depleting substances under the Montreal Protocol, and greenhouse gases under the [UNFCC] suggests that the asserted subsidy is not specific' (Wold 1996: 905). However, 'the specific group of enterprises or industries must be "within the jurisdiction of the granting authority"' (GATT Article XVI(1)) (ibid.: 905-906). 'This condition does not exist with international financing mechanism, because developed countries generally fund projects in developing countries' (ibid.: 906).

[83] *Canada – Patent Protection of Pharmaceutical Products,* (17 March 2000), WTO Panel Reports, WTO Doc. WT/DS114/R.

[84] *Brazil – Measures Affecting Patent Protection,* (8 June 2000), WTO Panel Reports, WTO Doc. WT/DS199/1.

years before the completion of 20 years patent period – was invoked as a exception under Article 30 of the TRIPS. But the Panel looked at TRIPS Article 28(1)(a) (which prohibits no-authorized manufacture and use of a patented product), Article 33 (which requires twenty-year patent protection) and decided that the patent rights needs to be protected for 20 years period and rejected the social welfare point of view.

It has been criticized in many ways that in determining what interest are legitimate within the meaning of Article 30 of TRIPS the Panel failed to taken into consider there are interest recognized as legitimate in the TRIPS agreement itself, such as 'the mutual advantage of producers and users of technological knowledge' (Article 7); 'public health and nutrition' (Article 8); and 'the public sector of vital importance to socio-economic and technological development' (Article 8); with respect to patens in particular, Article 27(2) of TRIPS lists such competing interests as '*ordre public* or morality'; 'human, animal or plant life or health'; and avoidance of 'serious prejudice to the environment'. All these interest would have been importance as per TRIPS Agreement (Howse 2007: 293-310).

But in the *Brazilian* case, as per Article 68 *et seq.* of the Brazilian Paten Law allows for domestic production of so-called 'generica', that is copies of patent protected medicines; but limits this to cases where the population is threatened by an epidemic and the price of the medicine on the world market is too high. Further, Article 68 of the Brazilian Paten Law says that if a foreign firm has been selling a pharmaceutical product for more than 3 years without establishing a local production plant in Brazil, then domestic production could be allowed for that patent medicine. When the two pharmaceutical industries – US Company Merck and the Swiss Company Roche – failed to open up local production, the Brazilian Health Minister announced for local production of generic copies. The US contested before the WTO DSB for the alleged violation of Article 30 and 31 of the TRIPS. While pending the case, when the WTO Ministerial Conference adopted a "Declaration on the TRIPS Agreement and Public Health"[85] – the

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[85] *WTO Ministerial Conference, 4th Session, Ministerial Declaration*, (20 November 2001), WTO Doc. WT/MIN(01)/Dec/1, para. 17; (20 November 2001), WTO Doc. WT/MIN(01)/Dec/2. Before the WTO Ministerial Conference adoption – the UN General Assembly adopted a Declaration of Commitment on HIV/AIDS, UN GAOR, Special Session, (25-27 June 2001).

US was in a awkward position to accept the resolution and has given way for public health protection of Brazil. This has been criticized by many patent holders and R&D institutes that the WTO does not give proper protection to the right holders (Fischer-Lescano and Teubner 2004: 1024-1032).

(iii) Human Rights and Humanitarian Law

When the head of the state had failed to protect the human rights within the state, it opens up way for the humanitarian intervention by other states –that is, humanitarian intervention in the name of human rights protection – which raises as many as regime conflicts: first, the conflict between human rights and humanitarian law; second, conflict between human rights protection and the general international law principle of use of force, state sovereignty, no-intervention; third, human rights protection and the principle of privileges and immunities of state; fourth, humanitarian law and environment; and so on (Krieger 2006: 265-291). In the *Nuclear Weapons* case,[86] the ICJ has dealt with the complexity of issues involved in the case. Here, the ICJ observed that both human rights law (namely the International Covenant on Civil and Political Rights) and the laws of armed conflict both applied 'in times of war'. Nevertheless, when it came to determine what was an 'arbitrary deprivation of life' under Article 6(1) of the Covenant, this fell 'to be determined by the applicable law of *lex specialis*, namely the law applicable to armed conflict' because 'which is designed to regulate the conduct of hostilities' (*Nuclear Weapons* case 1996: 240, para. 25).

Often the conflicts of norms between the different specialized legal regimes are considered to be a major problem – which poses a threat to unity, credibility and practicability of international law. The problem of norm conflict can not be resolved through the conflict resolving techniques (such as *lex superior, lex posterior and lex specialis*). Hence, the ILC proposes a two possible way to avoid rather than solve the conflict of norms: (i) by adopting conflict clause and (ii) by harmonizing the regimes through treaty interpretation. In addition, the conflict of norms could also be avoided in

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[86] *Legality of Threat or Use of Nuclear Weapons case, Advisory Opinion,* (8 July 1996), ICJ Reports: 240, para. 25.

two more ways: (i) by renegotiating the existing norms or adopting new norms and (ii) by obliging one norm and accepting responsibility for other.

5. Different Levels in which Conflict of Norms occur

Indeed, the conflict of norms may occur in all the three levels, namely, national, regional and international.

5.1. Vertical Conflict between National and International Law

Whenever a conflict of norms occur between the national and international law – on any fields such as environment, human rights, trade, etc. – the international law will prevail over the municipal law – if it had been incorporated or transformed into the municipal domain.[87] Further, in the absence of any domestic law on a point in a dispute, the municipal courts solve such dispute with the help of international law. In the same way, the international courts and tribunals are somehow dependent on the municipal law, for instance, when they look at national jurisprudence to ascertain customary international law, or when international decisions need to be enforced at the domestic level.

The WTO Appellate Body held in the *India-Patent* case that 'an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations' (quoted in Pauwelyn 2003: 208).[88] By this way the municipal and international courts and tribunals solves the problem of conflict of norms on various fields and secures the

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[87] As per incorporation theory, once a state entered into an international agreement will automatically apply in domestic sphere, whereas as per transformation theory, any enforcement or implementation of international agreement requires the national legislation through parliament. Further, Article 26 of the VCLT requires the international obligation should fulfill in good faith (*pact sunt servanda*); Article 27 of the VCLT says internal law is not a justification for breach of any international agreement; Article 62 of the VCLT provides that the fundamental change of circumstances cannot be invoked as a justification for breach of an international agreement *(rebus sic standibus)*.

[88] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (16 January 1998), WTO Appellate Body Reports, WTO Doc. WT/DS50, para. 65.

coherence and integrity in international law.

But Simma says this trend has been changing, for instance, 'the Israeli High Court of Justice has dealt with the *Wall* opinion of the Hague Court on the legal questions of necessity and proportionality relating to the course of the wall (while disagreeing on the factual assessment by the ICJ) with the way in which US courts, including the Supreme Court, disposed of the domestic repercussions of the *LaGrand* and *Avena* judgments concerning the individual right to consular information enshrined in the Vienna Convention on Consular Relations and the consequences of its violation spelt out by the ICJ' (Simma 2009: 290-291).

In a recent case, *Meadllin v. Taxes,* the US Supreme Court asserted 'the separateness of international law from the domestic constitutional order and the absence of any domestic judicial role in shaping the relationship between the two' (Burca 2010: 2). This case is about the enforcement of a judgement of the ICJ, the Supreme Court held that it can not be enforced in the US without prior congressional action (ibid.: 2, fn. 5).

But it happens only in rare occasions and the national courts often follows/gives importance to the judgments of the international as well as foreign courts (Burke-White 2004: 971-973, 975-977). Hence, the conflict of norms between national and international law does not create much problems.

5.2. Vertical Conflict between Regional and International Law

Whenever the conflict of norms occur between regional and international law – on any fields, namely environment, human rights, trade, etc. – the regional laws should read in coherence with international law and often it is presumed that the international law prevail over regional laws. Traditionally, the American and the EC courts gave preference to international law over regional laws. But in contemporary times it has been changing gradually, by stating that the regional laws prevail over international law (including the UN Charter).

For example, in *Kadi* case[89] – the European Court of Justice dealt with the

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[89] *Kadi & Al Barakaat International Foundation v. Council and Commission,* (2008), ECJ Reports, ECR I-

relationship between the European Community (EC) legal order and the international legal order (i.e., UN Charter). The case concerned the freezing of assets of individuals and entities suspected of having links to terrorists by the Council of the EU on the basis of resolution adopted by the Security Council.[90]

Here, the applicants argued to the CFI that the EC had lacked legal competence under the EC treaties to adopt the Regulation, and also that the Regulation violated his fundamental right to property, to a fair hearing, and to judicial redress. In response, the EU Council and Commission relied on the UN Charter and agreed that the EC, just like the EU member states, was itself bound by international law to give effect, within its power and competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the UN Charter.

The CFI ruled that the obligations of the EU member states under Charter prevail over every other obligations of domestic or international law (including those under the ECHR and the EC Treaties). UN Charter obligations include the obligations under the Security Council resolutions. Further, it held that even though the EC itself is not directly bound by the UN Charter and is not a party to the Charter, it is indirectly bound by those obligations by virtue of the provisions of the EC Treaty, because EC Treaty recognized such overriding obligations on its member states.

Than the matter was appealed to the ECJ, where the Court stated that it had the competence to examine the conformity of United Nations Security Council decisions with *jus cogens*. At one point it speculated about 'fundamental rights of the human person falling within the ambit of *jus cogens*', indicating that not all 'fundamental rights'

6351. Initially *Al Barakaat* case was filed and later the *Kadi* case was filed, due to similarity of facts – both cases were merged together.

[90] The Security Council passed three resolutions on the suppression of international terrorism under Chapter VII of the UN Charter, which required all States to take measures to freeze the funds and other financial assets of individuals and entities that were associated with Osama bin Laden, the Al Qaeda network, and the Taliban, as designated by the Sanctions Committee of the Security Council (SC Res. 1390 (16 January 2002), SC. Res. 1333 (19 December 2000), SC Res. 1267 (15 October 1999). The EC Council adopted a regulation to implement those resolutions (EC Council Regulations 881/2002). A latter Security Council resolution adopted, which allows states to permit certain humanitarian exception to the freezing of funds imposed by the three earlier resolutions subject to the notification and consent of the Sanction Committee (SC Res. 1452 (20 December 2002)). The EU in turn modified its laws to provide for the permitted humanitarian – exceptions in relation to food, medical expenses and reasonable legal fees (EC Council Regulation 561/2003).

but some. In its subsequent analysis over the question whether the freezing of applicants' rights constituted a breach of *jus cogens*, the court found in the negative.

'The bottom line of the judgement, however, was that the UN Charter and the Security Council resolutions, just like any other piece of international law, exist on a separate plane and cannot call into question or affect the nature, meaning, or primacy of fundamental principle of EC law' (Burca 2010: 24). Further, 'the EC asserted that even if the obligations imposed by the UN Charter were to be classified as part of the "hierarchy of norms within the Community legal order", they would rank higher than legislation but lower than the EC Treaties and lower than the "general principles of EC law" which has been held to include "fundamental rights"' (ibid.).

Therefore, in *Kadi* case, though the ECJ did not expressly distinguish between certain core principles of EC law which take precedence over international law, including the UN Charter, but appeared to treat all EC recognised 'fundamental rights' as belonging to the normatively superior category (ibid.: 24-25).

But it happens only in rare occasions and the regional courts and tribunals often follows/gives importance to the judgements of the international as well as foreign courts (Burke-White 2004: 971-973, 975-977). Hence, the conflict of norms between regional and international law also does not create much problems.

5.3. Horizontal Conflict between Regimes of International Law

Whenever the conflict of norms occur between specialized international legal regimes – between any fields, namely trade and environment, trade and human rights, human rights and humanitarian law, law of the sea and environment, etc., it poses two major problems: (i) institutional conflict (i.e. conflict of jurisdiction, forum shopping and conflict of jurisprudence); and (ii) substantial conflict (i.e. conflict within general law, conflict between general and special law, conflict between special laws).

Here, the first issue does not create much problem because it could be solved through institutional co-operation and through the principle of *lis alibi pendens, res judicata*, principle of *comity*, conflict clause and preliminary ruling procedure. Even in

the second issue, the conflict within general law and the conflict between general and special law does not create much problem because they could be resolved through conflict resolving techniques (*lex superior, lex posterior, lex spcialis*) and through hierarchy of sources (treaties and custom, general principles of law, judicial decisions) and so on. The conflict between special laws become a major problem because international law is based on law of co-operation and not on subordination – hence the law created under each regime gets equal weight – as a result no regime prevail over other. In such a case, the court has to declare *non-liquet* to resolve such type of conflict. To resolve the conflict of norms between special laws the ILC suggests two possible ways: (i) by adopting conflict clause; and (ii) by harmonising the regimes through treaty interpretation (Article 31(3)(c) of the VCLT). In addition, the scholars also suggest two more possible ways to avoid such conflicts: (i) by renegotiating the existing norms or adopting new norms; and (ii) by obliging one norm and accepting responsibility for other.

CHAPTER - IV

RESOLVING CONFLICT OF NORMS

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The fragmentation of international law and its increasing number of specialized legal regimes makes the problem of conflict of norms an inevitable consequence. Such a legal order affects not only the unity of international law but also 'jeopardizes the credibility, reliability, and consequently, the authority of international law' (Hafner 2004: 856; Hafner 2000: 144). Hence, to secure the credibility, reliability and authority, the unity of international law needs to be claimed.

In the year 2000, speaking at the UN General Assembly, Judge Guillaume said '[c]ertainly, international law must adopt itself to the variety of fields with which it has to deal, as national law has done. It must also adopt itself to local and regional requirements. Nonetheless, it must preserve its unity and provide the players on the international stage with a secure framework' (Guillaume 2000: 4).[1] Likewise, Hafner (2004) says '[i]n 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' (Hafner 2004: 861). However, Jenks (1953) rightly notes that:

> 'The conflict of law-making treaties while obviously an anomaly which every possible precaution should be taken to avoid, must be accepted as being in certain circumstances an inevitable incident of growth, and it becomes an essential part of the duty of international lawyers, while encouraging the adoption of procedures which will minimize the occurrence of such conflict, also to formulate principles for resolving such conflict when it arises'. So '[t]he measure of success which is achieved in eliminating and resolving conflicts between law-making treaties will have a major bearing on the prospect of developing, despite the imperfections of the international legislative process, a coherent law of nations adequate to modern needs' (Jenks 1953: 453).

In this respect, the coherence or the unity of international law could be possible

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[1] *'The proliferation of International Judicial Bodies: The outlook for the International Legal Order', Speech by His Excellency Judge Gilbert Guillaume, President of the ICJ, to the Sixth Committee of the UN General Assembly*, (27 October 2000), p. 4, see website http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_SixthCommittee_20001027.htm.

only by integrating or harmonizing the specialized legal regimes. The integration or harmonization of regimes takes place either by political (legislative) approach or by legal (judicial) approach. The former approach solves the problem of conflict of norms and integrates the regimes by the inclusion of conflict clause (i.e., in a clause giving priority or supremacy one over another instrument), and the latter approach solves the problem of conflict of norms and integrates the regimes by interpreting the regimes with the help of conflict rules (i.e., conflict resolving techniques).

The problem of conflict of norms (i.e., when there is a conflict between two norms, which of the two norms should be applied) arise only when the rules from different regimes are invoked before the courts and tribunals. It raises the question of hierarchy of norms in international law. To find the solutions to the conflict of norms in international law, the ILC made an attempt in its recent "Report on the Fragmentation of International Law" (2006). Apart from this, some scholars have proposed theoretical and practical solutions to the above said problem.

In brief, the Chapter looks at the following issue: when faced with an alleged conflict between instrument A and instrument B (either may deal with the same regime or different regimes), how can one decide whether there is conflict and, if so, how can one resolve that conflict?

1. Integration of Regimes

The ILC report on the Fragmentation of International Law (2006) states that 'the phenomenon of diverse functional sources of international law and diverse tribunals applying international law is not necessarily a problem; the problem with fragmentation arises/results from inadequate integration of different functional goals'. Integration takes place when the conflict of norms of different specialized legal regimes are clubbed or linked together. For example, "trade and ..." linkage arises when non-trade issues are linked to trade. Thus, 'if the United States declines to trade with Myanmar, until it complies with certain human rights or democracy standards, this is a "trade and ..." linkage' (Trachtman 2002: 77).

1.1. Modes of Integration

Usually the integration of regimes may happen either by political approach (i.e., legislative) or by legal approach (i.e., judicial). The former approach solves the problem of conflict of norms and secures the unity by way of negotiation, or by the inclusion of a conflict clause (i.e., in a clause giving priority or supremacy one over another instrument) or by an amendment in an international agreements; and the latter approach solves the problem of conflict of norms and integrates the regimes by way of interpreting the regimes with the help of conflict rules (i.e., conflict resolving techniques).

In the WTO, the integration or the linkage of non-trade issues with trade happens possibly through all the three branches, namely: legislative, executive and judicial branch. The legislative branch (i.e., WTO Ministerial Conference and General Council) could possibly be to link either by amending the WTO covered agreements in future trade rounds (as per Article X of WTO Agreement) or through the issuance of authoritative interpretations by the DSB (as per Article IX:2 of the WTO Agreement) (Alvarez 2002: 2).[2] The executive branch (i.e., WTO Secretariat and Committees structure) views that the non-trade issues remain merely an object of study within its ambit – '[t]hus, the possibility for expanding the trade regime to embrace, more directly, investment or environmental concerns remains, for now, under study within the General Council's Working Group on the Relationship between Trade and Investment and its specialized Committee on Trade and Environment, respectively' (ibid.: 2, fn. 10).[3] The judicial branch (i.e., the WTO Panels and Appellate Body) links the non-trade issues with trade

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[2] Article 3(9) of the DSU indicates that the Understanding is without prejudice to the rights of members to seek authoritative interpretations through decision-making under the WTO Agreement. 'The linkage might also occur *sub-silentio* if, for example, WTO members refuse to mount WTO challenges to consumer labeling initiatives' (Alvarez 2002: 2).

[3] The Declaration on Trade and Environment covers preexisting environmental conventions, and it establishes the WTO Committee on Trade and Environment, one of whose major task is to examine the relationship between the WTO Treaty and Multilateral Environmental Agreements (Pauwelyn 2001: 544-545). However, '[t]he Committee [endorsed] "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary of global nature" and said it preferred that trade disputes arising in connection with a multilateral environmental agreement be resolved through the mechanisms established by that agreement' (ibid.: 545, fn. 78).

by way of interpretation (through Article 3(2) of the DSU read with Article 31(3)(c) of the VCLT) (Pauwelyn 2001: 540, 542).

It is often viewed that, the developed states appreciates the issue of integration of regimes but the developing states opposes the same. Hence, the major issue upon the integration is: whether the specialized legal regimes need to be integrated or not?, and if so/not so, why?

In this regard, a number of symposium has been convened and articles were published, especially the symposium of the *American Journal of International Law* (2002) confirms the above said view on the issue of integration that: on the one side, the Western "left-leaning" academics and political groups support the integration of non-trade issues with trade; on the other hand, the Southern academics and political groups argue that linking the trade regime with non-trade issues (specifically with labour and environmental concerns) as best irrelevant to their priorities, or 'worse still as thinly veiled forms of protectionism' (Alvarez 2002: 1).[4] It identifies some of the reasons for which the WTO members link the WTO to non-trade issues:

> 'The trade regime might incorporate new issues simply because such linkage may facilitate deeper trade liberalization or because negative externalities (such as higher levels of pollution) or other "race to the bottom" (as with regard to labor conditions threaten the success achieved by the WTO. Sympathy for underpaid or underage workers abroad and the urge to extend WTO methods of enforcement...play equal roles in recipes for linkage' (ibid.: 2).

Further, pressure to link will arise both from business interests eager to expand economic liberalization to new sectors such as investment and from prominent members of "international civil society" (ibid.: 3).

The scholars have differed in many ways with each other on how the linkage between trade and non-trade take place in the WTO. For instance, Leebron (2002)

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[4] Salazar-Xirinachs argues that 'many labor problems in developing countries arise from their lack of capacity to implement core labor rights and that such concerns ought to be addressed not by welfare-reducing trade policies but by technical assistance and capacity building. And he contends that given the fundamental asymmetry in market size and power enjoyed by the United States, developing countries believe that explicit links to labor and environmental issues in the WTO would institutionalize unilateralism, overload the next trade round, and prevent less developed countries from using those negotiations to achieve what they most need, namely, economic growth to alleviate unemployment and reduce poverty' (Salazar-Xirinachs 2000: 377).

suggests, linkage may indeed occur through the *stick* of WTO-authorized trade retaliation against those who failed to comply with human rights norms or environmental standards, or through *carrot* of conditioning access to markets on the satisfaction of enumerated non-trade goals. Petersmann (1998) says it might also occur through the establishment of private rights of action in the WTO (as for those who suffer environmental injury as a result of action permitted or encouraged by trade rules). Kuyper (1994) argues that linkage take place through the WTO Dispute Settlement Body, by interpreting the relevant trade rules in the light of other substantive rules of public international law because trade, after all, is not a "self-contained regime". Pauwelyn (2001) also adopts the same kind of interpretative linkage in WTO with several WTO Panel and Appellate Body rulings. On the other hand, Trachtman (2002) argues that the trade and non-trade issues should not be integrated, because '[g]overnments link trade concessions to the satisfaction of other, non trade policy interest, either politically or legally, whenever they find such linkage useful to the achievement of their goals'. Further, he argues that 'WTO dispute resolution [P]anels and the Appellate Body are limited to the application of substantive international law or other conventional law' (Trachtman 1999: 342).[5]

1.2. Reasons of Integration

a. Pauwelyn's Argument on Integration

Pauwelyn argues that though each regime acts in their specified fields with their own substantive and institutional set up, they are not distinct from each other and are "inter-connected islands" within the broader general international law domain (Pauwelyn 2001: 535-578: Pauwelyn 2004: 903-927; Pauwelyn 2003: 440-486). He views that:

> '[T]he specialized institutions should continue to make and enforce their specialized law, but in doing so they should also take account of general international law and the law made by other institutions...If all fora were to follow this approach, fragmentation and unity of international law could go hand

[5] In this regard, Trachtman allows the application of the Vienna Convention rules of interpretation as well as any other rules specifically incorporated, and he views, such rules would mainly deal with procedural laws and not substantive laws (Trachtman 2002: 342).

> in hand and, when it comes to law-enforcement, conflicting ruling could largely be avoided' (Pauwelyn 2004: 904).

He takes the example of WTO regime and its reference to general international law principles, to support his argument.[6]

Article 3(2) of the DSU states that WTO covered agreements are to be interpreted 'in accordance with customary rules of interpretation of public international law' (Pauwelyn 2001: 540, 542). The principal customary rules of treaty interpretation have been codified under Articles 31-33 of the VCLT, in which Article 31(3)(c) directs that in interpreting a treaty, account must be taken not only of the treaty itself (i.e., the WTO treaty), but also of 'any relevant rules of international law applicable in the relations between the parties' (ibid.: 542).

The reason, Pauwelyn suggests, for the recognition of non-WTO law within the WTO regime is: as per Jenks's definition '[a] conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties' (Jenks 1953: 426)[7] – but as per Pauwelyn's view, in a wider sense, 'conflicts arise not only when faced with two mutually exclusive obligations. Conflict may also arise between an obligation to do X under one norm (say, to liberalize trade) and an explicit right not to do X under another (say, permission to ban a particular import under an environmental treaty' (Pauwelyn 2004: 907).[8]

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[6] There are three major reasons, Pauwelyn gives, for the adoption of WTO regime as an example: '(1) claims of violation under the WTO treaty are subject to compulsory jurisdiction of WTO Panels and the WTO Appellate Body (while claims under most other treaties are not); (2) many international disputes have some trade or economic angle so that the disputes, though not initially or mainly a trade dispute (and hence not subject to compulsory jurisdiction at first blush), end up before the WTO which then must deal with questions of overlap or "trade and ..." issues; and (3) countries increasingly engage in regional or bilateral free trade deals whose provisions and dispute settlement systems overlap with the multilateral WTO system' (Pauwelyn 2004: 905).

[7] The strict definition of conflict, as found in the *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, (5 November 1998), WTO Appellate Body Report, WTO Doc. WT/DS60/AB/R, para. 65. This Appellate Body seems to follow the strict definition, defining conflict as 'a situation where adherence to the one provision will lead to a violation of the other provision'. Pauwelyn views this interpretation is incorrect, because it allows only the cases where the mutually exclusive obligations are in conflict and does not allow the conflict between a obligation and a right (Pauwelyn 2001: 551).

[8] The wider definition of conflict, as found in the panel report *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, (25 September 1997), WTO Panel Report, WTO Doc.

The problem with a strict definition of conflict, Pauwelyn explains through an illustration:

> '[A] WTO rule imposes an obligation not to restrict certain trade flows, but a later non-WTO rule (say, an environmental convention) grants an explicit right to restrict trade. Under the strict definition of legal conflict...there would be no conflict. Indeed, complying with the WTO rule (not restricting trade flows) would not mean violating the later environmental rule. It would simply mean forgiving the right (to restrict trade granted by the environmental rule). In the absence of a conflict, the *lex posterior* rule of Article 30 would not even be activated. Thus, the (stricter) WTO rule would simply apply over and above the new (more lenient) environmental rule, not as a result of conflict rules but as a result of the very definition of conflict. However, for the new environmental rule to have any effect, it should be recognized that in these circumstances as well there is conflict, namely, conflict between an obligation in the WTO and an explicit right granted elsewhere. Here, too, the later-in-time rule should prevail, in principle. If not, one should consistently elevate obligations in international law over and above rights in international law' (Pauwelyn 2001: 551).

