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General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System

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Abstract

*This article takes issue with certain fundamental aspects of the fragmentation analysis by addressing the normative underpinnings of the proposition that international law is structured as a legal system. To this end, focus is had on the unitary character of the general/particular international law and primary/secondary rules terminology, as normative differentiations to the international legal system (the 'whole'), by virtue of the residual (default) applicability of the sets of norms they denote. Ergo, on the one hand, the doubts expressed by the ILC Study Group on Fragmentation concerning the allegedly obscure meaning and scope of the term 'general international law' are dispelled by demonstrating that the term indeed signifies the set of international legal norms binding erga omnes; on the other, the article elaborates on the crucial role of the distinction between primary and secondary norms for the proper operation of *lex specialis*, focal to the fragmentation analysis. Overall, the pertinence of the general/particular international law and primary/secondary norms termini technici in international adjudication supports the view that the international legal system is indeed equipped with the proper normative tools to cope with the challenges set by fragmentation.*

The phenomenon of fragmentation of international law, which has come to the forefront of academic discourse, features as an indication of the level of normative complexity in the realm of the international legal system; at the same time, its negative consequences often present themselves in international adjudication and are further

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enhanced by the multiplication of international courts and tribunals.¹ International judges and lawyers are increasingly faced with legal questions relating to the relationship of each specialized regime with its normative environment. In essence, effectively answering these questions constitutes *per se* a reiteration of the unity of international law. In response to the growing concerns expressed by judges and scholars, the International Law Commission (ILC) appointed a Study Group to address the topic of fragmentation.² The Study Group, having limited its analysis to the normative, rather than the institutional, forms of fragmentation,³ concluded its discussions by producing a voluminous Analytical Report in 2006. The merits of the analysis of the ILC Study Group in terms of codification and systematization of numerous of the pertinent issues involved, capitalizing on the existing scholarly literature on the topic, are hard to disregard. Nevertheless, the ‘tool-box’ it sought to provide so as to address the normative incongruities and conflicts between distinct international regimes appears to have been largely limited to reiterating largely undisputed international law assumptions, still leaving a number of outstanding issues open;⁴ and, importantly, it would appear that in times of fragmentation a unitary account of the international legal system may in fact necessitate more.

It is here that the impetus for the present article, seeking to contribute to the ongoing scholarly debate on fragmentation, lies; certain international legal *termini technici*, though potentially constituting crucial aspects of the fragmentation analytics as unitary elements of the ‘system’, yet remain largely neglected in international legal literature. Accordingly, in further theorizing the fragmentation phenomenon it is worth assessing the normative underpinnings of the framework proposition that international law is structured and operates as a legal system, hence constituting the normative ‘whole’ in the sphere of international legal relations (Section 1). Against this background it is equally necessary to dispel the doubts expressed by the ILC Study Group concerning the allegedly obscure meaning and scope of ‘general international law’ as a *terminus*

¹ See, e.g., Koskenniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden J Int’l L* (2002) 553, at 578. A prominent commentator has noted that ‘the multiplication of specialized tribunals is, by itself, a healthy phenomenon. Its description by the term “proliferation,” with its negative connotations, is misleading’: Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’, 31 *NYU J Int’l L and Politics* (1999) 919, at 925.

² See Analytical Report of the Study Group of the International Law Commission finalized by the Chairman M. Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, UN Doc A/CN.4/L.682, 13 Apr. 2006.

³ *Ibid.*, at para. 13. Criticizing the ILC Study Group’s choice of (normative) approach of the fragmentation phenomenon see, *inter alios*, Del Mar, ‘System Values and Understanding Legal Language’, 21 *Leiden J Int’l L* (2008) 29, at 34–57; Leathley, ‘An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?’, 40 *NYU J Int’l L and Politics* (2007) 259, at 271–304; Broude, ‘Fragmentation(s) of International Law: on Normative Integration as Authority Allocation’, in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth* (2008), at 99, 101–110.

⁴ See the critique and comments by, *inter alios*, Conforti, ‘Unité et fragmentation du droit international: “glissez, mortels, n’appuyez pas!”’, 111 *RGDIP* (2007) 5; P.-M. Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law’, 1 *Eur J Legal Studies* (2007) 1, at 15; Simma, ‘Universality of International Law from the Perspective of a Practitioner’, 20 *EJIL* (2009) 265, at 272.

technicus central to the fragmentation analysis (Section 2). Then, the discussion will focus on the often surpassed pertinence of the ‘primary/secondary norms’ terminology, an additional normative differentiation to the international legal system long known in the context of the law on state responsibility, not only as a unitary normative factor, but also as pivotal to the proper operation of the *lex specialis* doctrine (Section 3).

Overall, the argument goes, both differentiations, though situated at a distinct analytical level, in fact constitute particularizations of the proposition that international law is structured and should be assessed as a legal system; these differentiations verify and enhance the unity of international law by denoting the existence of a unitary ‘whole’ comprising both general and particular international law norms, as well as both primary and secondary rules; furthermore, they prove to be of substantial utility for the purposes of legal reasoning deployed in international adjudication often facing the challenges posed by fragmentation, and more specifically on the basis of the residual (default) applicability of general international law and (customary) secondary norms on state responsibility.

1 The Proposition that International Law Constitutes a Legal System

This section, by focusing on the international legal system, does not intend to engage in the debate on whether international law is really law.⁵ Nor does it attempt to test the feasibility of international law constituting a legal system by testing it against jurisprudential approaches on the necessary characteristics of legal systems.⁶ What it does attempt to assess are the logical and positive-law aspects of the proposition that international law constitutes a legal system proper. *Prima facie*, this can be understood as a fundamental logical presupposition upon which international lawyers’ and judges’ legal reasoning is grounded. But, it is here contended that there also exist normative, apart from logical, underpinnings to this proposition.

A The Logical Underpinnings of the Proposition

It cannot but be observed that scholarly reference is often (and casually) made to the ‘international legal system’ as a self-evident or established fact, dictated by logic and in no need of further justification, possibly motivated by the deeply held belief that the science of international law, targeted at the regulation of international relations, is

⁵ For an international lawyer’s perspective see, e.g., Amerasinghe, ‘International Law and the Concept of Law: Why International Law is Law’, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), at 83.

⁶ This has been done elsewhere: see, among others, O. Casanovas, *Unity and Pluralism in Public International Law* (2001), at 5–26; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), at 84–104; D’Amato, ‘International Law as an Autopoietic System’, in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (2005), at 335.

not a random, chaotic enterprise.⁷ ‘International law is not rules. . . . [i]t is a normative system’, goes the much-cited direct formulation of Dame Rosalyn Higgins, insofar as it is the existence of the ‘system’ that secures a desirable degree of societal order.⁸ In the course of scientific endeavour, the underlying belief that each distinct treatment of a particular issue forms part of an overall discourse pertaining to a holistic approach of distinct but interdependent parts of a ‘whole’ is a result of logic, and indeed secures some kind of order. And, generally, this constitutes often an implicit process, which, as fundamental as it may be, appears to be hardly disputed, in the sense that the presupposition of the international legal system constitutes a narrative essentially logical for international lawyers.

International law has thus been defined as ‘a system of law designed primarily for the external relations of states [which] does not work like any internal legal system of a state’;⁹ a ‘voluntary and cooptative system’, which, in contrast to domestic legal systems, is ‘horizontal because international society is a voluntary association of states with no superior authority to make law, pronounce judgment and otherwise enforce the law with binding effect, except through institutions which states have, by consent established’.¹⁰ In brief, as Shabtai Rosenne put it, ‘international law is a comprehensive and sophisticated legal system that, despite its voluntarist basis, operates exclusively in the international political environment where the principal actors are sovereign independent States’.¹¹ It is in this vein that the idea that international law is a ‘system’ has been characterized as ‘almost axiomatic’, insofar as ‘it is hard not to think about international law in a way that doesn’t invoke some idea of structure or system’.¹²

It is perhaps useful to observe at this early point that the terms ‘international legal system’ and ‘international legal order’ often feature in public international law theory as almost synonymous.¹³ Ergo, and while, as will be demonstrated *infra*, the judgments and decisions of international courts feature references to the ‘international

⁷ E.g., Fitzmaurice, ‘The Future of Public International Law and of the International Legal System in the Circumstances of Today: Second and Final Part of an Abstract (prepared by the Author) of a Special Report’, 5 *Int’l Relations* (1976) 949.

⁸ R. Higgins, *Problems and Processes: International Law and How We Use It* (1994), at 1.

⁹ P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (1997), at 6–7. Cf Roucouas, ‘Engagements parallèles et contradictoires’, 206 *RdC* (1987) 9, at 27: ‘[l]’accumulation du matériel de réglementation qui se produit à des niveaux différents, à l’aide d’instruments variés et qui comporte des effets juridiques inégaux, exprime ainsi une énorme normativité parallèle qui est loin d’être hiérarchisée de la même manière qu’en droit interne’ (footnotes omitted).

¹⁰ Cheng, ‘Custom: The Future of General State Practice in a Divided World’, in R. Macdonald and D. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (1983), at 513, 516, 519–520. Also see *SS Lotus case (France v. Turkey)*, PCIJ Series A No. 10, at 18.

¹¹ Rosenne, ‘The Perplexities of Modern International Law: General Course on Public International Law’, 291 *RdC* (2001) 9, at 40.

¹² Craven, ‘Unity, Diversity and the Fragmentation of International Law’, 14 *Finnish Yrbk Int’l L* (2003) 3, at 6. *Contra* Kingsbury, ‘Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?’, 31 *NYU J Int’l L and Politics* (1999) 679, at 692. Cf Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’, 22 *Leiden J Int’l L* (2009) 1, at 28.

¹³ See, e.g., the use of the two terms in the insightful analysis on the structure of the international legal system provided in Zemanek, ‘The Legal Foundations of the International System: General Course on Public International Law’, 266 *RdC* (1997) 9, at 29–42.

legal system',¹⁴ one could equally trace references to the 'international legal order', the two terms deployed lacking an *inter se* distinction or differentiation. For instance, the Chamber of the International Court of Justice (ICJ) in the *Gulf of Maine Case* referred to 'rules of law, in the international legal order, which govern the matter at issue'.¹⁵ What is more, in the context of recent arbitral practice relating to investment protection tribunals often note the distinction between national legal orders and the international legal order,¹⁶ including references to 'rights as resulting, within the international legal order from two international treaties',¹⁷ or statements such as that '[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders'.¹⁸

Notwithstanding that it is not here intended to enter the realm of legal philosophy,¹⁹ it can be observed that the two terms are intimately intertwined, though not synonymous in the strict sense. While 'international legal system' refers to the existence of a body of legal rules structured as a 'system', the concept of a 'legal order' (*ordre/ordonnement juridique*) as such entails and presupposes the existence of further elements, such as a social base (in acceptance of the maxim '*ubi societas ibi jus*' – 'where there is society there is law'), legal subjects, and certain basic, even if decentralized, functions. *Ergo*, and per Paul Reuter, a legal order comprises a body of rules '*mises en ordre*', of varying degrees of completeness and effectiveness, being more of an effort rather than a point of departure.²⁰ Bin Cheng has similarly defined the 'international legal order' as 'the structure which results from the existence and operation of the international legal system',²¹ while Pierre-Marie Dupuy has further explained that '[a] "legal order" may be defined as a system of norms binding on determined subjects which trigger some pre-established consequences when the subjects breach their obligations', then to conclude that 'the existence of the international legal order should not be challenged'.²² In any event, the crux of the matter seems to be that,

¹⁴ See *infra* nn 37–47, and accompanying text.

¹⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment [1984] ICJ Rep 246, at para. 79.

¹⁶ See, e.g., *El Paso Energy International Company v. Republic of Argentina*, Decision on Jurisdiction of 27 Apr. 2006, ICSID Case No. ARB/03/15, IIC 83 (2006), at para. 82.

¹⁷ *AES Corporation v. Argentina*, Decision on Jurisdiction of 26 Apr. 2005, ICSID Case No. ARB/02/17, IIC 04 (2005), at para. 93.

¹⁸ *SGS Société Générale de Surveillance SA v. Pakistan*, Decision on Objections to Jurisdiction of 6 Aug. 2003, ICSID Case No. ARB/01/13, IIC 223 (2003), at para. 147. Cf Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 1141.

¹⁹ This would escape the naturally limited purview and purposes of the present study. For such a discussion from the perspective of legal philosophy see, e.g., Moreso and Navarro, 'Some Remarks on the Notions of Legal Order and Legal System', 6 *Ratio Juris* (1993) 48.

²⁰ Reuter, 'Principes de droit international public', 103 *RdC* (1961) 425, at 460.

²¹ Cheng, *supra* note 10, at 516.

²² P.-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *NYU J Int'l L and Politics* (1999) 791, at 793. Cf Rousseau, 'Principes de droit international public', 93 *RdC* (1958) 369, at 389: '*[m]ais le droit n'est pas seulement un système de règles ou un ensemble de normes. C'est aussi un élément essentiel de l'organisation sociale. Si l'on considère le droit international en tant qu'ordre normatif, la réponse n'est pas douteuse. Le droit international remplit les deux conditions nécessaires et suffisantes pour être considéré comme un système normatif autonome.*'

necessarily avoiding rigid and abstractly systemic conceptions of international law as completely decoupled from ‘*le plan social [international]*’,²³ the terms ‘international legal system’ and ‘international legal order’ both constitute expressions of the proposition on the systemic character of international law, at least in methodological and/or analytical terms.²⁴ To what extent there exist normative, apart from logical, underpinnings to this proposition is analysed in the next section of this study.

