

# The Law of International Responsibility

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## Chapter 13

# LEGES SPECIALES AND SELF-CONTAINED REGIMES

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Since 1945, international law has witnessed a process of intense functional specialization. So much so that the proliferation of new legal regimes has recently sparked a vivid debate on the alleged fragmentation of international law. As international law has extended to subject areas as diverse as environmental protection, human rights, and international trade, numerous international instruments contain tailor-made rules on the legal consequences of breach. The Articles on State Responsibility adopted by the International Law Commission in 2001 open the door to such special sets of rules in article 55, entitled *lex specialis*.

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.

While the wording of article 55 is short and straightforward, it is both one of the most important and debatable provisions of the ILC's Articles. The ILC introduced the *lex specialis* principle as a tool for connecting the rules on State responsibility with other regimes of international law. However, the application of the principle is controversial with regard to

subsystems that have attained a particularly high degree of autonomy. The more a system's operation is 'closed' towards its international law environment, the less likely it is to fall back on the rules on State responsibility. We argue that the *lex specialis* principle is nonetheless a useful methodological tool for the international law practitioner, which helps to network 'traditional' international law and 'new' subsystems of international law. Social differentiation does not preclude normative compatibility. Self-contained regimes in the area of State responsibility are, thus, neither conceivable nor desirable.

## 1 The *lex specialis* principle and so-called 'self-contained regimes'

### (a) The *lex specialis* principle

The option of complementing international obligations with a specific set of secondary rules instead of adhering to a 'one-size-fits-all' approach on State responsibility is a prerogative inherent in the idea of sovereignty. Mostly, the sovereign will of States will be expressed in special treaty provisions. It is not excluded, however, that special secondary rules are established by particular (eg regional) custom.<sup>1</sup> There is no systemic reason why derogation from the rules on State responsibility should only be permissible by way of 'contractual instruments', as Special Rapporteur Arangio-Ruiz had suggested.<sup>2</sup> Either way, the *raison d'être* of special secondary norms remains the same. They are crafted with a view to enhancing the efficacy of the primary rules. An early expression of this rationale dates back to Emer de Vattel:

*De deux Loix, ou de deux Conventions, toutes choses d'ailleurs égales, on doit préférer celle qui est la moins générale, & qui approche le plus de l'affaire dont il s'agit. Parce que ce qui est spécial souffre moins d'exceptions que ce qui est général; il est ordonné plus précisément, & il paroît qu'on l'a voulu plus fortement.*<sup>3</sup>

Efficacy, for de Vattel, is a consequence of fewer exceptions, more regulatory precision, and, most interestingly, the assumption that what has been laid down in a more specific manner carries a stronger expression of State will.

The rule *lex specialis derogat legi generali* has been referred to as a well-recognized principle of international law.<sup>4</sup> However, despite its general acceptance, the *lex generalis-lex specialis* distinction has only occasionally played a prominent role in international jurisprudence. The International Court of Justice has affirmed that a treaty concluded between Hungary and Czechoslovakia governed the relations between the parties as a *lex specialis vis-à-vis* the rules of State responsibility.<sup>5</sup> Similarly, the Court ruled in the *Nicaragua* judgment that '[i]n general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on an a customary-law rule if it has by treaty already provided means for settlement of such a claim'.<sup>6</sup> In its *INA Corporation* decision, the Iran-US Claims Tribunal

<sup>1</sup> Cf *Right of Passage over Indian Territory, Merits, ICJ Reports 1960*, p 6.

<sup>2</sup> G Arangio-Ruiz, Fourth Report on State Responsibility, *ILC Yearbook 1992*, Vol II(1), 42.

<sup>3</sup> E de Vattel, *Les droit des gens ou principes de la loi naturelle*, Reproduction of the original edition of 1758 (Washington: Carnegie Institution, 1916), Liv VII, Ch XVII, §316: ('Of two laws or two conventions, we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches nearer to the point in question: because special matter admits of fewer exceptions than that which is general; it is enjoined with greater precision, and appears to have been more pointedly intended.' (Trans J Chitty, 1883, available at <<http://www.constitution.org/vattel/vattel.htm>>).

<sup>4</sup> *Ambatielos, Jurisdiction, ICJ Reports 1952*, p 28, dissenting opinion of Judge Hsu, 87.

<sup>5</sup> *Gabcikovo-Nagymaros Project (Hungary v Slovakia), ICJ Reports 1997*, p 7, 76 (para 132).

<sup>6</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, ICJ Reports 1986*, p 14, 137-138 (para 274).

decided that the standard of full compensation laid down in a Treaty of Amity prevailed over the more liberal standard of compensation for nationalization of property under general international law.<sup>7</sup>

Nonetheless, case law making express reference to the *lex specialis* principle is relatively scarce. One possible explanation would be that reference to a 'special' rule presupposes the perspective of general international law. Both the International Court of Justice and the Iran-US Claims Tribunal, in a first step, examined the content of the rule of general international law and considered, in a second step, whether States in the particular case had derogated from this standard by creating a more special set of rules. Tribunals established under a special legal subsystem—such as World Trade Organization (WTO) panels or the European Court of Justice (ECJ)—generally adhere to the reverse order of examination. They are primarily concerned with the content of 'their' special law. Only in a second step, if this special regime proves insufficient to resolve a case, is resort had to general international rules. While tribunals working on the basis of general international law resort to the *lex specialis* principle to justify the non-application of general international law, special tribunals are not required to provide a comparable justification for applying the special rules under which they were created.

#### (b) The problem of 'specialty' of norms

What appears to be a relatively straightforward provision, however, has a major built-in problem. When exactly can it be said that one rule is more special than another, and how far does the specialty extend?

First, as Sir Gerald Fitzmaurice has observed, '[t]he *generalia* rule can only apply where both the specific and general provision concerned deal with the same substantive matter'.<sup>8</sup> In our context, however, whether a special norm relates to the same subject-matter as the State responsibility rules can be problematic. For instance, does a non-compliance procedure under a multilateral environmental agreement (MEA) concern the same subject-matter as the regime of State responsibility? The subject-matter of the rules of State responsibility is, in essence, the legal consequences of unlawful conduct. State responsibility, thus, deals with consequences of 'breach', the MEA's regime with procedures for 'non-compliance'. If non-compliance does not necessarily imply unlawfulness, which 'breach' does, it would be conceivable to apply the 'hard' State responsibility regime in parallel, because the two sets of norms do not purport to regulate the same subject-matter. Alternatively, it could be argued that both the regime of State responsibility and a MEA's non-compliance procedure spell out consequences of a deviation from normative expectations. Then, the procedure under the MEA could be considered a *lex specialis*.

Second, if it can be established that a special norm concerns the same subject matter as the articles on State responsibility, the question remains how far the specialty of that particular norm extends. In this context, to give some contentious examples, the question has been raised whether a State can claim retrospective compensation pursuant to the general rules of State responsibility for breaches of WTO law, although the WTO Agreements do not authorize (nor forbid) such compensation. Another question would be whether a violation of EC law can ultimately be addressed with unilateral countermeasures, although

<sup>7</sup> *INA Corporation v Iran*, Iran-US Claims Tribunal, 12 August 1985, 75 *ILR* 595, 601 (para 378).

<sup>8</sup> G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 *BYIL* 203, 237.

the EC Treaty contains a comprehensive dispute settlement machinery. If we try to imagine a sliding scale of specialty, one could conceive at the one end a legal provision that is only designed to replace a single provision of the State responsibility articles while leaving the application of this framework otherwise untouched. On the other end of the scale, a strong form of *lex specialis* could exclude the application of the general regime of State responsibility altogether, either by explicit provision or impliedly by virtue of a regime's particular structure or its object and purpose.

### (c) Definitions of self-contained regimes

This latter concept of a strong *lex specialis* designed to exclude completely the general international law of State responsibility is what we denote as a 'self-contained regime'. Article 55 is meant to cover all kinds of special rules, from weaker forms of specialty that only modify the general regime on a specific point to strong forms such as self-contained regimes that attempt to exclude the application of the general rules of state responsibility altogether.<sup>9</sup>

#### (i) *The two major precedents before the world court*

As far as we can see, the phrase 'self-contained regime' was coined by the Permanent Court of International Justice in the *SS Wimbledon* case. The PCIJ was faced with the question whether the provisions in the Treaty of Versailles relating generally to German waterways also applied to the Kiel Canal. The Court pointed out that the drafters of the Treaty had devoted a special section to the Kiel Canal, which differed substantially from the rules relating to other watercourses. The Court concluded that:

[t]he 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 [the specific provisions regarding the Kiel Canal] is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them.<sup>10</sup>

In the *Wimbledon* case, the PCIJ applied the concept of self-containment to resolve a question of treaty interpretation concerning the relationship between two sets of primary international obligations. More recently, the International Court of Justice in its *Tehran Hostages* judgment transposed the concept of self-contained regimes to the level of secondary norms. The Court asserted that the regime of specific legal consequences contained in the Vienna Convention on Diplomatic Relations was self-contained *vis-à-vis* the customary international law of State responsibility. Consequently, in case of violations of the Vienna Convention, no resort may be had to any of the remedies provided by general international law, because 'diplomatic law by itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.<sup>11</sup> After exploring in detail the sanctions contemplated by the Vienna Convention (such as the option of declaring a diplomat *persona non grata*) the Court concluded:

<sup>9</sup> Commentary to art 55, para 5.

