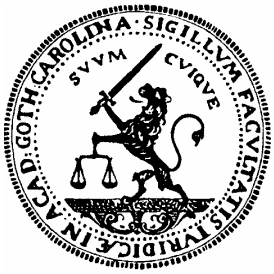

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Defining 'Self-contained Regime'

-A Case Study of the International Covenant on Civil and Political Rights-

Master thesis
30 points

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Contents

Summary

This thesis examines the definition of the term ‘self-contained regime’, a term firstly used by the International Court of Justice in the Tehran Hostages Case and since then discussed and analyzed by international scholars of international law. The term has been used to label a treaty or set of treaties in international law that set up a system of norms that to some extent exclude the applicability of general international law. It has however not been clearly established to what extent such an exclusion is possible and on which grounds such an exclusion has to be based. These questions are looked into in this thesis.

In a second part of this thesis, the definition of the term self-contained regime is applied to the International Covenant on Civil and Political Rights (ICCPR). Other treaties in the field of human rights law have earlier been nominated as possible self-contained regimes due to the special enforcement mechanisms often included in the treaties. By carrying out a case study on the enforcement mechanisms in the ICCPR, it will be possible to pin down its relationship to general international law and to answer the question of whether the ICCPR constitutes a self-contained regime.

Preface

I would like to thank Dr. Ulf Linderfalk for guidance, support and interesting discussions throughout the work with this thesis. I would also like to thank my family for the support given during the work with this thesis.

Abbreviations

ACHR	American Convention on Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILC Draft on State Responsibility	ILC Draft Articles on the Responsibility of States for International Wrongful Acts, 2001
PCIJ	Permanent Court of International Justice
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

To define the substance of international law and its components has been one of the main challenges to scholars of international law throughout the years. Two major problems in defining international law are the lack of a higher centralised legislator in international law and that the subjects creating the law coincide with the subjects bound by the law.

The legal basis of International law is twofold: free will agreements between states and customary rules based on state practice formulates the applicable rules. Consequently, no sole legislature exists in international law. The agreements do thereby not necessarily follow a systematic structure or hierarchy. Thus, a new agreement between states can touch upon fields of law not before included in international law or create a new institutional framework to handle a given problem. Every such agreement between states gives rise to new questions regarding hierarchy between sources and the relationship between different norms and agreements. As international law expands, it becomes more and more specialised and diverged and the predictability of the system tends to decrease. The more fragmented the international law gets the likeliness of norm conflicts increases. Each new multilateral or bilateral agreement between states may contribute to this fragmentation of the international law.

At its fifty-second session, in the year of 2000, the International Law Commission (ILC) included a risk-study of fragmentation in their long-time work with the objective of looking into the effects of the diversification of international law.[1] In the year of 2002, a study group was established on the topic by the ILC and different studies were proposed and initiated. One of the studies was "the Function and Scope of the *lex specialis* Rule and the Question of 'Self-Contained Regimes'".[2] In the year of 2006, the work of the study group was finalized and summarized in a final report on the fragmentation of international law.[3]

Parts of the above-mentioned final report on fragmentation handle the question of 'self-contained regimes', a set of norms, principles and rules in international law that is supposed to exist and function in a more or less

[1] International Law Commission, *Report on the work of its fifty-second session* (A/55/10) para. 729
[2] International Law Commission, *Report on the work of its fifty-fourth session* (A/57/10) para. 512
[3] International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf visited on 20 December 2007

autonomous way. Noortman gives an exemplifying list on regimes that might qualify as self-contained:

1. diplomatic immunities,
2. human right treaties,
3. the European Economic Community/European Union,
4. the General Agreement on Tariffs and Trade/WTO,
5. environmental treaties,
6. the Non-Proliferation Treaty,
7. dispute settlement mechanisms and
8. constituent instruments of international organisations providing for suspension and termination of memberships [4]

An autonomous entity in international law would strongly contribute to the fragmentation of international law and the above-mentioned questions regarding hierarchy and relationship between norms and regimes would be even harder to answer. In the end, it is a question of the possibility for a number of states to create new legal orders independent of general international law.

In one of the fields of law listed above, international human rights treaties, a discussion regarding the effectiveness of these treaties and the possibility of enforcement has been present for quite a while. Most of the major human rights treaties have their own enforcement mechanisms that are mostly concerned with reports and inter-state complaints. It has been alleged that the enforcement mechanisms are not able to uphold the field of human rights and that the enforcement of these rights thereby are ineffective. Thus, new methods of enforcing human rights need to be implemented in international law. One example of such enforcement measures is to create a connection between human rights and the GATT-agreement and the WTO, thereby giving states a new incentive to comply with international human rights law.

The two above-mentioned discussions, the one about the fragmentation of international law and the discussion about the enforcement of human rights treaties, overlap when analyzing the field of international human rights law from a fragmentation-perspective. With reference to the list above, human rights treaties are one of the fields in international law that might qualify as so-called self-contained regimes and the discussion of enforcement of human rights is highly affected by the question whether human rights treaties can be defined as self-contained regimes. If it is possible to enforce human rights obligations, with the help of the general international law on state responsibility as to be found in the ILC Draft on State Responsibility, 2001 (ILC Draft) and the compulsory jurisdiction of the ICJ under Articles 36 (1) and 36 (2) ICJ Statue, there might not be such a problem to uphold human rights as first suggested.

[4] M. Noortmann, *Enforcing International Law – from self-help to self-contained regimes* (Ashgate Publishing Limited, Hampshire, 2005) p. 141

1.2 Object and purpose

The object and purpose of this thesis is twofold. Firstly, I intend to clarify the term self-contained regime by describing and analyzing its meaning. By describing and analyzing the enforcement measures stipulated in the ICCPR (International Convention on Civil and Political Rights) I will then be able to apply the term self-contained regime to the ICCPR and thereby elucidate the relationship between the ICCPR and general international law.

The final questions to be answered in the thesis are:

1. What constitutes a self-contained regime? *and*

2. Is it possible to define the ICCPR as a self-contained regime?

1.3 Method and materials

This thesis is based around the work of the ILC on the subject on fragmentation and the work of Bruno Simma who first addressed the topic of fragmentation in his article *Self-contained Regimes* in the Netherlands Yearbook of International Law in 1985. Simma later developed his thoughts on the subject in an article in The European Journal of International Law in 2006 written in cooperation with Dirk Pulkowski; *Of Planets and the Universe: Self-contained Regimes in International Law*. Both Simma and Pulkowski are acknowledged scholars in the field of international law.

The methods applied in this thesis are desk research and textual analysis of the above-mentioned and complementing material.

When using material found on the internet the objective has been to focus on official websites of international courts and organisations to avoid the problem of unreliable sources.

1.4 Delimitations

When analyzing international law, basic views of the author on sociological, political and philosophical questions will result in the choice of a certain benchmark for the study, the result of the study may then vary depending on the chosen benchmark. The system of international law can be seen as either universalistic, international law as one big comprehensive universal system, or as particularistic, international law as a cluster of different fragments normally working in its own way, but working together when necessary. The main difference between the two approaches is the existence/non-existence of a central common denominator. No matter which of the two approaches that is chosen, it can be discussed whether a fragmentation of the international law is going on and what legal consequences this leads to. I

will however not be able to include a study of the different approaches in this thesis. When the two approaches are of importance, this will be noted in the running text.

When analyzing the term self-contained regime, the question of how to define the term 'regime' inevitably emerges. A number of definitions exist, and to ventilate the subject of regime theory would demand its own thesis. I have therefore chosen to concentrate on the 'self-contained' part of the full term in this thesis and to use the term regime in the broadly accepted definition:

> "..sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[5]

The chosen definition adheres to most other definitions.[6] The interesting part of regime-theory in this thesis is *how* the regime affects the international law, not what defines the regime per se.

When discussing the subject of fragmentation of international law, a number of problems arise and many different approaches can be taken. This thesis will be limited to studying fragmentation through the emergence of special law as exception to the general law, not conflicting interpretations or differentiation between conflicting fields of special law. The sphere of conflicts between international law and national regulations will not be examined.

1.5 Outline

Since the object and purpose of this thesis is twofold, I have found it necessary to divide the text into two main parts. In the first part, I focus on the definition of the term 'self-contained regime' and in the second part I apply the definition to the ICCPR. This division is necessary to make the topic of the thesis comprehensible and to keep the reading interesting. The concluding remarks are thereby separated in two parts, each handling one of the two final questions to be answered in the thesis.

Firstly, I will give a brief summary of the relevant Case law in chapter 2 to facilitate the reading of the following chapters. Chapter 3 handles the suggested definitions of the term and is followed by a further analysis of the definition and its relationship to its context of general international law in chapter 4. In chapter 5, I make concluding remarks on the definition of the term self-contained regime by summing up the analysis carried out and thereby answering the first of the two main questions in this thesis.

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[5] S. D. Krasner (ed.), *International Regimes* (Cornell University Press, 1983) p. 2
[6] *Ibid.*

The second part of the thesis is focused on the ICCPR and its enforcement mechanisms. I start out by summarizing the different enforcement mechanisms in the ICCPR and commenting on the nature of the obligations in chapter 6. In chapter 7, I apply the definition of the term self-contained regime attained in the first part of the thesis to the ICCPR and its enforcement mechanisms and answer the second of the two main questions in this thesis.

By summarizing the earlier made conclusions from both parts of the thesis and by making some final remarks on the topic of fragmentation of international law and the problems with the term self-contained regime, the thesis is finished off in chapter 8.