B The Legal Underpinnings of the Proposition

In search of the possible legal underpinnings of the narrative of international law as a ‘system’, it is necessary to turn to the formal sources of international law, as enshrined in Article 38(1) paragraphs (a) to (c) of the ICJ Statute.²⁵ The question here, then, is whether the proposition that international law is structured and operates as a normative system *per se* satisfies the ‘positive law tests’ mentioned in the *North Sea Continental Shelf Cases* necessary for the identification of international legal norms;²⁶ in other words, whether the proposition *per se* can be considered a customary norm according to Article 38(1)(b),²⁷ i.e., in the form of ‘settled’ and ‘generally consistent’ state

²³ See de Visscher, ‘Méthode et système en droit international’, 138 *RdC* (1973) 75, at 76, approvingly referring to the scientific analysis of international law as a system ‘*qui, par un rapprochement des espèces, tend à grouper les normes dans le plan doctrinal en un ensemble cohérent fondé non sur les postulats de la logique abstraite, mais sur l’observation des liens organiques qui, dans le plan social, animent les rapports d’intérêts en présence*’.

²⁴ For the sake of consistency, and in view of the normative approach followed in the present enquiry, the term ‘international legal system’ is to be utilized hereinafter.

²⁵ Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (‘ICJ Statute’), Art. 38(1). Paras (a) to (c) of the Art. list ‘the sources of international law which Article 38 of the Statute requires the Court to apply’: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment [1986] ICJ Rep 14, at para. 56, and is generally regarded ‘as a complete statement of the sources of international law’: I. Brownlie, *Principles of International Law* (2008), at 5; also see M. Shaw, *International Law* (2008), at 70.

²⁶ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment [1969] ICJ Rep 3, at para. 38. Similarly see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, at para. 29; *South-West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment [1966] ICJ Rep 6, at para. 89; *Fisheries Jurisdiction (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*, Merits, Judgment [1974] ICJ Rep 3, at para. 45. Still, one could suggest that, according to para. 1(d) of Art. 38, the previously mentioned views of scholars envisaging the existence of the international legal system could be qualified as ‘teachings of the most qualified publicists’, and thus serve as ‘subsidiary means for the determination of rules of law’.

²⁷ The option of Art. 38(1)(a) ICJ Statute is not to be explored further, insofar as it is rather unlikely for the proposition that international law constitutes a legal system to ever take the form of a treaty proviso. Moreover, qualifying the systemic proposition of international law as a general principle of law applied in *foro domestico* of para. (1)(c) can be potentially based, albeit indirectly, on the monist or dualist perceptions prevalent in the various domestic legal systems premised upon the *ab initio* distinction between the national and international normative realms (on monism and dualism: see, e.g., Sperduti, ‘Dualism and Monism: a Confrontation to Be Overcome’, 3 *Italian Yrbk Int’l L* (1977) 31; Wasilkowski, ‘Monism and Dualism at Present’, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), at 323. Notwithstanding the difficulties of acknowledging the existence of general principles of law, often depending on ‘judicial hunches’ (Schlesinger,

practice, such or carried out in such a way as to be 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.²⁸

It has been observed that the reference to 'systematization of rules of international law' in Article 15 of the Statute of the International Law Commission (adopted and subsequently amended via General Assembly resolutions) signifies 'their conceptualization within the embrace of a singular code'.²⁹ In this respect, it can be recalled that 'resolutions of the United Nations General Assembly may in some instances constitute evidence of the existence of customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law'.³⁰ Nevertheless, it is doubtful whether the above observation was in fact intended to imply that there exists unanimous state practice treating international law as a legal system, as a practice expressive of law. Interestingly, Christian Dominicé has written that, in no need of a theoretical foundation, based solely on a 'mere observation of reality' and the maxim *ubi societas ibi jus*, the conclusion that international law exists as a legal system 'is buttressed by the finding that there is a sort of collective *opinio juris*, a conviction that international law exists and that States could not do without it'.³¹ While indeed that author proceeds from a descriptive rather than a normative outlook, one would be tempted to proceed further and examine whether there exists any state practice to be coupled with the *opinio juris* Dominicé mentions, so as to argue in favour of the existence of a customary rule regarding the systemic character of international law.

'Research on the General Principles of Law Recognized by Civilized Nations', 51 *AJIL* (1957) 734, at 748–749; similarly, Sørensen, 'Principes de droit international public: cours général', 101 *RdC* (1960) 1, at 22–26, it would still not be unfeasible further to suggest that the contention that law, both domestic and international, is structured and operates systemically constitutes a general principle applicable to all kinds of legal relations, especially considering the frequent mention made of 'legal system/order', 'code', 'codification' etc in legal literature in general. E.g., see a common dictionary definition of 'law': '[t]he body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects. (In this sense usually the law.) Also, in early use, a code or system of rules of this kind' (emphasis added): *Oxford Online Dictionary* (www.oed.com).

²⁸ *North Sea Continental Shelf cases*, *supra* note 26, at paras 76–77; *Military and Paramilitary Activities in and Against Nicaragua* (Merits), *supra* note 25, at para. 186. From the most recent international jurisprudence on the identification of customary norms see *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, Special Tribunal for Lebanon, 16 Feb/2011, available at: www.unhcr.org/refworld/docid/4d6280162.html, at paras 83–102, regarding the international crime of terrorism.

²⁹ Craven, *supra* note 12, at 11. See Statute of the International Law Commission, Art. 15, adopted by the GA in res 174 (II) of 21 Nov. 1947, as amended by res 485 (V) of 12 Dec. 1950, 984 (X) of 3 Dec. 1955, 985 (X) of 3 Dec. 1955 and 36/39 of 18 Nov. 1981 (hereinafter: ILC Statute), with Art. 15 remaining unchanged.

³⁰ ILC Committee on the Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' ('ILA Report on Custom'), 69 *ILA Report of the Sixty-Ninth Conference Held in London* (2000) 712, at 766. See also *Texaco Overseas Oil Petroleum Co/California Asiatic Oil Co (TOPCO) v. Government of the Libyan Arab Republic*, 53 *ILR* 389 (1979), at paras 80–90.

³¹ Dominicé, 'Methodology of International Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), Vol. 3, at 354, 355.

Thus, insofar as relevant state practice is concerned, it is indeed possible, apart from the oft-cited remark in the 1906 Moore's Digest,³² to trace more contemporary uncontested statements, comments, claims, and observations made by various governments³³ approvingly referring to the international legal system as such, either before international judicial *fora*³⁴ or during ILC sessions.³⁵ Importantly for the purposes of the present discussion, there appears not to have been an instance where a state, or an international organization, or an international court or tribunal, has ever questioned, especially in the course of the settlement of international disputes, the generic proposition underlying the term 'international legal system'. This is how, for example, the similarly unequivocal view prevalent in the ILC ambit can be perhaps explained.³⁶

³² J. B. Moore, *A Digest of international Law as embodied in diplomatic discussions, treaties and other international agreements, international awards, the decisions of municipal courts, and the writings of jurists, and especially in documents, published and unpublished, issued by Presidents and Secretaries of State of the United States and the decisions of Courts, federal and state* (1906), at 2: '[t]he Government of the United States has on various occasions announced the principle that international law, as a system, is binding upon nations, not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental condition of their admission to full and equal participation in the intercourse of civilized states'.

³³ With respect to their possible value, in normative terms, see, e.g., ILA Report on Custom, *supra* note 30, at 725–726.

³⁴ See, e.g., the Polish submissions to the PCIJ in the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, PCIJ Series A./B. No. 44, at 23; also the submissions by India in the *Case concerning Right of Passage over Indian Territory*, Merits, Judgment [1960] ICJ Rep. 6, at 11.

³⁵ See, e.g., the comments and observations by Governments on the works undertaken by the ILC, referring to the 'system' of international law: Slovakia (UN Doc A/CN.4/515 [2001] II YbILC Pt One, at 20, making reference to the 'system of primary rules of international law'), Ireland (UN Doc A/CN.4/488 [1998] II YbILC Pt One, at 97, 162), UK (UN Doc A/CN.4/488 [1998] II YbILC Pt One, at 99), German Democratic Republic (UN Doc A/CN.4/414 [1988] II YbILC Pt One, at 2), Netherlands (UN Doc A/CN.4/182 and Corr. 1 & 2 and Add. 1, 2/Rev. 1 & 3 [1966] II YbILC 317), Chile (UN Doc A/CN.4/328 and Add. 1–4 [1980] II YbILC 96), Yugoslavia (UN Doc A/CN.4/328 and Add. 1–4 [1980] II YbILC 105).

³⁶ 'In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances': ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries', *Yearbook of the ILC*, Vol. II (Part Two) (2001), at 33. The ILC Responsibility Articles and their commentaries have been approvingly referred to by the Court in *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 Sept. 1997, [1997] ICJ Rep 7, at paras 49, 79, 83 (citing an earlier draft); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion [1999] ICJ Rep 62, at para. 62; *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Judgment [2007] ICJ Rep 43, at paras 173, 385, 388, 398, 401, 407, 414, 420, 431), stating that ILC Arts. 4 and 8 reflect customary international law; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 Apr. 2010, not yet reported, at para. 273, referring to ILC Arts. 34 to 37. Similarly, the ILC Arts. have been repeatedly invoked by investment arbitration tribunals as a codification of customary international law: see, e.g., *Noble Ventures Inc v. Romania*, Award of 5 Oct. 2005, ICSID Case No. ARB/01/11; IIC 179 (2005), at para. 69; *Saipem SpA v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 Mar. 2007, ICSID Case No. ARB/05/07, IIC 280 (2007), at para. 148; *Jan de Nul NV and Dredging International NV v. Egypt*, Decision on jurisdiction of 16 June 2006, ICSID Case No. ARB/04/13; IIC 144 (2006), at para. 89; *Gustav F W Hamester GmbH & Co KG v. Ghana*, Award of 10 June 2010, ICSID Case No. ARB/07/24; IIC 456 (2010), at para. 171.

So, while the ICJ, for example, has never directly addressed why and how international law is structured and normatively operates as a 'system', one can trace instances where the term 'international legal system' or related terms have been utilized *in passim* by the Court.³⁷ In the *Reparations case* the Court stated that 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.³⁸ Also, while in the *Namibia Advisory Opinion* the Court stated that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation',³⁹ later in the *Fisheries Jurisdiction* case it stated *in passim*: '[i]t is one thing to seek to determine whether a concept is known to a system of law, in this case international law'.⁴⁰ Combining the above with the parallel usage by the Court in its judgments and advisory opinions of terms such as 'legal system of the United Nations',⁴¹ 'system of the (ICJ) Statute',⁴² 'system of consular protection',⁴³ 'general system of minority protection',⁴⁴ and, most notably, 'self-contained regime',⁴⁵ it appears that the existence of the system of international law as a whole is judicially acknowledged via the recognition of certain of its systemic differentiations, i.e., the parallel identification of sub-systems operating in its ambit. Moreover, references to the international legal system have also been made by other international courts and tribunals.⁴⁶ The *OSPAR Arbitration* could be seen as a prominent

³⁷ The references by international judicial bodies to the system of international law can be considered as falling into the category of Art. 38(1)(d) of the ICJ Statute, as 'subsidiary means for the determination of rules of law': in this respect see, e.g., Roucouas, 'Rapport entre "moyens auxiliaires" de détermination du droit international', in: K. Koufa (ed.), *Sources of International Law – Thesaurus Acroasium (Vol. 19)* (1992), at 257. It must nevertheless be observed that individual judges of the ICJ in their declarations, dissenting and separate opinions appear more willing to use the term 'international legal system': see, e.g., *Immunity Advisory Opinion*, *supra* note 36, at 93 (Judge Weeramantry, Separate Opinion). On the potentially authoritative role of individual, dissenting and separate opinions in the development of international law see, e.g., Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication', 14 *ICLQ* (1965) 788, at 792–802; S. Rosenne, *The World Court: What It Is and How It Works* (1973), at 106–109; I. Hussain, *Dissenting and Separate Opinions at the World Court* (1984), at 73–82.

³⁸ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, at 178.

³⁹ *Namibia Advisory Opinion*, *supra* note 26, at para. 53.

⁴⁰ *Fisheries Jurisdiction case (Spain v. Canada)*, Jurisdiction, Judgment [1998] ICJ Rep 432, at 460.

⁴¹ *Effect of awards of compensation made by the UN Administrative Tribunal*, Advisory Opinion [1954] ICJ Rep 47, at 56.

⁴² *Nottebohm case (Liechtenstein v. Guatemala)*, Preliminary Objection, Judgment [1953] ICJ Rep 111, at 122.

⁴³ *LaGrand (Germany v. United States of America)*, Judgment [2001] ICJ Rep 466, at 492.

⁴⁴ *Danzig Advisory Opinion*, *supra* note 34, at 36–37, 39.

⁴⁵ *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment [1980] ICJ Rep 3, at 41. Also see *Case of the S.S. 'Wimbledon' (Britain, France, Italy & Japan (Poland Intervening) v. Germany)*, Judgment, PCIJ Series A No. 1, at 23–24; *Exchange of Greek and Turkish Populations*, Advisory Opinion, PCIJ Series B No. 10, at 20.