<sup>10</sup> *SS Wimbledon*, PCIJ, Series A, No 1 (1923), p 15, 24.

<sup>11</sup> *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, p 3, 38.

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to the 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.<sup>12</sup>

(ii) *A proposal for a more uniform terminology*

The concept of self-contained regimes attracted scholarly attention only after the *Tehran Hostages* ruling. Lack of uniform terminology has probably contributed a good deal to the controversial character of the discussion addressing the alleged self-containment of legal sub-systems. Various levels of autonomy have been associated with the term 'self-contained regimes'.

First, the notion of 'self-contained regimes' has been misconceived as an argument in favour of entirely autonomous legal subsystems. Social systems cannot exist in splendid isolation from their environment. Similarly, legal subsystems coexisting in isolation from the rest of international law are inconceivable. There will always be some degree of interaction, at least on the level of interpretation. In the words of the ILC's Study Group on 'Fragmentation of International Law':

No rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum. Its normative environment includes . . . not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the forms through which those rights and duties may be supplemented, modified or extinguished.<sup>13</sup>

Even the European Court of Justice has asserted that principles of general international law are applicable residually within the context of EC law, and has indicated its willingness to defer to the interpretation of an international agreement by a court established under such an agreement.<sup>14</sup> In the case of the WTO, the Appellate Body has acknowledged that the GATT remains firmly imbedded in general international law, stating that the Agreement 'is not to be read in clinical isolation from public international law'.<sup>15</sup> Thus, to avoid confusion, the term 'self-contained regime' should not be used to circumscribe the unrealistic hypothesis of a fully autonomous legal subsystem.

Nor should the term be used to describe *leges speciales* at the level of primary rules, although it is precisely in the context of primary rules that the PCIJ had originally introduced the concept. In its original meaning, the concept denoted a set of treaty provisions which cannot be complemented through the application of other rules by way of analogy. After *Tehran Hostages*, however, scholarly debate on self-contained regimes has narrowed down to the specific question of the 'completeness' of a subsystem's secondary rules. Hence, we reserve the term 'self-contained regimes' to designate a particular category of subsystems, namely those that embrace a full, exhaustive and definitive, set of

<sup>12</sup> Ibid, 40.

<sup>13</sup> International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, 64 (para 120).

<sup>14</sup> Opinion 1/91, *EEA I*, 14 December 1991, *EC Reports* 1991, I-6079 at paras 39 and 40.

<sup>15</sup> *US—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, WTO Doc WT/DS2/AB/R, 17.

secondary rules. The principal characteristic of a self-contained regime is its intention to totally exclude the application of the general legal consequences of wrongful acts as codified by the ILC, in particular the application of countermeasures by an injured State.<sup>16</sup>

(iii) *The position of the ILC in its work on State responsibility*

The ILC's stand with regard to the existence of so-called self-contained regimes concerning State responsibility varied with each Special Rapporteur taking up the subject of legal consequences of internationally wrongful acts. In a nutshell, the ILC first appeared to embrace the concept of self-contained subsystems (Riphagen), then became highly critical of the systematic feasibility of such isolation from State responsibility (Arangio-Ruiz), and finally adopted the position of a pragmatic 'maybe' (Crawford).

Special Rapporteur Riphagen's approach was characterized by considerable ambiguity. On the one hand, Riphagen charted the international legal system as an order modeled on a variety of distinct subsystems, within each of which primary rules and secondary rules are closely interlinked.<sup>17</sup> The regime of State responsibility was perceived as merely part of one such subsystem. Consequently, in the Rapporteur's view, '[t]he idea that there is some kind of least common denominator in the regime of international responsibility must be discarded.'<sup>18</sup> Riphagen even presented scenarios in which 'the subsystem itself as a whole may fail, in which case a fall-back on another subsystem may be unavoidable'.<sup>19</sup>

In the era of Special Rapporteur Arangio-Ruiz debate concentrated on one, particularly contentious, aspect of self-contained regimes, namely the question whether such a 'so-called self contained regime affect[s], and if so in what way, the rights of the participating States to resort to the countermeasures provided for under general international law'.<sup>20</sup> Focusing on the admissibility of countermeasures, Arangio-Ruiz concluded that none of the systems envisaged as self-contained regimes excluded the application of the rules of State responsibility *in concreto*. The Rapporteur added that, in any event, the very concept of closed legal circuits of responsibility rules was dubious even *in abstracto*.<sup>21</sup> Arangio-Ruiz suggested that the limitations built in the customary international law of State responsibility, most notably the proportionality principle, would suffice to take sufficient account of the peculiarities of subsystems. According to the Rapporteur, countermeasures 'outside' a special subsystem's secondary rules would, in principle, be disproportionate. Consequently, only after all available means within the subsystem are exhausted, may a State resort to proportional countermeasures under general international law.<sup>22</sup> Since Arangio-Ruiz perceived the conflict between special secondary rules and the general rules of State responsibility to be anchored in (and resolved by) the proportionality principle, he proposed the deletion of the *lex specialis* clause in the draft articles.

Rather than resolving the conceptual clash between the ILC's previous rapporteurs, Special Rapporteur Crawford decided to refer the issue of self-containment of subsystems to another topic which the Commission was going to take up, namely the fragmentation of international law. The Commentaries adopted in 2001 remain silent on whether a closed responsibility regime outside the customary law of State responsibility is conceptually

<sup>16</sup> Cf B Simma, 'Self-Contained Regimes' (1985) XVI *Netherlands Ybk* 111, 117.

<sup>17</sup> W Riphagen, Third Report on State Responsibility, *ILC Yearbook 1982*, Vol II(1), 24 (para 16).

<sup>18</sup> *ILC Yearbook 1982*, Vol I, 201 (para 8).

<sup>19</sup> W Riphagen, Third Report on State Responsibility, *ILC Yearbook 1982*, Vol II(1), 22, 30 (para 54).

<sup>20</sup> G Arangio-Ruiz, Fourth Report on State Responsibility, *ILC Yearbook 1992*, Vol II(1), 1, 35.

<sup>21</sup> *Ibid*, 40. <sup>22</sup> *Ibid*, 41 (para 116).

feasible and, if yes, which subsystems may qualify as thus closed. The Commission avoided express recognition of self-contained regimes by diplomatically speaking of 'strong' forms of *lex specialis*, including what are often referred to as self-contained regimes'.<sup>23</sup>

Despite such hesitation, the ILC's final product can still be recognized as a conceptual approximation to Special Rapporteur Arangio-Ruiz's position. Admittedly, the Commission preferred the more conventional legislative technique of an express conflict clause over Arangio-Ruiz's approach of re-interpreting proportionality. In substance, however, the very inclusion of a *lex specialis* clause implies a certain concept of the 'design' of the international legal order. The ILC moved away from Riphagen's idea of two competing regimes and towards Arangio-Ruiz's concept of a canon of general law that is applicable automatically unless States have specifically contracted out by virtue of a special legal regime.

In its deliberation on the topic 'The fragmentation of international law', the ILC appears to follow the course thus charted. In the Report elaborated in 2006 by the Study Group, special subsystems are described as firmly embedded within an omnipresent general law.<sup>24</sup>

#### (d) Self-contained regimes: a systematic critique

##### (i) *The inconclusiveness of treaty interpretation*

The principal characteristic of a self-contained regime is its intention to exclude the application of the general legal consequences of wrongful acts, in particular resort to countermeasures by an injured State. The question that immediately follows is how to find out whether such a complete exclusion of all secondary rules of general international law is in fact intended. This meets with considerable difficulties.

In theory, the answer can be found in a simple two-step process: first, the rules of the special regime must be interpreted according to article 31 of the Vienna Convention on the Law of Treaties in order to establish whether the regime's secondary rules are intended to be exhaustive and complete. Second, resort must be had to general international law to verify whether the latter permits such derogation.

