On the Primacy of the European Convention of Human Rights over Other International Treaties

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Abstract: States occasionally conclude treaties without regard to their prior engagements towards third states, which may result in the assumption of incompatible obligations. Human rights treaties, such as the ECHR, are particularly likely to give rise to such conflicts, as their wide scope of application can bring them in tension with treaties on almost any subject matter. National and international case law shows that the ECHR is usually given precedence in such cases. This practice cannot be rationalized by the chronological order of the treaties or the principle of *lex specialis*, because these criteria are either inapplicable to conflicts of this kind, or else have been deemed irrelevant by the courts or authorities involved. Neither can it be explained by reference to the Vienna Convention on the Law of Treaties, which does not specify how such conflicts are to be resolved. Instead, the reason of the ECHR's *de facto* primacy appears to lie in its character as a major human rights treaty. However, because the practice is neither sufficiently consistent nor supported by the necessary *opinio iuris*, it can not be assumed that the priority to the ECHR has yet emerged as a rule of customary law. This leaves it to the states caught between conflicting obligations to decide for themselves which treaty to fulfil, with the consequence of incurring state responsibility for breach of the other. The resulting risk of legal uncertainty and international conflicts, however, should not be overrated. States have, in the past, proven to be capable of finding solutions to accommodate their interests beyond the narrow framework of clear-cut priority rules. In addition, it can be expected that non-human rights treaties will increasingly include provisions bringing them in line with human rights obligations, which further reduces the potential for conflicts in the first place.

Keywords: treaty conflicts; human rights; european convention on human rights; priority; vienna convention on the law of treaties

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1. Introduction

This study examines whether from the viewpoint of public international law, the European Convention on Human Rights (ECHR) enjoys primacy over other international treaties in cases of conflict. It focuses on conflicts with bilateral treaties concluded by ECHR parties with third states, thus excluding conflicts with other multilateral treaties, with *inter se* agreements between some of the ECHR parties themselves[1], or with other agreements between *all* the ECHR parties[2]. In other words, it deals with treaty conflicts of the ABC/AD type, where a multilateral treaty between states A, B and C conflicts with a bilateral treaty between states A and D.

The article starts with a description of the practice of states and ECHR organs in pertinent cases (part 2), which will show that in the few conflicts that have arisen so far, the ECHR has usually been given priority. Part 3 analyses general treaty conflict rules under international law which might underlie and justify this practice. It begins with an excursus on conflict rules for treaties with *identical* parties (AB/AB type), showing that in these situations, the will of the parties as to the relationship of the treaties must be determinative ('voluntarist principle'); the *lex posterior* and *lex specialis* principles only serve to determine this will (section 3.2.). The following sections of part 3 examine the possible priority rules for conflicts of the ABC/AD type. Section 3.3.1 examines the temporal aspect, i.e., whether the ECHR might have prevailed over the other treaties because it was older or newer *(lex prior/posterior)*. It argues that while there is support for a primacy of the *lex prior*, it does not yet have the quality of customary international law. In any case, this rule could not explain the practice described, where the ECHR was granted priority regardless of whether it was older or newer. Section 3.3.2 then examines the *lex specialis* rule, which would grant precedence to the more 'special' treaty. It concludes that this rule has to be rejected generally for conflicts of the ABC/AD type, and especially for conflicts involving human rights treaties, which cannot be considered more or less 'special' than other, 'non-human rights' treaties. Subsequently, section 3.3.3 explores whether certain types of multilateral treaties – like the ECHR – as such might prevail over other kinds of treaties, but there is little support for such a rule as well. Other possible priority rules, examined in section 3.3.4, are either not pertinent to the conflicts

1. *Inter se* agreements are governed by Art. 41 of the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, in force 27 January 1980, 1155 UNTS 331. This provision would almost inevitably prohibit agreements aiming to reduce or having the effect of reducing the scope of protection of human rights treaties. See Art. 41(1)(b) VCLT and Christoph Gusy, 'Die neuere Entwicklung des völkerrechtlichen Auslieferungsrechts', *Bayerische Verwaltungsblätter* (1980) 10–15 at 14.
2. However, such conflicts between treaties with identical parties (ABC/ABC type of conflicts) will be dealt with in an excursus in section 3.2. below.

at hand (priority of status treaties), or clearly not part of international law (priority of *erga omnes* treaties). Section 3.3.5 then examines whether human rights treaties as such prevail over other conventional obligations. It finds that while state practice (especially the instances described in part 2) provides some support for an emerging rule to that effect, it can not yet be regarded as customary law. Besides, it is questionable whether such a hard rule would be desirable at all if it did not allow for exceptions.

2. Practice Regarding Conflicts Between the ECHR and Other Treaties

2.1. State Practice

2.1.1. General Remarks

Situations in which states were subject to conflicting obligations under the ECHR and other treaties have arisen only very infrequently. It appears that states succeed well in avoiding or concealing such clashes, either by not concluding incompatible treaties in the first place, by finding diplomatic solutions[3], by gaining the tacit acceptance of the parties to the prior treaty[4], or by glossing over the conflict with a 'harmonizing interpretation', ostensibly allowing the application of both of the treaties[5]. Two examples of this latter solution (the French 'repudiation' cases and the European Court of Justice's *Matthews* judgment on the right to vote of residents of Gibraltar) will be discussed later in this section; they also illustrate

3. See Christopher J. Borgen, 'Resolving Treaty Conflicts', 37 *George Washington International Law Review* (2005) 573–648 at 605–06; *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (13 April 2006) at 27, para. 41, and 118, para. 227.
4. See Yearbook of the International Law Commission (YILC) 1963 I, at 202, para. 83 (Antonio de Luna) ('States often concluded treaties which conflicted with prior treaty obligations. [I]t was found that in practice the States not parties to the later treaty were generally tolerant').
5. On harmonizing interpretation, see Wilfred Jenks, 'The Conflict of Law-Making Treaties', 30 *British Year Book of International Law* (1953) 401–53 at 428–29; Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2004) at 240–44; Edwin Vanderbruggen, *Above and Beyond the Treaty* (APTC: Bangkok, 2004) at 70; Manfred Zuleeg, 'Vertragskonkurrenz im Völkerrecht (Teil I)', 20 *German Yearbook of International Law* (1977) 246–76 at 271–74. – Frédéric Vanneste, 'Droit international général et droit international des droits de l'homme: l'apport de la Cour européenne des droits de l'homme', *Revue trimestrielle des droits de l'homme* (2011) 807–38 at 819, and Ineta Ziemele, 'Case Law of the European Court of Human Rights and Integrity of International Law', in Rosario Huesa Vinaixa and Karel Wellens (eds), *L'influence des sources sur l'unité et la fragmentation du droit international* (Bruylant: Brussels, 2006) 187–210 at 205, point out that the European Court of Human Rights regularly resorts to this approach in order to reconcile the ECHR with general international (treaty and customary) law.

that the line between 'harmonizing interpretation' and the granting of a priority can be blurred.

2.1.2. Netherlands

The only case of a 'true' conflict which was also acknowledged as such by the authorities appears to be the Dutch *Short* case[6]. Short was an American sergeant stationed in the Netherlands who had murdered his wife. The United States demanded his transfer under the NATO Status of Forces Agreement (NATO SOFA)[7]. The Dutch Supreme Court found that since Short faced the death penalty in the United States, the Netherlands would violate Article 1 of the Sixth Protocol to the ECHR by handing him over;[8] on the other hand, it would breach its obligations under the NATO SOFA if it refused to do so. For the court, there was no 'order of ranking' between the treaties which could resolve this dilemma. Instead, it found it necessary to weigh the interests involved, which '[i]n view of the great importance which must be attributed to the right not to suffer the death penalty', 'inevitably' resulted in a decision in Short's favour.[9] In the end, Short was nonetheless released to the US authorities, after they had guaranteed that he would be charged for a non-capital crime only.[10] This guarantee should not be understood as an acknowledgment by the US of the priority of the ECHR, or as a waiver of its treaty rights; instead, it appears that the American prosecutors simply realized, as the result of a pre-trial investigation, that the elements of proof required for a capital crime were not met. Indeed, the US authorities

6. Judgment of the *Hoge Raad* of 30 March 1990, 22 *Netherlands Yearbook of International Law* (1991) 432, 29 ILM (1990) 1375. – For the development of Dutch case law on extradition and human rights up to the *Short* case, see Harmen G. van der Wilt, 'Après Soering: The Relationship Between Extradition and Human Rights in the Legal Practice of Germany, the Netherlands and the United States', *Netherlands International Law Review* (1995) 53–80 at 63–69. It appears that the *Hoge Raad* never before had to deal with a situation of treaty conflict such as in *Short*. In addition to the court's somewhat unclear and changing statements in earlier judgments on the issue of extradition and human rights, this makes it difficult to say whether *Short* marked a shift in its practice.
7. See Art. 4, Exchange of notes constituting an agreement between the United States of America and the Netherlands relating to the stationing of United States Armed Forces in the Netherlands (13 August 1954, in force 16 November 1954, 251 UNTS 91), in connection with Art. VII(1)(a), (3)(a)(1), (5)(a), NATO Status of Forces Agreement (19 June 1951, in force 23 August 1953, 199 UNTS 67).
8. With regard to the applicability of the guarantees of the ECHR, the *Hoge Raad* referred to the *Soering* judgment of the European Court of Human Rights, discussed in section 2.1.3 below.
9. 22 *Netherlands Yearbook of International Law* at 437; see also 29 ILM at 1389, para. 3.5.
10. See 29 ILM at 1375, footnote; Steven J. Lepper, 'Short v. The Kingdom of The Netherlands: Is it Time to Renegotiate the NATO Status of Forces Agreement?', 24 *Vanderbilt Journal of Transnational Law* (1991) 867–943 at 876.

had previously rejected Dutch efforts to obtain such a guarantee (or a waiver of jurisdiction) as a matter of principle.[11]

The inclination of the Netherlands to favour human rights over extradition obligations has also found its way into treaty law. Under the extradition treaty with Hong Kong of 1992, a party has the right to deny an extradition request if complying with it would 'place that party into breach of its obligations under international treaties'.[12] While not mentioning them expressly, it is clear that the clause had human rights treaties in view.[13] The some holds true for a 1993 amendment to the extradition treaty with Surinam, which permits a Party to refuse an extradition which it consideres 'incompatible with the public interest or national law'. 'In making his decision', the responsible minister 'shall bear in mind the international obligations assumed by his State in connection with other matters'.[14]

2.1.3. United Kingdom

Less than a year before the *Short* judgment, a similar case had been before the European Court of Human Rights (ECtHR). It dealt with the pending extradition of Jens Soering from the United Kingdom to the United States, where the accused, suspected of double murder, would have faced the death penalty. In a landmark judgment, the ECtHR ruled that the UK was prohibited from extraditing Soering by Article 3 of the Convention.[15] The UK complied with this ruling and extradited Soering only after receiving assurances that no capital charges would be brought against him.[16] As in the *Short* case, the applicable treaty in principle obliged the UK to extradite murder suspects.[17] But in contrast to the situation in *Short*, the treaty allowed the requested party to refuse an extradition 'unless

11. See Lepper, 'Short', *supra* note 10, at 875–76, 896, 941.
12. Art. 7(c), Agreement between the Government of the Kingdom of the Netherlands and the Government of Hong Kong for the Surrender of Fugitive Offenders, 2 November 1992, in force 20 June 1997, 1998 UNTS 309.
13. See John Dugard and Christine van den Wyngaert (Co-Rapporteurs), 'Third Committee Report on Extradition and Human Rights', *International Law Association Conference Report* (1998) 132–54 at 134–35 n.3.
14. Art. 1(2), Protocol Containing Special Provisions Regarding the Agreement between the Kingdom of the Netherlands and the Republic of Suriname Concerning Extradition and Legal Assistance in Criminal Matters of 27 August 1976, 18 May 1993, in force 28 February 1995, 2335 UNTS 122; see, again, Dugard and van den Wyngaert, 'Extradition', *supra* note 13, at 134–35 n.3.
15. *Soering v. United Kingdom*, Application no. 14038/88, European Court of Human Rights, Plenary Court, Judgment (7 July 1989).
16. See Richard Lillich, 'The Soering Case', 85 *American Journal of International Law* (1991) 128–49 at 143.
17. Arts I and III, schedule para. 1, Extradition Treaty between the UK and the US, 8 June 1972, in force 31 January 1977, 1049 UNTS 167.

the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out'.[18] Such assurances were lacking untill well after the ECtHR judgment.[19] Thus, under the treaty itself, the UK was under no obligation to extradite. Yet, the British Secretary of State had signed an extradition order while Soering's appeal to the ECtHR was still pending.[20] If this order was communicated to the US without a reservation for an adverse ECHR judgment, it is arguable that there existed a binding agreement between the two states, the US having expressed its will in the extradition request and the UK consenting to it in granting the request. This would indeed correspond to the 'contractual theory' of extradition *('Vertragstheorie')*, according to which any extradition is preceded by an international agreement, be it a general extradition treaty or a case-specific agreement.[21] Thus, those authors which have asserted that the UK was facing conflicting obligations in the *Soering* case[22] – a view shared by the ECtHR itself[23] –, may be right, even though others have denied such a conflict[24]

18. Art. 4.
19. See *Soering*, *supra* note 15, at paras 20, 22, 97–98.
20. See *ibid.*, at para. 24.
21. See Otto Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland*, (Max-Planck-Institut für ausländisches und internationales Strafrecht: Freiburg i.Br., 1987) at 11–26.
22. Karl Doehring, 'Vertragskollisionen – Der Soering-Fall', in Jörn Ipsen and Edzard Schmidt-Jortzig (eds), *Recht – Staat – Gemeinwohl. Festschrift für Dietrich Rauschning* (Heymanns: Köln, Berlin, Bonn and München, 2001) 419–26; Gérard Cohen-Jonathan, 'Les rapports entre la Convention européenne des droits de l'homme et les autres traités conclus par les États parties', in Rick Lawson and Matthijs de Blois (eds), *Essays in Honour of Henry G. Schermers* (3 vols, Nijhoff: Dordrecht, Boston and London, 1994), vol. III, *The Dynamics of the Protection of Human Rights in Europe*, 79–111 at 102–03; Ahmad Ali Ghoury, 'Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?', *Asian Journal of International Law* 2012, 1–32 at 2; van der Wilt, 'Après Soering', *supra* note 6, at 55.
23. *Mamatkulov and Askarov v. Turkey*, Applications no. 46827/99 and 46951/99, European Court of Human Rights, Grand Chamber, Judgment (4 February 2005), at para. 107 ('In order to abide by the Convention and the Court's decision, the British Government were forced to default on their undertaking to the United States … Thus, the judgment resolved the conflict in this case between a State Party's Convention obligations and its obligations under an extradition treaty with a third-party State by giving precedence to the former'); *Al-Saadoon and Mufdhi v. United Kingdom*, Application no. 61498/08, European Court of Human Rights, Judgment (2 March 2010), at para. 128 ('[I]n *Soering* …, the obligation under Article 3 of the Convention … was held to override the United Kingdom's obligations under the Extradition Treaty').
24. Stephan Breitenmoser and Gunter E. Wilms, 'Human Rights v. Extradition: The Soering Case', 11 *Michigan Journal of International Law* (1990) 845–86 at 877–78 (no treaty conflict because of the absence of sufficient assurances); Jan Klabbers, *Treaty conflict and the European Union* (Cambridge University Press, 2009) at 104 ('no real treaty conflict'); Lepper, 'Short', *supra* note 10, at 878, 907 with n.180 (no obligation for the UK to extradite Soering in the absence of assurances). See also Colin Warbrick, 'Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case', 11 *Michigan Journal of International Law* (1990) 1073–96 at 1093–94 (leaving open whether a conflict existed).

(without any of either authors examining or even mentioning the contractual theory of extradition). Leaving this question open, one can at least say that the UK was giving a certain preference to the ECHR over the extradition treaty, in that it applied the latter in a way consistent with the Convention – although only after receiving explicit directions from the ECtHR.

2.1.4. France

French practice (and doctrine) provides some support for a priority of the ECHR as well, even though 'hard' treaty conflicts do not appear to have occurred there either. A representative of the Government and a prominent author have assumed that French courts would deny treaty-based extradition requests if France thereby violated the ECHR, considered part of the *ordre public* (public policy).[25] The *Cour de cassation* has indeed given preference to an ECHR provision of 1984 over earlier bilateral treaties (of 1964 and 1957/1981) on the mutual recognition of judgments[26]. The issue was whether divorce rulings based on the unilateral repudiation of the wife by the husband under Islamic law had to be recognized in France, despite the guarantee of equality between spouses in Article 5 of Protocol No. 7 to the ECHR. The *Cour de cassation* has denied such judgments any legal effect in France.[27] The non-recognition was formally based either on procedural

25. See the statement of R. Abraham, *commissaire du Gouvernement*, in *Revue du droit public* (1992) 1793–97 at 1796 (for whom the right to family life under art. 8 ECHR should, by the same principle, likewise prevail over a bilateral treaty providing for the loss of a residence permit); Cohen-Jonathan, 'Rapports', *supra* note 22, at 104. Cohen-Jonathan refers to the just cited statement of R. Abraham and to the *Fidan* judgment of the *Conseil d'État* of 27 February 1987, No. 78665, *Recueil Dalloz* 1987, jurisprudence, 309. In *Fidan*, an extradition which could have led to the death penalty was considered contrary to the *ordre public*. But, because no extradition treaty was involved, this judgment can hardly serve as a precedent for treaty conflicts. – For some authors, only a subset of ECHR rights belong to the *ordre public* (see the references in Lyn François, 'La Convention européenne des droits de l'homme est-elle supérieure aux conventions bilatérales reconnaissant les répudiations musulmanes?', *Recueil Dalloz* 2002, chroniques, 2958–62 at 2961), but this view seems to be isolated. – If all the State parties followed the French approach and considered the ECHR part of their *ordre public*, the Convention would indeed become a 'European ordre public', as the European Court of Human Rights called it in *Loizidou v. Turkey*, Application no. 15318/89, European Court of Human Rights, Grand Chamber, Judgment (23 March 1995), at para. 75 ('constitutional instrument of European public order [ordre public]') (see also François, at 2962).

26. Treaty between France and Algeria of 27 August 1964, Journal officiel de la République française (JO) 1965, 7269; Treaty between France and Morocco of 5 October 1957, JO 1960, 425, in connection with the Treaty of 10 August 1981, JO 1981, 1643.