1.6 Definitions

Jus Cogens norms, norms accepted and recognised by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[7] The principle of *Jus Cogens* is to be found in Article 53 VCLT stating that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

Primary Rules, rules that lay down the rights and obligations of the subjects in a legal system such as the system of international law. [8]

Secondary Rules, rules that regulate the primary rules by addressing the creation, application, interplay, suspension, termination, breach and enforcement of the primary rules. The secondary rules thereby define the meaning of the primary rules.[9]

Pacta sunt servanda, the binding nature of treaties upon the state parties, and that the state parties are supposed to perform their obligations in good faith. A general principle in international customary law and reaffirmed by article 26 in the Vienna Convention on the Law of Treaties (VCLT).[10]

1.7 Terminology

In the final report on fragmentation by the ILC, the term self-contained regime is replaced by the term 'special regimes'. The ILC finds the term self-contained regime misleading since no evidence is found supporting a

[7] M. N. Shaw, *International Law* (Cambridge University Press, Cambridge, 2003) p. 117
[8] M. D. Evans, *International Law* (Oxford University Press, New York, 2006) p. 115
[9] *Ibid.*
[10] Shaw, *supra* note 7, pp. 811 - 812

full exclusion of general international law.[11] I have chosen not to follow the wording used by the ILC and instead use the earlier term self-contained regime. The main reason for this is to facilitate the comprehension of a quite ambiguous discussion. Since both Case law and doctrine in general discuss the theory of self-contained regime and not special regimes, I believe that replacing the original term may contribute to the already existing confusion on the topic.

[11] International Law Commission, *Fragmentation of international law: Difficulties arising from the diversification and expansion of International Law* (A/CN.4/L.682) para. 152 (5) http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement visited on 26 February 2008

2 The Idea and Case Law

To grasp the concept and idea of self-contained regime a number of rulings by the PCIJ and the ICJ are of importance. The framework of the concept is to be found in the S.S. Wimbledon Case, the Tehran Hostages Case and the Nicaragua Case. Discussions in doctrine on the concept of self-contained regimes started after the Tehran Hostages Case and are therefore based on, and refer to, above-mentioned case law. I thereby find it necessary to give a brief sketch of the judgements before moving on to the suggested definitions of the concept. The Nicaragua Case will be described below in chapter 5.1 due to its linkage to the field of human rights law.

2.1 The S.S. Wimbledon Case

The term self-contained entered the domain of international law with a decision of the Permanent Court of International Justice (PCIJ), the S.S. Wimbledon case.[12] German authorities hindered a British steamship transporting military goods (S.S. Wimbledon), chartered by a French company, to pass through the Kiel Canal in 1921. The applicants questioned the German authorities' right to refuse access to the Kiel Canal and claimed a right to free access by referring to the Treaty of peace of Versailles regarding international waterways (the Versailles treaty). Article 380 in the Versailles treaty reads:

> "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality."[13]

The PCIJ compare the special regulation regarding the Kiel Canal in Article 380 to articles in the treaty that are generally applicable to inland waterways and less restrictive on the German sovereignty than Article 380. The general applicable articles limit the access to inland waterways to allied and associated powers alone.[14] The PCIJ states that

> "the provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their "raison d'être" ... The idea which underlies Article 380 and the following articles of the Treaty is not to be sought by drawing an

[12] *Case of the S.S "Wimbledon", (Brittany, France, Italy and Japan (with Poland as intervener)* v. *Germany)* 17 August 1923, PCIJ <www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon/> visited on 2 of February 2008.
[13] Treaty of Versailles, <http://history.sandiego.edu/gen/text/versaillestreaty/all440.html> visited on 26 of February 2008
[14] *Case of the S.S "Wimbledon" supra* note 12, p. 8

> analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them."[15]

The intended effect of the self-containment is that Article 380 is not to be interpreted with the help of the more general applicable sections since the more specific regulation concerning the Kiel Canal exists.[16]

2.2 Tehran Hostages Case

The first case law using the full term self-contained regime was the Tehran Hostages Case in the International Court of Justice (ICJ).[17] In the case, Iran defended certain actions as a reaction to alleged offences by the US and thereby tried to excuse its own breaches of international law. The court stated, "…diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions."[18] The mean of defence the court had in mind is the possibility for a state to declare an ambassador persona non grata under Article 9 Vienna Convention on Diplomatic Relations (VCDR):

> "1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his function with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State."[19]

According to the ICJ, the rule of persona non grata seems to exclude the general law on state responsibility and thereby excludes the possibility of countermeasures. The court clarifies this by stating:

> "…The rules of diplomatic law, 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 State to counter any such abuse. These means are, by their nature, entirely efficacious."[20]

The opinion of the court is that the VCRD can achieve the wished consequences of the statute on its own, without the help of general international law in the form of the ILC Draft on State Responsibility, and its equivalence in international customary law. Thus, Iran could not defend its actions by referring to the possibility of countermeasures. The question is

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[15] *Ibid*, pp. 8 - 9
[16] *Ibid*, p. 9
[17] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, 24 May 1980, ICJ, www.icj-cij.org/docket/files/64/6291.pdf visited on 22 February 2008
[18] *Ibid*, para. 83
[19] Article 9 (1) VCDR
[20] *Tehran Hostages Case (United States of America* v. *Iran) supra* note 17, para. 86

then how to define the term self-contained regime in order to find the fields in international law that it could be applied to and the effects of such an application. The definition given by the court is far from exhaustive. Note that self-contained regime in the Tehran hostages case is discussed only in the context of state responsibility.

The case law does clearly not answer the question of what constitutes a self-contained regime. By using the term, without giving an exhaustive definition, the ICJ leaves many questions unanswered. To be able to clarify the meaning of the term we have to turn to definitions suggested by doctrine.

3 Suggested Definitions

Following the judgement in the Tehran Hostages Case, the theory of self-contained regimes has often been misconceived as an attempt to create an entirely autonomous and closed legal system of international law. With the help of a complete set of secondary rules, the regime would then function in total isolation from general international law. The regime would thereby open up the possibility of several separate international laws existing side by side. It is however not possible to contract out of the system of international law. Firstly, the principle of *pacta sunt servanda* would prevent states from contracting out of their binding contractual obligations and create a new international law outside the system of existing international law. Secondly, it is unequivocal that self-contained regimes are not able to function without relating to the limitation imposed by *Jus Cogens*, peremptory norms of general international law from which no derogation is possible. Thirdly, no example of such a regime is possible to find in modern international law, examples often given, as the EC and WTO, have lost their strength since the European Court of Justice and the Appellate Body of the WTO both have confirmed the integration of the systems with international law in Case Law. The highly refined interpretation of the term as a closed legal system is thereby no longer of interest.[21] According to Koskenniemi the notion of self-contained regime is misleading and "...there is no support for the view that anywhere general law would be fully excluded."[22] The focus of the discussion on the term self-contained regime has hence shifted from closed systems in international law to the more narrow definition of self-contained regimes as interrelated sub-systems in the field of international law with relationships to both general international law and other sub-systems in the international law.

With the case law mentioned in chapter two and the earlier work of the Special Rapporteurs in mind, The ILC in its final report on the topic on fragmentation of international law distinguishes three categories of the term self-contained regime. The first category, defining self-contained regime as a subcategory of lex specialis within the law of state responsibility, is a result of the conclusions drawn by the court in the Tehran Hostages Case. This is also the most common and practiced definition of the theory on self-contained regimes as of today. In the second category, the ILC interprets self-contained regime as a broader concept, a regime on a special geographical area or a substantive matter. In the third and last category, an even wider definition is introduced when the ILC interprets the term self-

[21] B. Simma and D. Pulkowski, 'Of Planets and the Universe, Self-contained Regimes in International Law' *The European Journal of International Law*, Vol. 17 no. 3 (2006), pp. 493 – 494, summing up the work of ILC's Special Rapporteurs Riphagen, Arangio-Ruiz and Crawford.

[22] International Law Commission, *Fragmentation*, *supra* note 11 para. 152 (5)

contained regime as a specific field of law, for example, trade law or humanitarian law, including all principles regulating the problem area.[23]

3.1 Subcategory of lex specialis on state responsibility

The definition of self-contained regime as a regime with special secondary rules on state responsibility corresponds to the use of the term by the ICJ in the Tehran hostages case: "…diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions."[24] The main prerequisite is that the primary rules in a specific treaty are accompanied by secondary rules managing possible breaches of the primary rules, thereby excluding the applicability of general international law on state responsibility.

The expressed prerequisite seems to conform to the general principle *lex specialis derogate lege generali*, special law derogates from general law in the same subject matter.[25] The rationale according to the ILC is that the special law is often more substantial, better adjusted to the specific context and creates a more equitable result.[26] Lindroos describes the principle as "a technique that directs the attention of the decision-makers to a more appropriate regulation."[27] The principle is not included in the Vienna Convention on the Law of Treaties (VCLT), which only concerns the question of *successive* treaties on the same subject matter and between the same parties.[28] The silence of the VCLT does however not exclude the use of the principle, international tribunals have used other principles on interpretation and the principles included in the VCLT are not exhaustive.[29] The lex specialis principle is included in the ILC Draft on State Responsibility, Article 55, which states:

> "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."

The principle leaves two important questions unanswered. Firstly, when does a norm have the character of special or general? Secondly, when do two norms deal with the same subject matter?