In practice, however, treaty interpretation does not allow such clear-cut conclusions as to whether the customary law of State responsibility is to be altogether excluded. No treaty regime that we will analyse—whether in the fields of human rights, trade, or environmental protection—contains a catalogue of secondary rules that would match 'one-to-one' the kinds of secondary rules provided under general international law. There are always questions on which a special regime remains silent. WTO law, for example, does not contain any specific prescription concerning monetary compensation; nor does the WTO regime expressly provide for an obligation to restore the *status quo ante*. In human rights treaties, the question remains whether the primary rules set out in these treaties are subject to enforcement through bilateral countermeasures. Even the highly developed remedy system of the European Union is not without lacunae. The wording of the Treaties does not seem to provide for an obligation of one member State to pay damages to another, injured member State (see Section 2 below for a detailed discussion of these case studies).

<sup>23</sup> ARSIWA, Commentary to art 55, para 5.

<sup>24</sup> ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, 64 (paras 119ff).

In all these cases, the question arises whether such 'lacunae' should be interpreted as intentional deviations from the general regime of state responsibility or as gaps that need to be filled in by general international law. Special treaty regimes rarely answer this question in an unequivocal fashion (for example, through an express provision that 'the rules of this treaty are conclusive, and a recourse to general international law is precluded'). In most cases, 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (article 31(1) of the Vienna Convention on the Law of Treaties) allows for plausible arguments to be made for both positions.

Whether or not the general international law of State responsibility applies is not so much determined by the ordinary meaning of a treaty's terms but by certain background assumptions concerning the structure of the international legal order.<sup>25</sup> At the one extreme, international law is perceived as a unified and flawlessly integrated 'ordre juridique'.<sup>26</sup> At the other extreme, international law is described as the sum of fragmented regimes or as 'the epi-phenomenon of the multidimensional fragmentation of the world society'.<sup>27</sup>

(ii) *Leges speciales in a unified legal order*

According to scholars following a universalistic concept of international law, a presumption in favour of the application of general international law applies. Special Rapporteur Crawford has spoken of a 'presumption against the creation of wholly self-contained regimes in the field of reparation'.<sup>28</sup> Similarly, Pauwelyn's study is expressly based on the premise that the law of State responsibility, as an overarching catalogue of *leges generales*, is applicable whenever the special regime contains no explicit derogation. '[I]t is for the party claiming that a treaty has 'contracted out' of general international law to prove it'.<sup>29</sup> Since special responsibility regimes are simply considered an aggregate of *leges speciales*, which, nonetheless remain part of a unified legal order, a fallback on State responsibility is warranted to the extent that the special regime remains tacit.

Similar statements can also be found in the case law of the International Court. In the *ELSI* case, the question arose whether a long-standing rule of general international law, the exhaustion of local remedies rule, applied in the context of a special treaty regime. At the outset, the Court emphasized the freedom of the parties to a treaty to deviate from the rules of customary international law:

The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply.<sup>30</sup>

*In casu*, however, it was precisely the question whether the parties had agreed to deviate from customary international law that was contentious. In such a situation, the Court explained:

<sup>25</sup> See D Pulkowski, 'Rechtsvermutungen und Kompetenzallokation im Völkerrecht', in G Nolte & P Hilpold (eds), *Auslandsinvestitionen—Entwicklung großer Kodifikationen—Fragmentierung des Völkerrechts—Status des Kosovo* (Frankfurt, P Lang, 2008), 141.

<sup>26</sup> See eg P-M Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 *Recueil des cours* 1.

<sup>27</sup> G Teubner, A Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Mich J Int'l L* 999, 1004.

<sup>28</sup> J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507, para 147.

<sup>29</sup> J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge, CUP, 2003), 213.

<sup>30</sup> *Elettronica Sicula Spa (ELSI)*, ICJ Reports 1989, p 15, 42 (para 50).

the Chamber find itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.<sup>31</sup>

The conclusion that the Court reached—namely, that the local remedies rule applies—was not a result of grammatical or systemic interpretation of the concrete treaty at hand; it was pre-determined by the assumption that, in a unified legal order, general international law would apply unless the parties have not specifically contracted out of that regime.

Other examples of cases in which a presumption in favour of general international was applied include the *Nicaragua* and *Gabčíkovo* judgments of the International Court of Justice and the *INA* award of the Iran-US Claims Tribunal. In all three cases, the judges first examined the content of the general—customary—rule of international law, before turning to special treaty rules that might be relevant.<sup>32</sup>

### (iii) Self-contained regimes in a fragmented legal order

By contrast, scholars who conceive the international legal order primarily as the sum total of interrelated subsystems will generally put forward the opposite presumption, namely a presumption in favour of complete and exhaustive regulation in the respective subsystem. Once such a presumption is established, it can easily be concluded in accordance with the maxim *expressio unius est exclusio alterius* that no remedies other than the ones specified may be resorted to.

The paradigm of completeness of international regimes also underlies the rulings of the ECJ. Since the Community Treaty has 'created its own legal system',<sup>33</sup> the ECJ considers that Member States may not invoke the responsibility of other Member States for violations of EC law outside the procedures of the Treaty. This is even true, according to the ECJ, when Member States allege the violation of a provision of a 'mixed agreement' (that is, an international treaty ratified by the Community and its Member States) that falls within the competence of the Community. In the *MOX Plant* case, the ECJ ruled that Ireland was precluded from invoking the rules of State responsibility under general international law to seek redress for a violation of certain provisions of the United Nations Convention on the Law of the Sea.<sup>34</sup>

The ECJ's hesitation to use general international law has even extended to cases where no suitable remedies under Community Treaty exist. Instead of falling back on the rules on State responsibility, the Court has attempted to fill *lacunae* by analogies within the system or by recourse to general principles inherent in the Community legal order. The *Francovich* principles may be cited as one example for resolving shortcomings within the 'regime'.<sup>35</sup> Thus, according to the ECJ, the general international law of State responsibility is not a general fallback option that automatically fills up the *lacunae* of the special regime, but rather an *aliud*, resort to which requires special justification.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, p 14, 137–138 (para 274); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, p 7, 76 (para 132); *INA Corporation v Iran, Iran-US Claims Tribunal*, Award No 184-161-1 of 12 August 1985, 75 ILR 595, 601 (para 378).

<sup>33</sup> Case 6/64, *Costa v ENEL* [1964] ECR 585, 593.

<sup>34</sup> Case C-459/03, *Commission v Ireland*, ECR 2006, I-4635.

<sup>35</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, ECR 1991, I-5357.

While the regime of the European Community has clearly tended towards self-containment, the degree of integration of the WTO's remedies regime into the general international law of State responsibility is less obvious. While many scholars have called for a full integration of international trade law into general international law, others have put forward considerable arguments for the conclusiveness and completeness of the WTO regime. According to the second group of scholars, WTO law must be presumed to be self-contained, unless a party can demonstrate that the political bargain or 'package deal' that underlies the trading system extends to certain rules of general international law.<sup>36</sup>

(iv) *Fallback to the general law of State responsibility*

The first—universalistic—position takes the perspective of general international law. Derogation from the general regime is accepted only to the extent that such an intention is clearly stated in the treaty. Consequently, proponents of this position tend to deny the existence of self-contained responsibility regimes. The second—particularistic—position proceeds from the point of view of a particular regime. Since the standard assumption is that the regime is complete, recourse to rules outside the regime is more of an emergency operation than a desirable practice. Consequently, regimes are likely to appear as self-contained.

Often, a scholar's approach seems to depend on whether her intellectual home is the sphere of public international law or that of a specialized subsystem. As Special Rapporteur Arangio-Ruiz has observed with regard to the European Community:

Generally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties . . .<sup>37</sup>

Both positions have their merits, but neither of them should be taken to extremes. On the one hand, construing international law as a flawlessly integrated framework of rules, as proposed by strong universalists, may camouflage the functional differentiation of international law rather than resolving the problems arising from such differentiation. On the other hand, social differentiation does not necessarily entail separation at the normative level; strong particularists need to present additional arguments as to why the purposes of a 'special' system would not be served by general international law.

This suggests that the way forward is to focus on the added value that general international law can bring to special regimes (rather than spending energy on arguing in general terms for or against presumptions in favour or against the applicability of general international law). What should be decisive is whether, with respect to the particular issue at hand, a fallback on general international law is expedient to serve the purposes of the special regime.