27. The seminal judgments of 2004 are reported and discussed in Patrick Courbe, 'Le rejet des répudiations musulmanes', *Recueil Dalloz* 2004, chroniques, 815–20; *Recueil Dalloz* 2004, jurisprudence, 828–29; *Semaine juridique* 2004, 1481–87 (no. II 10128) (note Hugues Fulchiron); *Journal du Droit International* 2004, 1200–11 (note Léna Gannagé); 93 *Revue critique de droit international privé* (2004) 423–39 (note Petra Hammje); *Revue trimestrielle de droit civil* 2004, 367–69 (note Jean-Pierre Marguenaud); *Defrénois: La revue du notariat* 2004, 812–15 (note

reasons or on the *ordre public* clauses contained in the bilateral treaties (the *ordre public* in France comprehending, as mentioned, the ECHR rights), so that ostensibly, a direct conflict was avoided. In substance, however, the court was faced with opposing treaties, and resolved the conflicts in favour of the ECHR.[28] This is, at least, how the decisions were perceived from the outside. In fact, however, as the President of the deciding Chamber of the Court later confirmed, he had truly thought (and still thought) that the *ordre public* reservations had precluded a treaty conflict.[29] Therefore, one should probably not read too much into these decisions. Nonetheless, the same former President has also declared that as a general rule, the primacy of the ECHR, as a 'fundamental treaty', was 'difficult to deny'.[30] Thus, it can be assumed – in accordance with the statements cited at the beginning of this section – that in the case of a 'true' conflict, the *Cour de cassation* would decide in favour of the ECHR as well. This assumption is all the more justified by the importance that French courts attach to the *ordre public*, and

Jacques Massip). For the development of the case law *up to 2004*, see *D.D. v. France*, Application no. 3/02, European Court of Human Rights, Striking out (8 November 2005), at paras 21–24; Roula el-Husseini Begdache, *Le droit international privé français et la répudiation islamique* (LGDJ: Paris, 2002) at 231–34, 237; François, 'Convention', *supra* note 25, at 2959–60; Jacques Lemontey, 'Le volontarisme en jurisprudence: L'exemple des répudiations musulmanes devant la Cour de cassation', in *Droit international privé. Travaux du Comité fran*çais de droit international privé, 2004–2006 (Pedone: Paris, 2008) 63–73 at 64–69; Ali Mezghani, 'Le juge français et les institutions du droit musulman', 130 *Journal du Droit International* (2003) 721–65 at 730 n.39; 'Le rejet des répudiations musulmanes', *Recueil Dalloz* 2002, jurisprudence, 824–28 at 825–27 (conclusions Francis Cavarroc, Avocat général); Marie-Claude Najm, note sous Cour de cassation (Chambre civile 1), 3 janvier 2006, 95 *Revue critique de droit international privé* (2006) 629–42 at 629–30. For the case law *after 2004*, which has confirmed the continuing validity of the judgments of 2004, see particularly Cour de cassation (Chambre civile 1), 3 janvier 2006, 95 *Revue critique de droit international privé* (2006) 627–42 (note Marie-Claude Najm), and Cour de cassation (Chambre civile 1), 4 novembre 2009, no. 08-20.574, Bulletin des arrêts de la Cour de cassation. Chambres civiles, 2009 I, no. 217 (also reported in 99 *Revue critique de droit international privé* [2010] 369–72).

28. See Frédéric Guerchon, 'La primauté constitutionelle de la Convention européenne des droits de l'homme sur les conventions bilatérales donnant effet aux répudiations musulmanes', 132 *Journal du Droit International* (2005) 695–737 at 699–703; Marguenaud, 'note', *supra* note 27, at 368–69; Courbe, 'Rejet', *supra* note 27, at 816; Begdache, *Répudiation*, *supra* note 27, at 230 with n.502 (but see also *ibid.*, at 233–34: relying on the ECHR was an 'argument of opportunity', because in fact, equality of the sexes is a constitutional principle and was prioritized as such over the bilateral treaties; the reference to the ECHR only served to justify and legitimize the result); *Droit international privé. Travaux du Comité français de droit international privé, 2004–2006* (Pedone: Paris, 2008) at 81–82 (statement of Jean-Pierre Ancel).
29. See the statement of Jacques Lemontey in *Droit international privé. Travaux du Comité fran*çais de droit international privé, 2004–2006 (Pedone: Paris, 2008) at 80. He even revealed candidly that the true motive behind some of the judgments was to 'retort to' breaches of the bilateral treaty by the other side (*ibid.*, at 80–81; Lemontey, 'Volontarisme', *supra* note 27, at 65–67, 71). This, however, did not apply to those decisions that expressly referred to the ECHR.
30. Lemontey statement, *supra* note 29, at 80.

by the fact that they also apply principles of *ordre public* to treaties containing no such clause, as long as the treaty does not 'expressly' derogate from them.[31] Finally, the position also finds support in legislative proposals: In 2005, the Assemblée nationale's Delegation on the Rights of Women and Equal Opportunities Between Men and Women recommended to denounce bilateral conventions incompatible with gender equality; and in the preceding year, it was suggested in the Senate that an article be inserted in the Code civil affirming the priority of the ECHR over all other international commitments of France.[32]

The *Cour de cassation* employed an approach similar to the repudiation cases in a decision about a claim of a French dismissed by the African Development Bank. The Agreement establishing the African Development Bank granted the latter immunity and thus, on its terms, prevented the French courts from hearing the employee's claims. Nonetheless, the *Cour de cassation* decided that because the Bank itself lacked an internal tribunal with jurisdiction over the issue, the employee's right of access to a court would be violated if the French judiciary declined to accept the case. It held that such a refusal would amount to a denial of justice and a violation of the *ordre public*, so that the French courts had to declare themselves competent if the case was sufficiently linked to France. Thus, the Court again refrained from openly asserting a priority of the ECHR's right of access to a court (Article 6) as such, integrating it instead into to the domestic law concept of *ordre public* and making it prevail over the conflicting treaty in this way.[33] Remarkably, the Agreement establishing the African Development Bank does not contain a reservation for the *ordre public*, so that it is even clearer than in the repudiation cases that the decision amounts to the assertion of a priority of the Convention.

2.1.5. Germany

Compared to their French counterparts, German judges appear to be less inclined to resolve treaty conflicts in favour of the ECHR. Admittedly, the German Constitutional Court has, in general terms, stated that extradition decisions have to respect the 'internationally binding minimum standard' of human rights.[34] However, if those human rights obligations were to collide with extradition treaty obligations – which has never occurred up to date – it appears that the Court would give precedence to the obligation to extradite, unless the human

31. See the submission by M. Bonichot, commissaire du Gouvernement, in the *Fidan* case, *Recueil Dalloz* 1987, jurisprudence, at 306 *in fine*, and the case discussed in the next paragraph.
32. See Najm, *supra* note 27, at 633 n.16. The Senate amendment is available on <www.senat.fr/amendements/2002-2003/389/Amdt_32.html>.
33. See Mathias Forteau, 'L'ordre public "transnational" ou "réellement international"', *Journal du Droit International* 2011, 3–49 at 17 n.56.
34. Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 113, 154 (2005) at 162; 75, 1 (1987) at 19–20; 63, 332 (1983) at 337; 59, 280 (1982) at 282–83.

right was *ius cogens*.[35] This is questionable in view of the fact that Article 25 of the *Grundgesetz* places general (customary) international law – to which the 'internationally binding minimum standard' of human rights belongs – above statutory law. Treaties have the same hierarchical position as statutory law, because they derive their (internal) legal validity from the statute which transforms them into national law (the *'Zustimmungsgesetz'*).[36] Thus, in the view of the present author, the 'internationally binding minimum standard' of human rights should trump treaty obligations. This would also include those ECHR rights which are simultaneously part of general international law.

2.1.6. Switzerland

Pronouncements of Swiss authorities, while not free of some aberrations, point strongly towards a priority of the ECHR. In 1982, the Swiss Supreme Court decided that a treaty-based extradition request could not be granted if the accused ran the risk of human rights violations in the requesting state.[37] The case concerned a possible violation of Article 3 ECHR – and therefore of a *ius cogens* norm –, but the rule pronounced by the court appears to cover any human rights guarantees, which would thus precede obligations under extradition treaties. This reading is confirmed by a more recent dictum of the court, which states that in the case of a conflict between a legal assistance treaty and a human rights treaty, it would be difficult to deny that the latter would prevail.[38]

The Swiss Government, on its part, has also taken the general view that the 'significance' of a norm and the 'respect' that it enjoys should be taken into account when resolving conflicts between international law norms; as examples of

35. See BVerfGE 75, 1 (1987) at 19–20 (referring to the State responsibility that Germany would incur if it refused to extradite despite a treaty obligation; it seems that the Court overlooks that Germany would equally incur responsibility if it breached the human rights norm); BVerfGE 59, 280 (1982) at 283 (e contrario: 'Gegebenenfalls könnte ein solcher Verstoss [gegen den völkerrechtlich verbindlichen Mindeststandard] … Anlass sein, die rechtliche Zulässigkeit der Auslieferung zu verneinen, *insbesondere sofern … eine völkerrechtliche Auslieferungsverpflichtung nicht besteht*' – '*In an appropriate case*, such an infringement of the internationally binding minimum standard could be a reason to deny the permissibility of the extradition, *especially if there exists no obligation to extradite under international law*' [emphasis added]). – Nonetheless, for van der Wilt ('Après Soering', *supra* note 6, at 58), the case law of the Constitutional Court '[u]nambiguously … instructs the judges to give precedence to 'some' rules of international law [namely, the internationally binding minimum standard of human rights] over extradition obligations'.
36. BVerfGE 75, 1 (1987) at 18–19.
37. Entscheidungen des Schweizerischen Bundesgerichts, 108 Ib 408 (1982) at 412, para. 8.a.
38. Entscheidungen des Schweizerischen Bundesgerichts, 126 II 324 (2000) at 327–28, para. 4.d. This position has been welcomed by Walter Kälin, Regina Kiener, Andreas Kley, Pierre Tschannen and Ulrich Zimmerli, 'Die staatsrechtliche Rechtsprechung des Bundesgerichts in den Jahren 2000 und 2001', 138 *Zeitschrift des Bernischen Juristenvereins* (2002) 605–704 at 691–92.

'significant' and 'respected' norms, it mentioned human rights treaties, in particular the ECHR.[39] Somewhat to the contrary, the Swiss Federal Administrative Tribunal recently stated that a bilateral treaty between Switzerland and the United States on administrative assistance prevailed over the ECHR under the rules of the VCLT and general treaty conflict rules (*lex posterior* and *lex specialis*).[40] This reasoning is faulty in several respects: As will be shown below, the pertinent Article 30(4)(b) VCLT does not establish any order of priority between conflicting treaties with partially different parties, and neither does customary law contain a rule of *lex posterior* or *lex specialis* for such situations. In any case, the Tribunal hastened to add that the proclaimed conflict rules might appear too 'technical' in view of the special nature of the ECHR as part of the 'European ordre public'; in this context, it referred to the above-mentioned statements of the Supreme Court and the Federal Council.[41] In the end, the Administrative Tribunal left the question undecided. Its wavering deliberations cannot detract from the fact that the supreme judicial and governmental authorities in Switzerland have decidedly supported a priority of the ECHR over other treaties.

2.1.7. European Union

Under the heading of state practice in a wider sense, it also bears mentioning how the European Court of Justice (ECJ) responded to the *Matthews* judgment[42] of the ECtHR. In *Matthews*, the ECHR had held that the Community provisions for the elections to the European Parliament infringed the right to free elections under the First Protocol to the ECHR by excluding the residents of Gibraltar from the electorate. Subsequently, the ECJ decided that the controversial election provisions had to be – and could be – interpreted in a way consistent with the Convention, i.e., including the Gibraltarians.[43] While ostensibly only interpreting Community law – which prevented or removed a norm conflict in the first place –, the ECJ in fact placed the ECHR above Community law, because the wording of the relevant provisions did actually not leave any leeway for the proclaimed 'interpretation'.[44]

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39. Report of the Federal Council on the 'Relationship between International Law and National Law', Bundesblatt der Schweizerischen Eidgenossenschaft 2010, 2263, at 2284, with reference to the last-mentioned decision of the Supreme Court.
40. Entscheidungen des Schweizerischen Bundesverwaltungsgerichts, 2010/40 (decision of 15 July 2010) at para. 6.3.
41. *Ibid.*, at para. 6.4.
42. *Matthews v. United Kingdom*, Application no. 24833/94, European Court of Human Rights, Grand Chamber, Judgment (18 February 1999).
43. Case C-145/04, *Spain v. United Kingdom* [2006] ECR I-7917.
44. Annex I to the Act concerning the election of the representatives of the European Parliament by direct universal suffrage of 20 September 1976, OJ 1976 No. L278/1 (as amended by Council Decision 2002/772/EC, Euratom, of 25 June 2002 and 23 September 2002, OJ 2002 No. L283/1) unequivocally states that 'The United Kingdom will apply the provi-

2.1.8. Conclusion

State and EC practice favour a primacy of the ECHR over other treaties. These decisions appear to rest on the content of the treaties (human rights v. other obligations); other considerations such as the chronological order seem irrelevant.[45] However, this practice is rather sparse, especially concerning instances of 'true' conflicts forcing a state to openly choose one treaty over another. It has therefore hardly been able – at least not by itself – to generate a corresponding norm of customary international law. Still, one could argue that it indicates the emergence of such a rule.

2.2. Practice of ECHR Organs

2.2.1 Conflicts with Treaty Law

With regard to conflicts between the ECHR and *later treaties*, the former Commission[46] and the Court[47] have consistently taken the view that obligations under such a treaties cannot justify a violation of the Convention.

Whether this implies an assertion that the Convention takes a hierarchical priority over these treaties is controversial. Some authors argue that the competence of a treaty organ is necessarily limited to determining whether the treaty

sions of this Act only in respect of the United Kingdom'. See also Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke Journal of Comparative and International Law* (2009) 69–131 at 119: '[T]he ECJ retroactively interpreted the 1976 Act to make it compatible with Article 3 of Protocol No. 1 to the ECHR, even though after *Matthews* was decided everyone involved thought that it was incompatible.' – It should be noted that the Act of 1976 is part of or at least has the same status as the primary law of the Community, and therefore could not be reviewed by the ECJ for its compatibility with e.g. fundamental rights under EU law.

45. See John Dugard and Christine van den Wyngaert, 'Reconciling Extradition with Human Rights', 92 *American Journal of International Law* (1998) 187–212 at 194–95.

46. See *X. v. Germany*, Application no. 235/56, European Commission of Human Rights, Decision (10 June 1958), 2 *Yearbook of the European Convention on Human Rights* (1958–1959) 256 at 300 ('[I]f a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty [in casu, the ECHR], it will be answerable for any resulting breach of its obligations under the earlier treaty'), quoted with approval in *M. & Co. v. Germany*, Application no. 13258/87, European Commission of Human Rights, Decision (9 February 1990), 64 *Decisions and Reports* (1990) 138 at 145.

47. *Matthews*, *supra* note 42, at paras 32–33; *Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/98, European Court of Human Rights, Grand Chamber, Judgment (12 July 2001), at para. 47 ('Thus the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States'); *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, Application no. 45036/98, European Court of Human Rights, Grand Chamber, Judgment (30 June 2005), at para. 154; *Capital Bank AD v. Bulgaria*, Application no. 49429/99, European Court of Human Rights, Judgment (24 November 2005), at para. 111 (obiter dictum); *Al-Saadoon*, *supra* note 23, at paras 128, 137–38, 162.

to which it owes its existence has been violated; it would be impossible for it to leave this 'internal' perspective and examine from the 'outside', i.e. from the viewpoint of general international law, whether 'its' treaty might be subordinate or superior to another norm.[48] In the opinion of these authors, a finding by e.g. the ECtHR that the conclusion or implementation of another treaty violates the Convention simply means that the Court finds the two instruments incompatible, without asserting a priority of the ECHR. Thus, they consider the case law of such treaty organs irrelevant for the issue of treaty hierarchy. Indeed, the ECtHR, above all, has refrained from explicit statements about the priority or otherwise of the Convention over other international norms. Implicitly however, it has quite unmistakably acknowledged the priority of the UN Charter over the ECHR[49] – as, by the way, the ECJ has done with regard to EU law[50] –, which already disproves this doctrinal opinion.[51] Regarding other treaties or norms, the Court has approached the priority issue even more indirectly, simply treating them (or rather their conclusion or implementation) as restrictions of convention rights,

48. Dugard and van den Wyngaert, 'Reconciling', *supra* note 45, at 195; van der Wilt, 'Après Soering', *supra* note 6, at 55; Ignaz Seidl-Hohenveldern, 'Hierarchy of Treaties', in Jan Klabbers and René Lefeber (eds), *Essays on the Law of Treaties. A collection of essays in honour of Bert Vierdag* (Nijhoff: The Hague, Boston and London, 1998) 7–18 at 12 (for the ECJ; but see the contrary ECJ case law in note 51 below!). Jenks, 'Conflicts', *supra* note 5, at 448–49, calls this the 'autonomous operation principle'; according to him, this principle is limited by other principles like the 'hierarchic' or the 'lex specialis' principle.
49. See *Behrami v. France*, Application no. 71412/01, European Court of Human Rights, Grand Chamber, Decision (2 May 2007) at paras 147 and 27 (stating that the Court 'had regard to' Art. 103 of the Charter 'as interpreted by the International Court of Justice', which 'considers Article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty'); *Al-Jedda v. United Kingdom*, Application no. 27021/08, European Court of Human Rights, Grand Chamber, Judgment (7 July 2011), at para. 101 (apparently accepting that in the event of a conflict of the UN Charter with the ECHR, the Charter would prevail).
50. See note 260 below.
51. Nonetheless, it is certainly true that most international tribunals almost automatically give precedence to 'their' treaty (for the example of an Austrian-German Arbitral Tribunal, see Ignaz Seidl-Hohenveldern, 'Widersprüchliche völkerrechtliche Verpflichtungen vor internationalen Rechtsprechungsorganen', in Ottoarndt Glossner and Walter Reimers [eds], *Festschrift für Martin Luther zum 70. Geburtstag* (Beck: München, 1976) 179–90 at 187–89). However, even this does not necessarily have to rest on an *a priori* rejection of the relevance of other treaties. Instead, it could be due to the fact that the other treaties were treaties with *third states*. In the view of the present author, a tribunal is constrained to decide about and take into account only the rights and obligations between the parties before it, notwithstanding their relationships, including treaties, with third states. In other words: If treaty AD conflicts with treaty ABC, so that its conclusion or application by A violates the rights of B and C, a tribunal charged with overseeing compliance with treaty AD will still have to enforce this treaty, because it may not look beyond the relation of A and D. Such a judgment does not, then, imply that treaty AD 'prevails' over treaty ABC.

which have to be – and in appropriate cases can be – justified under the general[52] requirements for such restrictions. On first sight, this would seem to indicate no relationship of priority between the conflicting norms, because each of them could prevail in a specific instance. Nonetheless, a careful examination of the case law shows that at least *de facto*, some international norms – especially the customary law on immunity (see section 2.2.3. below) – are invariably given precedence over the ECHR. In the opinion of the present author, this indicates a tacit acceptance of the priority of these norms, similar to the more openly acknowledged priority of the UN Charter. Conversely, if the ECtHR subjects other international law norms to real scrutiny and does not hesitate to declare them incompatible if they do not fulfil the requirements for restrictions of Convention rights – which is exactly the case with treaties postdating the Convention –, it is submitted that the Court thereby asserts a priority of the Convention over these norms.[53]