⁴⁶ See, e.g., *The Case of Attilio Regolo and Other Vessels (Italy, Spain, United Kingdom, United States)*, Award of 14 Jan. 1945, 12 RIAA, at 9; *Mergé Case*, Italian–United States Conciliation Commission established under Art. 83 of the Treaty of Peace with Italy, Decision No. 55 of 10 June 1955, 14 RIAA 236, at 242; *Self case*, Italian–United States Conciliation Commission established under Art. 83 of the Treaty of

example in this respect, given that the Tribunal *in casu* directly referred to the international legal system as such, further cautioning against its ‘frustration’.⁴⁷

The above is not to be read as implying the existence of a comprehensive and detailed agreed view of the international legal system among states, adjudicators, or scholars. Agreement on the systemic nature of international law appears to have been achieved solely on the basis that the proposition still remains an elementary one. Certain questions regarding the more intimate attributes of the ‘system’ and, most prominently, its unity indeed remain unaddressed.

And this last point is crucial for a question that arises as a continuation of the analysis so far: is the proposition according to which international law is structured and operates as a ‘system’ capable of and/or suitable, in the first place, for constituting a customary norm? The formulation of the ILA on the formation of international customary law again appears pertinent: a customary norm must, *inter alia*, relate to state practice not situated ‘outside the sphere of international legal relations’ so that states are unable to claim specific performance as a matter of legal right.⁴⁸ In effect, this is expressive of the fact that only international legal norms establishing rights and obligations can be invoked in the context of international adjudication.⁴⁹ Hence, it must be further substantiated that *per se* the proposition of the international legal system lies ‘inside the sphere of international legal relations’, or, in other words, forms (or can form) part of the legal argument employed before international courts and tribunals.

Nevertheless, the previous tracing of the logical and legal contours of the proposition that international law is structured as a ‘system’, in terms similar to a deductive analytical approach,⁵⁰ appears to have reached its limits. In Koskeniemi’s words, ‘[i]t is often said that law is a “system”. By this no more need be meant than that the various decisions, rules, and principles of which the law consists do not appear

Peace with Italy, Decision No. 202 of 27 Jan. 1960, 14 RIAA 435, at 440; *De Pascale case*, Italian–United States Conciliation Commission established under Art. 83 of the Treaty of Peace with Italy, Decision No. MD/1018 of 24 June 1961, 16 RIAA 229, at 234; *Anaconda-Iran, Inc. v. Government of the Islamic Republic of Iran*, Award No. 65-167-3, 10 Dec. 1986, 13 Iran-USCTR 199, at para. 130; *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 Oct. 1994, 22 RIAA 3, at para. 122. Also see *Camuzzi International SA v. Argentina*, Decision on Objections to Jurisdiction of 11 May 2005, ICSID Case No. ARB/03/2, IIC 41, at para. 145; *Sempra Energy International v. Argentina*, Decision on Objections to Jurisdiction of 11 May 2005, ICSID Case No. ARB/02/16, IIC 221, at para. 157.

⁴⁷ *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Permanent Court of Arbitration, Final Award–Decision of 2 July 2003, 23 RIAA 59, at para. 146.

⁴⁸ ILA Report on Custom, *supra* note 30, at 745–746, excluding acts of interstate comity, for example. This conclusion potentially applies *mutatis mutandis* in the case of the emergence of general principles of law as unwritten international law.

⁴⁹ Unless the parties to the dispute agree that the case is decided *ex aequo et bono*, as, e.g., under Art. 38 (2) of the ICJ Statute.

⁵⁰ On the inductive and deductive approaches to international law see G. Schwarzenberger, *The Inductive Approach to International Law* (1965). Cf Roberts, ‘Traditional and Modern Approaches to Customary International Law: a Reconciliation’, 95 *AJIL* (2001) 757, at 758, referring to the inductive and deductive processes for deriving the existence of customary law.

randomly related to each other'.⁵¹ Accordingly, while the prevalent belief that international law exists as a legal 'system' appears reiterated, the proposition is of such generic and elementary character and remains at such a level of abstraction that answering the question whether it can be situated *per se* 'inside the sphere of international legal relations' appears obscure.

That said, a shift of analytical approach is hereby suggested in order to situate the proposition of the systemic character of international law within the sphere of international legal relations: more specifically, it is apt to consider in the next two sections of this study the potential contribution of two normative differentiations to the international legal system (the 'whole'), which, independently identified in international juridical reasoning, lend normativity to the proposition that international law constitutes a legal system, in terms, now, of a 'bottom-up' (inductive) analytical approach. Opting now for inductive legal reasoning,⁵² the discussion will turn to the 'general/particular' international law distinction as a normative scope-type differentiation from the 'whole' (the 'whole' comprising both general international law norms and particular international law norms), and the 'primary/secondary norms' distinction as a normative function-type differentiation from the 'whole' (the 'whole' comprising both 'primary' and 'secondary' norms). These differentiations, each denoting a specific sub-set of the totality of international rules, play a significant role in international adjudication, being situated in the core of legal argument before the various courts and tribunals often facing the legal challenges set by the normative fragmentation of international law. As will be demonstrated *infra*, they stand *in their own name* in the course of dispute settlement directly influencing the judicial acknowledgement of legal rights and obligations in the sphere of international dispute settlement. It is specifically in this vein that the existence of the above differentiations, pertaining to the scope and function of international legal norms, necessarily imply and are expressive, by virtue of the specific sub-sets of rules they denote, signify, and represent, of the parallel existence of the international legal system as the overarching normative structure.⁵³

⁵¹ ILC Fragmentation Report, *supra* note 2, at para. 36. Cf D'Amato, 'International Law as a Unitary System', Northwestern Public Law Research Paper No. 08-2002, available at: <http://ssrn.com/abstract=11106420>, at 5.

⁵² Cf Schwarzenberger, 'The Inductive Approach to International Law', 60 *Harvard L Rev* (1947) 539, at 568: '[a]n international lawyer who applies the inductive method in full awareness of the hierarchies of sources, law-determining agencies, and elements of such agencies will always have at his disposal reliable measuring rods for determining the significance of instances taken from state practice, of individual decisions of international and national courts, and of the writings of the most highly qualified publicists'.

⁵³ As Georges Abi-Saab masterfully observes, '*... dès qu'il existe une différenciation de fonctions ou de catégories [des normes internationales], cela implique nécessairement qu'elles sont reliées ou articulées d'une certaine manière les unes par rapport aux autres, qu'il existe une structure ou une architecture qui sous-tend et qui se dégage de cette articulation particulière des normes*'; Abi-Saab, 'Cours general de droit international public', 207 *RdC* (1987) 9, at 106. Similarly, see Gowlland Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), at 277, 280; Combacau, 'Le droit international: bric-à-brac ou système?', 31 *Archives de philosophie du droit* (1986) 85, at 90.

2 ‘General’ and ‘Particular’ International Law in the International Legal System as a Normative Scope-Type Differentiation

A A Normative Scope-Type Differentiation Central to the Fragmentation Analysis

It has been insightfully observed that the qualification of international law as ‘general’ *vis-à-vis* ‘special’ treaty regimes has been resorted to as means of concealing the true character of general international law as ‘residual’,⁵⁴ that is, applicable by default unless explicitly derogated from by (special) treaty language. Indeed, and as one can infer from the ICJ’s ruling in the *South-West Africa Cases (Second Phase)*, the normative effect of the residual/default applicability of a given international norm is such that the norm in question can ‘operate *per se* to give rise to legal rights and obligations’ which potentially expand to the sphere of *inter partes* international legal relations, i.e., subject matter specific regimes.⁵⁵ It is in a similar fashion that the *Eureko v. Slovak Republic* investment Tribunal noted that ‘the perspective of [a given international court or tribunal] must begin with the instrument by which and the legal order within which consent [to its *prima facie* jurisdiction] originated’;⁵⁶ differently put, the proper legal framework for adjudicating a given international legal dispute comprises the treaty *in casu* as well as other rules of international law *inter partes* or *erga omnes* (by default) binding. For, notwithstanding their specificities, all specialized regimes ‘are founded on, and connected with, general international law, and many disputes arising in their context can be settled only by reverting to rules of that law’,⁵⁷ insofar as, to recall Pierre-Marie Dupuy’s eloquent metaphor, all allegedly autonomous regimes ‘speak a language in which the common grammar is international law’.⁵⁸

⁵⁴ Weil, ‘Le droit international en quête de son identité: cours général de droit international public’, 237 *RdC* (1992) 9, at 90. See also, referring *in passim* to the residual character of norms derived from the wider corpus of general international law, R.-J. Dupuy (ed.), *A Handbook on International Organizations* (1988), at 742; Pallemmaerts, ‘International Legal Aspects of Long-Range Transboundary Air Pollution’, 1 *Hague Yrbk Int’l L* (1988) 189, at 204; V. Degan, *Sources of International Law* (1997), at 471; Fitzmaurice and Redgwell, ‘Environmental Non-Compliance Procedures and International Law’, 31 *Netherlands Yrbk Int’l L* (2000) 35, at 63–64; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 28, 149, 363, 406; O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: the Rise of the International Judiciary* (2005), at 77, 102, 394, 404.

⁵⁵ *South-West Africa cases (Second Phase)*, *supra* note 26, at para. 54, where the Court denied the existence of any ‘residual juridical content’ of the principle of sacred trust in Art. 22 of the Covenant of the League of Nations outside the Mandates’ system.

⁵⁶ *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Arbitrability, and Suspension of 26 Oct. 2010, PCA Case No 2008-13; IIC 463 (2010), at paras 228–229.

⁵⁷ Cafilisch, ‘International Courts and Tribunals – The Challenges Ahead: The Law – Substantive and Procedural Questions’, 7 *The Law & Practice of Int’l Courts and Tribunals* (2008) 289, at 297.

⁵⁸ Dupuy, *supra* note 4, at 4. Cf Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–1954: General Principles and Sources of Law’, 30 *British Yrbk Int’l L* (1953) 1, at 58–66. on ‘rights with double foundation’.

In fact, the case law of international courts and tribunals fully supports the proposition of residual applicability of general international law norms; or, as stated in *Micula and ors v. Romania*, '[investment tribunals, in their capacity as international courts] will certainly apply residually international law if the other applicable rules are silent or obscure or are eventually determined not to apply *ratione temporis*'.⁵⁹ Hence, the *Camuzzi v. Argentina* Tribunal referred to the customary rules of diplomatic protection as a 'residual mechanism' for the redress of injuries to individuals which is operative in the lack of *leges speciales* established by means of bilateral or multilateral treaties or other agreements.⁶⁰ It is in the same respect that the *SG v. Dominican Republic* Tribunal similarly noted that, '[t]he rules governing issues not addressed by the specific language of the treaty may sometimes be provided by the law of diplomatic protection, which apply as customary international law, and thus, provides for a residual role for at least some aspects of the law of diplomatic protection'.⁶¹ Furthermore, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) also offers references to the residual application of (general) international humanitarian law, and particularly in the context of Articles 3 and 5(i) of its Statute⁶² as 'residual clauses' designed so that no violation of the customary laws of war escapes the Tribunal's jurisdiction.⁶³

Ergo, the law of treaties constitutes a prime example of the residual applicability and application of norms identified as derived from general international law.⁶⁴ The VCLT, as observed by Sir Arthur Watts, authoritatively sets out the modern customary law

⁵⁹ *Micula and ors v. Romania*, Decision on Jurisdiction and Admissibility of 24 Sept/ 2008, ICSID Case No ARB/05/20; IIC 339 (2008), at para. 151. Similarly, see, e.g., *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, Interim Award of 1 Dec. 2008, Ad hoc – UNCITRAL Arbitration Rules, IIC 355 (2008), at para. 118; *National Grid PLC v. Argentina*, Award of 3 Nov. 2008, Ad hoc – UNCITRAL Arbitration Rules, case 1:09-cv-00248-RBW, IIC 361 (2008), at para. 256 *in fine*; *RosInvest Co UK Ltd v. Russian Federation*, Final Award of 12 Sept. 2010, SCC Case No. 075/2009; IIC 471 (2010), at paras 605–609.

⁶⁰ *Camuzzi International SA v. Argentina*, *supra* note 46, at para. 145.

⁶¹ *Société Générale v. Dominican Republic*, Award on Preliminary Objections to Jurisdiction of 19 Sept. 2008, LCIA Case No. UN 7927; IIC 366 (2008), at para. 108.

⁶² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, available at: www.icty.org, Art 3: '[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to. . .', as well as Art 5(i): '[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: . . . (i) other inhumane acts'.

⁶³ With respect to Art. 3 of the ICTY Statute see, e.g., *Prosecutor v. Dusko Tadic aka 'Dule'* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 Oct. 1995, at para. 91; *Prosecutor v. Vujadin Popović et al.* (Trial Chamber II Judgment), IT-05-88-T, ICTY, 10 June 2010, at para. 739. On Art. 5(i) see *Prosecutor v. Milomir Stakić* (Appeal Judgment), IT-97-24-A, ICTY, 22 Mar. 2006, at para. 315. Similarly see, e.g., *Prosecutor v. Milan Martić* (Trial Chamber I Judgment), IT-95-11-T, ICTY, 12 June 2007, at para. 82.

