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The Concept of a Special Regime

1.1 There Can Be No Special Regime Without a Theory of Law

Over the last thirty or so years, international law and legal practice have become increasingly more specialized and diversified. As stated by the ILC Study Group on Fragmentation of International Law in its Final Report of 2006:

> What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialized knowledge as 'investment law' or 'international refugee law' etc.[1]

In response to these developments, international lawyers have coined a new term. They now widely refer to international trade law, international human rights law, international environmental law and many others as 'special regimes'.[2]

[1] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the Fifty-eighth session of the International Law Commission, 1 May–9 June and 3 July–11 August 2006, U.N. Doc. A/CN.4/L.682, Corr. 1 and Add. 1, at 10.

[2] See, for example, Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849–863; Stephen Humphreys, 'Climate Change: Too Complex for a Special Regime' (2016) 34 *Journal of Energy & Natural Resources Law* 51–56; Daniel Joyner and Marco Roscini (eds.), *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (Cambridge: Cambridge University Press, 2012); Martti Koskenniemi, 'The Politics of International Law' (2009) 20 *European Journal of International Law* 7–19; Marie-Thérèse Lanquetin, 'L'égalité entre hommes et femmes dans le régime spécial de retraite de fonctionnaires' (2002) 2 *Droit social* 178–199; Daniel Moeckli, 'The Emergence of Terrorism as a Distinct Category of International Law' (2008) 44 *Texas International Law Journal* 157–183; Kurt Siehr, 'A Special Regime for Cultural Objects in Europe' (2003) 8 *Uniform Law Review* 551–564; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483–529; Raphaël van Steenberghe, *Droit international humanitaire.*

When lawyers refer to a legal branch such as trade law or human rights law as a 'special regime', they are thinking of it as a subpart of the international legal system. This was the approach of the ILC Study Group on Fragmentation of International Law,[3] and it has since also been the approach of the international scholars who have written on the topic.[4] Thus, for every instance in which the term is being used, it expresses an idea of the international legal system. This idea is markedly different from the one that traditionally dominated international legal thinking. International lawyers no longer conceive of the international legal system as an indivisible whole, but divide it into separate segments in their descriptions.[5] Academics are struggling to understand this new construction of the international legal system. It raises a series of critical questions. For example, what is the relationship between the different subparts of the international legal system – between the special regimes and the remainder of international law, and between the special regimes among themselves? And how can the development towards an increasingly more specialized and diversified international law be combined with the fundamental idea of international law as a single legal system? These questions prompt further inquiries into the concept of a special regime.

In an inquiry into a legal concept such as that of a special regime,[6] a researcher's focus is on two questions in particular. The first question is what it is that identifies a phenomenon as one that belongs to the *extension* of the investigated concept – that comes within its scope. According to the ontology adopted in this book, a concept is the generalized idea of an empirical or normative phenomenon or state of affairs or a class of such phenomena or states of affairs.[7] As implied by the word 'generalized', concepts are formed through a process of abstraction. They are the result of the ability of the human brain to perceive of particular

Un regime special de droit international? (Bruxelles: Bruylant, 2013); Jorge Viñuales, 'Cartographies imaginaires: Observations sur la portée juridique du concept de 'régime spécial' en droit international' (2013) 140 *Journal du droit international* 405–425. See also Fragmentation of International Law, U.N. Doc. A/CN.4/L.682, 37.

[3] Fragmentation of International Law, U.N. Doc. A/CN.4/L.682, 10.

[4] For references, see above, Note 2.

[5] Fragmentation of International Law, U.N. Doc. A/CN.4/L.682, 10.

[6] On the concept of a legal concept, see Ulf Linderfalk, 'The Concept of an International Legal Concept' (2023) 12 *Cambridge International Law Journal*, 177–189.

[7] For an excellent overview of the research done in this field, see Eric Margolis and Stephen Laurence, 'Concepts', in Edward Zalta and Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition), http://plato.stanford.edu/archives/sum2010/entries/concepts.

properties of phenomena as characteristics shared by all entities that belong to the extension of a concept.[8] For example, *footballs* are round or oval; they are made of leather or plastic; they weigh somewhere between 410 and 450 grams. Similarly, *the nationality of a ship* is an entitlement granted to a ship-owner by a state.[9] *High seas* are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a state, or in the archipelagic waters of an archipelagic state.[10] A *jus cogens norm* is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by the creation of a new norm of *jus cogens*.[11] Properties such as these serve as criteria for the identification of an entity as one that belongs to the extension of a concept. Hence, if an object is round and made of leather, and it has a weight of something of 420 grams, it may indeed be a football. Similarly, if a sea area is not included in the exclusive economic zone, territorial sea or internal waters of a state, nor in the archipelagic waters of an archipelagic state, it may be a part of the high seas. Again, if a norm is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by the creation of a norm of *jus cogens*, it may have the status of *jus cogens*.

A second question that any thorough investigation of a legal concept must address is the significance of having identified a phenomenon or state of affairs as one that belongs to its extension. A concept is not just a tool that human beings use to create a fair amount of order among their many beliefs about the world.[12] It is also crucial for the productivity of thought.[13] The concept of a football, for example, not only enables me to discriminate between footballs and non-footballs but also helps me draw

[8] Compare Stephen Laurence and Eric Margolis, 'Concepts and Cognitive Science', in Eric Margolis and Stephen Laurence (eds.), *Concepts: Core Readings* (Cambridge: The MIT Press, 1999), 3–81.