Hence, invoking non-WTO law before the WTO Panel or Appellate Body, may 'provide a defence against violation of WTO law (for example, an environmental agreement binding between the disputing parties may, depending on the relevant conflict rules, excuse a violation of GATT, independently of GATT Article XX)' (Pauwelyn 2004: 910). However, 'besides international law rules on treaty interpretation, many other rules of general international law not explicitly confirmed in the WTO treaty must be applied with respect to the treaty; that is, as long as it does not contract out of these rules' (Pauwelyn 2001: 543). Such non-WTO rules include: 'in particular rules on the law of treaties, state responsibility, and settlement of disputes, but also of other treaty rules that regulate or have an impact on the trade relations between states (such as certain rules in environmental or human rights conventions and customs unions or free trade arrangements)' (ibid.: 540-541). In its very first report, the WTO Appellate Body made it clear, '[t]hat direction [in Article 3(2) of the DSU] reflects a measure of recognition that the General Agreement [GATT] is not to be read in clinical isolation from public international law' (quoted in ibid.: 542).[9]

WT/DS27/R, para. 7.159. This panel adopted a wider definition of conflict, defining conflict as 'the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits'. Pauwelyn views that this interpretation is correct, because it permits not only conflict between two mutually exclusive obligations but also conflict between an obligation and an explicit right (ibid.: 551, fn. 109).

[9] *United States – Standards for Reformulated and Conventional Gasoline*, (20 March 1996), WTO

In this regard, Pauwelyn quotes some of the recent cases decided by the WTO Panel and Appellate Body, which include the US defence of its import ban on shrimp with reference to environmental treaties; the EU justification of ban on hormone-treated beef based on the precautionary principle; and Argentina defence to excuse a statistical import tax with reference to a memorandum it had concluded with the IMF (Pauwelyn 2003: 1-2; Pauwelyn 2004: 905). Pauwelyn concludes that:

> '[B]efore a particular court or tribunal, it is important to include all international law binding between the parties as part of the applicable law, even if the justification of the adjudicator is limited to a given treaty (say, WTO covered agreements). If all courts and tribunals follow this approach, it would mean that, although they may have jurisdiction to examine different claims, in so doing they would apply the same law. Hence in theory, no conflict should arise' (Pauwelyn 2004: 915-916).

Therefore, the relationship between the WTO Agreement and other treaties has to be understood by taking into account the other international obligations of WTO members. As a result of the above said reasons, Pauwelyn views that 'WTO law is not a secluded island but part of the territorial domain of international law...For public international law at large, this approach pleads for the unity of international law, not its fragmentation' (Pauwelyn 2003: xi; Pauwelyn 2001: 552). Therefore, it is clear, 'if the WTO is to become a vehicle for global governance one thing has to be clear: this vehicle ought not travel without a road map, and should be mindful of other traffic' (Bronckers 2001: 56).

b. Trachtman's Argument on Integration

Trachtman answers negatively to the question: 'whether trade rules and environmental, labor, human rights, or other non-trade rules should somehow be combined at the WTO in a different way than they now are' (Trachtman 2002: 77). The main thrust of his argument is based upon the 'welfare' point of view and poses a question 'does it [integration/linkage] make individuals, in the aggregate, better off to do so?' (ibid.). In this regard, economic analysis can not answer the question defining whether the linkage claims increases or decreases the welfare, because they use only the

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Appellate Body Report, WTO Doc. WT/DS2/AB/R.

market as the best determinant of welfare, assuming no transaction costs. But 'in domestic society, which is beset by transaction costs, government, too, serves as a device for revealing the preferences of individuals, and on this basis government regulates the market. In the final analysis, individuals, and states acting for them, must weigh the welfare consequences for themselves and express their preferences through political process' (ibid.)

However, according to Trachtman, all "trade and ..." linkages are merely political fact, because '[g]overnments link trade concessions to the satisfaction of other, non-trade policy interests, either politically or legally, whenever they find such linkage useful to the achievement of other goals' (ibid.).[10] He gives an example of US initiative to link intellectual property rights with trade in the WTO.[11] That is, political linkage evolved into institutional linkage, in the form of TRIPS, within the broader context of WTO. Here, the US goal on the one hand is 'to influence domestic regulation by other state of the level of intellectual property protection, an area that had traditionally been understood as largely within domestic jurisdiction' (ibid.);[12] on the other hand, 'it transferred a measure of authority over domestic intellectual property law to other WTO members, or perhaps one might say to the WTO itself' (ibid.: 79).[13]

Therefore, Trachtman states that the TRIPS and also other linkages is nothing but an allocation of jurisdiction, that is, 'a state's legal authority, largely in the mode of exercising prescriptive jurisdiction' (ibid.). He views the allocation of jurisdiction

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[10] 'States bargaining with one another use whatever tools are at hand: security matters are linked to trade, finance is linked to environmental protection, membership in regional organizations is linked to human rights' (Trachtman 2002: 78).

[11] 'Beginning in the mid-1980s, at the urging of U.S. pharmaceutical and other intellectual-property-dependent companies, the United States began to link trade to intellectual property protection. The U.S. policy was later incorporated in several U.S. unilateral policy instruments, including conditionality for the application of zero-tariff treatment to imports from developing countries under the Generalized System of Preferences and "Special 301" trade sanctions' (ibid.).

[12] That is, 'the US sought for its intellectual-property-dependent exporters enhanced protection under other states' intellectual property laws. By that way, it attempted to exercise, indirectly through diplomacy, authority over intellectual property protection in other countries' (ibid.).

[13] As a result of TRIPS including in the WTO, any WTO member may initiate dispute settlement to enforce these rights, and the WTO will decide whether they have been breached. In case of breach of TRIPS, the complaining state has the right to retaliate against the failure of other party complained with the decision, if it cannot satisfactorily retaliate by withdrawing TRIPS concessions, it may be permitted to withdraw concessions in other areas, such as market access for agricultural products (ibid.: 79).

occurrence in three ways: (1) horizontal allocation of jurisdiction among states, (2) vertical allocation of jurisdiction between states and international organizations, and (3) horizontal allocation of jurisdiction among international organizations (ibid.: 80-92).[14]

He concludes by stating that the "trade and ..." linkage can be made in any institutional structure (say for e.g., WTO), only by weighing, the following factors:

> '[O]ne is the extent to which other states' preferences are actually implicated, and the possibility for transfers of jurisdiction that would allow the aggregate preferences of the states concerned to be better satisfied'; and 'second factor is the institutional setting for transfers of jurisdiction, and more particularly, the costs of identifying, negotiating, monitoring, and enforcing transactions in jurisdiction ("transaction costs"). These transaction costs include the costs of overcoming bargaining problems' (ibid.: 79 and 92-93).

Regarding the WTO aspects, he refutes the argument of Pauwelyn, by arguing that 'WTO dispute resolution [P]anels and the Appellate Body are limited to the application of substantive WTO law and are not authorized to apply general substantive international law or other conventional law' (Trachtman 1999: 342). In this regard, he allows the application of the VCLT rules of interpretation as well as any other rules specifically incorporated, and views, such rules would mainly deal with procedural laws and not substantive laws (ibid.). Further, he goes on to say that although the international tribunals such as WTO Panels and Appellate Body are implicitly authorized to apply all law,

> 'the default rule for international law is auto-interpretation, and states are not held under international law to have accepted mandatory jurisdiction of international tribunals to apply law without their consent. The clear and general practice of international tribunals is to limit the scope of applicable law to that specified in their particular mandates. In the case of the DSU, its affirmative mandate is clearly and repeatedly limited to WTO law: the "covered agreements"' (Trachtman 2004: 858).

Hence, he views that 'the only law that WTO Panels and the Appellate Body are authorized to apply (directly) is WTO law' (ibid.).[15]

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[14] According to Trachtman, these allocations are inter-related: 'vertical allocation of jurisdiction between states and international organizations is a means of dealing with contention over horizontal allocation of jurisdiction among states. The horizontal allocation of jurisdiction among international organizations is an emerging area of concern, since the allocation of jurisdiction to a particular functional organization can substantively affect the horizontal allocation of jurisdiction between states'

[15] To support the argument, he quotes an example of WTO Appellate Body's refusal in the *Hormones* case to determine whether (or not) the precautionary principle is part of customary international law; and also

c. Chimni's Argument on Integration

Chimni argues that the integration of non-trade issues with trade secures the interest of the Transnational Capitalist Class (TCC)[16] as well as powerful states and become a technical barrier to trade for the developing countries vis-a-vis affects the interest of the third world peoples and states. He considers the intellectual property protection (TRIPS), regulation of foreign investment (TRIMS) and services (GATS) as non-trade issues and its integration with the WTO regime is largely for the benefit of the TCC, which limits the autonomy of the sovereign third world states and controls its decision-making authority even in the domestic sphere (Chimni 2004: 2, 7-8; Chimni 2007: 506-507). He also argues against the integration of environment and human rights (particularly labour standards) regime with the WTO (Chimni 2000: 1752; Chimni 2007: 505-506).[17]

With regard to the integration of environmental regime with trade, he quotes an example of the WTO Appellate Body ruling on *US – Shrimp-turtle*[18] and the *EC – Hormones* cases,[19] which sought to balance and integrate trade and environment

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the Appellate Body's flat refusal in the *Poultry* case to apply the bilateral Oilseeds Agreement, since it was not a covered agreement (Trachtman 2004: 858). And he says, 'the international community knows how to provide tribunals with broad jurisdiction to apply wide variety of law. For example, Article 293(1) of the [UNCLOS] requires the [ITLOS] to apply "other rules of international law not incompatible with this Convention [UNCLOS]"' (emphasis added) (ibid.).

[16] The Transnational Capitalist Class (TCC) 'is comprised of the owners of transnational capital, that is, the group that owns the leading worldwide means of production as embodied principally in the transnational corporations and private financial institutions' (quoted in Chimni 2004: 4). Originally, '[t]he TCC culture is lived and produced in the First World by a network of high-profile corporate executives, bankers, brokers, financial management experts, media managers, academics and bureaucrats using the most modern means of communications to create a world of ideas that has material force. In the production of this culture the third world counterparts essentially act as 'transmission belts and filtering devices for the imposition of the transnational agenda'' (ibid.).

According to an UNTAD estimate, 'there are now over 60,000 transnational corporations, compared with 37,000 in 1990. these transnational corporations have around 800,000 foreign affiliates, compared with some 170,000 foreign affiliates in 1990, and millions of suppliers and distributors operating along their value chains' (quoted in ibid.: 4, fn. 8). Such an emergence brings an assumption that the TCC is 'a kind of superstructure' that rests upon 'resilient national bases' (ibid.).

[17] And he views that '[t]he WTO also hopes to bring within its regulatory ambit, through the ongoing Doha round of trade negotiations, other aspects of the relationship between trade and investment, government procurement policy, competition policy and so on' (Chimni 2004: 8).

[18] *United States – Import Prohibition of certain Shrimp and Shrimp Products*, (6 November 1998), WTO Appellate Body Reports, WTO Doc. WT/DS58/AB/R.

[19] *European Communities – Measures Affecting Livestock and Meat (Hormones)*, (13 February 1998),

objectives (Chimni 2000: 1752-1761).[20] The US unilateral measures to impose import restriction on shrimp/shrimp products or even the EC measures to prohibit import of beef/beef product in the name of environmental protection – tends to favour the domestic producers – and consequently affects the overseas market access of developing countries, due to higher environmental standard requirements (ibid.: 1760). In his words, 'the environmental crisis is used by developed countries to protect inefficient domestic industry by raising non-tariff barriers to third world goods in the name of environmental protection' (Chimni 2007: 506).

As far as the issue of linkage between human rights (particularly labour standards) and trade under the WTO regime-poses the problem that non-enforcement of core labour standards become a legitimate basis for the WTO members to discriminate against countries that do not enforce those rights. Upon this issue, Chimni argues that, imposing labour standards and banning the import of goods which lacks such standards in the name of human rights protection is also a technical barrier to trade for the developing countries, because they lack the resources to do so (ibid.).[21] Here, the opposition to link trade and

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WTO Appellate Body Reports, WTO Doc. WT/DS26/AB/R and WTO Doc. WT/DS48/AB/R.

[20] In both *Shrimp-turtle* case and the *Hormones* case, the WTO Appellate Bodies integrated the trade and environmental objections very cautiously. For example, in the *Shrimp-turtle* case, both Panel and Appellate Body did not rule out the possibility of using unilateral trade measures to achieve environmental protection objectives. The Appellate Body merely specified certain preconditions which must be met before recourse to unilateral measures is permitted. In this regard, the Appellate Body clarified the Preamble structure of Article XX (particularly its Chapeau and Paragraph (g)) of GATT and advanced interpretations that go a long way towards shaping a balanced response to the relationship of trade and environment (Chimni 2007: 1754-1757, at 1756). And in the *Hormones* case, both Panel and Appellate Body held the EC measures at issue were inconsistent with the requirements of Article 5 of the SPS Agreement. In this regard, the Appellate Body advanced several interpretations on SPS Agreement (particularly risk assessment under Article 5(1), precautionary principle embodied in Article 5(7), the sixth paragraph of Preamble and 3(3) which go in a long way in integrating trade and environment objectives (ibid.: 1757-1759, at 1758).

[21] Contrary to this argument, there are four major arguments prevail: First, 'the most commonly preferred justification for transnational labor regulation and linkage is that with free trade, countries will engage in downward regulatory competition, weakening labor standards and regulation in order to be able to compete globally in a proverbial "race to the bottom"...Linkage would prevent this from occurring by conditioning better terms of trade on the provision of minimum standards of labor regulation' (Kolben 2007: 206-207); Second, 'international labor standards are a public good and that countries would benefit economically if they could agree, such as through a trade agreement...This argument posit that effective enforcement of labor rights and the creation of a viable labor relations system would improve business productivity and national economic performance' (ibid.); Third, 'a non-protectionist trade policy that permits discrimination between products based on human rights considerations is legally sound, normatively desirable, and consistent with the underlying principles of free trade. The notion that workers' rights are a subset of human rights has become widely accepted. Therefore, discrimination between products based on labor rights considerations should be acceptable' (this argument mainly posed by Trebilcock and Howse) (ibid.:

labour issues within the WTO arose from the developing countries, majorly on three grounds, namely, economic, political and structural (Kolben 2007: 212-213). Economic grounds for opposition are based on a belief that the linkage proposal by the developed countries 'are intended to or will lead to, illegitimate economic protection of producers and workers in developed countries from producers and workers in developing countries that possess a comparative advantage' (ibid.). Political arguments suggest that 'linkage would violate a nation's sovereignty, limiting its ability to self-govern' - in that regard, the developing countries are particularly sensitive to externally imposed regulatory regimes and viewed it as 'neo-colonial imperialism' (ibid.: 213). The structural argument suggests that 'the institutional capacity of particular international institutions to take on roles external to their core mission, such as the possibility of WTO assumption of a labor regulatory role' - in that regard, the developing countries in the Singapore Declaration of 1996 'explicitly declaring the ILO to be the appropriate body to deal with labor issues, implicitly rejecting the WTO' (ibid.).

With regard to the above said linkage initiatives in the WTO by the developed countries, Chimni makes a comment that 'what they may keep out through the front door may find its way into the WTO through the back door' (Chimni 2000: 1752).

However, upon the issue of integration between human rights and humanitarian law, Chimni criticizes the post-Cold War Western state conglomerate (e.g., NATO) intervention and subsequent use of force in the name of human rights protection in the third world countries (Chimni 2004: 16-17). He quotes the example of Western power bloc's six weeks bombing in former Yugoslavia in 1999; Kosovo 1999 and the 2003 war against Iraq (ibid.: 16). They projected such interventions as humanitarian concern and legitimized their action through the UN (ibid.).[22] In this regard, the integration between human rights and humanitarian law happens mainly by 'the reconstitution of the

207-208); Fourth, 'trade and labor linkage, and the spread of international labor standards, should be considered to be part of the development project'. Here the understanding of development 'expands beyond traditional notion that focus exclusively on purely economic measures such as increases in gross domestic product or individual income' that is, 'a broader understanding of development encompasses a more expansive and transformative process that seeks to develop civil society and political institutions, protect human rights, and expand basic freedoms, in addition to increasing aggregate wealth and decreasing poverty' (this argument mainly posed by Stiglitz) (ibid.: 208-209).

[22] He quotes an example of Security Council resolution 1244 (1999) retrospectively justified the bombing of former Yugoslavia. 'This is an erroneous view' (Chimni 2004: 16, fn. 66).

relationship between sovereignty and use of force' (ibid.: 17). Such a reconstitution is taking place through: '(a) attempts to declare the principle of sovereignty an anachronism in the context of human rights violations, thereby justifying the idea of humanitarian intervention; and (b) attempts to reinterpret Articles 2(4) and 51 of the UN Charter to justify the pre-emptive use of force' (ibid.)

Chimni concludes that 'whatever be the mode adopted to better integrate [the regimes'] objectives, [...] it should safeguard the interest of the third world countries against the forces of protection in the north' (emphasis added) (Chimni 2000: 1760). Further he says that 'the future may see a fragmented international law reunite to reflect the interest of the transnational capitalist class. In other words, the earlier unity has necessarily to split to create a new unity... If a new unified international law that is responsive to the fate of global subalterns is to be created, it is imperative to imagine suitable alternative features' (Chimni 2007: 509).

However, the issue of integration or harmonization of regimes or conflicting areas and the relationship between existing WTO rules and specific trade obligations set out in other non-trade agreements (i.e., in environment, human rights treaties, etc) are being widely discussed in the ongoing Doha Declaration.[23] The relationships between trade, environment and development have also been discussed in the 2002 Johannesburg Summit on Sustainable Development.[24] Further, the importance for the application of human rights in other issue areas had been discussed in the Vienna Declaration on Human Rights 1993; the UN Committee on Economic, Social and Cultural Rights;[25] and

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[23] The Doha Declaration explicitly listed 'the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)' as one of the topics on the negotiating agenda – Doha Ministerial, para. 31(i), adopted on 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1 dated 20 November 2001.

[24] The Johannesburg Summit on Sustainable Development took place between 26 August – 4 September 2002 and the *Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development*, was also adopted at the Summit.

[25] The United Nations Committee on Economic, Social and Cultural Rights, in a 1988 statement on globalization and economic, social, and cultural rights, declared that the realms of trade, finance, and investment are in no way exempt from human rights obligations. Further, it urged the members of the WTO to adopt a human rights approach to trade matters, asserting that the 'promotion and protection of human rights is the first responsibility of Governments' (Shelton 2006: 294).

in various Commissions[26] and Sub-Commissions on Human Rights.[27]

1.3. Different Levels at which Integration Occur

The integration between regimes may occur at the following three levels: (i) integration by unilateral/domestic state action; (ii) integration by bilateral/regional action; and (iii) integration by international action.

a. Integration by Unilateral/Domestic State Action

Indeed, the states integrate the international regime with their domestic laws to secure particular regime compliance. Often the unilateral trade legislation is integrated with the labour standards. For example, '[t]he United States has an extensive range of unilateral trade legislation that conditions special trade benefits and other economic incentives upon compliance with specified labour requirements' (Kolben 2007: 213). Such legislation include, the 'legislation governing loans issued by the Overseas Private Investment Corporation, the so-called "301 Legislation" that designates violations of workers' rights as a form of unfair trade practice' (ibid.). And the Generalized System of Preferences (GSP) that gives special tariff reductions beyond the MFN tariff levels agree to the WTO,[28] if a beneficiary country agree to provide its workers certain 'internationally recognized workers rights' (ibid.: 213-214).[29]

'The EU has also incorporated labour and other conditionality into its own GSP

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[26] The Commission on Human Rights has stated that 'the exercise of the basic rights of the people of debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot be subordinated to the implementation of structural adjustment policies and economic reforms arising from the debt' (ibid.).

[27] The Sub-Commission on the promotion and protection of Human rights has similarly affirmed the 'centrality and primacy of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies, agreements and practices' (ibid.).

[28] The GSP scheme is a specifically permitted deviation from WTO MFN principles that, as a general proposition, prohibit differential tariff treatment between – WTO members.

[29] "Internationally recognized workers rights" are defined to include '(A) the right of Association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children and a prohibition on the worst forms of child labor...; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health' (Kolben 2007: 214, fn. 62).

regime.[30] The EU scheme is constructed somewhat differently than the US system: it creates an incentive programme from beneficiary countries that grants additional tariff incentives, so called "special incentives", if these counties have "ratified and effectively implemented" a list of specified human and labour rights conventions' (ibid.: 214). In this regard, '[a] beneficiary country must apply those conventions for special incentives, and the European Council, after a review of the application, determines if the country complies with the requirement of the EU GSP regime' (ibid.).

These domestic regimes are not effective and suffer from a range of problems. For instance, some scholars argues that the US GSP regime has had limited success in improving workers' rights in some beneficiary countries in Central America, and also in Bangladesh, overall the results has not been overwhelming. In the same way, the EU's GSP regime was also criticized that it does not seem to be properly implemented by the beneficiary countries. In this regard, Colombia was often cited by human rights organizations and the ILO as being one of the countries in which basic labour and human rights are most violated, which is one of the beneficiaries under EU GSP scheme.

Therefore, it is often criticized that, 'domestic, unilateral legislative approaches to trade and other linkage are overly focused...on state enforcement of labour law; fail to engage the beneficiary states in a meaningful participatory process; are not highly effective in meaningful improvement of working conditions; and generally fail to achieve concrete improvement in labor rights enforcement by states' (Kolben 2007: 216).

A sequence of cases has been decided on the issue of unilateral actions of states before the GATT and the WTO and also before other *foras*. For example, Japan's Southern Blue-Fin Tuna case,[31] Mexican Tuna case,[32] US-Shrimp Turtle case,[33] EC-

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[30] EU Council passed a regulation 980/2005 on "Applying a Scheme of Generalized Tariff Preferences" (hereinafter EU GSP Regulation).

[31] *Southern Blue-Fin Tuna Case (New Zealand v. Japan; Australia v. Japan), Order on Provisional Measures,* (27 August 1999), para. 90(c) and (d).

[32] US Measures on Yellow-Fin Tuna Imports, 30 ILM 1594 (1991).

[33] *United States – Import Prohibition of Certain shrimp and Shrimp Products,* (6 November 1998), WTO Appellate Body Reports, WTO Doc. WT/DS58/R, para. 7.61.

Preference case,[34] and so on.

b. Integration by Bilateral/Regional Action

Indeed, states also integrate international regimes with bilateral/regional arrangements to secure the compliance of a particular regime. Mostly it occurs in FTAs and various regional arrangements ranging from North America Free Trade Agreement (NAFTA), Southern Common Market (MERCOSUR), Caribbean Common Market (CARICOM), South Asian Association of Regional Cooperation (SAARC) and so on. For instance, Kolben (2007) notes that the US has, since NAFTA arrangement with Mexico and Canada in 1992, included labour rights provisions in all of its negotiated bilateral and regional trade agreements.

The bilateral and regional integration action remains to be the most effective means of integration of regime. Because the bilateral and regional arrangements provide the possibility of negotiated solutions for all issues ranging from human rights, trade, environment, etc. problems. Further, '[i]n consent driven negotiated process in a bilateral or regional context, trading partners might often have more in common with each other both culturally and economically than do the contracting members of the WTO' or of any other international regimes (ibid.: 224).

Kolben quotes many regional cooperation agreements, which integrate labour issues with trade – for example, the countries of the European Community, although varied both culturally and economically, generally share a range of cultural norms that might lead to common ground on the linkage issues; the Southern Community Market (MERCOSUR) makes a labour rights coordination between its countries, and the Caribbean Common Market (CARICOM) is undertaking a labour law harmonisation project; the South Asian Association of Regional Cooperation (SAARC) also finds mutually beneficial means to conquer labour problems that are unique to its region and so on (Kolben 2007: 224-225).

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[34] *European Community – Conditions for the Granting of Tariff Preferences to Developing Countries,* WTO Panel Reports, WTO Doc. WT/DS246/R.

Though the bilateral and regional arrangements secure effective compliance, it is not free from critique. First, such arrangements also have inefficient enforcement mechanisms like that of the unilateral state actions to protect human rights, environment, labour standards, etc. – because often these arrangements states that the integrations should be enforced based on "State Action – State Sanction Model". (Kolben 2007: 221-224).[35] Second, these arrangements are not an exception for powerful states domination either within regional arrangements or even between bilateral treaty partners – because they try to project their self-interest as common interest.

c. Integration by International Action

As noted earlier, at international level, the integration of regimes takes place in two ways: either by political (legislative) action or by legal (judicial) action. Through, first mode, the states integrate the regimes by negotiating treaties and achieves their political object; and through second mode, the states integrate the regimes by interpreting the treaties and achieve their political object. Integration of regimes often gains support from north rather than from south. In this regard, Pauwelyn argues that the regimes need to be integrated, because no regimes are self-contained, hence they all fall under the broader territorial domain of general international law. Trachtman argues that the regimes should not be integrated, because each regime came for some special purpose, hence through interpretation the courts and tribunals should not add to or diminish the rights and obligations of the parties to a particular regime. On the other hand Chimni argues that regimes' integration takes place for the purpose to protect the interest of the Transnational Capitalist Class as-well-as the powerful Western developed states, which directly affects the interest of the subaltern or the marginalized people of the third world developing states. Hence, he opines that the regimes may be integrated, but such

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[35] For instance, though the labour codes are largely in compliance with the core provisions of international law and ILO Standards, but state enforcement is poor. 'In developing countries, regulatory failure often occurs because of a lack of will by government elites to enforce labour law, resistance from business owners and managers in implementing regulations, weak civil society and unions to that cannot adequately put pressure on the government to enforce and strengthen domestic law, and deep-rooted failures in regulatory capacity that include lack of skills, lack of funds, and high rates of corruption' (Kolben 2007: 224). In this regard, Kolben says that '[c]ompliance law is a start, but if there is no enforcement, the law is a dead letter' (ibid.)

integration should take into account the interest of the third world states and peoples.