⁶⁴ Cf Abi-Saab, 'The WTO Dispute Settlement and General International Law', in R. Yerxa and B. Wilson (eds), *Key Issues in WTO Dispute Settlement: the First Ten Years* (2005), at 7, 10–11. For a detailed analysis of Arts 19–23 VCLT as the result of codification as well as progressive development of international law see Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 *British Yrbk Intl L* (1994) 245.

on treaties,⁶⁵ while there has been no occasion as yet where the ICJ has addressed the application of its provisions, and has not verified their customary status.⁶⁶ So to the extent to which the majority of the VCLT provisions reflect custom, one can conclude that the norms of the law of treaties apply residually, that is, ‘automatically, and without incorporation’,⁶⁷ insofar as that they have not been explicitly derogated from by specific treaty provisions.⁶⁸

Moreover, as is the case with the residual applicability of the customary law on treaties, the application of the ‘general residual law’⁶⁹ on state responsibility is premised and dependent upon the lack of specific derogation by states in their *inter se* legal relations. The ILC Responsibility Articles ‘being general in character, . . . are also for the most part residual’,⁷⁰ while Article 55 (*Lex specialis*) ‘addresses the question of which rule to apply where there are multiple rules addressing the same subject matter’.⁷¹ Accordingly, the *Archer Daniels* investment Tribunal stated, when examining Mexico’s countermeasures’ defence derived from general international law, that ‘[i]n the context of Chapter Eleven [of the North American Free Trade Agreement – NAFTA], customary international law – as codified in the ILC Articles – . . . operates in a residual way’,⁷² while also, in the later *Corn Products v. Mexico* investor–state dispute another ICSID Tribunal equally explained that the ILC Responsibility Articles as a whole ‘are in principle applicable under the NAFTA save to the extent that they are

⁶⁵ A. Aust, *Modern Treaty Law and Practice* (2007), at p. xv.

⁶⁶ *Ibid.*, at 11.

⁶⁷ ILC Fragmentation Report, *supra* note 2, at para. 177.

⁶⁸ See ILC Draft Articles on the law of treaties with commentaries, *Yearbook of the ILC*, Vol. II (1966), at 233, 269, 272; Haak, ‘“Unless the Treaty Otherwise Provides” and Similar Clauses in the International. Law Commission’s 1966 Draft Articles on the Law of Treaties’, 27 *ZaōRV* (1967) 540; H. Thirlway, *International Customary Law and Codification: an Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972), at 111–112; Rosenne, ‘“Consent” and Related Words in the Codified Law of Treaties’, in S. Rosenne, *An International Law Miscellany* (1993), at 357, 376, fn 39; M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties* (2005), at 317.

⁶⁹ *United Parcel Service of America Inc v. Canada*, Award of 24 May 2007, Ad hoc – UNCITRAL Arbitration Rules, IIC 306 (2007), at para. 59.

⁷⁰ ILC Responsibility Articles, *supra* note 36, at 62. See also ILC, ‘Summary record of the 1733rd Meeting’, UN Doc A/CN.4/SR.1733, *Yearbook of the ILC*, Vol. I (1982), at 211; Bodansky and Crook, ‘Symposium: The ILC’s State Responsibility Articles – Introduction and Overview’, 96 *AJIL* (2002), at 780, 790; R. Bishop, J. Crawford, and M. Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (2005), at 797–798.

⁷¹ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, circulated 11 Mar. 2011 (not yet reported), at para. 316.

⁷² *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v. Mexico*, Award and Separate Opinion of 21 Nov. 2007, ICSID case No. ARB(AF)/04/05, IIC 329 (2007), at para. 119. On countermeasures in international law see L-A. Sicilianos, *Les réactions décentralisées à l’illicite: des contre-mesures à la légitime défense* (1990); L. Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (1992).

⁷³ *Corn Products International, Inc. v. United Mexican States*, Decision on Responsibility of 5 Jan. 2008, ICSID case No. ARB (AF)/04/1, IIC 373 (2008), at para. 76. Cf *Suez and ors v. Argentina*, and joined case, Decision on Liability of 30 July 2010, ICSID Case No. ARB/03/19; IIC 443 (2010), at para. 262, where the Tribunal stated that the lack of an explicit exclusion in the text of a given treaty constitutes one of the ‘conditions’ for the invocation of the customary necessity defence. See further on necessity *infra* notes 172–192, and accompanying text.

excluded by provisions of the NAFTA as *lex specialis*'.⁷³ Ergo, the same stance (i.e., default applicability of the ILC Responsibility Articles in the absence of a specific treaty stipulation to that effect) is consistently taken by investment arbitration tribunals.⁷⁴ In the context of WTO adjudication, and among other instances where the default applicability of general international law in WTO disputes has been acknowledged,⁷⁵ the Arbitrator in the *US – 'Upland Cotton'* Article 4.11 and 7.10 SCM arbitrations authoritatively cited the ILC commentaries on countermeasures and acknowledged the residual applicability of the ILC Responsibility Articles in so far as they 'do not purport to prevail over any specific provisions relating to the areas it covers that would be contained in specific legal instruments'.⁷⁶ In addition, the Arbitral Tribunal established by the second Canada/US Softwood Lumber Agreement (SLA) of 2006 in order to resolve the long-standing trade dispute between the parties also acknowledged the default applicability of the *Chorzów Factory* principle⁷⁷ enshrined in Article 31 of the ILC Articles on State Responsibility, explaining that since 'there is no necessity for this principle to be stated in the applicable treaty itself. . . [its] applicability . . . for the SLA, therefore, must be accepted unless further examination leads to a different conclusion', i.e., that a *lex specialis* provision exists in that agreement.⁷⁸ That said, it is evident that general international law can play a central role in international adjudication currently hampered by the normative fragmentation of international law; for, as verified in the Report of the ILC Study Group, fragmentation takes place 'against the background' of general international law.⁷⁹ Nevertheless, the normative characteristics of this 'background' operation still remain obscure; perhaps this obscurity is further fuelled by the inconsistent and occasionally confusing stance adopted by the Study Group insofar as the content and scope of the term 'general international law' are concerned.

⁷⁴ See, e.g., *LESI SpA and ASTALDI SpA v. Algeria*, Award of 4 Nov. 2008, ICSID Case No. ARB/05/3; IIC 354 (2008), at paras 102–118; *Kardassopoulos v. Georgia* and joined case, Award of 28 Feb. 2010, ICSID Case Nos ARB/05/18; ARB/07/15; IIC 458 (2010), at paras 503–511; *Al-Bahloul v. Tajikistan*, Final Award of 8 June 2010, SCC Case No. 064/2008; IIC 475 (2010), at paras 40–52; *Alpha Projektholding GmbH v. Ukraine*, Award of 20 Oct. 2010, ICSID Case No. ARB/07/16; IIC 464 (2010), at paras 399–401.

⁷⁵ From the WTO sphere see on the default applicability of general international law in the lack of a *lex specialis* provision in the covered agreements Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541, at para. 7.96; Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, adopted 14 Nov. 2008, as modified by Appellate Body Report WT/DS320/AB/R para. 7.336; Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R, adopted 14 Nov. 2008, as modified by Appellate Body Report WT/DS321/AB/R para. 7.336.

⁷⁶ See Decision by the Arbitrator, *US – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, circulated 31 Aug. 2009 (not yet reported), at para. 4.41, n. 129; Decision by the Arbitrator, *US – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, WT/DS267/ARB/2, circulated 31 Aug. 2009 (not yet reported), at para. 4.31, n. 69.

⁷⁷ *Case concerning the Factory at Chorzow (Germany v. Poland)*, Claim for indemnity – Jurisdiction, PCIJ Series A. No. 9 (1927), at 21: '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.

⁷⁸ *US v. Canada*, Award on Remedies of 23 Feb. 2009, LCIA Case No. 7941, at para. 274.

⁷⁹ ILC Fragmentation Report, *supra* note 2, at para. 493.

More specifically, while the Study Group employed the term ‘general international law’ to denote customary rules and general principles of law, there are instances in its analysis where equal mention of general international law is made by reference to environmental or human rights treaties.⁸⁰ Moreover, in the last pages of the Analytical Report, while general international law is defined as encompassing custom and general principles of law recognized by civilized nations, it is nevertheless confusingly stated that ‘it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars, in dubio mitius, estoppel* and so on)’.⁸¹ It was perhaps in realization of the above inconsistencies that an ‘examination of the notion of general international law’ was deferred by the Study Group to future ILC studies in order to determine what sources are covered by the term, as well as its relationship with treaty-making;⁸² hence, it is most probably the prior invocation of the concept of ‘principles of international law proper’ by the Study Group that cast doubts over the content and meaning of the term ‘general international law’. It is worth, then, investigating what these ‘principles of international law proper’, allegedly a potential normative response to the fragmentation phenomenon, may actually mean, given the importance attributed to them by the ILC Study Group. In this respect, it is useful to revisit briefly the concept of general principles in international law. One could recall that whether Article 38(1) (c) ICJ Statute includes both ‘general principle of law recognized by civilized nations’ and ‘general principles of international law’ has been subject to scholarly debate.⁸³ While certain international lawyers have taken the view that both are in fact included in paragraph 1(c), the, perhaps dominant, restrictive approach envisages that paragraph as including solely those general principles derived from domestic law, while ‘general principles of international law’ are rather derived from or associated with or reflected in custom and multilateral treaty law.⁸⁴ It is perhaps with the above in

⁸⁰ For instance compare para. 170 *in fine* with para. 174, as well as para. 194 with para. 443, of the ILC Fragmentation Report, *supra* note 2.

⁸¹ *Ibid.*, at 254.

⁸² *Ibid.*, at 256.

⁸³ The Proceedings of the Advisory Committee of Jurists, which prepared the draft Statute of the Permanent Court of International Justice (PCIJ), only limitedly resolve the debate, insofar as they display the divergence of opinions respectively between its Members, and rather demonstrate that the text of what today stands as Art. 38(1)(c) ICJ Statute was adopted as a product of compromise. See Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes* (1920), at 307–325, 331–343. Also see Gaja, ‘General Principles of Law’, in R. Wolfrum (ed.), *Max-Planck Encyclopedia of Public International Law (online edition)*, available at: www.mpepil.com, at paras 7–20.

⁸⁴ For an overview of the relevant debate see, e.g., F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008), at 41–42, referring, on the one hand, to scholars endorsing the ‘restrictive’ view on the scope of Art. 38(1)(c), such as Lachs, Virally, Barberis, Rosenne, Dupuy, and Cassese, and, on the other, to Lammers, Zemanek, and Brownlie as proponents of a more expansive approach. Cf A. Cassese, *International Law* (2001), at 158–159, remarking that in the quest for general principles, one should start from general principles specific to a particular branch of international law, proceed then to general principles of international law, and finally examine those general principles commonly applied in *foro domestico*.

mind that the Study Group moved to refer to 'principles' of international law proper.⁸⁵ In parallel, one could also point to the extra category of general principles in international law coined by Hermann Mosler, that is, 'general principles applicable [inherent] to all kinds of legal relations' as distinct from general principles of either the national or the international legal system,⁸⁶ as potentially fitting the description of 'principles of legal process' mentioned by the Study Group (i.e., *audiatur et altera pars, in dubio mitius, estoppel*). But again, the Study Group made clear that at least the 'principles of international law proper' as such do not constitute a sub-categorization of the general principles of law envisaged by Article 38(1)(c) ICJ Statute.

As an alternative, then, one could trace a link between the 'principles of international law proper' and the often-cited 1928 *Georges Pinson* claim in the Franco-Mexican Commission,⁸⁷ insofar as the Study Group more than once based its conclusions on the fact that, as per Umpire Verzijl, parties to a treaty are taken 'to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way'.⁸⁸ It is then necessary to observe that the cited passage of the *Pinson* award, authenticated in French, actually featured the term '*droit international commun*'. Moreover, it appears that the *Annual Digest of Public International Law Cases* version of the award indeed translated the term as meaning 'general principles of international law';⁸⁹ nevertheless, formulations such as 'principles of public international law', 'general principles of international law', and so on have long been considered as plainly referring to general international law.⁹⁰

For example, according to the American Law Institute, 'references to "general principles of international law" ordinarily mean principles accepted as customary international law whether or not they derive from principles common to national legal systems'.⁹¹ In fact, that was also the use of the term made by the PCIJ in the *Danzig* Advisory Opinion,⁹² more recently confirmed by the WTO panel in *EC – Biotech*, holding that 'the term "general principle of international law" . . . may be understood as encompassing either rules of customary law or the recognized general principles of law or both'.⁹³ It then indeed appears to a large extent settled that references to

⁸⁵ See, e.g., ILC Fragmentation Report, *supra* note 2, at para. 462.

⁸⁶ Mosler, 'General Principles of Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1995), ii, at 524–525.

⁸⁷ *Georges Pinson case*, Franco-Mexican Commission, Award of 13 Apr. 1928, 5 RIAA 329, at 422: '[t]oute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente'.

⁸⁸ See ILC Fragmentation Report, *supra* note 2, at paras 179, 414, 465.

⁸⁹ 4 *Annual Digest of Public International Law Cases* (1927–1928), at 427.

⁹⁰ Buzzini, 'La «généralité» du droit international général: réflexions sur la polysémie d'un concept', 108 *RGDIP* (2004) 381, at 391.

⁹¹ American Law Institute, *Restatement Third of Foreign Relations Law of the United States* (1987), at para. 102, Reporters' Note 7.

⁹² *Danzig* Advisory Opinion, *supra* note 34, at 23–24, 25.

⁹³ Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add. 1 to Add. 9, and Corr. 1, adopted 21 Nov. 2006, DSR 2006:III–VIII, at para. 7.86.

‘general principles of international law’ in international legal doctrine and practice entail more an actual *renvoi* to general international law, rather than somehow signifying an allegedly novel legal concept of ‘principles of international law proper’.⁹⁴ It is in this sense that the Study Group’s reference to ‘principles of international law proper’ can only prove to be circular; for, insofar as the Study Group itself explicitly distinguished ‘principles of international law proper’ from custom and general principles of law, the allegedly novel concept which it sought to introduce into the fragmentation discourse can only be viewed as a plain reiteration of the omnipresence and continuous relevance of general international law (i.e., customary rules and general principles of law) in tackling the negative challenges set by fragmentation. Nevertheless, the Study Group itself also declined to define what ‘general international law’ means and deferred its examination for future ILC works.

