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# *Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*

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## **1 Introduction**

The diversity of international secondary norms has been the subject of increasing attention over the last decade. While primary norms regulate the behaviour of subjects of international law, secondary norms regulate the primary rules: creation, modification, extinction, interpretation and operation. The distinction between primary and secondary norms<sup>1</sup> was adopted by the International Law Commission (ILC) in its analysis of state responsibility. Regimes of international law which combine certain primary norms with a distinct set of secondary norms designed to ensure the operation of those primary norms have since been termed 'subsystems' of international law.

The possibility of legal problems arising from the multitude and diversity of international norms was initially perceived with respect to primary norms. The extensive interrelations between states after 1945 brought a substantial increase in primary norms. It became evident, however, that the mere existence of these primary norms did not create order. On the contrary, the unorganized mass of — sometimes similar, at other times conflicting — primary rules made the system of international law more and more confusing: it became difficult to see the forest for the trees.

As a result, some primary norms were equipped with special secondary norms to ensure their proper application and to resolve conflicts between norms. With the

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<sup>1</sup> The distinction has its origin in Hart's legal theory; see H.L.A. Hart, *The Concept of Law* (1961).

evolution of more precise, specialized and detailed primary norms it became necessary to design tailor-made secondary norms or flexible fora, such as international organizations. The last decades have consequently witnessed an increase in the number of subsystems in nearly all fields of international law. While this development has undeniably contributed to a better application of primary norms, the ensuing multitude and variety of subsystems has also resulted in a new structural disarray as each set of secondary norms can only assist in the operation of the specific primary norms within its own subsystem. Conflicts between subsystems have subsequently emerged, creating unprecedented difficulties for practitioners and scholars.

The *Netherlands Yearbook of International Law (NYIL)* has always been in the forefront of journals focusing on contemporary issues of theory in international law. In a widely-acclaimed article in the 1985 *Yearbook*, Bruno Simma examined the relationship between subsystems and general international law.<sup>2</sup> Since the publication of that article, structural questions of subsystems and international regimes have been treated in several *NYIL* articles. To commemorate the twenty-fifth volume of the *NYIL* the editors devoted the entire *Yearbook* to one topic: the effects of subsystems on the system. This special volume, written by the Board of Editors, was also published separately in book form.<sup>3</sup> As the issues discussed in this book are the subject of growing interest among both scholars and practitioners, it seemed appropriate to analyse them in greater depth than a normal book review would allow.

## 2 Object and Method

In his introductory article, Wellens presents the central question explored in the book: Is the diversity of secondary norms a threat to the global unity and efficacy of the international legal order?<sup>4</sup> While the ILC generally subsumes merely operational norms of state responsibility under the term 'secondary norms', the book uses Hart's broader definition: namely, all norms designed to monitor the primary norms. The book thus examines various fields of international law where primary norms are accompanied by special secondary norms. Using the term 'subsystem', as defined above, it is possible to rephrase the main question of the book: Is the existence of diverse subsystems a threat to the unity and efficacy of the international system?

The editors of the *NYIL* were not the first to seek an answer to this question. In 1980 Sørensen posed a very similar question in an article on autonomous legal orders: '... the question arises whether the existence of such a multitude of independent legal orders leads to the dissipation and fragmentation of the universal legal order'.<sup>5</sup>

<sup>2</sup> Simma, 'Self-Contained Regimes', 16 *NYIL* (1985).

<sup>3</sup> L.A. Barnhoorn and K.C. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (1995) [hereinafter *Diversity in Secondary Rules*].

<sup>4</sup> *Diversity in Secondary Rules*, at 4–5.

<sup>5</sup> Sørensen, 'Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order', 32 *ICLQ* (1983) 575. Wellens does not refer to

Relying mainly on theoretical deductions, Sørensen concluded that subsystems posed no imminent threat to international law. However, he did not examine in detail how the norms of subsystems differ from the general norms in practice, how special secondary norms actually function and which reciprocal effects could result from the interaction between subsystems and the general system. The authors of the book presently under discussion are indeed the first to undertake such an extensive analysis.

From a strictly theoretical point of view, it should be pointed out that the assumptions relied on by Sørensen and the editors of the *NYIL* in their respective examinations are not self-explanatory. Firstly, an investigation into the effects of secondary norms on the unity and efficacy of the general legal order presupposes that the international legal order *is* or *was* an efficient single legal system. Yet, the mere existence of numerous and diverse secondary norms casts doubt on whether the attribute of 'unity' may be attached to the overall system. Neither Wellens nor his colleagues address this issue. To be sure, a detailed discussion would clearly have overburdened the book. Yet, at the same time, a look at the factors that render the international legal order a single efficient system would have enabled the reader to better understand which elements of the system, besides the very abstract notions of 'unity' and 'efficacy', are in danger.

Secondly, the *NYIL* authors assume that special secondary norms/subsystems *can* be detrimental to the unity and efficacy of the international legal system. However, these norms/subsystems are created by secondary rules of general international law. It is improbable — if not unsystemic — that the products could legally harm their producer. Nevertheless, as with the problems posed by primary norms mentioned above, the sheer quantity and diversity of subsystems could cause *de facto* disorder in the system. Wellens seems to have this practical danger in mind when he considers subsystems to be a potential threat to international order. The authors of the book are therefore mainly concerned with *Rechtssicherheit* in the international system. On the other hand, some subsystems are equipped with such an extensive set of secondary norms that doubts arise as to the remaining function of general international law. Moreover, such regimes at times explicitly exclude the application of international law. Quite clearly, this phenomenon could endanger the unity and efficacy of the international system, especially if the closed subsystem does not possess all the secondary rules necessary to function properly. Some of the authors address these questions in their articles and Wellens generally refers to 'closed and semi-closed systems' in international law.<sup>6</sup> Yet, in order to grasp the problems posed by the structure of subsystems a short general analysis of the legal relationship between the

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Sørensen, but de Witte pays tribute to Sørensen's investigation in his article: see *Diversity In Secondary Rules*, at 300.

<sup>6</sup> *Ibid.*, at 4.

international system and its subsystems would have been helpful. It could have assisted the reader in understanding why and how reciprocal effects can take place, resulting thereby in a change of legal quality of the respective norms and consequently in a legal devaluation of the subsystem or system.

As it is, the reader is confronted with two paradigms: the unity and efficacy of the international legal order and the capacity of subsystems to endanger these characteristics by their number and diversity. The main methodological course of the book thus lies in the description of the various subsystems and international regimes and in an examination of whether their secondary norms differ from the secondary norms of general international law. Wellens' task is to determine whether the deviations are of such gravity as to risk the unity and the efficacy of international law.<sup>7</sup> This section of his article will be dealt with in Part 5 below.

### 3 Not-institutionalized Subsystems

Four articles of the book treat not-institutionalized special regimes: Malanczuk examines space law; Fitzmaurice, environmental law; Post, the law of armed conflict; and Barnhoorn, diplomatic law. The authors adopt similar approaches in their discussions of the respective fields of law. It is therefore possible to examine the articles jointly under two main headings: sources and responsibility.

#### A Sources

In his thorough analysis of space law Malanczuk finds a number of special features which have resulted, to a large extent, from this field's omnipresent dependency on technological and scientific innovation as well as geo-strategic and financial interests. He detects a trend towards consensus as the main technique of norm creation, a process which takes into account not only the interests of the developed states actively engaged in space activity but also the concerns of developing states. Due to the pace of development, customary law and general legal principles play a minor role as sources of space law, unless one accepts Bin Cheng's concept of 'instant custom'.<sup>8</sup> Malanczuk, however, discards this possibility, stressing instead the importance of state practice, which itself — as well as the *post facto* assessment — requires time, a factor which is practically incompatible with instant custom.<sup>9</sup>

<sup>7</sup> Wellens explains that the use of the broad definition of secondary norms allowed the authors to choose the norms they wished to examine. He gives examples of typical secondary norms: rules regulating the creation of norms within the subsystem (sources), rules governing the consequences of a breach of primary rules (responsibility, countermeasures), rules of dispute settlement; *ibid.* at 9–25. Considering the number and diversity of secondary norms and the free choice of the authors, it would have been interesting to know how the various findings were compared and evaluated. In this respect Wellens, however, does not reveal his methodology.

<sup>8</sup> Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', *Indian Journal of International Law* (1965) 23.

<sup>9</sup> *Diversity in Secondary Rules*, at 161.

Like most authors, Malanczuk examines sources referred to in Article 38 of the ICJ Statute. Exemplary of the intellectual depth of his article is the fact that he does not do this without first addressing meta-questions. Indeed, assuming that space law has special secondary norms unknown to general international law, the regime could also be equipped with unique sources. Malanczuk, however, finds that the sources are the same, explaining that: ‘This follows from the . . . regulatory scope of space law which needs to be understood on the basis of increasing interaction between international and national rules and principles.’<sup>10</sup> As legal deduction this is hardly satisfactory. Malanczuk’s definition of space law includes national rules and would thus indicate a notably different set of sources to that of general international law. Nevertheless, from Malanczuk’s subsequent examination of each of the sources it becomes apparent that they truly are identical with the sources of general international law.