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[23] International Law Commission, *Conclusions*, *supra* note 3, para. 12
[24] *Tehran Hostages Case (United States of America* v. *Iran) supra* note 17, para. 83
[25] Shaw, *supra* note 7, p. 116
[26] International Law Commission, *Conclusions*, *supra* note 3, para. 7
[27] A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' 74 *Nordic Journal of International* Law (2005) p. 36
[28] Article 30 VCLT – Application of successive treaties relating to the same subject-matter
[29] Lindroos, *supra* note 27, pp. 36 - 37

According to the ILC, the application of the principle does not only presuppose two norms on the same subject matter, but also a conflict between the norms.[30] A conflict of norms according to the ILC is at hand when two norms are applicable and "...there must be some actual inconsistency between them..."[31] Priority has to be given to one of the conflicting norms since the application of one of the norms will violate the other norm. By using the definition of conflict above, it is also possible to define the expression the 'same subject matter':

> "...when two norms mutually exclude their own applicability in some regard, that is, the two norms cannot be applied at the same time to the same set of circumstances, then they must deal with the same subject matter and be in conflict."[32]

There is however a possibility to apply a broader definition of the principle of lex specialis. In this notion of lex specialis, no conflict of norms as defined above has to be at hand, instead the general norm is supplemented by the special norm. Thus, the norms overlap and support the same conclusion. If the norms do not overlap, they do not handle the same subject matter and the principle of lex specialis will not be applicable since no conflict is present.[33] When applying the principle of lex specialis to secondary rules, applying the later definition is more justified since secondary rules on e.g. state responsibility theoretically can be applied simultaneously without one of the norms being violated.

When the ICJ in the Tehran Hostages Case states that the specific rule of persona non grata excludes the applicability of rules on countermeasures in the general rules on state responsibility, the concept of self-contained regime seems to be synonymous with the principle of lex specialis - a specific rule replaces a more general rule in a specific case. However, when the court states that the effect of the self-contained regime is that the enforcement mechanisms at the disposal of the receiving state thereby are entirely efficacious, this indicates that the court refers to a more comprehensive system than a normal case of lex specialis on specific rules. The phrase 'entirely efficacious' implies that the regime is supposed to function isolated from the general rules on state responsibility. To what extent the rule of persona non grata replaces the general rules and what makes a treaty entirely efficacious is however not elaborated by the court.

The difference between lex specialis and the self-contained regime as a subcategory of lex specialis thereby has to be established. What makes a treaty a self-contained regime and not just a treaty with certain lex specialis norms?

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[30] International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts with commentaries*, 2001, p. 358 <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>
[31] *Ibid.*
[32] Lindroos, *supra* note 27, p. 45
[33] *Ibid*, p. 47

In its comments to Article 55 ILC Draft, the ILC subdivides the lex specialis principle into a weak and a strong form. The weak form covering "…specific treaty provisions on a single point..." and the strong form of lex specialis covering "…what are often referred to as self-contained regimes..."[34] In the comments the ILC does not define the strong form of lex specialis or its relationship to general international law,[35] but exemplifies it by referring to the inconclusive definitions given in the S.S. Wimbledon Case and the Tehran Hostages Case. The ILC thereby ends up with a circular argument that does not give us any answers to our questions.

According to Simma and Pulkowski, a self-contained regime is not the same as any legal subsystem within the international law, only legal subsystems that "…embrace, in principle, a full (exhaustive and definite) set of secondary rules"[36] are to be defined as self-contained regimes. The effect of the self-contained regime will be "...to totally exclude the application of the general legal consequences of wrongful acts as codified by the ILC."[37] Hence, the definition set up by Simma and Pulkowski corresponds to the definition given by the court in the Tehran Hostages Case, a so-called entirely efficacious system, but only within the field of state responsibility. A regime can be entirely efficacious by including lex specialis norms on all fields covered by the general law on state responsibility; a cluster of weak lex specialis provisions makes the regime a strong lex specialis regime. What separates the strong form of lex specialis from the weak according to Simma and Pulkowski is the possibility to exclude general law "by explicit provision or by implication, that is, by virtue of a regime's particular structure or its object and purpose."[38] It is thereby possible to exclude rules in general international law without replacing them with other rules on the same subject matter, as long as the state parties intentions are that the rules included should be exhaustive and general international law permits its exclusion. A residual character limits the principle, it is not possible to authorize acts not in conformity with peremptory norms of international law by referring to the principle, the special rule has to be of at least the same rank as the rule it is derogating from.[39]

When studying the Tehran Hostages Case it is obvious that the VCDR is neither entirely efficacious, nor embracing a full set of secondary rules. One of the most obvious indications is that the rule of persona non grata only

[34] International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts with commentaries*, *supra* note 30, p. 358
[35] "the general law on state responsibility" is the ILC Draft Articles on the Responsibility of States for International Wrongful Acts, 2001 (ILC Draft). Since ILC Draft is not a binding treaty, the actual binding rules on state responsibility intended are the ILC Draft's equivalence in international customary law. The ILC Draft does not have an exact copy in customary law, but most of the general rules are well recognized as customary law, See Dixon, Martin, Textbook on International Law, Oxford University Press, 5th edition, 2005, Page 228 f.
[36] B. Simma and D. Pulkowski, *supra* note 21, p. 493
[37] *Ibid.*
[38] *Ibid*, p. 490
[39] International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts with commentaries*, *supra* note, p. 357

relates to violations by one of the states parties to the dispute. Defining the VCDR as a closed system regarding state responsibility excludes the applicability of the general rules on state responsibility just as much for the state sending a diplomatic mission, as for the state receiving the diplomatic mission. Since the rule of persona non grata only applies to the receiving state, the sending state would be left without applicable rules on state responsibility and no way of responding to a violation.[40] As Simma and Pulkowski state, "...there is no ground for arguing that diplomatic law contains an exhaustive set of secondary rules."[41] Hence, labelling the VCRD as a treaty setting up an entirely efficacious system closed from general law on state responsibility and thereby defining it as a self-contained regime, has been widely criticized.[42] However, the fact that it is not possible to define the diplomatic law and the VCRD as a self-contained regime, does not exclude the possibility of other self-contained regimes in the field of state responsibility.

3.2 Geographical area or substantive matter

In its final report on fragmentation, the ILC opens up for the interpretation of the term self-contained as a system of rules covering a specific geographical area or substantive matter, such as rules protecting a particular river or rules on the use of a specific weapon.[43] The idea of the definition is based on the PCIJ judgement in the S.S. Wimbledon Case defining the provisions on the Kiel Canal as self-contained. It has been asserted that the PCIJ in this judgement opens up for the idea, or possibility, of a special regulation that diverges from the general international law. It can however be questioned whether such an interpretation of the judgment in the S.S. Wimbledon Case is possible. In the S.S Wimbledon Case, the PCIJ defines the hierarchy and relationship between two primary rules on the same subject matter to be able to interpret one of these rules. The outcome is that a specific rule is applied and interpreted without influence of a more general rule in the same treaty. The possibility of interpreting the S.S Wimbledon Case as an application of the "weak" form of the principle of *lex specialis* on the relationship between two primary rules therefore seem more reasonable than the extensive interpretation done by the ILC.

Simma and Pulkowski comment the use of the term self-contained in the S.S Wimbledon Case as follows: "the concept denoted a set of treaty provisions that can't be complemented through the application of other rules by way of analogy." and that "the debate on self-contained regime has narrowed down

[40] *See* Noortmann, *supra* note 4, p. 140, listing a number of arguments supporting the thesis.
[41] Simma and Pulkowski, *supra* note 21, p. 514
[42] *See* M. Noortman, *supra* note 4, p 140
[43] International Law Commission, *Conclusions*, *supra* note 3, para. 12

to the specific question of the ´completeness` of a subsystem's secondary rules".[44]

Koskenniemi expands upon the definition by stating that this type of self-contained regime consists of "interrelated wholes of primary and secondary rules ... that cover some particular problem differently from the way it would be covered under general law."[45] By including secondary rules into the definition, the resemblance to the strong form of lex specialis as described by the ILC in its comments on Article 55 ILC Draft accentuates and when exemplifying this notion of self-contained regime, Koskenniemi emphasises special rules on adoption, modification, administration and termination, rules of the second degree.[46] The final definition thereby moves away from the judgement of the S.S Wimbledon Case and towards the judgment of the Tehran Hostages Case and the notion of self-contained regime as a form of lex specialis on secondary rules. The main difference seems to be the possibility of defining self-contained regimes based on the existence of secondary rules on other fields besides state responsibility.

3.3 Specific branches of law

Whereas the first two categories of self-contained regimes both are founded in case law, the third category is an academic creation. The category is supposed to stretch even further than the second category on geographical area/subject matter. It does not only cover a specific area or matter as the second category above, instead, whole fields of international law are delimited as self-contained regimes. These fields coincide with some of the general disciplines in international law such as humanitarian law, environmental law, law of the sea and human rights law. According to the ILC, the purpose of expressing these fields of law as self-contained regimes is interpretative.[47]. Koskenniemi suggests that principles of interpretation can be more embedded in such a regime than in general international law with the effect that the self-contained regime provides "interpretative guidance and direction that in some way deviates from the rules of general law."[48] Once again, the exclusion of general international law is the main characteristic. Nevertheless, as Koskenniemi also notes, the problems of delimiting the different areas of law, and how to apply the theory in practice, are hard to solve. The main problem is to identify the exact features distinguishing these fields of law from a collection of treaties containing single rules with a general lex specialis character. According to Koskenniemi, the way general international law is affected is not constant and thereby no general effect is to be found. [49]

[44] Simma and Pulkowski, *supra* note 21, p. 492
[45] International Law Commission, *Fragmentation, supra* note 11,, para. 128
[46] *Ibid*, para.128
[47] International Law Commission, *Conclusions, supra* note 3, para.12
[48] *Ibid*, para.12
[49] International Law Commission, *Fragmentation, supra* note 11, paras. 129 - 132

Interpretative principles might exist in one of the fields mentioned by Koskenniemi and may be based in a specific treaty or in customary law. In both cases, an interpretative principle does not exclude all principles and rules on interpretation in general international law, treaty based and customary law. A more specific principle therefore bears a resemblance to the weak form of lex specialis.

To be able to define the term self-contained regime, the suggested definitions above help us out to some extent, it is however necessary to analyze the term in the context of general international law.