It is in view of the above that the position taken in the present study is at odds with the one expressed by the ILC Study Group suggesting the allegedly obscure, and in need of further elaboration, content of the term ‘general international law’, and the independent existence of ‘principles of international law proper’. As will be demonstrated *infra*, the term ‘general international law’, denoting a normative scope-type differentiation from the international legal system, has long been delimited in international legal theory and judicial practice, and it is exactly in its normative ambit that possible solutions to the challenges set by the fragmentation phenomenon could be sought by virtue of the default applicability of international legal norms binding *erga omnes*.

B A Normative Scope-Type Differentiation in Fact Delimited

The term ‘general international law’ has been characterized as endowed with a ‘certain degree of imprecision’,⁹⁵ even though it often features in international instruments.⁹⁶ Hence, it has been suggested that references in treaties to ‘international law’ are in practice equated with references to ‘general international law’, still without further elaboration.⁹⁷ Nevertheless, one can be reminded that Bin Cheng has defined ‘general international law’ from a normative scope-type perspective, i.e., as the set of norms ‘the legal effect of which are *erga omnes*’, and distinguished it from the ‘international legal system’ which, in turn, constitutes the entire set of international norms ‘whether binding on all (*erga omnes*), or only between some (*inter partes* or *inter se*)’. Similarly, Sir Gerald Fitzmaurice viewed treaties merely as a ‘sources of obligation’

⁹⁴ Note also that a more careful reading of the previous passages of the *Pinson case* in fact reveals that the Umpire also referred to the potentially central role of equity and equitable principles in international adjudication. See further on this point Gourgourinis, ‘Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)’, 103 *ASIL Proceedings* (2009) 79, at 80–82.

⁹⁵ Wood, ‘The International Tribunal for the Law of the Sea and General International Law’, 22 *Int’l J Marine and Coastal L* (2007) 351, at 354.

⁹⁶ Art. 53 VCLT; 1982 UN Convention on the Law of the Sea, 21 *ILM* (1982) 1261, Preamble.

⁹⁷ Kunz, ‘General International Law and the Law of International Organizations’, 47 *AJIL* (1953) 456, at 458.

rather than 'sources of law', sources being reserved to general custom and fundamental general principles of law as opposable *erga omnes*.⁹⁸ A more recent view by Buzzini has also identified an aspect of 'extrinsic generality' in general international law as 'objective law' imposed upon the entirety of states.⁹⁹ It then appears that this understanding has prevailed to the extent that 'general international law' is now indeed generally taken to refer to international norms binding *erga omnes*, contrary to treaty (or other) norms binding *inter partes*.¹⁰⁰ In this context, the *erga omnes* binding force of a given norm should not be confused with the concept of obligations *erga omnes*, i.e., legal obligations owed to the international community as a whole. For the concept of obligations *erga omnes* relates to *jus standi* (who has standing to invoke responsibility), while *erga omnes* binding force refers to the scope of addressees of the norm (*vis-à-vis* whom can the norm be invoked against).¹⁰¹ Otherwise put, general international law refers to norms which are 'binding on and, in principle, applicable to all the subjects of the international legal system'.¹⁰²

International judicial practice reaffirms the above position. For example, in the *ELSI Case*, the Chamber of the ICJ interpreted the reference to 'international law' in a treaty provision as referring to general international law.¹⁰³ Importantly, general

⁹⁸ Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in *Symbolae Verzijl: présentées au professeur J. H. W. Verzijl à l'occasion de son LXX-ième anniversaire* (1958), at 153, 157–160; for further references on the debate as it stood early in 1953 see *ibid.*, at 456 ff. For a contemporary view on the growing relevance of multilateral conventions in the formation of general international law see Buzzini, 'La théorie des sources face au droit international général: réflexions sur l'émergence du droit objectif dans l'ordre juridique international', 106 *RGDIP* (2002) 581, at 609–612.

⁹⁹ Buzzini, *supra* note 90, at 391.

¹⁰⁰ Similarly, see ILC Articles on the law of treaties, *supra* note 63, at 246; ILC Responsibility Articles, *supra* note 36, at 169, 215, 254; Valticos, 'Pluralité des ordres juridiques internationaux et unité du droit international', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), at 301, 305–306; Wood, *supra* note 95, at 354–355.

¹⁰¹ Buzzini, *supra* note 90, at 392–395. Also, further respectively ILC Responsibility Articles, *supra* note 36, at 126–128 (Art. 48 – Invocation of responsibility by a state other than an injured state), and M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997).

¹⁰² Cheng, 'Some Remarks on the Constituent Element(s) of General (or So-called Customary) International Law', in A. Anghie and G. Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998), at 377, 379–380 *Contra* L. Oppenheim, *International Law: A Treatise, Vol. I – Peace* (2005), at 2–3. While both Bin Cheng and Oppenheim would agree that, in their analyses, international legal system and universal international law are more or less conterminous, they would still disagree on the connotation of general international law; in other words, whether the term connotes norms binding on all (*erga omnes*), or only between some (*inter partes* or *inter se*). Bin Cheng appeared more flexible in one of his earlier writings, where he suggests that, first, often general international law is taken to refer to the international legal system as a whole, and, secondly, that according to the ICJ jurisprudence there exists a wider meaning and a narrower sense of general international law, the first comprising both custom and general principles, and the latter custom solely. In any case, he still did not endorse Oppenheim's distinction (Bin Cheng, *supra* note 10, at 526).

¹⁰³ *Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, Judgment [1989] ICJ Rep 15, at para. 111. Also see *North Sea Continental Shelf* cases, *supra* note 26, at para. 63. Cf *Diplomatic and Consular Staff case*, *supra* note 34, at para. 62: '[i]n the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law'.

international law features greatly in the Court's treatment of issues on state responsibility. Hence, 'the obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law';¹⁰⁴ also, 'it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act'.¹⁰⁵ In the more recent *Application of the Genocide Convention Case* the Court juxtaposed the Convention with other legal norms on interpretation and responsibility which were derived from general international law.¹⁰⁶ Overall, it can be safely deduced that the ICJ resorts to the use of the term 'general international law' in order to denote norms binding *erga omnes*, contrary to treaty (or other) norms binding *inter partes*.¹⁰⁷

At this point, confusion could possibly arise so as to create the impression that general international law and customary international law constitute but one and the same normative concept, possibly fuelled by statements like 'in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties'.¹⁰⁸ But this assumption would be erroneous, given that the ICJ used both terms in the *Nicaragua* case in a way that leaves little doubt as to their

¹⁰⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, at para. 150. The same view is expressed in the ILC Responsibility Articles' commentaries on Art. 30 ('Cessation and non-repetition'): see ILC Responsibility Articles, *supra* note 36, at 88–91.

¹⁰⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment [2005] ICJ Rep 168, at para. 259 (references omitted), corresponding essentially to the ILC Responsibility Articles, *supra* note 36, at 91–94 (Art. 31 – Reparation).

¹⁰⁶ *Application of the Genocide Convention Case*, *supra* note 36, at para. 149. In a later passage (at para. 429) the Court reiterated the usage of general international law as denoting norms with *erga omnes* validity; and also when referring to trial and appellate judgments of the International Criminal Tribunal for the Former Yugoslavia (at paras 403–405) and their influence on issues of state responsibility. For it remarked that the international criminal tribunals enjoy competence limited only to criminal cases, and not related with 'questions of State responsibility' which are 'issues of general international law'. Therefore, it used the term general international law, not in the scope-type sense analysed *infra*, but with respect to subject-matter (international criminal law vs. general international law). See Goldstone and Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *Leiden J Int'l L* (2008) 95, at 102.

¹⁰⁷ See, e.g., ILC, 'Third report on the Law of Treaties by Mr. G. G. Fitzmaurice, Special Rapporteur', [1959] II *YbILC* 41, at para. 77. But cf Tunkin, 'Is General International Law Customary Law Only?', 4 *EJIL* (1993) 534, at 541. Furthermore, the possibility of treaties contributing to the formation of custom is indeed acknowledged, but still considered to be limited. See the relevant analysis in the ILC Report on Custom, *supra* note 30, at 756–765.

¹⁰⁸ *Case Concerning the Border and Transborder Armed Actions (Nicaragua/Honduras)*, Jurisdiction and Admissibility, Judgment [1989] ICJ Rep 6, at para. 35. Similarly confusing are perhaps the early usages of the term 'general international law' in the World Trade Organization (WTO) context. See, e.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 17; Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 Aug. 2000, DSR 2002:I, 19, at para. 3.44; Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 Nov. 2001, DSR 2001:XII, 6027, at para. 120.

distinct bearing.¹⁰⁹ In addition to that, one can further identify a parallel tendency in international adjudication to refer to 'general customary international law',¹¹⁰ often interchangeably with customary international law.¹¹¹ Or, as recalled by Tunkin from the days of his ILC membership, 'the Commission never used the terms "general international law" and "customary international law" as synonymous'.¹¹² It then appears that general international law indeed includes (general) customary law *inter alia*, but not exclusively.¹¹³

Hence, the ILA has stated that general international law, defined as the law that applies to all states, is not limited to general custom but may possibly include other forms of unwritten law such as 'fundamental' or 'constitutional' principles of international law.¹¹⁴ The relationship between legal rules and principles has been characterized 'as no more than the use of a dual expression to convey one and the same idea . . . the term "principles" . . . justified because of their more general and more fundamental character'.¹¹⁵ *Prima facie*, then, general international law also includes general principles of law recognized by civilized nations, general principles inherent in all kinds of legal relations, as well as general principles of international law.¹¹⁶ The reasoning of the PCIJ in the *Mavrommatis Concessions Case* unequivocally recognized the *erga omnes* binding force of general principles as general law.¹¹⁷ The ICJ in the *Right of Passage Case* later reaffirmed this when juxtaposing local custom on the one hand, and 'general international custom or the general principles of law recognized by civilized

¹⁰⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment [1984] ICJ Rep 392, at para. 73. See further Cannizzaro and Bonafé, 'Fragmenting International Law through Compromissory Clauses?: Some Remarks on the Decision of the ICJ in the Oil Platforms Case', 16 *EJIL* (2005) 481, at 488–489.

¹¹⁰ E.g., *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment [2003] ICJ Rep 161, at paras 207–208. This passage has been approvingly cited to support identical reasoning in later international decisions, such as the *Saluka Investments BV v. Czech Republic* Partial Award of 17 Mar. 2006, Ad hoc—UNCITRAL Arbitration Rules, IIC 210 (2006), at para. 254, and *Kardassopoulos v. Georgia*, Decision on jurisdiction of 6 July 2007, ICSID Case No. ARB/05/18, IIC 294 (2007), at para. 208. Also, see *ADF Group Inc v. United States*, Award of 9 Jan. 2003, ICSID Case No. ARB(AF)/00/1, IIC 02 (2003), at para. 186.

¹¹¹ See, e.g., *Gulf of Maine case*, *supra* note 28, at para. 114.

¹¹² Tunkin, *supra* note 62, at 538. Cf. Lowe, 'Do General Rules of International Law Exist?', 9 *Rev of Int'l Studies* (1983) 207, at 211, referring to *pacta sunt servanda* and *jus cogens* as 'truly general laws'.

¹¹³ Also in agreement see Yasuaki, 'The ICJ: An Emperor Without Clothes?: International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law', in A. Nisuke, E. MacWhinney, and R. Wolfrum (eds), *Liber amicorum Judge Shigeru Oda* (2002), at 191, 203–204. Cf. Mendelson, 'The International Court of Justice and the Sources of International Law', in A.V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (1996), at 63, 80–81.

¹¹⁴ ILA Report on Custom, *supra* note 30, at 716–717. Cf. 'Fourth report on the Law of Treaties by Mr. G. G. Fitzmaurice, Special Rapporteur' [1959] II YbILC 42, at para. 1.

¹¹⁵ See for the distinction *Gulf of Maine Case*, *supra* note 279, at para. 79.

¹¹⁶ Similarly see Verdross, 'General International Law and the United Nations Charter', 30 *Int'l Affairs* (1954) 342, at 342–343; Wood, *supra* note 95, at 355, citing R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), at 1; Conforti, *supra* note 4, at 5.

¹¹⁷ *The Mavrommatis Jerusalem Concessions (Greece v. Britain)*, Judgment, PCIJ Series A. No. 5, at 28.

nations' on the other.¹¹⁸ This is further reinforced by the Court's remark in the *Barcelona Traction* case concerning the 'rights of protection [from slavery and racial discrimination which] have entered into the body of general international law',¹¹⁹ also citing a passage from the *Reservations Advisory Opinion* stating that 'principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.¹²⁰ In any case, it would be problematic otherwise to understand *dicta*, such as those provided by the ICJ in the *Nottebohm Case*¹²¹ or the *Namibia Advisory Opinion*¹²² without accepting that 'general international law' as a term includes also paragraph (c) of Article 38(1) ICJ Statute.¹²³ And this was in essence the position also taken by the ICSID-constituted Tribunal in the *Waguih Elie, George Siag and Clorinda Vecchi v. Egypt* investment dispute.¹²⁴ In sum, then, it would seem that, contrary to the view expressed by the ILC Study Group on fragmentation, the normative concept of 'general international law' is in fact delimited, comprising customary rules and general principles of law. As a result, it is not clear what the Study Group intended when suggesting that there is a need for future ILC studies to address the concept of 'general international law'. On the one hand, the Study Group's attempt to introduce the concept of 'principles of international law proper' in the fragmentation discourse constitutes, as mentioned earlier, merely a *renvoi* to general international law norms, so that a future ILC study along those lines would eventually lead to a vicious circle, simply reiterating the (otherwise uncontested) pertinence of general law in the fragmentation discourse. On the other, if the Study Group envisaged a future ILC study pertaining to the codification of the entirety of general international law norms, so as, circuitously again, to respond to the normative challenges of fragmentation, this suggestion would be over-ambitious, if not unrealistic.