Fitzmaurice and Post do not doubt that the sources of their respective regimes correspond to the sources enumerated in Article 38 of the ICJ Statute. In her examination of environmental law, Fitzmaurice discovers one paramount customary norm: the obligation not to harm another state.<sup>11</sup> Most other legal norms are treaties, which sometimes have special structures to enable adaptation to technological and environmental developments or to facilitate consensus.<sup>12</sup> Fitzmaurice further notices the frequency of soft law instruments, such as non-binding annexes to treaties or resolutions and declarations, but she does not give them ‘source’ status, even though some disputes are settled by reference to these instruments.<sup>13</sup> It is interesting to note the parallels with the regime of space law: environment and space law share a number of special characteristics, none of which however amount to real deviations from the general rules.

On the whole, the law of armed conflict also closely adheres to general international law. Post remarks that some peculiarities exist with respect to customary law, especially regarding the role of national military manuals.<sup>14</sup> He notes, however, that the formation of a rule of customary law does not follow a single pattern and that state practice assumes a variety of forms. He concludes, ‘More in general, the “secondary rules” for the formation of customary law in the law of armed conflict do not seem to be at variance with those of general international law.’<sup>15</sup> With respect to treaties, however, Post detects a unique secondary rule. The invalidity of treaties due to coercion by one of the parties contained in Article 52 of the Vienna Convention of the Law of Treaties (VCLT) is general international law. However, in situations of armed

<sup>10</sup> *Ibid.*, at 158.

<sup>11</sup> *Ibid.*, at 187.

<sup>12</sup> ‘Umbrella’ treaties or opting out provisions are cited as examples; *ibid.*, at 193.

<sup>13</sup> *Ibid.*, at 201.

<sup>14</sup> *Ibid.*, at 99–101.

<sup>15</sup> *Ibid.*, at 98. If the norms of creation of the special branch are norms of general international law, the question could arise whether it is possible to speak of a ‘special branch’ or ‘regime’. Post does not look into the question, but most authors agree that special rules of norm creation are no prerequisite for subsystems.

conflict, agreements are often concluded in the midst of hostilities and they are nevertheless valid.<sup>16</sup> Post concludes that this is proof of the existence of a special secondary norm of the regime. Unfortunately, he does not examine the effects, if any, that the special rule has on the general system.<sup>17</sup> Instead, he devotes a large part of his article to the hierarchy and difference in legal quality of the regime's rules, more precisely the *erga omnes* and *ius cogens* nature of some of the laws of armed conflict.<sup>18</sup>

The theoretical problems relating to norms with *erga omnes* effects and norms of *ius cogens* are well known in legal literature. Few authors go beyond allegations to provide legal proof — or at least logical reasons — for the difference of legal quality of the norms. Post therefore raises high expectations when he embarks upon this path. Following *Abi-Saab*,<sup>19</sup> Post has no difficulty in classifying the 'hardest core of humanitarian principles' as obligations '*erga omnes* and perhaps even *ius cogens*'.<sup>20</sup> To substantiate this assumption he relies, firstly, on the fact that breaches of these norms are labelled 'grave breaches' which must reflect the legal nature of the norm. Secondly, he relies on the fact that the basic humanitarian rights correspond in content and scope to the 'hardest core of human rights' which are commonly qualified as obligations *erga omnes* and/or *ius cogens*. These reasons, however, only convince a reader on first glance. The fact that a treaty labels some breaches of its provisions as 'grave breaches' is a terminological specificity and can hardly have an external effect *per se*. Evidence would have to be put forward to prove that mere terminological classification suffices to endow norms with special legal quality. The parallel with basic human rights is equally unsatisfactory since it is not clear why, how or even

<sup>16</sup> A problem arises with respect to peace treaties, which are normally concluded after the end of a conflict. Post brings the good example of the Joint Declaration that terminated the state of war between the USSR and Japan; *ibid.*, at 102. The agreement was reached in 1956, more than ten years after the end of hostilities. If peace treaties were not part of the special regime and thus outside the special rule, they would underlie general international law, in particular Article 52 of the VCLT. This argument opens a floodgate of questions regarding the defeasibility of peace treaties, but Post skilfully evades this problem. He points out that, since peace treaties are not part of the regime of armed conflict, they are a 'non-issue' for his article; *ibid.*, at 116.

<sup>17</sup> Post also examines the effects that the mere existence of an armed conflict has on treaties; *ibid.*, at 103ff. Relying on the work of the *Institut de droit international*, he rejects the notion that war results in the general annulment of agreements. Instead, treaty relations continue and belligerents only have the possibility of suspending the treaty for reasons of general international law (e.g. *clausula rebus sic stantibus*). This is obviously not a special secondary rule known only to the special regime of the law of war. Post refers to treaties that expressly regulate situations of armed conflict, for example by means of clauses excluding certain provisions. However, this depends solely on the treaty and there is no special secondary norm generally applicable in the regime. Post therefore concludes that no special secondary norms exist in this respect.

<sup>18</sup> It must be emphasized that the primary norms of the regime have *erga omnes* or *ius cogens* quality. However, secondary norms have to determine how and why primary norms receive and lose their special quality and what the contents of the special status are.

<sup>19</sup> *Abi-Saab*, 'The Specificities of Humanitarian Law', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law: In Honour of Jean Pictet* (1984), at 270.

<sup>20</sup> *Diversity in Secondary Rules*, at 117.

whether the human rights norms have acquired special status. Furthermore, there is no evidence that similar norms have similar legal quality or effect.

Considering the multitude of questions it would have been better to let the discussion rest at this point. Post, however, dwells on the issue. For some obligations, breaches of which are termed 'war crimes' and 'grave breaches' by the Geneva Conventions, there are no parallel human rights obligations. Post believes that these norms should be awarded a more prominent position in the hierarchy of international norms and classifies them as special norms *sui generis*.<sup>21</sup> As always, 'sui generis' classifications only convey information if the special status and the consequences are subsequently explained. Post, however, does not elaborate further on the phenomenon, apart from placing the norms in structural perspective:

There does not seem to be sufficient reason to also qualify them as obligations *erga omnes* and much less to call them *ius cogens*. However, their special status nevertheless singles them out as special obligations *sui generis* with a normative value in general international law 'higher' than ordinary obligations.<sup>22</sup>

If the sole effect of this classification on the norms is that they now carry a new label, this hardly seems worth the effort. On the other hand, if the new status includes a change of normative quality (and this is obviously Post's intention), the mere fact that this difference in normative quality exists is in itself of interest. Again, however, the essential questions remain unanswered: Why and how can the secondary rules of the regime of the laws of armed conflict create primary norms of different normative quality? Why and how can these norms create a legal quality that has effects outside the regime? It is clear that there are no simple answers to these questions, nor does the reader expect a lengthy analysis of the legal quality of norms and the interrelationship between regimes and general international law. However, these questions carry significance for the general investigation of the book and, if raised, might well have merited consideration.

In her article on environmental law Fitzmaurice encounters similar questions. Indeed, she devotes a section of her article to treaty-based environmental subsystems:

These are regimes which have been set up under conventions which, though they have been concluded within the framework of traditional international law, once in operation involve systems which effectively bypass the mechanisms of traditional law.<sup>23</sup>

Regimes that can 'effectively bypass' general international law are precisely what the reader might expect to be a threat to the unity and efficacy of the general legal system. Fitzmaurice does not claim to have discovered these regimes herself. In analysing the Montreal Protocol Gehring examined whether highly self-sufficient regimes require

<sup>21</sup> He writes: 'The special normative status of these norms in the law of armed conflict is not reflected in a corresponding status in the general law. There seems ample reason to classify them tentatively as special obligations *sui generis*.' *Ibid.* at 113.

<sup>22</sup> *Ibid.* at 117.

<sup>23</sup> *Ibid.* at 194.

assistance from general international law in order to operate properly.<sup>24</sup> He was not concerned with a conceptual analysis of the relationship between subsystems and international law. Yet this is, of course, the central theme of the present book. By giving a detailed presentation of Gehring's 'sectoral legal systems', Fitzmaurice seems poised to enter the debate on the interrelationship between closed subsystems and the international system, a discussion which seeks to determine whether self-contained regimes are a threat to the unity and efficacy of international law. Fitzmaurice, however, limits herself to a presentation of Gehring's reflections. This is regrettable because she obviously understands the importance of the issues.<sup>25</sup> It would have been interesting to see how a specialist in the field evaluates the role of closed subsystems in environmental law and their power to negatively affect the general system.

## **B Responsibility**

In the field of space law Malanczuk does not detect grave deviations from the general secondary norms in the regime's rules. Technological implications of the regime have resulted in the development of certain refined concepts, such as responsibility for private individuals, concepts of absolute and joint liability and a variety of dispute settlement mechanisms. According to Malanczuk, however, these features do not make the regime systemically different from international law. Bearing in mind that he reached the same conclusion with respect to the norms of creation, Malanczuk concludes that space law is, on the whole, an 'integral part of general international law'.<sup>26</sup> Moreover, from the practice of the actors involved in outer space activity he deduces that it is the international community's intention that space law *should* be a part of the general system.<sup>27</sup>

In the field of environmental law the situation is more complex. The detailed investigation of the 'special liability regime' by the ILC seems to indicate the existence of a substantially different system of responsibility. In her article, Fitzmaurice neatly and comprehensively summarizes the general problems related to the concepts of state responsibility and liability, the work of the ILC and some of its criticism. She is

<sup>24</sup> Gehring, 'International Environmental Regimes: Dynamic Sectoral Legal Systems', 1 *Yearbook of International Environmental Law* (1990) 37.