Some benefits of opening special regimes to general international law are obvious (and relatively uncontroversial). The general international law on State responsibility provides

<sup>36</sup> See, for a universalistic view, J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *AJIL* 535; L Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *JWT* 499; P Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11 *EJIL* 763; and for a particularistic view, DM McRae, 'The WTO in International Law: Tradition Continued or New Frontier?' (2000) *JIEL* 27; JL Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence' (2001) 33 *Geo Wash Int'l L Rev* 979, 1009; J Trachtman, 'Review' (2004) 98 *AJIL* 855.

<sup>37</sup> *ILC Yearbook 1992*, Vol I, 76.

solutions for problems of attribution (articles 4–11 of the ILC Articles), circumstances precluding wrongfulness (articles 20–27 of the ILC Articles), or the non-availability of a justification based on domestic law that will normally be as relevant in special systems as under general, customary international law (article 32 of the ILC Articles). A harder case, however, remains the question whether recourse to countermeasures should be permitted in the event of a continuous violation of a treaty obligation. General international law vests a State with certain capacities to ensure that its rights be respected, including a restricted right to unilateral enforcement action. Often, such countermeasures are not specifically provided under special systems. Can States fall back on general international law after they have exhausted the special rules and procedures of a special regime? The crucial question is whether primary rules contained in special subsystems ‘deserve’ the additional ‘bite’ that enforcement through countermeasures can deliver.

To put it differently, are there reasons why obligations in special regimes should be considered ‘softer’ than other international law? If Vattel is right, the contrary is the case: *‘il est ordonné plus précisément, & il paroît qu’on l’a voulu plus fortement’*.<sup>38</sup> The fact that States decide to go through the cumbersome process of multilateral treaty making suggests that the rules elaborated in this process are of particular importance. Therefore, we should not presume too readily that a State was willing to give up ‘the rights or *facultés* of unilateral reaction it possessed under general international law’<sup>39</sup> by subscribing to a regime that sets out other procedures for ensuring compliance.

Instead, it seems reasonable to assume that States only intended to relinquish their *facultés* under general international law in favour of a special regime’s procedures to the extent that and as long as that subsystem’s procedures prove effective. As the ILC Study Group put it:

if instead of enhancing the effectiveness of the relevant obligations the regime serves to dilute existing standards . . . then the need of a residual application, or a ‘fall-back’ onto the general law of State responsibility may seem called for.<sup>40</sup>

Under this premise, a fallback on countermeasures under the general international law of State responsibility is conceivable in at least three hypothetical scenarios: (1) in the case of a continuous violation of an obligation under a special system despite a decision on the contrary by the system’s competent dispute settlement body; (2) in the case of an injured State’s failure to obtain reparation despite a respective decision by the system’s competent dispute settlement body; and (3) if unilateral action is necessary as a defensive measure.

In the application of countermeasures, due respect must obviously be paid to the characteristics of the special regime in question. It would be wrong, however, to assume from the outset that the delicate creatures of environmental law or human rights could not be adequately treated by the general international law practitioner with her State responsibility toolbox. The Articles take account of sensitivities of special regimes in various ways:

<sup>38</sup> E de Vattel, *Les droit des gens ou principes de la loi naturelle*, Reproduction of the original edition of 1758 (Washington: Carnegie Institution, 1916), Liv VII, Ch XVII, §316.

<sup>39</sup> *ILC Yearbook 1992*, Vol I, 76.

<sup>40</sup> ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, para 137.

- (1) The differentiation between injured States and non-injured States entitled to a limited range of remedies ensures that States whose interests are not affected do not feel entitled to meddle in other States' affairs.
- (2) The test of proportionality allows accommodating the needs of special fields of international law and the interest of States in the integrity of an institutional system.
- (3) Except where no other response can be envisaged, no remedy may be resorted to that would impair the continued performance of the obligation breached. This refers above all to countermeasures. Thus, the spectre of State responsibility loses some of its horror once a closer look is had on how the draft Articles operate in practice.

## 2 Case studies: special regimes and the 'fallback' to State responsibility

### (a) Diplomatic law

The rules of international law most commonly associated with the notion of self-containment, the rules of diplomatic law, are at the same time the least convincing example of a closed system of secondary rules. In what may well be referred to as a jurisprudential overkill, that is, an unnecessarily broad statement, the Court in the *Tehran Hostages* judgment ruled that diplomatic law 'specifies the means at the disposal of the receiving State to counter any such abuse' of diplomatic privileges and that, therefore, diplomatic law constituted a self-contained regime.<sup>41</sup> We do not contest that the possibility to declare a diplomat *persona non grata* is a special remedy of diplomatic law, recourse to which will usually be the appropriate reaction to an abuse of diplomatic privileges. However, the Court's dictum goes too far:

- (1) The Court was only concerned with the question whether a receiving State is entitled to resort to countermeasures as a reaction to a breach of the Vienna Convention. However, if one perceives diplomatic law as a closed system, recourse to the rules of State responsibility would equally be excluded for the sending State. This is neither logical from a systematic point of view nor is it necessary for safeguarding diplomatic relations. There is no reason why the sending State should be precluded from initiating countermeasures (not affecting diplomatic personnel) if the receiving State fails to respect the immunities of the sending State's diplomatic personnel. For instance, international law did not preclude the United States in that situation from resorting to countermeasures outside the Vienna Convention, including the suspension of a treaty of amity, in order to induce Iran to free its personnel.
- (2) Even assuming an abuse of diplomatic privileges similar to the conduct of which Iran accused the diplomats in *Tehran Hostages*, there may be a need to resort to remedies under general international law. The Vienna Convention does not contain a provision on reparation. If a diplomat, however, by abusing his privileges inflicts economic damage on the receiving State, there is no reason why the receiving State should be precluded from recovering that damage, in addition to declaring the perpetrator *persona non grata*. In *Tehran Hostages*, the Court itself affirmed Iran's duty to make reparation to the United States.
- (3) Diplomatic law has always been the classic playground of reciprocity. At least at the time when the Vienna Convention was drafted, the ILC appears to have been of the

<sup>41</sup> *United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980*, p 3, 40.

view that the symmetry of obligations under diplomatic law would allow reciprocal reprisals.<sup>42</sup> Given the traditional acceptance of countermeasures as a 'fact of life', it is to be strongly doubted whether diplomatic law has since evolved into a non-reciprocal regime justifying the categorical exclusion of all forms of unilateral reaction. Paul Reuter's comment in the ILC plenary of 1984 still merits consideration: 'He was of the view that, in so far as more general obligations such as humanitarian obligations were not involved, the injured State could respond in kind to a manifest violation of the rules on privileges and immunities. For instance, in the event of the violation of the unanimously accepted rule concerning the diplomatic bag, the injured State should be entitled to act in the same way as the State responsible for the violation. In such circumstances, the regime of privileges and immunities did not seem to be particularly self-contained.'<sup>43</sup>

- (4) Finally, resort to countermeasures may be necessary under the fallback scenarios outlined above. This may include cases in which the sending State fails to withdraw a diplomat who was declared *persona non grata*; or cases in which a temporary infringing upon diplomatic immunity is the only way to prevent a diplomat from committing a serious crime. To the same token, the ILC had stated in the commentary to its draft convention on diplomatic relations that diplomatic inviolability 'does not exclude . . . either measures of self-defence or, in exceptional circumstances, measures to prevent [a diplomat] from committing crimes or offences'.<sup>44</sup>

Given the 'permeability' of diplomatic law, in fact its dependence on the remedies of the general rules of State responsibility, there is no ground for arguing that diplomatic law contains an exhaustive set of secondary rules. Rather, the exemption of diplomatic immunity from the scope of lawful 'targets' of countermeasures is a limitation within the general law of State responsibility, which follows from the purposes for which the diplomatic immunities are granted. Diplomatic channels may be useful—even, and *a fortiori*, in times of crisis.<sup>45</sup> Moreover, diplomatic relations would be severely impeded if diplomatic personnel were potentially to 'constitute resident hostages'.<sup>46</sup> The definition of certain limitations to unilateral countermeasures is all that the *Tehran Hostages* ruling was about in substance. It is unfortunate that the Court's unnecessarily broad *dictum* is suggestive of a closed-circuit system of legal consequences. In Dominicé's words, 'pour affirmer qu'une violation initiale du droit diplomatique ne peut en aucune manière autoriser l'Etat qui en est la victime à le transgresser à son tour, l'argument du régime se suffisant à lui-même n'est pas nécessaire'.<sup>47</sup>

The ILC's draft articles on State responsibility impliedly confirm the theory that the exemption of diplomatic immunity from countermeasures is merely a question of the proper application of the general rules of State responsibility. The Commission's earlier debate mirrors the confusion caused by the Court's *Tehran Hostages* pronouncement. Special Rapporteur Riphagen, speaking, more in passing, of a 'self-contained regime of

<sup>42</sup> Commentary to the ILC draft art 44 (now art 47 of the Vienna Convention), *ILC Yearbook 1958*, Vol II, 105.