4 Self-contained regime and general international law

As mentioned above, the notion of self-contained regimes as closed legal systems is no longer considered as an intrinsic definition.[50] A self-contained regime thereby has to be able to interact with other subsystems and general international law. When trying to identify and analyze a set of rules (e.g. a specific treaty) that might fit the definition of self-contained regime the relationship to other subsystems and general international law must consequently be decided on. Questions as to what extent general international law can come in to fill possible gaps in the self-contained regime and to help in the interpretation and administration of the regime has to be answered. The ILC's final report on fragmentation manages these questions by stating:

> "(14) *The relationship between special regimes and general international law.* A special regime may prevail over general law under the same conditions as *lex specialis* generally."[51]
>
> "(15) *The role of general law in special regimes. Gap-filling.* The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant law will apply."[52]
>
> "(16) *The role of general law in special regimes: Failure of special regimes.* Special regimes or the institutions set up by them may fail [...] in the event of failure, the relevant general law becomes applicable."[53]

That a regime may prevail over general international law is a repetition of the purpose and the effect of a self-contained regime or the principle of lex specialis, rather than an answer to the question of the relationship established between such a regime and general international law. The role of general law in the regime and the possibility of gap filling are however of importance when defining the effects of a self-contained regime, and so is the possibility of failure of the regime.

In Chapter 4.1, I will discuss the possibility of defining how far the specialness of the rules in a self-contained regime extends and in Chapter 4.2, I will look into the possibility of fallback on general international law.

[50] See Chapter 3
[51] International Law Commission, *Conclusions, supra* note 3, para. 14
[52] *Ibid*, para. 15
[53] *Ibid*, para. 16

4.1 "how far does the specialness of the special treaty extend?"[54]

Most of the regimes that might qualify as self-contained are based on international treaties and thus the Vienna Convention on the Law of Treaties (VCLT) or its equivalence in international customary law applies when interpreting the regimes and their relation to other norms in international law.[55] It is however worth mentioning that the applicability of VCLT as the only applicable source of norms regarding the law of treaties has been questioned in relation to some specific fields of law, e.g. human rights law.

Articles 31 – 32 VCLT set up general and supplementary rules on interpretation of treaties, and these rules thereby apply when analyzing whether a specific treaty fulfils the prerequisite of a self-contained regime and to what extent a self-contained regime is supposed to exclude general international law. According to article 31 in the VCLT, the principle of ordinary meaning of a treaty is the primary rule of interpretation.[56] The ordinary meaning has to emerge in the context of the treaty and in the light of the object and purpose, this is summarized as the principle of integration.[57] The non-exhaustive list in Article 32 VCLT of supplementary means of interpretation can be used to confirm the result or to assist the principle of ordinary meaning, or to determine the meaning of the treaty when an interpretation in accordance with article 31 VCLT:

> "(a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."[58]

When establishing the intention of the state parties to a specific treaty regarding the relationship to general international law, it is the special rule that defines its relationship to the general international law,[59] thus, the treaty/treaties setting up the regime is the decisive factor.

When interpreting a treaty and its relationship to general international law, the result may differ depending on whether a universalistic or particularistic approach is applied.[60] A universalistic approach implicates that general international law is applicable as long as no derogation has been made, while a particularistic approach implicates the presumption that it is not

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[54] Simma and Pulkowski, *supra* note 21, p. 500
[55] Article 1 VCLT and M. Dixon, *Textbook on International Law* (Oxford University Press, 2005) p. 55
[56] Article 31.1 VCLT
[57] I. Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) p. 604
[58] Article 32 VCLT
[59] International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts with commentaries*, *supra* note 30, p. 357
[60] See Chapter 1.4 on delimitations of the thesis regarding universalistic and particularistic approaches.

possible to apply general international law as long as this has not been clearly justified. Koskenniemi and the ILC apply a universalistic approach. When discussing a special regime Koskenniemi states "...general international law – supplement it to the extent that no special derogation is provided or can be inferred from the instrument(s) constituting the regime".[61] States have to contract out from general international law and if no such derogation is to be found with the help of the rules on interpretation, general international law is applicable. Thus, when applying the rules on interpretation to the first category of self-contained regime (lex specialis on state responsibility), the main purpose is to find out whether the state parties intended the regime to be exhaustive in the specific field of secondary rules or not. If no such intention is to be found, the parties did not intend the regime to be exhaustive and the treaty is not a self-contained regime in that specific field of law.

When establishing which fields that the state parties intended to be self-contained, this implicates that all other fields of law with rules of the second degree in general international law, on e.g. interpretation or attribution will still be applicable since the state parties have not intended to contract them out. The applicability of general international law in the fields where the self-contained regime does not have the "special character" has been confirmed by the European Court of Human Rights regarding the relationship between general international law and the European Convention in the Bankovic Case:

> "More generally, the 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," [62]

Analyzing the VCDR, a self-contained regime pursuant to the ICJ statement in the Tehran Hostages Case, it does not contain any specific provisions on the exclusion of general international law on state responsibility. The wording does not directly exclude general law and the context, in the form of the preamble of the treaty, states "Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."[63] The wording of the statement in the non-binding preamble on the relationship with general international law rather suggests the applicability of the general law than the exclusion of it if not expressly regulated. The absence, or silence, on the relationship to specific parts of international law is also to be found in the EC Treaty and the WTO Dispute Settlement Understanding, two regimes

[61] International Law Commission, *Fragmentation, supra* note 11, para. 152
[62] *Bankovic and others* v *Belgium and others*, 12 December 2001, ECHR, Decision as to the admissibility, para. 57, http://cmiskp.echr.coe.int/tkp197/view.asp?item=10&portal=hbkm&action=html&highlight=belgium&sessionid=5751491&skin=hudoc-en visited on 26 of February 2008
[63] Preamble of VCRD

often referred to as examples of self-contained regimes.[64] This indicates that the ordinary meaning including a justification for the specialness of a regime, is not always to be found in the precise wording of the analyzed text, instead, it often seems to originate from the context as defined in Article 31 (2) VCLT and/or the object and purpose of the regime. A second possibility is that the specialness of a regime is not to be found in the ordinary meaning of the treaty text, but by using the supplementary means of interpretation in Article 32 VCLT.

4.2 The possibility of fallback

When the boundaries of a certain self-contained regime are more distinct, it is easier to decide on when to apply the special norms of the regime and when to apply the general international law. According to the ILC, the regime might however fall back on the general international law if the special regime fails.[65] What happens if a self-contained regime, with its special rules on state responsibility, is not capable of handling a breach of one of its primary rules? Alternatively, if a self-contained regime with its own rules on interpretation cannot get an acceptable result when interpreting a certain provision? A commonly used example of a situation creating this type of problem is a continuous violation of a treaty obligation where all special rules and procedures of the regime are exhausted without reaching the intended effect. In such a situation, is a fallback on general international law acceptable in spite of the fact that the regime is self-contained in that specific field of secondary rules, e.g. on state responsibility?

The first question that arises is if a fallback on the general international law is an overall possibility. Is there an exception from the main rule that a self-contained regime excludes the applicability of the general rules on the specific field of secondary rules? If no such exception exists, the result will be that a breach of a rule in an international treaty might pass by unnoticed by general international law on state responsibility.

As when defining which field of secondary rules that are self-contained in a specific regime, the focus has to be on the state parties to the treaties and their intentions. States that have chosen to contract out general international law on state responsibility regarding breaches of specific rules of the first degree with the help of a self-contained regime, did they intend the possibility of a fallback? Since the common examples of self-contained regimes do not contain any explicit statements regarding the possibility of fallback, the interpretation has to focus on the context and the object and purpose of the regimes, which might shift from different regimes.

While Koskenniemi does not reflect over the possibility of different objects and purposes between different regimes, Simma and Pulkowski believe that

[64] Simma and Pulkowski, *supra* note 21, p. 501
[65] International Law Commission, *Conclusions*, *supra* note 3, para. 16

the speciality of the rules and the fact that states put the effort into creating the self-contained regime supports the possibility of fallback since these factors demonstrate a strong commitment. This strong commitment then indicates a will to enforce the commitments with the help of general international law when necessary.[66] Thus, an intention to allow a fallback is generally to be interpreted into the object and purpose of a self-contained regime. When accepting that a fallback on general international law is possible, the next question is when such a fallback is possible.

According to the ILC, a fallback on general international law becomes applicable when the special regime fails.[67] The definition of 'failure is however moot and unclear. The ILC mentions a regime whose institution is not able to fulfil its purpose, and as mentioned above, persistent non-compliance by a state party, as examples of failure. Whether a regime has failed or not must be estimated in the specific case with the help of the constitutional instruments of the regime.[68] Koskenniemi divides failure into substantive failure and procedural failure.[69] The substantive failure is equated with a regime failing to fulfil the purpose it was created to attain, as the examples given by the ILC in its final report. A procedural failure is connected to institutions set up by a regime, when an institution is not able to function in the way it is supposed to, it is defined as a failure. Koskenniemi draws an analogy from the rule on exhaustion of local remedies, that a failure is manifested when the regime's institutions or rules on state responsibility are unavailable, ineffective or if it otherwise would be unreasonable to expect recourse to it.[70]

Simma and Pulkowski use the principle of effective treaty interpretation, *ut res magis valeat quam pereat*, that a treaty should be interpreted so that it is not ineffective,[71] to justify the view that the more specific mechanisms of control have priority over the more general international law on state responsibility only as long as the mechanisms are effective.[72] Since

> "...it cannot be easily inferred that a state was willing to give up 'the rights of *facultés* of unilateral reaction it possessed under general international law' by complementing special primary obligations with a specific set of secondary obligations."[73]

The state parties to the self-contained regime only gave up on the general international law as long as the special procedures and rules prove efficacious.