But, perhaps more importantly, what the Study Group only limitedly, if at all, highlighted was the normative weight to be attributed to the qualification of a given norm as belonging to the corpus of general international law. It is exactly this omission that

¹¹⁸ *Right of Passage* case, *supra* note 34, at 44.

¹¹⁹ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment [1970] ICJ Rep 3, at para. 34.

¹²⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep 15, at 23.

¹²¹ *Nottebohm Case*, *supra* note 24, at 119.

¹²² *Namibia Advisory Opinion*, *supra* note 26, at para. 96. Cf *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment [1972] ICJ Rep 46, at para. 30, making mention of a 'principle of general international law, or of international treaty law, allowing of suspension or termination on this ground', identified in the 1969 Vienna Convention on the Law of Treaties (hereinafter: VCLT), 1155 UNTS 331.

¹²³ The ILC generally appears to hold the same view; for instance, see a meticulous analysis of the drafting history of Art. 31(3)(c) VCLT in Merkouris, 'Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)', 9 *Int'l Community L Rev* (2007) 1, at 30.

¹²⁴ *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, Award of 11 May 2009, ICSID Case No. ARB/05/15, IIC 374 (2009), at para. 177.

makes the (analytical) difference here. For example, in the jurisdictional phase of the *Nicaragua Case* it was stated:

The Court cannot dismiss the claim of Nicaragua under principles of customary and general international law simply because such principles have been enshrined in the texts of the conventions relied on by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. . . . Therefore, since the claim before the Court in this case is not confined to violation of the multilateral convention provisions invoked, it would not in any event be barred by the multilateral treaty reservation in the United States 1946 Declaration.¹²⁵

As observed by Dame Rosalyn Higgins, '[i]t was important for the Court in that case, because of jurisdictional difficulties it faced in dealing with the UN Charter as a treaty-based applicable law, to find a parallel customary international law'.¹²⁶ In the merits phase, the Court was even more explicit and elaborated on the default application of customary rules *vis-à-vis* treaty law, by virtue of the former's classification as part of general international law. For even the UN Charter, as a multilateral treaty proper, does not pose an exception respectively, insofar as

this treaty [the Charter] itself refers to pre-existing customary international law [on the right to self defence]. . . Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. . . . It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, . . . customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.¹²⁷

Differently put, in the *Nicaragua Case* 'general international law' as a normative term *per se* generated juridical consequences in the course of international judicial process by expanding the available applicable law to the disputed claims outside the realm of particular international law (i.e., treaties). Via this route, the norms *per se* that belong to general international law (in the *Nicaragua Case*, the prohibition of use of force and principle of non-intervention) were qualified as within the Court's competence, and thus can be taken into consideration to generate in turn their own juridical consequences (in other words, they are residually applicable).

As a result of the above analysis, it appears that the general/particular international law differentiation signifies a specific normative perspective, i.e., the scope of international norms as binding *erga omnes* or *erga omnes partes*. The term 'general international law' *vis-à-vis* each specific norm it encompasses operates similarly to but still somewhat differently from terms such as 'customary law', 'treaty law', and 'general principles of law': the difference lies in the fact that general international law rather signifies a different level of normative enquiry (that is, normative scope as binding *erga omnes*), while the last three terms originally refer to sources of international law (that

¹²⁵ *Military and Paramilitary Activities in and Against Nicaragua* (Jurisdiction), *supra* note 109, at para. 73.

¹²⁶ Higgins, *supra* note 1, at 37.

¹²⁷ *Military and Paramilitary Activities in and Against Nicaragua* (Merits), *supra* note 25, at para. 176.

is, how law is created). In this way, the existence of ‘general international law’ as a normative scope-type sub-differentiation denoting only those norms which are binding *erga omnes* logically and normatively adheres to the international legal system (the normative ‘whole’); for admitting the existence of a category of norms binding on all logically and normatively presupposes and inclines to admit the parallel existence of other norms binding on some, both categories envisaged against the framework of the international legal system as the normative ‘whole’ (that is international norms binding *erga omnes* or *erga omnes partes*).

3 ‘Primary’ and ‘Secondary’ Rules in the International Legal System as a Normative Function-Type Differentiation

A A Normative Function-Type Differentiation Delimited

It is striking that only sporadically has the fragmentation debate addressed the crucial, as it is herein submitted, normative function-type differentiation pertinent for the fragmentation analysis, namely, the distinction between primary and secondary norms long known in the context of state responsibility for internationally wrongful acts. In international legal scholarship, ‘primary’ and ‘secondary’ norms were first substantially utilized by the ILC in its work on state responsibility in 1970, secondary norms being the ones eventually considered for the purposes of the codification of the law on state responsibility, that being ‘*l’épicentre d’un système juridique*’.¹²⁸ Primary norms are those ‘which in one sector of inter-State relations or another, impose particular obligations on States’, while secondary norms are those that are ‘concerned with determining the consequences of failure to fulfill obligations established by the primary rules’.¹²⁹ Insofar as the ‘formal unity’ of international law is in fact composed of secondary rules,¹³⁰ the ‘primary’/‘secondary’ norm distinction denotes the existence of a normative function-type differentiation from the system as a ‘whole’, categorizing international rules according to their normative operation in the context of state responsibility analysis. It is true that the ILC’s distinction between primary and secondary norms may *prima facie* appear, to a large extent, to be influenced by H.L.A. Hart’s *Concept of Law*;¹³¹ nevertheless, Hartian thought should not be considered as the origin of the distinction, especially given Hart’s broader definition of secondary norms,¹³² as well as his reluctance to consider international law except as a ‘simple

¹²⁸ P.-M. Dupuy, ‘Le fait générateur de la responsabilité internationale des états’, 188 *RdC* (1984) 9, at 21.

¹²⁹ ILC, ‘Second report on State responsibility, by Roberto Ago, Special Rapporteur – the origin international responsibility’ [1970] II *YbILC* 179.

¹³⁰ Dupuy, *supra* note 22, at 793–794, also referring to the obligations towards the international community as a whole as providing for the ‘substantial unity’ of international law.

¹³¹ H.L.A. Hart, *The Concept of Law* (1961), at 92. Hart’s theory on primary and secondary rules is said to have emerged from his criticisms of the Augustinian conception of law: see Cohen, ‘Critical Notice: The Concept of Law by H. L. A. Hart’, 71 *Mind* (1962) 395.

¹³² See Marschic, ‘Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System’, 9 *EJIL* (1998) 212, at 213.

regime of primary or customary law'.¹³³ James Crawford, the last ILC Special Rapporteur on state responsibility, indeed appears uncertain whether Hart or continental jurisprudence provided the source of inspiration for the ILC,¹³⁴ while others argue that the distinction was by that time already familiar to international lawyers.¹³⁵ Indeed, Dionisio Anzilotti famously opined as early as 1906 that the violation of an international legal obligation by a state gives rise to a legal duty of reparation.¹³⁶ One could further refer to the Comments to the 1929 Harvard Draft Convention on International Responsibility where it was similarly clarified in that 'the term "responsibility" [in the Harvard Draft] is used to indicate the secondary duty of a state to make reparation for the failure to perform some primary duty'.¹³⁷ Moreover, in the early work of Roberto Ago on state responsibility, to a great extent influenced by Anzilotti,¹³⁸ the author similarly wrote that '*l'attribution de la qualité juridique d'illicite à un fait donné s'identifie avec l'attribution de la valeur juridique de fait produisant une obligation de réparer ou bien légitimant l'application d'une sanction*';¹³⁹ it was in this fashion that, much earlier than Hart, he utilized the classification of international legal obligations into primary and secondary ones.¹⁴⁰

It appears moreover that, in any case, Roberto Ago, as the ILC's Special Rapporteur, did not intend to take part in the debate concerning Hart's theory situated in the sphere of legal theory when resorting to the use of the primary/secondary norm terminology;¹⁴¹ on the contrary, he only sought to facilitate his own analysis by endorsing the distinction as a sort of *terminus technicus*, generally defined for the purposes of state responsibility, and not as identical to the one propounded by Hart.¹⁴² More specifically,

¹³³ Hart, *supra* note 131, at 226. For convincing rebuttals see, *inter alios*, Brownlie, 'The Reality and Efficacy of International Law', 52 *BYBIL* (1981) 1, at 5–8; Abi-Saab, *supra* note 53, at 122–123.

¹³⁴ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 14.

¹³⁵ Vermeer-Knzi, 'As If: The Legal Fiction in Diplomatic Protection', 18 *EJIL* (2007) 37, at 49, citing C. De Visscher's early work; P.-M. Dupuy, 'L'unité de l'ordre juridique international: Cours général de droit international public', 297 *RdC* (2002) 9, at 74, referring to Rudolf von Jhering's writings.

¹³⁶ Anzilotti, 'La responsabilité internationale des états: à raison des dommages soufferts par des étrangers', 13 *RGDIP* (1906) 5, at 13: '[I]a violation de l'ordre juridique international commise par un Etat soumis à cet ordre, donne ainsi naissance à un devoir de réparation, qui consiste en général dans le rétablissement de l'ordre juridique troublé'. Cf Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States', 3 *EJIL* (1992) 139, at 140, skilfully observing, with respect to Anzilotti's theory on state responsibility, that '[t]he syntax which he more or less formulated was subsequently taken up by the majority of authors'.

¹³⁷ Harvard Law School: Research in International Law, 'Draft Convention and Comments on Responsibility of States for Injuries to Aliens', 23 *Supplement to AJIL, Special Number* (1929) 133, at 141.

¹³⁸ In this respect see Ago, 'The European Tradition in International Law: Dionisio Anzilotti – Rencontres avec Anzilotti', 3 *EJIL* (1992) 92. Cf Nolte, 'From Dionisio Anzilotti to Roberto Ago: the Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations', 13 *EJIL* (2002) 1084, at 1087–1088, 1093–1094.

¹³⁹ Ago, 'Le délit international', 68 *RdC* (1939) 415, at 426.

¹⁴⁰ *Ibid.*, at 479, 486, 504, 529.

¹⁴¹ See, e.g., R. Dworkin, *Taking Rights Seriously* (1977).

¹⁴² See, e.g., Weil, 'Droit des traités et droit de la responsabilité', in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformacion: liber amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga* (1995), i, at 523, 528–529; d'Aspremont, 'Hart et le positivisme postmoderne', 113 *RGDIP* (2009) 635, at 636–637.

the ‘move to a set of articles dealing solely with secondary obligations associated with breach was a step in the direction of profitable generalization’¹⁴³ was expressive of Ago’s decision to opt for the codification of a general regime of responsibility, residually applicable irrespective of the international legal rule infringed, i.e., approaching the topic of state responsibility ‘*lato sensu*’,¹⁴⁴ as opposed to the previous approach focusing on responsibility for injuries to aliens taken by the first Special Rapporteur, Garcia Amador. The distinction between primary and secondary rules for the analytical purposes of state responsibility signalled the ILC’s choice to deal solely with secondary norms as general law. No prominent role was reserved for an indispensable part of Hart’s theory, that is, the ‘rule of recognition’, as it would possibly touch upon the already debated topic of sources of international law;¹⁴⁵ rather, the primary/secondary differentiation remained at a certain level of abstraction, designed solely as a methodological vehicle so as to avoid taking a ‘circuitous route’ for determining the duties imposed by international law on states regarding the treatment of aliens in the context of codifying the law on state responsibility.¹⁴⁶

Hence, following Ago’s endorsement of the primary/secondary norm distinction, later studies by the ILC have also featured and utilized this international legal *terminus technicus*, again in order to delimit the scope and content of the analysis undertaken, i.e., whether the codification and/or development enterprise related to the specific international legal rules establishing primary obligations or the secondary rules dealing with the breach of subject-specific primary ones. For instance, the commentary to Article 27 of the 1978 ILC ‘Draft Articles on most favoured-nation clauses’ referred to and relied on the distinction so as to clarify that the consequences of their breach (as ‘primary rules’) were not dealt with therein and were rather governed by the secondary rules on state responsibility.¹⁴⁷ Moreover, the primary/secondary norm distinction was characterized as an ‘analytic device’ in the context of the ILC works on international liability for injurious consequences arising out of acts not prohibited by international law,¹⁴⁸ while, more recently, the commentaries on the 2006 ILC Draft Articles on Diplomatic Protection made clear that ‘[those] draft articles, like those on

¹⁴³ Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’, 96 *AJIL* (2002) 874, at 878.

¹⁴⁴ See Goldie, ‘State Responsibility and the Expropriation of Property’, 12 *Int’l Lawyer* (1978) 63, at 63–73.

¹⁴⁵ At variance with the ILC approach, international lawyers have attempted to transplant Hart’s rule of recognition theory in international law analysis: see, e.g., Wellens, ‘Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends’, in L. Barnhoorn and K. Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995), at 3, 9–16.

¹⁴⁶ ILC, ‘Working paper prepared by Mr. Roberto Ago’, UN Doc A/CN.4/SC.1/WP.6, [1963] II YbILC 253. As Ago further noted, ‘[t]he international responsibility of the State is a situation resulting not only from the violation of particular international obligations, but from the infringement of any international obligation, whether established by rules covering a specific matter or by other rules. To achieve such a general view, complete and at the same time free of all extraneous matter, appears to be the indispensable condition for any useful effort of codification in this field’ (*ibid.*).