Concerning treaties predating the convention, the case law of ECHR organs is less conclusive. In a decision about the imprisonment of Rudolf Hess in Berlin-Spandau by the allied powers under an agreement of 1945, the Commission made a statement that can be understood to concede priority (or at least immunity from scrutiny) to earlier treaties.[54] However, its significance is reduced by the fact that it was an obiter dictum (as will just be seen, the case was decided on the ground of Article 1 ECHR and not of a priority of one of the treaties) and that it literally only covered the *conclusion* of the agreement in 1945, which indeed did not fall under the convention *ratione temporis*. Acts implementing the agreement, on the other hand, were not attributed to the respondent state (the United Kingdom), because they were undertaken collectively by the allied powers. Therefore, Hess was considered not to be within the UK's 'jurisdiction' as required by Article 1 ECHR.[55] More recently, the Court has held in the *Slivenko* case that it can

52. Or sometimes modified, as especially in the case of secondary EU law (see section 2.4.1 *infra*).
53. Accord Alexander Orakhelashvili, 'Art. 30', in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary* (Oxford University Press, 2011) 764–803 at 798: '[T]he decisions of the European Court of Human Rights on the primacy of the European Convention over other treaties' (he probably means the decisions that tested later treaties for compliance with the ECHR, because explicit 'decisions … on the primacy' of the ECHR do not exist) are not based on the 'autonomous operation principle' (see note 48 above); rather, the Court asserts a 'real' primacy of the Convention over other treaties.
54. *Hess v. United Kingdom*, Application no. 6231/73, European Commission of Human Rights, Decision (28 May 1975), 2 *Decisions and Reports* (1975) 72 at 74: 'The conclusion by the respondent Government of an agreement concerning Spandau prison of the kind in question in this case could raise an issue under the Convention if entered into when the Convention was already in force for the respondent Government. The agreement concerning the prison, however, came into force in 1945. Moreover, a unilateral withdrawal from such an agreement is not valid under international law.' – The statement is understood in this sense by, e.g., Bardo Fassbender, 'Der Fürst, ein Bild und die deutsche Geschichte', *Europäische Grundrechte-Zeitschrift* (2001) 459–66 at 463.
55. *Hess*, *supra* note 54, at 74. – The Commission declared the application inadmissable *ratione*

review actions implementing an earlier treaty for their compatibility with the Convention.[56] In this dispute, the earlier treaty was a treaty between Latvia and Russia of 1994, Latvia having subsequently joined the ECHR in 1997 and Russia in 1998. However, a closer examination reveals that the case did not involve the kind of treaty conflict that is of interest here. First, the earlier treaty was a treaty between two states that were also parties to the ECHR.[57] Such a situation must be governed by the principle of *lex posterior*, as provided for by Article 30(3) VCLT, according to which a later treaty prevails over an earlier one between the same parties insofar as the two are incompatible. Second, it appears that Latvia was not pitted between conflicting obligations at all. The bilateral treaty provided for the withdrawal of Russian troops and the return of retired Russian officers to Russia, but apparently it did not *oblige* Latvia to expel them (which was the cause of the complaint).[58] Third, the treaty itself required that 'Latvia shall guarantee the rights and freedoms of [the persons affected], in accordance with the legislation of the Republic of Latvia and the principles of international law'.[59] Thus, there was probably no 'true' conflict at all, as the bilateral treaty, even if it obliged Latvia to expel these persons, did not require it to do so in violation of its ECHR obligations. For all these reasons, on the facts of the case, *Slivenko* does not mean that the Court claims a priority of the ECHR over earlier treaties where such priority is not already ensured by the principle of *lex posterior*. Nonetheless, the decision's wording is admittedly broader[60], which has led some observers to conclude that *Slivenko* contains an 'important statement of principle' implying that 'obligations in human rights treaties … enjoy some kind of a precedence to merely transactional bilateral instruments'.[61]

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personae (because Hess' detention and treatment were not attributable to the United Kingdom); it could have also denied the admissibility *ratione loci* (because Hess was detained neither in the UK nor under the sole power of the UK in Berlin).

56. *Slivenko v. Latvia*, Application no. 48321/99, European Court of Human Rights, Grand Chamber, Decision (23 January 2002) *('Slivenko I')*, at paras 60–62, and *Slivenko v. Latvia*, Application no. 48321/99, European Court of Human Rights, Grand Chamber, Judgment (9 October 2003) *('Slivenko II')*, at para. 120.
57. This is overlooked by Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (8th edn, LGDJ: Paris, 2009) at 300, para. 173.
58. See the submissions by the applicants in *Slivenko I*, *supra* note 56, at paras 42 and 62, and *Slivenko II*, *supra* note 56, at para. 69, which are nowhere contradicted by the Court or the defendant state.
59. *Slivenko II*, at para. 65; *Slivenko I*, at para. 62.
60. *Slivenko I*, at para. 61: 'In the Court's opinion the same principles [that the Court has the power to review the compatibility of an older law with the convention] must apply as regards *any* provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions' (emphasis added).
61. ILC, *Fragmentation*, *supra* note 3, at 127, para. 248; similarly, Daillier, Forteau and Pellet, *Droit international public*, *supra* note 57, at 300, and Cornelia Janik and Thomas Kleinlein,

2.2.2. Conflicts with Secondary EU Law

Conflicts of the ECHR with secondary EU law can be seen as a special case of treaty conflicts, the conflicting treaties being the Convention on the one hand and the Treaty on European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU) – which underlie the secondary law and make it mandatory for member states – on the other. However, these conflicts and their treatment by the ECtHR have some particular features, which warrant a separate discussion.

The leading case for conflicts with secondary EU law is *Bosphorus*,[62] dealing with the impoundment by Ireland of an aircraft owned by the national airline of Yugoslavia, in implementation of an EEC regulation. In its decision, the ECtHR did not explicitly address the issue of a hierarchy between EU law and the ECHR. Instead, it simply examined whether the Irish measure complied with the conditions for the restriction of a Convention right (legitimate aim, proportionality).[63] This might appear to imply that the Convention claims priority over secondary EU law, as is apparently the case with respect to primary (treaty) EU law[64]. However, this is put into doubt by the Court's self-imposed limitation on the scope of its scrutiny in such cases. The Court presumes state actions implementing the secondary law of an inter- or supranational organisation to be compatible with the ECHR, if only the relevant organisation offers a mechanism for the protection of human rights which is 'at least equivalent to that for which the Convention provides'.[65] To rebut this presumption, it needs to be shown that 'in the circumstances of a particular case, … the protection of Convention rights was manifestly deficient'.[66] Practically, this means that secondary EU law prevails over the ECHR in all but the most extraordinary cases. Yet, neither should one fall into the other extreme and see therein an acknowledgment of a hierarchical superiority of secondary EU law. First, the wording of the decision is incompatible with such an understanding.[67] Second, as has been mentioned, the ECtHR subjects *primary* (treaty) EU law postdating the Convention to its scrutiny, which

'When Soering Went to Iraq…: Problems of Jurisdiction, Extraterritorial Effect and Norm Conflicts in Light of the European Court of Human Rights' Al-Saadoon Case', 1 *Goettingen Journal of International Law* (2009) 459–518 at 510.

62. *Bosphorus*, *supra* note 47, resting essentially on the less famous precursor case *M. & Co. v. Germany*, *supra* note 46. The *Bosphorus* approach has recently been confirmed in *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, Grand Chamber, Judgment (21 January 2011), at para. 338 (*obiter dictum*, as Art. 3 of the Dublin Regulation did not oblige Belgium to return the asylum seeker to Greece [see *ibid.*, at paras 74, 339–40]).
63. *Bosphorus*, *supra* note 47, at *paras* 149–51.
64. See the *Matthews* case, *supra* note 42 and accompanying text.
65. *Bosphorus*, *supra* note 47, at para. 155.
66. *Ibid.*, at para. 156.
67. *Ibid.*, at para. 153: '[A] Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question

makes it logically impossible that the same court considers *secondary* EU law superior to the ECHR (if A is superior to B and B superior to C, C cannot be superior to A). Third, the ECtHR reserves the possibility to declare a violation of a Convention right where its protection by the EU itself is 'manifestly deficient', which means that 'when push comes to shove', the ECHR is still given priority. Thus, the approach of the Court should rather be seen as a pragmatic solution which takes account of the fact that states do transfer substantial competences to supranational organisations like the EU and cannot, once they have done so, realistically refuse to implement the secondary law emanating from such an organisation. Therefore, it would simply be unfair and impractical to hold them responsible according to the normal standards.

2.2.3. Conflicts with Customary International Law

In addition to conflicts between ECHR obligations and obligations under other treaties or EU law, the ECtHR has also had to deal with conflicts or tensions between the ECHR and customary international law. So far, this has been limited to the field of immunities.

In the *Al-Adsani* case[68], a torture victim had tried to sue Kuwait in England. The English courts had rejected the suit on account of Kuwait's sovereign immunity. Al-Adsani claimed that this violated his right of access to a court under Article 6 ECHR. The ECtHR agreed that granting an immunity curtails this right, and that this is only permissible if it pursues a legitimate aim and is proportional.[69] It considered 'complying with international law to promote comity and good relations between States through the respect of another State's sovereignty' a legitimate aim.[70] Regarding proportionality, the Court held that 'measures …

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was a consequence of domestic law or of the necessity to comply with international legal obligations [like the EEC regulation in question]'.

68. *Al-Adsani v. United Kingdom*, Application no. 35763/97, European Court of Human Rights, Grand Chamber, Judgment (21 November 2001).
69. *Ibid.*, at para. 53.
70. *Ibid.*, at para. 54. – One could argue that the phrase 'to promote comity and good relations between States through the respect of another State's sovereignty' is redundant, because 'complying with international law' (especially the law of immunity) always 'promote[s] comity and good relations between States'. However, it seems that the Court sees compliance with international law and the 'promotion of comity and good relations between States' as separate legitimate aims. This becomes apparent in the slightly different formulation in the simultaneous *McElhinney* judgment, *infra* note 81, where the Court speaks of 'compliance with generally recognised principles of international law *and* the promotion of harmonious relations, mutual respect and understanding between nations' as the legitimate aim (at para. 28) (emphasis added). It is further confirmed by *Cudak* and *Sabeh el Leil*, *infra* note 83, where the Court *denied* an immunity under international law, and nonetheless accepted a legitimate aim. This could be explained by the view that the granting of immunity serves the legitimate purpose of promoting 'comity and good relations between States' or 'harmonious relations, mutual respect and understanding between nations' even where it is not mandated

which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1'.[71] This amounts to a presumption of proportionality. Accordingly, one would have expected the Court to examine whether it was justified to overturn this presumption in the present case. In reality, it confined itself to examining whether international law provided for an immunity of states against claims for damages for torture.[72] When it came to a positive result, it jumped directly to the conclusion that there was no 'unjustified restriction' of Article 6.[73] It therefore appears that observing an internationally mandated immunity in itself justifies a restriction of the right of access to a court, both under the headings of legitimate aim and of proportionality. It is at least unclear and hard to imagine what special circumstances could override this 'principle', if the quest of a torture victim to seek compensation cannot. In effect, the approach adopted by the Court means that the law of state immunity prevails over the ECHR.

This reading is confirmed by other immunity cases, decided simultaneously with or subsequently to *Al-Adsani*:

In *Kalogeropoulou v. Greece and Germany*, the Court found that international law provided for state immunity from civil claims or enforcement proceedings such as the one at issue.[74] Accordingly, it saw a legitimate aim in the granting of such an immunity by Greece to Germany. Concerning the proportionality of this measure, the Court, while repeating the 'in principle'-formula from *Al-Adsani*, again simply examined the state of international law, and when it came to the above-mentioned result, held that '[a]ccordingly', there had been no 'unjustified interference with [the] right of access to a tribunal'.[75] This confirms that to satisfy the criterion of 'proportionality' (as well as that of a legitimate aim), it is sufficient for a measure to be required by international customary law.

In *Fogarty v. the United Kingdom*, the Court noted that there was no unanimous view on the immunity of states from claims related to employment in a foreign mission or embassy, and left the issue undecided.[76] Nonetheless, it affirmed without hesitation that the United Kingdom had pursued a legitimate

by international law. An alternative explanation could be that the Court accepted that the defendant states had acted in the (false) *belief* that international law obliged them to grant an immunity, which should also constitute a legitimate aim.

71. *Al-Adsani*, *supra* note 68, at para. 56.
72. *Ibid.*, at paras 57–66.
73. *Ibid.*, at para. 67.
74. *Kalogeropoulou v. Greece and Germany*, Application no. 59021/00, European Court of Human Rights, Decision (12 December 2002), section D.1.a of the part 'The law'.
75. *Ibid.*
76. *Fogarty v. the United Kingdom*, Application no. 37112/97, European Court of Human Rights, Grand Chamber, Judgment (21 November 2001), at para. 37.

aim by granting immunity to the United States,[77] maybe because the UK could plausibly assert a belief to be obliged to do so by international law, or because even without such belief, the granting of an immunity serves to promote 'comity and good relations between States'[78]. Concerning proportionality, the Court again simply examined the state of international law, and when found it to be ambiguous, it held without anything more that the United Kingdom had not 'exceeded the margin of appreciation allowed to States in limiting an individual's access to court'.[79] It appears that to be 'proportional', it suffices if a measure is arguably intended to implement international law.

In *McElhinney v. Ireland*, the Court also left open the existence of an immunity under international law for claims of the kind at issue.[80] Still, as in *Fogarty*, it did not hesitate to accept the legitimacy of the aim and the proportionality of the Irish decision to accord immunity, on the basis of not much more than the possibility that it was mandated by international law.[81]

In the more recent cases of *Cudak v. Lithuania* and *Sabeh el Leil v. France*, the Court came to the conclusion that the defendant states had granted immunities even though they had not been required to do.[82] Nonetheless, the Court accepted that the defendant states had pursued a legitimate aim.[83] Under the heading of 'proportionality', the Court then examined whether international law did prescribe an immunity in the cases at hand; as mentioned, with a negative result, leading to the declaration of a violation of Article 6 ECHR.[84] This implies again that proportionality and compliance with international law are congruent, at least when the state of international law is clear.

The case law described can be summarized as follows: Wherever a state has rejected a suit out of an at least arguable duty under the international law of state immunity, the ECtHR considers the restriction of the right of access to a court justified. Where, on the other hand, clearly no such duty existed, the restriction is considered a violation of Article 6. At least de facto, this corresponds to a priority of the law of state immunity over the ECHR.

This solution has much to be said for. The customary law on state immunity predates the ECHR, and it is universally valid, not only for the members of the

77. *Ibid.*, at para. 34.
78. See note 70 above.
79. *Fogarty*, at paras 35–39.
80. *McElhinney v. Ireland*, Application no. 31253/96, European Court of Human Rights, Grand Chamber, Judgment (21 November 2001), at para. 38.
81. *Ibid.*, at paras 35–40. The Court also pointed to the possibility of bringing an action against the UK (the state protected by the presumed immunity) in this state itself (at para. 39).
82. *Cudak v. Lithuania*, Application no. 15869/02, European Court of Human Rights, Grand Chamber, Judgment (23 March 2010); *Sabeh el Leil v. France*, Application no. 34869/05, European Court of Human Rights, Grand Chamber, Judgment (29 June 2011).
83. For an explanation, see note 71 above.
84. *Cudak*, *supra* note 82, at paras 62–74; *Sabeh el Leil*, *supra* note 82, at paras 56–67.

ECHR. It is comparable with a preceding treaty with third states like the Four Powers agreement in the *Hess* case. Third states would hardly accept that their rights should be diminished by a subsequent agreement to which they are not parties and which therefore is *res inter alios acta* for them.

2.2.4. Conclusion

Contrary to the expectation that a treaty body inevitably gives priority to the agreement which it is charged to implement, the ECHR organs have not asserted a general primacy of the Convention. Instead, the Commission in the *Hess* case can at least be understood to have granted exactly this priority to earlier treaties with third states, and the ECtHR, at least in practical terms, does the same with regard to secondary EU law and the customary law of immunity. In this respect, the ECHR organs are even more deferential to other international law vis-à-vis the ECHR than the member states. However, the Court clearly asserts a priority of the Convention over later treaties.

This case law is in line with pronouncements of the Court that the Convention should be interpreted in light of and in harmony with other rules of international law.[85] With regard to earlier customary law and earlier treaties with third states, it also corresponds to an arguable conflict rule under general international law, which would grant priority to the earlier norm.[86]

3. Possible Conflict Rules under International Law Supporting the ECHR Practice

3.1. Sources for Conflict Rules

After sketching the practice of states and ECHR organs on collisions between the Convention and other treaties, this section will now explore whether international law contains rules for such conflicts, either backing or contradicting the

85. *Al-Adsani*, *supra* note 68, at para. 55 ('The Court must … take the relevant rules of international law into account … The Convention should so far as possible be interpreted in harmony with other rules of international law'); *Al-Saadoon*, *supra* note 23, at para. 126; *Capital Bank AD*, *supra* note 47, at para. 111; *Cudak*, *supra* note 82, at para. 56; *Demir and Baykara v. Turkey*, Application no. 34503/97, European Court of Human Rights, Judgment, Grand Chamber (12 November 2008), at para. 67 ('[T]he Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties' – but note that obligations owed towards third states would not be covered by this formula); *Sabeh el Leil*, *supra* note 82, at para. 48.

86. See section 3.3.1.2.2. *infra*.

practice described. These rules will be looked for in treaty law, customary law and general principles of law.

As to *treaty law*, the only instrument potentially containing general rules on treaty conflicts is the Vienna Convention on the Law of Treaties. Its Article 30(4)(b), dealing with incompatible treaties between partially identical parties, will be explored in section 3.3.1.1 below.

While identifying relevant treaty law does not pose any difficulties in the present context, establishing *customary law* is more challenging. Customary international law develops out of the essentially uniform practice of a sufficient number of states over a usually prolonged period of time, performed out of a belief that it is obligatory *(opinio iuris)*. The required uniformity is especially lacking if the practice of large and important states,[87] and of states specially affected by relevant situations (in this case, treaty conflicts), is contrary to the asserted rule. Thus, to establish customary law from the ground up, it would be necessary to examine the practice of a great number of states, especially the larger ones. This would go beyond the scope of this article. Instead, it will rely mainly on pronouncements by state officials and scholars, which at least provide strong indications about the state of international law; the official statements, as verbal acts, also contribute by themselves to the development of customary law. A particularly rich source for official and semi-official statements about the law of treaty conflicts are the preparatory works for the VCLT. In addition, reference will be made to actual state practice wherever it is available (a subset of actual practice, the one about conflicts between the ECHR and other treaties, has already been surveyed in section 2).