<sup>25</sup> With respect to the regimes of environmental law and the law of development Fitzmaurice points out the interlinkages surrounding borderline principles, such as the principle of sustainable development; *Diversity in Secondary Rules*, at 225. Regarding other treaty-based subsystems she acknowledges that there are special regimes with special features, such as civil liability regimes, but even these 'notwithstanding their private character should be governed by international law'; *ibid.*, at 197.

<sup>26</sup> *Ibid.*, at 178.

<sup>27</sup> Malanczuk sees no negative effects arising out of this classification and even recommends it to the academic world. Scholars should not let the increasing specialization of space law draw it away from general international law: 'As an academic discipline, space law will not be able to flourish as a self-contained intellectual compartment. To avoid the danger of an esoteric approach and to preserve the unity of the system as a whole, more systematic efforts should be encouraged to integrate research and teaching in the "branch" of space law more closely into the mainstream of international law and its evolution.' *Ibid.*, at 180.



aware of the different legal concepts but, relying on Akehurst<sup>28</sup> and Boyle,<sup>29</sup> sees no special environmental liability regime today. According to Fitzmaurice, the traditional concept of state responsibility suffices to solve all problems of environmental harm.<sup>30</sup> This approach relies on a primary norm prohibiting the mere occurrence of harm regardless of fault. The author is in favour of this system of strict liability (also contained in the ILC Draft Articles on International Liability for Injurious Consequences of Acts not Prohibited by International Law), without failing to mention, however, that the majority of writers rely on standards of due diligence to mitigate the concept.

Fitzmaurice encounters certain difficulties in her approach when she examines the consequences that arise from environmental harm. Having determined that the general rules of state responsibility govern environmental harm, all damage results in obligations of cessation, reparation and guarantee of non-repetition.<sup>31</sup> According to the traditional concept of responsibility, countermeasures would be applicable in the event that the obligations were not fulfilled. However, Fitzmaurice departs from the general concept at this point and doubts that reprisals are applicable.<sup>32</sup> In general, her unease is understandable because in cases of strict liability a state that is a victim of environmental harm caused by another state can retort by means of an illegal act. This seems unfair and contrary to the idea of justice, but the possibility of enforcement by means of reprisal is a central element of general state responsibility and (though mostly only in theory) essential for international law enforcement. Fitzmaurice is aware of the traditional concept and finds no evidence that would prohibit reprisals. She therefore shifts the attention from the secondary norms regarding reprisals to the regime as a whole by noting that: 'Environmental law, being imprecise and developing, is not an easy field of international law to apply reprisals and there is no certainty as to what the law in this respect is.'<sup>33</sup>

This is a dangerous conclusion because if environmental law were truly 'imprecise and developing' this would apply to all norms, primary and secondary alike. It is hard to see how one can speak of 'legal norms' and 'state responsibility' in relation to uncertain rules without conflicting with the maxim *nullum crimen sine lege*. As a consequence, not only would reprisals be redundant but the whole concept of legal responsibility for violation of environmental norms would also lose its relevance. This is contrary to Fitzmaurice's intention, but she is influenced by authors who criticize reprisals for various reasons and is thus reluctant to apply the general theory of state

<sup>28</sup> Akehurst, 'International Liability for Injurious Consequences of Acts not Prohibited by International Law', 16 *NYIL* (1985) 3.

<sup>29</sup> Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?', 39 *ICLQ* (1990) 22.

<sup>30</sup> *Diversity in Secondary Rules*, at 209.

<sup>31</sup> In this respect, Fitzmaurice also mentions a 'balance of interests principle', apparently as a special feature of the regime. However, it does not become clear in which respect the principle is special and what relevance it has.

<sup>32</sup> *Diversity in Secondary Rules*, at 216.

<sup>33</sup> *Ibid.*, at 217.

responsibility wholeheartedly to environmental law. It would, however, have been better to criticize reprisals at their origin, in their international law setting, rather than targeting environmental law. As it is, Fitzmaurice draws the following conclusion:

Overall, though the position is by no means clear, there would seem to be grounds for doubting whether the doctrine of countermeasures should, or does, apply without modification in relation to environmental damage.<sup>34</sup>

If the traditional regime of countermeasures — a cornerstone of state responsibility and an important compendium of secondary norms of general international law — is not applicable in environmental law, it is almost certain that this latter regime is of a different legal nature. This would imply a distinct legal entity, possibly a self-contained regime, a result that would demand a detailed investigation into the relationship between environmental law and general international law. Fitzmaurice, however, ends her study of state responsibility at this point, and it becomes clear that it was never her intention to argue the point of systemic difference. Presumably her purpose was merely to criticize countermeasures in the context of environmental law in the same way that self-help measures are criticized in general international law.

Countermeasures are also at the heart of Barnhoorn's article on diplomatic law. He detects a special secondary rule which he calls the 'special sanctions rule': a wrongful act does not enable the injured state to infringe the immunity of diplomats and the diplomatic mission.<sup>35</sup> Subsequently, Barnhoorn tries to establish this rule, a task that is not as easy as it initially seems. None of the treaties concerning diplomatic law contain corresponding provisions. The special rule could be implied in the conventions' concepts of absolute immunity of diplomats and of diplomatic missions coupled with the fact that the receiving state cannot terminate diplomatic immunity unilaterally.<sup>36</sup> At the same time, however, the conventions contain provisions on non-discrimination and reciprocity. Barnhoorn notes that this obviously envisages sanctions.<sup>37</sup> Indeed, the ILC commentary of its draft articles does not consider the notion of reprisals against diplomats and missions as wholly illegal. Still trying to substantiate the rule, Barnhoorn then turns to case law and state practice. From a number of well-chosen examples he convincingly deduces that the 'special sanctions rule' exists. This rule prohibits sanctions against diplomatic persons, premises, documents, archives and the diplomatic and consular bag.<sup>38</sup> As a result, the only actions legally admissible to counter a violation are declarations of *persona non grata*,

<sup>34</sup> *Ibid.*, at 217–218.

<sup>35</sup> *Ibid.*, at 43.

<sup>36</sup> Cf. Articles 9, 39, 43, 45 of the Vienna Convention on Diplomatic Relations.

<sup>37</sup> *Diversity in Secondary Rules*, 48–49.

<sup>38</sup> Regarding permanent missions and delegations to international organizations, Barnhoorn notes that state practice only provides evidence that persons are protected by the rule; *ibid.*, at 68.

severance of diplomatic relations, closure of premises and reciprocity measures specifically permitted by the diplomatic conventions.<sup>39</sup>

After having ascertained that the rule exists, Barnhoorn searches and finds reasons for the special rule: the maintenance of good relations between states, reciprocity,<sup>40</sup> the 'fundamental character' of diplomatic law,<sup>41</sup> and the 'effectiveness' of the subsystem whose special secondary norms are better equipped to serve diplomatic law than the secondary norms of general international law. Reading the article carefully, all four reasons basically boil down to one: the special rule exists because it is, according to Barnhoorn, good for all concerned: diplomats, states and international relations. The author, however, supplies one further reason for the rule (which he restricts to the special case of violation by a diplomat of diplomatic law), employing this time a purely legal argument: diplomatic law is a self-contained regime and thus all sanctions of general international law are permanently excluded.

At first glance, this argument is convincing but it stands at odds with Barnhoorn's own perception of the concept of self-contained regimes. A self-contained regime is generally understood as a subsystem of international law that contains all necessary secondary norms and that explicitly prohibits application of secondary norms of general international law. The ILC employs the term 'self-contained regime' to designate closed subsystems and in the context of the current Article 37 of the ILC draft articles on state responsibility. Special Rapporteur Arangio-Ruiz undertook a highly critical investigation of the nature of self-contained regimes, concluding that no permanently closed subsystems currently exist under contemporary international law.<sup>42</sup> This position is shared by the majority of legal writers. Barnhoorn, however, adopts a different definition for the term. He relies on a literal interpretation of the judgment of the International Court of Justice (ICJ) in the *Tehran Hostages* case where the Court stated:

The rules of diplomatic law, in short, constitute a self-contained regime which on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious. . .<sup>43</sup>

Strong criticism of the Court's use of the term 'self-contained regime' for diplomatic law was voiced in the legal literature. It is now generally accepted that the ICJ did not intend to declare diplomatic law a closed subsystem, but merely sought to protect

<sup>39</sup> Furthermore, as immediate responses in situations of distress, short arrest of diplomats and self-defence against diplomats are permitted. According to Barnhoorn, self-defence cannot be invoked, however, to arrest a killer on the premises of an embassy. Here the immunity and inviolability of the mission prevails; *ibid.*, at 58–60.

<sup>40</sup> In Barnhoorn's argument, this is basically the same thing in reverse: reciprocal exercise of diplomatic functions overrides the exercise of sanctions.

<sup>41</sup> This, as Barnhoorn admits, is, in itself, 'too unclear' and, at the same time, a reiteration of the first reason.

<sup>42</sup> G. Arangio-Ruiz, Fourth Report on State Responsibility, Doc. A/CN.4/444 and Add. 1 and 2, para. 113.