2. Hierarchy of Norms in International Law

Unlike the domestic legal system, international law is "decentralized" and has no central legislator to create its rules. And the rules of international law are mostly created by its subjects (prominently by states). Here, the states as creators of law are complete equals and further, international law is based on the principle of law of co-operation, not subordination (Meron 1986: 3; Pauwelyn 2001: 535-536). However, its creation depends essentially on the consent of states (either explicit or implicit). And the lack of consent by a given state generally means that it cannot be held to the rule in question (*pacta tertis nec nocent nec prosunt*).[36] As a result, '[t]he law created by states *A* and *B* has the same legal value as that created by state *C* and *D*' (Pauwelyn 2001: 536). Therefore, when conflict occurs between norms, the issue arises as to which norm prevails over the other, and it leads to the question of hierarchy of norms. Of course, domestic legal systems are well-acquainted with hierarchy of norms to resolve conflicts. For instance, the constitutional provisions prevail over ordinary statutes, the statute prevail over secondary legislation or administrative regulations, and so on. Is there any such hierarchy exists in the international legal system, to resolve the conflict between norms or put it differently, is there a hierarchy of norms in international law?[37] Two major views prevail upon the issue: (1) there is a hierarchy of norms in international law, and (2) there is no hierarchy of norms in international law.

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[36] Articles 34-38 of the VCLT dealing with treaties and third parties.

[37] There were many scholars dealt with the issue of hierarchy of norms in international law. And recently a symposium was also convened upon the issue jointly by a European-American symposium on Wolfgang Friedman's celebrated book, *the Changing Structure of International Law*, and subsequently published in the European Journal of International Law in 1997. The title of the symposium was 'The Changing Structure of International Law Revisited' and the symposium identified four areas of investigation: 'The state between fragmentation and globalization; Is there a hierarchy of norms in international law?; Is international law moving towards criminalization?; Where does the international community stand?' (EJIL 1997: 545).

2.1. There is a Hierarchy of Norms in International Law

On the one hand, the scholars argue that every legal system is well-acquainted with the hierarchy of norms to solve the conflict of norms and the international law is not an exception. According to them, the international legal system solves the conflict of norms by looking at the following hierarchy: (a) conflict resolving techniques – (i) *lex superior derogate legi inferiori* (peremptory (*jus cogens*) norms, obligations *erga omnes*, Article 103 UN Charter obligations) (ii) *lex posterior derogate legi priori* (Articles 30/59 and 41/58 VCLT), (iii) *lex specialis derogate legi generali* (Article 55 of the Draft Article on State Responsibility), (iv) hierarchy of sources (Article 38(1) of the ICJ Statute), (v) systemic integration (Article 31(3)(c) VCLT); and (b) conflict avoidance techniques – (i) conflict clauses, (ii) treaty interpretation, (iii) state responsibility.

a. Conflict Resolving Techniques

Every legal system has evolved techniques for resolving conflicts between different legal rules. These techniques fall into three main categories: (i) *lex superior*, (ii) *lex posterior*, and (iii) *lex specialis*.[38] In addition (iv) hierarchy of sources, and (v) systemic integration (Akehurst 1974-75: 273-278).

(i) *Lex Superior Derogate Legi Inferiori* (*Lex Superior*)

As the principle of *lex superior*, the 'rules derived from one source prevail over rules derived from another source' (ibid.: 273). That is, some norms are more important than other norms and that in cases of conflict, those important norms should be given effect to. The existence of such norm could be found in the international legal domain and they get higher value than any other norms, namely peremptory norms (*jus cogens*), obligations *erga omnes*, and Article 103 of the UN Charter obligations.

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[38] These techniques have evolved over a period of time, especially in the domestic legal systems to resolve the conflict of norms. Gradually such techniques have moved into the international legal system as a general principles of international law or as a customary rules of international law to resolve the conflict of norms.

Peremptory (*Jus Cogens*) Norms: '[T]he development of the international law notion of *jus cogens* has undoubtedly been influenced by domestic laws that provide for the nullity of agreements concluding with *ordre public* or public policy objectives' (ILC Report on the Fragmentation 2006: 182, para. 361). The International Law Commission in its Vienna Convention on the Law of Treaties made distinction for the first time that certain norms as 'peremptory (or *jus cogens*) norms', due to its fundamental importance to the international community and all other norms considered as 'ordinary customary or conventional rules' (Weil 1983: 423-424).[39]

'Peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' (Article 53 of the VCLT). And '[it] can be modified only by subsequent norm of general international law having the same character' (ibid.). Further, a treaty will be void 'if at the time of its conclusion, it conflicts with [such] norm' (ibid.).[40] However, '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates' (Article 64 of the VCLT).

Therefore, according to the VCLT, a rule could be regarded as *jus cogens*, only if it fulfills two requirements, such as: '(1) it must be a rule of 'general international law' and (2) it must be accepted and recognized by the international community of States as a whole'. And any rule of *jus cogens* could be modified by a norm having the same character. Further, any treaty in violation of such norm is void. Akehurst says '[i]n the event of a conflict between a rule of *jus cogens* and a rule of *jus dispositivum*, the rule of

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[39] Infact, the peremptory (*jus cogens*) norms discussed at length for the first time by Verdross in 1937. Even prior to this, Quincy Wright had noted the problem of illegal treaties, based on a 1916 judgment of the Central American Court of Justice denying the capacity of Nicaragua to conclude the 1914 Bryan Camorro Treaty with the United States. Further, Judge Schucking in dissenting opinion in the *Chinn* case (1934), argued that the Court should refuse to enforce an agreement contrary to international public policy (Shelton 2006: 297-298).

[40] The ILC included the provisions on *jus cogens* in its 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations. 'The Commentary called the prohibition of the illegal use of armed force embodied in the UN Charter 'the most reliable known example of a peremptory norm'' and also claimed that the notion of peremptory norms, as embodied in VCLT Article 53, "had been recognized in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions"' (quoted in Shelton 2006: 300).

jus cogens must prevail, regardless of the sources of the conflicting rules, regardless of whether the rule of *jus dispositivum* came into existence before or after the rule of *jus cogens*, and regardless of whether the rule of *jus dispositivum* is more specific or less specific than the rule of *jus cogens*' (Akehurst 1974-75: 281-282).

However, the background, nature and effects of *jus cogens* were summarized by the ICTY in its *Furundzija* case that

> 'Because of the importance of the values it [the prohibition of torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force' (quoted in ILC Report on Fragmentation 2006: 182-183, para. 361).[41]

Here, the peremptory (*jus cogens*) norms could be dealt in three ways: (i) the effect of *jus cogens*, (ii) the content of *jus cogens*, and (iii) the sources of *jus cogens*.

(i) *Effect of Jus Cogens*: The effect of *jus cogens* could possibly be viewed in three ways: (a) Article 53 read with Article 71(1); (b) Article 64 read with Article 71(2); and (c) Article 65(3) read with Article 66(a) of the VCLT.

(a). Article 53 read with Article 71(1) of the VCLT: First of all, Article 53 invalidates the treaties which, at the time of their conclusion, are in conflict with a peremptory norm of general international law. In this regard, 'the concept of *jus cogens* encapsulates is a rule of hierarchy *senso strictu*, not simply a rule of precedence' (ILC Report on the Fragmentation 2006: 184, para. 365). Further, Article 71(1) suggests that '[i]n the case of a treaty which is void under Article 53 the parties shall (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflict with the peremptory norm of general international law; and (b) bring their mutual relations into conformity with the peremptory norm of general international law'.

(b). Article 64 read with Article 71(2) of the VCLT: Article 64 invalidates the existing treaties, which is in conflict with the new peremptory norm of general

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[41] *Prosecutor v. Anto Furundzija, Judgment*, (10 December 1998), ICTY Trial Chamber II, Case No. IT-95-17/1.

international law. Here, the *jus cogens* norms does not have a retroactive character, because it only terminates the treaty but the rights and obligations based on it shall only become void in as much as they are themselves contrary to the new *jus cogens* (ibid.: 184-185, para. 366). In this regard, Article 72(2) reads that '[i]n the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty (a) releases the parties from any obligation further to perform the treaty [and] (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law'.

(c) Article 65(3) read with Article 66(a) of the VCLT: In fact, a *jus cogens* norm may possibly conflict in three ways: (i) it may conflict with a treaty, (ii) it may conflict with a rule of (general) customary international law, and (iii) it may conflict with another norm of *jus cogens* (ibid.: 185, para. 367). Conflict of a treaty (bilateral or multilateral) with *jus cogens* renders the treaty – or a separable provision thereof – invalid (ibid.).[42] Conflict of a (general) customary law with *jus cogens* renders the latter invalid (ibid.). Conflict between two *jus cogens* norms – 'for example the question of the right to use force in order to realize the right of self-determination' – in this regard ILC says 'there is no hierarchy between *jus cogens* norms *inter se*' and is much more difficult to resolve such conflicts (ibid.). Regarding this, where a dispute arise, Article 65(3) of the VCLT suggests that the dispute should be settled through peaceful means listed in the UN Charter.[43] Failing which, they should approach the ICJ for settlement as per Article 66(a) of the VCLT, which reads as follows: 'any one of the parties to a dispute concerning the application or the interpretation of Articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common

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[42] Even if the provisions of the UN Charter conflicts with *jus cogens* renders invalid, and the same also goes for resolutions of international organizations (including the Security Council resolutions under the UNO) (ILC Report on the Fragmentation of International Law 2006: 185, para. 367).

[43] Article 33(1) of the UN Charter mentions various peaceful means for the settlement of disputes, which include 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.

consent agree to submit the dispute to arbitration'.[44]

(ii) *Content of Jus Cogens*: McNair (1961) said that '[t]here is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*' (quoted in ibid.: 188, para. 374). Further, he viewed that 'it is easier to illustrate these rules [*jus cogens*] than to define them' (quoted in ibid.: 188, fn. 519). However, the ILC in its Commentary to Draft Articles on State Responsibility (2001) stated that '[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may [...] give it the character of *jus cogens*' (quoted in ibid.: 189, fn. 522). Judge Schucking in the *Oscar Chinn* case stated that 'the possibility of creation of *jus cogens* in the form of agreements between States' (ibid.: 191, fn. 529).[45]

But the criterion mentioned under Article 53 of the VCLT is, it must be 'accepted and recognized by the international community of States as a whole'. In its Commentary to the Draft Articles on State Responsibility, the ILC gave examples of *jus cogens* which include 'the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture..., basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination' (ibid.: 188-189, para. 374). Further, in the *Furundzija* case, the ICTY defined torture as both a peremptory norm and an obligations *erga omnes*.[46] Most frequently cited examples for the status of *jus cogens* include: (i) the prohibition of aggressive use of force; (ii) the right to self-defence; (iii) the prohibition of genocide; (iv) the prohibition of torture; (v) the crime against humanity; (vi) the prohibition of slavery and slave trade; (vii) the prohibition of piracy; (viii) the prohibition of racial discrimination and apartheid; and (ix) the prohibition of hostilities directed at civilian population (i.e., "basic rules of international humanitarian law") (ibid.: 188-189, para. 374). Some scholars have proposed that *jus cogens* encompasses also the freedom of the high seas (ibid.: 189, fn. 522). These norms are also referred as "peremptory norms", "elite norms", "highest ranking norms", "quality labels", "super norms", and so on (Weil 1983: 423).

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[44] No cases have been brought to the ICJ under this article to date.

[45] *Oscar Chinn case*, (1934), PCIJ Reports, series A/B, No. 63 (separate opinion of Judge Schucking), 149.

[46] *Prosecutor v. Anto Furundzija*, (10 December 1998), ICTY Trial Chamber II Reports, Case No. IT-95-17/1, 121 ILR (2002), 260-262, paras. 151-157.

Though Article 53 of the VCLT identified *jus cogens* by reference to what is 'accepted and recognized by the international community as a whole' – but it is not free from controversy (especially reference to a community of "States" and to the meaning of the requirement "as a whole"), there is also a disturbing clarity about it (Weil 1983: 413-422). Indeed, 'the historical background of *jus cogens* lies in an anti-voluntaries, often religiously inclined natural law, the presumption of the existence of "absolute" norms on human conduct' (ILC Report on Fragmentation 2006: 189-190, para. 375).

(iii) *Sources of Jus Cogens*: The peremptory norm may originate in any of the formal sources of international law: conventions, custom, general principles of law – some even say, resolutions of international organizations (which, by some alchemy, would magically transmute non-normative acts into supernormative acts) Weil 1983: 425). And such norms should be recognized and accepted by 'all the essential components of the international community' (ibid.: 426-427).

Obligations *Erga Omnes*: The term "*erga omnes* obligations" indicate '[a] norm which is creative of obligations *erga omnes* is owed to the "international community as a whole" and all States – irrespective of their particular interest in the matter – are entitled to invoke State responsibility in case of breach'[47] (ILC Report on Fragmentation 2006: 193, para. 380). In other words, the *erga omnes* obligations deals with a very specific issue of jurisdictional *locus standi* in case of breach of an obligation owed to the international community as a whole.[48]

Infact, the bulk of international law arise out of contractual relations of states and mostly in a "bilateralist" way.[49] Here, bilateralism of international law means that international law obliges states reciprocally in their relations *inter se* – as a result, the obligations are owed by states to each other and each of which, is only individually

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[47] Here, the Latin term "*erga omnes*" means "towards everyone/all".

[48] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, (2004), ICJ Reports, 43 ILC (2004): 1009, para. 37 (separate opinion of Judge Higgins), where she states that 'the dictum in *Barcelona Traction* was directed to a very specific issue of jurisdictional *locus standi*' (ILC Report on Fragmentation 2006: 202, fn. 560).

[49] The term "bilateralist" was first used by Special Rapporteur Riphagen in his Draft Articles on State Responsibility. As pointed out by Simma, 'the term "bilateralist" grasp the essence of international law more precisely and is less prone to misunderstandings than the adjectives "relative" or "relational"' (ILC Report on Fragmentation 2006: 193, fn. 535).

entitled to invoke a breach as a basis for state responsibility – that may be characterized in terms of "private justice" or an "every-man-for-himself doctrine" (ibid.: 193-194, para. 382-383; Weil 1983: 431). Therefore, '[f]or a State to enjoy a right implies its possession of legal standing to claim performance of the corresponding obligation and, in default, to bring to book the person or persons owing that obligation... In sum, no obligations *erga omnes*, traditionally, exist: it is up to each State to protect its own rights; it is up to none to champion the rights of others' (Weil 1983: 431). In the same way, the ICJ in its *Reparation* case held that 'only the party to whom an international obligation is due can bring a claim in respect of its breach' (quoted in ILC Report on Fragmentation 2006: 194, para. 384).[50]

But contemporary international law has moved well beyond bilateralism. For example, in the *Reservation* case,[51] the ICJ reasoned that, classical treaties were about individual advantages and disadvantages to States, or about the maintenance of a contractual balance. Yet under Convention such as the Genocide Convention, states were not pursuing their national or individual interest. Instead they had a 'common interest, namely, the accomplishment of those high purposes which are the *raison d'etre* of the Convention' and '[c]onsequently, in a convention of this type one cannot talk of individual advantages or disadvantages of States, or of the maintenance of a perfect contractual balance between rights and duties' (quoted in ibid.: 195, para. 386).

Thereafter, the ILC in its VCLT debate, made a distinction between treaties creating obligations that were owed by states to each other in a network of reciprocal relationships and treaties creating a more absolute type of obligation – that is, an obligation of an "integral" or "interdependent" character, for example disarmament and humanitarian law conventions (ILC Report on Fragmentation 2006: 195, para. 385).[52] Here, the obligations under the "integral conventions" could not be meaningfully reduced into reciprocal state-to-state relationships (ibid.)

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[50] *Reparations for Injuries Suffered in the Services of the United Nations, Advisory Opinion*, (1949), ICJ Reports, 181-182.

[51] *Reservations to the Convention on the Prevention of the Crime of Genocide, Advisory Opinion,* (1951), ICJ Reports, 23.

[52] More specifically, Special Rapporteur Fitzmaurice made the above said two type of treaties distinction in his report to the ILC Draft on the Vienna Convention on Law of Treaties.

Such a distinction was confirmed by the ICJ in the *Barcelona Traction* case,[53] where the court held that Belgium did not posses legal standing to act on behalf of Belgian shareholders in a Canadian company against Spain. In a famous *obiter dictum*, the Court stated:

> '...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law...others are conferred by international instruments of a universal or quasi universal character' (quoted in ibid.: 196, para. 387).

From the *dictum*, the court made it clear that there exists different types of obligations in international law: '[o]n the one hand, there are obligations of a traditional type that exist towards another particular State or States on a bilateralist basis – and then obligations which are the concern of all States and for the protection of which all States have a legal interest' (ILC Report on Fragmentation 2006: 196, para. 388).

'Though the examples of obligations *erga omnes* mentioned in the *dictum* may have the character of *jus cogens*, but the court did not seek to emphasize their non-derogability. Instead, it wanted to point to the fact that there were some rules that gave rise to generality of standing to make claim in the event of violation' (ibid.: 197, para. 389). Therefore, the *erga omnes* norms were not necessarily distinguished by the importance of their substance. They were norms with certain procedural features – namely, the features that a breach of them could be invoked by any state and not just by individual beneficiaries. There were obligations that were about secondary, not primary rules.[54]

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[53] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), second phase*, (1970), ICJ Reports, 32, para. 33.

[54] Ruiz in his Report to the ILC Draft Articles on State Responsibility stated that 'the concept of *erga omnes* obligations is not characterized by the importance of the interest protected by the norms – this aspect being typical of *jus cogens* – but rather by the "legal indivisibility" of the content of the obligation, namely

Finally, the ILC adopted the concept of "*erga omnes* obligations" in its Draft Articles on State Responsibility (2001). Article 48 of the Draft Articles on State Responsibility reads as follows: '1. Any State other than an injured State is entitled to invoke the responsibility of another...if: (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole'.

(i) *Obligations Erga Omnes Partes*: Article 48(1)(a) of the Draft Articles on State Responsibility deals with "obligations *erga omnes* partes" – that is to say, obligations arising out of a treaty and designed to protect the "collective interest" of the treaty parties. The Commission gives an example of such treaties include the treaties dealing with an environmental or the security of a region or a regional system of protection of human rights, etc. (ILC Report on Fragmentation 2006: 198, fn. 550). In this regard, Seiderman has stated that 'in order to institute an *actio popularis*, a State or other subject of international law would need both standing and a forum. *Erga omnes* addresses itself only to the former requirement' (quoted in ibid.: 201-202, para. 399). For example, in the *East Timor* case, the ICJ held that:

> '[T]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligation invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*' (quoted in ibid.: 202, fn. 560).[55]

(ii) *Obligations Erga Omnes*: Article 48(1)(b) of the Draft Articles on State Responsibility deals with "obligations *erga omnes*" – that is, obligations in the general law whose implementation is the concern of 'the international community as a whole'. The Commission gives an example of such treaties include the treaties dealing with environment, human rights, humanitarian law, etc. at the international level (ibid.: 198, fn. 551). In these fields, most (not all) obligations are *erga omnes* and they do not create

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by the fact that the rule in question provides for obligations which bind simultaneously each and every addressee with respect to all others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations)' (quoted in ILC Report on Fragmentation 2006: 197, fn. 548).

[55] *Case Concerning East Timor (Portugal v. Australia)*, (1995), ICJ Reports, 102, para. 29.

reciprocal obligations between states in the bilateral manner (ibid.: 198, para. 391). Further, it has been stated that the source of norm cannot said to be decisive on whether that norm does give rise to obligations *erga omnes* or not. It is rather the character of primary norms which determine the nature of secondary rules (ibid.: 203, para. 402). For example, in the *Furundzija* case, ICTY stated that the prohibition of torture was *jus cogens* norm, it also defined it establishing an *erga omnes* obligation as follows:

> 'Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligation owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued' (quoted in ibid.: 199-200, para. 394).[56]

However, Special Rapporteaur Gaja in his report to the *Intitute de Droit International* stated that 'a collective reaction involving all states "is in practice impossible"'. Therefore, he concluded that:

> '[A]n obligation owed to the "international community as a whole" is also owed to each state individually and without any specific interest on the state's part and that each of them has the capacity to react in case of breach. Whether also other subjects – individuals, groups of individuals or organizations – might be entitled to react depends on the content of the relevant norm and whether suitable avenues for such reaction are present' (ibid.: 200, para. 396).

(iii) *Relationship between Jus Cogens and Erga Omnes Obligations*: *Jus cogens* norms are particularly important norms that are distinguished by their non-derogability. A norm that conflicts with them is null and void. Obligations *erga omnes* are obligations in fulfillment of which every state ('the international community as a whole') has a legal interest. That is, all states have interest in the observance of rules from which no derogation is permitted.

Therefore, it is clear that all *jus cogens* norms constitute *erga omnes* obligations and not vis versa. Byers observes that:

> '*Jus cogens* rules, otherwise known as 'peremptory rules', are non-derogable rules of international 'public policy'. They render void other, non-peremptory rules which are in conflict with them. *Erga omnes* rules, on the other hand, are

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[56] *Prosecutor v. Anto Furundzija*, (10 December 1998), ICTY Trial Chamber II Reports, Case no. IT-95-17/1, 121 ILR (2002): 260, para. 151.

> rules which, if violated, give rise to a general right of standing – amongst all States subject to those rules – to make claims' (Byers 1997: 211).

For example, in the *Furundzija* case, the ICTY made clear the relationship between the procedural thrust of *erga omnes* obligations and the linkage of *jus cogens* to normative hierarchy: 'while the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major future of the principle proscribing torture relates to the hierarchy of rules in the international normative order' (quoted in ILC Report on Fragmentation 2006: 204-205, para. 406).

Infact, the clear difference between *jus cogens* norms and obligations *erga omnes* is that the former have to do with the normative "weight" of a norm, the latter with its procedural "scope". Further, a *jus cogens* norm has necessarily an *erga omnes* scope, but not all *erga omnes* obligations have same weight as *jus cogens* (ILC Report on Fragmentation 2006: 205, para. 408).

Article 103 UN Charter Obligations: Indeed, the UN Charter obligations gains some superiority and priority over all other obligations agreed under other international, regional, bilateral agreements and even the private contracts and licences. In this regard, Article 103 of the UN Charter reads that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail'.[57] Further, the primacy of Article 103 is expressly mentioned under Article 30(1) of the VCLT: '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'. Infact, Article 30 of the VCLT deals with the "[a]pplication of successive treaties relating to the same subject-matter" – does not presume that the treaty being set aside under it would be invalid, but merely set aside in order to apply the higher-ranking treaty and to the extent

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[57] Article 103 of the UN Charter was drafted based on Article 20 of the League Covenant, which reads as follows: 'The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations'.

that this is necessary – in the above said context, it simply highlights the hierarchical effects of obligations under the Charter.

(i) ***An Obligation to Prevail over Another*****:** What does it mean for an obligation to prevail over another as per Article 103, whether it gives priority or invalidity? Those who believe that the UN Charter is a "constitution" of the international community say that any agreement in conflict with the Charter is invalid (ILC Report on Fragmentation 2006: 170, para. 334). Fassbender has argued that conflict of obligations under treaties with obligations under the Charter lead to the same result as conflicts with *jus cogens* – invalidity (Fassbender 1998: 590). But most of the commentators agree that the question here is not of validity but of priority, that is, the lower-ranking rule is merely set aside to the extent that it conflicts with the obligations under Article 103. Waldock argued during the ILC debate on Article 30 of the VCLT that 'the very language of Article 103 makes it clear that it presumes the *priority* of the Charter, not the invalidity of treaties conflicting with it' (quoted in ILC Report on Fragmentation 2006: 170, para. 333).

The ICJ has occasionally dealt with issues under Article 103. Before 1992 the court had discussed it in only one decision – for example, in the *Nicaragua* case in 1986, the court underlined the priority of obligations under the UN Charter over other treaty obligations (ibid.: 180, para. 356). Thenafter, Article 103 was given full attention in the *Lockerbie* case in 1992 – the court held that:

> 'Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carryout the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;
>
> Whereas the Court, while thus not at this stage called upon to determine definitively the legal effects of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures' (quoted in ibid.: 180, para. 357).[58]

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[58] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. the United Kingdom), Provisional*

(ii) ***Obligation of the Charter includes the Obligation under Resolutions*****:** The issue here is whether the obligations of the Charter include the obligations arise out of the resolutions based upon UN Charter? Infact, the UN Charter covers, not only the rights and obligations in the Charter itself, but also duties based on binding decision by United Nations bodies (ibid.: 168-169, para. 331). Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine (ibid.). In this regard, Article 25 obliges member states to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter.[59] From the beginning of the 1990s many Security Council resolutions made under Chapter VII (i.e. resolutions creating obligations) have underlined their priority in relation to any other obligations. A famous reference to Article 103 is to be found in resolution 670 (1990), in which the Council decided on measures against Iraq. The resolution reads as follows: '[r]ecalling the provisions of Article 103 of the Charter of the United Nations, acting under Chapter VII of the Charter of the United Nations, ...[c]alls upon all States to carry out their obligations to ensure strict and complete compliance with resolution 661 (1990)'[60] However, the Security Council often suggests that its resolutions prevail not only over other international obligations but also private law contracts, licences permits and the like. For example, Security Council resolution 1267 (1999) reads that:

> '[The SC] calls upon all States and all international and regional organizations to act strictly in conformity with this resolution notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement or of any contract entered into or any licence or permit granted prior to the entry into force of the measures imposed [by the Council]'[61]

Measures, (1992), ICJ Reports, 15: paras. 39-40.

[59] Article 25 of the UN Charter reads that '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

[60] The Security Council adopted numerous resolutions imposing an embargo – many of which expressly or implicitly give priority to any other commitments. For former Yugoslavia – SC Res. 748 (1992), SC Res. 713 (1991), SC Res. 724 (1991), SC Res. 727 (1992), SC Res. 743 (1992), SC Res. 757 (1992), SC Res. 787 (1992), SC Res. 820 (1993). See also similar decisions in respect of Somalia (SC Res. 733 (1992)) and Liberia (SC Res. 788 (1992). Apart form this, we can also find such words in other resolutions – SC Res. 1267 (1999), SC Res. 1127 (1997), SC Res. 1173 (1998), SC Res. 1132 (1997), and SC Res. 1298 (2000) and so on.