[9] Compare United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 U.N.T.S. 397, Art. 91.

[10] Compare ibid., at Art. 86.

[11] See common Art. 53 of the 1969 and 1986 Vienna Conventions on the Law of Treaties. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 U.N.T.S. 331; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Vienna, 21 March 1986, not in force, (1986) 25 ILM 543.

[12] See Margolis and Laurence, 'Concepts'.

[13] Ibid.

inferences about footballs.[14] If I identify some certain object as a football, I may infer from this observation that the object may be put to use in a game of football; that the object, in order to be of good use, should be inflated to a certain pressure; that the object will not seriously hurt me if I kick or head it; that the object, if I kick it hard, will easily go through a glass window; and so forth. Similarly, if I identify an area (A) as a part of the high seas, I may immediately infer that, according to international law, all states have the right to navigate in this area; that fishing in area A does not come under the exclusive jurisdiction of any state; that in area A, enforcement jurisdiction may only be exercised by the flag state, save in exceptional circumstances; and so forth.[15]

These simple observations point out the direction that any thorough investigation of the concept of a special regime must take. In this investigation, emphasis will need to be on the below two questions:

Question (1): What are the defining features that allow international lawyers to think about a segment of the international legal system as a special regime separate from other special regimes and from general international law?

Question (2): What is the significance of having identified a segment of the international legal system as a special regime?

Since, for all lawyers, a special regime is a segment of the international legal system, any answer to Question (1) presupposes some idea of how this system is constructed – it presupposes a conception of an international legal system. This close relationship between the concept of a special regime and lawyers' conception of an international legal system makes the question more difficult than it may appear at first glance. International lawyers not only have one conception of an international legal system, but several of them. These different conceptions derive from different theories of law.[16] Hence, responses to Question (1) will inevitably vary depending on the particular theory of law that the respondent presupposes.

Responses to Question (2) are similarly conditional upon the presupposition of a theory of law. This is so because the practical significance of having identified an entity as one that belongs to the extension of a concept is dependent on the defining features of this concept. Thus, it is

[14] Ibid.

[15] Compare Part VII of the United Nations Convention on the Law of the Sea.

[16] Ulf Linderfalk, *The International Legal System as a System of Knowledge* (Cheltenham: Edward Elgar Publishing Limited, 2022), 19–38.

because footballs are thought of as objects weighing somewhere between 410 and 450 grams that I may infer about an object identified as a football that it will easily go through a glass window if I kick it hard. It is because the high seas are thought of as areas open for all states to use that I may infer about an area identified as high seas that fishing in this area does not come under the exclusive jurisdiction of any individual state. The significance of having identified a segment of the international legal system as a special regime is similarly dependent on the feature or features that define it as precisely such as regime. Thus, if lawyers have different ideas of what it is that defines a segment of the international legal system as a special regime, they will also have different ideas of the practical significance of having identified such a segment as one that fits the presupposed definition.

As evident, there can be no concept of a special regime without a theory of law. Whether you are interested in establishing the criteria that define a segment of the international legal system as a special regime, or the significance of having so identified it, the theory of law that you bring to bear on this investigation will determine its outcome. In the subsequent Sections 1.2 and 1.3, we will explore the further implications of this dependence.

1.2 The Defining Features of a Special Regime

What are the features that define a segment of the international legal system as a special regime? There are essentially three different ways of answering this question. Each answer corresponds to a distinct theory of international law.

A first way of conceiving of the defining features of a special regime is that associated with exclusive legal positivism.[17] Exclusive legal positivism is founded on two fundamental tenets, sometimes referred to as the pedigree and separation theses.[18] According to the pedigree thesis, legal norms can be identified by their pedigree and source of origin.[19] According to the separation thesis, law exists irrespective of its moral

[17] On the distinction between exclusive and inclusive legal positivism, see, for example, Kenneth Himma, 'Legal Positivism', in *Internet Encyclopedia of Philosophy*, https://iep.utm.edu/legalpos.

[18] Ibid.

[19] See, for example, G. J. H. Van Hoof, *Rethinking the Source of International Law* (Deventer: Kluwer Law and Taxation Publishers, 1983), 36.

and other merits.[20] The combination of these two theses explains the positivist's conception of a legal system. For exclusive legal positivism, law exists only as part of a legal system.[21] A legal system is a system of norms. These norms serve as reasons for action and bases for the justification of legal decisions. They are organized along chains of authority – according to the way in which they confer authority upon each other.[22] For an exclusive legal positivist, since a legal system provides itself the conditions for the existence of its norms, there is nothing outside of these chains of authority that we can refer to as law.[23] Legal norms are the only constitutive elements of law.

In a chain of authority, a 'superior' norm provides only a reason of validity, but does not itself provide the contents of the norm or norms that are 'inferior' to it.[24] Hence, the relations between norms are purely formal.[25] They are conditioned only by the pedigree of norms and their logical form. This means that, ultimately, from the point of view of exclusive legal positivism, law is nothing but a logical framework. It remains to be furnished with substantial contents drawn from social facts,[26] such as the conclusion of an agreement creating an international organization, or the adoption of a resolution by an organ of this organization. Importantly, these facts are themselves not included in the concept of law.