<sup>43</sup> *Tehran Hostages* case, ICJ Reports (1980), para. 86.

diplomatic personnel and missions by endowing them with special status. The ILC has reacted in its efforts to codify state responsibility, and both Riphagen and Arangio-Ruiz have presented propositions to include provisions to protect diplomatic personnel and missions from sanctions (Article 50c of the ILC draft articles). As mentioned above, however, Barnhoorn interprets the ICJ judgment literally and narrows the scope of 'self-contained regime' down to cases where diplomats themselves have violated the law.<sup>44</sup> The term 'self-contained regime' therefore has only one very restricted content: if a diplomat violates diplomatic law, the receiving state may not adopt sanctions that violate the immunity of the diplomat and the mission.<sup>45</sup>

As the reader follows Barnhoorn's justification of the 'special rule' by referring to the 'self-contained regime' quality of diplomatic law, it becomes clear which doubts may assail him or her: What is the connection between the special rule and the 'closed' character of the subsystem? Is diplomatic law a self-contained regime because of the special rule or does the special rule exist because diplomatic law is a self-contained regime? In Barnhoorn's narrow understanding of the term 'self-contained regime', both the special rule and the closed character of the subsystem have the same content.<sup>46</sup> A rule cannot legally justify itself unless it is a *Grundnorm* in Kelsen's sense, an argument that Barnhoorn clearly does not intend to take up.

On the whole, however, Barnhoorn's in-depth investigation of state practice provides sufficient evidence of the existence of a special secondary norm in diplomatic law, a norm unknown to general international law. Like the other authors reviewed in this section, however, Barnhoorn does not believe that the special rule suffices to speak of a different legal system. While displaying some special features, the secondary norms of not-institutionalized subsystems are closely related to their counterparts in general international law. There is regular and fruitful interaction between the general system and the subsystems. Irrespective of form and quantity, not-institutionalized subsystems clearly do not endanger the unity and efficacy of general international law.

<sup>44</sup> *Diversity in Secondary Rules*, at 65f, 68, 81.

<sup>45</sup> This is a new and interesting approach to 'self-contained regimes', related to some extent to that of Riphagen, the third ILC Special Rapporteur on State Responsibility. It was Riphagen who first introduced the question of self-contained regimes and subsystems into the discussions of the ILC. However, Riphagen's unclear perception of the relationship between subsystems/self-contained regimes and the general system of international law resulted in confusion and a delay in the codification process. It also led to heavy criticism from within and without the ILC. Barnhoorn goes in defence of Riphagen and criticizes the critics. However, even Barnhoorn cannot deny that the basic flaw in Riphagen's theory was that there never existed a clear and easily recognizable concept of subsystems and self-contained regimes.

<sup>46</sup> In his conclusion Barnhoorn writes: 'Where violations are committed by diplomats of the sending State itself, there can be said to be a self-contained regime, since the receiving State can take efficient action against the diplomats by means of the retorsions...'; *Diversity in Secondary Rules*, at 68. He thereby gives the impression that regimes are self-contained if states can take efficient action to counter the violation. This, however, would enlarge the scope of self-contained regimes to all cases of effective countermeasures.

## 4 Institutionalized subsystems

Four articles in the book treat subsystems with more or less institutionalized structures: a complex set of secondary norms including permanent organs and sophisticated dispute settlement procedures. Vierdag studies the field of human rights and Kuyper analyses the new GATT/WTO. The articles by Hancher and de Witte examine the currently most refined subsystem in international law, the European Communities.

### A Human Rights

Bearing in mind the general thrust of the book, human rights regimes present interesting examples of subsystems because some of the regimes explicitly exclude general international law.<sup>47</sup> One would expect legal literature to have exhaustively analysed the relationship between human rights treaties and general international law. Yet, despite the extensive literature, this is far from true. A number of basic problems still lack legally-founded answers. A good example is the norm prohibiting violations of human rights treaties as reprisals in the context of state responsibility: Is this obligation a norm of the subsystem or a norm of general international law?<sup>48</sup> In his examination of supervisory human rights systems, Vierdag points out the difference between Article 62 of the European Convention on Human Rights (ECHR) and Article 44 of the United Nations Covenant on Civil and Political Rights (UNCCPR). Whereas Article 62 ECHR seeks to establish a self-contained regime, Article 44 UNCCPR deliberately makes the Covenant an open subsystem. Since both constructions exist in human rights treaties, Vierdag concludes that neither is a 'special feature' typical of the field of human rights.<sup>49</sup> This is hardly convincing and, in any case, is beside the point. The question is whether and in what way either construction affects general international law. Vierdag does remark at the end of his article that Article 62 ECHR 'may indeed justify the qualification that that instrument is a special feature of international law...'<sup>50</sup> but then unfortunately he does not investigate whether the closed structure of the European Convention affects the general legal system.

In general, Vierdag devotes his article to a search for 'special features' of secondary norms in human rights treaties and ways in which they deviate from international law. Looking closely at certain special elements, such as the 'common interest' that replaces reciprocal interests, the domestic remedies that most human rights treaties envisage, the *erga omnes* effects of obligations and the compliance systems (submission

<sup>47</sup> Cf. Article 62 of the European Convention on Human Rights (ECHR).

<sup>48</sup> The difficulty in grasping the relationship between human rights subsystems and the general international legal system becomes particularly obvious in the ICJ's judgment in the *Barcelona Traction* case concerning human rights: 'Some of the corresponding rights of protection have entered into the body of general international law...'; ICJ Reports (1970), at para. 34.

<sup>49</sup> *Diversity in Secondary Rules*, at 138.

<sup>50</sup> *Ibid.*, at 142.

of reports, supervising systems, state responsibility). Vierdag concludes that none of these secondary norms are unique to the field of human rights.

Vierdag does notice, however, a particular characteristic of the regime which distinguishes it from the general system. Reservations to human rights treaties are more frequent and broader in scope than reservations to other international treaties.<sup>51</sup> This is certainly an accurate observation: each major human rights treaty has a large number of reservations, some of which are so far-reaching in content that they appear to be in contradiction with the object and purpose of the particular treaty. Nevertheless, only few states protested against the reservations. The secondary norms concerning reservations in human rights treaties are, in general, the same as the norms of general international law. It is not as yet clear whether we are confronted with a specific form of state practice or whether this practice has resulted in a change in the secondary norms concerning reservations in the field of human rights. The latter possibility would have significant implications for future human rights treaties and could also affect the general system of reservations.

## B GATT/WTO

Kuyper's article on the GATT/WTO subsystem is among the best in the book. He shows a thorough understanding of the theoretical concept of subsystems, sees the topic in a broader perspective and is familiar with the relevant terminology. Like Barnhoorn, Kuyper looks at the special secondary norms of the subsystem not only to find special features but also to inquire as to why the deviations from the general rules occur and what effects they have on the subsystem and on general international law. Kuyper first looks at the subsystem's rules of interpretation and notes that the GATT panels rely almost exclusively on historical background and on the *travaux préparatoires*. General international law as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) places primary importance on other means, such as the object and purpose of the treaty, its terms and the context. Kuyper especially regrets the scarce reference to subsequent practice which, as he correctly points out, can fundamentally change the content and scope of treaty articles. It is difficult to see a reason behind the practice of the GATT panels. In 1986 McGovern criticized the panels' 'lack of knowledge' of the general rules of treaty interpretation.<sup>52</sup> Kuyper notes that there has hardly been any improvement since.<sup>53</sup> His hope, however, is that the new GATT/WTO Dispute Settlement Understanding (DSU), which refers explicitly to the customary rules of treaty interpretation, will bring positive change. This change, in Kuyper's opinion, is vital for the functioning of the subsystem.<sup>54</sup>

<sup>51</sup> *Ibid.*, at 132–134.

<sup>52</sup> McGovern, 'Dispute Settlement in the GATT — Adjudication or Negotiation?', in M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds.), *The European Community and the GATT* (1986), 73.

<sup>53</sup> *Diversity in Secondary Rules*, at 229.

<sup>54</sup> He writes: 'It does not serve the development of a special field of international law well, when dispute settlement becomes primarily a question of who can exploit the historical record best. Fortunately, there

Kuyper next turns to secondary norms that deal with procedural issues of the subsystem's dispute settlement procedures. He notices that the requirement of exhausting local remedies prior to raising claims before an international organ is not applied in GATT. Kuyper argues that such a fundamental procedural concept of international law would have to be applicable within the GATT system, unless there is a clear intention of the GATT parties to deviate from the general rules and to create a *lex specialis*. Neither the GATT, nor the new Agreements on Safeguards, Subsidies and TRIPs, nor the new Anti-Dumping Agreement demonstrate a corresponding explicit intention. The need to exhaust local remedies would thus appear to be a valid procedural requirement in the GATT/WTO context.<sup>55</sup> Kuyper, however, is aware of the GATT practice of instituting panels without waiting for private parties to exhaust local remedies. Defendants do not raise objections in this regard. Kuyper argues that, naturally, the defendants are not obliged to raise the issue. Nevertheless, it seems that GATT Member States and panels concur with Petersmann, who argues that the local remedies rule only applies in cases of diplomatic protection while under the GATT system states claim a violation of their own rights.<sup>56</sup> Kuyper demonstrates that Petersmann's argument is erroneous because in instances of diplomatic protection (where states explicitly espouse the claims of nationals) the claim is also attributed to the state.<sup>57</sup> Cases in which nationals were given rights in treaties and states subsequently made claims before an international tribunal prove Kuyper's point.