<sup>43</sup> *ILC Yearbook 1984*, Vol I, 264 (P Reuter).

<sup>44</sup> *ILC Yearbook 1958*, Vol II, 97.

<sup>45</sup> LA Barnhoorn, 'Diplomatic Law and Unilateral Remedies' (1994) 25 *NILR* 39, 63.

<sup>46</sup> Commentary to art 50, para 15.

<sup>47</sup> Ch Dominicé, 'Représailles et droit diplomatique', in JP Müller (ed), *Recht als Prozeß und Gefüge. Festschrift für Hans Huber zum 80. Geburtstag* (Bern, Stampfli, 1981) 551 ('It is not necessary to have recourse to the notion of a self-contained regime in order to affirm that an initial violation of diplomatic law cannot in any way authorize the wronged State to transgress that law in turn.').

diplomatic law',<sup>48</sup> seemed to be inclined to construe diplomatic law as a closed circuit containing its own conclusive secondary rules. Special Rapporteur Arangio-Ruiz questioned whether limitations on the use of countermeasures really flow from a self-contained nature of diplomatic law. Rather, he suggested, such limitations are a consequence of the application of the general rules and principles constituting the regime of countermeasures.<sup>49</sup> Consequently, he introduced a provision in the regime of countermeasures that specifically prohibits measures affecting diplomatic inviolability (Article 14 of the 1995 draft). The commentary adopted in 1995, however, did not fully reflect Arangio-Ruiz's criticism. In the commentary, the ILC suggested that the prohibition of reprisals is either derived from the self-containment of diplomatic law or from an alleged preemptory character of some of its essential norms.<sup>50</sup> Special Rapporteur Crawford and, following him, the Commission discarded the latter hypothesis. Article 50 now makes an explicit distinction between *jus cogens* and other obligations the performance of which may be particularly useful in times of conflict, namely obligations flowing from diplomatic immunities and contractual dispute settlement obligations. While such an exemption of diplomatic immunity from countermeasures on functional grounds was generally endorsed, the Commission avoided grounding it in any view of the self-contained character of diplomatic law.

Systematically, the most convincing solution is to perceive the limitations to countermeasures in article 50(2) of the ILC project simply as an expression of the proportionality principle laid down in its article 51. Countermeasures affecting diplomatic inviolability or the suspension of dispute settlement obligations are, in principle, deemed disproportionate. If article 50(2) is understood as a presumption of disproportionality, however, this presumption can be refuted in an individual case if a State demonstrates that overriding interests are at stake. The Court has had occasion to confirm that insistence on dispute settlement duties may be 'wholly artificial' and 'excessively formalistic'—in short: disproportionate in individual cases.<sup>51</sup> Similarly, in the cases sketched above, insistence on the inviolability of diplomatic personnel may be a disproportional limitation to a State's right to unilateral reaction. The threshold for infringing the physical freedom of diplomats, however, would obviously have to be very high.

### (b) The European Community legal system

While diplomatic law is a rather unlikely candidate for self-containment (if it were not for an unfortunate dictum of the Court), the legal system set up by the 'Treaty establishing the European Community' bears very strong characteristics of self-containment. The point of view of the European Court of Justice is as well-known as it is unequivocal: the Community Treaty has 'created its own legal system'<sup>52</sup> which 'constitutes a new legal order of international law'.<sup>53</sup> Therefore, 'the basic concept of the Treaty requires that member States shall not fail to carry out their obligations and shall not take the law into their own

<sup>48</sup> W Riphagen, Fourth Report on State Responsibility, *ILC Yearbook* 1983, Vol II (1), 3, 18 (para 97).

<sup>49</sup> G Arangio-Ruiz, Fourth Report on State Responsibility, *ILC Yearbook* 1992, Vol II(1), 1, 39 (para 110).

<sup>50</sup> International Law Commission, Text of arts 13 and 14 of Part Two and of arts 1 to 7 of Part Three and the annex thereto, with Commentaries, provisionally adopted by the Commission at its forty-seventh session, *ILC Yearbook* 1995, Vol II(2), 64–74, with further references.

<sup>51</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, ICJ Reports 1986, p 14, 137–138 (para 274).

<sup>52</sup> Case 6/64, *Costa v ENEL*, ECR 1964, p 585, 593.

<sup>53</sup> Case 26/62, *Van Gend en Loos*, ECR 1963, p 1, 12.

hands' following reciprocity considerations.<sup>54</sup> 'A member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another member State to comply with the rules laid down by the Treaty.'<sup>55</sup> The continuous assertion of the Community's *sui generis* character, however, does not by itself create an 'own legal order'. From a public international law perspective, the EC legal system remains a subsystem of international law.<sup>56</sup> Since any amendment of the constituting treaties still depends on the consent of the Union's sovereign member States, 'the Community legal order is still dominated by the spirit of international law'.<sup>57</sup>

From a purely systematic point of view, the rules on State responsibility are, hence, residually applicable. But is there still a need for such residual application? Our proposition was that States only intend to relinquish their *facultés* under general international law in favour of a special regime's procedures to the extent that and as long as a subsystem's procedures prove efficacious. Consequently, a fallback on the general rules of State responsibility presupposes that the mechanisms under the EC Treaty fail to give effect to the obligations members have assumed under the Treaty. The indemnity regime under the EC Treaty is comprehensive and mostly effective. As Conway has correctly pointed out, most of the gaps of the indemnity regime still existing 20 years ago have now been filled.<sup>58</sup> The *Franovich* and *Brasserie du Pêcheur* principles have vested individuals with a remedy to recover damage resulting from breaches of EC law by member States.<sup>59</sup> Article 228 EC Treaty has been introduced to give the declaratory judgments of the Court rendered according to articles 226 and 227 the 'bite' of a pecuniary sanction, if a member State disregards them; and article 7 of the EU Treaty provides for an institutionalized procedure for the suspension of membership in case of a grave and continuous violation of Community law. As far as we can see, only two hypothetical scenarios can be identified in which *lacunae* in Community law may prompt a fallback on State responsibility.

- (1) The first scenario would involve a continuous violation of Community law by an EC member State. Obviously, the *lex specialis* principle would require another member State (or the Commission) to exhaust the more 'special' mechanisms under the EC Treaty. A starting point would be for an affected State to bring the matter before the Commission and, if the Commission does not take up the case itself, to the European Court of Justice pursuant to article 227 EC. If the violating State chooses not to change its conduct despite a judgment of the Court, the Commission has the authority to seize the Court once more with an application for a pecuniary penalty pursuant to article 228(2) EC. If the violation persists, the member State may attempt to have the membership of the violating State suspended pursuant to article 7 EU. The latter remedy, which operates on the political rather than the legal plane, will not prove to

<sup>54</sup> Joined Cases 90/63 and 91/63, *Commission v Luxemburg and Belgium*, ECR 1964, 625.

<sup>55</sup> Case 232/78, *Mutton and Lamb*, ECR 1979, 2729.

<sup>56</sup> Cf. A Pellet, 'Les fondements juridiques internationaux du droit communautaire' (1994) V *Collected Courses of the Academy of European Law* 249.

<sup>57</sup> B De Witte, 'Rules of Change in International Law: How Special is the European Community?' (1994) XXV *Netherlands Ybk* 299, 331.

<sup>58</sup> G Conway, 'Breaches of EC Law and the International Responsibility of Member States' (2002) 13 *EJIL* 679, 688.

<sup>59</sup> Joined cases C-6/90 and C-9/90, *Franovich and Bonifaci v Italy*, ECR 1991, I-5357; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Germany and Factortame v UK*, ECR 1996, I-1029.

be successful, however, unless the 'injured' State can obtain a declaration of a grave and continuous breach by unanimous vote of the Council. Arguably, in this extreme scenario, the only option to induce compliance that remains for the 'injured' State is a fallback on unilateral countermeasures.