The third source of international law, *general principles of law*, are mainly derived from rules or principles that can be found in all or at least the major national legal systems; these principles are then transposed and adapted to the inter-state level.[88] In addition, general principles of law are sometimes considered to include principles necessary for every legal system, principles of 'legal logic', and principles which can be derived inductively from more specific rules of international law.[89]

The distinction between customary law and general principles of law can be difficult, as both of them basically rest on widespread acceptance and state practice.

87. See *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), at 92 n.25: 'While it is not possible to claim that the practice or policies of any one country, including the United States, has such authority that the contours of customary international law may be determined by reference only to that country, it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a *bona fide* customary international principle.'
88. See, in detail, Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Nijhoff: Leiden and Boston, 2008) at 45–72.
89. See Pauwelyn, *Conflict*, *supra* note 5, at 125–26; see also Raimondo, *Principles, supra* note 88, at 1, 46.

For present purposes, however, it is not necessary to try to draw a clear line between them is.[90] It shall be sufficient if it can be established that a treaty conflict rule is generally recognized by states as a rule of international law; whether it is part of customary law or the general principles of law is of no practical importance.

Besides, it is unlikely that treaty conflict rules should exist in the form of general principles of law, even though some authors think differently[91]. Due to the fundamental structural differences between the international and the national legal systems, intra-state rules on norm conflicts are hardly transposable to the inter-state level,[92] and the other categories of general principles of law will not provide solutions for conflicts of the kind examined here either. For this reason and for the sake of simplicity, this article will only speak of customary law when it refers to rules that could either be customary law or general principles of law.

3.2 Excursus: Conflict Rules for Treaties Between Identical Parties

Before turning to the specific topic of this article – conflicts between treaties with only partially identical parties –, it is useful to look at conflicts between treaties with identical parties (AB/AB type). The inclusion of this closely related – and considerably less complex – subtopic gives a more complete picture of treaty conflicts and allows seeing the specific difficulties of ABC/AD conflicts more clearly. It is particularly useful to recognize the appropriate scope of the *lex posterior* and *lex specialis* principles, which are often falsely extended to conflicts of

90. For their distinction in detail, see Pauwelyn, *Conflict*, *supra* note 5, at 131–32.

91. Hans Aufricht, 'Supersession of Treaties in International Law', 37 *Cornell Law Quarterly* (1952) 655–700 at 655, considers *lex posterior* a general principle of law, applicable to treaty conflicts. Jenks, 'Conflicts', *supra* note 5, at 406, wants to develop a system of treaty conflict rules on the basis of general principles of law, drawing mainly on 'national practice in regard to conflicts between statutes [and] the principles applied in reconciling general and subordinate legislation, federal and State legislation under federal systems' ('as far as they are relevant or suggestive of analogies'). Jorge Cardona Lloréns, 'Le rôle des traités', in Rosario Huesa Vinaixa and Karel Wellens (eds), *L'influence des sources sur l'unité et la fragmentation du droit international* (Bruylant: Brussels, 2006) 25–51 at 44 considers 'certain general principles of law' following from 'juristic logic', like the *lex specialis* principle, a source of conflict rules, but with due regard to the 'particular characteristics of international law'. Lastly, Lauterpacht claimed that his rule of the nullity of the later treaty (text accompanying note 133 below) 'follow[ed] cogently from *general principles of law governing the subject*, from requirements of international public policy and the principle of good faith' (emphasis added) (YILC 1953 II, at 156; see also *ibid.*, at 158–59).

92. Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Nijhoff: Leiden and Boston, 2003) at 190–91; Suzanne Bastid, *Les traités dans la vie internationale* (Économica: Paris, 1985) at 164 ('[L]es règles de droit interne sur la compatibilité des normes ne peuvent être transposées que dans des cas exceptionnels dans la vie internationale'); Wilhelm Heinrich Wilting, *Vertragskonkurrenz im Völkerrecht* (Heymanns: Köln, Berlin, Bonn and München, 1996) at 78–79.

the ABC/AD type when the fundamental difference between the two types of conflicts is overlooked.

According to Article 30(3) VCLT, a later treaty prevails over an earlier one between the same parties on the same subject matter *(lex posterior derogat legi priori)*. To override this principle, Article 30(2) VCLT requires the later treaty to 'specify' that it cedes priority to the earlier one. If this is understood literally, only an express treaty clause could satisfy this requirement; the mere will of the parties to reserve the earlier agreement would be insufficient.[93] This understanding of Article 30(2) might appear to be supported by reading it against the countless other provisions in the Convention that plainly speak of the 'intent', 'consent' or 'agreement' of the parties, or even specifically of the 'intention' of the parties '[as it] appears from the … treaty *or is otherwise established*'[94]. However, the drafting history shows that the ILC had no intention to attach such a limitative meaning to Article 30(2); rather, the provision has to be understood as only exemplary.[95] Indeed, it would be pointless to try to impose a priority rule on treaty parties against their will, only because they did not express their consensus to subordinate the more recent treaty in writing. And even if their original consensus later broke down, it would go against *pacta sunt servanda* and good faith if the party that changed its mind could rely on a purported defect of form in the initial agreement.[96] Therefore, it is with good reason that the majority of the doctrine holds that whether expressed or implied, the *will of the parties* decides the priority question;[97] this may be called the *'voluntarist principle'*. To reconcile

93. See Sadat-Akhavi, *Methods*, *supra* note 92, at 205.
94. See Arts 28, 29, 44(3)(b), 59(1)(a) and 59(2); see also Arts 12(1)(a)+(b), 13, 14(1)(a)+(b), 15(a)+(b), 22(3), 25(2), 33(1)+(2), 44(1), 70(1) and 72(1) (substantially the same).
95. See Sadat-Akhavi, *Methods*, *supra* note 92, at 205–06.
96. See also Art. 3(a) VCLT (though only applicable to written treaties, the Convention does not affect the legal force of agreements in other forms).
97. See, in general (and without always taking a clear position themselves), Daillier, Forteau and Pellet, *Droit international public*, *supra* note 57, at 292–93 ('méthode subjective'), 297; Arnold Duncan McNair, *The Law of Treaties* (Oxford University Press, 1961) at 219; Pauwelyn, *Conflict*, *supra* note 5, at 328, 330–31, 380, 388 ('principle of contractual freedom of states'); Paul Reuter, *Introduction au droit des traités* (3rd edn, Presses Universitaires de France: Paris, 1995) at 119, para. 201 ('principe de l'autonomie de la volonté'); Charles Rousseau, *Principes généraux du droit international public* (1 vol. published, Pedone: Paris, 1944) at 812 ('En l'espèce c'est la volonté des parties qu'il y a lieu d'interpréter'); Sadat-Akhavi, *Methods*, *supra* note 92, at 63, 205–06, 211–12, 243, 249–50; Humphrey Waldock, Third Report on the Law of Treaties, YILC 1964 II, at 34–35, Art. 65(2) ('Whenever it appears from the terms of a treaty, the circumstances of its conclusion or the statements of the parties that their intention was that its provisions should be subject to their obligations under another treaty, … the other treaty shall prevail'), 37–38, para. 12; Vanderbruggen, *Above and Beyond the Treaty*, *supra* note 5, at 63–64 ('The phrase "when the treaty specifies" of Art. 30 (2) VCLT must be given a wide interpretation. "Specifies" does not mean "stipulate explicitly" or even "in writing". It does not exclude that the intent of the parties on this matter is not explicit and can only be established by using the general rule of interpretation or even supplementary

this common-sense position with the wording of Article 30(2) and (3) VCLT, it has been creatively suggested that two treaties *are* 'compatible' if the later one is supposed to give way to the earlier.[98]

The *lex posterior* rule thereby loses its quality of an (independent) conflict rule, but it keeps an important role as a presumption or an *aid to determine the will* of the parties: Usually, they intend to replace the provisions of an older treaty with those on the same subject matter in a later one, but this presumption can be rebutted by proof of a contrary intention.[99]

As a presumption, *lex posterior* is complemented by *lex specialis (lex specialis derogat legi generali / generalia specialibus non derogant)*.[100] This is not a conflict rule in itself either, but expresses the (again: rebuttable) experience that a general treaty is often not meant to override a more special one.[101] If in a concrete case,

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means of interpretation'), 70, 72–73, 102; YILC 1963 I, at 88, para. 15 (Mustafa Kamil Yasseen); 1964 I, at 120, para. 13 (Alfred Verdross); 1964 I, at 127, para. 8 (Paul Reuter); Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 257; and specifically with regard to *lex posterior* and *lex specialis* (as aids to determine the – decisive – will of the parties), see notes 100 and 102 below. The voluntarist principle also corresponds to the rules on *termination* of a treaty by way of conclusion of a later treaty on the same subject-matter, where it is sufficient that 'it appears from the later treaty *or is otherwise established* that the parties intended that the matter should be governed by that treaty' (Art. 59(1)(a) VCLT). – *Contra* Felipe Paolillo, 'Art. 30', in Olivier Corten and Pierre Klein (eds), *Les conventions de Vienne sur le droit des traités: commentaire article par article* (3 vols, Bruylant: Brussels, 2006), vol. II, 1247–83 at 1271 ('Les termes "[l]orsqu'un traité précise" ... ne laissent aucun doute quant au fait que le rapport de subordination ... d'un traité avec un autre traité doit être explicitement établi'); Jenks, 'Conflicts', *supra* note 5, at 426 (conflicts between treaties 'must be determined on the basis of law rather than intention' – but it is unclear whether this should also be true for conflicts between treaties with identical parties); Aufricht, 'Supersession', *supra* note 91, at 698 (apparently applying *lex specialis* and *lex posterior* as rules of law, independently of the will of the parties). – This leaves open the question of how to deal with a situation where the intention of the parties cannot be established by any means. In this case, the *hypothetical will* of the parties should be decisive (*cf.* Sadat-Akhavi, *Methods*, *supra* note 92, at 210–12, 249, who in such cases whould normally apply the *lex posterior* rule as corresponding most likely to the will of the parties [see note 108 below]).

98. Reuter, *Introduction*, *supra* note 97, at 119, para. 201.

99. ILC, *Fragmentation*, *supra* note 3, at 119, para. 230, and 125, para. 243; see also Pauwelyn, *Conflict*, *supra* note 5, at 331, 388. *Cf.* also Aufricht, 'Supersession', *supra* note 91, at 657 (*lex posterior* in cases of 'implied' or 'tacit' supersession of an earlier treaty), with the contradictory position *ibid.*, at 659 (failure to insert conflict clauses in a later treaty indicates the intent to uphold the prior treaty).

100. For further elaboration on the *lex specialis* principle, see section 3.3.2 *infra*.

101. Michael Akehurst, 'The Hierarchy of the Sources of International Law', 47 *British Year Book of International Law* (1974/75) 273–85 at 273, 274 above n.1; McNair, *The Law of Treaties*, *supra* note 97, at 219; Pauwelyn, *Conflict*, *supra* note 5, at 388 (rejecting *lex specialis* as a 'self-standing legal norm[]' and limiting it to a 'practical method[] in the search for the "current expression of state consent"') – but see also *ibid.*, at 331, 366 (seeing *lex specialis* as 'either an element to be looked at in determining the "current expression of state consent" *or a principle of customary international law in its own right*') (emphasis added), 406 (same); Charles Rousseau,

this leads to the precedence of an earlier, more specific treaty, the question of the compatibility with Article 30(3) and (2) VCLT returns. Some would again argue that these two treaties are in fact 'compatible'; others have suggested that due to their different degrees of concreteness, a general and a special treaty do not 'relate to the same subject matter' in the sense of Article 30 VCLT, so that this provision would not be applicable at all,[102] but this is quite far-fetched as well[103].

If a later, more specific treaty conflicts with an earlier general one, the interplay of the *lex specialis* and the *lex posterior* presumptions, leading to the same result, poses no problem. In the reverse situation, the question of priority among the presumptions arises. Castberg gives the example of a treaty on a particular subject with an arbitration clause, followed by a later treaty between the same parties whereby they agree to submit all their legal disputes to an international court. For Castberg, it cannot be supposed that the parties intended to replace the arbitration clause, specifically fitted to particular disputes, with the new general rule.[104]

'De la compatibilité des normes juridiques contradictoires dans l'ordre international', *Revue générale de droit international public* (1932) 133–92 at 177–78. This so-called 'voluntarist understanding of *lex specialis*' (see ILC, *Fragmentation*, *supra* note 3, at 37, paras 60–61; see also *ibid.*, at 62, para. 114) is also supported by the fact that *lex specialis* is not mentioned as a conflict rule in the VCLT at all. – Authors sometimes speak of lex specialis as an aid of *interpretation* (Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 257; ILC, *Fragmentation*, *supra* note 3, at 38–40, paras 65 and 67), but that is not to the point, because almost always, there will be no (conflict) clause which could be 'interpreted'. Instead, the (tacit or even hypothetic) will of the parties has to be ascertained, which can hardly be called 'interpretation'.

102. United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April – 22 May 1969, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Doc. A/CONF.39/11/Add.1, at 222, para. 41 (Ian Sinclair), 253, para. 41 (Humphrey Waldock); Anthony Aust, *Modern treaty law and practice* (2nd edn, Cambridge University Press, 2007) at 229; Léna Gannagé, *La hiérarchie des normes et les méthodes du droit international privé* (LGDJ: Paris, 2001) at 255–56; Paolillo, 'Art. 30', *supra* note 97, at 1263; Reuter, *Introduction*, *supra* note 97, at 119, para. 201; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984) at 98; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot: Berlin, 1984) at 501–02, para. 786; Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 257.

103. Against such an interpretation, Pauwelyn, *Conflict*, *supra* note 5, at 364–65 (but he agrees that Art. 30 VCLT does not stand in the way of an application of the *lex specialis* principle, if this is what the parties wanted: at 406), and Wilting, *Vertragskonkurrenz*, *supra* note 92, at 88–89.

104. Frede Castberg, 'La méthodologie du droit international public', 43 *Recueil des Cours* (1933) 313–83 at 334. – For similar examples and positions, see Law of Treaties Conference Records 2nd Sess., *supra* note 102, at 222, para. 41 (Ian Sinclair) (if a convention on liability in the field of nuclear energy with provisions on the recognition of corresponding judgments is followed by a general treaty on the recognition of judgments, the prior treaty is still applicable in its field because of its special nature), 253, para. 37 (Mustafa Kamil Yasseen) ('If a small number of States concluded a consular convention granting wide privileges and immunities, and those same States later concluded with other States a consular convention having a much larger number of parties but providing for a more restricted regime, the earlier convention would continue to govern relations between the States parties thereto if the circumstances or the intention of the parties justified its maintenance in force').

Thus, he gives precedence to the *lex specialis* over the *lex posterior* presumption. However, one could equally well imagine that the later treaty was in fact meant to override all previous dispute settlement provisions, or to complement them, permitting a choice between the procedures[105]. It all depends on the (actual or presumptive) will of the parties; there is no abstract priority between *lex specialis* and *lex posterior*, even though some authors tend to favour either the former[106] or the latter[107] in case of doubt. It is also possible that apart from *lex specialis* and *lex posterior*, other priority rules discussed below come into play – again solely as aids to determine the presumptive will of the parties. For instance, if states known to attach great weight to human rights conclude a treaty which conflicts with a prior human rights agreement between them, it could be presumed that they did not want the later treaty to be applied to the extent of the conflict.

3.3. Possible Conflict Rules for ABC/AD Conflicts

3.3.1. Lex prior / lex posterior

In this section, it will be examined whether the VCLT or customary international law offer any temporal priority rules (*lex posterior derogat legi priori* v. *prior in tempore, potior in iure/lex prior derogat legi posteriori*) for treaty conflicts of the ABC/AD type.

3.3.1.1. Article 30(4)(b) VCLT

Article 30(4)(b) VCLT provides that in a conflict between treaties relating to the same subject matter with only partially identical parties (AB/AC, ABC/AD etc.), *'as between a State party to both treaties [A] and a State party to only one of the treaties [B, C and D], the treaty to which both States are parties governs their mutual rights and obligations'*. This corresponds to the principles of *pacta sunt*

105. For the latter solution, see Sadat-Akhavi, *Methods*, *supra* note 92, at 232 ('The principle of cumulative application of instruments concerning dispute settlement'); Vanderbruggen, *Above and Beyond the Treaty*, *supra* note 5, at 76. But Sadat-Akhavi himself rejects that rule if the later treaty sets up a mandatory mode of dispute resolution; see *ibid.*, at 238–39.

106. Aufricht, 'Supersession', *supra* note 91, at 698 (see also Pauwelyn, *Conflict*, *supra* note 5, at 405 n.162); Ignaz Seidl-Hohenveldern and Torsten Stein, *Völkerrecht* (10th edn, Heymanns: Köln, Berlin, Bonn and München, 2000) at 95, no. 94 (a later treaty should be interpreted so as to leave unaffected a narrower, more detailed earlier treaty).

107. Sadat-Akhavi, *Methods*, *supra* note 92, at 246–47 (in the absence of any indications as to the will of the parties, the later treaty should prevail, as corresponding most likely to this will); similarly Pauwelyn, *Conflict*, *supra* note 5, at 405–09, 437–39 (*lex posterior* as the 'rule of first resort' [at 408, 439], or even as always prevailing over *lex specialis* [at 409, 438]), and Ian Sinclair, *The Vienna Convention*, *supra* note 102, at 93. Daillier, Forteau and Pellet, *Droit international public*, *supra* note 57, make contradictory statements: at 297, they favour (slightly) *lex specialis* over *lex posterior*; at 298, they do the opposite, referring to the 'implicit will' of the parties, which *lex posterior* is supposed to reflect best.

servanda[108] and *pacta tertiis nec nocent nec prosunt*[109]: The treaties with B/C and D are both binding for A in the respective relation *(pacta sunt servanda)*, and the positions of B/C and D are not impaired by the treaties concluded by A with other states *(pacta tertiis)*.

Thus, Article 30(4)(b), rather than offering A an escape route from the dilemma into which it has put itself, confirms it's 'double bind'. Particularly, the provision does not indicate that one of the treaties should be given priority.[110] Under the VCLT, it is rather up to A to decide which of the treaties it prefers to perform, thereby exposing itself to liability under the other treaty.[111] This corresponds to the 'principle of political decision' (section 3.3.8 below).

3.3.1.2. Customary Law and Doctrine

The fact that the VCLT does not contain a temporal (or any other) priority rule does not necessarily mean that no such rule exists; under customary international law, one treaty could still enjoy priority. Still, it indicates that such a rule is at least not too obvious or universally accepted; otherwise, it would be hard to understand why it was not incorporated into the VCLT, like the largely uncontroversial *lex posterior* principle for treaties with identical parties (Article 30(3)). Indeed, the *travaux préparatoires* show that while the special rapporteurs' drafts had provided

108. Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht* (2nd edn, 3 vols, De Gruyter: Berlin, 1989–2002), vol. I/3: *Die Formen des völkerrechtlichen Handelns; Die inhaltliche Ordnung der internationalen Gemeinschaft* (2002), at 694; Daillier, Forteau and Pellet, *Droit international public*, *supra* note 57, at 302; Sadat-Akhavi, *Methods*, *supra* note 92, at 64.