Nevertheless, it is doubtful whether Kuyper's argument gives adequate attention to the structural level of GATT. Within GATT the legal structure has always been exclusively state-oriented. Although the subject matter mainly affects private individuals, states have always been the central actors and the GATT has always been more of a forum for state negotiation than an institutional subsystem. Consequently, all state acts are closely scrutinized by the other parties and responsibility can be summoned quickly, for instance, by legislative acts. A further example of the sensitive structure of GATT is the non-violation procedure, whereby states can institute proceedings if they feel they have been treated unfairly. If this suffices to raise a claim, it seems out of place to demand exhaustion of local remedies in cases where individuals have suffered from GATT violations. An interpretation which takes account of the whole GATT system, its object and purpose and, especially, the practice of the states could provide the clear intention of the original GATT parties to deviate from the general requirement of exhaustion of local remedies. Kuyper acknowledges

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are sufficient indications that the result of the Uruguay Round and the anticipation on that result by major partners in their most recent panel cases will lead a return to orthodoxy.' *Ibid.*, at 255-256.

<sup>55</sup> *Ibid.*, at 238.

<sup>56</sup> Petersmann, 'GATT Dispute Settlement Proceedings in the Field of Anti-Dumping Law', 8 *CMLR* (1991), at 101-102.

<sup>57</sup> *Diversity in Secondary Rules*, at 234.

the practice of the GATT parties and raises the question whether this could signal a change in procedural law. He leaves open the question of whether this change would affect only the GATT/WTO regime or general international law as well. With respect to GATT, Kuyper comments that the abolition of the requirement to exhaust local remedies would not be beneficial for the subsystem:

A very important function of the rule is to avoid unnecessary conflicts at international level. A result of ignoring it will be that many more cases on anti-dumping, etc., and TRIPs will be brought to panels than would otherwise be the case. This may lead to a needless dramatization of these cases and a possible overload of the system.<sup>58</sup>

At the same time, Kuyper sees a positive trend in GATT procedural law. Unlike general international law, claims of responsibility raised under GATT law do not require proof of legal interest in the outcome of the case. This could imply that the GATT offers an *actio popularis* to all Member States. Kuyper, however, does not go this far. He points out that the impression of *actio popularis* results from the state-oriented structure of GATT that creates wide responsibility for the legislature.<sup>59</sup> Furthermore, practice demonstrates that claimants generally do rely on some form of personal interest. This indicates that no real *actio popularis* exists within the subsystem at the moment, even though the structure of the GATT shows an evolution in this direction.<sup>60</sup>

From the procedural secondary norms Kuyper turns his attention to the field of state responsibility. He notes that GATT panel cases show that the imputability of acts to states for violations of GATT primary law is sometimes stretched to the limits of general international law. Yet none of his examples can be considered to be outside the traditional system and Article XXIV/12 of GATT (no real responsibility for acts of local governments) has been brought into line with general international law (Article 27 VCLT) in the Uruguay Round.<sup>61</sup> Nevertheless Kuyper acknowledges that the GATT/WTO regime does possess one truly special feature in its 'non-violation procedure'. Proceedings can be instituted against a state simply because, while acting in conformity with GATT, it has acted in contradiction to another state's (reasonable) expectations. Kuyper argues that the non-violation procedure is not a form of 'liability for lawful activity', but an extension of international responsibility for illegal acts.<sup>62</sup> It is difficult to follow the author in this reasoning: How can responsibility for illegal acts be extended to legal acts without bringing down completely the traditional concept of state responsibility? Two explanations are possible: the non-violation procedure can only be part of state responsibility if there is a corresponding (inherent) primary norm

<sup>58</sup> *Ibid.*, at 256.

<sup>59</sup> It is interesting to note that Kuyper raises here the exact argument which could have explained the lack of the rule of exhaustion of local remedies above.

<sup>60</sup> According to the author, this is a positive result for GATT: *Diversity in Secondary Rules*, at 256. It is not really clear why this should be the case: *actio popularis* would also lead to a substantial increase in panel procedures and would overload the system. Difficult problems arise regarding who would be entitled to raise the claim (one for all or all at once) or to reap the benefits of a panel ruling.

<sup>61</sup> *Ibid.*, at 241–243.

<sup>62</sup> *Ibid.*, at 247.



requiring states not to act unexpectedly in such a way that other states can be affected negatively. Otherwise, the non-violation procedure is not a secondary norm of state responsibility. It is a special primary obligation to negotiate in the form of a panel if certain conditions are met and another state so requests.

In a probably wise attempt to avoid unnecessary doctrinal discussion Kuyper plays down the problem. In his opinion, the non-violation procedures can only be applied in areas not regulated by GATT law. He predicts that further regulation of GATT/WTO law will minimize the scope of and need for non-violation cases.<sup>63</sup> At the same time, Kuyper warns that an extension of the system, as proposed by some delegations at the Uruguay Round, would be a threat to the subsystem: 'The tendency to apply non-violation to the substantive rules of GATT is almost certainly perverse, and if pursued, may prove dangerous to the confidence in the dispute settlement system.'<sup>64</sup>

Finally, Kuyper addresses the issue of countermeasures and, consequently, questions of open and closed subsystems. GATT law tries to rule out all unilateral measures and requires its organs to prescribe which measures states may apply for retaliation purposes. Self-help, in theory, is strictly prohibited. Article 23 of the DSU now explicitly labels the subsystem 'closed'. Aware of the number of unilateral measures that GATT parties have had recourse to in the past, even though they were prohibited, Kuyper is careful in his appraisal of the structure of the subsystem:

It is perhaps too early to say if the GATT, which was a self-contained system of international law only in aspiration but not in reality, has moved decisively in the direction of such a self-contained system in the form of the WTO. It is obvious, however, that the intention was there.<sup>65</sup>

Indeed, only time and the practice of the WTO members and organs will clarify whether the regime is a closed subsystem. Time and practice will also enable proper assessment of whether a treaty provision establishing a self-contained regime suffices to fully detach the regime from general international law and what effects this has on the general system.

### *C The European Communities*

The last two articles of the book are devoted to the most sophisticated institutionalized subsystem, the European Communities (EC). In his excellent contribution de Witte analyses the EC's secondary 'rules of change', in other words, the norms governing treaty amendment. Three major procedures to amend a treaty exist in international law: adoption of a new treaty by all parties to the original one (revision by consensus), specific procedure foreseen in the treaty (without any limitation as to what procedural requirements are necessary), and subsequent practice of the members or the organs (for example, by means of progressive interpretation of the treaty). Apart from *ius cogens*, international law knows no material limits in modifying a treaty, unless the

<sup>63</sup> *Ibid.*, at 247.

<sup>64</sup> *Ibid.*, at 257.

<sup>65</sup> *Ibid.*, at 252.

treaty contains an explicit provision in that regard.<sup>66</sup> De Witte carefully examines the Community's mechanisms of amendment to see how they differ from the general rules. In de Witte's view, this field of study is particularly suitable for the book because:

If amendment of the basic rules of an international organisation is no longer under the full control of its founding members, then the organisation may be said to have left the domain of international law.<sup>67</sup>

The EC treaty provides for revision in Article 236, now Article N of the Treaty on European Union (EU). The provisions do not contain any substantive limits for modifications. Nevertheless, judgments and opinions of the European Court of Justice (ECJ), such as the Opinion on the European Economic Area (EEA),<sup>68</sup> have led to speculations about inherent limits, for example the prohibition of changes in 'essential characteristics' of the Community legal order.<sup>69</sup> De Witte convincingly counters these speculations by referring to the practice of the Member States.<sup>70</sup> The sole material limitations in treaty modification would thus be *ius cogens* and this would be in full conformity with general international law.

With respect to the amendment procedure, Article N basically relies on the consensus of Member States. The EC organs have certain functions in the preparatory stage of treaty modification; in the final score, however, it is the states alone that decide on the new treaty.<sup>71</sup> Even if it were the will of all Member States, the subsystem's rules of amendment do not permit any simplified procedure for modifying the treaty. This was made clear, *inter alia*, by the ECJ in the second *Defrenne* case.<sup>72</sup> Whereas Member States have the sole competence for making material revisions of the treaties, this is not the case for the procedure for revising the treaties.<sup>73</sup> De Witte emphasizes, however, that the prohibition of a simplified procedure for modifying the

<sup>66</sup> One such provision is Article 311(6) of the United Nations Convention of the Law of the Sea.

<sup>67</sup> *Diversity in Secondary Rules*, at 301–302.

<sup>68</sup> Opinion 1/91, European Economic Area 1991; see esp. 318–322 for in-depth discussion.

<sup>69</sup> De Witte cites as an example Barents, 'The Court of Justice and the EEA-Agreement', *Rivista di diritto europeo* (1992) 751, at 766.

<sup>70</sup> He writes: 'Only a few weeks after the Court's EEA Opinion, the member States signed the Treaty of Maastricht. Although they did not interfere with the fundamental provisions of the Community legal order that had been mentioned by the Court of Justice, they nevertheless dealt with the "acquis communautaire" in a rather cavalier fashion and were acting as true "Herren der Verträge".' *Diversity in Secondary Rules*, at 320.