- (2) The second scenario revolves around the issue of State-to-State reparation for breaches of EC law. Claims for compensation of damages suffered by nationals, ie cases of diplomatic protection, do not fall under this category; following *Brasserie du Pêcheur* and *Francoovich*, individuals are vested with a cause of action of their own. Cases where economic losses may be incurred by a member State's domestic economy as such, rather than by certain individuals, may resemble the so-called '*guerre de moutons*'. In this instance, the United Kingdom indicated that the damage caused by French non-compliance with a Court judgment resulted in economic losses of £20 million.<sup>60</sup> Yet, the EC Treaty makes no explicit provision for a mechanism that would allow inter-State claims of reparation. The literature has proposed several dogmatic bridges to fill up this *lacuna* and accommodate inter-State claims for reparation within the EC system. The first is to resort to an extensive interpretation of articles 227 and 228, according to which a declaration of breach by the European Court entails the duty 'to re-establish the status quo ante (*restitutio in integrum*) and, where necessary, pay compensation for any injury suffered.'<sup>61</sup>

Some authors, however, doubt that the Commission's involvement under article 228 is suitable for indemnity cases and consequently suggest grounding claims for reparation directly on article 220, which emphasizes the Court's role as a guardian of the law.<sup>62</sup> A third dogmatic foundation of inter-State claims would be an application *mutatis mutandis* of the *Francoovich* principles.<sup>63</sup> Resort to the rules on State responsibility will not be necessary if the European Court of Justice accepts one of these dogmatic bridges to accommodate inter-State claims for damages within the European legal system. Nonetheless, a fall-back on countermeasures would still be conceivable to *enforce* a member State's claim of reparation. Member States may well have to resort to the mechanisms of State responsibility if the mechanisms within the EC do not prove effective.

Thus, systematically, a fallback on countermeasures remains conceivable, albeit only in two narrow 'emergency' scenarios. Some authors claim, however, that the specific teleology of the Community order precludes such unilateral action. One argument points to the exclusive jurisdiction of the European Court of Justice in adjudicating disputes on Community law (article 292 EC Treaty). However, the fallback scenarios envisaged take due account of the Court's central role, since unilateral action is reserved for cases of non-compliance with the Court's decision. A more weighty argument relates to the alleged lack of reciprocity in the legal relations among the member States. The European Court has asserted that the new legal order created by the EC Treaty leaves no room for reciprocity

<sup>60</sup> Cf Schwarze, 'Das allgemeine Völkerrecht in den innergemeinschaftlichen Beziehungen' (1983) 18 *Europarecht* 24. The UK government initially requested that the Commission order France to pay £20 million in damages. The request, however, was withdrawn for political reasons.

<sup>61</sup> AG Toth, *Legal Protection of Individuals in the European Communities*, Vol II (Amsterdam, North Holland, 1978), 181.

<sup>62</sup> Ch Tomuschat, 'Völkerrechtliche Schadensersatzansprüche vor dem EuGH', in JF Baur, P Müller-Graff, M Zuleeg (eds), *Europarecht—Energierrecht—Wirtschaftsrecht: Festschrift für Bodo Börner zum 70. Geburtstag* (Köln, Berlin, Carl Heymanns Verlag, 1992), 458.

<sup>63</sup> A Marschik, *Subsysteme im Völkerrecht* (Berlin, Duncker & Humblot, 1997), 233.

considerations. Reciprocity, however, is not something States can choose to 'abolish'; it is an inherent structural characteristic of obligations that operate on a *do ut des* basis. Many of the substantive provisions of the Treaty, such as the fundamental freedoms, are structurally reciprocal guarantees. Whether member States have renounced their rights to enforce these guarantees by reciprocal measures is quite a different question. They certainly have done so to a great extent. But here we return to our basic proposition: member States only intended to relinquish their reciprocal *facultés* under general international law to the extent that the EC's special procedures prove effective. Consequently, the non-reciprocity argument does not preclude countermeasures in the two 'emergency' scenarios outlined above, in which the procedures inherent in the EC system fail.

As a third argument against unilateral action, Weiler has pointed to the adverse effects of reprisals on individuals. '[T]he recourse to counter-measures would inevitably affect individuals removed from the dispute, militating against the very notion of a "new legal order of international law . . . the subjects of which comprise not only Member States but also their nationals"'.<sup>64</sup> It is true that countermeasures will usually impair certain individual benefits. Weiler seems to disregard, however, that this is equally true for the continuous violation of EC law that provokes unilateral reaction. A grave and enduring breach of Community law constitutes not only a measure of disrespect for the other member States' rights but at the same time inevitably affects the benefits of 'individuals removed from the dispute' in those member States.

To sum up: it is reasonable to conclude that EC law operates as a closed system of secondary rules for most practical purposes. Conceptually, however, it is not a self-contained regime since there remain scenarios where a fallback on State responsibility remains feasible and necessary, and since such a fallback is not precluded by peculiar characteristics of the Community order. Only after the European Union has attained such a degree of integration that recourse to general international law is not conceivable without putting into question the whole *raison d'être* of the treaty framework, the conclusion of self-containment might be justified. But this, it is submitted, is not (yet) the state of European integration.

### (c) The WTO system

Kuyper has contrasted the GATT, 'which was a self-contained regime of international law only in aspiration but not in reality' with the (then) newly created WTO, which 'has moved decisively in the direction of such a self-contained regime'.<sup>65</sup> In the GATT era, there was a clear need for unilateral enforcement, since a single Contracting Party, including the defeated respondent, was able to block the adoption of a panel report (or the establishment of a panel in the first place). The Marrakesh Agreement with its Dispute Settlement Understanding (DSU) has eliminated this loophole by establishing a negative consensus procedure. Moreover, Article 23 DSU obliges members to submit (all of) their disputes to the WTO's dispute settlement machinery: 'When Members seek the redress of a violation . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding.'

The ILC in its commentaries on State responsibility interprets this provision as an explicit derogation from the rules of State responsibility. 'In some cases it will be clear from the language of a treaty or other text that only the consequences specified are to flow.

<sup>64</sup> JHH Weiler, *The Constitution of Europe: The Transformation of Europe* (Cambridge, CUP, 1999), 29.

<sup>65</sup> PJ Kuyper, 'The Law of GATT as a Special Field of International Law' (1994) 25 *NYIL* 227, 252.

. . . An example . . . is the World Trade Organization Dispute Settlement Understanding as it relates to certain remedies.<sup>66</sup> Other authors have affirmed the contrary, namely that '[n]othing in Article 23 of the DSU, according to which WTO Member States shall have recourse to the DSU and abide by its rules, amounts to an express derogation from the right to adopt countermeasures when a losing party fails to implement a decision of the dispute settlement organs and the remedies provided for in the treaty have been exhausted without any positive result.'<sup>67</sup> It is true that the wording of article 23 establishes the primacy of WTO dispute settlement. On the other hand, the wording neither specifically permits nor prohibits recourse to additional remedies under general international law beyond those provided by WTO law. However, are there remedies under State responsibility that WTO law would not contain in a more tailor-made form?

It is clear that the DSU contains a *lex specialis* on cessation of the breach and on continued performance of the obligation. Pursuant to article 19.1 DSU, panels are empowered to order a Member to 'bring the measures into conformity' with WTO law. It is far from clear whether the WTO system contains remedies akin to reparation and countermeasures. Article 22 DSU addresses 'compensation' and the 'suspension of concessions' (also known as 'sanctions' or 'retaliation'). From a systematic point of view, however, both remedies can be regarded as a special variant of the *inadimplenti non est adimplendum* principle of the law of treaties. In case of a breach, the general rules of the law of treaties permit the temporary suspension of a treaty to restore the symmetry of obligations. The compensation provision of article 22.1 introduces an element of flexibility. It allows a State to temporarily uphold a violation in exchange for concessions in other areas, provided that the injured State agrees. Similarly, suspension of concessions pursuant to article 22.4 constitutes merely a partial non-performance of the treaty, subject to prior authorization from and subsequent monitoring by the Dispute Settlement Body. Since 'compensation' and 'retaliation' are designed to restore the (economic) reciprocity balance within one and the same Agreement (with the potential exception of cross-retaliation), they systematically 'deal with the same substantive matter' as article 60 of the Vienna Convention; being essentially 'remedies' under the law of treaties, they would not necessarily derogate as *leges speciales* the rules of State responsibility.

Systematic arguments aside and seen from a functional perspective, sanctions pursuant to article 22 DSU operate in a way that is very similar to countermeasures. As Pauwelyn has pointed out, concessions are suspended primarily with a view to inducing compliance. Once the principal objective is compliance (and not the restoration of contractual equity), however, the WTO sanctions 'have shifted into the area of State responsibility'.<sup>68</sup> The *US-Foreign Sales Corporations* and *US-Steel* disputes between the EC and the US confirm the finding that States employ suspensions of concession similarly to countermeasures under general international law. In the *Steel* case, the mere threat of sanctions worth more than \$2 billion persuaded the US administration to cut back domestic steel

<sup>66</sup> Commentary to art 55, para 3.