[61] In this respect, see also the SC Res. 1160 (1998), SC Res. 1127 (1997), SC Res. 1132 (1997), SC Res. 1173 (1998), and SC Res. 1298 (2000).

Here, 'with regard to the effect of Security Council resolutions on pure private law instruments, the assumption must be that they are not automatically invalidated but that the obligations is on states not to give effect to such contract' (ILC Report on Fragmentation 2006: 170, para. 332).

The question has also arise whether the SC resolutions adopted *ultra vires* prevail by virtue of Article 103?. The answer is no, and the decisions *ultra vires* do not give rise to any obligations, hence no conflict exist – as a result Article 103 will not be getting attracted (ibid.: 169, para. 331). Another question also arises: whether the SC resolutions in contravention with *jus cogens* are void or valid?. This issue has been dealt in the *Kadi* case, the Court of First Instance of EC held that:

> 'International law [...] permits the inference that there exists one limit to the principle that resolutions of the Security Council binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however, improbable that may be they would bind neither the Member States of the United Nations, nor in consequence, the Community [i.e., European Community]' (emphasis added) (quoted in ibid.: 177-178, para. 349).[62]

(iii) *Conflict with Treaties between UN Member States and Non-Members*: Another major problem arise when the conflict between obligations under the Charter and treaties concluded between member states and non-member state of the UN. The text of Article 103 does not differentiate between obligations incurred among UN member states and obligations of non-member states. Those who accepts the charter as a "constitutional" document, supports the view that the Charter applies to both members and non-members of the UN. Bernhardt (2002) says that:

> '[T]here are good reasons for assuming that treaties concluded with third states that are in clear or at least apparent contradictions to the Charter are not only unenforceable but also invalid with respect to such States. The Charter has become the 'constitution' of the international community and third states must, in their treaty relations and otherwise, respect the obligations arising under the Charter for UN members' (quoted in ILC Report on Fragmentation 2006: 174, para. 341).

Further, Goodrich and Hambro said that, 'the Charter...assumes the character of basic law of the international community. Non-members, which they have not formally

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[62] *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, (21 September 2005), Court of First Instance Reports, Case T-306/01, para. 281.

accepted it, are nevertheless expected to recognize this law as one of the facts of international life and to adjust themselves to it' (quoted in ibid.: 174, para. 342). In this regard, Article 2(6) of the UN Charter obliges even the non-members to carry out certain obligations.[63] Even the above said SC resolution 1267 (1999) obliges "all states", which include not only UN member states but also non-members.

On the other hand, those who does not believe Charter as a "constitutional" document says that non-members are formally not bound by the Charter which for them *res inter alios acta* (ibid.: 174, para. 343). McNair (1961) also confirms that 'the Charter of the United Nations not have the power to make rules contained therein binding upon non-members' (quoted in ibid.: 174, fn. 470). In this regard Article 34 of the VCLT says that '[a] treaty does not create either obligations or rights for a third state without its consent'. But at the same time, for United Nations members, the absolute primacy of Charter obligations over conflicting obligations with United Nations non-members. It could be rationalized with reference to Article 30(1) of the VCLT.

(iv) ***Conflict with Norms of Customary International Law***: Further, Article 103 of the UN Charter raises the question; does it include customary law also? The wording of Article 103 clearly shows that it applies only to 'obligations under any other international agreement'. Those who uphold the "constitutional" vision claim that Article 103 extends to conflicting customary law as well. Bernhardt (2002) claims that:

> '[I]t would not be correct to assume that obligations under the Charter do not also prevail in relation to these other [including customary law based] obligations. Article 103 must be seen in connection with Article 25 and with the character of the Charter as the basic document and 'constitution' of the international community. Therefore, the ideas underlying Article 103 are also valid in case of conflict between Charter obligations and obligations other than those contained in treaties' (quoted in ILC Report on Fragmentation 2006: 175, para. 344).

Perhaps two considerations might be relevant here: first, 'a literal interpretation render a clear result. However, expansively one interprets "international agreements", it does not cover international custom'; second, as per *lex specialis* – treaty prevail over custom, which includes the treaties establishing an international organisations such as the

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[63] Article 2(6) of the UN Charter provides that '[t]he organization shall ensure that states which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security'.

United Nations (ibid.: 176, para. 345).

(v) *Conflict with Norms of Jus Cogens*: The next issue arise, how the Article 103 relates with the *jus cogens* norms. Whenever the conflict between the UN Charter and the norms of *jus cogens* arise – here the issue is not of pre-eminence but of their validity. In this sense, the UN Charter is an international agreement like any other treaty; hence it is subject to *jus cogens* norms. As a result, any decision or resolution passed by the UN organs is invalid, if it contravenes the *jus cogens* norms. For example, Judge Lauterpacht, in his separate opinion to the order of the ICJ in the *Genocide* case discussed the relationship between Article 103 and *jus cogens*:

> 'The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between the Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent' (quoted in ibid.: 181, para. 359).[64]

Further, in the *Kadi* case, the Court of First Instance of EC held that:

> 'International law [...] permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations, nor in consequence, the Community [i.e., European Community]' (emphasis added) (quoted in ibid.: 177-178, para. 349).

Therefore, it is clear that the United Nations Charter is not above *jus cogens* and it also cannot transfer a power to contradict *jus cogens* to bodies that receive their jurisdiction from the Charter.

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[64] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro)*, (1993), (Separate Opinion of Judge Lauterpacht) ICJ Reports, 440, para. 110.

(ii) *Lex Posterior Derogat Legi Priori* (*Lex Posterior*)

As per the maxim of *lex posterior*, 'later rules prevail over earlier rules' (Akehurst 1974-75: 273). That is, '[p]refering today over yesterday, it reflects more concretely present circumstances and the present will of the relevant actors' (ILC Report on Fragmentation 2006: 117, para. 226).[65] Yet, the principle of lex posterior cannot claim absolute priority and is subject to the *jus cogens* norms. The question of conflicts between earlier and later treaties is covered by Articles 30/59 and 41/58 of the VCLT.

Article 30(3) of the VCLT confirms the rule of *lex posterior*: '[w]hen 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 later treaty'. But it is subject to an exception mentioned under Article 30(1) of the VCLT, which reads that '[s]ubject to Article 103 of the [UN Charter], 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' (emphasis added). Thereby, it makes Article 103 a special case among the conflict rules claiming priority in the future.[66]

Further, the *lex posterior* applies only if nothing else follows from party intent, for instance, Article 30(2) of the VCLT reads that '[w]hen 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'. Apart from this it is subject to explicit conflict clauses in either treaty, that is, invalidity in Articles 53/64, illegality under Articles 41/58 as well as termination or suspension pursuant to Article 59/60. However, Article 30 makes explicit caveats for Article 41 and 60 under its paragraph 5 as well as Article 103

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[65] 'It has sometimes been regarded as a "general principle of law recognized by civilized nations" under article 38(1)(c) of the [ICJ Statute], sometimes as a customary law principle of interpretation. Occasionally it has been envisaged as a technique' to resolve conflict between successive treaties (emphasis added) (ILC Report on Fragmentation 2006: 116-117, para. 225). And it derive from domestic legal system (ibid.: 117, fn. 296). Especially it has its roots from Roman Law and is recognized by various early writers (e.g. Grotius and Vattel) (ibid.: 116-117, para. 225).

[66] The ILC in its commentary to Article 30(1) explained this reference to Article 103 as follows: 'the position of the Charter of the United Nations in modern international law is of such importance, and the States Members of the United Nations constitute so large a part of the international community, that it appeared to the Commission to be essential to give Article 103 of the Charter special attention and a special place in the present article' (quoted in Pauwelyn 2003: 337, fn. 21).

of the UN Charter in its paragraph 1. Therefore, Article 30 is often considered as residual nature in solving the conflict between earlier and later treaties.

Here, the rule of *lex posterior* could be made research in four angles (a) application of successive treaties relating to the same subject-matter, (b) modification of multilateral treaties, (c) conflict clause, and (d) state responsibility.

Application of Successive Treaties Relating to the Same Subject Matter: (a) To invoke Article 30, two conditions must be fulfilled: (i) the treaties must be 'relating to the same subject-matter' and (ii) The treaties must be 'successive treaties'. Both conditions are set out in the title of Article 30: '[a]pplication of successive treaties relating to the same subject matter'.

(i) ***The Treaties must be 'Relating to the Same Subject-Matter'*****:** The major problem with respect to Article 30 arose from its title (and paragraph 1) itself, because it seems to limit the conflict between treaties 'relating to the same subject-matter'. And it raises the questions: what is meant by same subject-matter as per Article 30? Can't Article 30 be applied to the conflict between environmental and trade treaties or say, human rights and humanitarian law treaties? Two major views prevail upon the issue: one view is that, Article 30 cannot be applied to conflict between environmental and trade treaties or between human rights and humanitarian law treaties, since they deal with different subject-matter (Borgen 2005: 603-604, and 611-615); other view is that, the trade law, environmental law, human rights law, etc. have no normative value *per se* and '[t]hey are only informal labels that describe the instruments from the perspective of different interests or different policy objectives' (ILC Report 2006: 17, para. 21; 129-130, paras. 253-254). For example, '[m]ost international instruments may be described from various perspectives: a treaty dealing with trade may have significant human rights and environmental implications and vice versa. A treaty on, say maritime transport of chemicals relates at least to the law of the sea, environmental law, trade law and the law of maritime transport' (ibid.: 17, para. 21). Hence, they come within the purview of 'same subject-matter'. Consequently, ILC viewed that 'the test of whether two treaties deal with the "same subject-matter" is resolved [only] through the assessment of whether the fulfillment of the obligation under one treaty affects the fulfillment of the obligations

of another' (ibid.: 130, para. 254).

According to Sinclair, the phrase 'same subject-matter', 'should be construed strictly' and '...those words should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases the question involved such principles as *generalia specialibus non derogat*' (quoted in Pauwelyn 2003: 364). Here, the words 'same subject-matter' impose a requirement that there must be a conflict or incompatibility. For instance, the word 'incompatible' mentioned in Article 30(2) and 30(5) and 'compatible' mentioned in Article 30(3) shows the existence of conflict. At the same time, '[t]hey do not inject the *lex specialis* principle into Art. 30, nor, a *fortiori*, should they be read as implying an absolute preference for the *lex specialis* principle over and above the *lex posterior* rule' (ibid.: 365).

Therefore, '[t]he requirement of 'same subject-matter' relates...to whether there is a genuine conflict (i.e. a material overlap) as *between two specific treaty provisions in the particular circumstances of each case*' (ibid.: 367).

(ii) *The Treaties must be 'Successive Treaties'*: The second condition for Article 30 to apply is that the treaties must be 'successive treaties', that is, successive in time. For instance, Article 30(2) of the VCLT reads that '[w]hen 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'. Here, the question arose which of the agreements is the earlier one? Take an example of Sinclair, '[s]upposing that Convention A was signed in 1964 and came into force in 1966, whereas Convention B was signed and entered into force in 1965, which of them would be earlier?' (quoted in Pauwelyn 2003: 371, fn. 95). Therefore, the issue is, while deciding time of the treaty which one take into consider either the date of conclusion, opening for signature, ratification, or entry into force. Expert consultant at the Vienna Conference made it clear that 'for purposes of determining which of the two treaties was the later one, the relevant date should be that of the adoption of the treaty and not that of its entry into force (quoted in ibid.: 370-371).[67]

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[67] In case of amendment to treaty, the date of amendment and in case of revision, the date of revision, and in case of accession to continuing or living treaty, the date of accession must prevail as a later rule (for

(b) Article 30 offers substantive solutions in the following situations: (i) conflict between treaties with identical parties, and (ii) conflict between treaties with non-identical parties.

(i) ***Conflict between Treaties with Identical Parties*****:** Article 30(3) of the VCLT deals with conflicts where 'all the parties to the earlier treaty are parties also to the later treaty', but the earlier treaty was not terminated or suspended pursuant to Article 59, 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. Article 59 of the VCLT expressly reads that the earlier treaty is considered as terminated, 'if all the parties to it conclude a later treaty relating to the same subject-matter'[68] and 'it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty'[69] or 'the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time'.[70] And it further reads that the earlier treaty is considered as suspended in operation, 'if it appears from the later treaty or is otherwise established that such was the intention of the parties'.[71] Therefore, the *lex posterior* rule in Article 30(3) confirms the presumption that the states have the contractual freedom to 'change their minds', as a result, a later expression of consent prevails over an earlier one (Pauwelyn 2003: 381; ILC Report on Fragmentation 2006: 118-119, paras. 229-231).

(ii) ***Conflict between Treaties with Non-Identical Parties*****:** In contrast to Article 30(3), Article 30(4) of the VCLT covers conflicts where 'the parties to the later treaty do not include all the parties to earlier one'. And it deals with two conflict situations: (a) 'as between State Parties to both [the earlier and the later] treaty', the later treaty prevails to the extent of the conflict. Here, Article 30(4)(a) simply refers the rule in Article 30(3), hence 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. Or put it differently, the later treaty prevails to the extent of the conflict (Pauwelyn 2003: 382); and (b) 'as between a State Party to both treaties and a

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more discussion see Pauwelyn 2003: 367-380).

[68] Article 59(1) of the VCLT.

[69] Article 59(1)(a) of the VCLT.

[70] Article 59(1)(b) of the VCLT.

[71] Article 59(2) of the VCLT.

State Party to only one of the treaties [be it the earlier or the later one], the treaty to which both the States are parties governs their mutual rights and obligations. Here, Article 30(4)(b) makes a simple confirmation of the *pacta tertiis nec nocent nec prosunt* rule in Article 34, pursuant to which '[a] treaty does not create either obligations or rights for a third state without its consent' or put it differently states can only be held by treaty norms they agreed to (ibid.).

This paragraph (i.e. Article 30(4)) is subject to Article 41 of VCLT (Article 30(5) makes this explicit).[72] As a result, the conflict rule in Article 41 prevails over those in Article 30(4). Article 41 deals with '[a]greement to modify multilateral treaties between certain of the parties only' (which will be discussed in succeeding section). Therefore, only if the later *inter se* agreement is permissible under Article 41, the solution offered by Article 30(4) will prevail and if the later agreement is not permissible under Article 41, then it cannot prevail as the latest expression of state intent even as between the parties to both treaties (ibid.).

Resort may be had to Article 30 only in case Article 59 on '[t]ermination or suspension of the operation of a treaty implied by conclusion of a later treaty' – has not led to the termination or suspension of the earlier treaty. Article 30(3) explicitly refers to Article 59. Further, Article 30 is of a residual nature only, subject to explicit conflict clauses in either treaty, that is, invalidity in Articles 53/64, illegality under Articles 41/58, as well as termination or suspension pursuant to Articles 59/60. Further, Article 30 makes explicit caveats for Articles 41 and 60 as well as Article 103 of the UN Charter.

It should be recalled that Article 30 provides for priority rules as between specific provisions of successive treaties. It does not invalidate or terminate norms, nor does it give priority to (let alone does it invalidate or terminate) entire treaties. Consequently, if under Article 30 the later treaty provision ceases to exist, the earlier provision with which it was in conflict will be reactivated. In contrast, if, under Article 59, the later treaty is ended, the earlier treaty which was terminated by the later one does not revive.

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[72] Article 30(5) of the VCLT reads that: '[p]aragraph 4 is without prejudice to article 41, or to any question of 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'.

Modification of Multilateral Treaties: During the ILC debate on treaty conflict – 'a distinction was constantly made between subsequent agreements between some of the treaty parties to *modify* the application of the treaty in their relations *inter se* and subsequent treaties in which, in addition to parties to the earlier treaty, also other states participated' (ILC Report on Fragmentation 2006: 151-152, para. 295). Here, the former situation (i.e. *inter se* agreement) is dealt under Article 41 of the VCLT.[73]

In fact, the *inter se* agreement in a multilateral treaty give rise to two types of legal relations: (i) the "general" relations that apply between all the parties to the original treaty; and (ii) the "special" relations that apply between states parties to the *inter se* agreement (ibid.: 155, para. 301). An analogous situation may also arise in case of treaty amendment when some of the parties undertake to revise the treaty but not all parties agree to the revision. In such case, the treaty remains in force in its original form for the parties that do not participate in the amendment. The same is true in regard to parties that do not ratify amendments, the original treaty remains in force between them whereas the amended treaty enters into force for the others.

The difference between "amendment" and "*inter se* agreements under Article 41" is that the purpose of the latter is not to revise the original treaty, merely to modify its application in relations between the certain parties.[74]

(i) ***Conditions Applicable to the Conclusion of Inter Se Agreements*:** In fact, Article 41 keeps a balance between the two requirements: (i) by meeting the needs of a limited number of parties wishing to regulate their relations by *inter se* rules; and (ii) by allowing the other parties to continue applying the treaty regime in its initial form. A treaty may either expressly allow or expressly prohibit the conclusion of *inter se* agreements either wholly or in part (Article 41(1)(a) of the VCLT). When a treaty is

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[73] 'A similar provision is also included in Article 41 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations... They deal with the case of agreement between two or more parties to a multilateral treaty to modify the treaty as between themselves only. Such *inter se* agreements may be rationalized both as a case of *lex posterior* as well as *lex specialis*. Whichever rationale is used, however, the provision operates similarly' (ILC Report on Fragmentation 2006: 155, fn. 412).

[74] 'The ILC has rejected the use of the term "revision" because of its political connotation and opted for the term "amendment" to denote alteration of a multilateral treaty by all the parties and "modification" to denote alteration of a multilateral treaty by an *inter se* agreement' (ibid.: 156, fn. 416).

silent, or to the extent that it is so, the question of their permissibility emerges. But Article 41(1)(b) permits the *inter se* modification only when it: '(i) does not affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations; and (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'.

For example, Article 311 (3) of the UNCLOS provides as follows:

> 'Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention'.

Preservation of the Rights and Interest of the Parties to the Original Treaty: As per Article 41(1)(b)(i) of the VCLT, an *inter se* agreement should satisfy that the agreement must not affect the enjoyment of the other parties of their rights or the performance of their obligations under the treaty. Therefore, it is clear that the legal effect of an *inter se* agreement are limited only to its parties and they remain bound by the original treaty and must continue to observe it in their relations with the other parties as if the *inter se* agreement did not exist. For example:

> 'Article XXIV of the [GATT] provides for the formation and maintenance of "customs union" and "free-trade areas" on condition that the conditions of commerce under them "on the whole [must not] be higher or more restrictive than the general incidence" of such duties and regulations before formation of the union. The assumption here is [that the] regional trade agreements (RTAs) do not generally undermine the multilateral free trade system' (ILC Report on Fragmentation 2006: 157-158, para. 305).[75]

Further, nowhere the WTO prohibits the member states to conclude an *inter se* agreement to restrict trade between themselves – in the absence of such rules, the member states of the WTO can very well conclude an *inter se* agreement, but it should not affect Article III and XI of the GATT – because such an agreement would affect the rights and obligations of the other members of the WTO (ibid.: 158, para. 306; Pauwelyn

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[75] At present, there are '312 RTAs had been notified to the WTO of which 170 remained then in force' (ibid.: 158, fn 421)

2003: 303).[76]

Preservation of the Object and Purpose of the Multilateral Treaty: As per Article 41(1)(b)(ii) of the VCLT, an *inter se* agreement should satisfy that the agreement must not affect the effective execution of the object and purpose of the treaty as a whole. Because '[t]he *inter se* agreement could often be seen as development of the treaty, fully in line with its ethos and its object and purpose' (ILC Report on Fragmentation 2006: 160, para. 310). In this regard, during the debate on VCLT, the ILC noted that there are two types of treaties: (i) 'treaties containing (merely) reciprocal obligations'; and (2) 'treaties whose obligations were non-reciprocal (i.e. "a more absolute type")' (ILC Report on Fragmentation 2006: 160, para. 310). In the former case, the obligations could be broken down into bilateral relationships – hence *inter se* agreement between the parties are always possible because they normally only affects the bilateral relationships and even if it affects all other parties, it would not create much problem. For example, the 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations of treaties containing essentially reciprocal obligations (ibid.: 160-161, para. 312).[77] The parties may at will derogate from those obligations in their relations *inter se*. In the latter case, the obligations could not be broken down into bilateral relationships – hence *inter se* agreement is not possible and mostly seems contrary to the object and purpose of the treaty. Such non-reciprocal treaties were often characterized as "absolute", "integral" or "interdependent" nature of obligations. For example, a disarmament treaty, 'where the performance by one party of its obligations is a prerequisite for the performance by the other parties of theirs' – '[a] breach by one

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[76] These Articles respectively prescribe discrimination against imported products in favour of domestic products and the application of quantitative restrictions at frontiers.

[77] Article 47 of the 1961 Vienna Convention on Diplomatic Relations and Articles 72 and 73(2) of the 1963 Vienna Convention on Consular Relations – both allow the conclusion of agreements on their respective subject-matters that provide more favorable treatment or confirm, supplement, expanding or amplify their relevant provisions. For example, 'the agreement concluded between Czechoslovakia and Austria on 14 March 1979 in which the two States wish "to confirm, supplement, and amplify the provisions of that Convention [the Vienna Convention on Consular Relations] in accordance with its article 73, paragraph 2, and thereby also contribute to the further development of friendly relations between the two States in conformity with the provisions of the Final Act of the Conference on Security and Cooperation in Europe"' (ibid.: 153, para. 298).

party is in effect a breach vis-a-vis all the other parties' (ibid.).[78] In the same way, human rights convention is 'an absolute or "integral" treaty' – '[t]he obligations it imposes are independent of any expectation of reciprocity or performance on the part of other parties of their obligations' (ibid.).[79]

In fact, the concept of incompatibility with the object and purpose of a treaty was first set out by the ICJ in the *Reservations* case (1951), where the court stated that 'each State will appraise from itself whether or not a reservation made by a state is compatible with the object and purpose of the treaty and decides what action it should take regarding the reservation' (ibid.: 161, para. 313).[80] Therefore, '[t]he matter of reservation is left to the discretion of the parties – although the use of that discretion is, of course, subjected to the duty of good faith' (ILC Report on Fragmentation 2006: 161, para. 313). Further, the court addressed the legality of reservations to treaties and concluded that reservation 'incompatible with the object and purpose of the treaty' could not be tolerated (such a finding incorporated now in Article 19(c) of the VCLT) (Pauwelyn 2003: 308).

In this regard, it is important to look at the following two provisions: Article 60(2)(c) of the VCLT provides a special rule on invoking breach were 'the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every other party in respect to the further performance of its obligations under

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[78] In this regard, '[a]n example of a treaty expressly encouraging parties to conclude agreements that implement or extend their provisions further is provided by the treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, [A]rticle 7 of which provides that "nothing in this treaty affects the right of any group of State to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories". As a consequence, several regional agreements reinforcing the prohibition of nuclear weapons at the regional level have in fact been concluded' (ibid.: 153-154, para. 299). For example, 'the Treaty on the Southeast Asia Nuclear Weapon – Free Zone of 15 December 1995 (the Bangkok Treaty); the South Pacific Nuclear Free-Zone Treaty of 6 August 1985 (the Treaty of Rarotonga) between the States of the South Pacific (Australia, New Zealand and the Island States of the region); and the African Nuclear-Weapon-Free Zone Treaty of 11 April 1996 (the Treaty of Pelindaba) establishing nuclear-weapon-free zones in, respectively, South-East Asia, the Pacific (where a protocol expressly prohibits nuclear testing) and Africa' (ibid.: 154, fn. 405).

[79] Further, 'a nuclear zone free treaty or any other treaty where each parties' performance is effectively conditioned upon and requires the performance of each of the others' (ibid.: 160, fn. 430).

[80] *Reservations to the Convention on the Prevention and Punishment of Crime of Genocide, Advisory Opinion*, (1951), ICJ Reports, 26. The same concept has also prominent place in the Articles of the VCLT, namely in Article 18 (obligation not to defeat the object and purpose), Article 19 (reservations), Article 31 (interpretation), Article 41 (*inter se* agreements), Article 58 (termination and suspension of an *inter se* agreements) and Article 60 (material breach) (ibid.: 159, para. 309).

the treaty'. Likewise, Article 42(b)(ii) of the Draft Articles on State Responsibility makes reference to 'interdependent obligations' – namely obligations the breach of which 'is of such a character as radically to change the position of all the States to which the obligation is owed'.

(ii) ***Notification to the Other Parties and Their Reaction*:** Article 41(2) of the VCLT provides that when the possibility of *inter se* modification is not provided by the treaty itself – then the parties wishing to conclude an *inter se* agreement (i.e. 'the parties in question') must notify the other parties of their intention. In fact, the wording in paragraph 2 provides that the other parties must be informed of the 'modification to the treaty for which it [the agreement] provides'. It means that the 'notification must be given at a relatively advanced stage in the negotiation of the *inter se* agreement but nevertheless sufficiently prior to its so as to enable a meaningful reaction' (ILC Report on Fragmentation 2006: 163-164, para. 318). For example:

> '[T]he European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20 May 1980 provides, in Article 20(2) that when two or more contracting states have by some means, including an agreement between themselves, created a special system of recognition or enforcement, they may apply that system in place of the Convention or of any part of it. Parties to the Convention that wish to take that step must "notify their decision to the Secretary-General of the Council of Europe" and "any alteration or revocation of [their] decision must also be notified"'. (ibid.: 162-163, para. 316).