<sup>71</sup> There is a slight difference regarding Article O (formerly Article 237), which requires the assent of the European Parliament for 'adjustments' necessary due to the accession of a new state. The Member States are therefore not alone in deciding. However, it is often argued that Article O merely envisages technical modifications directly due to the accession of a new state. No substantial alterations may be made under that provision. De Witte, on the other hand, points out that, for example, changes in weighted voting are not only technical in nature but also have significant effects on EC policy. He therefore contends that Article O is a *lex specialis* which provides for a true limitation of sovereignty. *Ibid.*, at 322.

<sup>72</sup> Case 43/75 *Defrenne*, [1976] ECR 480.

<sup>73</sup> 'The amendment of the European Treaties is not, therefore, within the "domaine réservé" of the States. It is a feature of the legal order of the European Union which is subject to the authoritative interpretation of the Court of Justice.' *Diversity in Secondary Rules*, at 315–316.

treaties is not as clear-cut in practice as it is in theory. Renowned for its 'creative interpretation' of Community law, the ECJ quite often modifies the original treaties substantially. The EC Council, in its turn, has made frequent use of Article 235 for the adoption of new policies formerly not envisaged by the EC treaties. Both cases need not be in contradiction to the rule because the prohibition of simplified procedures is only directed at the states parties to the treaties. However, de Witte also finds evidence that the Member States adopt simplified procedures with the full consent of the Community organs.<sup>74</sup> There are, therefore, rare exceptions to the consensus rule, especially in politically delicate cases.

De Witte sees one fairly new trend which could signal a general departure from the consensus method. The opting-out possibilities of the EU Treaty and the concept of *géométrie variable* in the discussions on structural reform could mean the beginning of a new era. De Witte correctly points out that the opting-out provisions of the Maastricht Treaty are only valid because all Member States have agreed to them. On the other hand, he raises the question, whether further evolution of the EU will not require a system wherein some states can forge ahead even if others prefer the *status quo*.<sup>75</sup> In general, however, de Witte concludes that the rules of change of the EC system are not systemically different from the rules of change in general international law.<sup>76</sup> The secondary norms of the subsystem consequently do not have any negative effects on the general system. But de Witte points out that the Community is now at a stage of integration where the opposite might very well be true:

We may now have reached the point at which continuing adherence to the rules of international law becomes unsustainable. There is official optimism about a further revision of the Treaty on European Union, to be conducted in 1996 along the same procedural lines as the Single European Act and the Treaty of Maastricht; but it is not very likely that the unanimous consent of all the member States on substantive changes to the Treaty will be attainable.<sup>77</sup>

De Witte sees two possibilities for overcoming this *impasse*: either the Member States and the EC organs make better use of the general international rules of change and adopt majority voting or, alternatively, they should 'abandon' international law and

<sup>74</sup> For instance, there was no protest against the *de facto* revision when the German Democratic Republic was absorbed by the Federal Republic in 1991, even though this resulted in a substantial change of the territorial scope of the EC treaties.

<sup>75</sup> *Diversity in Secondary Rules*, at 328. Such a *variable géométrie* would necessitate a special procedure that would first have to be adopted by all states. De Witte remarks, however, that political crises could result in attempts to adopt change without resort to the valid secondary norms of the subsystem. He cites as examples amendments to the United States and Swiss Constitutions, for both of which the changes were illegal at first but were subsequently legitimized. The crisis after the failure of Denmark's referendum was on the verge of becoming a precedent for the departure from the consensus method. Enlargement and the momentary Euro-scepticism may provide for new crises.

<sup>76</sup> The secondary norms of the subsystem are 'based on the very traditional principle of unanimous consent for treaty amendment, and [are] thereby more respectful of national sovereignty than the amendment procedures of many other multilateral treaties which allow for some form of majority decision-making'. *Diversity in Secondary Rules*, at 331–332.

<sup>77</sup> *Ibid.*, at 332.

employ new mechanisms of a constitutional character, such as parliamentary conventions or public referenda, to bring about treaty modifications. With respect to the latter suggestion, it is not clear why international law must be discarded. No rule in international law prohibits modification of international treaties by direct public referenda or by other 'constitutional mechanisms'. De Witte does not inquire whether a structural change directed at 'constitutionalization' of the EC would have effects on the general legal system. Hancher's article, however, is entirely devoted to this issue and the relationship between the 'constitutionalized' EC subsystem and international law is thus given ample consideration.

According to Hancher, the ECJ has extended its competences by means of extensive interpretation of the EC treaties in such a manner that the Community legal order has acquired the characteristics of a constitutional system. Consequently, most of the article is devoted to a scrutiny of the EC's 'secondary norms of adjudication'. The ECJ's case law is systematically investigated and the special legal concepts developed by the ECJ to extend its jurisdictional powers are described in great detail.<sup>78</sup> Hancher largely restricts the examination to EC law and does not inquire whether the legal techniques employed by the ECJ are derived from international law concepts. This is unfortunate, as it would have enabled an assessment of whether there is an interrelationship affecting the 'unity and efficacy' of either of the two legal systems.

The relationship between EC law and international law is, however, approached from another angle. From EC case law Hancher draws the conclusion that there is a distinct 'trend towards constitutionalism' in the EC legal system, a trend that increasingly separates EC law from international law.<sup>79</sup> The legal basis for this separation lies in 'doctrines' that play a central role in the jurisdiction of the ECJ: the 'doctrines' of direct effect, supremacy, implied powers and human rights. Hancher admits that the concepts are not unknown in international law. On the other hand, she argues that '[t]heir combined impact on the development of judicial remedies and enforcement, however, sets the Community legal regime apart from other legal orders'.<sup>80</sup>

For her argument Hancher relies on Weiler's contention that secondary norms of international law are not applicable in Community law because the 'doctrines' transform the EC into a novel legal system *sui generis*.<sup>81</sup> Hancher consequently terms the EC a 'quasi-federalist' system which is inherently different from the general

<sup>78</sup> *Ibid.*, at 272-295.

<sup>79</sup> *Ibid.*, at 297-298.

<sup>80</sup> *Ibid.*, at 265-266.

<sup>81</sup> Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2422. He writes: 'The Community legal order, in this view is a truly self-contained regime with no recourse to the mechanisms of State responsibility, at least as traditionally understood, and therefore to reciprocity and counter-measures, even in the face of actual and potential failure. Without those features so central to the classic international legal order, the Community truly becomes something new.'

international legal system.<sup>82</sup> Although the EC has its roots in international law, a legal mutation has resulted in an increasing separation from the original system.<sup>83</sup>

Since the establishment of the Communities a large number of authors have argued that a systemic difference exists between Community law and international law.<sup>84</sup> No one, however, has supplied convincing legal arguments to show that a subsystem of international law created by international treaties and regularly modified by the rules of international law can transform itself into a systemically distinct legal system.<sup>85</sup> The argument that the 'doctrines' and 'special features' make the EC unique and *sui generis* is not persuasive because all special EC characteristics are known in international law and nearly all subsystems, including the UN, the Danube Commission and diplomatic law, have unique features which nevertheless do not cast doubt on their being part of international law.<sup>86</sup> Moreover, if it were accepted that the EC is not a subsystem of international law but a different legal system, the relationship between the EC and international law would have to be regulated by a meta-system, a legal system on a higher plane, in relation to which both Community law and international law would be subsystems. This would unnecessarily complicate the situation and would be difficult to prove. Finally, from a teleological point of view there is no convincing argument demonstrating what would be gained from placing Community law outside international law. There is thus no reason to accept the hypothesis of a systemic difference between EC law and international law.

Neither Weiler nor Hancher make clear whether they are of the opinion that there is systemic difference. Both authors constantly refer to interrelationships between international law and EC law, without however presenting a meta-rule governing that relationship. Presumably, the authors mean to argue that the EC is a self-contained regime, closed *vis-à-vis* international law but part of the international legal system. Even this contention, however, is questionable. Self-contained regimes

<sup>82</sup> *Diversity in Secondary Rules*, at 296.

<sup>83</sup> She writes: 'Given the dynamic nature of Community law one should expect to see the gulf between international and Community law widen still further, despite the latter's origin. From this perspective, at least, Community law deserves to be recognised as a self-contained regime.' *Ibid.*, at 298.

<sup>84</sup> See, e.g., Bernhardt, 'Das Recht der Europäischen Gemeinschaft zwischen Völkerrecht und staatlichem Recht', in E. Diez and J. Monnier (eds.), *Festschrift für Rudolf Bindschedler* (1980), at 231, 233; Everling, 'Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?', in R. Bernhardt *et al.* (eds.), *Völkerrecht als Rechtsordnung: Internationale Gerichtsbarkeit — Menschenrechte — Festschrift für Hermann Moser* (1983), 180; White, 'State Responsibility in the Context of European Community Law', in B. Cheng and E.D. Brown (eds.), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his Eightieth Birthday* (1988), 306.

<sup>85</sup> Regarding the modification of EC law see the article by de Witte, reviewed above.

<sup>86</sup> When the ICJ termed Diplomatic Law a self-contained regime it meant to establish a closed system within international law, not a different system outside its own scope of jurisdiction.

are fully autonomous legal systems. They are part of the general system and created by international law, but they explicitly exclude any application of norms that are not part of the regime. Open subsystems, on the other hand, require that the internal special norms are applied first. However, should there be a situation in which the norms of the subsystem prove inadequate, international law may be applied to achieve the goal for which the special norms failed.