<sup>67</sup> Cf M Garcia-Rubio, 'Unilateral Measures as a Means of Forcible Execution of WTO Recommendations and Decisions', in L Picchio Forlati & L-A Sicilianos (eds), *Les sanctions économiques en droit international Economic Sanctions in International Law* (Leiden, Hague Academy of International Law, 2004), 445-475. Cf also P Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11 *EJIL* 763.

<sup>68</sup> J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge, CUP, 2003), 230.

subsidies after the Appellate Body had confirmed their illegality.<sup>69</sup> Consequently, there are strong grounds for regarding the WTO rules on retaliation as *leges speciales vis-à-vis* counter measures under general international law. Recourse to reprisals parallel to or in lieu of WTO-authorized sanctions is thus precluded. Similarly, the panel in *US—Section 301* concluded that ‘WTO members [are prevented] from unilaterally resolving their disputes in respect of WTO rights and obligations’.<sup>70</sup>

Most contentious, however, is the question whether a fallback on reprisals under State responsibility remains an option once the suspension of concessions proves ineffective. The ILC commentaries are critical of such a fallback from the WTO type of countermeasures to the State-responsibility type. Having discussed WTO sanctions, the ILC adds that ‘[t]o the extent that derogation clauses . . . are properly interpreted as indicating that the treaty provisions are “intransgressible”, they may entail the exclusion of countermeasures’.<sup>71</sup>

In our view, however, a conceptual distinction must be drawn between a far-reaching *lex specialis*, on the one hand, and the notion of ‘intransgressibility’, on the other hand. While the DSU clearly contains a *lex specialis*, the conclusion of intransgressibility is not warranted. When it comes to inducing compliance with WTO law, the special mechanisms of WTO law preclude recourse to the regime of countermeasures under general international law for most practical purposes. Yet, conceptually, countermeasures under general international law remain the *ultima ratio* in case of continuous non-compliance and provided that there is a prospect that unilateral action will effectively induce compliance. To the large trading powers, reprisals will hardly be an option. WTO-authorized trade sanctions will generally be the most effective means of instigating compliance. If trade sanctions worth \$4 billion annually cannot persuade the United States to amend its Foreign Sales Corporations subsidies legislation, it would be surprising if the suspension of a bilateral treaty could. Recourse to countermeasures under general international law would, thus, be precluded. For smaller and developing countries, however, countermeasures outside the WTO system may be a necessary last resort. If a large trading nation fails to comply with a WTO ruling, the temporary non-performance of a non-WTO treaty may well strengthen the position of a smaller injured State.

The WTO Agreements contain no functional equivalent of retrospective reparation. Can States, consequently, fall back on the rules of State responsibility and demand *restitutio in integrum* and monetary compensation either in panel proceedings or outside the dispute settlement machinery? Member States have argued partly in favour of, partly against an obligation to make reparation for injury.<sup>72</sup> Textual arguments for both positions are relatively weak. The question whether reparation is a helpful tool in the context of trade law is essentially one of *Rechtspolitik*. Panels have shown an inclination to recognize an obligation to grant *restitutio in integrum*, where restitution was feasible. This was particularly the case with respect to illegal subsidies (which the beneficiary could pay back) and unlawfully imposed antidumping duties (which the collecting State could reimburse to the unjustly

<sup>69</sup> *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, 10 November 2003, WTO Doc WT/DS248/AB/R.

<sup>70</sup> *United States—Sections 301–310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, WTO Doc. WT/DS152/R, 7.46.

<sup>71</sup> ARSIWA, Commentary to art 50, para 10.

<sup>72</sup> In favour of reparation, eg Ecuador, WTO Doc WT/DSB/M/89, para. 8; against reparation Australia, the EC, the US and Canada, WTO Doc WT/DSB/M/75, 5ff.

targeted company).<sup>73</sup> For the bulk of trade-restricting measures, however, restitution is not a feasible option. Monetary compensation, by contrast, raises a number of problems. Which damages would States claim? Claiming losses of nationals would introduce an element of diplomatic protection, which may be alien to the 'objective' trade regime. Moreover, total damages would easily amount to billions if the breach extends over several years. Had the negotiating States during the Uruguay round envisaged an obligation to make such retrospective compensation, they would have defined the terms of operation of such a massive indemnity regime (calculation of damages, statutory limitation, etc). Given the current state of WTO law, it seems reasonable to infer that compensation beyond a balancing of trade losses through the treaty-law mechanisms of article 22 DSU is precluded.

With the introduction of 'suspensions of concessions' as a countermeasures equivalent, the WTO system has indeed 'moved decisively in the direction of . . . a self-contained regime'. The object and purpose of the DSU do not permit a State to have parallel recourse to indemnity claims or countermeasures under State responsibility. As an *ultima ratio* in cases of continuous non-compliance, however, countermeasures outside the WTO framework remain an option. Thus, conceptually, not even the WTO is completely decoupled from the secondary rules of general international law.

#### (d) Treaties for the protection of human rights

The internationalization of human rights has turned the State 'inside out'. To the extent that treatment of individuals has been elevated to a matter of concern under international law, an important area of State regulation has been carved out of the traditional *domaine réservé*. The movement to internationalize the protection of human rights has led to the adoption of various international conventions such as, on a regional level, the European and American Conventions on Human Rights (ECHR, ACHR) and the Banjul Charter; the two 'global' Covenants on Civil and Political Rights (CCPR) and on Economic, Social and Cultural Rights (ESCR); and sectoral human rights regimes such as the Convention on the Elimination of all Forms of Racial Discrimination (CERD). All these treaties spell out particular enforcement mechanisms. However, given the centrality of human rights in 21st century international relations, it is not surprising that the spirit of human rights has transcended these specific instruments, entering the formerly State-oriented area of 'general' international law. For instance, the rules on State responsibility codified in 2001 contain a specific regime on responsibility for breaches of obligations in the collective interest. The crucial question in the present context is: to what extent do these rules on State responsibility apply to breaches of obligations under a human rights treaty? The International Court's *Nicaragua* judgment, on its face, appears to suggest that remedies under human rights treaties should be considered exclusive.

[W]here 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 conventions themselves.<sup>74</sup>

<sup>73</sup> *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000, WTO Doc WT/DS126/RW, 6.48; *Guatemala—Cement II*, Panel Report, 17 November 2000, WTO Doc WT/DS156.

<sup>74</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, ICJ Reports 1986, p 14, 134 (para 267).

However, a closer look qualifies any quick conclusion of exclusiveness. Remedies under human rights treaties, according to the Court, are not exclusive *per se*. Rather, the Court found that the special treaty mechanisms excluded unilateral enforcement mechanisms under general international law because 'the mechanisms provided for have functioned'. Bearing this qualifier in mind, however, the Court stated precisely what is being advocated here: treaty mechanisms exclude the rules on State responsibility as long as they function effectively. Where this is no longer the case, States may have recourse to the remedies provided for under the general law of State responsibility. Once the exclusiveness theory has been thus discarded, we can turn to two familiar questions: Which of the mechanisms under human rights treaties are *leges speciales* to the rules on State responsibility in the first place? How far does their speciality extend?

Human rights treaties have created innovative procedures for monitoring and enforcing compliance with the obligations under the convention. Such procedures include periodic reporting, which forces parties to justify their human-rights record before treaty bodies, individual complaint procedures as well as political and judicial inter-State proceedings. To what extent are these procedures *leges speciales* to the rules on State responsibility? Conceptually, the responsibility of States arises irrespective of who has the right to invoke it in which fashion. The various procedures have no bearing on the question whether a State is responsible for a breach. Instead, they operate on the level of invocation of responsibility, dealing with the question of who may present a claim against the responsible State and request which remedies. Thus, they compete with articles 42 and 48 of the ILC's codification.

In our view, most of these procedures do *not* constitute *leges speciales* to articles 42/48. Individual claims procedures are not 'concerned with the same substantive matter' as the rules of State responsibility—to pick up on Fitzmaurice's definition of special rules. 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. *Vice versa*, the mere existence of an individual claims procedure cannot warrant the conclusion that inter-State invocation is consequently precluded. Rather, the invocation of State responsibility then rests on two pillars.

Moreover, reporting procedures cannot be deemed *leges speciales vis-à-vis* the rules on State responsibility. The Articles on State Responsibility are concerned with the legal consequences of concrete breaches. Reporting procedures before treaty bodies are not. Their function is to provide a comprehensive monitoring and critique of the human rights situation in a particular member State. They are designed to help improve the overall human rights record of States by using an innovative mix of judicial assessment akin to a tribunal, political pressure and legal assistance. It is true that both reporting procedures and inter-State invocation of responsibility for breaches of human rights serve the overarching goal of improving compliance with human rights standards. However, they involve different actors and operate with different techniques of persuasion. Crucially, reporting procedures do not result in the treaty body ordering any specific remedies. Thus, such procedures complement the right to invoke State responsibility rather than replacing it. The fact that reporting procedures do not involve 'the same substantive matter' as inter-State complaints is reaffirmed by the Conventions themselves. Where inter-States complaint procedures are available, such procedures exist alongside a periodic reporting system.