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[66] Simma and Pulkowski, *supra* note 21, p. 507
[67] International Law Commission, *Conclusions, supra* note 3, para. 16
[68] *Ibid*.
[69] International Law Commission, *Fragmentation, supra* note 11, paras. 188 - 190
[70] *Ibid*., para.152 (4)
[71] U. Linderfalk, *Om tolkningen av traktater* (Studentlitteratur i Lund, 2001) p. 247
[72] Simma and Pulkowski, *supra* note 21, pp. 508 - 509
[73] *Ibid*, p. 508

5 Concluding remarks

5.1 The definition(s)

A major problem with the ILC definition of the term self-contained regime, is the breakdown into three possible types of definitions. Earlier mentioned Case law on the subject is unclear and leaves more of an abstract idea rather than a theory with clear prerequisites. Instead of narrowing down the definition, the widening of the concept into three different definitions makes it almost intangible. Not only are the three different definitions vague, they also lack clear-cut boundaries which makes it even more unclear when to apply which definition. By trying to cover a wide range of possibilities with the help of the three definitions, the ILC therefore ends up with a set of definitions that are unpractical and impossible to apply. The reason for the wide definition/definitions may be political or other, nonetheless, the result is that it does not give any clear guidance on the question of what constitutes a self-contained regime. It is however possible to read out some useful guidance from the ILC definitions.

The first of the revisited definitions, self-contained regime as a strong form of lex specialis on state responsibility, is clearly the most elaborated definition of the term self-contained regime. Specific rules replace the general law on the same subject matter. However, The ILC does not answer the question of what the difference is between a normal case of lex specialis and the subcategory of self contained-regimes. Simma and Pulkowski give a better answer to this question, the term is reserved for subsystems that "embrace a full, exhaustive and definite, set of secondary rules" and "...the principal characteristic of a self-contained regime is its intention to totally exclude the application of the general legal consequences of wrongful acts...".[74] The category thereby seems to have a clear-cut prerequisite. The question of in what ways this autonomy can be attained then arises. Once again, the ILC does not answer the question, and we will have to turn to Simma and Pulkowski whose views on the question are possible to summarize in three ways in which a treaty may constitute a self-contained regime:

- A cluster of norms with a lex specialis character in the treaty covers a field of secondary rules in the same subject matter as the general international law that thereby is excluded.

- A single norm in the treaty explicitly excludes the applicability of the general international law on a specific field of secondary rules.

- The structure, object and purpose of the treaty implicate an exclusion of the general international law on a specific field of secondary rules.

[74] *Ibid*., pp. 492-493

The second ILC definition, self-contained regime as geographical area or substantive matter, bears a strong resemblance to the earlier definition, but introduces other possible fields of secondary rules than state responsibility that exclude international general law. According to the ILC, the different categories will float into each other, and are to be seen as different approaches to the problem of special regimes, not clearly defined phenomenon's in international law.[75] Hence, a treaty might be self-contained in more than one of the three notions. It should however be possible to integrate the first and second definition.

The first and second definition set up by the ILC can consequently be summarized in a single new definition, *self-contained regime as a form of lex specialis on a field of secondary rules.* Nothing in international law hinder state parties to develop regimes including exhaustive systems on other fields of secondary rules than state responsibility, a possible non-existence of such regimes today is not to be mistaken for a theoretical impossibility.

The third definition given by the ILC in its final report on fragmentation (specific branches of law) has no common denominators with the first and second definitions above more than the result of a possible exclusion of general international law. A principle on e.g. interpretation may affect a single case when balancing it against other principles of international law. Since no clear boundaries are defined and there are no rules on when the principles have the effect of exclusion of general law, the definition is however of no help when analyzing international law from the perspective of self-contained regimes. The principles on interpretation will be able to replace some general rules on interpretation, but not more than single rules. Hence, this third definition is not comparable to a self-contained regime but a case of lex specialis on a single provision and thereby no further analysis of this definition will henceforth be carried out in this thesis.

5.2 The relationship to general international law

As mentioned above, it is now clear that the three definitions by the ILC are too wide and do not offer much help in trying to decide on whether a specific treaty constitutes a self-contained regime. Instead, we have to focus on the definition given by Simma and Pulkowski and the three possible ways to attain the autonomy that follows from the status of a self-contained regime.

Both in defining a set of rules as a self-contained regime and when drawing the line between the regime and general international law the rules in the

[75] International Law Commission, *Fragmentation, supra* note 11, para. 135

VCLT on interpretation of treaties are the main tools to be used in international law. The interpretation of the regime has to focus on the context and/or the object and purpose of the regime when the state parties have made no clear textual statement. The intention of the state parties has to be defined to be able to clarify if and to what extent a certain set of rules constitute a self-contained regime. This is to be done by interpreting the context and/or the object and purpose of the regime.

When discussing the possibility of fallback on general international law, it is once again the intention of the state parties that are the decisive factor. Both the ILC and Simma and Pulkowski end up accepting a fallback when the outcome in the self-contained regime is no longer effective or has failed to execute its object and purpose. Following Simma and Pulkowski a possibility of fallback is to be interpreted into the object and purpose of a self-contained regime. The fact that general international law on other fields of secondary rules continues to be applicable and thereby fills the gaps, is a reminder that the notion of self-contained regime as a closed legal-circuit is not acceptable. What has not been contracted out from is thereby still applicable.

6 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral human rights treaty with 160 parties as of today and its provisions entered into force in March 1976,[76] and it is thereby one of the major international human rights documents. The treaty consists of a normative part that defines the different rights and freedoms, and an administrative part that lays down a structure for the monitoring of the state parties implementation of the earlier mentioned normative part of the treaty.

The normative part of the treaty contains all the basic human rights such as the right of peoples to self-determination (article 1), the right to life (article 6), the prohibition on slavery and torture (article 7 and 8), the right to liberty and security of the person (article 9). These rules are norms of the first degree, thus, the obligations and rights that the state parties have to live up to.

The administrative part of the ICCPR contains secondary rules and is complemented by the first Optional Protocol that sets up a mechanism for an individual complaint possibility. It is the administrative secondary rules and thereby the enforcement mechanisms that might qualify the ICCPR as a self-contained regime in the field of state responsibility by excluding general international law on state responsibility.

The possibility to define a human right treaty as a self-contained regime was first touched upon by the ICJ in the *Nicaragua Case*, although the specific term self-contained regime was not used by the court.[77] In the Nicaragua Case, the main justification given by the United States of its support to the Contras in Nicaragua was a right to collective self-defence, this justification was however rejected by the ICJ.[78] The court therefore examined the possible justification of countermeasure. The United States believed Nicaragua not to be following the expected level of action in the field of human rights. A list was presented with alleged breaches of human rights and humanitarian law and changes the United States were expecting from Nicaragua.[79] These breaches of international law would then constitute a right for the United States to use countermeasures according to general international law. When evaluating the justification of countermeasure, the ICJ states:

[76] <http://www2.ohchr.org/english/bodies/ratification/4.htm> visited on 22 February 2008
[77] *Case concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua* v. *United States of America)* 27 June 1986, ICJ, http://www.icj-cij.org/docket/files/70/6503.pdf visited on 2 february 2008
[78] *Ibid*, para. 248
[79] *Ibid*, para. 169

> "The Court also notes that Nicaragua is accused by the 1985 finding of the United State congress of violating human rights. This particular point requires to be studied independently of the questions of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where 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 for in the convention themselves."[80]

The ICJ points out the monitoring functions in human right conventions as exclusive remedies, the possible forms of protection is provided within the convention, in the Nicaragua Case, the American Convention on Human Rights (ACHR). The ICJ does however open up for the application of general international law since the monitoring functions was considered exclusive only if "the mechanisms provided for therein have functioned."[81] If the mechanisms had not functioned, this would not mean that the violations would pass by unnoticed by international law. Thereby the monitoring functions exclude the possibility of countermeasures in general international law, as long as the monitoring functions are functioning effectively, thereby "preventing a potential 'effectiveness gap' in human right treaties."[82]

The statement by the ICJ above seems to conform to the authors own merged definition of a self-contained regime as a form of lex specialis on a field of secondary rules.[83] The ruling also opens up for the possibility of fallback as defined in chapter four. The ICJ does however not discuss the problem of how far the speciality of the regime extends.

A more in depth description of the administrative institutions of the ICCPR will be now be carried out in chapter 6.1 and will be followed by a study of the nature of the obligations of the ICCPR in chapter 6.2.

6.1 Enforcement mechanisms

ICCPR contains four different enforcement mechanisms. These are, the reporting system the member states has to comply with, general comments made by the committee, the individual complaint mechanism in the Optional Protocol to the International Convention on Civil and Political Rights (first Optional Protocol), and the inter-state complaint procedure.

Article 28 in the ICCPR establishes the Human Rights Committee (HRC), and the main task of the HRC is to monitor the implementation of ICCPR by the state parties with the help of the above-mentioned mechanisms. The

[80] *Ibid*, para. 267
[81] *Ibid*, para. 267
[82] Simma and Pulkowski, *supra* note 21, p. 525
[83] *See* chapter 5

HRC adopts its own rules of procedure without any need of approval of other organs. The rules may however not deviate from the ICCPR and its optional protocol or conflict with the rules on interpretation in the VCLT.[84] As will be discussed below, the HRC is not a formal judicial or legislative body.