Since, for exclusive legal positivism, the international legal system is a system of norms, a special regime too must be a system of norms, or else it cannot be a segment of the international legal system. These norms relate to each other as units in a logical system. This is not to say that a special regime is ever 'self-contained',[27] in the sense of a collection of norms that are all analytically separate from all norms that are not comprised by this regime. The way positivists conceive of a legal norm, there can be no such impermeable boundaries between collections of

[20] Ibid.
[21] See, for example, Mario Prost, *The Concept of Unity in Public International Law* (Oxford: Hart, 2012), 73.
[22] See Hans Kelsen, *Pure Theory of Law*, Max Knight (translator), 2nd edition (Berkeley: University of California Press, 1967), 221–222.
[23] Prost, *The Concept of Unity*, 73.
[24] The words 'superior' and 'inferior', in this context, have nothing to do with any hierarchy of norms.
[25] See Michael Green, 'Hans Kelsen and the Logic of Legal Systems' (2003) 54 *Alabama Law Review* 365–413.
[26] Ibid.
[27] On this concept, see *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* [1980] I.C.J. Rep. 3, para. 41.

norms.[28] Neither is a special regime self-contained, in the sense of a collection of norms, which derive from an entirely distinct set of legal sources, unknown to other parts of international law, or which have no logical connection to norms that do not belong to that collection.[29] If that had indeed been the case, we would not be able to speak any more about a special regime as an integral part of the international legal system. Instead, we would have had to deal with it as a legal system of its own.

As we have to conclude, then, a special regime is for exclusive legal positivism a collection of norms, the pedigree or logical structure of which somehow distinguishes it from other parts of international law with respect to some, *but not all*, of its several features.[30] For an example that would seem to fit this description, consider diplomatic law. This law has a very distinct form, structured, as it is, based on a relationship between a sending and receiving state.[31] Similarly, positivists would no doubt conceive of European human rights law as a special regime, if by 'European human rights' we understand the collection of all norms that come within the jurisdiction of the European Court of Human Rights. For an even clearer example, think of the law of the United Nations, which can be conceived of as a collection of norms, which all have their basis in the Charter of this organization, directly or indirectly.

A second way of conceiving the defining features of a special regime is that of American legal realism.[32] American legal realists accept the description of the international legal system as a collection of norms. By a norm, however, realists understand something other than the legal positivists. Realists reject the existence of norms in the sense of objective reasons for action and as bases for justification of legal decisions.[33]

[28] See Ulf Linderfalk, 'The Legal Consequences of *Jus Cogens* and the Individuation of Norms' (2020) 33 *Leiden Journal of International Law* 893–909. For legal positivism, a norm is complete if, and only if, it provides a description of: (i) the specific kind of conduct or state of affairs being prescribed, prohibited, or permitted (as the case may be); and (ii) each and every single condition, of which the prescription, prohibition, or permission is dependent.

[29] Compare Simma and Pulkowski, 'Of Planets and the Universe', 483–529.

[30] See Linderfalk, *The International Legal System*, 109–119.

[31] See Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, in force 24 April 1964, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Vienna, 24 April 1963, in force 19 March 1967, 596 U.N.T.S. 261.

[32] On American legal realism, see, for example, Michael Green, 'Legal Realism as a Theory of Law' (2005) 46 *William and Mary Law Review* 1915–2000.

[33] Ibid., at 1936.

For them, a legal norm is a piece of language, which guides the behaviour of its addressees because of its grammatical form and legal meaning, and not because it expresses any legal obligations.[34] This piece of language is not inscribed in any written legal instrument, such as a treaty or a resolution adopted by an international organization. It is essentially a prediction of how adjudicators and other legal decision-makers would generally decide.[35] This prediction may be based partly on the existence of a treaty or a resolution adopted by an international organization. Importantly, it may be constructed also on the basis of other social facts, if and to the extent that these can be thought to have an influence on legal decision-making – even though they do not express anything that the legal positivist would consider legally binding.[36]

With this approach to law, the relationship between legal norms cannot possibly pertain to their logical form. It can only pertain to their legal meaning. By the legal meaning of a norm, realists understand its relationship with what it refers to in the real world.[37] More specifically, while, for legal realists, the function of law is to cause adjudicators to change their opinions and behaviour, they identify the legal meaning of a norm with its referential function in this chain from cause to effect.[38]

For the realists, consequently, the meaning of a norm cannot be detached from the concrete situations of its application. To illustrate, consider the dispute between the Netherlands and Russia in the case of *The Arctic Sunrise*.[39] This dispute was brought before an arbitration tribunal by the Netherlands, instituting arbitral proceedings under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS).[40] A norm that is central to the consideration of this case is the one laid down in Article 92, paragraph 1 of the Convention, together with Article 58, paragraph 2:

[34] Ibid., at 1921–1925.
[35] Ibid., at 1934.
[36] Ibid.
[37] See Alf Ross, 'Tû-tû' (1956–1957) 70 *Harvard Law Review* 812–825.
[38] Ibid.
[39] Further information about the case can be obtained through the webpage of the International Tribunal of the Law of the Sea. 'The "*Arctic Sunrise*" Case (*Kingdom of the Netherlands v. Russian Federation*), Provisional Measures', www.itlos.org/en/main/cases/list-of-cases/case-no-22.
[40] Ibid.