The EC system is, without doubt, conceived as a highly self-sufficient legal order. The founding instruments do not expressly establish a self-contained regime.<sup>87</sup> Practice shows that the internal EC system relies to a large extent on secondary norms of international law.<sup>88</sup> EC law alone does not suffice. Both treaties and state practice therefore imply that the EC is an open subsystem of international law. There is a further argument against the closed character of the EC system: it is a central element of legal orders and law that the system ensures that its norms are legally applicable. Since a closed subsystem excludes recourse to general international law, it must contain *all* norms necessary to ensure the 'legal quality' of the subsystem: norms to right wrongs, norms to modify rules, norms to correct errors in the system, and so forth. A self-contained regime without a complete set of norms to ensure that its order will be upheld is no *legal* system and consequently its norms are not legally binding.<sup>89</sup> As pointed out above, Community law does not yet contain all norms necessary to ensure complete functioning of the system. If the system were thus truly self-contained, it would not be a legal order. The EC system would be a compendium of soft law.<sup>90</sup> It is, however, beyond doubt that the EC is conceived as a legal order containing legally binding norms. The EC relies on a complex network of norms and regulations and on a sophisticated procedural enforcement system. It would be absurd to consider this structure as lacking legal quality. Since neither the EC treaties, nor state practice, nor theoretical reflections suggest that the EC system is a self-contained regime, it should be regarded as an open subsystem of international law. This is not a negative result, nor an intrusion of a 'primitive legal order' capable of harming a highly sophisticated legal system. International law would only be applicable if the subsystem's secondary rules were inadequate to deal with a certain situation and only in order to assist the subsystem in achieving its goal. In her article, Hancher clearly

<sup>87</sup> Article 219 determines that all EC disputes are to be resolved by the ECJ. This is, however, typical of every subsystem: the internal special secondary norms have to be applied first. The EC treaties do not imply that the secondary norms of the subsystem have to be applied when they are inadequate to solve a dispute.

<sup>88</sup> De Witte proved this convincingly with respect to the secondary rules of change.

<sup>89</sup> It may be pointed out that general international law is a legal system in which the secondary norms ensure that the legal order functions. States have adequate competences to regulate their relationship at will and to adapt the norms to new developments. It is true that international law, lacking central enforcement, is a weak system in practice. In theory, however, the possibility of self-enforcement of obligations foreseen in the context of state responsibility makes international law enforceable. The fact that states often do not make use of this possibility for various reasons is not relevant in this context: in national legal systems state organs do not have to apply a law to make it legal and private persons do not have to bring claims if they prefer not to.

<sup>90</sup> This review does not permit further elaboration of the argument. For a detailed discussion see A. Marschik, *Subsysteme im Völkerrecht — Ist die Europäische Union ein 'self-contained regime'?* (1997).

also does not wish to classify the EC as a definitely closed subsystem and envisages just this role for general international law:

... It certainly remains possible to refute the idea that it is a totally self-contained legal order, entirely distinct from international law, even if only on minor points. Nor is it implied that in the unlikely circumstance that the Community legal system fails to provide for an effective remedy or sanction, that it would be inappropriate or impossible to fall back on the guidance of international law as a last resort.<sup>91</sup>

Unfortunately, even though Hancher examines the structural interrelationship between the EC legal order and general international law in some detail, no conclusions are drawn as to the effects a closed or open structure of the EC system could have on international law.

## 5 Conclusions and Evaluation

Having examined the articles on the various regimes, let us now return to the introductory article by Wellens. Apart from describing the object and method of the book, this author also draws general conclusions regarding the effect of subsystems on the unity and efficacy of international law. He notes, for example, that the subject matter of subsystems has a decisive impact on the creation of and changes to primary norms: the subject matter influences the choice of source (treaty, custom, resolution, etc.). Wellens argues that international actors choose the source that fits the subject matter of the regime best and detects a trend in favour of treaty law and soft law.<sup>92</sup> This is definitely a current trend in all branches of international law as well as in the general system. However, the articles in the book seem to imply that international actors are influenced less by the subject matter than by their proper *ad hoc* interests. They consequently make use of all sources. Wellens concedes this and writes that 'the simultaneous, concurrent or subsequent use in whatever order, of customary and treaty law is a function of the matter and interests at hand'.<sup>93</sup>

<sup>91</sup> *Diversity In Secondary Rules*, at 270. Subsystems that are open 'as a last resort' are not self-contained regimes. Hancher thus presumably adheres to the view that the subsystem is open. The basic problem, in this respect, is that the book does not adopt a general theoretical approach towards the open and closed structure of subsystems and does not prescribe precise definitions. In his conclusions, Wellens' discussion of the EC equally suffers from the lack of a theoretical structure. He notes the many special features of EC law and labels the subsystem a 'new legal order of international law'. The relationship of the subsystem to general international law is seen as 'a combination of a more open or closed relationship' and depends on 'each particular situation or circumstance'; *ibid.* at 29. Since the use of the terms 'open' or 'closed' is not explained, the reader is left to his or her own intuition. The dependency on special circumstances rules out any general conclusion.

<sup>92</sup> *Ibid.* at 26.

<sup>93</sup> *Ibid.* at 10.

In this context Wellens raises the question of the relationship between the creators of norms and the quality of norms:

Both the consistency and the quality of primary rules are heavily dependent upon not merely the kind of actors involved in the process, but more importantly upon the availability of an appropriate forum or organs to embark upon the law-creating process.<sup>94</sup>

The availability of secondary norms as well as the structure of an institutionalized subsystem are themselves regulated by the subsystem's secondary norms. Wellens stresses the interaction and interdependence of primary and secondary norms and sees a tendency towards their union.<sup>95</sup> An interesting example is the effort by states to circumvent the binding effect of treaties, the maxim *pacta sunt servanda*, which has led to a variety of forms, such as reservations and interpretative declarations, contracting-out provisions and the system of *géométrie variable*.<sup>96</sup> The policy of selective obligations has done much to further the development of international law. It has, on the other hand, also introduced a negative trend directed at an avoidance of legally binding obligations.

As a further common point of interest, Wellens notes the influence that subsystems have in promoting the importance of non-state actors in international law.<sup>97</sup> The role of private persons in subsystems such as human rights treaties or the EC has given individuals and non-governmental organizations a prominent place in international law. This effect is paralleled by individual responsibility for war crimes in times of armed conflict.<sup>98</sup>

Wellens' main conclusion in relation to secondary norms of responsibility is that subsystems have an overall positive effect on the fulfilment of international obligations. This is firstly due to the multilateral structure of subsystems which enables mutual monitoring of the performance of obligations. More importantly, the same breach of law violates the rights of several states. Consequently, a defaulting state comes under stronger pressure to abide by the rules of state responsibility. Furthermore, the fact that organized subsystems often have special bodies to deal with violations of law means that enforcement is systemized and more common.<sup>99</sup> Briefly returning to his deliberations on sources, Wellens argues that the subject matter of subsystems influences the degree of abidance. The subject matter induces the creators of a subsystem to reshape general state responsibility to the needs of the area of law and to install and use the most appropriate dispute settlement mechanism.<sup>100</sup> It is beyond doubt that subsystems will be equipped with the best available secondary

<sup>94</sup> *Ibid.*, at 13–14.

<sup>95</sup> Examples are primary *erga omnes* obligations and *ius cogens*: both are *prima facie* primary norms but their special quality has inherent secondary effects.

<sup>96</sup> *Diversity in Secondary Rules*, at 34.

<sup>97</sup> *Ibid.*, at 35.

<sup>98</sup> Wellens subsequently demands access to the ICJ for international organizations and — in the form of a system of preliminary rulings — for individuals.

<sup>99</sup> *Diversity in Secondary Rules*, at 18.

<sup>100</sup> *Ibid.*, at 17, 24.



norms. As with the question regarding sources, however, it appears that 'best' or 'appropriate' is not determined by the subject matter alone but, to a large extent, by the interests of the creators and members of the regime.

In addressing the initial question of the book — whether subsystems are a threat to the unity and efficacy of international law — Wellens once more reviews the ways in which subsystems employ secondary norms. He concludes that

the relative autonomy of special fields has been used by the different actors involved, as far as the secondary rules are concerned, in a way which, at the same time, promoted and guaranteed the growing effectiveness of their own particular set of primary rules, without putting into jeopardy the unity and coherence of the international legal order. On the contrary, the coexistence of the latter with 'autonomous' special fields provides every opportunity for remaining a powerful tool towards an overall increase in the effectiveness of primary rules. Indeed, we find it hard to believe that any claim to the contrary could be fully substantiated.<sup>101</sup>

Wellens perceives only two detrimental effects that subsystems could have on international law. Firstly, selective obligations, as mentioned above, have negative effects on the acceptance of full legal responsibility. If international actors are less willing to accept legally binding obligations, this could jeopardize the efficacy of international law and consequently endanger the stability of the international order. Secondly, since subsystems are sometimes created in new areas of international law, responsibility is often made dependent on vague notions, such as 'appreciable' harm, 'serious' damage, 'grave' breaches or 'mass' violations of law. Indeterminate language could become increasingly popular also in general international law and could dilute the 'hard' core of international responsibility.<sup>102</sup> In Wellens' view, however, both these effects do not constitute an imminent danger for the efficacy and unity of international law.