6.1.1 The periodic reporting system

According to Article 40 (1), the state parties shall submit reports "on the measures they have adopted which effect to the rights recognized"[85] in the covenant to the HRC on a regular basis. The reports are supposed to follow a general reporting guideline set up by the HRC.[86] Members of the civil society have the possibility to compile a so-called shadow report giving an alternative perspective on the official state report. The HRC then examines the report in a dialogue with state representatives and sets out the result in a written concluding observation consisting of comments on the state party's implementation of the convention, and recommendations on areas concerning the HRC.[87] The function of the HRC in the reporting system is to support the State parties in the implementation of the ICCPR, not solely to judge on possible violations by the reporting state.[88] Since many states have failed to hand in its periodic reports new rules have been adopted by the HRC inferring that if a state fails to provide the committee with the necessary reports, the committee will assess the states behaviour in their own discretion. A Special Rapporteur has been set up to follow the development after concluding observations and reports to the HRC when needed.[89]

6.1.2 General comments by the committee

Article 40 gives the committee competence to issue general comments addressed to all state parties, according to Article 40 (4) the HRC "...shall transmit...such general comments as it may consider appropriate..." By doing this the HRC is supposed to clarify and analyze the articles of the covenant. The general comments adopted by the HRC contain both interpretative statements of certain normative provisions and comments on

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[84] I. Boerefijn, , *The Reporting Procedure under the Covenant on Civil and Political Rights – practice and procedures of the Human Rights Committee*, (Intersentia, 1999), p. 36
[85] Article 40 (1) ICCPR
[86] Human Rights Committee, *Consolidated guidelines for State reports under the International Covenant on Civil and Political Rights*, (CCPR/C/66/GUI/Rev.2.) <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.66.GUI.Rev.2.En?Opendocument> visited on 26 february 2008
[87] Office of the High Commissioner for Human Rights, Fact Sheet 15, p. 19
[88] Boerefijn, *supra* note 84, p. 202
[89] Human Rights Committee, *General Comment No. 30: Reporting Obligations of States parties under article 40 of the Covenant*, (CCPR/C/21/Rev.2/Add.12.) <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c4007d6e34e519a1c1256eac002f3173?Opendocument> visited on 26 February 2008

the administrative obligations by the state parties.[90] In some of its concluding observations under the reporting system, the HRC has included references to general comments to be taken into account by the state.[91]

6.1.3 Inter-state complaint procedure

The inter-state complaint procedure offers the possibility for a state to complain to the committee regarding another state's infringement of the convention. Article 41 opens up the possibility for a state to transfer competence to the committee to receive and consider inter-state complaints. Unlike the obligation to submit reports according to Article 40, the possibility of transferring the competence to the HRC is optional for the parties and reciprocity is a prerequisite for an inter-state procedure to take place. According to Article 41, the accused state party shall explain the behaviour in question within three months. If a time of six months goes by without the matter being settled with satisfaction to both states, a right realizes for any of the two states to refer the matter to the HRC. The committee will try to find a friendly solution with the help of its good offices, thereafter a report will be submitted on the topic. If the matter still is not resolved to the satisfaction of the state parties, Article 42 opens up for the establishment of a reconciliation committee. As of today, no inter-state complaint has been lodged and tried by the HRC.

6.1.4 Individual claim procedure

Under the first Optional Protocol, states recognise the competence of the HRC to receive and consider claims from individuals.[92] This additional fourth monitoring mechanism thereby strengthens the focus on the individual as an actor in international law. The Optional Protocol is not compulsory, its individual claim procedure is optional and communications may only be received if they relate to a State Party to the Protocol.[93] For a complaint to be considered by the HRC the conditions on admissibility in Articles 1 – 5 in the Optional Protocol must be fulfilled. When a case is submitted, the HRC might request the state to take interim measures to preserve the rights of the parties. According to Article 5 (4), the HRC then concludes its findings regarding the possible violation in the case in views, which are communicated to the plaintiff and the state in question. If violations of the statute are found, the committee requests the state to remedy the violation according to article 2 (3) of the ICCPR and might recommend a suitable form of remedy.

[90] A complete list of the general comments is to be found at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> visited 22 February 2008
[91] Boerefijn, *supra* note 84, p. 298
[92] Article 1 First Optional Protocol to the ICCPR
[93] Article 1 First Optional Protocol to the ICCPR

It is the four enforcement mechanisms above that might qualify the ICCPR as a self-contained regime, thereby excluding the applicability of general international law on state responsibility. To be able to decide on whether exclusion is possible or not, the nature of the obligations in the ICCPR have to be further studied.

6.2 The nature of the obligations

The nature of the obligations in a specific treaty gives indications of the relationship between the obligations in the treaty and general international law, enabling us to fit the obligations into a hierarchy of sources in the international law. No formal hierarchy is to be found in the general international law, but Article 38 in the Statute of the International Court of Justice is descriptive of the sources of international law, and said to give an informal hierarchy of these sources.[94] The concept of jus cogens further strengthens the idea of a hierarchy in international public law.

6.2.1 The principle of Pacta sunt servanda

Being an international agreement between states, the principle of *pacta sunt servanda* applies to the ICCPR. The principle that treaties are binding upon the state parties and that state parties are to perform their obligations in good faith, is part of international customary law and reaffirmed in article 26 VCLT.[95] When the HRC in a General Comment states, "The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole." [96], the principle is further established by the committee in relation to the ICCPR. The binding nature applies to the treaty as a whole, both the individual rights and the obligations of administrative nature such as the obligations to set up effective remedies and to adopt the legislative measures needed.[97] However, while the principle of *pacta sunt servanda* clarifies the nature of obligations in the ICCPR treaty, the comments, views, decisions and reports springing from administrative institutions created by the treaty (HRC) are not covered by the principle. The legal status of the committee's work might seem unproblematic. Since not covered by the *pacta sunt servanda* principle, they are not binding to the state parties with the effect that a state party is not obliged to cease a behaviour violating the norms of the ICCPR because of a view from the committee stating a violation. The non-binding character does however not mean that these views and comments have no influence what so ever on the relationship between the state parties, an intention to give them a normative effect might

[94] International Law Commission, *Fragmentation, supra* note 11, para. 85
[95] Shaw, *supra* note 7, p. 811
[96] Human rights Committee, *General comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13.) <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument > visited on 26 February 2008
[97] Articles 2 (2) and 2 (3) ICCPR states the administrative obligations mentioned.

still exists. Scheinin and Lewis-Anthony try to avoid the problem of the non-binding character by accepting it, but at the same time referring to the views as "authoritative pronouncements on the legal obligations" not to be seen as mere recommendations.[98] Even if it is possible to refer to the views in the interpretation of the treaty, this does however not change the legal status of the non-binding views. Thus, the act of not following the recommendation given in a view is not a breach of international law since the enforcement measure in the ICCPR does not lead to binding judicial decisions. The behaviour violating a normative rule in the treaty is however not conformable with international law. The obligations in the treaty are still applicable and binding and the behaviour of a state might still be in breach of one or more of these obligations. This implicates that a specific incident tried in the committee under the first Optional Protocol, during the reporting system or inter-state complaints does not have the character of *res judicata* in international law. The admissibility-criteria in article 5 (2) (a) first Optional Protocol, stating that if the same matter is being examined under another procedure in international investigation or settlement the committee shall declare the communication inadmissible, is not to be mistaken for an expression of res judicata. The communication will only be declared inadmissible as long as the same matter is pending under another procedure during the course of the admissibility being considered by the HRC.[99]

6.2.2 Erga Omnes

Most international agreements are of a multilateral character and can thus be diverged into several bilateral relationships between the state parties. As mentioned earlier, the beneficiaries of the ICCPR are individuals and not states and thereby, the normal division into bilateral relationships mentioned is not possible since it is not one state, e.g. state X, with separate obligations towards the other state parties, A,B,C and D. That the fundamental human rights are obligations *erga omnes*, obligations not only towards the single state but also towards the international community as a whole, was established in the Barcelona Traction Case where ICJ states that:

> "…an essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another state….By their very nature the former are the concern of all states…" and that "such obligations derive, for example, in contemporary international law, from the outlawing of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person…" [100]

[98] S. Lewis-Anthony and M. Scheinin, 'Treaty-Based Procedures for Making Human Rights Complaints Within the UN System' in H. Hannum (ed.), *A Guide to International Human Rights Practice*, (Transnational Publishers, Inc. 2004) p. 51

[99] M. Nowak, , *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (N.P. Engel,Publisher, 2005) p. 875

[100] *Barcelona traction. Light and Power Company, Limited, (Belgium* v. *Spain)* 5 February 1970, ICJ, p. 32 < www.icj-cij.org/docket/files/50/5387.pdf> visited on 13 January 2008

The nature of the rules of the ICCPR as erga omnes is confirmed by the HRC when referring to the obligation to promote human rights in a General Comment on the legal obligation of the state parties, "every State Party has a legal interest in the performance of every other State Party of its obligations."[101] It can however be questioned whether all human rights in the ICCPR are *fundamental* and thereby of an erga omnes character. If the answer to this is found to be negative, the non-fundamental rights and obligations are to be considered as *erga omnes partes*, obligations towards the group of states parties to the treaty and established for the protection of a collective interest. Thus, not obligations towards the international community as a whole.[102]

The effect of defining a provision as erga omnes is that all states have a legal interest in the compliance of the obligation and thereby have a possibility to invoke state responsibility as non-injured states according to Article 48.1 (b) ILC Draft. The nature of obligations as erga omnes also affects the possibility of countermeasures as an enforcement measure in general international law on state responsibility. Suspension of obligations according to Article 49 (2) ILC Draft is not possible regarding erga omnes obligations since it will affect not only the defaulting state. Article 50 (1) (b) ILC Draft, stating that countermeasures shall not affect "obligations for the protection of fundamental human rights" confirms this. Thus, even a state not a party to the ICCPR might have a legal interest to a breach by a state party, if the obligation is of erga omnes character. In general international law, this would imply a possibility to invoke state responsibility according to Article 42 ILC Draft.

The enforcement mechanisms in the ICCPR are thus legally binding obligations, and obligations of erga omnes or erga omnes partes character. The administrative results springing from the enforcement mechanisms are however not legally binding. As will be shown below, this will affect the possibility to define the ICCPR as a self-contained regime.