> **Article 92, para. 1**
> Ships shall sail under the flag of one State only and, save in exceptional circumstances provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction.
>
> **Article 58, para. 2**
> Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

For the realists, this norm refers, on the one hand, to the facts, which serve as a condition for its application to the case of *The Arctic Sunrise*: Russian authorities exercised enforcement jurisdiction over a ship called *The Arctic Sunrise*; jurisdiction is exercised in the exclusive economic zone of Russia; *The Arctic Sunrise* is a ship sailing under the flag of the Netherlands. On the other hand, the norm refers to the predictable legal consequences of its application to the case at hand: arbitrators will decide that Russia is internationally responsible for having exercised enforcement jurisdiction over *The Arctic Sunrise*, and that it shall offer appropriate assurances and guarantees of non-repetition, and make full reparation for any injury caused.

This example helps to explain the realists' conception of a special regime. For the American legal realists, a special regime is a collection of norms, which address either a set of similar facts or a set of similar legal consequences.[41] To give a few concrete examples, for the realists, diplomatic law is a special regime, because it addresses diplomatic activities. International trade law is a special regime because it addresses trade across borders. International responsibility law is a special regime because it ensures the full reparation of injury caused to a state or an international organization, and the non-repetition of wrongful behaviour. International criminal law is a special regime, because it establishes individual criminal responsibility for certain acts.

A third way of conceiving the defining features of a special regime is that associated with legal idealism.[42] Legal idealism can be distinguished from legal positivism by the way in which it approaches the separation thesis. Contrary to legal positivism, legal idealism dismisses the idea that law can exist independently of its moral or other merits.[43] This position can be explained by the legal idealists' understanding of law as a social

[41] See Linderfalk, *The International Legal System*, 109–119.
[42] Ibid. On the concept of legal idealism, see, for example, Sean Coyle, 'Positivism, Idealism and the Rule of Law' (2006) 26 *Oxford Journal of Legal Studies* 257–288.
[43] Ibid.

practice.[44] A social practice manifests itself in concrete action. One of the characteristic features of a social practice is the idea among its participants that there is something that makes this action worthwhile.[45] This is why social practices inevitably come with a normative element, which will always reflect upon participants' conception of how to properly think and do things.[46] This understanding of law comes hand in hand with a very particular attitude to the relationship between law and social order – one that is markedly different from that of the legal positivists. Whereas positivists see law as a form of social order valuable in its own right,[47] idealists do not. For legal idealists, no law can be self-justifying. If law exists, then this is always because of the presence of some or other idea, either of what law should be like, or what the legal project should achieve.[48] This fundamental idea – sometimes referred to as 'the connection thesis' – [49] is a necessary element of all legal idealists' theories of law.

To have an idea of what law should be like, or what law should achieve, is to set an ideal for the legal project.[50] As defined by legal philosophers, an ideal is a state of affairs presented by a person or a group of persons as something desirable and worth aspiring to.[51] Idealists are divided over the issue of what precisely are the ideals set for legal enterprise. Examples range from justice and the well-being of all members of the international community, to legality and the integrity of law.[52] These differences notwithstanding, legal idealists have a common conception of a legal system. They all think of a legal system as a system of norms arranged to accommodate for the one or several ideals set for the legal project. A legal norm is a reason for action and a basis for justification of legal decisions. Since ideals lack this prescriptive dimension, the logical form of a norm cannot explain the relationship between a legal norm and an ideal. This relationship can only be a matter of the efficacy of the norm relative to

[44] Ibid.
[45] See Etienne Wenger, *Communities of Practice: Learning, Meaning and Identity* (Cambridge: Cambridge University Press, 1998), 73.
[46] Ibid., at 81.
[47] See, for example, Coyle, 'Positivism, Idealism and the Rule of Law', 257–288.
[48] Ibid.
[49] See, for example, Torben Spaak, 'Realism About the Nature of Law' (2017) 30 *Ratio Juris* 75, 78.
[50] On the concept of an ideal, see Sanne Taekema, *The Concept of Ideals in Legal Theory* (The Hague: Kluwer Law International, 2010), 1–45.
[51] Ibid., at 4.
[52] See Ulf Linderfalk, *Understanding* Jus Cogens *in International Law and International Legal Discourse* (Cheltenham: Edward Elgar Publishing Limited, 2020), 53–59.

the ideal.[53] Interestingly, idealists conceive similarly of the relationship between the norms themselves. The one conclusive issue that in all cases determines this relationship is the degree to which norms help to bring about the ideal or ideals set for the legal project.[54]

Legal idealists have to align their definition of a special regime with this particular conception of an international legal system, or else a special regime cannot for them be a segment of the international legal system. This prompts them to think of a special regime as a community of practice, in the sense of Etienne Wenger: a group of people, who experience and continuously create their shared identity within larger society through engaging in and contributing to a more or less well-defined activity, much like footballers, carpenters, neurobiologists or dentists.[55] A community of practice presupposes the existence of a very particular kind of relationship between community members. According to Wenger, this relationship manifests itself in a distinct set of normative presuppositions. Applied to the concept of a special regime, thus, different international law specialists think of themselves as engaged in the pursuit of an enterprise together with different people; they have different ideas of what desirable state or states of affairs they are pursuing; they find different rhetorical tools appropriate; and so forth.