109. Aust, *Modern treaty law*, *supra* note 102, at 224; Daillier, Forteau and Pellet, *Droit international public*, *supra* note 57, at 302; Karl Doehring, *Völkerrecht* (C.F. Müller: Heidelberg, 1999) at 150–51, para. 349; Taslim Olawale Elias, *The Modern Law of Treaties* (Oceana: Dobbs Ferry, and Sijthoff: Leiden, 1974) at 55; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (3 vols, vols I/1 and I/2–4 in 9th edn, Longman: Harlow, 1992), vol. I/2–4, at 1212, para. 590; Nele Matz-Lück, 'Conflicts between Treaties', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online edition, <www.mpepil.com>, at para. 17; Paolillo, 'Art. 30', *supra* note 97, at 1275, para. 47; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff: Leiden and Boston, 2009), ad art. 30 at para. 15; Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 249.

110. For the sake of completeness, it shall be mentioned that a few voices have assumed that this provision gives priority to a bilateral treaty over the ECHR: See the decision of the Swiss Federal Administrative Tribunal of 15 July 2010, *supra* note 40 and accompanying text; Begdache, *Répudiation*, *supra* note 27, at 224–25, 227; Gannagé, *La hiérarchie*, *supra* note 102, at 254. They appear to believe that the bilateral treaty is, due to the smaller number of parties, *lex specialis* vis-à-vis the Convention and that Art. 30(4)(b) establishes such a *lex specialis* rule.

111. See Eric Suy, 'The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms', in Ulrich Beyerlin et al. (eds), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (Springer: Berlin, 1995) 267–77 at 276–77; Pauwelyn, *Conflict*, *supra* note 5, at 383–84, 426–27; Sadat-Akhavi, *Methods*, *supra* note 92, at 63–66, 72; Wilting, *Vertragskonkurrenz*, *supra* note 92, at 112–13; Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 268.

for a priority of the earlier[112] or even the nullity of the later treaty[113], and some ILC members and Conference delegates adopted these positions[114], the majority of them took no clear stance on the issue (apart from rejecting the nullity theory), instead contenting themselves with very general statements, implying or even explicitly stating that they did not recognize a priority rule – especially not a temporal one – under international law[115].

However, this should not discourage us from venturing to examine whether a priority rule based on the temporal succession of the treaties can nonetheless be found in customary international law, especially in view of the possibility that such a rule might have developed since the conclusion of the VCLT.

3.3.1.2.1. Nullity of the Later Treaty

Up to the middle of the 20th century, scholars usually regarded a treaty contradicting an earlier one as null and void, either because it was thought to have an impermissible or 'immoral' object, or because by entering a prior agreement, the state had lost the capacity to conclude a contradictory agreement.[116] Such was the view of authors like Vattel[117], Pufendorf[118], Wolff[119], Mably[120], Klüber[121], Phillimore[122],

112. See note 153 below.
113. See notes 132–133 and section 3.3.3.2 below.
114. See notes 143 (second sentence) and 155 below.
115. See YILC 1966 I, pt. 2, at 102, para. 88 (Mustafa Kamil Yasseen) ('He himself could not understand why priority should be given to the first treaty rather than the second'), para. 90 (Roberto Ago) (same). – For other voices rejecting a priority rule, see section 3.3.8 below.
116. For the theoretical underpinnings of the nullity theory, see Guyora Binder, *Treaty Conflict and Political Contradiction. The Dialectic of Duplicity* (Praeger: New York, 1988) at 39–42.
117. Emer de Vattel, *Le Droit des Gens* (2 vols, Leyden, 1758), vol. I, book 2, at paras 165, 315 (English translation in 'Harvard Draft Convention on the Law of Treaties', 29 *American Journal of International Law* [1935] [supp.] 653–1099 at 1025).
118. Samuel Pufendorf, *De jure naturae et gentium libri octo* (Hoogenhuysen: Amsterdam, 1688), book III, ch. VII, at para. 11.
119. Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (Halle, 1749) at 305–306, para. 383.
120. Gabriel Bonnot de Mably, *Le droit public de l'Europe, fondé sur les traités* (3rd edn, 3 vols, Compagnie des Libraires: Geneva, 1764) at 33–35.
121. Johann Ludwig Klüber, *Droit des gens moderne de l'Europe* (2 vols, Cotta: Stuttgart, 1819), vol I, at 228–29, para. 144 (a treaty violating the rights of third parties is 'not binding' because of 'moral impossibility of performance'), 261, para. 164(e).
122. Robert Phillimore, *Commentaries Upon International Law* (3 vols, Johnson: Philadelphia, 1855), vol. II, at 91, para. 97.6.

Martens[123], Heffter[124], Woolsey[125], Field[126], Fiore[127], Oppenheim[128], de Louter[129], Hall[130], Scelle[131], Lauterpacht[132], Fitzmaurice (in parts)[133], and probably also of Bluntschli[134]. A few times, states have taken the same position: In its dispute with Nicaragua about the American-Nicaraguan Bryan-Chamorro Treaty of 1914, Costa Rica called this treaty null because of a conflict with the Nicaraguan-Costa-Rican Cañas–Jerez Treaty of 1858.[135] The United States in its turn notified Japan and

123. Georg Friedrich de Martens, *Précis du droit des gens moderne de l'Europe*, (2nd edn, 2 vols, Guillaumin: Paris, 1864), vol. II, at 167, para. 53.
124. August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (5th edn, Schroeder: Berlin, 1867) at 159, para. 83.
125. Theodore D. Woolsey, *Introduction to the Study of International Law* (4th edn, Scribner and Armstrong, 1874) at 176, para. 101; see also *ibid.*, at 186, para. 109.
126. David Dudley Field, *Outlines of an International Code* (2nd edn, Baker and Voorhis: New York, and Trübner: London, 1876) at 81, para. 198.
127. Pasquale Fiore, *Il diritto internazionale codificato* (2nd edn, Unione Tipografico-Editrice: Torino, 1898) at 266, para. 628(c); 271, para. 643; 288, para. 710; 289, para. 714.
128. Lassa Oppenheim, *International Law: A Treatise* (2 vols, Longmans and Green: London, 1905), vol. I: *Peace*, at 526–27, paras 501, 503. The current edition of this work from 1992 (cited *supra* note 109) leaves the question open (at 1214–15, para. 591).
129. Jan de Louter, *Le droit international public positif* (2nd edn, 2 vols, Oxford University Press, 1920), vol. I, at 480.
130. William Edward Hall, *A Treatise on International Law* (8th edn, A. Pearce Higgins ed., Oxford University Press, 1924) at 396–97, para. 112.6.
131. Georges Scelle, 'Règles générales du droit de la paix', 46 *Recueil des Cours* (1933) 327–703, at 471–76 (with the exception of status treaties, which he saw as hierarchically superior and which therefore were supposed to derogate also older treaties; see note 220 below).
132. See Art. 16 of Hersch Lauterpacht's draft articles for the law of treaties as the first special rapporteur for the ILC, YILC 1953 II, at 93 (with a clarification in YILC 1954 II, at 133, 138, that the nullity should affect only the relevant provisions and not the whole treaty, if they were severable); see also note 92 above. For detailed discussions of Lauterpacht's proposal, see Binder, *Treaty Conflict*, *supra* note 116, at 52–55; Klabbers, *Treaty Conflict*, *supra* note 24, at 71–74; Emmanuel Roucounas, 'Engagements parallèles et contradictoires', 206 *Recueil des Cours* (1987) 9–288 at 96–97; Jan B. Mus, 'Conflicts Between Treaties in International Law', *Netherlands International Law Review* (1998) 208–32 at 227–29; Sadat-Akhavi, *Methods*, *supra* note 92, at 66–67; Jenks, 'Conflicts', *supra* note 5, at 443; Pauwelyn, *Conflict*, *supra* note 5, at 425; Wilting, *Vertragskonkurrenz*, *supra* note 92, at 38–41, 92–94; Orakhelashvili, 'Art. 30', *supra* note 53, at 767–68; Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 248; Paolillo, 'Art. 30', *supra* note 97, at 1250–51.
133. See Art. 19 of Gerald Fitzmaurice's draft articles for the law of treaties as special rapporteur for the ILC, YILC 1958 II, at 27–28, 44–45 (nullity for treaties conflicting with multilateral treaties of the 'interdependent' or 'integral' type; for details, see section 3.3.3.2 below).
134. See Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (Beck: Nördlingen, 1868) at 236–37, para. 414 (for French version, see 'Harvard Draft', *supra* note 117, at 1210, and Hall, *Treatise*, *supra* note 130, at 397 n.1). The passage could also be read to mean that a protest of a party to the older treaty ensures its priority, without in the strict sense nullifying the newer one. For a reading that Bluntschli meant nullity, see 'Harvard Draft', *supra* note 117, at 1025.
135. 11 *American Journal of International Law* (1917) at 181, 197, 202, 227. According to Christine Chinkin, *Third Parties in International Law* (Oxford University Press, 1993) at 74, the

China in the famous Stimson note of 1932 that it does not 'intend to recognize any treaty or agreement entered into between these governments, … which may impair the treaty rights of the United States … in China';[136] this policy apparently implied that such treaties were regarded as void or voidable[137].

Despite the long and once broad doctrinal support enjoyed by this theory, no national or international court has ever declared a treaty void on that basis.[138] The only backing that it can muster from international case law, are a few individual opinions in the *Oscar Chinn*[139] and the *European Commission of the Danube*[140] cases before the PCIJ, which considered a later conflicting treaty void, but both

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nullity of the later treaty is also 'the inevitable conclusion' of the court's holding in this case. Similarly, Rousseau, *Principes généraux*, *supra* note 97, at 803; the same, *Droit international public* (3 vols, Sirey: Paris, 1970–1983), vol. I: *Introduction et sources* (1970), at 162; and Seidl-Hohenveldern, 'Widersprüchliche Verpflichtungen', *supra* note 51, at 184, maintain that the court regarded Nicaragua legally incapable to conclude the later treaty because of its contradiction with the earlier one; this would entail its nullity as well. In truth, however, such a view is nowhere expressed in the judgment. The court only stated that concluding the later treaty violated the earlier one (11 *American Journal of International Law* [1917] at 210, 212, 228–29; see also Josef L. Kunz, 'The Meaning and the Range of the Norm Pacta Sunt Servanda', 39 *American Journal of International Law* [1945] 180–97 at 193 n.62: '[T]he Court decided that the Bryan-Chamorro Treaty was illegal, but not void'). This restraint was due to the fact that the United States were not subject to the jurisdiction of the court, so that it considered itself rightly incapable of adjudging the validity of the Bryan-Chamorro Treaty (see note 51 above). – It is, however, true that the court declared in a related dispute between Nicaragua and El Salvador that 'Nicaragua lacks the legal capacity to alter by itself the *status jure* existing in the Gulf of Fonseca' (11 *American Journal of International Law* [1917] 674 at 728), which Nicaragua had attempted to do by granting rights in the Gulf to the United States in the Bryan-Chamorro Treaty. But this rested on the fact that the Gulf was commonly owned by Nicaragua, El Salvador and Honduras (based on historic rights, not a treaty), so that indeed Nicaragua alone was incapable of granting a right *(in rem)* to the United States. It does not mean that Nicaragua would have been incapable of concluding a purely obligatory (instead of a dispositive) treaty with the United States, conflicting with its obligations towards El Salvador and Honduras, all the more so if these obligations were only contractual as well.

136. Note of January 7, 1932, 26 *American Journal of International Law* (1932) 342, also reproduced in *Oppenheim's International Law*, *supra* note 109, vol. I/1, at 184, para. 54.
137. See 26 *American Journal of International Law* (1932) at 344, 346–47.
138. Julio Barberis, 'Le concept de "traité international" et ses limites', 30 *Annuaire français de droit international* (1984) 239–70 at 261–62; Klabbers, *Treaty Conflict*, *supra* note 24, at 61; Matz-Lück, 'Conflicts between Treaties', *supra* note 109, at para. 17. For fairness, it must be added that at least what concerns international tribunals, these have apparently never been 'directly compelled to pass upon the question of the effect of conflicts or incompatibility [with other treaties or international law] upon the validity of a treaty' (McNair, *The Law of Treaties*, *supra* note 97, at 214), so that this case law (or the absence thereof) not decisive in itself.
139. *The Oscar Chinn Case* (UK/Belgium), PCIJ Series A/B, No. 63 (1934), Separate Opinions of Judges van Eysinga, at 131, and Schücking, at 148.
140. *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion, PCIJ Series B, No. 14 (1927), Observations by Judge Nyholm, 71 at 73, and maybe also the Dissenting Opinion of Judge Negulescu, 84 at 129.

times, the majority did not follow them[141]. Anyway, these cases concerned *inter se* agreements,[142] which are not necessarily subject to the same rules as conflicts of the ABC/AD type.

In addition to the fact that the nullity theory is not advocated by writers anymore at all, this lack of supporting case law makes it very unlikely that the theory reflects (current) international law. The VCLT suggests the same conclusion: If Article 30(4)(b) states that the rights and obligations of the parties to the earlier and the later treaty are each governed by the respective treaties, it implies that the treaties are both valid. The discussions during the elaboration of the VCLT clearly show that this was indeed the opinion of the large majority of state representatives.[143]

3.3.1.2.2. Priority of the Earlier Treaty

Up to at least 1935, the great majority of authors who did not go so far as to support the nullity theory, at least advocated the *lex prior* rule.[144] This was the

141. In both cases, the majority did not explicitly reject or even examine the nullity argument. In *Oscar Chinn*, it contended itself with the observation that the parties to the dispute had agreed that their legal relationship should be governed by the later treaty (PCIJ Series A/B, No. 63 [1934] at 79–80); similarly, in *European Commission of the Danube*, it did not admit the argument that the later treaty might be void, 'as all the Governments concerned in the present dispute have signed and ratified both' treaties (PCIJ Series B, No. 14 [1927] at 23). Most authors therefore regard these opinions as inconclusive for this issue (see Binder, *Treaty Conflict*, *supra* note 116, at 24). However, on the assumption that a court has to consider the nullity of a legal act *ex officio*, some authors have seen them as implicit rejections of the nullity theory (e.g., Humphrey Waldock in his second and third reports on the law of treaties, YILC 1963 II, at 56–57, and 1964 II, at 41–42; see Binder, *Treaty Conflict*, *supra* note 116, at 24, 174 n.296).

142. To be precise, in *Oscar Chinn*, the later agreement included one additional party (Japan) that was not bound by the previous treaty; but because the parties to the dispute (the United Kingdom and Belgium) were parties to both treaties, the Court could certainly treat the case as an *inter se* situation.

143. See YILC 1963 II, at 53, Art. 14(2)(a); 1963 I, at 202, para. 75 (finding 'the idea of nullity attractive from the academic point of view, but it did not reflect the present position in international law'); 1964 II, at 35, 44; 1964 I, at 121, paras 22 and 25 (always Humphrey Waldock); 1963 I, at 88, paras 17–18; 1964 I, at 122, para. 33 (Mustafa Kamil Yasseen); 1963 I, at 89, paras 26–27; 1964 I, at 122, para. 30 (Antonio de Luna); 1963 I, at 91, para. 52, and at 200, paras 49–50, 52 (Roberto Ago), 91, para. 55; 1966 I, pt. 2, at 101, para. 84 (Alfred Verdross); 1963 I, at 91–92, para. 60 (André Gros), 200, para. 56 (Milan Bartoš); 1964 I, at 123, para. 47 (Herbert W. Briggs), 126, para. 4 (José M. Ruda), 127, para. 9 (Paul Reuter) (all rejecting the nullity of the later treaty). *Contra* YILC 1963 I, at 91, para. 57 (Radhabinod Pal) (conflict with a prior treaty 'at some points touched upon the issue of validity' of the later one), 197, para. 19 (Grigori Tunkin) (voidness of the later treaty; but see also notes 155 and 206 *infra* for a different position of this Soviet representative); 1964 I, at 120, para. 20 (Eduardo Jiménez de Aréchaga).

144. In 1935, the 'Harvard Draft', *supra* note 117, found it the 'unanimous' view of writers that the earlier treaty should prevail (by way of its priority or of the nullity of the later treaty) (at 1025). One exception might be Henry Bonfils, *Manuel de droit international public* (4th edn,

position of Calvo[145], Pradier-Fodéré[146], Wright[147] and Wilson[148], as well as of the Harvard Draft Convention on the Law of Treaties[149].

As a general principle, Grotius too appeared to favour a primacy of the earlier treaty.[150] However, a state bound by military alliances with several states was not required to fulfil any of them in a war between the allies.[151] Grotius does not give any reasons why in this particular situation the conflicting treaty obligations should 'neutralize' each other – in the very sense of the word. Apparently he borrowed this proposition from Gentili,[152] who apart from this special case also displayed a preference for the earlier treaty.

During the *travaux préparatoires* to the VCLT, Humphrey Waldock, the fourth and last special rapporteur of the ILC, suggested that an earlier treaty should prevail over a conflicting later one.[153] Even though several representatives spoke out in favour of this proposal or otherwise of a priority of the earlier treaty[154], others dismissed that idea[155]; in the end it was, as we have seen, not included in

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Paul Fauchille ed., Arthur Rousseau: Paris, 1905) at 477, para. 855.D, for whom apparently *both* conflicting treaties would be null, or at least would not have to be performed.