¹⁴⁷ ILC, ‘Draft Articles on most-favoured-nation clauses with commentaries’ [1978] II YbILC, Pt Two, at 71.

¹⁴⁸ ILC, ‘Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur’ [1980] II YbILC 254.

the Responsibility of States for internationally wrongful acts, maintain the distinction between primary and secondary rules and deal only with the latter'.¹⁴⁹

Perhaps a noteworthy recent example of the reception of the primary/secondary norm distinction in international legal analysis can be found in Resolution No. 2/2010 on reparation for victims of armed conflict adopted in the 2010 Hague Conference of the ILA.¹⁵⁰ The Resolution incorporated the Conference Report of the relevant ILA Committee, which in turn contained a 'Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)', along with commentaries.¹⁵¹ What is important here is that the text *per se* of Article 3 of the Declaration ('Applicable law') explicitly features and incorporates the primary/secondary norm terminology in order to clarify that the Declaration is limited to secondary rules.¹⁵² The direct reference to the distinction between primary and secondary rules is striking, especially considering that, until then, only in ILC commentaries rather than ILC instruments as such was the distinction highlighted. *Ergo*, and endorsing in full Ago's 'analytical device', the commentary to Article 3 of the Declaration justified this choice by remarking that '[t]he distinction between primary and secondary rules is well established in the law of state responsibility',¹⁵³ while one could further observe that the ILA Committee in any event remained cautious so as not 'to blur the distinction between primary and secondary obligations'.¹⁵⁴

It is then perhaps in the above spirit that various comments and observations by governments in the context of ILC works again reveal that states are not hesitant to refer to, and often explicitly endorse, the distinction between primary and secondary rules.¹⁵⁵ Moreover, states, as parties to international disputes, have at the same time

¹⁴⁹ ILC, 'Draft Articles on Diplomatic Protection with commentaries' [2006] II YbILC, Pt Two, at 24.

¹⁵⁰ Available at: www.ila-hq.org/download.cfm/docid/E253190F-9527-4EC3-A9CD6751D817A2EA.

¹⁵¹ ILA International Committee on Reparation for Victims of Armed Conflict, 'Hague Conference Report: Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)', available at: www.ila-hq.org/download.cfm/docid/4E702C99-897E-46A9-AA505E7F-F291AFB7.

¹⁵² *Ibid.*, at 3: '[t]he primary norms the violation of which may give rise to the secondary rights and obligations reflected in the present Declaration are the rules of international law applicable in armed conflict, the object and purpose of which is to protect the victim in the sense of Article 4'.

¹⁵³ *Ibid.*, at 3, n 23.

¹⁵⁴ *Ibid.*, at 24, n 171.

¹⁵⁵ See, e.g., the statements, comments, and observations on the work of the ILC received from the following governments: Czech Republic (UN Doc A/CN.4/48 [1998] II YbILC Pt One, at 137, 164), Germany (UN Doc A/CN.4/488 [1998] II YbILC Pt One, at 102), Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden, and Denmark) (UN Doc A/CN.4/488 [1009] II YbILC Pt One, at 101), USA (UN Doc A/CN.4/515 [2001] II YbILC Pt One, at 48, 70), Japan (UN Doc A/CN.4/515 [2001] II YbILC Pt One, at 55, 68), Slovakia (UN Doc A/CN.4/515 [2001] II YbILC Pt One, at 47), Spain (UN Doc A/CN.4/351, Add. 1–2 & Add. 2/Corr. 1, Add. 3 & Corr. 1 [1982] II YbILC Pt One, at 16), Mexico (UN Doc A/CN.4/515 [2001] II YbILC Pt One, at 65), Netherlands (UN Doc A/CN.4/328 and Add. 1–4 [1980] II YbILC Pt One, at 102; UN Doc A/CN.4/515 [2001] II YbILC Pt One, at 83, 93), Canada (UN Doc A/CN.4/328 and Add. 1–4 [1980] II YbILC Pt One, at 93), Chile (UN Doc A/CN.4/328 and Add. 1–4 [1980] II YbILC Pt One, at 101), Kuwait (UN Doc A/CN.4/575, 18 Aug. 2006, at 4), Republic of Panama (UN Doc A/CN.4/561, 27 Jan. 2006, at 11), France (UN Doc A/CN.4/488 [1998] II YbILC Pt One, at 122; UN Doc A/CN.4/509 [2000] II YbILC Pt One, at 129), Yugoslavia (UN Doc A/CN.4/328 and Add. 1–4 [1980] II YbILC Pt One, at 104), Sweden (UN Doc A/CN.4/342 and Add. 1–4 [1981] II YbILC 78).

utilized the ILC's 'analytic device' in their claims and submissions before international courts and tribunals, so that, for instance, the legal arguments advanced by both the United Kingdom and France in the more recent *Eurotunnel Arbitration* operated and were designed upon the primary/secondary distinction.¹⁵⁶ As will be further developed in the next section, the main reasons for this relates to the role of the distinction in the context of the proper application of the *lex specialis* principle in the settlement of international disputes, lying at the core of the contemporary fragmentation analysis.

B A Normative Function-Type Differentiation Pertinent to the Proper Operation of *Lex Specialis*

It is worth noting at this point that certain authors have recently taken a negative stance towards the substantial utility of distinguishing between primary and secondary norms in modern international legal analysis.¹⁵⁷ Given that the concept of 'self-contained regimes' is in fact designed to denote 'those subsystems that embrace a full, exhaustive and definitive, set of secondary rules',¹⁵⁸ reference to the distinction is usually made only as a descriptive, factual element the analytical merits and normative consequences of which remain unaddressed. In the same fashion, while the ILC Study Group dedicated a substantial portion of its analysis to *lex specialis*, when it came to elaborate on the crucial aspects underlying specialty of subject-matter, so that a given ('special') norm prevails over another ('general' one), no reference was made to the different functions served by primary and secondary rules as a decisive element for the operation of *lex specialis*, and it was simply recalled that 'the criterion of the "same subject-matter" as a condition for applying a conflict rule is too unspecific to be useful'.¹⁵⁹ It is exactly in this respect that the unitary character of the primary/secondary function-type differentiation gains significance by providing normative solutions in cases of genuine conflicts between rules of general and particular international law,¹⁶⁰ which *prima facie* challenge the unity and coherence of the international legal system; for it is exactly the differing normative function of primary and secondary rules that prevents them from qualifying as relating to the 'same subject-matter'.

Although the ICJ in its decisions, orders, and advisory opinions has so far refrained from explicitly using the primary/secondary norm terminology, it has nevertheless

¹⁵⁶ *The Channel Tunnel Group Limited & France-Manche S.A. v. Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland & le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*, Partial Award of 27 Jan. 2007, Permanent Court of Arbitration, 132 ILR 1, at paras 111, 114.

¹⁵⁷ See Lindefalk, 'State Responsibility and the Primary–Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System', 78 *Nordic J Int'l L* (2009) 53.

¹⁵⁸ Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *EJIL* (2006) 483, at 492–493.

¹⁵⁹ ILC Fragmentation Report, *supra* note 2, at para. 117. Similarly, see the discussion at para. 22: '[t]he criterion of [same] "subject-matter" leads to a *reductio ad absurdum*. Therefore, it cannot be decisive in the determination of whether or not there is a conflict'.

¹⁶⁰ Pauwelyn, *supra* note 54, at 240–244.

implicitly confirmed the importance of the distinction in terms of the proper operation of *lex specialis* in the *Gabcikovo-Nagymaros Case*, where general international law was juxtaposed to the 1977 Treaty constituting particular international law (*lex specialis*).¹⁶¹ Also, later in the *Application of the Genocide Convention* case the ICJ observed in a more explicit fashion that '[t]he [secondary] rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*', i.e., a particular secondary rule.¹⁶² To use the formulation of the *F-W Oil Interests* investment Tribunal:

the substantive standards against which the Claimant puts forward its claims are those laid down in a specific treaty, not general international law. immediately opens up the possibility that particular standards of attributability may apply, as *lex specialis*, in substitute for or supplementation of the general rules of State responsibility – a possibility to which the ILC draws attention repeatedly in its draft Articles and the Commentaries (notably Article 55 & Commentary). Even if not (ie, even if the applicable secondary rules of State responsibility remain unaffected), the fact that the treaty is a BIT opens up a further possibility at the level of primary obligation, specifically that the broad scope mutually agreed by the Contracting Parties for encouraging as well as protecting the investments of one in the territory of the other may have the effect of requiring (sc. As a matter of treaty obligation) the Government to adopt patterns of conduct in respect of its State organs and para-statal entities different from those that would ordinarily be required under general international law or treaty law.¹⁶³

Equally, in a later award the *United Parcel Service of America Inc v. Canada* Tribunal also acknowledged the prevalence of the various provisions of Chapter Fifteen NAFTA dealing with monopolies and state enterprises over ILC Articles 4 and 5 on the conduct of state organs and monopolies.¹⁶⁴ In the above cases, the arbitral tribunals verified the applicability, in principle, of customary secondary norms on state responsibility by making explicit reference to the primary/secondary norm distinction, hence demonstrating that the operation of *lex specialis* necessitates the juxtaposition of two primary or two secondary norms. Still, one would note that the primary/secondary norm distinction is potentially difficult to draw.

Indeed, and notwithstanding that the distinction has not given rise to particular problems in actual (i.e., judicial) international practice,¹⁶⁵ the formulation of primary and secondary norms the ILC opted for has occasionally met with doctrinal criticism, mainly on the ground that certain secondary norms can also be conceived as

¹⁶¹ See *Gabcikovo-Nagymaros case*, *supra* note 22, at para. 132, as pointed out in Crawford, *supra* note 22, at 16.

¹⁶² *Application of the Genocide Convention case*, *supra* note 22, at para. 401. Similarly see *Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain) v. United States*, Decision of 9 Nov. 1923, Arbitral Tribunal (GB–US) constituted under the Special Agreement of 18 Aug. 1910, 6 RIAA 114.

¹⁶³ *F-W Oil Interests Inc v. Trinidad and Tobago*, Award of 20 Feb. 2006, ICSID Case No ARB/01/14; IIC 395 (2006), at para. 206 (original underlining).

¹⁶⁴ *United Parcel Service*, *supra* note 55, at para. 62.

¹⁶⁵ Tams, 'All's Well that Ends Well: Comments on the ILC's Articles on State Responsibility', 62 *ZaōRV* (2002) 759, at 764–765.

primary ones.¹⁶⁶ The rules on attribution of internationally unlawful acts found in Articles 4 to 11 have been identified as a pertinent example of internal overlap in the context of the primary/secondary norm differentiation.¹⁶⁷ It is here perhaps that the abovementioned passage from *F-W Oil Interests Inc v. Trinidad and Tobago* proves to be of added value: The last Special Rapporteur, James Crawford, in his Third Report on State Responsibility hinted that, as a result of the primary/secondary norm distinction, the secondary norms contained in the ILC Articles can be ‘qualified by the relevant primary rule, or by a secondary *lex specialis*’.¹⁶⁸ In other words, a given treaty may derogate from the customary secondary norms on state responsibility either by incorporating the ILC standard in one of the provisions (primary norms) it contains, or by being itself equipped with a special provision operating as a secondary norm. It appears that this is the possibility alluded to in *F-W Oil Interests*: according to one scenario, the ILC Articles are displaced by virtue of the *lex specialis derogat legi generali* doctrine by those provisions of the bilateral investment treaty (BIT) in question which operate as secondary norms;¹⁶⁹ according to a second scenario, it is ‘at the level of primary obligation’, and thus escaping the operative scope of *lex specialis*, that standards different from those found in the ILC Articles are established via the conclusion of treaties.¹⁷⁰ For it was often explicitly and implicitly made clear that the default operation of the ILC Articles, notwithstanding the operation of *lex specialis*, was above all subordinated to the normative content and scope of the primary rule the breach of which they sought to address in the first place. Overall, the identification of a norm as primary or secondary crucial in terms of the proper operation of *lex specialis* appears by now reiterated in international adjudication.¹⁷¹

That said, one cannot ignore the fact that the distinction between primary and secondary norms for the purposes of state responsibility has more often been invoked and resorted to in investment arbitration in the context of the relationship between

¹⁶⁶ See, e.g., Shelton, ‘Reparations: Righting Wrongs in the Articles on State Responsibility’, 96 *AJIL* (2002) 833, at 846; Nissel, ‘The ILC Articles on State Responsibility: From Self-Help to Solidarity’, 38 *NYU J Int’l L and Politics* (2005–2006) 355, at 361; David, ‘Primary and Secondary Rules’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010), at 27; Nollkaemper and Jacobs, ‘Shared Responsibility in International Law: A Concept Paper’, *ACIL Research Paper No. 2011-07 (SHARES Series)*, finalized 2 Aug. 2011, available at: www.sharesproject.nl, at 45–51.

¹⁶⁷ Bederman and Crook, ‘Symposium: The ILC’s State Responsibility Articles – Introduction and Overview’, 96 *AJIL* (2002) 773, at 780–781. Similarly, see Lee, ‘Hart’s Primary and Secondary Rules’, 77 *Mind* (1968) 561.

¹⁶⁸ ILC, ‘Third report on State responsibility by Mr. James Crawford, Special Rapporteur’, UN Doc A/CN.4/507 (15/3/2000), at 21, para. 43, n. 81.