[101] Human Rights Committee, General comment No. 31, *supra* note 96, p. 1
[102] International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts with commentaries*, *supra* note 30, p. 320

7 ICCPR and general International Law

Do the enforcement mechanisms in the ICCPR affect the applicability of general law on state responsibility? Have the state parties by setting up the enforcement mechanisms excluded the use of enforcement measures in general international law? And does the ICCPR thereby embrace, in principle, a full (exhaustive and definite) set of secondary rules which is intended to more or less totally exclude the application of the general legal consequences of wrongful acts? As described in chapter 3, it is possible to exclude the general international law on state responsibility by a cluster of lex specialis norms, by explicit provision or by implication. In this chapter, I will examine all three possibilities in relation to the ICCPR.

7.1 Exclusion by explicit provision

The easiest way to establish the intention of the state parties to a treaty is when an explicit provision in the treaty handles the concerned question. If a provision that clearly expresses a will to exclude general law in a certain field of secondary rules were to be found in a treaty, the wording of the provision would then, according to article 31 VCLT, be interpreted to exclude the applicability of general international law on the specific topic. The ICCPR does however not contain any such explicit provisions excluding the applicability of any field of secondary rules in general law and hence, it is not possible to draw the conclusion that the ICCPR is to be considered a self-contained regime by such an explicit provision.

7.2 Exclusion by a lex specialis cluster

As described in Chapter 3, it is possible to exclude the application of general international law on state responsibility by including specific rules in a treaty covering all subject matters handled by general international law on state responsibility.

When applying the principle of lex specialis to the enforcement measures stipulated in the ICCPR, the question of whether the enforcement measures handles the same subject matter as the general international law on state responsibility has to be decided upon. As discussed above in chapter 3, the prerequisite of the same subject matter can be read in a number of ways. The ILC interpret the same subject matter narrowly, claiming a need of a collision between the compared norms, an interpretation that however is not suitable when analyzing secondary rules. Another alternative is a broader

definition that does not exclude a simultaneous applicability.[103] We will now turn to the ICCPR to study to what extent its enforcement mechanisms, one by one, handle the same subject matter as general international law on state responsibility.

The different enforcement mechanisms of the ICCPR all handle the consequences of a potential breach of international law. Consequences of such breaches are normally handled by the ILC Draft on State Responsibility in general international law. Procedures for enforcement such as the ones established in the ICCPR and its first Optional Protocol compete with the first chapter of part three of the ILC Draft, Invocation of the responsibility of a state, containing rules on who that may present a claim. They also compete with the rules defining the consequences of international wrongful acts handled by part two in the ILC Draft.

Simma and Pulkowski analyze the different types of enforcement mechanisms normally set up in human right treaties in comparison to the above-mentioned parts of the ILC Draft to examine whether the enforcement mechanisms are to be defined as leges specialis to the general international law. Simma and Pulkowski begin with the individual claim procedure, which they consider not to be leges speciales to the ILC Draft since:

> "The scope of the ILC Articles is limited to the right of *states* to invoke the responsibility of other states. They have no bearing on the question whether, and under which conditions, individuals are entitled to present claims or to request remedies."[104]

It is correct that the articles in question do not include provisions on individual claims, but the topic of the articles in the ILC Draft is "invocation of the responsibility of a State"[105] and not invocation *by a state* of the responsibility of a state. Both regulations handle the responsibility of a state. By using a wider definition of the same subject matter, the individual complaint mechanism can be defined as lex specialis to the rules in general international law on state responsibility, since both regulations handle the question of invocation of the responsibility of a state. The consequences of such an interpretation would however not be reasonable. Excluding the possibility of a state to invocate the responsibility of another state would mean that if no individual complaint were made regarding a specific violation, no party would be able to invocate the responsibility of the violating state in question. The individual complaint mechanism by itself can thereby not be considered as lex specialis to the rules in the ILC Draft.

When analyzing reporting procedures, Simma and Pulkowski use the same type of argument as above concluding that reporting procedures are not lex specialis to the general rules on state responsibility since, "The Articles on

[103] See Chapter 3.1
[104] Simma and Pulkowski, *supra* note x, p. 525
[105] ILC Draft, Part three, chapter 1, headline

state responsibility are concerned with the legal consequences of concrete breaches. Reporting procedures are not."[106] The argument does however have a flaw; a reporting procedure that allows the HRC to ask questions and follow up on a state report may be concerned with specific violations.[107] It is however a problem that the reporting procedures are mainly focused on the implementation of the treaty. If the reporting procedure would replace the possibility to invoke state responsibility in general law, a number of questions would emerge - would it only replace the possibility when a report is concerned with a specific violation? Moreover, how would it be possible to decide when not only comments on the implementation are at hand, but a judgement on a specific violation? Since there are no general answers to these questions, the reporting procedures in the ICCPR cannot be regarded as lex specialis to the rules in the ILC Draft.

By excluding the possibility of a self-contained regime based on individual complaint mechanisms and reporting systems, Simma and Pulkowski believe that the special monitoring mechanism has to consist of an inter-state procedure of judicial character that addresses concrete breaches of the treaty. To sum up, Simma and Pulkowski state:

> "To the extent that a human rights treaty contains such procedures for inter-state claims, states are barred from invoking the responsibility of another state through other channels."[108]

The inter-state complaint procedure in the ICCPR thereby seems to be the only possible enforcement mechanism left that might be lex specialis to the rules in the ILC Draft. The problem with the inter-state complaint procedure in the ICCPR is the legal status of the procedure. As described in Chapter 7.2.1 a final report springing from the inter-state complaint procedure is not binding to the parties to the dispute in a strict legal sense. The judicial character is thereby missing. It could however be argued that demanding a binding character is to interpret the same subject matter too narrowly, and that an inter-state procedure as the one in the ICCPR thereby could be considered as lex specialis to the rules in the ILC Draft. The main problem of the inter-state complaint procedure in the ICCPR is however that it is optional, and the fact that no state has lodged a complaint as of today. It is thereby hard to draw any general conclusions on its possible lex-specialis relationship to the rules in the ILC Draft.

There is a risk when narrowing down the same subject matter, as Simma and Pulkowski do, that almost no norms will handle the same subject matter and thus, the principle of lex specialis will not be able to give any guidance when analyzing the relationship between special and general international law. If a number of states have the intention to create a system handling certain questions of state responsibility in an alternative way compared to the general international law, they will have great difficulties achieving this

[106] Simma and Pulkowski, *supra* note 21 , p. 525
[107] *See* Chapter 6.1.1
[108] Simma and Pulkowski, *supra* note 21, p. 526

as long as the alternative is not almost an exact copy of the general law. On the other hand, it is also important not to interpret the same subject matter too broadly when applying the principle of lex specialis to single norms. The consequence of such an interpretation would be a constant uncertainty on whether the applicability of norms in general international law has been excluded or not.

It is thereby not possible to find a cluster of lex specialis norms in the ICCPR that is exhaustive and thereby intended to exclude the applicability of the rules in the ILC Draft. We will now have to turn to the possibility of exclusion by implication.

7.3 Exclusion by implication

Since it is not possible to exclude the application of general international law on state responsibility by referring to a complete set of lex specialis rules on state responsibility in the ICCPR, and since no clear provision in the statute stipulates that the secondary rules on state responsibility in general international law will not apply, exclusion by implication is the only remaining possibility to define the ICCPR as a self-contained regime.

To be able to exclude the applicability of general law on state responsibility by implication we will have to turn to *the rule of necessary implication,* a supplementary rule of interpretation following article 32 VCLT. The meaning of the rule of necessary implication can be summarized as follows: if it, at the interpretation of a treaty, can be shown that a term or norm can be implied from the treaty and if this implication is necessary, the treaty should be understood and interpreted in a way that is in accordance with the implied term or norm.[109] The possible implication is to be found in the object and purpose of the treaty and not with the help of the ordinary meaning of the text in the treaty.[110] The object of the rule of implication is to make sure that an interpretation of a treaty does not contribute to a result where the treaty is normatively ineffective.[111]

By turning to the possibility of implied norms, a new dimension is added to the interpretation of a treaty, it is not only the wording of the text in the treaty that is of interest to the interpreter. A norm that is deduced with the help of the rule of necessary implication has the same binding character to the state parties as a norm printed out in the treaty text.

When studying the possibility of implied norms, a wider definition of the same subject matter has to be applied compared to when studying the relationship between singular norms with the help of the principle of lex specialis. The interpreted treaty will not necessary contain rules on all

[109] Linderfalk, *supra* note 71, p. 322
[110] *Ibid*, p. 323
[111] *Ibid*, p. 326

subject matters handled by the general international law, but the general international law will still be excluded if the state parties so intended. It is the structure, object and purpose of the treaty that opens up for the possibility of exclusion and not the specific enforcement mechanisms. This is the main character that separates exclusion by implication from a normal case of lex specialis. When focusing on the question of the same subject matter Simma and Pulkowski thereby seem to forget that we are no longer trying to apply lex specialis on single norms. What we are now looking for are implications that might be found in the specific treaty that support the state parties intention to exclude general law on state responsibility no matter if they have chosen to substitute all of it or not.

The decisive factor is thus whether the state parties to the ICCPR intended the convention to be self-contained in the area of state responsibility or not. To be able to conclude on whether the state parties intended such an exclusion of the general international law on state responsibility or not, I have tried to set up arguments both in support of exclusion and against exclusion.

7.3.1 Arguments in support of exclusion

It can be argued that certain indications of a will of the state parties to exclude the applicability of the general international law on state responsibility are to be found in the ICCPR.

The mere fact that different enforcement mechanisms has been set up in the treaty can be interpreted as an intention by the state parties to handle questions of state responsibility within the regime of the ICCPR instead of general international law. If the general international law on state responsibility were to be applicable, there would be no need to set up the enforcement mechanisms that are found in the ICCPR.