(iii) ***Consequence for Breach of the Multilateral Treaty by Parties to an inter se Agreement*:** In fact, the text of Article 41 of the VCLT leaves two questions open: (i) 'the legal effect of a conclusion of an *inter se* agreement in violations of Article 41(1) constituting a material breach of the treaty'; and (ii) 'the legal effect of an objection made after notification had been given under [Article 41(2)]' (ILC Report on Fragmentation 2006: 164, para. 319). Further, it seems from Article 41 that the *inter se* agreement concluded in deviation from the original agreement is not thereby invalidated. However, it seems from the above discussion regarding a conflict of treaties with non-identical parties that it should depend on an interpretation of the original treaty as to what consequences should follow.

The consequences of breach of treaty are dealt with in Article 60 of the VCLT,

and through the regime of state responsibility. In fact, 'the collective termination or suspension of the original treaty may take place through the unanimous agreement of those parties to the original treaty that are not parties to the modification in case the latter constitute a material breach – i.e., relates to a provision that is essential to its execution' (ibid.). Further, 'individual decision to suspend the operation of treaty in whole or in part are permitted in two cases': (i) '[a] party that is especially affected by the (illegal) modification may suspend the operation of the treaty in the relations between itself and the parties to the offering *inter se* agreement'; and (ii) 'when a material breach constituted by the modification radically changes the position of every other party with respect to the performance of its obligations under the treaty, any of the affected parties may similarly suspend the operation of the treaty with respect to itself' (ibid.: 164-165, para. 319). However, Article 58 of the VCLT deals with the '[s]uspension of the operation of a multilateral treaty by agreement between certain of the parties only' and has almost similar conditions like that of Article 41.

If any treaty fulfills any one of the conditions mentioned under Articles 41/58 of the VCLT, it will be the *lex prior* (multilateral treaty) which prevail, not the *lex posterior* (*inter se* agreement). In such a situation, the *lex posterior* will then be illegal on the basis of *lex prior,* i.e., it constitutes wrongful conduct under the earlier norm, either directly (explicit prohibition under Articles 41(1)(a) / 58(1)(a)) or indirectly (through operation of Articles 41(1)(b)(i),(ii) / 58(1)(b)(i),(ii)). For example, unlike Article 30 – Article 41 and 58 not only set out a 'priority rule' and go further and actually declare the *inter se* agreement impermissible or illegal. ILC commentary notes that, under Article 41 'the main issue is the conditions under which *inter se* agreements may be regarded as permissible' (quoted in Pauwelyn 2003: 310).

Although Article 41 and 58 go further than the priority rule in Article 30, and they do not go further than the Articles 53 and 64 on *jus cogens.* Therefore, Article 41 and 58 may lead to the illegality of *inter se* agreement; they do not result in its invalidity. In this regard, Karl notes that 'Article 41, which refers to these cases [of *inter se* agreements expressly or impliedly prohibited], governs only the question of their *legality*. The later treaty may therefore be illegal and cannot be invoked against states standing aloof, but it is not invalid' (Karl 1984: 471).

From the above discussion, it is clear that 'the law on conflicts between successive agreements is largely based on presumptions about party intent and the object and purpose of treaties. Conflict-solution here is inextricable from treaty interpretation. Neither the earlier nor the later treaty enjoys automatic preference. It is by now well settled that in case of conflict, the issue is not with validity but relative priority between treaties' (ILC Report on Fragmentation 2006: 165, para. 320). On the other hand, 'concluding an *inter se* agreement is an important and widely accepted instrument through which a limited number of parties to a treaty may seek to guarantee the most appropriate and effective implementation of the original treaty between themselves. Nevertheless, [A]rticle 41 VCLT also limits the faculty to conclude *inter se* agreements, especially this would go too timely against the object and purpose of the original treaty' (ibid.: 165-166, para. 322).

Conflict Clause: The conflict of norms between regimes could easily be resolved by inserting an explicit conflict clause – in such a situation, the *lex posterior* only has least application. The conflict clause has been explicitly permitted under Article 30(2) of the VCLT. It reads that: '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 provision of that other treaty prevail'. The ILC distinguishes, there are various types of conflict clauses: (i) clauses that prohibit the conclusion of incompatible subsequent treaties; (ii) clauses that expressly permit subsequent 'compatible' treaties; (iii) clauses in the subsequent treaty providing that it 'shall not affect' the earlier treaty; (iv) clauses in the subsequent treaty that provide that among the parties, it overrides earlier treaty; (v) clauses in the subsequent treaty that expressly abrogate the earlier treaty; (vi) clauses in the subsequent treaties that expressly maintain earlier compatible treaties; (vii) clauses that promise that future agreement will abrogate earlier treaties (ILC Report on Fragmentation 2006: 135-137, para. 268). For example, Article 103 of the UN Charter, Article 311 of the UNCLOS, Article 22(1) of the Convention on Biological Diversity and so on. This point has been elaborately discussed in the succeeding section.

State Responsibility: When the conflict of norms between two equal regimes occurs, for example, a trade norm and an environmental law, the law of treaties does not provide a solution. In such a case, neither *lex posterior* nor the *lex specialis* will apply

and the adjudicator has to say *lacuna* in the system or *non-liquet*. In that regard, Article 30(5) of the VCLT provides that: '[p]aragraph 4 is without prejudice 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' (emphasis added). Therefore, the state is responsible which has taken conflicting obligations has to decide which one is to oblige and which one has to breach, then breach lead to responsibility. This point has been elaborately discussed in the succeeding section.

(iii) *Lex Specialis Derogat Legi Generali* (*Lex Specialis*)

As per the maxim of *lex specialis*, 'a particular rule prevail over a general rule' (Akehurst 1974-74: 273).[81] That is, 'if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former' (ILC Report on Fragmentation 2006: 34-35, para. 56). Yet the principle of *lex specialis* cannot claim absolute priority and is subject to the *jus cogens* norms and the general international law.

The principle of *lex specialis* is 'a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts' and has a long history not only in domestic but also in international jurisprudence (ibid.: 34, paras. 56; 36, para. 59). An early reference to *lex specialis* as a conflict rule can be found in the writings of Grotius, Vattel and Pufendorf (ibid.: 37, para. 61; Pauwelyn 2003: 387). Grotius expressed that:

> '*What rules ought to be observed in such cases* [i.e. where parts of a document are in conflict]. Among agreements which are equal...that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general'(quoted in ILC Report on Fragmentation 2006: 36, para. 59).[82]

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[81] Here, the 'particular' and 'general' 'are relative, not absolute terms; one rule may be more general than a second rule and less general than a third rule' (Akehurst 1974-75: 273). Further, the principle of *lex specialis*, according to which 'in the whole of law, special takes precedence over genus'; and its close variant, the principle of *ejusdom generis*, according to which 'special words control the meaning of general ones' (ILC Report on Fragmentation 2006: 34-35, fn. 57).

[82] Further, Dionisio Anzilotti said that 'a treaty between two States would prevail over a multilateral treaty just like the [treaty] would have priority over customary law' (ibid.: 37, para. 61). On the other hand, Charles Rousseau stated that 'the power of the *lex specialis* maxim lay in the way in which it seemed to

Infact, this passage refers to two reasons why the *lex specialis* rule is so widely accepted: (i) '[a] special rule is more to the point ("approaches most nearly to the subject in hand") than a general one'; and (ii) 'it regulates the matter more effectively ("are ordinarily more effective") than general rules' (ibid.: 36, para. 60). Further, 'the special norm reflects most clearly, precisely and/or strongly the consent or expression of will of the states in question' than the general law, hence the former often considered as more appropriate, effective and efficient than the latter (Pauwelyn 2003: 387; Krieger 2006: 269).

At present, Article 55 of the Draft Articles on State Responsibility deals with the principle of *lex specialis*. It reads that, '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'. The provision clearly allows the States to develop, apply and to derogate from the general rules of State responsibility by agreement themselves. Further, to apply *lex specialis* maxim, the ILC commentary to Article 55 of the Draft Articles on State Responsibility explained that: 'For the *lex specialis* principle to apply it is not enough that the same subject matter is deal with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other' (quoted in ILC Report on Fragmentation 2006: 50, para. 89).

For example, in the *Gabcikovo Nagymaros* case, the ICJ confirmed the notion of *lex specialis* as follows:

> '[I]t is of cardinal importance that the Court has found that the 1977 treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed above all, by the applicable rules of the 1977 treaty as a *lex specialis*' (quoted in ibid.: 50-51, para. 91).[83]

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realize party will' (ibid.). For Georges Scelle, by contrast, 'a special rule would only rarely be allowed to override...general law. It followed from his sociological anti-voluntarism that general regulation, expressive of an objective sociological interest that would always prevent contracting out by individual States' (ibid.).

[83] *Case Concerning the Gabcikovo Nagymoros Project (Hungary v. Slovakia), Merits*, (1997), ICJ Reports, para. 132.

Here, the rule of *lex specialis* could be made research in four angles: (a) types of *lex specialis*; (b) prohibited *lex specialis*; (c) the relational character of the general and special distinction; (d) the relational character of the *lex specialis* and *lex posterior* distinction, (e) self-contained regimes.

Types of *Lex Specialis*: Indeed, there are two types of *lex specialis* exists: (i) *lex specialis* as an application or elaboration of *lege generali*, and (ii) *lex specialis* as an exception to the general rule. Here, in the first case, '[a] particular rule may be considered as an *application* of a general standard in a given circumstance'; and in the second case, a particular rule may be considered as 'a *modification, overruling* or *setting aside*' of a general rule (ibid.: 49, para. 88). The first case is sometimes seen as not a genuine *lex specialis* because it involves the simultaneous application of the special and the general standard. Only the second case often considered as a genuine *lex specialis* because it overrule a general standard by a conflicting special one (ibid.).

(i) *Lex Specialis as an Application or Elaboration of Lege Generali*: A rule may be a *lex specialis* 'in regard to another rule as an application, updating or development thereof, or which amount to the same, as a supplement, a provider of instructions on what a general rule requires in some particular case' (ibid.: 54, para. 98). A regional instrument may be a *lex specialis* in regard to a universal one and an implementation agreement may be a *lex specialis* in regard to a general 'framework instrument'. For example:

> '[M]any provisions in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer are special law in relation to the 1985 Vienna Convention on the Protection of the Ozone Layer. When states apply the emission reduction schedule in Article 2 of the Montreal Protocol, they give concrete meaning to the general principles in the Vienna Convention. Though it may be said that in such case they apply *both* the Protocol *and* the Convention' (ibid.: 54, para. 99).

In which the Protocol has now set aside the Convention, and at the same time, the Convention continue to express the principles and purposes that also affect the interpretation and application of the Protocol.

In Iran-US Claims Tribunal stated that:

> 'As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of

> the treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provision' (quoted in ibid.: 55, para. 100).[84]

Further, in the *Oil Platforms* case, the ICJ stated that:

> '[T]he general law concerning the use of force was applied to give meaning to a wide standard of "necessity" in the relevant *lex specialis*, the 1955 Treaty of Amity between Iran and the United States. It was not that a particularly important *lex generalis* would have set aside *lex specialis* but that the latter received its meaning from the former' (ibid.: 56, para. 102).

(i) *Lex Specialis as an Exception to the General Rule*: 'Most of general international law is dispositive and can be derogated from by way of exception' (ILC Report on Fragmentation 2006: 56, para. 103). It is often stated that the laws of war are *lex specialis* in relation to rules laying out the peace-time norms relating to the same subjects (Jenks 1953: 446). In the *Nuclear Weapons* case,[85] the ICJ discussed the relationship between the International Covenant on Civil and Political Rights and the laws applicable in armed conflict. Article 6(1) of the Covenant established the right not arbitrarily to be deprived of one's life. The court held that this right also applies in hostilities:

> 'The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities' (quoted in ILC Report on Fragmentation 2006: 56, para. 103).

Here, the Court was careful to point out that human rights law continued to apply within armed conflict. 'The exception – humanitarian law – only affected one (albeit important) aspect of it, namely the relative assessment of arbitrariness' (ibid.: 57, para. 104). Therefore, humanitarian law as *lex specialis* did not suggests that human rights law were abolished in war altogether.

Prohibited *Lex Specialis:* 'Most of general international law may be derogated from by *lex specialis*. But sometimes a deviation is either prohibited expressly or may be derived from the nature of the general law' (ILC Report on Fragmentation 2006: 59, para. 108). Whether derogation by way of *lex specialis* is permitted will remain a matter of interpreting the general law. The *lex specialis* can not arise against *jus cogens* norms.

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[84] *Amoco International Finance Corporation v. Iran,* (1987), Iran-US Claims Tribunal Reports, 15(II): 222.

[85] *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion,* (1996), ICJ Reports, 240, para. 25.

Aside from *jus cogens*, there are other types of general that often do not permit derogation – for example, in regard to conflicts with human rights norms, where the human rights norms always overriding (Meron 1986: 1-23; Koji 2001: 917-941). In the recent *OSPAR* dispute,[86] the Arbitral Tribunal held that 'it is self-evident that its task was to apply, alongside the OSPAR Convention itself, also international custom and general principles of law to the extent they were not overridden [or contracting out] by the Convention as *lex specialis*, adding however that "[e]ven then, it must defer to then relevant *jus cogens* with which the parties' *lex specialis* may be inconsistent"' (quoted in ILC Report on Fragmentation 2006: 59, para. 108).

The Relational Character of the General/Special Distinction: The major difficulty with regard to *lex specialis* rule follows from the absence of clarity about the distinction between "general" and "special". 'For every general rule is particular, too, in the sense that it deals with some particular substance' (ibid.: 66, para. 111). For example, the Convention on Anti-Personnel Landmines (Ottawa Treaty) lays down general law on the use of land mines (ibid.). Yet this also a "special" aspect of the general rules of humanitarian law. On the other hand, 'all special law is general, too, as it is a characteristic of rules that they apply to a class "generally"' (ibid.: 60-61, para 111). For example, 'it is reflected in the distinction made by many domestic laws between laws and acts' (ibid.). Therefore, it is often said that generality and specialty are relational. This relationality functions in two ways: (i) A rule may be general or special 'in regard to its *subject-matter* (fact-description)'; and (ii) A rule may be general or special 'in regard to the *number of actors* whose behavior is regulated by it' (ibid.: 61, para. 112). In addition, 'there may be a rule that is general in subject-matter (such as a good neighborliness treaty) but valid for only in a special relationship between a limited number (two) of States' (ibid.). For example, the use of anti-personal mines is a *special subject* within the *general subject* of humanitarian law (ibid.). The distinction between general and local custom provides an example of the register of number of actors covered (ibid.).

(i) *Specialty in Regard to Subject Matter*: A norm may be more special than

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[86] *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, Final Award*, (2 July 2005), ITLOS Arbitral Tribunal Reports.

another one based on its more specific subject matter. Such norm may then be *lex specialis* because it addresses more directly or precisely. For example, a WTO rule dealing with countermeasures for breach of WTO obligation is *lex specialis* as opposed to general international law dealing with countermeasures generally, for any breach of international law. Further, 'the WTO's SPS Agreement, dealing generally with all sanitary and phyto-sanitary measures, *irrespective of the product or health concern*, could be seen as less specific than, for example, the Cartagena Protocol on Biosafety which addresses certain specific products, such as 'living modified organisms', and deals with a specific health concern, namely risks related to certain genetically modified organisms (Pauwelyn 2003: 389).

(ii) *Specialty in Regard to Parties*: A norm may also be more specific than another norm with reference to its membership. It does not mean that a treaty with fewer parties generally prevails over a treaty with more parties or that an *inter se* agreement always prevails over an earlier multilateral agreement. Rather some treaty norms must be seen as *lex specialis* because they deal with the same subject matter as the opposing *lex generalis* does, but in a way that goes further, either in terms of detail or in terms of the objectives pursued under both treaties (ibid.: 390).

For example, in respect of regional human rights conventions (such as the ECHR) as opposed to universal human rights conventions (such as those concluded in the UN) – here, the regional treaty will deal with the protection of human rights more detail than the universal treaty – to the extent that, 'these regional conventions ought to be seen as *lex specialis* that prevail over more general norms' (ibid.). Another example can be found in the preference given by the ICJ in the *Right to Passage* case 'to special customary international law binding as between some states only over and above general customary international law which is, in principle, binding on all states' (ibid.: 390-391).

Relational Character of the *Lex Specialis* and *Lex Posterior* Distinction: In fact, the principle of *lex posterior* (Article 30 of the VCLT) – suggests that the 'latest expression of state consent' ought to prevail; whereas the principle of *lex specialis* (Article 55 of the Draft Articles on State Responsibility) – suggests that the 'most closest, detailed, precise or strongest expression of states consent' ought to prevail. Therefore,

both the principle attempt to answer one and the same question, namely:

> '[W]hich of the two norms in conflict is the 'current expression of state consent'? Since both *lex posterior* and *lex specialis* derive from the principle of contractual freedom of states, both principles are 'subjective' conflict rules in the sense that it is the intention of the parties that counts, not some formal criterion such as source' (Pauwelyn 2003: 388).

Indeed the major differnce between the *lex posterior* and *lex specialis* is – in the former case, the decisive element is *time* and in the later case, the decisive element is *speciality.* Therefore, it is often very difficult to say among the two principles which one prevail over other. Some Scholars argue that the *lex posterior* is to be more explicit or objective than the *lex specialis*, which is always implicit and subjective determination of what is more special – hence often stated that the time could be generally applied more easily than specialty. Others argue that determining the relevant date of a treaty is often not as straightforward and often subject to controversy – hence time element may not apply to certain conflicts and in such a case the *lex specialis* principle ought to be resorted to assess one and the same question, namely, what is the 'current expression of state consent'? In the event of two treaties in question, as between the states concerned, cannot be seen as 'successive' so that Article 30 does not apply, that is, impossible to put a single or definite time table on either of the two norms – in such a case, the *lex specialis* rule ought to prevail over another norm, alleged to be *lex posterior* (Pauwelyn 2003: 407). Further:

> '[B]ased on the *adage generalia specialibus non derogant* being part of customary law or a general principle of law – is difficult to establish: if support can be found in state practice that a special law prevails over a more general one, it is hard to find instances where states acknowledged that a treaty which is clearly later in time must give way to an earlier on the ground that the earlier treaty is more special' (ibid.: 407-408).

In this regard, Paragraph 8 of the Preamble to the VCLT includes a safeguards clause in which it is affirmed 'that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention'. Infact, these views give the *lex specialis* principle an absolute higher legal standing than the *lex posterior* rule – though only the latter was codified in the VCLT. Whatever the argument may be, but the *lex posterior* rule in Article 30 is and should remain the rule of first resort.

One author says the *lex specialis* rule prevails over the *lex posterior*; or the *lex specialis* comes to apply as a conflict resolving technique only on the following situations:

> '(i) the *lex specialis* is contracting out of general international law (hence Art. 30 on conflict between *treaty norms* does not apply); (ii) the *lex specialis* is, at the same time, the *lex posterior* (hence, in the event of conflict between treaties, the principle *confirms* the result reached under Art. 30); (iii) both treaty norms in question have the same date, e.g. because they are set out in one and the same treaty (hence Art. 30 on *successive* treaties does not apply); or (iv) given, for example, the 'continuing' or 'living' nature of the treaties involved, the two conflicting treaties cannot be said to be 'successive' in time (hence Art. 30 on *successive* treaties does not apply)' (ibid.: 409).

Therefore, the *lex specialis* principle as conflict rule is often considered as both limited and broad – it is limited in the sense that it cannot overrule the *lex posterior* principle in Article 30 – it is broad in the sense that it will be the decisive criterion in many cases (especially where Article 30 does not apply).

Self Contained (Special) Regimes: The commentary to Article 55 of the Draft Articles on State Responsibility makes a distinction between 'weaker forms of *lex specialis*' and 'strong forms of *lex specialis*' (ILC Report on Fragmentation 2006: 65, para. 123).[87] Among the two, 'the strong form of *lex specialis*' recognized as 'self-contained regime' (ibid.: 66, para. 124). The ILC identified the term 'self-contained regime' has been used in three different ways: first, the term refers to primary rules coupled with special set of secondary rules – that is, the secondary rules that determines the consequences of a breach of certain primary rules (including the procedure of such determination) and claims primacy to the general rules concerning consequences of a violation;[88] second, the term also refers to as "regimes" or "systems" or "sub-systems" of

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[87] Article 55 (*lex specialis*) reads that 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'.

[88] 'Such a definition closely follows the use of the term by the ICJ in the *Hostages* case where the court identified diplomatic law as a self-contained regime precisely by reference to the way it had set up its own "internal" system for reacting to breaches: "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations 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 States to counter any such abuse"' (ILC Report on Fragmentation 2006: 66, para. 124). For reference, *Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Merits*, (1980), ICJ Reports, 40: para. 86. In other words, 'no reciprocal breach of diplomatic immunity is permissible; the

rules on a limited problem together with the rules for the creation, interpretation, application, modification, or termination and such rules regulates specific questions differently from general law;[89] third, the term also refers the whole fields of functional specialization as 'branches of international law', that are claiming to be regulated by their own principles – that is, such branches allegedly follows certain special rules and techniques of interpretation, enforcement and administration (which usually differs from the rules of general law (ibid.: 68, paras. 128-129; 81, para. 152).[90] In a 1971 Report to

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receiving State may only resort to remedies in diplomatic law which, the Court presumed, were "entirely efficacious"' (ibid.: 66, para. 125).

'In *Nicaragua* case, the court viewed human rights law somewhat analogously: the relevant human rights treaties had their own regime of accountability that made other ways of reaction inappropriate' (ibid.). Here, the court noted that 'the use of force was not "the appropriate method to ensure respect of human rights", for "when human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided in the conventions themselves"' (ibid.: 66, fn. 150). For reference, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, (1986), ICJ Reports, 14: paras. 267-268).

[89] In fact, the PCIJ in the *S.S. Wimbledon* case uses a broader notion of a "self-contained regime". Here, the issue was the status of the Kiel Canal which was covered both by the general law on internal waterways as well as the special rules on the Canal as laid down in the Treaty of Versailles of 1919. The court reads that: 'Although the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterways of the State holding both banks, the Treaty [of Versailles] has taken care not assimilate it to the other internal navigable waterways of the German Empire. A special section has been created at the end of the Part XII...and in this section rules exclusively designed for the Kiel Canal have been inserted; these rules differ on more than one point from those to which other internal navigable waterways of the Empire are subjected... The difference appears more specifically from the fact that the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways is...limited to the Allied and Associated powers alone... The provision of the Kiel Canal are therefore self-contained. The idea which underlies [them] is not to be sought by drawing an analogy from [provisions of other waterways] but rather by arguing *a contrario*, a method of argument which excludes them' (quoted in ibid.: 66-67, para. 126). For reference, Case of the *S.S. "Wimbledon"*, (1923), PCIJ Series A, No. 1, 23-24. Here, 'the notion of a "self-contained regime" is not limited to a special set of secondary rules. The "special" nature of the Kiel Canal regime appears instead to follow rather from the speciality of the relevant primary rules – especially obligations on Germany – laid down in the appropriate sections of the Treaty of Versailles than of any special rules concerning their breach' (ibid.: 67, para. 127)

[90] The ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case used the widest notion of "self-contained regime" covers a whole area of functional specialization. The law of it identified the laws of armed conflict as *leges speciales* and also 'the environmental law, which often accompanied with special principles such as the principle of "precaution", "polluter pays" and "sustainable development" that seek to direct the administration of environmental matters' (ibid.: 72, para. 136). For reference, *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion*, (1976), ICJ Reports, 226. In *Beef Hormones* case, the EC argued within the WTO that the precautionary principle that had been in the 1992 Rio Declaration should influence the assessment of the justifiability of the EC prohibition of the importation of certain meet and meet products. The Appellate Body stated that while it may have 'crystallized into a general principles of customary environmental law', it was not clear that it had become a part of general customary law (ibid.). For reference, *European Communities – Measures Concerning Meat and Meat Products (Harmones)*, (16

the Commission, the UN Secretary-General identified 17 different "topics" or "branches" of international law, which include international human rights law, WTO law, humanitarian law, environmental law, space law, European law/ EU law and so on.

(i) *Contract Out of General International Law*: A treaty may very well contract out of general international law and it is explicitly permitted in Article 55 of the Draft Articles on State Responsibility (*lex specialis*). It provides that, '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law'. To discover the 'extent' to which a treaty has contract out of general international law, each and every treaty norm must be examined pursuant to normal rules of treaty interpretation and each time the extent of conflict and contracting out must be determined. The contracting out may happen in two ways: (i) explicit contracting out; and (ii) implicit contracting out.

Explicit Contracting Out: 'By explicit contracting out means the treaty provisions which either (i) explicitly state that they derogate from general international law (in such a case, there is not even a conflict of norms); or (ii) in explicit terms cover a specific subject matter differently from a given norm of general international law' (in such a case, if the treaty norm is exercised, the general international law norm would be breached, or vice versa) (Pauwelyn 2003: 216-217).

Implicit Contracting Out: 'A treaty norm may not contract out of general international law by means of its very terms. But it may still do so when these terms are interpreted in context and/or with reference to the object and purpose of the treaty' (ibid.). In such a case Article 31 and 32 of the VCLT finds the intention of the parties to the extent to which they contract out of general international law.

(ii) *Fall-Back to General International Law*: The failure of the special (self-contained) rules to contract out – lead to the fall back to the general international law principles. But no general criteria set up to determine what counts as 'regime failure'. The failure may be substantive or procedural. A substantive failure takes place if the regime completely fails to attain the purpose for which it was created. A procedural

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January 1998), WTO Appellate Body Reports, WTO Doc. WT/DS26/AB/R, 180-181, paras. 123-125.

failure take place when the institutions of the regime fail to function in the way they should (ILC Report on Fragmentation 2006: 98, paras. 188-189).

All norms are created in the background of all already existing norms, in particular norms of general international law. For all issues not explicitly regulated by the new treaty (in provisions either adding, confirming or contracting out of rights or obligations), pre-existing norms of international law continue to apply and a 'fall-back' to, especially, general international law is required. There is no need for an explicit *renovi* in the new treaty for rules of general international law to apply to the new treaty. In addition, new law is not only created in the context of general international law, but in the context of all rules of international law, including other treaties. If the new law does not contradict pre-existing treaties, the latter continue to apply (ibid. 201). The fall back by a treaty on other norms of international law may happen in two ways: (i) interpretation of treaty norm with other norms; and (ii) application of treaty norm with other norms.