145. Charles Calvo, *Le droit international theorique et pratique* (6th edn, 6 vols, Guillaumin etc.: Paris, and Puttkammer and Mühlbrecht: Berlin, 1887–1896), vol. III (1888) at 398, para. 1659.
146. Paul Pradier-Fodéré, *Traité de droit international public européen et américain* (8 vols, Pedone: Paris, 1885–1906), vol. II (1885) at 753–54, para. 1083. However, a treaty in which one party expressly undertakes to violate an earlier treaty is considered null because of immorality (at 752, para. 1082).
147. Quincy Wright, 'Conflicts Between International Law and Treaties', 11 *American Journal of International Law* (1917) 566–79 at 576, 579.
148. George Grafton Wilson, *International Law* (8th edn, Silver and Burdett: New York etc., 1922) at 216, para. 88(b).
149. 29 *American Journal of International Law* (1935) (supp.) 653–1099 at 661–62 (Art. 22(c)), 1024–29 (with numerous examples from practice); for the Harvard Draft, see also Mus, 'Conflicts', *supra* note 132, at 228; Jenks, 'Conflicts', *supra* note 5, at 442–43; Orakhelashvili, 'Art. 30', *supra* note 53, at 767; Pauwelyn, *Conflict*, *supra* note 5, at 424–25.
150. Hugo Grotius, *De jure belli ac pacis libri tres* (Nicolas Buon: Paris, 1625) at book II, ch. XV, para. 13.3.
151. *Ibid.*, at para. 13.2. At least one more recent author has followed him on this point: Bonfils, *Manuel*, *supra* note 144, at 477, para. 855.D.
152. Alberico Gentili, *De Iure Belli Libri Tres* (William Anton: Hanau, 1612) at book III, ch. XVIII.
153. YILC 1963 II, at 53–54, Art. 14; 1964 II, at 35, Art. 65(4). – For discussions of Waldock's proposal in the literature, see Binder, *Treaty Conflict*, *supra* note 116, at 55–62; Klabbers, *Treaty Conflict*, *supra* note 24, at 77–80; Orakhelashvili, 'Art. 30', *supra* note 53, at 769–71; Paolillo, 'Art. 30', *supra* note 97, at 1253–57; Roucounas, 'Engagements', *supra* note 132, at 99–101; Mus, 'Conflicts', *supra* note 132, at 229–30; Sadat-Akhavi, *Methods*, *supra* note 92, at 68–70.
154. YILC 1963 I, at 88, para. 18 (Mustafa Kamil Yasseen), para. 24 (Grigori Tunkin) (with exceptions, see note 205 below), 91, paras 49 and 52 (Roberto Ago); 1966 I, pt. 2, at 100, para. 69 (Grigori Tunkin); United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Doc. A/CONF.39/11, at 164, para. 5 (Anatoly N. Talalaev), para. 8 (M. Sarin Chhak).
155. See note 154 above.

the VCLT. This outcome provides support for the thesis that a priority rule is not recognized as part of customary international law.[156] One Commission member even found that in view of the UN resolutions 'on the emancipation of peoples', 'it had become appropriate to regard a recent treaty as superseding an earlier treaty' because '[m]any old treaties belonged to the colonial era and should not be given precedence over more recent ones'.[157] Others have not gone so far as to proclaim the *lex posterior* principle as the decisive rule to resolve treaty conflicts, but have at least mentioned it as one factor to be taken in consideration.[158] As the *lex prior* principle is usually mentioned as another relevant factor, the temporal element effectively loses its significance. In any case, it is remarkable that very few authors still advocate a strict *lex prior* rule,[159] usually preferring a more eclectic approach. Some authors explicitly proclaim the hierarchical equality of earlier and later treaties.[160] Of course, those authors who reject the existence of any priority rules[161] also reject a *lex prior* or *lex posterior* rule.

National and international practice, while scarce, points towards a *lex prior* rule. A Dutch District Court in 1952 held that the obligations under a Convention between, among others, the Netherlands and Belgium 'could not be reduced by a later Convention between the Netherlands and Indonesia'.[162] The ECJ has held that not only under positive EU law[163], but also under 'principles of international law', the EU Treaty does not affect obligations of member states under earlier trea-

156. See text accompanying note 116 above.
157. YILC 1963 I, at 201, para. 64 (Abdul Hakim Tabibi).
158. See Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 265–66. – Others mention the *lex posterior* principle as a rule to resolve treaty conflicts without discussing at all whether the treaties must have identical parties (Walter Kälin, *Das Prinzip des non-refoulement. Das Verbot der Zurückweisung, Ausweisung und Auslieferung von Flüchtlingen in den Verfolgerstaat im Völkerrecht und im schweizerischen Landesrecht* ([Lang: Berne and Frankfurt a.M., 1982] at 58).
159. But see Lepper, 'Short', *supra* note 10, at 910–11 (customary international law and the VCLT [!] prescribe a priority of the earlier treaty). See also Cardona Lloréns, *supra* note 91, at 38–39 (advocating a *lex prior* rule for earlier 'interdependent' and – if protecting 'collective interests' – 'integral' treaties; for these notions, see section 3.3.3.2 below).
160. E.g., Seidl-Hohenveldern, 'Hierarchy of Treaties', *supra* note 48, at 10.
161. See section 3.3.8 below.
162. *In re B.*, District Court of the Hague (26 May 1952), ILR 1952 No. 55. It is not apparent that a true conflict between the two treaties existed, so the statement will only have the value of an *obiter dictum*.
163. Art. 351(1) TFEU: 'The rights and obligations arising from [previous] agreements between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'; see Aust, *Modern treaty law*, *supra* note 102, at 221–22.

ties with third parties; such obligations may be performed even when conflicting with EU treaty law.[164] Advocate General Lagrange has expressed the same view.[165]

In the national case law on conflicts between the *ECHR* and other treaties described in section 2.1 above, precedence was almost always given to the ECHR when it was the prior treaty. In the Dutch *Short* decision and the decisions of the French *Cour de cassation* of 17 February 2004, the Convention even prevailed despite being more recent. In none of these decisions, however, was the issue of the temporal order even mentioned. This strongly indicates that they were based on the *content* of the treaties rather than on their temporal sequence, so that they do not count as state practice with respect to a possible *lex prior/posterior* rule. The sole exception – both with regard to relying on the chronological order and to subordinating the ECHR – is the decision of the Swiss Federal Administrative Tribunal of 15 July 2010, where a bilateral treaty was said to prevail over the ECHR as *lex posterior*.

Some support for *lex prior* could also be seen in the fact that when treaties contain conflict clauses, they almost invariably provide for the priority of previous treaties with partially different parties.[166] Opposite clauses would

164. Case 812/79, *Attorney General v. Burgoa* [1980] ECR 2787 at para. 8 (see also Sadat-Akhavi, *Methods*, *supra* note 92, at 157–58, and Klabbers, *Treaty Conflict*, *supra* note 24, at 127–29); Case C-249/06, *Commission v. Sweden*, [2009] ECR I-1335 at para. 34; Case C-62/98, *Commission v. Portugal* [2000] ECR I-5171 at para. 44. – But see text accompanying notes 255–261 below for the important exception made in the *Kadi* judgment for human rights guarantees of the EU Treaty.

165. Case 10/61, *Commission v. Italy* [1962] ECR 12 at 17 (provision corresponding to today's Art. 351(1) TFEU 'is merely stating an established principle of international law'); see Sadat-Akhavi, *Methods*, *supra* note 92, at 158.

166. See Elias, *Modern Law*, *supra* note 109, at 55–56; YILC 1966 II, at 215 ('Such clauses … appear in any case of incompatibility to give pre-eminence to the other treaty'); 1964 II, at 37–38; Klabbers, *Treaty Conflict*, *supra* note 24, at 14 (Art. 103 UN Charter as the only current conflict clause providing for the priority of the treaty that contains it); see also Wilting, *Vertragskonkurrenz*, *supra* note 92, at 67–74 (especially 72–73) (with examples). For an ancient example of such a clause, see the alliance between Carthage and Macedonia of 215 BC, as reported by Polybios, *Histories*, at book VII, 9.8, 9.9, 9.16, and Grotius, *De jure belli*, *supra* note 150, at book II, ch. XV, para. 13.2 ('We shall be the enemies of your enemies, with the exception of the kings, states, and ports with which we have treaties of friendship'). One possible exception is the peace treaty between Israel and Egypt of 1979 (18 ILM [1979] 362), which is also binding and applicable 'in the event of a conflict between the obligations of the Parties under the present Treaty and any of their other obligations' (Art. VI(5)). However, this provision is counteracted by an annex according to which 'there is no assertion that this Treaty prevails over other Treaties' (18 ILM at 392); see Binder, *Treaty Conflict*, *supra* note 116, at 14–15. Another partial exception appears to be the UN Convention on Biological Diversity (5 June 1992, in force 29 December 1993, 1760 UNTS 79), which in Art. 22(1) claims priority over existing treaties in case of 'serious damage or threat to biological diversity' (see Klabbers, *Treaty Conflict*, *supra* note 24, at 101).

anyway be largely ineffective, because they could of course not diminish the rights of third parties.[167]

Overall, state practice supporting a *lex prior* rule is probably not sufficient for it to be already considered customary law; but it could be seen as a rule *in statu nascendi*. Support for a *lex posterior* rule, on the other hand, is almost non-existent, so that its customary nature does not come into question.[168] This lack of support for a *lex posterior* rule is not surprising in view of the difficulty of justifying such a rule. The only serious argument in its favour would be the need to preserve the ability of treaty law to evolve in accordance with the changing needs and circumstances of the international community. This could be impeded if a party to an out-dated treaty was able to prevent the other party or parties from concluding new treaties better adapted to the current situation.[169] However, in balance, the need to uphold the bindingness of (prior) treaties and to preserve the rule

167. See *Oppenheim's International Law*, *supra* note 109, vol. I/2–4, at 1213 n.9; Pauwelyn, *Conflict*, *supra* note 5, at 331–32, 437.

168. See 'Harvard Draft', *supra* note 117, at 1029 ('Apparently in no case in practice has the general principle of the priority of the obligations previously assumed by a State over those subsequently assumed by it with a third State, ever been seriously denied, and no decision of an international tribunal is known in which the contrary principle has been sustained'); Gannagé, *La hiérarchie*, *supra* note 102, at 257; Guerchon, 'La primauté', *supra* note 28, at 706 ('[N]i la doctrine ni la jurisprudence n'ont été jusqu'à estimer que la … norme la plus récente devait primer la plus ancienne'); Roucounas, 'Engagements', *supra* note 132, at 82–83 (*lex posterior* only applicable among the same parties); Seidl-Hohenveldern, 'Widersprüchliche Verpflichtungen', *supra* note 51, at 183. – But see, remarkably, Dieter Blumenwitz, 'Die Hess-Entscheidung der Europäischen Menschenrechtskommission', *Europäische Grundrechte-Zeitschrift* (1975) 497–98 at 498 (rejecting *lex prior* and tending to favour *lex posterior*), and Aufricht, 'Supersession', *supra* note 91, at 656, 670–71 (*lex posterior* 'in principle' only applicable to treaties between the same parties, but 'in practice' also if only some of the parties to the two treaties are the same; Aufricht does not indicate what 'practice' he means).

169. See Sadat-Akhavi, *Methods*, *supra* note 92, at 211 (using this argument in support of a *lex posterior* rule, even though it is unclear whether he only thinks of AB/AB or also of ABC/AD situations); Geraldo Eulalio do Nascimento e Silva, 'Le facteur temps et les traités', 154 *Recueil des Cours* (1977) 215–97 at 244–45; Rousseau, *Principes généraux*, *supra* note 97, at 785; Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 263 (mentioning this as an argument against a – strict – *lex prior* rule). See also the following voices, using this argument against the *invalidity* of later treaties, especially multilateral ones: YILC 1963 I, at 199, para. 40 (Mustafa Kamil Yasseen), 202, para. 81 (Antonio de Luna) (to place the provision on treaty conflicts in the draft of the VCLT in the section on validity of treaties 'would be to build a veritable bastion of ultra-conservatism or even reaction in international law'); 1964 I, at 126, para. 82 (Milan Bartoš) ('States should not be obliged to remain bound by vestiges of treaties that were still formally in force, but no longer corresponded to reality. A State must be free to exercise its treaty-making capacity, subject only to the proviso that in doing so it engaged its international responsibility'); 126, para. 5 (José M. Ruda) (nullity would make amendments of multilateral treaties 'virtually impossible, thereby impairing the flexibility needed to keep abreast of changing international conditions'); see also text accompanying note 158 above and 185 below.

of law, stability and good faith – all favouring *lex prior* – should outweigh these concerns. This is all the more justified effectively, and maybe not even legally, as even under a *lex prior* rule, states are not strictly prevented from concluding, contradictory treaties, and will also be able to perform them in most cases, if they are prepared to accept the consequence of incurring state responsibility. In addition, not every replacement of a rule by a newer one is a positive development.[170] If the *lex posterior* rule was admitted, a state could effectively free itself of an inconvenient treaty by concluding a contrary agreement with a third state, in contradiction with the principles of *pacta sunt servanda* and of *pacta tertiis*. This would be inacceptable.[171]

3.3.2. Lex specialis

3.3.2.1 Rejection of a lex specialis Rule for Treaties Between Non-Identical Parties

It has already been shown that with regard to treaties between the same parties, the *lex specialis* principle does not operate as a conflict rule in itself, but serves as a presumption or an aid to determine the will of the parties. With regard to conflicts between treaties with non-identical parties (like of the ABC/AD type), the principle does not even have this limited function; the majority of the literature and practice rightly hold it inapplicable in this situation[172]. It would indeed appear untenable if a party to an earlier treaty, by concluding a more 'special' treaty with a third party, could thereby invalidate the prior treaty or at least push it back into second rank.[173] In the relationship between these treaties, their 'special' or 'general' nature must be irrelevant. Anything else would invite absurd manipulations, in that treaties would be set up as 'specially' as possible (by splitting comprehensive treaties into separate ones covering more limited areas,

170. Klabbers, *Treaty Conflict*, *supra* note 24, at 92; Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 265.
171. See 'Harvard Draft', *supra* note 117, at 1024.
172. Lagodny, *Die Rechtsstellung*, *supra* note 21, at 102–03; Rousseau, *Principes généraux*, *supra* note 97, at 787; Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 266; statement of R. Abraham, commissaire du Gouvernement, in *Revue du droit public* (1992) 1793–97 at 1795–96; see also ILC, *Fragmentation*, *supra* note 3, at 62, para. 115 ('largely irrelevant'). – For *contrary opinions*, see Decision of the Swiss Federal Administrative Tribunal of 15 July 2010, Entscheide des Schweizerischen Bundesverwaltungsgerichts 2010/40, at para. 6.3 (applying the *lex specialis* rule to an ABC/AD type of conflict); Begdache, *Répudiation*, *supra* note 27, at 227–28 (apparently accepting that in cases concerning the recognition of a judgment, a bilateral treaty on the recognition of judgments prevails over the ECHR by virtue of its more 'special' nature in that respect); Gannagé, *La hiérarchie*, *supra* note 102, at 257–58 (same, but considering this rule as 'largely facultative for the courts'); and apparently also Guerchon, 'La primauté', *supra* note 28, at 708–15 (examining – though with a negative result in the specific case – whether an ABC/AD type of conflict should be resolved on the basis of the *lex specialis* principle).
173. If, on the other hand, the earlier treaty is more 'special', the *lex specialis* rule is simply unnecessary, because the treaty already arguably enjoys priority as *lex prior*.

rights etc., or dividing multilateral treaties into bilateral ones – depending on the criterion for 'speciality'), in order to secure their precedence.

3.3.2.2. Possible Criteria for 'Speciality'

Even if the *lex specialis* rule was applicable in ABC/AD situations, another difficulty would be to find a satisfactory criterion for 'speciality'.

Sometimes, it has been suggested that the *circle of states* bound by a rule should be decisive, so that a bilateral, local or regional norm would be more 'special' than – and possibly prevail over – a multilateral or universal one.[174] It is indeed true that particular usually prevails over general international law.[175] The situation at issue here is, however, different. First, the principle mentioned concerns at least primarily customary law; treaty law conflicts follow different rules, as is already apparent from the treatment of *inter se* treaties, which, instead of generally prevailing over the general treaty, are only permissible within the limits set by it.[176] Second, the situation examined here is not one of a general rule for a wider circle of states v. a special rule for some of them (ABC/AB conflict), but one of an ABC/AD conflict, where no set of treaty parties is a subset of the other. It is therefore not possible to qualify one treaty as more 'special' solely because of the smaller number of its parties.

Instead of by the number of their parties, 'speciality' could also be determined by the *content* of the treaties; this is also by far the prevailing approach. In some cases, it is indeed possible to say which of two treaties has a more 'special' subject, as in the case of a treaty about the recognition of judgments in family matters and another one about the recognition of private law judgments in general. Here, the subject-matter of the former is a subset of the latter. In most cases, however, where treaties intersect only in certain situations and otherwise cover different grounds, it is impossible to qualify one of them as 'special'.[177] This is particularly true of conflicts between human rights treaties and treaties on extradition, the

174. Rousseau, *Principes généraux*, *supra* note 97, at 785; YILC 1963 I, at 89, para. 29 (Antonio de Luna); see also Akehurst, 'Hierarchy', *supra* note 101, at 273 (mentioning this as one possibility); ILC, *Fragmentation*, *supra* note 3, at 35–36, para. 58, and 61, para. 112 (same); Pauwelyn, *Conflict*, *supra* note 5, at 389–91 (same); and Vanderbruggen, *Above and Beyond the Treaty*, *supra* note 5, at 71 (same); Guerchon, 'La primauté', *supra* note 28, at 708–12 (discussing and finally rejeting a priority based on 'spécialité spatiale' for an ABC/AD type of conflict).

175. *Right of Passage over Indian Territory (Portugal v. India)*, Merits, ICJ Reports (1960) 6 at 44; Jean Combacau and Serge Sur, *Droit international public* (9th edn, Montchrestien: Paris, 2010) at 72; Pauwelyn, *Conflict*, *supra* note 5, at 391–95.

176. But see ILC, *Fragmentation*, *supra* note 3, at 47, para. 85, claiming explicitly that 'particular treaties [generally enjoy priority] over general treaties' by virtue of the *lex specialis* principle.

177. See Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law', in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart: Oxford and Portland, 2011) 19–44 at 34–35 (with several examples); Cardona Lloréns, *supra* note 91, at 46 (same); see also ILC, *Fragmentation*, *supra* note 3, at 63, para. 118.

recognition of judgments etc.[178] With regard to *extradition*, the extradition treaty is more 'special', if the human rights treaty lacks specific provisions on that issue; but with regard to the *human rights of the extraditee*, the human rights treaty is the 'special' one, if the extradition treaty is silent about these rights.[179] In addition, the assessment may depend on whether one looks at the treaties as a whole or the provisions actually in conflict (and it is unclear what the proponents of a lex specialis rule would advocate): Comparing the treaties as such, one might argue that, e.g., the human rights treaty is more general because its scope of application is much wider, covering any kind of state action with an impact on a number of human rights. The specific provisions involved, however, may be Article 3 ECHR versus a treaty provision that suspected criminals must be extradited. From this perspective, the speciality claim of the extradition treaty is much more doubtful. And even if criteria and methods for determining 'specialty' could be found, it would be very questionable to decide on this basis about the priority of the treaties. Not only is there no objective reason why a more special treaty or provision should precede, such a rule would also invite manipulations: e.g., in order to secure the priority of human rights, states would have to conclude specific treaties (or include specific provisions in treaties) on particular human rights or on the application of human rights in particular circumstances, instead of the general codifications that are prevailing now and that are certainly preferable.[180] These considerations further confirm that a *lex specialis* rule has no application in conflicts between treaties with non-identical parties.

3.3.3. Priority of certain multilateral treaties ('lex multilateralis')

Over the course of the past sixty years, several authors have advocated a priority (or another kind of preferential status) of certain types of multilateral treaties. Such a rule would in a certain sense be the opposite of the *lex specialis* rule, if 'general/special' is defined by the number of states bound by a rule (general v.

178. See also E.W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions', 59 *British Year Book of International Law* (1988) 75–111 at 100 (refusing to qualify a provision on conditions for satellite broadcasting in the 'International Radio Regulations' as *lex specialis* vis-à-vis the right to freedom of expression in Art. 19(2) ICCPR, because the latter was 'deliberately framed in sweeping terms', ruling out 'any *specialia* in another instrument').