Another possible argument to exclude the applicability of the general international law on state responsibility is based on the nature of the ICCPR as a human rights treaty. It can be argued that the speciality of the human rights branch in international law makes it inadequate for the ILC Draft to handle breaches of the ICCPR. Human rights treaties provide rights to individuals and thereby have a third party as beneficiary. Of course, the treaty has a contractual basis between states, but this does not affect the actual beneficiaries. This feature is a new tendency in international law, a field that earlier has been mainly concerned with the rights and obligations of states. The treatment of individuals has thereby been promoted to international law and according to the preamble of the ICCPR, the rights "derive from the inherent dignity of the human person".[112] Thus, it can be argued that the ICCPR does not have the same reciprocal character as general international agreements and the ILC Draft is not designed to handle

[112] Preamble of the ICCPR

this type of non-reciprocal agreements. The state parties intended to replace the general international law on state responsibility with enforcement mechanisms handling breaches of the primary rules in the ICCPR in a more collective manner compared to the ILC Draft. If the state parties considered the general international law to handle these questions in an effective way, there would be no need to set up separate enforcement mechanisms in the ICCPR.

The above-mentioned arguments would thereby make it necessary to read out an implicated norm to the ICCPR excluding general law on state responsibility. If such an implication is not made, the enforcement mechanisms in the ICCPR would not be able function as expected and the ICCPR would consequently not be able to effectively fulfil its object and purpose.

7.3.2 Arguments against exclusion

No matter whether the state parties intended the ICCPR to be self-contained or not, the erga omnes character of some of the rights in the covenant is problematic. A violation of such a right in the treaty would not only affect the state parties but the international community as a whole, whilst the enforcement mechanisms within the ICCPR are not available to states not parties to the convention. The general international law on state responsibility thereby has to be applicable to guarantee the non-injured states their possibility to invocate state responsibility. It is not possible for the state parties to change the status of the rights as obligations to the international community as a whole by setting up separate enforcement mechanisms within the ICCPR. Such a solution would be in conflict with the principle of pacta sunt servanda.

A provision in Article 44 in the ICCPR states that the provisions in the covenant shall not prevent the states parties from having recourse to other procedures settling a dispute in accordance with general agreements in force between them. The provision relates to implementation mechanisms in part IV, the state reporting and inter-state communication procedures.[113] Article 44 thereby authorises coexistence between a procedure under the special enforcement mechanisms in the ICCPR and a procedure under general international law and supports the idea that the ICCPR is not self-contained in its relationship to general international law.

The main problem with the ICCPR and its enforcement mechanisms is its diversity of provisions, some mandatory and some optional to the state parties. The fact that most of the enforcement mechanisms are optional to the state parties, as described in chapter 7 only the procedure for periodic reports is mandatory, makes it hard to imply such autonomy to the treaty that is connected to the term self-contained regime. The effect of such an

[113] Nowak, *supra* note 99, p. 789

implication would be that the relationships between the state parties would be almost impossible to sort out. As an example, the ICCPR could then be self-contained in the relationship between state A and B, and between state B and C, but not in the relationship between state A and state C. If state A has not opted in for the inter-state complaint procedure, this will also affect its relationship to state B. A labyrinth of different relationships between states would complicate the applicability of both the enforcement measures in the ICCPR and the applicability of the general international law on state responsibility in the ILC Draft. The fact that there are four different enforcement mechanisms to keep track of makes it even more problematic. It would be necessary to decide on which of the enforcement mechanisms that a state has to opt in on to be able to exclude the applicability of general international law on state responsibility in relationship to other states. It can be questioned whether it is an overall possibility to set up a treaty that is supposed to be a self-contained regime only between some of the state parties and not all states parties to the covenant. If the state parties had intended the ICCPR to be self-contained, the enforcement mechanisms would thereby have been mandatory to all state parties and the relationship between two conflicting states parties to the ICCPR would then have been unproblematic.

With the support of the above-mentioned arguments, it would not be possible to interpret the ICCPR as a self-contained regime with the help of the rule of necessary implication, since no such intention is to be found in the structure, object and purpose of the covenant.

7.4 Concluding remarks on the ICCPR

When comparing the arguments in support of exclusion with the arguments supporting coexistence between the ICCPR and general international law on state responsibility, the arguments in support of exclusion are the most problematic.

The fact that enforcement mechanisms are included in the ICCPR is not such a solid argument supporting exclusion as it first may seem. With reference to the comparison between the ILC Draft and the enforcement mechanisms in the ICCPR above in Chapter 7.2, it is clear that a simultaneous application of both the general and the special law is possible. The state parties intentions with the enforcement mechanisms included in the ICCPR might just as well be to complement the general international law on state responsibility as to exclude it. The second argument in support of exclusion, based on the non-reciprocal character of the ICCPR, is also fallacious. Even if a third party is the beneficiary of the rights in the treaty, it is still the state parties that have concluded the treaty and given these rights to the individuals and thereby should be able to protect the rights given by them.

The problems of a possible exclusion are even more obvious when studying the arguments against exclusion. The erga omnes character of the rights and the fact that most enforcement mechanisms are optional both makes it impossible to imply an exclusion of general international law on state responsibility.

The ICCPR does thus not embrace a set of secondary rules intended to exclude more or less totally the application of the general legal consequences of wrongful acts, by explicit provision, a cluster of lex specialis rules or by implication. The enforcement mechanisms in the ICCPR thereby have to be considered as complementary to the general international law on state responsibility, rather than replacing it. An exclusion would have effects that would undermine the rights in the covenant and the possibility to enforce these rights rather than strengthen the position of human rights in international law.

Since the ICCPR does not constitute a self-contained regime, the possibility of fallback has not been further analyzed in relationship to the covenant. It could be argued that if we were to define the ICCPR as a self-contained regime, the possibility of fallback would prevent the undermining of the rights since a breach of the rights would not pass by unnoticed. Looking at the number of 'fallbacks' that would have to occur if we were to apply the theory in practice, this is however not a solid argument. There would be more cases of fallback than cases where the question of state responsibility could be handled within the self-contained regime and the possibility of fallback is supposed to be the exception in a self-contained regime, not the main rule.

The ICCPR and its enforcement mechanisms does thereby not hinder a state, whether an injured state or a non-injured state, to invoke the responsibility of a violator state through other channels such as the ICJ with reference to the general international law on state responsibility.

8 Summary and Final Remarks

The first part of the twofold object and purpose of this thesis was to analyze and define the term self-contained regime. The term was used in its full wording by the ICJ in the Tehran Hostages Case and has since then been widely discussed by scholars of international law due to the lack of an explanatory statement by the ICJ. As has been shown, the work on the topic of self-contained regimes by the ILC has resulted in a mishmash of definitions that cover all possible types of phenomenons in international law. To be able to define the term self-contained regime in a comprehensible way, and to be able to narrow down the field of application of the term, mainly the work of Simma and Pulkowski has been used.

The final definition of the term self-contained regime in this thesis is a treaty or a number of treaties that embrace a full, exhaustive and definite, set of secondary rules with the intention to exclude the application of the general international law in a given field of secondary rules. This intention can be established in three possible ways, by a cluster of norms with a lex specialis character, by a single norm in the treaty that explicitly excludes the applicability of the general international law, or by a structure, object and purpose of a treaty that implicate exclusion. Even if the purpose of establishing a self-contained regime is to exclude the application of general international law, the general law might be applied through a fallback if the self-contained regime is not able to handle a given problem in an effective way and/or is not able to fulfil its given object and purpose.

A possibility for states to set up a treaty that excludes general international law on a specific field of secondary rules thereby exists. Most of the fields of international law that have been alleged to be self-contained regimes do probably not qualify as such when using the definition above, but even if no treaty in international law as of today constitutes a self-contained regime, such a treaty may be agreed upon by a number of states any time in the future.

The second part of the object and purpose of this thesis was to answer the question of whether it is possible to define the ICCPR as a self-contained regime. When applying the above-mentioned definition to the ICCPR and its enforcement mechanisms, it became clear that the covenant is not a self-contained regime. Quite the contrary, the ICCPR with its wide variety of optional enforcement mechanisms is lacking most of the features that are significant for a self-contained regime. The enforcement mechanisms in the covenant do thereby not affect the applicability of the general international law on state responsibility. The obligations in the covenant can be enforced with the help of the ILC Draft on State Responsibility and the compulsory jurisdiction of the ICJ.

The question of the fragmentation of international law mentioned in the introduction to this thesis is highly affected by how we choose to interpret the term self-contained regime and deserves to be commented on. No matter how we define a self-contained regime, the concept as such leads to an increased fragmentation of the international law. The effects of the fragmentation will however differ depending on the definition. If a clear and uniform interpretation of the term self-contained regime is at hand, it will help to increase the predictability of the international law by clarifying the relationship between special and general international law and the fragmentation is thereby positive. On the other hand, if there are only vague ideas on how to interpret the term, or if no consensus exists on the interpretation, the fragmentation created when a treaty is labelled as a self-contained regime will only decrease the predictability of international law. The idea of self-contained regimes will then open up for the possibility of some type of autonomy, but as long as we do not know in what way, to what extent and when such autonomy is at hand, the idea as such will only affect the international law in a negative way. Such a contingency on how to define a self-contained regime will also affect states when concluding new agreements. If explicit prerequisites of a self-contained regime do not exist, it becomes harder for states to make their intention clear, not knowing which prerequisites that have to be fulfilled in order to make the agreement constitute a self-contained regime.

Thus, if the international community is not able to agree on the definition of the term self-contained regime, perhaps there is no point in using the term and label treaties as self-contained regimes. This is however not possible as long as international tribunals and courts such as the ICJ keep on using it to describe relationships between general and special law. The term therefore has to be continuously discussed in order to sort out the effect of such statements.

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