Interpretation of treaty norm with other norms: Interpretation of the treaty norm with reference to other norms of international law (pursuant to Article 31(3)(c) of the VCLT. In other words, 'to the extent the terms in the treaty norm are ambiguous enough, general international law definitions as well as certain other rules should be injected in the treaty norm' (Pauwelyn 2003: 201-202).

Application of treaty norm with other norms: Application of the treaty norms in the context of other norms of international law. For example, 'for those areas on which the treaty remains silent, other norms of international law (in particular, general international law) continue to apply. As a result, the treaty cannot be applied in isolation. It must be applied together with those other norms of international law' (ibid.: 202).

Here, the first type of fall-back is based on the process of interpretation of the treaty norm in question. The second type of fall-back (application) on the very fact that the treaty is part of the wider context of international law.

(iv) Hierarchy of Sources

Those who supports the existence of hierarchy of norms in international law, answers the question (does the international law have any hierarchy of sources?) positively. The drafters of the Statute of the PCIJ in 1920 included in their draft a provision that the items listed in the first paragraph of Article 38 should be applied *en ordre successif* (Akehurst 1974-75: 274).[91] As a result, some authorities have argued that Article 38 lays down a hierarchy of sources and others disagree (ibid.). Later on, the drafters of the Statute of the ICJ in 1945 incorporated the same Article 38(1) into their draft by omitting the word *en ordre successif*. The sources of international law have been arranged under Article 38(1) of the ICJ statute in following way: (a) international conventions; (b) international custom; (c) general principles of law; and (d) judicial decisions and highly qualified writings. Among these sources, the first two sources are considered as 'primary sources' of international law and the third source are considered as 'secondary source' of international law and it has been mentioned explicitly that 'subsidiary means for the determination of rules of law'.

Now the issue is: whether the items listed in Article 38(1) of the ICJ Statute implies any special hierarchy of sources of international law. Those who supports the existence of hierarchy, interprets the Article in a threefold way:

> '(1) it establishes a hierarchy and a relative subordination of particular norms originating from different sources; (2) it indicates the degree to which the respective sources have been expressly accepted by States; [and] (3) it expresses different degrees of clarity and speciality of norms originating from the different sources' (Czaplinski and Danilenko 1990: 6-7).

Further, it is sometimes argued that the order in which the various items are listed in Article 38(1) reflects the maxim *lex specilis derogate legi generali* – that is, customary rules are more general than treaties, and general principles of law are more general than custom (ILC Report on Fragmentation 2006: 47, para. 85; Akehurst 1974-75: 274; Czaplinski and Danilenko 1990: 8). This is probably more truth in Le Fur's observations

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[91] '[I]t is not clear whether these words were intended to establish a definite hierarchy of sources, or whether...they merely reflected the logical sequence in which the rules would occur to the judge's mind. The words *en ordre successif* were deleted by the sub-commission of the Third Committee of the First Assembly of the League of Nations, but it is not clear whether the deletion was inspired by a feeling that the idea contained in the words was wrong, or that the idea was so obviously right as not to need stating'(Akehurst 1974-75: 274).

that 'treaties are easier to prove than custom and custom is easier to prove than general principles of law; that is one reason why they are likely to be applied in that order, and perhaps why Article 38 lists them in that order' (Akehurst, ibid.).

Treaties and Custom: Treaty and custom are mutually independent and they can replace each other. Generally, treaties enjoy priority over custom and particular treaties over general treaties (ILC Report on Fragmentation 2006: 47, para. 85). And it is also said that the treaties prevail over custom by virtue of the *lex specialis* maxim – because often the subject-matter of a treaty is more specific than a customary rule, or that the states bound by a treaty are fewer than the states bound by a customary rule (Akehurst 1974-75: 275). For example, the *Iran-US Claims Tribunal* found that:[92]

> 'As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions' (quoted in ILC Report on Fragmentation 2006: 55, para. 100).

And it is equally possible that a customary rule may be more specific than a treaty, or that a special custom binding a small number of states may conflict with a multilateral treaty binding a large number of states; in such cases the *lex specialis* maxim causes the customary rule to prevail over the treaty (ibid.).

Further, it is also said that local customs (if proven) have primacy over general customary law (ILC Report on Fragmentation 2006: 47, para. 85; Pauwelyn 2003: 394-395).[93] For example in the *Right of Passage* case,[94] the ICJ established the right of transit through Indian territory of private person, civil officials and goods, on the basis of 'a constant and uniform practice' which 'was accepted by the parties' (quoted in Pauwelyn 2003: 128). Portugal had invoked general custom as well as general principles of law in support of its claim of a right of passage. But the court simply observed that:

> 'Where therefore the court finds a practice clearly established between two states

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[92] *Amoco International Finance Corporation v. Iran*, (1987), Iran-US CTR, 189, para. 112.

[93] However, it should be noted that the special custom can only prevail over general custom in case the general custom is not part of *jus cogens*.

[94] *Right of Passage over Indian Territory*, (1960), ICJ Reprots, 40, 41.

> which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations, *such a particular practice must prevail over any general rules*' (quoted in ibid.).

Both treaties and custom prevail over general principles of law by virtue of the *lex specialis* maxim (Pauwelyn 2003: 394).[95] However, in the contemporary world it often happens that the same norm binds certain states as custom, the others as a conventional regulation (Czaplinski and Danilenko 1990: 8). For example, in the *Nicaragua* case, the Court held that '[i]n general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim' (quoted in ILC Conclusions on Fragmentation 2006: fn. 3). Further, the court noted that, '[i]t will...be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content' (quoted in ibid.: fn. 4). Therefore, it seems that treaties and custom are of equal authority. The later in time prevails.[96] A treaty can be override pre-existing custom, but subsequent custom can override a treaty. However, '[t]ermination of a treaty as a result of the subsequent growth of a conflicting custom is an example of *desuetude*, a well-recognised method by which treaties can come to an end' (Akehurst 1974-75: 275).[97]

General Principles of Law: The expression 'general principles of law' can refer to 'one of two different things – general principles of international law, and general principles borrowed from municipal law' (ibid.: 278). General principles of international law are not a separate source of international law – in the sense that, they often borrowed by international law from municipal law – and mentioned as a source of international law under Article 38(1)(c) of the ICJ Statute.[98] The court refers the general principles of law only when there is no treaty or customary law exists on a particular point in a dispute, in

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[95] It is subject to *jus cogens* principle.

[96] With the possible exception of cases where it can be proved that the parties intended otherwise – as per Article 30(2) of the VCLT.

[97] Article 54(b) of VCLT adds 'the words 'after consultation with the other contracting State'...was apparently not intended to prevent the operation of desuetude' (Akehurst 1974-75: 275, fn. 7).

[98] The examples of general principles of international law are: the principle of diplomatic immunity, freedom of the seas, state sovereignty, sovereign equality of states, non-intervention, and so on.

such a case the general principles fills the gap. Therefore, it is often stated that treaties and customs override general principles of law in the even of conflict.

However, it is permissible to use general principles of (municipal) law to interpret treaties and custom. Moreover, 'general principles of law are sometimes are more specific than very broad principles laid down by treaties or customary law, and in such cases the maxim *lex specialis derogate generali* can sometimes lead to general principles of law being applied in preference to very broad principles laid down by treaties or customary law' (ibid.: 279).

Judicial Decisions and Highly Qualified Writings: Judicial decision and highly qualified writings are described in Article 38 of the ICJ Statute as 'subsidiary means for the determination of rules of law'. This suggests that they have a lower hierarchical value than treaties, customs and general principles of law. Some scholars have not agreed them as sources, and they regard these sources only as indirect and secondary evidence of rules created by the true sources (i.e. treaties, customs and general principles of law) (ibid.: 280). As noted in the preceding Chapter, international law is not composed only of rules; it is a continuing process in which the international adjudication plays an important role.

Apart from this, often the list of sources mentioned under Article 38(1) of the ICJ Statute has been criticized that it does not reflect the present day reality. Because after the adoption of the Statute, there were many other new sources has been evolved, for example, 'unilateral acts of different subjects of international law', and 'binding decisions of international organizations'. Hence, the criticizers viewed that the Article needs to be amended.

(v) Systemic Integration through Article 31(3)(c) of VCLT

Another way developed in international law to solve the problem of conflict of norms and to cope with the challenge of fragmentation is that of systemic integration of regimes *inter se* by way of interpretation. Article 31-33 of the VCLT reflects the customary rules of treaty interpretation. In which Article 31 dealing with '[g]eneral rule of interpretation' and Article 32 dealing with '[s]upplementary means of interpretation'

seems more essential for the harmonization of regimes.[99] Here, the Articles 31 and 32 adopt 'both an "ordinary meaning" and a "purposive approach"; they look for party consent as well what is in accordance with good faith' (ILC Report on Fragmentation 2006: 215, para. 427). Therefore, 'it is in fact hard to think of any approach to interpretation that would be excluded from Articles 31 and 32' (ibid.). In particular Article 31(3)(c) of the VCLT often referred to as the principle of "systemic integration" which stipulates that, in interpreting a treaty, there shall be taken into account 'any relevant rules of international law applicable in the relations between the parties'. McNair (1961) says that treaties must be 'applied and interpreted against the background of the general principles of international law' (quoted in ibid.: 208, para. 414). In fact, the systemic nature of international law has received clearest formal expression in Article 31(3)(c). Hanqin during the debates in the ILC suggested the significance of Article 31(3)(c) that, 'the provision operates like a "master key" to the house of international law' (ibid.: 211, para. 420).

In case there is a systemic problem – an inconsistency, a conflict, an overlap between two or more norms and no other interpretative means provides a resolution, then recourse may always be had to Article 31(3)(c) in order to proceed in a reasoned way. In any case no formal reference to Article 31(3)(c) is needed.

However, the wording of Article 31(3)(c) raises four major issues: (1) It refers to "rules of international law" - which emphasizes that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules; (2) Its wording is not restricted to "general international law" but extends to "any relevant rules of international law" - as a result, it covers all the sources of international law, including custom, general principles, and, where applicable, other treaties; (3) It mentions that those rules must be "relevant" and "applicable in the relations between the parties" – here, it does not specify, one to determine relevance and applicability – whether the term 'parties' refers to all parties to the treaty establishing the 'relevant rules', or whether it is sufficient that the parties to a particular dispute one bound by the rule in question; or whether in case of multilateral

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[99] Article 33 of the VCLT deals with "[i]nterpretation of treaties authenticated in two or more languages".

treaties, this requires that all parties to the treaty to be interpreted are parties also to those other treaties "to be taken into account"; and (4) It does not contain any temporal provision – that is, it does not state whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded or at the date on which the dispute arise (ILC Report on Fragmentation 2006: 214-215, para. 426; 212, para. 422; Simma 2009: 276-277).

Simma (2009) says that, interpreting 'parties' to mean only those involved in a particular dispute before a court or tribunal would risk divergent interpretations of one and the same rule even for multilateral treaties of the law-making type.

> 'Hence, it has been suggested that it would be sufficient for the purposes of Article 31(3)(c) that the parties in dispute are both parties to the other treaty (i.e. the treaty informing the interpretation of the instrument in question), if this instrument is of a 'reciprocal', 'synallagmatic', or 'bipolar' type, whereas the rule adopted by the panel in *Biotech* should apply if the treaty to be interpreted is of the 'integral' or 'interdependent' type' (Simma 2009: 277).

Although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment – that is to say "other" international law. Infact, most of the international courts and tribunals (including the ICJ, WTO, ECJ, human rights tribunals and arbitral tribunals) often refers 'any relevant rules of international law in the relations between the parties' – as per Article 31(3)(c) of the VCLT.

For example, the ICJ in the *Oil Platforms* case[100] – 'was called upon to interpret two provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States. It was requested to determine whether actions by Iran which were alleged to imperial neutral commercial shipping in the Iran/Iraq war, and the subsequent destruction by the United States Navy of three Iranian oil platforms in the Persian Gulf were breaches of the Treaty' (especially Article XX(1)(d)) (ILC Report on Fragmentation 2006: 228, para. 451).[101] The court held that:

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[100] *Oil Platforms case (Iran v. United States of America), Merits*, (2003), ICJ Reports, para. 32 and 40.

[101] Article XX(1)(d) of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran provides that: 'The present Treaty shall not preclude the application of measures: ...(d) necessary to fulfill the obligations of a High Contracting Parties for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'.

> 'Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, Paragraph 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by...the 1955 Treaty' (quoted in ibid.: 229, para. 453).

In the recent case of *Djibouti v. France*,[102] the ICJ again applied 'Article 31(3)(c) of the VCLT, this time to two bilateral treaties, and interpreted a Convention on Mutual Assistance in Criminal Matters of 1986, the alleged violation of Friendship and Cooperation concluded between the two parties in 1977' (Simma 2009: 277).

On the other hand, WTO in its very first decision *Gasoline* case[103] – categorically states that the WTO agreement should not be read 'in clinical isolation from public international law' (quoted in ILC Report on Fragmentation 2006: 87, para. 165). Since then, the Appellate Body has frequently sought 'additional interpretative guidance, as appropriate, from the general principles of international law'. The WTO Panel and Appellate Body invoked Article 31(3)(c) of the VCLT in the *Shrimp-Turtle* case – it found that the terms 'natural resources' and 'exhaustible' under Article XX(g) of GATT were by 'definite evolutionary' with the help of UNCLOS, Agenda 21 of the Rio Declaration, CITES. Apart from this, it was invoked in *US–FSC* case. *EC–Poultry* case, *Korea–Beef* case, *EC–Biotec* case, *EC–Hormones* case and so on.

Further, the human rights bodies such as ECHR and IACHR – refers regularly the general international law not only treaty interpretation but matter such as statehood, jurisdiction and immunity as well as a wide variety of principles of procedural propriety. For example, in *Loizidou* case, the ECHR had decided 'whether to recognize as valid certain acts of the Turkish Republic of Northern Cyprus ("TRNC"). It invoked Article 31(3)(c) as a basis for reference to United Nations Security Council resolutions and

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[102] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Merits*, (4 June 2008), ICJ Reports, para. 112.

[103] *United States – Standard for Reformulated and Conventional Gasoline,* (20 May 1996), WTO Appellate Body Reports, WTO Doc. WT/DS2/AB/R.

evidence of state practice supporting the proposition that the TRNC was not regarded as a state under international law. The Republic of Cyprus remained the sole legitimate Government in Cyprus and acts of the TRNC were not be treated as valid' (ILC Report on Fragmentation 2006: 219-220, para. 436). Further, in *Al Adsani* case in 2001, 'the ECHR utilized Article 31(3)(c) in order to decide whether the rules of State immunity might conflict with the right of access to court under Article 6(1) of the European Convention'. The court decided that '[t]he right of access to the courts was not absolute. It could be subject to restrictions, provided that they were proportionate and pursued a legitimate aim' (ibid.: 220, para. 437). In the *Bankovic* case of 1999, the ECHR made it clear that:

> '[T]he Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part' (quoted in ibid.: 86-87, para. 163).[104]

Iran-US Claims Tribunal (in the *Amoco* case) expressly confirmed that: '...the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions' (quoted in ibid.: 218, para. 434). 'The issue which prompted a specific reference to Article 31(3)(c) was the determinations of the nationality requirements imposed by the *Algiers Accords* in order to determine who might bring a claim before the tribunal' (ibid.). In the same way, the *MOX Plant/OSPAR Arbitration* also made specific reference to Article 31(3)(c) of the VCLT (ibid.: 221-223, paras. 439-442).

The international courts and tribunals makes a specific reference to general international law principles, such as freedom of maritime communication, good faith, estoppel, *ex injuria non jus oritur*, criteria of statehood, the law of state responsibility (under human rights conventions), the law of economic countermeasures (in the WTO),

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[104] *Bankovic v. Belgium and others, Admissibility*, (20 December 2001), ECHR, 2001-XII: 351, para. 57 (reference omitted).

the law of state immunity, the use of force and so on (ILC Report on Fragmentation 2006: 236, para. 469). Pauwelyn lists among procedural principles regularly used by the Appellate Body of the WTO those of burden of proof, standing, due process, good faith, representation before panels, the retroactive forces of treaties, or error in treaty formation (Pauwelyn 2003: 225-226).

b. Conflict Avoidance Techniques

The conflict of norms between the regimes could be avoided possibly in three ways: (i) by adopting conflict clause, (ii) by harmonizing the regimes through treaty interpretation, and (iii) by accepting responsibility for the breach.

(i) Conflict Clause

Infact, the conflict clauses express explicitly the intention of the parties, by stating that which treaty or provision of a treaty prevail over the other. In this regard, Article 30(2) of the VCLT explicitly acknowledges the conflict clause. It reads that '[w]hen a treaty specifies that it is subject to, or that is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. This provision gives a presumption that the norm conflict between the regimes can be avoided by way of adopting conflict clause in a treaty. The conflict clause can be adopted at two stages: (a) at the negotiating stage and (b) at the enforcement stage.

Negotiating Stage: When states negotiate treaty norms they may not only express their intention as to what the content of the treaty norms should be, but also create rules as to what would happen in case of conflict with other norms (Pauwelyn 2003: 237). For example, conflict may be prevented by one norm explicitly stating that it derogates from, or is an exception to, another norm. One norm can also make an explicit reference to, or incorporate the conditions of, another norm. In those cases, the two norms simply accumulate and conflict of norms between the regimes could be prevented at the negotiation stage itself. 'There are three types of explicit, treaty-based conflict clause: (i) those relating to *pre-existing* treaties; (ii) those relating to *future* treaties; and (iii) those

regulating conflict of norms within the *same* treaty' (ibid.: 328).

(i) ***Conflict Clause in Respect of Pre-Existing Treaties*****:** The states have the contractual freedom to include 'a treaty clause stating that, in the event of conflict, the new treaty prevails over an earlier treaty *as between the parties to the new treaty*' – it is expressed in Article 59 and Article 30(3) of the VCLT (Pauwelyn 2003: 331-332). Here, the conflict clause cannot impose the new treaty on third states without their consent. For example, Article 311(1) of UNCLOS provides that, '[t]his Convention shall prevail, as between States parties, over the Geneva Convention on the Law of the Sea of 29 April 1958'.

'A new treaty may also state that, in the event of conflict with a pre-existing treaty, the earlier treaty prevails' (ibid.: 332). Here, the '[p]re-existing treaties may be treaties either (i) between *one* or *some* of the state parties to the new treaty, or (ii) between *all* of the state parties to the new treaty and third states' (ibid.: 332). For example, Article 22(1) of the UN Convention on Biological Diversity provides that '[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights or obligations would cause serious damage or threat to biological diversity'. '[I]n so far as the clause gives priority to earlier treaties as between the parties to the new one, the clause deviates from the *lex posterior* principle set out in Articles 59 and 30(3) of the VCLT' (ibid.: 333) . In this regard, Article 30(2) of the VCLT explicitly permits conflict clauses in favour of pre-existing treaties, notwithstanding the *lex posterior* principle: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier...treaty, the provisions of that other treaty prevail'.

(ii) ***Conflict Clauses Relating to Future Treaties*****:** '[A] conflict clause proclaiming its priority over future treaties cannot limit the contractual freedom of states. States can always change their mind in the future, by mutual consent (subject only to *jus cogens* and Arts. 41/58 of the VCLT)' (Pauwelyn 2003: 335). Karl rightly remarked that, '[c]lause which claim priority over future treaty engagement are futile: [t]hey cannot be invoked against third States; they do not render later conflicting treaties void; and they

can always be overcome by the common will of the parties' (Karl 1984: 471).

> 'Take the example of an ABCD Treaty X stating that it prevail over all future treaties as between A, B, C and D... A later treaty Y is subsequently concluded as between A, B, C, and D and conflicts with the earlier treaty X. Treaty Y will then, notwithstanding the conflict clause in treaty X, prevail *unless treaty Y explicitly states that it is subject to treaty* X (only in that case does Art. 30(2) apply and deactivate the *lex posterior* principle). Treaty Y will so prevail even if it does not explicitly reverse the conflict clause in treaty X. The mere incompatibility with the earlier treaty X activates Art. 30(3) and calls for preference for the later treaty Y. Even if states A and B, subsequent to treaty X between A, B, C and D conclude an *inter se* agreement deviating from treaty X, this *inter se* agreement shall, as between A and B, prevail, once again, notwithstanding the conflict clause in treaty X [if such an agreement met the conditions provided in Arts. 41/58]' (Pauwelyn 2003: 336).

In this regard, Article 103 of the UN Charter is an exception because it reads that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. Here, the term 'any other international agreement' in Article 103 covers both past and future agreements.[105] Hence, a conflict between a UN Charter obligation and a future agreement must be decided in favour of the UN Charter obligations. Further, 'Article 30(1) of the VCLT makes an explicit exception to the *lex posterior* principle for Art. 103 of the UN Charter – thereby making Art. 103 a special case among the conflict rule claiming priority in the future' (ibid.: 337). Article 30(1) of the VCLT reads that '[s]ubject 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'.

A treaty may expressly permit subsequent compatible treaties as between its parties. When the state parties to the treaty subsequently enters an *inter se* agreement, then the latest one will prevail as per Article 30(3) of the VCLT. In this regard, Article 41 and Article 30(4)(b) of the VCLT permits the *inter se* agreements to change the legal relationship between the parties, as long as certain conditions are met. For example, Article 311(3) of the UNCLOS reads that:

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[105] In the same way Article 104 of the NAFTA, and Article 307 of the EC Treaty gives an explicit preference in case of conflict to the past and future treaties.

> 'Two or more State Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other State Parties of their rights or the performance of their obligations under this Convention'.

(iii) ***Conflict Clause Resolving Conflict within a Treaty*****:** Sometime a conflict clause may also be included to address 'conflicts as between norms within the treaty in which it set out' (Pauwelyn 2003: 355). For example, WTO Final Act, though various agreements have been negotiated and adopted in different rounds of trade negotiations – but finally all the agreements clubbed together as WTO Final Act and adopted as a 'package deal' or as 'single undertaking' and entered into force on 1 January 1995. As a result, there are number of provisions in the WTO covered agreements in conflict with one another. Therefore, '[t]he WTO treaty includes a series of conflict clauses [to] address internal WTO conflicts, that is, conflicts between two norms both of which are part of WTO covered agreements' (ibid.: 356). Some of the most important conflict clauses in the WTO covered agreements are as follows:

Article XVI:3 of the Marrakesh Agreement provides that: '[i]n the event of a conflict between a provision of the Marrakesh Agreement and a provision of any of the Multilateral Trade Agreements [i.e., GATT, GATS, TRIPS or DSU], the provisions of this Agreement [i.e., Marrakesh Agreement] shall prevail to the extent of the conflict'.

Further, The General Interpretative Note to Annex 1A of the Marrakesh Agreement provides that: '[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A [to the Marrakesh Agreement], the provision of the other [i.e. Annex 1A] agreement shall prevail to the extent of the conflict' (emphasis added). For example, in the event of conflict between a GATT provision and a provision of TBT or Subsidies or Safeguards Agreement, than the provisions of later prevail over the provision of former to the extent of the conflict. '[The WTO Panel] and the Appellate Body have so far identified four relationships between provisions of the GATT 1994 and provisions of Annex 1A Agreement, which can be

characterized as *conflict, express derogation, overlap, and complementarity*' (Montaguiti and Lugard 2000: 473-484 at 475). Apart from this, there are several cross-references have been made in individual agreements. For example, Articles 10 and 32.1 of the SCM Agreement, Articles 1 and 11(a) of the Agreement on Safeguards or Article 21.1 of the Agreement on Agriculture. 'Other Annex 1A Agreements may not have such specific textual guidance. In that case, the Appellate Body noted that the relationship between provisions of the Annex 1A Agreement and the GATT 1994 provisions should be determined 'on the basis of the texts of the relevant provisions as a whole'' (ibid.: 475).[106]

However, Article 1.2 of the DSU provides that: '[t]he rules and procedures of this understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2 [to the DSU], the special or additional rules and procedures in Appendix 2 shall prevail' (emphasis added).

Further, Article 1.2 also provides for a special procedure in case of 'disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review'; 'where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the [DSB]..., in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member'. In making such decision, 'the Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict'.

'The WTO treaty does not provide conflict clauses to resolve conflicts between provisions in GATT, GATS or TRIPS' (Pauwelyn 2003: 361).

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[106] *United States – Tax Treatment for 'Foreign Sales Corporations'*, (20 March 2000), WTO Appellate Body Reports, WTO Doc. WT/DS108/AB/R, para. 117.

Conflict clauses in the WTO treaty on the relationship between WTO law and other norms of international law: In fact, '[t]he WTO treaty does not explicitly provide that it is to prevail over pre-existing law, nor does it state that it is without derogation from pre-existing law' (ibid.: 344). Further, '[it] does not include a general conflict clause in respect of future treaties either' (ibid.). Bartels argues that DSU Articles 3.2 and 19.2 – which reads that 'the [P]anel and Appellate Body' and '[r]ecomendation and rulings of the DSB cannot add to or diminish the rights and obligations provided in the [WTO] covered agreements' - constitute a general conflict clause in favour of WTO rules in all situations of conflict between WTO norms and other norms (Bartels 2001: 499). By refuting this argument, Pauwelyn says that:

> '[The] WTO members could always clarify or change the relationship between WTO rules and other rules of international law. [It] could be done [either] by providing authoritative interpretations of WTO rules, [or] by granting certain waivers or by amending WTO rules (under Article IX:2, IX:3, or X of the Marrakesh Agreement, respectively)' (ibid.: 344).

Further, he views that:

> '[The] WTO organs, such as the Ministerial Council or General Council, on the advice of the Committee on Trade and Development, could also adopt certain guidelines. Several WTO rule explicitly allow for WTO organs to define more clearly the relationship between the WTO and other international organizations' (ibid.).