To illustrate, think of the difference between international environmental law and the law of international investment. International environmental lawyers generally think of themselves as pursuing the ideal of sustainable development,[56] whereas international investment lawyers generally do not.[57] Alternatively, think of the difference between international criminal law and the law of the European Convention on Human Rights. European human rights lawyers generally conceive of the concept of torture as necessarily involving an act of a state,[58] whereas international criminal lawyers generally do not impose this requirement.[59] Again, think of the difference between World Trade

[53] Linderfalk, *The International Legal System*, 31–32.
[54] Ibid.
[55] See Wenger, *Communities of Practice.*
[56] See, for example, Christina Voigt, *Sustainable Development as a Principle of International Law* (Leiden: Martinus Nijhoff Publishers, 2008).
[57] See, for example, Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (New York, NY: Routledge, 2018).
[58] See, for example, Case 25803/94, *Selmouni v. France*, [1999] ECHR 66, para. 97.
[59] See, for example, *Prosecutor v. Kunarac*, Trial Chamber, Judgement Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 496.

Organization (WTO) law and the law of the European Convention on Human Rights. WTO lawyers have been generally critical of the few cases, in which the WTO Appellate Body conducted a proportionality assessment to determine the legality of the imposition of a safeguard.[60] This way of approaching safeguards, they say, implies a change of the clear intention of the drafters of the relevant treaty texts.[61] European human rights lawyers have no similar qualms about the practice of the European Court of Human Rights, which regularly resorts to the proportionality principle to determine whether human rights restrictions are consistent with the European Convention.[62] Legal idealists would explain all these differences of attitude as characteristic traits of different special regimes.

1.3 The Significance of Having Identified Something as a Special Regime

What is the significance of having identified a segment of the international legal system as a special regime? Stated in utilitarian terms, what does the concept of a special regime help doing that cannot as easily be done without it? International lawyers answer this question differently, depending on the particular theory of law that they are assuming.

For the exclusive legal positivists, the international legal system recognizes only the logical form of legal norms and their function as sources of authority of other international norms.[63] This particular conception of an international legal system comes hand in hand with a very particular idea of the function of legal concepts: concepts help us understand and describe social facts in a logically coherent fashion.[64] The particular need that the concept of a special regime helps to meet presents itself when positivists find that legal decision-makers deal differently with similar issues in different parts of legal practice. Logical coherence requires that there be a sound reason for these differences. The proposition that practices pertain to different special regimes provides such a reason.[65]

[60] See, for example, Andrew Mitchell, 'Proportionality and Remedies in WTO Disputes' (2006) 17 *European Journal of International Law* 985, 1004–1008.
[61] Ibid., at 1008.
[62] See, for example, Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Groningen: Europa Law Publishing, 2013), 187–234.
[63] See Section 1.2.
[64] Linderfalk, *The International Legal System*, 109–119.
[65] Ibid.

Take, for example, the UN Human Rights Committee, which in General Comment No. 24 reflected on its approach to the legal effect of invalid reservations to the International Covenant on Civil and Political Rights (ICCPR).[66] Previously, in consideration of the effect of invalid reservations to treaties generally, the International Court of Justice had stressed the principle of state consent: if a reservation to a treaty is invalid, the reserving state will not be a party to the treaty.[67] The Human Rights Committee had chosen a different approach. As it had insisted, invalid reservations to the ICCPR 'will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'.[68] The emphasis placed by the Committee on 'the special character of a human rights treaty' such as the ICCPR would seem to have helped to secure a sufficient amount of support for this proposition.[69]

For another example, consider the judgement of the International Court of Justice in the *Tehran Hostages Case*.[70] This judgement confirmed the claim that Iran had committed a long series of breaches of diplomatic law, including many provisions of the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations. To establish the responsibility on Iran for these breaches, the Court explored the suggestion of the Iranian Government that its conduct might be justified as an exercise of its right to take countermeasures.[71] The right to take countermeasures entitles an injured state to take action, which is itself inconsistent with international law, to induce compliance with the several secondary obligations entailed by a wrongful act taken previously by another state.[72] It applies generally, save only for those situations where the implementation of the international responsibility of a state is governed by special rules of international law.[73] As the Court found, this

[66] Human Rights Committee, General Comment No. 24, 11 November 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para. 18.

[67] See *Reservations to the Convention on Genocide Advisory Opinion*, ICJ Reports 1951, p 15, at 29. See also, for example, Alain Pellet, 'Article 19: Formulation of a Reservation', in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1 (Oxford: Oxford University Press, 2011), 442.

[68] Human Rights Committee, General Comment No. 24, para. 18.

[69] Ibid.

[70] *United States Diplomatic and Consular Staff in Tehran*, 3.

[71] Ibid., at paras. 80–81.

[72] See Articles on the Responsibility of States for Internationally Wrongful Acts, 28 January 2002, U.N. Doc. A/RES/56/83, Annex, Art. 49.