179. *Cf.* Guerchon, 'La primauté', *supra* note 28, at 713 (arguing similarly that it is impossible to decide whether the ECHR or a treaty on the recognition of judgments is more 'special'); Vanderbruggen, *Above and Beyond the Treaty*, *supra* note 5, at 71 (same, with regard to a human rights treaty and a double taxation agreement).

180. *Cf.* Michaels and Pauwelyn, 'Conflict of Norms', *supra* note 177, at 35 ('[S]hould treaty parties be able to undermine their WTO obligations merely by formulating a specific rule?', as would be the case with a mechanical application of the *lex specialis* principle).

special international law).[181] But as has been shown[182], a *lex specialis* rule would in any case not be applicable to the kind of treaty conflicts examined here (ABC/AD conflicts), so that it could not preclude the existence of a *'lex multilateralis'*.

3.3.3.1. 'Legislative' or 'Particularly Important' Multilateral Treaties

Hersch Lauterpacht, the second special rapporteur of the ILC on the law of treaties (and the first to address the issue of treaty conflicts), favoured the nullity of the later treaty.[183] In general, this was his position irrespective of the multi- or bilateral nature of the treaties involved. However, he provided for one exception, in that *'subsequent multilateral treaties, such as the Charter of the United Nations, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest'*, were excepted from this nullity and should instead prevail even over prior other treaties.[184] His idea was that the development of such treaties of fundamental importance and of a 'constitutional' (a word not used by him) or at least 'quasi-legislative' (his expression) character should not be 'hampered by the obligations of existing treaties'.[185]

Support for a preferential treatment of particularly important multilateral treaties, especially those protecting community interests including human rights, has been expressed by other scholars as well.[186] The Swiss Government is also of the view that the 'significance' of a norm should be taken into account when resolving conflicts between international law norms.[187]

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181. See text accompanying note 175 above.
182. *Supra* section 3.5.2.2.
183. See note 132 *supra*.
184. YILC 1953 II, at 93, Art. 16(4).
185. YILC 1953 II, at 157.
186. Dahm, Delbrück and Wolfrum, *Formen*, *supra* note 108, at 692 (hierarchically higher status for, among others, multilateral treaties 'protecting important community values', like human rights and the environment), 694–95; Vanneste, 'Droit international général', *supra* note 5, at 814 and 816 (a hierarchically superior status of human rights treaties – or at least the ECHR – is justified because – or insofar as – they protect a 'common interest'); Cardona Lloréns, *supra* note 91, at 46 (postulating *de lege ferenda* that the 'norm which protects the more important legal interest' should prevail, which he calls a 'kind of *lex superior*'); Daillier, Forteau and Pellet, *Droit international public*, *supra* note 57, at 301 (apparently in favour of a hierarchically higher status of important and widely ratified multilateral treaties, but not yet seeing this as *lex lata*); YILC 1963 I, at 88, para. 20 (Mustafa Kamil Yasseen) (normally, an earlier treaty only *prevails* over a later one with partially different parties; but nullity is conceivable in conflicts with 'conventions of great political importance based on a balanced compromise achieved with great difficulty'); 199, para. 41 (Mustafa Kamil Yasseen) (now prepared to accept the nullity of the later treaty as the basic rule, but not if it is a 'general multilateral treaty').
187. See text accompanying note 40 above.

3.3.3.2. 'Interdependent' and 'Integral' Treaties

Gerald Fitzmaurice, Lauterpacht's successor as the ILC's special rapporteur, rejected his predecessor's general nullity theory, advocating instead the priority of the earlier treaty as the basic rule.[188] But he too supported the nullity of the later treaty in case of conflict with multilateral treaties of the 'interdependent' and 'integral' type.[189]

He defined *'interdependent'* treaties as treaties 'where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely a non-performance in their relations with the defaulting party'.[190] These treaties are, so to speak, especially 'vulnerable' or 'fragile', in that their whole purpose – often aimed at creating or preserving a certain 'balance' among the parties – 'collapses' if they are breached by anyone. As an example, Fitzmaurice mentioned multilateral disarmament treaties.[191]

'Integral' treaties, on the other hand, are treaties 'where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others'.[192] In contrast to 'interdependent' treaties, they appear as especially 'stable' and 'mandatory', because they have to be obeyed even where ordinary treaties – resting on the principle of *do ut des* – could be repudiated.[193] The most important example of 'integral' treaties are human rights treaties.[194] Indeed, the ECtHR has stressed that the ECHR, '[u]nlike international treaties of the classic kind, … comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations'.[195]

188. YILC 1958 II, at 27, Art. 18 para. 6. – For more details on Fitzmaurice's proposals, see Binder, *Treaty Conflict*, *supra* note 116, at 52–55; Klabbers, *Treaty Conflict*, *supra* note 24, at 74–77; Orakhelashvili, 'Art. 30', *supra* note 53, at 768–69; Paolillo, 'Art. 30', *supra* note 97, at 1252–53; Roucounas, 'Engagements', *supra* note 132, at 97–99; Mus, 'Conflicts', *supra* note 132, at 223–24, 229; Sadat-Akhavi, *Methods*, *supra* note 92, at 67–68; Wilting, *Vertragskonkurrenz*, *supra* note 92, at 41–42, 94–97.
189. YILC 1958 II, at 27–28, Art. 19.
190. YILC 1958 II, at 27–28, Art. 19(a). – See also Art. 60(2)(c) VCLT, which contains a special rule for interdependent treaties (without naming them so) with regard to their termination or suspension following a material breach.
191. YILC 1958 II, at 44; further examples in YILC 1966 II, at 216 n.117.
192. YILC 1958 II, at 28, Art. 19(b).
193. Art. 60 VCLT grants a right to termination or suspension of a treaty as a consequence of its material breach. Art. 60(5) provides that this right does not apply to 'treaties of a humanitarian character', thereby acknowledging – while not in so many words – their 'integral' nature.
194. See YILC 1958 II, at 44 ('humanitarian convention[s]', like the Convention on the Prevention and Punishment of the Crime of Genocide, as examples of integral treaties); further examples in YILC 1966 II, at 216 n.117.
195. *Ireland v. United Kingdom*, Application no. 5310/71, European Court of Human Rights, Plenary Court, Judgment (18 January 1978), at para. 239; *Mamatkulov*, *supra* note 23, at para. 100.

It is difficult to perceive the difference, if any, between the concepts of 'integral' and *erga omnes partes* obligations. 'Integral' obligations are owed towards all the other treaty parties, and are thus, by definition, simultaneously obligations *erga omnes partes*.[196] Conversely, it is hard to imagine an *erga omnes partes* obligation that would not qualify as 'integral'. Therefore, this section should be read in conjunction with section 3.3.4.2 below on treaties with *erga omnes* effect.

While 'interdependent' and 'integral' treaties *are* treated differently in the VCLT with regard to their termination or suspension as a consequence of their breach[197], they enjoy no special treatment under Article 30. This can be traced to the fourth and final special rapporteur, Humphrey Waldock, who rejected Fitzmaurice's distinctions and proposed to treat all categories of treaties (with the exception of constituent instruments of international organizations[198]) the same way in case of conflict (with a priority of the earlier treaty).[199] He argued that 'integral' treaties often expressed *ius cogens* norms, so that the nullity of inconsistent later treaties was assured anyway.[200] Besides, 'interdependent' and 'integral' treaties 'may vary widely in their character and importance',[201] which made it difficult to see why all of them should be accorded such a preeminent status.[202] The case law of the PCIJ did not provide support for Fitzmaurice's distinctions either.[203] – Waldock's arguments evidently convinced the other ILC members and delegates at the Vienna Conference[204]; almost no one requested the reintroduction of a special treatment for 'interdependent' or 'integral' multilateral treaties[205]; indeed, the official commentary of the ILC to the final draft

196. 'Interdependent' obligations are owed towards all the other treaty parties as well, but the consequence of their breach – essentially a breakup of the treaty – appears to distinguish them decisively from *erga omnes (partes)* obligations.
197. See notes 190 and 193 above.
198. See section 3.3.3.3 *infra*.
199. See the references in note 154 *supra*.
200. YILC 1963 II, at 59, para. 25; 1964 II, at 44, para. 33; see also 1966 II, at 217, para. 13.
201. See *infra* section 3.3.3.3, with the same point regarding *erga omnes* treaties.
202. YILC 1963 II, at 59, para. 26; 1964 II, at 44, para. 33; see also 1966 II, at 217, para. 13. – This militates, of course, all the more against granting a higher status to *all* multilateral treaties.
203. YILC 1963 II, at 60, paras 28–29.
204. For an explicit statement in support, see YILC 1963 I, at 89, para. 26 (Antonio de Luna); see also 1966 I, pt. 2, at 103, para. 12 (Humphrey Waldock) ('Most members, and he shared their view, seemed opposed to introducing any idea of a hierarchy of treaties', Law of Treaties Conference Records 1st Sess., *supra* note 154, at 165, para. 14 (Ian Sinclair) ('There was no need to subdivide multilateral conventions into various categories').
205. But see YILC 1963 I, at 88, para. 24 (Grigori Tunkin) (no general nullity of treaties conflicting with earlier ones, but with exceptions; e.g., treaties concluded in violation of the agreement on the neutrality of Laos – certainly an 'interdependent' treaty – should be void) (similarly at 116, para. 22); 1964 I, at 129, para. 31 (Grigori Tunkin) (suggesting a clarification that integral and interdependent treaties always prevailed over later conflicting treaties).

for a Convention on the Law of Treaties explicitly rejects it[206]. Neither are such special rules supported by the current literature,[207] with one notable exception[208].

3.3.3.3. Constitutive Treaties of International Organizations

Article 103 of the UN Charter states that in the event of conflict with obligations under other treaties, the obligations under the Charter prevail. The question whether this rule is opposable to a non-member state (so that the Charter would prevail over treaties between members and non-members) is still controversial, but, in view of the universal membership of the UN, nowadays devoid of practical significance.

Some scholars have suggested that such a rule is applicable to all treaties founding an international organization, even if they do not contain an express priority clause (or rather: claim) like Article 103. For do Nascimento e Silva, constitutive treaties of large international organizations, like (but apparently not limited to) the United Nations, should 'generally' prevail over other treaties.[209] Dahm, Delbrück and Wolfrum assert the same for 'important' international organisations.[210] Waldock, as we have seen, generally rejected the nullity of a treaty as a consequence of its conflict with an earlier one; but at one time he made a reservation with regard to *'invalidity that may arise when the earlier treaty is the constituent instrument of an international organization which contains provisions limiting the treaty-making powers of its members with respect to the amendment of the constituent treaty or with respect to any particular matters'*.[211] McNair held the same view.[212]

From a practical and political viewpoint, it is understandable that the formation and workings of such essential organizations should not be impeded by conflicting prior or later (especially bilateral) treaties; but legally, a claim for superiority of their founding treaties is hard to justify, even for the UN Charter. In any case, as the ECHR is not a constitutive treaty of an international organization,[213] such a priority rule would not be applicable for its benefit. If, in the reverse situation, the ECHR was pitted against such a constitutive treaty, it may be that this hypothetical priority rule would not be applicable either: Apparently, most authors would even reject the applicability of Article 103 of the Charter to conflicts between UN

206. YILC 1966 II, at 217.
207. For an explicit rejection, see Wilting, *Vertragskonkurrenz*, *supra* note 92, at 110–11.
208. See note 159 above for the position of Jorge Cardona Lloréns.
209. Do Nascimento e Silva, 'Le facteur temps', *supra* note 169, at 243, 246, 248.
210. Dahm, Delbrück and Wolfrum, *Formen*, *supra* note 108, at 692.
211. YILC 1963 II, at 54, Art. 14(3)(a). He later dropped this provision without an explanation; see YILC 1964 II, at 34–35, Art. 65.
212. McNair, *The Law of Treaties*, *supra* note 97, at 221.
213. The Council of Europe is founded on the Statute of the Council of Europe. The ECHR is the founding instrument for the European Court of Human Rights, but the Court alone is not an international organization.

obligations and human rights treaties,[214] and this should be all the more the case for constitutive treaties of a less 'constitutional' character than the UN Charter.

3.3.3.4. Assessment

The VCLT in its final form and in its overall history, as well as international case law (where multilateral treaties as such have never been accorded a higher status) indicate that a *'lex multilateralis'* – for multilateral treaties in general or particularly important categories of them – does not exist in international law. This conclusion is shared by part of the literature.[215] Nonetheless, other authors have expressed support for such a rule, so that it is conceivable that it might be adopted by the practice in the future. At present, however, it can not provide a basis for a priority of the ECHR over bilateral treaties.

3.3.4. Priority of Other Categories of Treaties

In addition to or instead of multilateral (especially 'interdependent' or 'integral') and human rights treaties, it has been suggested that certain other categories of treaties should enjoy priority or another kind of special status.

3.3.4.1. Status Treaties

Even though the ECHR is certainly not a status treaty, this category shall be mentioned here for the sake of completeness, and because it is conceivable that the ECHR itself could conflict with a status treaty.[216]

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214. This is at least what Martti Koskenniemi and Päivi Leino claim: 'Even as Article 103 may seem like a constitutional provision, few would confidently use it to uphold the primacy of Security Council decisions over, for example, human rights treaties' ('Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* [2002] 553–79 at 559).
215. See note 207 above with regard to 'interdependent' and 'integral' treaties in particular; with regard to multilateral treaties in general see Benedetto Conforti, 'Consistency Among Treaty Obligations', in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) at 187–91, 189; Vanderbruggen, *Above and Beyond the Treaty*, *supra* note 5, at 60 ('Multilateral treaties do not necessarily have priority over bilateral ones'); Ziemele, 'Case Law', *supra* note 5, at 203 ('questionable' and 'certainly too general for satisfactorily addressing the many different types of treaties'); Rousseau, *Principes généraux*, *supra* note 97, at 787, 812; explicitly with regard to the ECHR, see Begdache, *Répudiation*, *supra* note 27, at 226–27 (no priority of the ECHR over bilateral treaties by virtue of its multilateral nature).
216. One could, for example, imagine a treaty between the United Kingdom and Spain on the status of Gibraltar, with provisions on the citizenship and voting rights of the residents of this territory, conflicting with Art. 3 of Protocol No. 1 to the ECHR (an example obviously inspired by the *Matthews* case, section 2.1.7 *supra*). Another fictional example (inspired by *Drozd and Janousek v. France and Spain*, Application no. 12747/87, European Court of Human Rights, Plenary Court, Judgment [26 June 1992]) would involve a treaty on the status of Andorra, providing for the enforcement of Andorran judgments in the contracting parties, in possible violation of their obligations under Art. 6 ECHR.

Status treaties are treaties whereby states set up an *'objective'* or *'territorial' 'régime'* for an area in the general interest and usually with (purported) effect for all other states *(erga omnes)*, or at least to all other states which have not raised a protest.[217] Instances of status treaties are *'treaties providing for the navigation of international rivers or waterways, for the neutralization or demilitarization of particular territories or localities, for mandates or trusteeships of particular territories, … treaties of cession and boundary treaties, etc.'*[218]. For some scholars, at least certain status treaties – even if clearly not creating rights *in rem* – entail a loss of capacity of the state concerned to dispose of or regulate the subject matter of the status treaty; therefore, later contrary treaties – at least those which do not include all parties to the status treaty – are ineffective and void.[219] Whether existing contrary treaties are supposed to become void as well is usually not made clear,[220] but it can be assumed. This would mean that status treaties enjoy status that is in effect even akin to *ius cogens*.

However, practice shows that status treaties *are* sometimes amended or superseded by treaties between parties which do not include all the parties to the (earlier) status treaty. For instance, some of the parties to the Berlin Act of 1885 amended, as between them, its provisions on navigational rights on the Congo in the Treaty of Saint-Germain-en-Laye of 1919. The later treaty was held applicable by the PCIJ in the *Oscar Chinn* case,[221] over the dissent of Judge van Eysinga, who regarded the treaty of 1919 as void particularly because it attempted to change an international régime,[222] and of Judge Schücking, who agreed with van Eysinga.[223] As another example, the provisions on the European

217. See Waldock's Draft Article 63 on 'treaties providing for *objective régimes*' in YILC 1964 II, at 26–27, and his commentary thereto, *ibid.*, at 27–34. – The controversial issue of the *erga omnes* effect of status treaties will not be treated here.
218. YILC 1964 II, at 27, para. 4.
219. For *neutralization* treaties: YILC 1963 I, at 62, para. 68 (Humphrey Waldock) (treaties concluded by Laos in violation of the agreement of 1962 on its neutrality [456 UNTS 301] could be invalid, because Laos might have lost its capacity to conclude such treaties); 200, para. 50 (Roberto Ago) ('There was only one case in which the question of nullity could arise: that in which the first treaty had effected the capacity of one of the States. Such a consequence was possible in the case of certain neutralization treaties, where the neutralized State would be deemed no longer to possess the capacity to conclude certain treaties, such as treaties of military alliance'); 202, para. 74 (Humphrey Waldock) (agreeing with Ago); McNair, *The Law of Treaties*, *supra* note 97, at 220–21 (neutralization treaties entail a 'surrender of treaty-making capacity'). – For further kinds of status treaties, see the following footnote.
220. But see Scelle, 'Règles générales', *supra* note 131, at 474–75: With the conclusion of 'annexion, confederation, protectorate, and customs union' treaties, certain existing treaties with third states (e.g., in the case of customs unions, all trade treaties) become automatically void. However, doctrinally, this seems rather to be based on an idea similar to *rebus sic stantibus* than on the concept of status treaties.
221. See note 141 above.
222. PCIJ Series A/B, No. 63 (1934) at 132–35.
223. *Ibid.*, at 148.

Commission of the Danube in the 1919 Versailles Peace Treaty were amended by the Definitive Statute of the Danube of 1921, agreed between only some of the parties to the Versailles Treaty. Again, the later treaty nonetheless served as the basis of a decision of the PCIJ.[224] The Statute of 1921 itself was amended by further treaties, especially the Belgrade Convention of 1948. Here, parties to the earlier treaties which did not accede to the Belgrade Convention protested, and the wording of the protest indicates that they considered it void.[225] Protests were also evoked by the revisions of the international régime for Tangier, 'from certain States which considered that their rights or interests under earlier instruments had been disregarded'.[226] Finally, the international régime for Trieste instituted in the peace treaty with Italy of 1947 was later abolished by an agreement between Italy, the United Kingdom, the United States of America and Yugoslavia only; in this case, no protests were raised against this course of action.[227] These are by far not the only examples of this kind.[228]

Despite the occasional protests mentioned, the later treaties have all become operative, at least in respect of their parties; none of them has been annulled. It therefore seems that status treaties do not affect the capacity of the states to contract, and therefore do not enjoy the claimed superior status.[229] Of course, any later treaty changing a territorial régime (as much as the original treaty establishing it![230]) must include the states with territorial or *in rem* competence to dispose of the object of the treaty; *nemo plus iuris transferre potest quam ipse habet*.