Any evaluation of the book under review must first stress that the authors' investigation of the diversity of secondary norms is a singular achievement in the debate on the relationship between subsystems of international law and the general legal system. Legal literature knows no other study of secondary norms that covers such a broad range of subsystems. To date, systems analysis in international law has been mainly restricted to theoretical elaborations on the structure of the international system, especially in the context of state responsibility. This book demonstrates the importance of studying a variety of secondary norms and analyses a multitude of subsystems. The current largely theoretical debate on subsystems can now rely on information from various sectors of international law and can be expanded to cover still uncharted areas.

Two general lines of criticism may be brought against the book. Firstly, the book lacks a theoretical setting. Wellens' article is a thorough introduction to the book's topic and method and sums up the main arguments put forward by the authors. There is, however, no general elaboration of the parameters of the investigation. Apart from

<sup>101</sup> *Ibid.*, at 28.

<sup>102</sup> *Ibid.*, at 34.

Hart's definition of primary and secondary norms, the necessity, function, structure and scope of secondary norms and of subsystems are not explained. Malanczuk is the only author who takes the time to explore why subsystems emerge as distinct legal entities. The main reason he puts forward is the human need to systemize the world in order to understand it.<sup>103</sup> The fragmentation of the general legal system into special regimes and subsystems allows the analyst to understand the system of international law.<sup>104</sup> Malanczuk is aware of the importance of the interrelationship between subsystem and system.<sup>105</sup> Almost all the authors must deal with problems of open and closed subsystems in their contributions. This is not surprising because the question of the unity of international law demands an inquiry into the relationship between the parts and the whole.<sup>106</sup> It is quite clear that none of the authors had the space to address complex theoretical problems in the context of the special regime they were investigating. A brief introductory presentation would, therefore, have been helpful to the reader and, as a common point of reference, possibly also useful for the authors.<sup>107</sup>

<sup>103</sup> He concludes that the fragmentation of international law into 'branches of law' has a 'pragmatic purpose in the attempt to arrange the law in a comprehensible (and teachable) manner which is reflected in the difficulties of agreeing on the definitions of such branches. Its function is to identify, with a sufficient degree of clarity and certainty, what one is referring to in a legal discourse with regard to a more or less distinct field of law having its own characteristics due to common elements. Such common elements may follow either from the subject matter, the purpose, the area of application, or from the persons affected.' *Ibid.*, at 146.

<sup>104</sup> Malanczuk thus sees the importance of the interrelationship and interaction of subsystems among themselves and with the general system; *ibid.*, at 169ff. He points out, by way of example, that space law partly overlaps and is in conflict with other legal regimes, such as air law, law of the sea, economic law, human rights, international criminal law, European Community law and environmental law.

<sup>105</sup> In his view, 'law is an intellectual product which in its process of differentiation into "branches", regulating certain aspects of social conduct, exists by cross-fertilization and direct interaction between its segments'; *ibid.*, at 146. While conflicts of norms can arise due to overlapping subject matter, the interlinkages can amount to mutually benefiting effects. Principles and legal techniques applicable in one field can be transferred and adapted in others; *ibid.*, at 171ff. He cites as examples the principle of the common heritage of mankind, which is known in space law, law of the sea and the Antarctic legal regime. Even though Malanczuk restricts his observations to inter-regime relations, all the above is equally true of the relationship between subsystems and the general system.

<sup>106</sup> As an example, it would have been interesting to determine whether the 'special sanctions rule' that Barnhoorn unveils in his article is a norm of general international law or a specific rule of the subsystem 'diplomatic law'. On first sight, the rule appears to be part of the subsystem. However, Barnhoorn suggests that the rule also applies outside the context of diplomatic relations. He notes that 'it applies not only when diplomats of the sending State infringe diplomatic law in the receiving State, but also when the sending State itself infringes international law, including diplomatic law, elsewhere'. *Ibid.*, at 68. The protection of diplomats is thus absolute and applies also if a state violates an obligation unrelated to diplomatic law, such as an environmental treaty obligation. In this case the injured state may apply those measures that the environmental treaty supplies as secondary norms. Nevertheless, even though the 'special sanctions rule' is quite clearly not a special secondary norm of the environmental subsystem, Barnhoorn argues that it would apply. It must therefore be a rule of general international law, possibly a rule of *ius cogens*.

<sup>107</sup> The field of study that suffers most from the lack of a theoretical framework is the discussion of self-contained regimes. Some of the authors touch on this issue in their articles, but since there is no general concept they adopt different approaches to the subject. Consequently it is almost impossible to compare the results and to draw general conclusions.

The second point of criticism which can be raised concerns the rather negligent treatment of the danger of too great a diversity of secondary norms. As explained in the Introduction, this diversity leads to a dissipation of legal relationships, to conflicts of norms, legal incertitude and, consequently, to a weakening of the international legal system. There are many examples that can illustrate these problems: environmental subsystems in contradiction with economic subsystems; general regional treaties in conflict with special universal conventions; disputes that fall under several institutionalized dispute settlement bodies which make their decisions irrespective of what occurs in the others.<sup>108</sup> As long as the conflict of norms existed on the level of primary norms, a solution could be found with the customary maxims of *lex specialis* and *lex posterior*. With the special secondary norms, however, this is not always possible: the subsystem's organs determine whether a violation has taken place solely within the regime's legal system; they do not investigate whether the act of the state was required under another subsystem. As a result, if a state is party to two subsystems that demand contradicting behaviour, it can only abide by one and consequently state responsibility arises from the other.

The reason for these problems is clear. New subsystems are increasingly created irrespective of existing subsystems, thus producing overlapping competences and conflicts of norms. To the analyst, it appears that, in endeavouring to create more order by organizing the law on lower levels through subsystems, the international community creates more disorder in international law than previously existed. More order in parts of a system can create less order in the system as a whole.<sup>109</sup>

Clearly, an examination of the diversity of secondary norms cannot dwell on every question that might crop up. Nevertheless, it would have been interesting to see how specialists in the field of secondary norms evaluate the problems that arise with conflicts of norms. The book, however, places its main emphasis on describing the secondary norms of different branches of international law. Interaction and conflicts between subsystems are only marginally treated. Wellens sees a potential risk of norm-overload, but restricts it to primary norms.<sup>110</sup> He calls for a more frequent use of secondary norms (especially 'norms of change') that could do away with the need to regulate everything beforehand in the form of primary norms. This is certainly wise but, as stressed in the Introduction, the overload of primary norms and the resulting conflict of norms could be righted today — the necessary secondary norms are there. It is the overload of conflicting secondary norms that presents the real problem.

<sup>108</sup> In Europe, the possibility of conflicting jurisdictions of the Court of the European Communities and the European Court of Human Rights has resulted in an intense debate on how to harmonize the two subsystems.

<sup>109</sup> The problem of too much order is not only incumbent on international law but also on some subsystems themselves. Large subsystems, such as the UN, which are sometimes termed 'supersystems' due to their universal scope, often contain sub-subsystems within themselves. This structure can lead to norm and competence conflicts, resulting in unnecessary *doubling* of organs — bureaucracies which cost time and money. A good example which has been criticized recently is the UN family.

<sup>110</sup> *Diversity in Secondary Rules*, at 32.

It must be stressed, however, that neither of these general points of criticism affect the invaluable nature of the book's contribution to future debate and research. The *NYIL* editors have dared to address a difficult and controversial subject. They posed a question which carries considerable legal implications and were able, in the end, to present a convincing and well-founded answer. Indeed, the book provides ample evidence that subsystems enhance the effectiveness of international law and do not jeopardize its unity. Due to the multitude and variety of subsystems, the development of international law currently mainly takes place within the special fields. Most special regimes are far more refined and can adapt to changes more quickly and in a more pronounced manner than general international law. Subsystems influence the general system inasmuch as the application of their norms and regulations constitutes practice that results in modifications of the general rules. The book provides proof that the density and intensity of norm creation, norm application and norm enforcement in subsystems is beneficial for international law.

At the same time, however, it should be stressed that the relationship is not a one-way street. Just as subsystems influence the system, general international law also leaves its mark on the special regimes. Several articles in the book demonstrate the influence of international law on the norms of subsystems. Almost all special regimes adapt traditional secondary rules of international law to their specific needs and rely on international law when their special rules fail to function. The dominant role of international law could give rise to the impression that the interrelationship and interaction between general international law and subsystems are more likely to jeopardize the internal unity and efficacy of subsystems than the unity and efficacy of the general international system. This impression, however, only arises if one does not pay careful attention to the function of international law apparent in many of the articles. The general system has a vital interest in the proper performance of its sub-entities. International law serves as a guarantee that the subsystem will function, even in those cases where there is no special norm or where the norm is inadequate to fulfil its purpose. International law thus serves solely as a support for subsystems.

It is in this respect that the book makes such an important contribution to the debate on the relationship between subsystems and the general international system. It proves wrong those who fear the intrusion and interference of 'primitive' international law and who call for barriers to exclude the general norms. The book shows how similar secondary norms of subsystems and the general secondary norms are and how the 'basic' general rules complement the 'sophisticated' special rules. It becomes clear that both subsystems and the general system rely on one another to ensure optimal performance of law. Smooth interaction and open interrelationship between subsystems and the system enable the international legal order to overcome the difficulties posed by the international actors' rapture for new special regimes and subsystems.