[73] Ibid., at Art. 55.

right to take countermeasures does not apply in cases of breaches of obligations provided in Articles 41 and 55 respectively of the 1961 and 1963 Vienna Conventions. '[D]iplomatic law', the Court explained, 'itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions' – in effect, the right to declare a member persona non grata, and to break off all diplomatic relations with a sending state and call for the immediate closure of its mission.[74] This finding was not self-evident, as neither of the two Vienna Conventions explicitly excludes the application of the right to take countermeasures. If you approach it from the perspective of a legal positivist, the categorization of diplomatic law as a special regime may help to secure the necessary justification. The Court itself came very close to doing precisely this when describing diplomatic law as a 'self-contained régime'.[75]

American legal realists think of international norms as pieces of language, and not in terms of the legal obligations that they express. Therefore, the significance of the concept of a special regime cannot for them have anything to do with the logical relationship between norms. It can only pertain to their legal meaning. By the legal meaning of a norm, realists understand its referential function in the chain from cause to effect – that is, from the facts that form the condition for the application of the norm, to their predictable legal consequences. If the international legal system is a collection of norms in this unorthodox sense, the significance of having identified a segment of this system as a special regime must be explained accordingly. As we conclude, the concept offers a way for the realists to conceive of legal facts and legal consequences in general terms.[76] It helps them to predict future legal decision-making and to think and talk about detected differences in legal practice in a more economic fashion than they would be able to do without it.[77]

As a simple example, consider once again the approach of the UN Human Rights Committee to the effect of invalid reservations to the ICCPR. If other human rights treaty monitoring bodies follow suit,[78] it is comparably easy to say that in human rights law, if a state has formulated

[74] *United States Diplomatic and Consular Staff in Tehran*, para. 83.
[75] Ibid., at para. 86.
[76] See Linderfalk, *The International Legal System*, 109–119.
[77] Ibid.
[78] See, for example, *Belilos v. Switzerland*, [1988] ECHR 4, paras. 50–60; Case 11.816, *Hilaire v. Trinidad and Tobago*, [2001] Inter-. Am. Ct. H.R. (ser. C) No. 80, paras. 43–98.

an invalid reservation to a treaty, it will be a party to this treaty without benefiting from the reservation.[79] It is certainly more difficult to say that this is the approach of the UN Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of Women, the European Court on Human Rights, the Inter-American Courts on Human Rights, and so forth. Similarly, if the categorization of 'diplomatic law' as a self-contained regime means what the Court says, not only is there no right for Iran to take countermeasures pursuant to a violation of Articles 41 and 55 of the two Vienna Conventions by the United States. There is no right for *any* receiving state to take countermeasures pursuant to *any* violation of *any* sending state of *any* provision of those two conventions. If this proposition is indeed correct, there can be no objection to the Court's way of presenting its conclusion. The alternative would be to think of the issue as one that concerns single states and single provisions of the two Vienna Conventions, which certainly requires a more elaborate description of the relationship between diplomatic law and the law of countermeasures.

For legal idealists, the mere existence of an international legal discourse manifests a commitment on the part of all its participants – a willingness to give time and energy to the realization of some presupposed legal ideal or ideals. From the point of view of legal idealists, the concept of a special regime helps to understand and describe social facts in a way that coheres with this commitment. International criminal lawyers may be using a different definition of the concept of torture than European human rights lawyers,[80] for example. Similarly, environmental lawyers may be more inclined than international investment lawyers to understand legal texts in the light of the principle of sustainable development.[81] Legal idealists would justify these differences in terms of the efficacy of international law. As they would contend, if the practice of international norms is to be of any help for the realization of the presupposed legal ideal or ideals, we have to accept that different contexts of law sometimes require different solutions to similar problems.

[79] See, for example, Bruno Simma and Gleider Hernández, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?', in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), 60–85.

[80] See, for example, *Prosecutor v. Kunarac*, paras. 465–497.

[81] See, for example, Chi, *Integrating Sustainable Development*.

1.4 The Objective of This Book

The previous two sections of this chapter demonstrated the multifarious nature of the concept of a special regime. For the same reasons as lawyers disagree about the proper definition of the concept of international law, they conceive differently of the concept of a special regime. Sections 1.2 and 1.3 highlighted altogether three such conceptions:

1. A *special regime* is a collection of norms, the pedigree or logical form of which somehow distinguishes it from other parts of international law with respect to some, but not all, of its several features. The concept helps international lawyers to understand and to describe social facts in a logically coherent fashion.
2. A *special regime* is a collection of norms, which address either a set of similar facts, or a set of similar legal consequences. The concept helps international lawyers to think and talk about detected differences in legal practice in an economic fashion.
3. A *special regime* is a community of practice in the sense of Etienne Wenger – it is distinguishable because of the normative presuppositions of community members. The concept helps international lawyers to understand and describe social facts in a way that coheres with their commitment to give time and energy to the realization of some presupposed legal ideal or ideals.

To facilitate easy reference, we will refer to these as 'the legal positivist's', 'the legal realist's' and 'the legal idealist's' conception, respectively.