¹⁶⁹ E.g., see Art. XV(2) of the USA/Trinidad & Tobago BIT, according to which ‘[a] Party’s obligations under this Treaty shall apply to a state enterprise in the exercise of any regulatory, administrative or other governmental authority delegated to it by that Party’.

¹⁷⁰ As would be the case of a BIT provision presumably reading ‘[n]either Party, nor any state enterprise in the exercise of any regulatory, administrative or other governmental authority delegated to it by that Party, shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments’.

¹⁷¹ Further see Gourgourinis, ‘*Lex Specialis* in WTO and Investment Protection Law’, 53 *German Yrbk Int’l L* (2010) 579, at 613–618.

BIT non-precluded measures (NPM) clauses and the customary necessity defence as a secondary norm enshrined in Article 25 of the ILC Responsibility Articles. More specifically, and in the context of the numerous investment protection disputes generated by the Argentinean economic crisis, the issue of necessity has been perhaps the most controversial issue, having been given conflicting treatment by different investment arbitration tribunals.¹⁷² Importantly, the ICSID Annulment *Ad Hoc* Committee in *CMS v. Argentina*, made substantial use of the primary/secondary norm distinction. A substantial aspect of the dispute focused on state of necessity as a defence provided by both the BIT and customary law. The *CMS* Tribunal had in the first place dealt with Article XI of the Argentina–US BIT (a NPM clause)¹⁷³ as *lex specialis* allegedly identical to the customary law necessity defence.¹⁷⁴ This view was severely criticized at the annulment stage. The *Ad Hoc* Committee found that the *CMS* Tribunal had *erred in law* because it had treated Article XI of the BIT and necessity as a circumstance precluding wrongfulness under customary law as one and the same defence; in other words, because it did not take into account the primary/secondary norm-type differentiation in its analysis.¹⁷⁵ Necessity as a secondary norm and a circumstance precluding wrongfulness may justify an act which has already been qualified as wrongful,¹⁷⁶ and ‘is not intended to cover conduct which is in principle regulated by the primary obligations’.¹⁷⁷ Circumstances precluding wrongfulness were treated in the ILC Articles ‘as secondary rules of a general character, and not as a presumptive part of every primary rule’.¹⁷⁸ Conversely, non-precluded measures clauses, such as Article XI of the BIT, or Article XX GATT 1995,¹⁷⁹ rather constitute primary norms which, if operative, lead to the acknowledgement of ‘no breach’ as the juridical result. Secondary norms are dependent upon the prior breach of primary ones;¹⁸⁰ primary and secondary norms

¹⁷² For further analysis see, *inter alios*, Kurtz, ‘Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis’, Jean Monnet Working Paper 06/2008, at 12–42; Reinisch, ‘Necessity in Investment Arbitration’, 41 *Netherlands Yrbk Int’L* (2010) 137.

¹⁷³ Reading in pertinent part: ‘[t]his Treaty shall not preclude the application by either Party of measures necessary . . .’.

¹⁷⁴ *CMS Gas Transmission Company v. Argentina*, Award of 12 May 2005, ICSID Case No. ARB/01/8, IIC 65 (2005), at paras 308, 374.

¹⁷⁵ *CMS Gas Transmission Company v. Argentina*, Decision on application for annulment of 25 Sept. 2007, ICSID case No. ARB/01/8, IIC 303 (2007), at paras 133–134. Nevertheless, given the prescribed limited jurisdiction of ICSID *Ad Hoc* Annulment Committees (under Art. 52 ICSID Convention), Argentina’s claim regarding ‘manifest excess of powers’ was rejected.

¹⁷⁶ See, e.g., *Gabcikovo-Nagymaros case*, *supra* note 22, at para. 51; *MV Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 31 July 1999 (ITLOS case No. 2), ITLOS, 38 ILM (1999) 1323, at para. 133.

¹⁷⁷ ILC Responsibility Articles, *supra* note 36, at 205.

¹⁷⁸ ILC, ‘Second report on State responsibility by Mr. James Crawford’, Special Rapporteur, UN Doc A/CN.4/498 (17/3/1999), at 8, para. 10.

¹⁷⁹ According to the provision’s *chapeau*, ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures’. For the text of GATT 1994 see WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1994).

¹⁸⁰ See Malanczuk, ‘Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission’s Draft Articles on State Responsibility’, 43 *ZaōRV* (1983) 705, at 713–715; Weil, *supra* note 103, at 528–535; Dupuy, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility’, 13 *EJIL* (2002) 1053, at 1059.

do not purport to regulate the same subject-matter.¹⁸¹ Consequently, the customary necessity defence under Article 25 becomes pertinent only after the requirements of non-precluded measures clauses have not been fulfilled and have resulted in the prior (in resorting to the secondary norm) acknowledgement of the breach which is sought to be justified.¹⁸² Moreover, while the necessity defence in Article 25 is formulated in negative language prescribing what can *in exceptional cases* be illegal but still justified,¹⁸³ in contrast NPM clauses positively prescribe what is *in any event* legal.¹⁸⁴ In this respect, and due to the different context and operation, it is not possible to consider these NPM clauses as *lex specialis vis-à-vis* the general international law necessity defence; for, NPM provisions in fact constitute primary norms proper and thus cannot, and should not, be regarded as ‘special’ *vis-à-vis* contextually similar secondary norms of a customary nature. As a result, and notwithstanding the existence of NPM clauses in the regulatory ambit of treaty-established specialized regimes, secondary norms on state responsibility derived from general (that is, *erga omnes* binding) international law can be still independently invoked as applicable defences in adjudication taking place in the realm of the various international regimes.¹⁸⁵

While the CMS stance towards the primary/secondary distinction has also been followed, albeit partly confusingly, in *Continental Casualty Co v. Argentina*,¹⁸⁶ it was only very shortly before the time of writing of this study that the above propositions on the preponderant role of the primary/secondary norm distinction for the operation of *lex specialis* were fully verified by the ICSID Ad hoc Committee which annulled the previously rendered Award of the *Sempra* Tribunal for manifest excess of powers on the basis of failure to apply the applicable law, namely Article XI of the Argentina–US BIT.¹⁸⁷ The *Sempra* Ad hoc Committee, in mid-2010, approvingly referred to the findings of the CMS Ad hoc Committee and reiterated the importance of drawing the primary/

¹⁸¹ Fitzmaurice, ‘Law and Procedure of the International Court of Justice 1951–1954: Treaty Interpretation and Other Treaty Points’, 33 *BYBIL* (1957) 203, at 237; Simma and Pulkowski, ‘*Leges speciales* and Self-Contained Regimes’, in Crawford, Pellet, and Olleson (eds), *supra* note 166, at 141.

¹⁸² In agreement, see Bottini, ‘Protection of Essential Security Interests in the BIT Era’, in T. Weiler (ed.), *Investment Treaty Arbitration and International Law* (2008), at 145, 148 ff; Burke-White and von Staden, ‘Investment Protection in Extraordinary Times: the Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’, 48 *Virginia J Int’l L* (2008) 307, at 320–324; Kurtz, *supra* note 125, at 13–26, 54–56. *Contra* Alvarez and Khamsi, ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’, in K. Sauvart (ed.), *Yearbook on International Investment Law & Policy 2008–2009* (2009), at 379, 427–440.

¹⁸³ ILC Responsibility Articles, *supra* note 36, at 202, para. 14.

¹⁸⁴ CMS Annulment, *supra* note 175 at para. 129; Bjorklund, ‘Emergency Exceptions: State of Necessity and Force Majeure’, in P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), at 459, 492–498.

¹⁸⁵ Cf Ruiz Fabri, ‘La nécessité devant le juge de l’OMC’, in Société Française pour le Droit International, *La nécessité en droit international: colloque de Grenoble* (2007), at 189, 198–200; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 495–497.

¹⁸⁶ See *Continental Casualty Co v. Argentina*, Award of 5 Sept. 2008, ICSID Case No. ARB/03/9; IIC 336 (2008), at paras 162–168.

¹⁸⁷ *Sempra Energy International v. Argentina*, Decision on application for annulment of 29 June 2010, ICSID case No. ARB/02/16, at paras 186–219.

secondary norm distinction for the purposes of proper analytical legal reasoning in international adjudication: essentially, it is exactly because the customary necessity defence in Article 25 of the ILC Responsibility Articles and Article XI of the BIT in question (as an NPM clause) ‘deal with quite different situations’ (i.e., display different normative function) that the application of the former does not take place in the context of interpreting the latter as *lex specialis*,¹⁸⁸ but, rather, both apply in a parallel and independent fashion.¹⁸⁹ Nor should the view expressed by the *Renta* Tribunal, according to which the distinction between primary and secondary norms is allegedly non-normative,¹⁹⁰ be considered as undermining the propositions expressed by the *CMS* and *Sempra Ad hoc* Committees. What must be noted is that the impetus underlying the *Renta* Tribunal’s remark was rather to be found in its subsequent statement that the application of the most-favoured-nation (MFN) clause is not limited to primary obligations.¹⁹¹ It appears then that its stance on the primary/secondary distinction was rather premised on the misconception of secondary rules as allegedly ‘procedural’ norms, i.e., not creating rights or obligations; but again, the Tribunal possibly omitted to take into account Crawford’s important observation that the obligations in the ILC Articles associated with cessation, reparation, and countermeasures ‘are themselves international obligations of the State concerned, and the draft articles, which apply to all international obligations of States, are thus reflexive’.¹⁹²

In this sense, and for the purposes of application of MFN *in casu*, the distinction *per se* actually posed no obstacles, so that the remark made *in passim* on the utility of the primary/secondary norm distinction, already analysed in detail in this study, should be treated as of limited, if any, analytical impact. Hence, and unlike those who view the primary/secondary norm distinction as of limited pertinence to the fragmentation discourse,¹⁹³ the primary/secondary norm distinction in fact plays a crucial normative role in the international legal argument as closely interlinked with the operation of the *lex specialis* principle. For, it becomes apparent that a primary norm cannot prevail

¹⁸⁸ *Ibid.*, at para. 200 (original emphasis).

¹⁸⁹ On the equally crucial, and necessary to be drawn here, distinction between interpretation and application of norms in international adjudication see Gourgourinis, ‘The Distinction between Interpretation and Application of Norms in International Adjudication’, 2 *J Int’l Dispute Settlement* (2011) 25, at 51–54.

¹⁹⁰ *Renta 4 SVSA and ors v. Russian Federation*, Award on Preliminary Objections of 20 Mar. 2009, SCC Case No 24/2007, IIC 369 (2009), at para. 99: ‘[i]t may be that some international lawyers reflexively adopt the dichotomy of primary/secondary obligations made familiar by the International Law Commission. This might explain the temptation to consider “treatment” a matter primary or substantive rules and thus distinct from “secondary” rules – such as remedies – in the event of alleged breach. Perhaps this idea merges into that of a substance/procedure distinction. Yet there is nothing normative about the primary/secondary dichotomy; it has simply been the classification by which the ILC determined its field of work on State responsibility.’

¹⁹¹ *Ibid.*, at para. 100.

¹⁹² ‘Third report on State responsibility’, *supra* note 168, at 5. Cf Gourgourinis, *supra* note 189, at 53.

¹⁹³ Lindefalk, *supra* note 157, at 56–70. It is worth noting that the author, while criticizing the primary/secondary norm terminology for lack of potential normative significance, does not refer to, and thus appears not to have taken into account, the *CMS* Annulment Decision or the *Application of the Genocide Convention* case analysed earlier. Cf McLachlan, ‘Investment Treaties and General International Law’, 57 *ICLQ* (2008) 361, at 388–391.

as ‘special’ to a secondary norm. Put otherwise, the *lex specialis* principle is inoperative and secondary norms apply residually by default. It hence appears that the primary/secondary rule distinction should not be seen as ‘an analytical device’ suitable *solely* for the purposes of codification of norms on state responsibility, but should be *further* treated as pertinent for the purposes of international adjudication, especially in interesting times characterized by the fragmentation of international law where the operation of *lex specialis* is focal. It is exactly in this sense that the primary/secondary norm terminology operates as a binary analytical normative function-type differentiation of the ‘whole’ (the totality of international norms, both primary and secondary), indeed capable of constituting a ‘powerful normative expression of the unity of the international legal order’,¹⁹⁴ insofar as ‘general international law [prominently including residual secondary rules] provides a systemic fabric from which no special legal regime is completely decoupled’.¹⁹⁵

4 Concluding Remarks

The proposition that international law is structured as a legal system appears to be deeply rooted in international legal thought and practice. This study has examined the above proposition by way of addressing its logical and legal underpinnings. It was then further argued that the proposition is practically evidenced in international adjudication by the elevation of two normative differentiations from the international legal system as the normative ‘whole’, i.e., ‘general/particular international law’ and ‘primary/secondary norms’, to the status of international legal *termini technici*. These scope-type and function-type normative differentiations are in fact endowed with their own normative weight influencing the outcome of international dispute resolution, exemplifying the residual (default) applicability of general international law norms and, most prominently, the VCLT and secondary rules on state responsibility. Importantly, while these differentiations pertain to further theorizing on the fragmentation of international law analytics, they are also expressive of a (normative) sense of accord in the international legal system in times of (normative) fragmentation, reiterating in terms of a ‘bottom-up’, inductive analytical approach, that the international legal system indeed offers the normative tools necessary for international lawyers effectively to address the problems the ‘system’ itself generates.

¹⁹⁴ Paparinskis, ‘Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law’, in T. Broude and Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011), at 259, 288.

¹⁹⁵ Simma and Pulkowski, *supra* note 158, at 529.