For example, Article V:1 of the Marrakesh Agreement on 'Relationship with Other Organizations' provides: '[t]he General Council shall make appropriate arrangements for effective co-operation with other intergovernmental organizations that have responsibilities related to those of the WTO'. GATS Article XXVI on 'Relationship with Other International Organizations' provides in turn: '[t]he General Council shall make appropriate arrangements for consultations and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services'.

As far as, the relationship between the WTO treaty and MEAs is concerned, the Declaration on Trade and Environment does not set out an explicit conflict clause, but it establishes the WTO Committee on Trade and Environment (CTE), which examines the relationship between the WTO treaty and MEAs (ibid.: 350-351).

Further, GATT Article XXI(c) and GATS Article XIVbis(c) makes an explicit link between WTO law and UN law. GATT Article XXI(c) set out an explicit conflict clause giving preference to certain obligations of WTO members under the UN Charter, over and above the WTO treaty. It provides that: '[n]othing in this Agreement shall be construed...to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'. GATS Article XIVbis(c) sets out exactly the same conflict clause in respect of GATS. 'They make clear that whenever UN members are under an obligation to impose economic sanctions on another state (pursuant to a UN Security Council resolution), their WTO trade obligations vis-a-vis that state should not prevent them from doing so' (ibid.: 351).

Article 11.3 of the SPS Agreement provides that '[n]othing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement'.

Apart from this, the DSU Articles 3.2 and 19.2 provide a more general conflict clause, which specifically addresses the relationship between WTO law and other norms of international law. Particularly, the sentence follows directly the instruction for Panels and Appellate Body to clarify WTO covered agreements 'in accordance with customary rules of interpretation of public international law' - in this regard the judicial bodies 'may not create new rights and obligations, they must apply those that WTO members agree to' (ibid.: 353).

He concludes that, 'even if DSU Arts. 3.2 and 19.2 are treated as conflict clause claiming priority for the WTO treaty over all other norms of international law ..., when it comes to *future* treaties in conflict with the WTO treaty, this conflict clause would have little effect' (ibid.: 354). The reason is, the contractual freedom of WTO members allows them to deviate from the WTO treaty, including the alleged conflict clause.

> 'All WTO members could conclude a new treaty and, even without explicitly amending DSU Arts. 3.2 and 19.2, such new treaty would then, as the later in time, prevail over the old WTO treaty, notwithstanding the conflict clause. This would occur pursuant to Art. 30(3) of the VCLT, unless the later treaty is explicitly made subject to the earlier WTO treaty (so that Art. 30(2) VCLT

> applies)... [In fact,] Article 30 of the VCLT gives effect to only one conflict clause claiming priority over future treaties and this is Art. 103 of the UN Charter' and no other treaty gets priority over future treaties (WTO is not an exception) (ibid.).

However, 'a limited number of WTO members could than conclude an *inter se* agreement meets the conditions of Arts. 41/58 of the VCLT' (ibid.).

Enforcement Stage: Conflict can also be avoided at the enforcement/reliance stage of a norm. In fact, many of the conflicts arise only when a state decided to rely on a particular right or an obligation arises out of a norm (Pauwelyn 2003: 239-240). At that sage, states may either renegotiate or secure an amendment to an existing treaty or may renegotiate a new treaty to resolve the conflict of norms between the regimes. In addition, such conflict may also be avoided by means of domestic consultations or domestic expressions of preference against or in favour of relying on a particular right, or enforcing a particular obligation. This type of approach what one author calls the "normative feedback loop" – pursuant to which states decide, consistent with domestic constituency preferences, whether or not to promote a particular regime or rule (Kelly 2001: 673-734). It was described as follows:

> 'Nations, in response to regimes, balance the value of rule compliance against other interests they may have by means of the normative feedback loop. The normative feedback loop may take the form of a nation's decision to: (i) comply with a regime rule which would require it to act (or not to act); (ii) encourage another nation to comply (or not) with a regime rule; (iii) enact (or refuse to enact) domestic legislation to promote regime values' (ibid.: 690).

Indeed, this "normative feedback loop" determines whether a conflict of norm could actually be resolved; it may also provide the mechanisms by which a conflict is avoided – because many factors play a vital role in the eventual outcome of the negotiations reached through this loop.

(ii) Treaty Interpretation

Another way to avoid the conflict of norms between the regimes is treaty interpretation. In the 'absence of explicit conflict clauses' in a treaty, the 'implicit expression of intent on what to do in case of conflict may be found' through treaty interpretation (Pauwelyn 2003: 330). In this regard, Articles 31-33 of the VCLT codifies

the "customary rules of treaty interpretation". In which Article 31 dealing with "[g]eneral rules of interpretation" and Article 32 dealing with "[s]upplementary means of interpretation" seems more essential for the harmonization of regimes.[107] Here, the elements such as the preamble to the treaties in question (part of the context in which interpretation must take place) dealt by the former and, in case of ambiguity, their *travaux preparatoires* dealt by the latter. Most importantly, Article 31(3)(c) of the VCLT often referred to as the principle of "systemic integration" – which stipulates that, in interpreting a treaty, there shall be taken into account 'any relevant rules of international law applicable in the the relations between the parties'. Most of the international court and tribunals (including ICJ, WTO, human rights tribunal, ECJ, Arbitral tribunals) refers often this provision to avoid the conflict of norms across the regimes (which is already explained above).

(iii) State Responsibility

One more way to solve the conflict of norms between the regimes is by obliging one norm and accepting the responsibility for the breach of another norm. In this regard Article 30(5) of the VCLT provides that: '[p]aragraph 4 is without prejudice 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' (emphasis added). For example, when a AC (environmental) norm constitute a breach of the earlier AB (trade) norm. To use the words of Article 30(5), this relates to the 'question of responsibility which may arise for a State [A] from the *conclusion*...of a treaty [in casu, the AC norm], the provisions of which are incompatible with its obligations towards another State [B] under another treaty [*in casu*, the AB norm]' (Pauwelyn 2003: 428).

In the above example, 'if A complies with AB norm, it will engage its responsibility towards state C. If A complies with AC norm, it will engage its responsibility [towards] B' (ibid.). '[I]n the even of conflict between mutually exclusive obligations, not an option that would avoid breach, for state A to sit and not to execute

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[107] Article 33 of the VCLT deals with "[i]nterpretation of treaties authenticated in two or more languages".

either of the two norms would mean that it breaches at least one of them, perhaps even both' (ibid.). As a result, in the former case state A would engage its responsibility towards either B or C and in the latter case towards both state B and state C (ibid.). Therefore, under the law of treaties state A is free to comply with either norm, while doing so it will necessarily activate state A's responsibility under other norm. In such a case, the breach may lead to adjudication.

Arechaga during ILC debate on law of treaties stated that:

> 'According to the principle of nullity, a treaty which conflicted with a prior treaty was void. According to the principle of State responsibility, it was valid, but the State which had assumed conflicting obligations was free to choose which had assumed conflicting obligations was free to chose which of the treaties it would fulfill; so far as the unfulfilled treaty was concerned, it was required to pay an indemnity. The State which had assumed conflicting obligations thus 'bought' its choice' (quoted in Pauwelyn 2003: 429).

However, 'in case of breach either norm by state A, and in the event such breach constitutes a 'material breach', the state subject to the breach may then be allowed to invoke the termination or suspension of the treaty breached by state A pursuant to Article 60 of the [VCLT]. Article 30(5) explicitly reserves the operation of Art. 60' (ibid.).

2.2. There is no Hierarchy of Norms

On the other hand, the scholars reject every formal hierarchy of international law, and they find it only a characteristic of municipal legal systems (Czaplinski and Danilenko 1990: 7; Pauwelyn 2003: 95-96).[108] Because international law lacks a central legislator and the international rules mostly created by its subjects (predominently by states); and further international law is based on the principle of 'law of coordination' not a 'law of subordination' (ibid.). As a result all international norms have equal force, irrespective of their source.[109] Hence, conflict of norms must be decided according to

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[108] Because, 'the norms in the municipal legal order gets hierarchy based on the hierarchy of state organs unlike the international legal order' (Czapliniski and Danilenko 1990: 7). Further, domestic law, 'the hierarchy of norms is determined by *whom* and *how* the norm was enacted: for example, was it enacted by constitutional procedure, the federal legislative or the local commune? The situation is different under international law, where a centralised legislature is lacking and formal sources of law are not as clearly defined as in domestic law' (Pauwelyn 2003: 96).

[109] For example, where or in what context or which international organisation a norm has been created (be

conflict rules other than those inspired by the concept of *lex superior* (Czaplinski and Danilenko 1990: 7-8).

The Principle of *Lex Superior*: The principle of *lex specialis* (i.e., peremptory (*jus cogens*) norms, obligations *erga omnes* and Article 103 UN Charter Obligations) has been criticized and rejected their superior status in the following ways:

(i) Peremptory (*Jus Cogens*) Norms: In fact, both in the comments of governments on the ILC draft and during the discussion at the Conference numerous reservations to the concept of *jus cogens* (or peremptory norms) were expressed – for example Article 53 was adopted by 87 votes to 8, with 12 abstentions (against were, *inter alia*, France, Belgium, Australia and Turkey; among the abstentions were Japan and the United Kingdom) (ibid.: 9). These facts clearly testify that the concept of peremptory norm was not accepted as an established concept at the time of conference. Subsequent state practice has not clarified the problem either.

Further, Article 53 of the UN Charter reads that peremptory norm is 'a norm accepted and recognized by the international community of States as a whole'. Infact, this provision brings the moral or ethical values into the positive law.[110] In this regard Weil views that:

> 'One could even see in it an unexpected return to the historic sources of international law: to "irreducible natural law", no doubt, but also to the fundamental unity of the human race expressed in the 16th century by Vitoria's famous "*Totus orbis, qui aliquo modo est una res publica*", of which the "international community of States as a whole" is, after all, simply a modernized version' (Weil 1983: 422-423).

Here the word 'international community' means 'states' – the question is does

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it the WTO or WIPO or under MEA). '[A] treaty originally concluded by a head of state does not carry more weight than one concluded by an ambassador. Similarly, a norm (say, an act of an international organisation) validly adopted by majority voting must not necessarily give way to one adopted by unanimity. Nor must oral or implied consent necessarily give way to written or explicit consent (say, consent implied from subsequent practice, as opposed to a written treaty provision)' (pauwelyn 2003: 95-96).

[110] The ILC's work on the theories of *jus cogens* and international crimes mentions 'the terms "legal conscience of states", "awakening of conscience", "universal conscience", "common good of mankind"', which actually reflects moral and ethical values (Weil 1983: 422, fn. 29). 'In fact, even before the Second World War, concern to deny states the right to infringe – even by common accord – certain moral rules regarded as superior had led some writers to canvass the concept of peremptory norms or rules of *jus cogens*' (ibid.: 422, fn. 30).

'the international community of states as a whole' indicate all states, or merely some, and if so, which states? The answer given by the Commission is well known:

> '[A] reference to recognition by "the international community as a whole...certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto" what is required is recognition "not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community"' (quoted in ibid.: 426-427).

'It seems to be assumed that super norms, once recognized and accepted as such by the "essential components of the international community", will *ipso jure* be opposable to all states, including even those who were against that recognition' (ibid.: 430)[111] or those who not even ready to recognize and to accept it as an ordinary norm (ibid.: 427).[112] Further, it poses 'a danger of the implantation in international society of a legislative power enabling certain states – the most powerful or numerous – to promulgate norms that will be imposed on the others' (ibid.: 441).[113] Here:

> '[T]he fundamental distinction between *lex lata* [i.e. what the law *is*] and *lex ferenda* [i.e. what the law *ought to be*] will be blurred, since the "law desired" by certain states will immediately become the "law established" for all, including others' (ibid.).

As a result,

> 'The sovereign equality of states is in danger of becoming an empty catch phrase: for now some states are more equal than others. Those privileged to partake of that legislative power are in a position to make sure that their own hierarchy of values prevails and to arrogate the right of requiring others to observe it' (ibid.).

Consequently, the concepts of 'legal conscience' and 'international community' are lending themselves 'to all kinds of manipulation' (ibid.). Therefore, Weil believes

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[111] 'At the Vienna Conference on the Law of Treaties, the French delegation had prepared an amendment to the effect that a peremptory norm "shall not be opposable to a State able to prove that it has not expressly accepted it as such", but as it seemed doomed in advance to failure, it was not even tabled' (Quoted in Weil 1983: 430).

[112] 'As, for example, the provisions of General Assembly Resolution 1514 (XV) on decolonization, which the "international community" appears to regard as peremptory rules, whereas, France refuses even to see them as ordinary rules of law' (ibid.: 430, fn. 68).

[113] Weil fears that 'since a state's membership in this club of "essential components" is not made conspicuous by any particular distinguishing marks – be they geographical, ideological, economic or whatever – what must happen in the end is that a number of states (not necessarily in the majority) will usurp an exclusive right of membership and bar entry to the others, who will find themselves not only blackballed but forced to accept the super-normativity of rules they were perhaps not even prepared to recognize as ordinary norms' (ibid.: 427).

that any trend toward recognition of the distinction between "peremptory" norms and "ordinary" norms contributes to a 'dilution' of normativity itself and fosters the development of pathology in or the erosion of the international system (ibid.: 423-424).

(ii) Obligation *erga omnes*: In fact, Article 48(1)(b) of the Draft Articles on State Responsibility deal with general *erga omnes* obligations that establish a right for all states – that is to say, in their capacity as members of the "international community" – to invoke the breach. Although in practice norms recognised as having an *erga omnes* validity set up undoubtedly important obligations, this importance does not translate into a hierarchical superiority similar to that of Article 103 and *jus cogens* (ILC Report on Fragmentation 2006: 193, para 381). It may be true that '[t]he question as to the legal significance of the category of State obligations *erga omnes* has been hotly contested among scholars and lawyers and remains stubbornly unsettled within international legal literature and practice' (quoted in ibid.). For instance, Simma says that the state practice has not (yet?) embraced the concept with any notable passion – '[v]iewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is"' (quoted in Simma 2009: 275). On the other hand, it has been criticized that the distinction made between the theory of international crimes and delicts, with its distinction between norms creating *erga omnes* and norms creating obligations of a less essential kind – by the ILC – shatters the unity of international law (Weil 1983: 431-440). However, the obligations *erga omnes* indicated only the *locus* of the states rather than indicating the actual application of law before the courts and tribunals.

(iii) Article 103 UN Charter obligations: In fact, Article 103 of the UN Charter reads that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. This Article has been criticized in many angles: First, the scholars argued that the Article 103 prevails only in case conflicting obligations and not rights[114] and further, it applies only

[114] In the *Lockerbie* Case, Libya invoked an explicit right granted to it under the Montreal Convention to keep the two Libyan suspects of the Lockerbie bombing in Libya so as to try them there (Article 7 of the Convention). Nonetheless, the US and the UK invoked a UN Security Council resolution imposing an obligation on Libya to surrender its two nationals to the US and the UK. In that situation, the ICJ, in its

to conflicting obligations under treaties and not under customary international law (ILC Report on Fragmentation 2006: 175-176, para. 344-345).[115] Second, most commentators agreed that the question with regard to Article 103 is not validity but of priority between Charter and other obligations (Pauwelyn 2003: 338). Waldock says the matter during the ILC debates on Article 30 of VCLT: '[T]he very language of Article 103 makes it clear that it presumes the priority of the Charter, not the validity of treaties conflicting with it' (quoted in ILC Report on Fragmentation 2006: 170, para. 333).[116] The drafting material of the Charter states that:

> '[I]t would be enough that the conflict should arise from the carrying out of an obligation under the Charter. It is immaterial whether the conflict arises because of intrinsic inconsistency between the two categories of obligations or as the result of the application of the provisions of the Charter under given circumstance' (quoted in ibid.: 171, para. 334).

It is clear that the Charter differs from *jus cogens*, in which later deal with invalidity of norms but former deal only priority of obligations (ibid.: 173, para. 340). Indeed, the text of Article 103 does not differentiate between obligations incurring among United Nations member states and obligations of non-member states.

Third, at the Vienna Conference, Switzerland opposed the formula of Article 30(1) of the VCLT which confirms the primacy of Article 103 of the UN Charter – on the ground that Switzerland, being a non-UN member, could not recognize the priority of UN Charter obligations (Czapliniski and Danilenko 1990: 15-16; Pauwelyn 2003: 338).[117] In

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1992 order on provisional measure, found *prima facie* that, pursuant to Article 103, the obligations of the Parties in that respect (contained in UN Security Council resolution 748) prevail over their obligations under any other international agreement, including the Montreal Convention (*Lockerbie* case 1992: para. 42). For reference, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. United States of America), Provisional Measures*, 1992, ICJ Reports.

[115] But it has been resulted in many occasions by the Scholars and also by the ICJ. Kaczorowska (2002) states that '[a] number of commentators have suggested that this provision would apply equally to inconsistent customary law' (Quoted in ILC Report on Fragmentation 2006: 176, fn. 476). Further, White and Abass (2003) argue that 'Article 103 gives obligations arising out of the UN Charter pre-eminence over obligations arising under any other international treaty, though it is not clear that this affects member States' customary rights' (ibid.: 176, fn. 477).

[116] Fassbender has argued that conflicts of obligations under treaties with obligations under the Charter lead to the same result as conflict with *jus cogens* – invalidity (Fassbender 1998: 590).

[117] The primacy of Article 103 is expressly mentioned under Article 30(1) of the VCLT: 'Subject to Article 103 of the [UN charter], 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'.

this regard, Article 34 of the VCLT reads that '[a] treaty does not create either obligations or rights for a third State without its consent', therefore, the non-members are formally not bound by the Charter which for them remains *res inter alios acta* (ILC Report on Fragmentation 2006: 174, para. 343). McNair also confirms that even the Charter of the United Nations does not have the power to make rules contained therein binding upon non-members (ibid.: 174, fn. 470).[118] Fourth, even if Article 103 represents a special case, it must be recalled that the contractual freedom of UN members does not prevent them amending Article 103 (Pauwelyn 2003: 337). Hence, Article 103 is also limited and subject to contractual freedom of UN members (particularly the five permanent members of the Security Council), because any amendment to the UN Charter – Article 108 requires the two-third members of the UN General Assembly, 'including all the permanent members of the Security Council' – hence, Article 103 UN Charter obligations under the feet of veto. Fifth, the United Nations Charter is not above *jus cogens* and further, it also cannot transfer a power to contradict *jus cogens* to bodies (i.e. Security Council, General Assembly, etc.) that receive their jurisdiction from the Charter (ILC Report on Fragmentation 2006: 181, para. 360).[119] Therefore, 'Article 103 is a compatibility (priority clause), and does not designate the Charter as a superior law comparable with the peremptory rules of international law' (Czaplinski and Danilenko 1990: 16-17).

The principle of *Lex Posterior*: Article 30 of the VCLT deals with *lex posterior* rule and its title reads that, "[a]pplication of successive treaties relating to the same

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[118] In contrast, Bernhardt argues that 'there are good reasons for assuming that treaties concluded with third States that are in clear or at least apparent contradiction to the Charter are not only unenforceable but also invalid with respect to such States. The Charter has become 'constitution' of the international community, and third States must, in their treaty relations and otherwise, respect the obligations arising under the Charter of the UN members' (quoted in ILC Report on Fragmentation 2006: 174, para. 341). In the same way, Goodrich and Hambro argue that, '[t]he Charter...assumes the character of basic law of the international community. Non-members, while they have not formally accepted it, are nevertheless expected to recognize this law as one of the facts of international life and to adjust themselves to it' (quoted in ibid.: 174, para. 342).

[119] This view has been held more recently in the *Kadi* Case, the CFI of the EC held that '[i]nternational law [...] permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the community' (*Kadi* case 2005: para. 281). For reference, *Ahmed Ali Yusuf and Al Barakaat International Foundation, Merits*, (21 September 2005), CFI Reports, Case No. T-306/01, para. 276.

subject matter". Hence, it has been criticized in two ways: First, some scholars argued that it cannot be applied to conflict between environmental and trade treaties or between human rights and humanitarian law treaties, since they deal with different subject-matter (Borgen 2005: 603-604, and 611-615); Second, some scholars criticized that while deciding time of the treaty, which one take into consider either the date of conclusion, opening for signature, ratification, or entry into force – in such a situation which one is successive and which one is earlier treaty (ILC Report on Fragmentation 2006: 371, para. 370-371); Third, some of them criticized that the rule of *lex posterior* always gives way for the principle of *lex specialis* (Pauwelyn 2003: 395-396); Fourth, some of the scholars argued that the treaties and acts of international organizations may have a precise date on which they were concluded – but it is virtually impossible to point to the precise date on which a general principles of law or custom emerged. The same argument could be made in respect of unilateral acts of states which may consist of a serious of events which, only taken together, constitute a binding undertaking (ibid.: 97).

The Principle of *Lex Specialis*: Article 55 of the Draft Articles on State Responsibility deals with '*lex specialis*' rule. It has been criticized in two aspects: First, Scelle said that a special rule would only rarely be allowed to override the general law. Because the general regulation expressive of an objective sociological interest would always prevent contracting out by individual states (ILC Report on Fragmentation 2006: 37, para. 61); Second, the *lex specialis* rule not even mentioned under the VCLT as a rule of interpretation and it has been kept under the Draft Articles on State Responsibility, where it stipulates that the states could very well contract out of general international law (Hafner 2004: 860-861). Such a permission keeps the doctrine of *lex specialis* always in a "shaking" position.

Hierarchy of Sources: It has been contended that there is no hierarchy of the sources of international law. The reason is that unlike domestic legal system, the international law is "decentralized", and its subjects (prominently states) create the international rules. The states are completely sovereign equals and the international law is based on law of cooperation not on subordination and moreover the rules are bound the principle of *pacta sunt servanda.*

Hence, all the rules created by states has to be given equal value – as result no hierarchy of sources of international law will arise (Pauwelyn 2003: 94-96; ILC Report on Fragmentation 2006: 166, para. 324). The ILC also accepts that Article 38 (1) of the ICJ Statute creates only an informal hierarchy between the sources of international law, not a formal one (ILC Report on Fragmentation 2006: 47, para. 85). This informal hierarchy follows from no legislative enactment but, emerges as a "forensic" or a "natural" aspect of legal reasoning (ibid.). Any court of lawyer will first look at treaties, then custom and then the general principles of law for an answer to a normative problem. Therefore, the traditional sources of international law mentioned in Article 38(1) of the ICJ Statute – that is, treaties, custom, general principles of law and judicial decisions and highly qualified writings – is not regarded as setting out any priori hierarchy. Brownlie stated that, the sources in Article 38(1) 'are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word "successively" appeared' (Quoted in Pauwelyn 2003: 94). Further, Phillimore argued that the order in which the sources are mentioned in Article 38(1) seems to reflect 'the logical sequence in which the rules would occur to the judge's mind, rather than to establish a definite hierarchy of sources' (Akehurst 1974-75: 274).

Systemic Integration through Article 31 (3) (c) of VCLT: Article 31(3)(c) of the VCLT often referred to as the principle of "systemic integration" – which stipulates that, in interpreting a treaty, there shall be taken into account 'any relevant rules of international law applicable in the relations between the parties'. This provision has been critical both in its substantive and temporal scope and its normative force: 'How widely should "other law" be taken into account? What about prior or later law? And what does "taking into account" really mean?' (ILC Report on Fragmentation 2006: 212-213, para. 423). Weeramantry noted in the *Gabcikovo Nagymaros* case, the provision 'scarcely covers this aspect with the degree of clarity requisite to so important a matter' (quoted in ibid.).[120] Thirlway even doubts '....whether this sub-paragraph [Article 31(3)(c) of VCLT] will be of any assistance in the task of treaty interpretation' (Thirlway 1991: 58).

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[120] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia),* (1992), ICJ Reports (Separate Opinion of Judge Weeramantry), 114

Further, three more questions arise with regard to the application of Article 31(3)(c) of the VCLT:

> 'One concerns the extent of the reference therein. What are the "rues of international law applicable in the relations between the parties" to which the provision refers? The second question concerns the normative weight of the reference. What does it mean that those rules "shall be taken into account, together with the context?" The third is the question of inter-temporality: [W]hat is the critical date for the rules to be taken into account – the date of the conclusion of the treaty or the law in force at the moment of its application?' (ILC Report on Fragmentation 2006: 232, para. 461).

Conflict Clause: Of course, one possible way to solve the problem of conflict of norm between the regimes is: to include in treaties explicit provisions regulating the possible conflict with other treaties. But this solution also not left with critique – scholars viewed that such clauses suffers 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' (Hafner 2004: 861).

Therefore, the real issue with respect to fragmentation of international law is not, as is commonly argued, that the proliferation of regime and the specific decision-making bodies poses a threat to the continued coherence of general international law. Rather, the threat is that given the non-existence of a definitive global legal hierarchy of norms, important political and normative decisions will be made piecemeal by the decision making bodies of particular legal regime (Khrebtukova 2007). Hence, it is useful to agree the words of Jenks:

> 'Assuming, as it is submitted we must, that a coherent body of principles on the subject is not merely desirable but necessary, we shall be constrained to recognize that, useful and indeed essential as such principles may be to guide us to reasonable conclusions in particular cases they have no absolute validity' (Jenks 1953: 407).

3. ILC'S STUDY ON FRAGMENTATION

The ILC studied the fragmentation of international law and identified that the fragmentation happens in two ways: (i) an institutional fragmentation; and (ii) a substantive fragmentation (ILC Report on Fragmentation 2006: 247, para. 489). At an institutional level, 'the proliferation of implementation organs – often courts and tribunals – for specific treaty-regimes has given rise to a concern over deviating jurisprudence and forum-shopping' (ibid.). At a substantive level, 'the emergence of "special laws", treaty regimes, and functional clusters of rules and specialized branches of international law and on their relationship *inter se* and to general international law' (ibid.). Here, the former involves the issue regarding the competence of various institutions applying international legal rules and their hierarchical relations *inter se* (ibid.: 13, para. 13). Since the issue of institutional problems (i.e. jurisdictional competences and forum-shopping issues) could be or is often resolved by the institutions themselves, ILC set aside the institutional aspects of fragmentation for its study (ibid.).