To reach a first conclusion: only State-to-State procedures of a judicial character that address concrete violations of the treaty are *leges speciales* to the rules on invocation of State responsibility. 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. The decision-making power of the respectively competent treaty body must not be bypassed by unilateral auto-interpretation. Where no such procedures are provided, States are free to invoke the responsibility of a violator State pursuant to the provision of article 48 of the ILC Articles as a 'State other than an injured State'. Such a State can claim only a limited range of remedies including cessation, and guarantees of non-repetition. Moreover, it may request reparation in the interest of the persons whose rights were violated.

So far so good. But what if a State fails to cease an ongoing violation of human rights or denies the victims of a human rights violation adequate reparation? The question of enforceability of human rights has remained most controversial—so much so that it almost jeopardized the adoption of the final draft Articles by the ILC during its 2001 session. Human rights treaties do not contain special provisions regarding the right of States to enforce obligations under these treaties. In accordance with the proposition outlined above, it could be easily concluded that States have a right to ensure that international law be respected, including a restricted right to unilateral enforcement action (countermeasures).

However, it has been suggested that human rights are different and, therefore, de-coupled from the general regime of legal consequences of internationally wrongful acts. The arguments advanced in support of such a contention fall within two principal strands. The first argument is a teleological one: unilateral enforcement of human rights may create 'disorder' in international relations, especially in light of the fact that such enforcement rights are prone to political abuse.<sup>75</sup> The second argument is a doctrinal one. Given the structural non-reciprocity of human rights obligations, it is being argued, bilateral inter-State enforcement through countermeasures would be systematically flawed.<sup>76</sup>

Human rights obligations have thus been characterized as 'objective regimes'.<sup>77</sup> As the European Court of Human Rights stated in the *Northern Ireland* case:

Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.<sup>78</sup>

In our view the Court's statement should not be interpreted as suggesting that human rights are of a non-reciprocal character. While human rights have an objective, public-law-like, perhaps even constitutional character,<sup>79</sup> technically, they nonetheless formally remain 'reciprocal engagements between contracting States'. It is crucial to distinguish between

<sup>75</sup> JA Frowein, 'Die Verpflichtungen *erga omnes* im Völkerrecht und ihre Durchsetzung', in R Bernhardt et al (eds), *Festschrift für Hermann Mosler* (Berlin, Springer, 1983), 242, 255; M Koskeniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72 *BYIL* 337, 347.

<sup>76</sup> Cf the references cited in B Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Berlin, Duncker & Humblot, 1972), 176ff.

<sup>77</sup> W Ripphagen, Fourth Report on State Responsibility, *ILC Yearbook 1983*, Vol. II(1), 3, 17 (para 89).

<sup>78</sup> *Ireland v UK*, *ECHR Series A No 25* (1978), para 239.

<sup>79</sup> (1991) 34 *Ybk European Commission on Human Rights* 35, 52.

reciprocity as a formal characteristic of a norm on the one hand, and reciprocity as a substantive *do-ut-des* relationship on the other hand. Human rights treaties do not involve such a substantive exchange, since their ultimate beneficiaries are the individuals under the jurisdiction of the State undertaking the obligation. However, since human rights remain 'mutual, bilateral undertakings' owed to the other States parties to the respective convention, there is no compelling systematic reason why States should be precluded from bilateral enforcement of human rights (provided, of course, that the human rights treaty's rules on invocation of responsibility have been exhausted). In Virally's words: 'Chaque Etat partie à un tel traité a le droit d'exiger des autres parties qu'elles respectent ces engagements, pris envers lui-même'.<sup>80</sup>

As to the second strand of argument, are countermeasures prone to creating particular disorder if they are employed with the purpose of inducing compliance with human rights obligations? From a developed-countries perspective, Frowein expressed the concern that unilateral enforcement would create considerable legal uncertainty. Koskenniemi added (with a surprising touch of Morgenthau-style realism) that elevating the enforcement of human rights from politics to the level of law 'would vest diplomacy with pressures and expectations it cannot carry'.<sup>81</sup> Authors from developing countries, by contrast, stress the danger of political coercion of developing countries by rich and powerful States.<sup>82</sup> While it is true that countermeasures for the enforcement of human rights have so far remained a domain of 'Western' industrialized States, Tomuschat has argued that the regime of countermeasures 'does not place new States in a position of inferiority', pointing out as an example that developing countries could freeze foreign assets to induce compliance.<sup>83</sup>

The ILC Drafting Committee of 2000 had proposed a provision pursuant to which 'any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached'.<sup>84</sup> At the same time, however, the draft contained various safeguards to accommodate the concerns of developing countries and prevent political abuse. Article 41 of the draft articles provisionally adopted in 2000 restricted countermeasures to cases of wrongful acts 'that constitute a serious breach', meaning a 'gross and systematic failure by the responsible State to fulfil its obligation, risking substantial harm to the fundamental interests protected thereby'. However, the proposal was received critically by a majority of States in the Sixth Committee of the 2000 General Assembly. Thus, in its 2001 session, the ILC was seeking a compromise that would eliminate the risk that the Assembly would not 'pass' the draft Articles. The present article 54, a general saving clause, is an attempt to leave the question open without

<sup>80</sup> M Virally, 'Le principe de réciprocité dans le droit international contemporain' (1967-III) 122 *Recueil des cours* 1, 26: 'Every State Party to such a treaty has the right to require the other parties to respect these commitments, which have been made to the State itself.'

<sup>81</sup> M Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72 *BYIL* 337, 347.

<sup>82</sup> Cf the discussion in J Crawford, Third Report on State Responsibility, 2001, A/CN.4/507/Add.4, 16, 18, who concedes that there is 'a due process issue' from the perspective of the targeted State if a few powerful States decide to act as a kind of human rights police for the world, based on their auto-interpretation of human rights law.

<sup>83</sup> Ch Tomuschat, 'Are Counter-measures Subject to Prior Recourse to Dispute Settlement Procedures?' (1994) 5 *EJIL* 77, 78.

<sup>84</sup> Article 54 of the draft articles provisionally adopted by the Drafting Committee on second reading, A/CN.4/L.600.

prejudicing the evolution of a future *opinio iuris* regarding the permissibility of countermeasures in the collective interest.

In our view, the ILC draft of 2000 may still provide valuable guidance as to what the evolving law on countermeasures in the collective interest could look like. There is no return to an international law that puts on an indifferent face to human rights. Human rights cannot be fenced in an exclusive *domaine réservé* anymore; once their genie is out of the bottle, human rights necessarily transcend to the realm of general international law. Against this backdrop, it is only consequential not to deny States the means to induce compliance with obligations under human rights treaties, once the collective enforcement mechanisms of the treaty have failed.<sup>85</sup>

The concerns raised by some authors (and States) neglect the realities of human rights protection: So far, States have hardly shown the excessive human rights 'vigilantism' dreaded by some.<sup>86</sup> For instance, in the history of the European Convention, States have generally lodged inter-State complaints almost exclusively in situations where their interests were specially affected. The two exceptions were the application against Greece in 1967,<sup>87</sup> and the application against Turkey in 1982.<sup>88</sup> Far from obsessively policing human rights violations across the world, the attitude of States towards human rights violations is all too often characterized by a remarkable lack of vigour to counter such treaty breaches.

### Further reading

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<sup>85</sup> Cf B Simma, 'Staatenverantwortlichkeit und Menschenrechte im ILC-Entwurf 2001', in JA Frowein, K Scharloth, I Winkelmann, & R Wolfrum (eds), *Verhandeln für den Frieden—Negotiating for Peace, Liber Amicorum Tono Eitel* (Berlin, Springer, 2003), 423; concurring, LA Sicilianos, *Les réactions décentralisées à l'illicéité* (Paris, LGDJ, 1990), 167.

<sup>86</sup> S McCaffrey, 'Lex Lata or the Continuum of State Responsibility', in JHH Weiler, A Cassese, & M Spinedi (eds), *International Crimes of State* (Berlin, de Gruyter, 1989), 244.

<sup>87</sup> 11 *Ybk European Commission on Human Rights* (1968) 691; 12 (II) *Ybk European Commission on Human Rights* (1969).

<sup>88</sup> ECHR, Applications Nos 9940-9940/82.

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