If we isolate these conceptions from the theories of law, with which they are associated,[82] they are not in all cases mutually exclusive. Thus, in single instances, when you apply two or more of the three conceptions to categorize a segment of the international legal system, it is fully possible that they lead to the same conclusion. One example would be diplomatic law, which is a special regime, whether you apply the legal positivist's or the legal realist's conception of a special regime.[83] This observation tells us something important about the deep structure of the three conceptions. If there are differences among them, it is not because they insist upon different understandings of identical facts. It is because they place their emphasis on different aspects of legal structure and because they further the realization of different results. The legal positivist's

[82] See, for example, Linderfalk, *The International Legal System*, 109–119.
[83] See Section 1.2.

conception stresses the formal relationship between legal norms. It serves to maintain the logical coherence of the international legal system. The legal realist's conception stresses the relationship between legal norms and what they refer to in the real world. It serves to facilitate thought about facts and legal consequences in general terms, which seems to be necessary if predictions of future legal decisions are to be at all possible. The legal idealist's conception emphasizes the relationship between the human beings that are engaged with understanding, discussing and applying legal norms. It serves to promote the efficacy of international law relative to the legal ideal that they assume.

The different emphasis of the three conceptions make them unequally suited to manage and control the effect of legal fragmentation – yet another phenomenon associated with the increased specialization and diversification of international law.[84] Fragmentation of international law has been a much-discussed issue among international lawyers and scholars, all since the mid-1990s.[85] Discussions led the International Law Commission (ILC) to include the topic on its agenda of work and to establish a group for the purpose of conducting a study on the topic.[86] In parallel to the work of the ILC, scholars published a long series of articles and monographs addressing particular issues raised by the trend of seeing a fragmenting international law.[87] This research – much like the

[84] Fragmentation of International Law, U.N. Doc. A/CN.4/L.682.

[85] See, for example, Mads Andenäs and Eirik Björge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: Cambridge University Press, 2015); L. Barnhoorn and Karel Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (Den Haag: Nijhoff, 1995); Andreas Fisher-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046; Chiara Giorgetti and Mark Pollack (eds.), *Beyond Fragmentation: Cross-Fertilization, Co-operation and Competition among International Courts and Tribunals* (Cambridge: Cambridge University Press, 2022); Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law: Post-Modern Anxieties' (2005) 15 *Leiden Journal of International Law* 553–579; Ulf Linderfalk, 'Cross-Fertilisation in International Law' (2015) 84 *Nordic Journal of International Law* 428–455; Andreas Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation' (2005) 74 *Nordic Journal of International Law* 297–334; Serge Sur, 'The State between Fragmentation and Globalization' (1997) 8 *European Journal of International Law* 421–434; Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012).

[86] Report of the International Law Commission, Fifty-fourth Session, 29 April–7 June and 22 July–16 August 2002, U.N. Doc. A/57/10, paras. 492–494.

[87] See, for example, Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74 *Nordic Journal of International Law*

work of the ILC Study Group – concentrated mainly on the formal relationships that exist between rules of international law, and on phenomena such as legal hierarchy, the resolution of normative conflicts, the filling of legal gaps, the systemic interpretation of treaties, and the possibility of review of international legal decisions. It paid little attention to the more acute issue of 'cross-border' communication. Because of the increasing specialization and diversification of international law, specialists are experiencing increasingly greater difficulty in understanding the reasoning of other specialists and their particular solutions to legal problems. Generalists are having similar problems in understanding the specialists, and vice versa. This is the real threat posed by a fragmenting international law and legal practice. When lawyers cannot understand each other any more, all that they will see is incorrect thought and behaviour. It is at this point that lawyers start seriously questioning the fundamental idea of international law as a single legal system.[88]

To improve communication across borders of different regimes, a doctrine must be developed that can explain why, sometimes, specialists in different fields of law do similar things differently. The legal positivist's and legal realist's conceptions of a special regime cannot perform this task. The positivist's conception directs attention to the formal relationship between legal norms. Its explanation as to why different specialists prefer different solutions is that they are dealing with norms with partly different logical structures or pedigrees. The realist's conception directs attention to the referential meaning of legal norms. Its explanation is that

27–66; Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer, 2003); Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279–320; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006); Paulus, 'Jus Cogens', 297–334; Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003); Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291–323; Simma and Pulkowski, 'Of Planets and the Universe', 483–529; Christian Tams, *Enforcing Obligations* Erga Omnes *in International Law* (Cambridge: Cambridge University Press, 2005); Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 *European Journal of International Law* 395–418.

[88] The International Law Commission Study Group concludes: 'International law is a legal system'. See Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group prepared for the Fifty-eighth session of the International Law Commission, 1 May–9 June and 3 July–11 August 2006, U.N. Doc. A/CN.4/L.702, at 7.

different specialists are dealing with norms that address different categories of facts or legal consequences. Both explanations beg further questions. They do not explain why the different logical structures or pedigrees of norms, or the focus of these norms on different categories of facts or legal consequences, cause specialists to prefer different solutions. They lack the depth of a sound explanation of human behaviour, for the same reason that legal positivism and legal realism do not offer any full explanations of the concept of legal obligation.[89]