Instead, it focused only on substantive problems (i.e. conflict between regimes and solution for such conflict), hence the ILC study involves the "conflict-ascertainment" and "conflict-resolution" through *legal reasoning* (ibid.: 13, para. 13; 20, para. 27). Further, even in its study on the substantive aspects of fragmentation, it does not cover all substantive law problems and it concerned only the questions about "hard law". Here, the 'questions about "soft law" as special-type of law with its idiosyncratic ("soft") enforcement and dispute-settlement mechanisms has not been subjected discussion' (ibid.: 248, para. 490). Likewise, 'the questions having to do with the emergence of patterns of constraint out of private or combined public-private activities – including *lex mercatoria* or other types of informal regulation of transnational activities – and their effects on traditional law-making have been left outside this study' (ibid.).

While looking at the substantive aspects of fragmentation, the ILC discussed four types of relationship that lawyers have traditionally understood to be implicated in normative conflicts:

> '(a) Relations between special and general law...'; (b) Relations between prior and subsequent law...; (c) Relations between laws at different hierarchical levels...; and (d) Relations of law to its "normative environment" more

> generally...' (ibid.: 16, para. 18). Overall, in its report, the ILC tries to find out the answers to three major questions 'What is the nature of specialized rule-systems? How should their relations *inter se* be conceived? Which rules should govern their conflicts?'.

The ILC work agrees the absence of hierarchy in international law, but viewed 'it does not mean that normative conflict would lead to legal paralysis' (ibid.: 245, para. 485). The ILC established some form of hierarchy and codified the conflict resolving techniques, which is usually prevailing in the international courts and tribunals and used often by the international lawyers to resolve the conflict of norms.

The codified conflict resolving techniques are: (1) *lex superior derogat legi inferiori* (peremptory (*jus cogens*) norms, *obligations erga omnes*, Article 103 of the UN Charter obligations) (ibid.: chapter E); (2) *lex posterior derogat legi priori* (Articles 30/59, 41/58 of the VCLT) (ibid.: chapter D); (3) *lex specialis derogat legi generali* (Article 55 of the Draft Articles on State Responsibility) (ibid.: chapter C); (4) systemic integration (through Article 31(3)(c) of the VCLT) (ibid.: chapter F); and (5) informal hierarchy of sources (Articel 38(1) of the ICJ Statute) (ibid.: 47-49, para. 85-87) – are all explained in the previous section.

All the techniques, what the ILC has codified, may resolve the problem of conflict within a particular regime and to some extent the conflict between special and general law. But those techniques may not solve the conflict of norms across or between the regimes and in this respect, the ILC failed in its work (Koskenniemi 2005: 10; Lindroos 2005: 27).

Generally, the conflict of norms may arise out of the treaties in three different ways:

(i) AB/AB type conflict – two treaties entered within a single regime – for example, state A may entered into B an environmental treaty, subsequently A enters another environmental treaty with B – which may lead to conflict of norms. Such conflicts could be resolved easily by the conflict resolving technique (i.e. *lex posterior* or *lex specialis*) codified by the ILC. The ILC calls such conflict as "soft" or "weak" conflict.

(ii) AB/AB conflict – two treaties entered in different regimes – for example, A entered trade treaty with B vis-a-vis environmental treaty – if the environmental treaty

sets out a rule to ban certain trade (which is harmful to the environment) and the trade treaty set out a product-specific environmental exceptions (which is directly in conflict with environmental rule). A conflict between these two norms might not be resolvable by either *lex posterior* or *lex specialis* – because both norms are special and applies in the same situation – hence one cannot decide which one ought to prevail – as a result, one may have to decide a *non-liquet* (Pauwelyn 2003: 419). The ILC calls such conflict as "hard" or "strong" conflict.

According to the ILC a straight forward priority of one regime over another cannot be achieved on a merely chronological basis and it requires a more nuanced approach (ILC Report on Fragmentation 2006: 138, para. 272). It might be achieved only through the adoption of appropriate conflict clause: Two types of such clause may be distinguished[121] – 'A first type might follow article 30 VCLT and seek resolution by establishing a firm priority between two treaties'[122] – A second type 'seeks to coordinate the simultaneous application of the two treaties as far as possible' (ibid.). Here, the assumption is that conflict may and should be resolved between the treaty partners as they arise and with a view to mutual accommodation. By concluding this type of conflict clause, states parties transfer their competence to decide on what should be done in case of conflict to the law applier. The ILC viewed that this may work well in case the two treaties are part of the same regime and share a similar object and purpose or carry a parallel "ethos" (e.g. between several environmental or trade instruments *inter se* (ibid.:

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[121] Article 41(b) of the VCLT requires that the *inter se* agreements should not affect: (i) the rights and obligations of the third parties; and (ii) the object and purpose of the original treaty.

[122] The ILC identifies various categories of conflict clauses: (i) clauses that prohibit the conclusion of incompatible subsequent treaties; (ii) clauses that expressly permit subsequent compatible treaties; (iii) clauses in the subsequent treaty providing that it 'shall not affect' the earlier treaty; (iv) clauses in the subsequent treaty that provide that among the parties, it overrides earlier treaty; (v) clauses in the subsequent treaty that expressly derogate the earlier treaty; (vi) clauses in the subsequent treaties that expressly maintain earlier compatible treaties; (vii) clauses that promise that future agreements will abrogate earlier treaties; etc. (ibid.: 135-138, para. 268-271).

Such clauses support the idea of interpreting the treaties in manner which preserves the rights and obligations under both treaties in a maximal way. For example, the preamble of the Protocol on Biosafety to the Convention on Biological Diversity (2000) reads that: "Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development, emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements, understanding that the above recital is not intended to subordinate this Protocol to other international agreements' (quoted in ibid.: 139, para. 274).

141, para. 277; 142, para. 280). But if the conflict is between across two regimes and share a different (perhaps opposite) objectives and purposes, then the solution works only if the law-applier is an impartial third party (i.e. regime-independent dispute settlement). However, if the law-applier will be a body or an administrator closely linked to one or another of the (conflicting) regimes, than an open-ended conflict clause will come to support the primacy of the treaty that is part of the law-applier's regime (ibid.). Another way harmonization could be made between the regimes through systemic integration under Article 31(3)(c) of the VCLT, which stipulates that in interpreting a treaty, there shall be taken into account 'any relevant rules of international law applicable in the relations between the parties'. By this way, it could be possible to coordinate the simultaneous application of the two treaties of the different specialized legal regimes as far as possible (ibid.: 206-244, para. 410-480).

(iii). AB/AC type conflict – two treaties entered into either within regime or between regimes – for example, where state A has undertaken conflicting obligations in regard to two (or more) different states (B and C) – the question arise which of the obligations shall prevail (the ILC Report on Fragmentation 2006: 62, para. 115; Pauwelyn 2003: 422-424). Here, the *lex specialis* or the *lex posterior* (subject to Articles 41/58 of the VCLT) appears largely irrelevant.[123] Because each treaty relations is governed by *pacta sunt servanda* with effect towards third parties excluded. In such a case, the ILC suggests that '[t]he State that is party to the conflicting instrument is in practice called upon to choose which treaty it will perform and which it will breach, with the consequences of State responsibility for the latter' (ibid.).[124] The ILC calls such conflict also as "hard" or "strong" conflict.

For all the above said three conflict situations, the principle of *lex superior* (especially peremptory norm) applies because it determines the validity of each treaty.

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[123] 'Lauterpacht originally proposed that the later treaty should be held void unless it posed "a degree of generality which imputes to [it] the character of legislative enactment"... Latter special Rapporteurs (Fitzmaurice and Waldock), however, thought that this set the innocent party to the latter treaty at an unjustified disadvantage, hence Lauterpacht idea was dropped' (ILC Report on Fragmentation 2006: 62, fn. 142).

[124] In fact, this solution derived from Article 30(5) of the VCLT, which provides when the parties are non-identical, the state having concluded the incompatible obligations to choose which of them it will observe – breach lead to state responsibility.

The ILC agrees that,

> 'This study has not aimed to set up definite relationships of priority between international law's different rules or rule-systems... However, such priorities cannot be justifiably attained by what is merely an elucidation of the process of legal reasoning. They should reflect the (political) preferences of international actors, above all States' (ibid.: 245, para. 484).

Because

> 'Normative conflicts do not arise as technical "mistakes" that could be "avoided" by a more sophisticated way of legal reasoning. New rules and legal regimes emerges as responses to new preferences, and sometimes out of conscious effort to deviate from preferences as they existed under old regimes. They require a legislative, not a legal-technical response' (ibid.).

'*One principal conclusion of this report has been that the emergence of special treaty-regimes (which should not be called "self-contained") has not seriously undermined legal security, predictability, or the equality of legal subjects*' (ibid.: 248, para. 492). '[T]he second main conclusion of this report – *no homogenous, hierarchical meta-system is realistically available to do away with such problem* [i.e., the problem of conflicting rules and overlapping legal regimes]' (ibid.: 249, para. 493). To solve the said problems and make coherence in international law successfully, '*increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions*' (ibid.).

4. Theoretical way for Conflict Resolution

Some scholars find the solution for the conflict of norms between the regimes in a theoretical way. They find a solution by looking at various theories ranging from realism, institutionalism, liberalism, constructivism, modified constructivism, etc. As per realism, the states act in their own interests while constantly struggling to achieve and maintain power (Kelly 2001: 678). Institutionalism starts from a realist perspective, but add that states will work together within institutional regimes to maintain stability and reduce the struggle among themselves (ibid.). According to liberalism, states acts as agents for the benefits of their constituencies and are therefore subject to change through the liberal functioning of the domestic system (ibid.). Constructivism like liberalism, posits that state are endogenous (subject to change), but constructivism views that states acting as

states (not merely as agents) (ibid.: 678-679). Constructivism contend that states share and influence each other's expectations and understandings of international law (ibid.)

Kelly views that the "self-enforcing regimes" (SERs) – that is, 'a regime or institution capable of meaningful costs for non-compliance with its rules with some degree of autonomy, such as the World Trade Organization (WTO)' – failed to consider the values of "non-self enforcing regimes" (non-SERs) – that is, a regime or institution which lacks an autonomous method of securing compliance, such as the International Labour Organization (ILO)[125] – within its ambit (Kelly 2001: 673, fn. 1).[126] Such a situation, what Kelly hypothesize that 'SERs create a value vacuum' (ibid.: 677). As a result of SERs greater institutional authority and autonomy on the one hand, and sanctioning method on the other, secures its own value effectively and undermines the values of non-SERs. In such a case, '[a] normative feedback loop...serves a valuable mechanism to interpose non-SER values' within SERs (ibid.).[127]

To achieve this object, Kelly proposes a modified constructivist theory, which links the liberalism and constructivism through the normative feedback loop. Modified constructivism espouses the presence of two constants: '(i) assertion of national preferences by constituents for whom the state acts as an agent in international relations; and (ii) social construction of state identities through interaction with other state in the international arena' (Kelly 2001: 687). The link between these two factors is the normative feedback loop, a mechanism by which states consult national values in their international actions (ibid.). That is, the normative feedback loop is both the mechanism states use to consult national values in their international actions and the bridge between national and international value formation (ibid.: 674).

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[125] 'Although the ILO has more than 170 conventions relating to labour standards, it has no enforcement mechanism by which its can achieve compliance with the norms it propagates' (Kelly 2001: 677, fn. 16). But often ILO uses a strategy 'to adopt non-legally binding instruments in guideline form' to enforce the labour norms (ibid.).

[126] Kelly also mentions a third type of regime called "non-conflictual regime" – '[such] regimes focus on coordination problems, such as the international Civil Aviation Organisation, where compliance arises from successful coordination' (ibid.: 673, fn. 1).

[127] 'Robert Ellickson (1991) uses the term "feedback loop" to describe a system that harmonizes the rules (norms) emanating from different sources, explaining that "political forces may limit the deviation of law from norms, and conversely, law may influence a citizenry's moves"' (quoted in Kelly 2001: 674, fn. 2).

First, the normative feedback loop may take the form of a nation's decision to comply with a regime rule, which would require it to act (or not to act). For example, in *Tuna-Dolphin* dispute, the US Marine Mammal protection Act (MMPA) was contested because MMPA protects the dolphins by prohibiting the importation of tuna into the US market, which caught in a manner that endangered and killed dolphins. Though the two GATT Panels found the MMPA violated GATT Article XI's prohibition on import laws but by the MMPA, the US constituency preference (i.e. the normative feedback loop supported non-compliance with GATT norms (ibid.: 690-691).

Second, the normative feed loop may also take the form of a nation's decision to encourage another nation to comply (or not to comply) with a regime rule. For example, prior to the Uruguay Round, the US used the threat of unilateral retaliation to change policies which affected United States Commerce (ibid.: 691).[128] Here, the unilateral actions of the US (acted as normative feedback loop) to make another country to comply with a regime.

Third, the normative feedback loop may take the form of a nation's decision to enact (or refuse to enact) domestic legislation to promote or implement regime values. For example, the US Generalized System of Preferences (GSP) legislation, which affords trade preferences to developing nations, incorporates international labour standards (ibid.: 691).[129] Here, as a domestic legislation, the GSP statute implicates the normative feedback loop, because national legislation considers constituency values and preferences. A country may similarly refuse to enact domestic legislation designed to promote compliance with a regime rule as a result of its normative feedback loop.

Therefore, Kelly (2001) says that 'the normative feedback loop allows a nation to revisit its policy decisions concerning the weight or vitality of constituency preferences. In other words, a nation's initial belief that it is within its interests to join a regime does not demand the conclusion that it will forever be committed to that specific regime's

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[128] 'Typically this unilateralism was accomplished through the famous Section 301 legislation... During the Uruguay Round, negotiators sought to persuade the [US] to give up Section 301 in exchange for the new Dispute Settlement Understanding (DSU)... Although the DSU came to be, but the [US] did not repeal Section 301. It has, however, refrained from using it' (ibid.: 691, fn. 84).

[129] GSP deviates from the WTO/GATT foundational theory by allowing for preferential treatment for less developed nations.

norms', so the state may at any movement revisit its policy decisions according to their constituency preferences. Apart from this, he also proposes several institutional modifications to compensate for the value vacuum (i.e. to make the interaction between non-SERs and SERs). Such modifications include:

> '(i) an increase in the voice given to non-SER values within an SER through greater access or exceptions under the SER rules; (ii) the availability of direct access by non-state actors to SERs to compensate for the devaluations of the normative feedback loop; and (iii) a strengthening of the compliance mechanisms for non-SERs' (ibid.: 677).

But viewed that '[n]one of these options will fill the value vacuum, but each may alleviate the deficit it creates' (ibid.).

In brief, Kelly argue that the regimes or norms which have a strong compliance mechanism – such as the WTO – are more likely to prevail in this costs on non-compliance (such as most MEA regimes) (ibid.: 701). In such a situation, the conflict between the regimes may be averted or resolved to some extent, by means of domestic consultations or domestic expressions of preference against or in favour of relying on a particular right, or enforcing a particular obligation of the regimes. Such a strategy to resolve the conflict, what Kelly calls the 'normative feedback loop' pursuant to which states decide, consistent with domestic constituency preferences, whether or not to promote a particular regime or rule. It was described as follows:

> 'Nations, in response to regimes, balance the value compliance against other interest they may have by means of the normative feedback loop. The normative feedback loop may take the form of a nation's decision to: (i) comply with a regime rule which would require it to act (or not to act); (ii) encourage another nation to comply (or not) with a regime rule; (iii) enact (or refuse to enact) domestic legislation to promote regime values' (Kelly 2001: 690).

On the other hand, Frank (1988) argues that legitimacy promotes compliance among regimes.[130] He posits that:

> '[F]our indications of legitimacy support the "legitimacy" and "pull" of a rule: determinacy (the clarity of the textual language), symbolic validation (the lineage or pedigree which has a signalling effect), coherence (the consistent application of the rule); and adherence (the rule's relation to a normative hierarchy)' (Kelly

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[130] Franck (1988) argues that 'compliance is secured – to whatever degree it is – at least in part by perception of a rule as legitimate by those to whom it is addressed' (Frank 1988: 706).

2001: 696-697).[131]

Frank has also argued that the fairness of international rule contributes to compliance, hence the compliance pull of a rule is directly related to its fairness (ibid.: 697, fn. 115).[132]

Fischer-Lescano and Teubner (2004) '[a]ny aspiration to the organizational and doctrinal unity of law is surely a chimera. The reason is that global society is a "society without an apex or a center"' (Fischer-Lescano and Teubner 2004: 1017). According to them, since the cause of norm collisions not arise because of jurisdictional hierarchy, but because of 'the underlying conflicts between the "policies" pursued by different international organizations and regulatory regimes' (ibid.: 1003).

> 'In this political perspective, collisions between legal norms are merely a mirror of the strategies followed by new collective actors within international relations, who pursue power-driven "special interests" without reference to a common interest and give rise to drastic "policy conflicts"' (ibid.).

Hence, they viewed that '[n]either doctrinal formulas of legal unity, nor the theoretical ideal of a norm hierarchy, nor the institutionalization of jurisdictional hierarchy provide an adequate means to avoid such conflicts' (ibid.). And they suggests that:

> '[T]he only possible perspective for dealing with such policy conflicts is the explicit politicization of legal norm collisions through power mechanism, negotiation between relevant collective actors, public debate and collective decisions' (ibid.).

Further:

> '[T]his might be achieved through a selective process of networking that normatively strengthens already existing factual networks between the legal regimes: law-externally, the linkage of legal regimes with autonomous social sectors; and, law-internally, the linkage of legal regimes with one another' (ibid.: 1017).

And they identified three guiding principles for the decentralized networking of legal regimes: (i) 'Simple normative compatibility instead of hierarchical unity of law'; (ii)

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[131] Franck situates these elements as the 'lawyer's approach to larger sociological, anthropological and political questions: what conduces to the formation of communities and what induces members of a community to live by its rules?' (ibid. : 713).

[132] Franck observes that 'in the "post ontological" age of international law the most important question for international lawyers is not only law's enforceability, but its fairness' (Kelly 2001: 697, fn. 115).

'Law-making through mutual irritation, observation and reflexivity of autonomous legal orders'; and (iii) 'Decentralized modes of coping with conflicts of laws as a legal method' (ibid.: 1018).

5. Suggestions to Resolve the Conflict of Norms

Scholars have given various suggestions to resolve the conflict of norms between the regimes, in which some of them are as follows: (i) Make the ILC a supervisory body to review the treaties of a regime by taking into consider other regimes, whenever the states are engaged in a new treaty formation; (ii) Make the ICJ an appellate and also an advisory body in civil matters, whenever the conflict of norms occur before any court or tribunal; (iii) Make the ICC as an appellate and also an advisory body in criminal matters, whenever the conflict of norms occur before any court or tribunal; (iv) The court or tribunal of a regime should take into consider the interest of other regimes; and so on.

CHAPTER – V

CONCLUSION

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The major findings and conclusions of this study are as follows:

(1) In the process of its evolution, international law has been continuously changing to accommodate the changing needs of international society. As a result, international law has been transformed from natural law to secular law to European international law to universal international law to fragmented international law. The study has argued that universal international has replaced European international law, and it is constituted of various specialized legal regimes (such as international trade law, environmental law, human rights law, and so on) in a fragmented way.

(2) Most of the specialized legal regimes are treaty based and have their own institutional mechanisms to decide the disputes. It raises two sort of problems: (a) institutional conflicts (which led to conflicting jurisdiction, forum shopping, conflicting jurisprudence); and (b) substantial conflicts (which raises the problem of conflict within general law, conflict between special law and general law, and conflict between special laws). Therefore, the study concurs that the fragmentation of international law creates a major problem of conflict of norms between different legal regimes.

(3) To solve the conflict of norms, the regimes need to be integrated – the integration may possibly happen in two ways: either by political (legislative) approach or by legal (judicial) approach. The developing states argue that the integration (either political or legal) will take place for the benefit of northern developed states. The study concurs that the fragmentation and its subsequent integration affects the developing countries in their quest for global justice.

(4) The ILC studied the problem and codified the existing doctrines and principles (such as *lex superior, lex posterior and lex specialis*) to solve the problem of conflict of norms. Unfortunately, those codified principles solve the problem of norm conflict only within regimes and left unnoticed the norm conflict across regimes. In this regard, the

ILC stated that all the specialized legal regimes are only arbitrary labels based on professional specialization of the academicians. Hence, it viewed all regimes as parts of the broader territorial domain of general international law. Therefore, individual regimes have to approach the Vienna Convention on Law of Treaties to solve the norm conflict and proposed for systemic integration through Article 31(3)(c) of the VCLT. Therefore, the study concluded that though the ILC solved the problem of norm conflict within regimes, it refrained from solving norm conflict across regimes as there are no easy answers.

Some other findings and conclusions are as follows:

(1) The study finds that there is no proper definition for norm and also for conflict. Some scholars (particularly Jenks) support the strict definition of conflict and others (particularly Pauwelyn) support the broader definition of conflict, both the contenders suggest that their definitions will respectively bring effectiveness and coherence in international law. Apart from that, the study finds that conflicts occur possibly in two different ways: (a) Institutional conflict – which lead to, (i) conflicting jurisdiction, (ii) forum shopping, and (iii) conflicting jurisprudence – here, the first two problems could often be resolved by institutions itself, but the third to some extend poses threat to the unity of international law; and (b) Substantial conflict – which lead to, (i) conflict within general law, (ii) conflict between special and general law, and (iii) conflict between special laws – here the first one could be and seems to be resolved through institutional co-operation, and the second one could be solved by conflict resolving techniques, and to resolve the third one, the ILC proposed that it could be resolved either by inserting conflict clauses in the treaties, or through systemic integration (Article 31(3)(c) VCLT) or by accepting state responsibility for the breach of a norm.

(2) The study shows that conflict may happen at three levels: (a) vertical level between national and international law; (b) vertical level between regional and international law; and (c) horizontal level within international law. In the first case, international law prevails over domestic law. In the second case, traditionally international law prevails over regional laws, but in contemporary times, it seems the regional institutions refuse to acknowledge the supremacy of international law (ECJ's

decision on *Kadi* case shows this approach). And in third case, though institutional conflict could be resolved in policy level, the substantial conflict finds no such solution in international law.

(3) The study finds that the integration of regimes may happen in different levels: (a) unilateral/domestic state action; (b) bilateral/regional action; and (c) international action (either by political or legal approach). Here, the first sort of integration is faced with utter failure (especially the developing countries are reluctant to follow such approach). The second approach is to some extent made effective due to trade benefit arise out of regional partners (e.g., CAFTA, SAFTA. NAFTA, ASEAN, etc.). At the third level of integration, the north-south divide emerges sharply, the developing countries reject it by viewing that the integration may affect their development one way or other – in this regard, the work reviewed Pauwelyn's, Trachtman's, and Chimni's argument on integration.

(4) Though critiques exist against the hierarchy of norms in international law, the study shows and agrees that a number of hierarchy of norms exists even in international level, which include: (a) conflict resolving techniques – (i) *lex superior*, (ii) *lex posterior*, (iii) *lex specialis*, (iv) hierarchy of sources, (v) systemic integration through Article 31(3)(c) VCLT; and (b) conflict avoidance techniques – (i) conflict clause, (ii) treaty interpretation, and (iii) state responsibility.

(5) Apart from this, the study also highlights the approach of scholars to the problem of conflict of norms. Among the scholars, some propose theoretical solutions to solve the problem of norm conflict across regimes. In this regard, Kelly looks at various theories ranging from realism, to liberalism, to institutionalism to constructivism. He proposes modified constructivism, which prescribes a "normative feedback look" to integrate the regimes. Such "loop" secures both the domestic and international interest simultaneously. Other scholars attempt to solve the problem by making the ICJ and the ICC as an appellate and advisory authority in civil, and criminal matters, respectively. The ILC would be turned into a supervisory body to review different treaty regimes. The courts/tribunals of a regime should consider the values of other regimes in deciding the cases. On the other hand, the scholars like Fischer-Lescano and Teubner says that '[a]ny

aspiration to the organizational and doctrinal unity of law is surely a chimera' – because 'the global society is a "society without an apex or a center"' (Fischer-Lescano and Teubner 2004: 1017) and further, '[g]lobal legal pluralism happens...is not simply a result of political pluralism, but is instead the expression of deep contradictions between colliding sectors of a global society' (ibid.: 1004).

Overall the study agrees that international law is dynamic and globalization calls for global legal solutions. Therefore, fragmentation is not necessarily a bad thing, nor will it disappear any time soon. Further, multiplicity of regimes on the one hand better reflects the states' interest. The only problem with fragmentation and the conflict of norms arising out of such fragmentation are – the lack of conflict resolution techniques to resolve such conflict (especially norm conflict between specialized legal regimes), which threatens the unity, integrity and predictability of international law.

The only solution to conflict of norms between different specialized legal regimes is that the regimes may be specialized in its sphere but not self-contained as they are all part of general international law. If we agree that no regime is self-contained, then there could be a possibility to harmonize the regimes – through "systemic integration" under Article 31(3)(c) of the VCLT, which stipulates that, in interpreting a treaty, there shall be taken into account 'any relevant rules of international law applicable in the relations between the parties'. In this regard, the international courts and tribunals and the practitioners have the responsibility to integrate the regimes very carefully at the enforcement stage. And at the negotiation stage, the states have to take into consider other regimes' values and make the treaties clear and precise.

It seems from the above scenario that, today's subjects of international law (especially states) and their relations with international law looks like more or less the famous prediction of Marx: 'all that is solid melts into airs, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his world' (quoted in Koskenniemi 2005: 2-3).

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