The legal idealists' conception certainly does better. This conception directs attention to the relationship between the human beings that are engaged with understanding, discussing and applying legal norms. Like the legal positivist's and the legal realist's conceptions of a special regime, it provides an answer to the question of why specialists in different fields of law sometimes prefer different solutions to similar problems. The answer is that specialists operate in different social contexts. Access to the social context of human behaviour is often crucial to understanding it. Assume, for example, that in the beginning of a game of football, a TV commentator sounds off: 'United has a good bench'. Football buffs will immediately understand that the commentator is referring to the substitutes of the one team.[90] Outside of the community of football buffs, people will understand this utterance differently, and they will no doubt conceive of it as very peculiar. From the point of view of the idealist's conception, a special regime is fully comparable to the community of football buffs. If lawyers that are not themselves active in a special regime are not equipped to understand the reasoning and behaviour of those who are, this is because they do not have the same access to the social context in which these other lawyers operate. This is indeed a very plausible explanation to why different groups of lawyers have great difficulty understanding each other.

What makes the idealist's conception less appealing are the methodological problems that come with every instance of its application. Whatever conception of a special regime that you apply, your

[89] Positivists have still to answer the question: Why should a legal rule be complied with, just because it can be traced back to a source of law recognized by the basic criteria of the legal system? Realists owe an answer to an equally critical question: why should a legal decision-maker decide as the legal realists predict that legal decision-makers in a jurisdiction generally would?

[90] I admit to having used this example before. See Ulf Linderfalk, 'Proportionality and International Legal Pragmatics' (2020) 89 *Nordic Journal of International Law* 432.

categorization of a segment of the international legal system as a special regime will raise a very particular question of justification: how can you support your suggestion that this segment is a special regime? Confronted with this question, the positivist's conception will direct your attention to the pedigree and logical structure of norms. It will allow you to justify your suggestion easily by reference to legal norms and norms of deontic logic. The realist's conception, for its part, will direct your attention to legal facts and their predictable legal consequences. It, too, will allow you to justify your suggestion easily. Justification will require no more than a reference to earlier legal decisions, coupled with the assumption that future legal decision-makers will decide according to the patterns that these earlier decisions establish. The important point that we are trying to make is that the idealist's conception presupposes a methodology of a very different kind, directing attention, as it does, to social context. Many international lawyers and scholars would conceive of this focus of the conception as a problem. They would consider themselves ill-equipped to engage with any relationship between human beings and the social context in which they operate. As these lawyers would insist, such engagement requires the methodology and expertise of a sociologist.

There are strong reasons against this position. Not only does the idealist's conception have great explanatory value. It is also not correct that the application of this definition presupposes the use of sociological methods – methods that the legal scholar is not used or equipped to employ. As we, the authors of this book, maintain, the task of establishing the social context characterizing a special regime is not significantly different from many investigations that classically trained legal scholars are already conducting, more or less as a matter of course. It is the objective of this book to establish this one proposition.

The book offers an explanatory framework for understanding the significance of disciplinary boundaries in international law. As should be clearly understood, we do not as such endorse any particular theory of international law. If our preferences are with the legal idealist's conception of a special regime, it is because it helps to answer the question of why specialists in different fields of law sometimes prefer different solutions to similar problems. In fact, the legal idealist's conception of a special regime has the great advantage of being compatible with all of the legal positivist's, legal realist's and legal idealist's conceptions of an international legal system. This will transpire from subsequent chapters.

Our writing will proceed in three steps. In a first step, we will explore how Etienne Wenger's theory of communities of practice translates to the context of international law and the concept of a special regime. According to Wenger, a community of practice is defined by the presence of three structural elements: there must be a mutual engagement of community members; community members must be engaged in a joint enterprise; and they must have a shared repertoire.[91] As we will explain, this can be interpreted to mean that in different special regimes:

1. Community members think of themselves as engaged in the pursuit of an enterprise together with different people.
2. Community members think of themselves as pursuing different states of affairs than that which other international lawyers pursue, and they have a different idea of the proper way to perform assignments.
3. Community members have different opinions about the appropriateness of different intellectual tools, such as forms of argumentation, legal terminologies and legal concepts.[92]

In a second step, we will draw up the contours of a methodology that will help the classically trained legal scholars to establish such normative presuppositions. To cut the story short, our suggestion is that they be studied as implicit in the actual conduct of community members, based on the assumption that these specialists act rationally and that they recognize the appropriateness of their own action. This methodology is not significantly different from the way in which international courts establish the *opinio juris* of states, or the way in which legal scholars establish a court's understanding of rules of international law.

In a third and last step of writing, we will conduct case studies that will help to illustrate the practical operation of our proposed methodology. Case studies will be organized around the below three sets of questions:

- What is the engagement of the selected community of international law specialists? How does this engagement compare with that of other communities of international lawyers?
- What desirable states of affairs are the selected community of international law specialists pursuing? How do these states of affairs compare with those pursued by other communities of international lawyers?

[91] Wenger, *Communities of Practice*.
[92] See Section 2.2.

- What rhetorical tools does the selected community of international law specialists consider appropriate? How do these rhetorical tools compare with those that other communities of international lawyers consider appropriate?

The first and second steps correspond to Chapter 2. The third step corresponds to Chapters 3–5. In the concluding Chapter 6, we will reflect on the question of how the development towards an increasingly more specialized and diversified international law can be combined with the fundamental idea of international law as a single legal system.