224. See note 141 above. – As to this and the previous case, see also YILC 1963 II, at 60 paras 28 (Humphrey Waldock) ('In both these cases the prior treaty was a multilateral treaty establishing for a particular region an international régime which contained obligations of an "integral" or "interdependent" type. In both cases the special character of the treaty was emphasized by the dissenting judges, yet the Court would not look beyond the fact that the disputing States were themselves parties to the later treaty and had not challenged its validity') and 29 ('The jurisprudence of the Permanent Court therefore, so far as it goes, seems to be opposed to the idea that a treaty is automatically void if it conflicts with an earlier multilateral treaty establishing an international régime').
225. See YILC 1964 II, at 43, para. 31; Verdross and Simma, *Universelles Völkerrecht*, *supra* note 102, at 503, para. 788.
226. YILC 1964 II, at 43, para. 31.
227. See YILC 1964 I, at 128, para. 25, and 154, para. 17; 1966 I, pt. 2, at 27, para. 25. But this may have been a special case, because the other parties to the peace treaty had no discernable interest in the preservation of the status of this small territory ('had not been principally concerned': YILC 1966 I, pt. 2, at 27, para. 25).
228. YILC 1964 II, at 43, para. 31.
229. Accord, YILC 1964 II, at 43, para. 31 *in fine* (Humphrey Waldock); similarly, 1963 I, at 201, paras 59–60 (Milan Bartoš) (generally no 'incapacity of a State to conclude treaties' because of a status treaty, with the possible exception 'of a territorial régime forming an integral part of the general international regime, which had the force of *jus cogens*').
230. See Waldock's Draft Article 63(1) (*supra* note 217): '… provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question'.

3.3.4.2. Erga omnes partes or *erga omnes* Treaties

While the obligations under some multilateral treaties (for instance, treaties on diplomatic immunities) are owed, in each concrete case, towards only one state, other treaties create obligations towards its parties as a whole *(erga omnes partes)*.[231] Human rights treaties are an important example of the latter category.[232] Human rights obligations under customary international law may even be owed towards the international community as a whole *(erga omnes)*.[233]

The reason for the *erga omnes*[234] nature of an obligation usually lies in the importance of its subject matter. Often, though not always (see, e.g., the prohibition of agression), this is coupled with the additional reason that it would be impossible to identify any specific state as injured by a violation (e.g., human rights violations committed by a state against its own nationals). It is unclear whether the latter fact alone is (or whether even other considerations are) sufficient to attribute to a norm an *erga omnes* character, even if it does not protect an important community interest. Some authors seem to think so, accordingly pointing to the purely 'procedural' feature of these obligations and their not necessarily important subject matter.[235] It is understandable that some of these authors deny *erga omnes* treaties a hierarchically superior status.[236] Others, while

231. See Art. 48(1)(a) of the ILC's Draft Articles on State Responsibility, GA Res. 56/83, 12 December 2001, Annex: 'obligation … owed to a group of states …, … established for the protection of a collective interest of the group'. – As mentioned in section 3.3.3.2 above, the concept of obligations *erga omnes partes* is very similar to, if not identical with, the concept of *integral* treaties.

232. See ILC, *Fragmentation*, *supra* note 3, at 198, para. 391; American Law Institute, *Restatement of the Law (Third), The Foreign Relations Law of the United States* (2 vols, American Law Institute Publishers: St. Paul, 1987), vol. II, § 703(1); Commentary of the ILC to the Draft Articles on State Responsibility, YILC 2001 II, pt. 2, at 126, para. 7 ad Art. 48 (regional human rights treaties).

233. *Barcelona Traction Light and Power Co. Ltd.* (Belgium/Spain), ICJ Reports (1970) 3 at 32 ('basic rights of the human person' as 'obligations of a State towards the international community as a whole'); *Restatement (Third)*, *supra* note 232, vol. II, § 702, comment o, and § 703(2) with comment b; Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective', 17 *European Journal of International Law* (2006) 771–801 at 779; Dahm, Delbrück and Wolfrum, *Formen*, *supra* note 108, at 692 (attributing this effect even to human rights *treaty* obligations – which is hard to justify at least for regional treaties); Klabbers, *Treaty Conflict*, *supra* note 24, at 121 (same opinion as Dahm, Delbrück and Wolfrum).

234. Used here and in the following sentences in a wider sense, embracing *erga omnes* in the literal meaning of the word and *erga omnes partes*.

235. E.g., ILC, *Fragmentation*, *supra* note 3, at 193, para. 380, and 197, para. 389. See also Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international', 297 *Recueil des Cours* (2002) 9–490 at 140–41, and Cardona Lloréns, *supra* note 91, at 37 (saying the same for 'integral' treaties, which can be equated with *erga omnes* treaties – see note 231 above).

236. ILC, *Fragmentation*, *supra* note 3, at 193, para. 380. But see Malcolm N. Shaw, *International*

not addressing the requirements for *erga omnes* obligations, share this conclusion.[237] On the other hand, it is also asserted that *erga omnes* obligations enjoy priority over other international norms.[238] Still others – on the background of support for a priority of particularly important treaties – assert that *erga omnes* treaties do often enjoy a higher status, but that there is no direct causal relationship between these two circumstances. Instead, the material importance of the treaties is the reason for their *erga omnes* effect as well as for their hierarchical superiority.[239]

Of course, insofar as *erga omnes* obligations are at the same time *ius cogens*, their priority – indeed the nullity of the contrary treaty – is out of doubt.[240]

3.3.5. Priority of Human Rights Treaties, Especially the ECHR

As far as human rights treaties reflect *ius cogens*, they too supersede other treaties.[241] While it is unquestionable that *some* human rights belong to *ius cogens*, the exact extent of that category is an open question.[242] Not infrequently, it is contended that the non-derogable rights of Article 15(2) ECHR are *ius cogens*.[243] The possibility of human rights or the ECHR as *regional European ius cogens* should also be mentioned.[244] If this were accepted, it would raise the difficult question whether such a 'regional' status could be opposed to a third state like the US.

Beyond *ius cogens*, several authors have claimed a general priority of human rights treaties or the ECHR over other treaties,[245] while others have rejected the

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Law (6th edn, Cambridge University Press, 2008) at 124, who speaks of a higher status of *erga omnes* obligations, and yet says that this concept has 'primarily a procedural focus'.

237. Klabbers, *Treaty Conflict*, *supra* note 24, at 94–95; Sadat-Akhavi, *Methods*, *supra* note 92, at 56; Wilting, *Vertragskonkurrenz*, *supra* note 92, at 54, 107.

238. 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Final Report of the Study Group of the International Law Commission, in Report of the International Law Commission, 58th Sess., UN Doc. A/61/10 (2006) 403–23 at 418–23.

239. Dahm, Delbrück and Wolfrum, *Formen*, *supra* note 108, at 692.

240. Arts 53 and 64 VCLT.

241. See note 240 above and Kälin, *Non-refoulement*, *supra* note 158, at 58, 166–67.

242. See, e.g., Art. 50(1)(b) of the ILC's Draft Articles on State Responsibility, GA Res. 56/83, 12 December 2001, Annex: 'obligations for the protection of fundamental human rights' as *ius cogens*.

243. François, 'Convention', *supra* note 25, at 2960; see also Entscheidungen des Schweizerischen Bundesgerichts, 133 II 450 (2007) at 461–62, paras 7.1 and 7.2 (non-derogability as an indication of *ius cogens* nature; derogable rights 'generally' not *ius cogens*).

244. See Verdross and Simma, *Universelles Völkerrecht*, *supra* note 102, at 334, para. 531.

245. Cohen-Jonathan, 'Rapports', *supra* note 22, at 98–100, 108 (for the ECHR); Dahm, Delbrück and Wolfrum, *Formen*, *supra* note 108, at 692 (quoted *supra* note 186); Lemontey statement, *supra* note 29, at 80 (quoted in text accompanying note 29 above); Hans A. Stöcker, 'Grund- und Menschenrechte bleiben im Zweifel unberührt', *Juristenzeitung* (1976) 45–49 at 47–48 (at least if the conflicting treaty does not contain an explicit conflict rule); Vanneste, 'Droit international général', *supra* note 5, at 814 and 816 (quoted *supra* note 186); Vierdag, 'The Time', *supra* note 178, at 108 (tentatively); van der Wilt, 'Après Soering', *supra* note 6,

idea.[246] The idea of such a priority is also reflected in a resolution of the *Institut de Droit international* on extradition, which subordinates duties to extradite to 'fundamental' human rights,[247] and in a resolution of the ILA on the same subject, inviting states to include a clause in their extradition treaties that extradition shall be refused if the requested person 'would face a real risk of a serious violation of his or her human rights'.[248]

Claims for a priority of human rights treaties can also be found in decisions of the UN Human Rights Committee, which is responsible for monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR). A statement in *Chitat Ng v. Canada* suggests that the Committee considers the ICCPR superior to other, conflicting treaties.[249] This is confirmed by *Sayadi and*

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at 76. See also Walter Kälin, 'Menschenrechtsverträge als Gewährleistung einer objektiven Ordnung', 33 *Berichte der deutschen Gesellschaft für Völkerrecht* (1994) 9–48 at 25 (literature and practice increasingly recognize as justified a refusal to fulfill extradition treaty obligations if the extradition would lead to serious human rights violations), 45; Koskenniemi and Leino, 'Fragmentation', quoted *supra* note 214 (Art. 103 UN Charter not applicable to conflicts with human rights treaties).

246. Conforti, 'Consistency', *supra* note 215, at 189; Guerchon, 'La primauté', *supra* note 28, at 733–36 (priority of the ECHR over other treaties in French law, as far as the Convention reflects French constitutional law; but no priority under international law); Lepper, 'Short', *supra* note 10, at 910–11 (customary international law and the VCLT [!] prescribe a priority of the earlier treaty, even over later human rights treaties, 926–27, 938–39; but he also acknowledges 'some support' for a priority of human rights [at 922]); Seidl-Hohenveldern and Stein, *Völkerrecht*, *supra* note 106, at 95, no. 439 (ECHR does not even have primacy over the 'most banal adminstrative agreement'); Dinah Shelton, Normative Hierarchy in International Law, 100 *American Journal of International Law* (2006) 291–323 at 294 ('The asserted primacy of all human rights law has not been reflected in State practice'); Joel P. Trachtman, 'Joost Pauwelyn: Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law' (book review), 98 *American Journal of International Law* (2004) 855–61 at 860 ('[I]t seems quite incorrect to say that WTO law is generally trumped by international environmental, human rights, or labor agreements. Rather, in the general international legal system, we are stuck with the messy and often normatively incoherent rules of *lex posterior*, as reflected in Article 30 of the Vienna Convention, and questions about how multilateral treaties may be modified by custom or by other multilateral treaties with different membership'); Vanderbruggen, *Above and Beyond the Treaty*, *supra* note 5, at 60 ('In and on itself, treaties on human rights do not have priority over treaties that organize more mundane matters such as taxation'); Wilting, *Vertragskonkurrenz*, *supra* note 92, at 107; Christine van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?', 39 *International and Comparative Law Quarterly* (1990) 757–79 at 762 ('little support in positive international law' for a superiority of human rights treaties).

247. See 60-II *Annuaire de l'Institut de Droit international* (1984) 304 at 306, Art. IV.

248. *International Law Association Conference Report* (1998) at 13; see also the corresponding report by Dugard and van den Wyngaert, 'Extradition', *supra* note 13, at 135–38, 152.

249. Communication no. 469/1991, Views (5 November 1993), UN Doc. CCPR/C/49/D/469/1991 (1994) at para. 14.1: 'States parties to the Covenant will also frequently be parties to bilateral treaty obligations, including those under extradition treaties. A State party to the Covenant

Vinck v. Belgium[250], where the Committee even examined the ICCPR conformity of Belgian measures implementing Security Council resolutions, despite Article 103 of the UN Charter.[251] Ostensibly, it did this on the premise that Belgium itself was ultimately responsible for the challenged measures (so that Article 103 did not apply): First, because it was this state which had originally transmitted the names of the supposed terrorist supporters to the Security Council, and second, because it would have always had the option not to take any implementation measures.[252] However, both propositions are hardly convincing; Belgium had in fact always acted as required by the Security Council.[253] If this is so, then *Sayadi and Vinck* indicates that the Committee considers the obligations under the ICCPR even superior to (or at least unaffected by) obligations under the UN Charter, and probably *a fortiori* to obligations under other treaties.

Further limited support for a priority of human rights is provided by the *Kadi* judgment[254], where the ECJ carved a significant exception in favour of human rights out of Article 351(1) of the Treaty on the Functioning of the European Union (TFEU). This Article lays down the principle that obligations under earlier treaties with third states shall not be affected by EU law, thus enshrining a *lex prior* rule.[255] Despite the general wording of Article 351(1), the ECJ decided that this provision 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights [see Art. 6 Treaty on European Union, which also refers to the ECHR], including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights'.[256] In other words, the ECJ sees human rights obligations under the EU Treaty as paramount over, or unaffected by, Article 351(1) TFEU. This even applies if the earlier agreement is the UN Charter, as was the case in *Kadi*, where the Court was asked to review Community measures that implemented binding Security Council resolutions. Nonetheless, the ECJ emphasised that such a review is undertaken 'in the context of the internal and

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must ensure that it carries out all its other legal commitments in a manner consistent with the Covenant.'

250. Communication no. 1472/2006, Views (22 October 2008), UN Doc. CCPR/C/94/D/1472/2006 (2008).

251. See, especially, *ibid.*, at para. 10.6 ('[T]he Committee considers that … it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council').

252. See *ibid.*, at para. 10.7.

253. See the dissenting opinion of Ivan Shearer, *ibid.*, appendix B, and Marko Milanović, 'The Human Rights Committee's Views in Sayadi v. Belgium: A Missed Opportunity', 1 *Goettingen Journal of International Law* (2009) 519–38 at 529–32, 534.

254. Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council* [2008] ECR I-6351.

255. See note 163 and accompanying text above.

256. *Kadi*, *supra* note 254, at para. 304.

autonomous legal order of the Community',[257] that is, from the viewpoint of this order as an 'autonomous legal system',[258] where it is the 'hierarchy of norms within the Community legal order'[259] that matters. In other words, the Court does not claim a priority of the EU Treaty over the UN Charter under general international law; at the opposite, it recognizes the primacy of the UN Charter under that system.[260] Still, the fact that the ECJ effectively places (only) human rights above contrary obligations under treaties with third states points to their increasingly elevated status in the context of treaty conflicts.

The prime justification for a priority of human rights treaties under general international law would have to be the pivotal place that human rights now occupy in that legal system. For some, the protection of the rights and interests of people has replaced state sovereignty and its safeguard as the central pillar and purpose of international law (or has always occupied that place),[261] and it could be regarded as consequential that this should be reflected in a higher status of human rights treaties. This view, however, is contested by others, for whom human rights are subjected to and limited by the traditional structural principles and aims (peaceful and orderly relations and cooperation between states) of international law;[262] accordingly, human rights treaties would not enjoy precedence. One could also argue that, upon closer examination, it is often not in the interest of the greatest number of people that human rights trump other international obligations, so that the view that such a hierarchical order would most benefit 'the people' appears

257. *Ibid.*, at para. 317.
258. *Ibid.*, at para. 316.
259. *Ibid.*, at para. 305.
260. *Ibid.*, at paras 288 (a judgment of a EU court holding that the implementation of a Security Council resolution is contrary to EU law 'would not entail any challenge to the primacy of that resolution in international law'), 300 ('principle of the primacy at the level of international law of obligations under the Charter of the United Nations'). The Court of First Instance has expressed the same view even more clearly; see Case T-306/01, *Yusuf v. Council* [2005] ECR II-3533, at para. 231, and Case T-315/01, *Kadi v. Council* [2005] ECR II-3649, at para. 191 ('From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law').
261. See, e.g., Theodor Meron, *The Humanization of International Law* (Nijhoff: Leiden and Boston, 2006) at xv ('The humanization of public international law under the impact of human rights has shifted its focus ... from State-centered to individual-centered'); Shaw, *International Law*, *supra* note 236, at 258 ('The essence of international law has always been its ultimate concern for the human being'); Report of the Federal Council on the 'Relationship between International Law and National Law', Bundesblatt der Schweizerischen Eidgenossenschaft 2010, 2263 at 2273 (international law increasingly gives priority to the protection and well-being of people, instead of only stabilizing inter-state relations).
262. See, e.g., Christian Maierhöfer, 'Der EGMR als "Modernisierer" des Völkerrechts? – Staatenimmunität und ius cogens auf dem Prüfstand', *Europäische Grundrechte-Zeitschrift* (2002) 391–98 at 397.

short-sighted.[263] For instance, under a strict priority of human rights treaties, it is conceivable that an extradition obligation could not be fulfilled because the accused is threatened with the death penalty in the requesting state, but could neither be prosecuted in his state of residence because of a lack of jurisdiction.[264] A potentially highly dangerous person would then have to be left unpunished and free, threatening the safety of the population at large.

Other considerations which have been put forward to justify a priority of human rights are even more problematic. Some authors want to derive a priority of such treaties from *Articles 1(3), 55, 56 and 103 of the UN Charter.*[265] Article 103, as we have seen, proclaims the priority of obligations under the Charter over those under other treaties, whereas Articles 1(3) and 55 declare the promotion of respect for and of observance of human rights and the achievement of international cooperation in this respect as one of the purposes of the United Nations, and Article 56 contains a 'pledge' of member states to cooperate with the UN for this purpose. However, a close reading of these provisions reveals that it is not possible to derive from them an elevated status of human rights obligations of states. First, Articles 1 and 55 are addressed at the United Nations, not its member states. Article 56 only calls on states to 'cooperate' with the United Nations in its efforts for the promotion of human rights, which is different from an obligation of states to observe human rights by themselves.[266] Second, Articles 1, 55 and 56 probably do not create rights or obligations in the legal sense at all,[267] so that

263. *Cf.* Trachtman, 'Joost Pauwelyn', *supra* note 246, at 856 (criticising reviewed book's author's 'systematic efforts to demote WTO law in favor of less "mercantile" law, such as human rights law and environmental law', on the ground that '[t]he rights to trade ... are not necessarily inferior in priority to certain other rights. We can think of circumstances in which there may be deep normative import, if not normative superiority, attaching to trade law values; for example, trade disciplines may alleviate poverty in a very significant way at the expense of modest incursions on human rights or environmental protection').

264. This would have been exactly the situation in the *Short* case, if the problem had not been resolved in the way described in section 2.1.2 above (see 22 *Netherlands Yearbook of International Law* [1991] 432 at 438 n.139; Lepper, 'Short', *supra* note 10, at 875 n.17).

265. See Jochen Abraham Frowein and Rolf Kühner, 'Drohende Folterung als Asylgrund und Grenze für Auslieferung und Ausweisung', 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1983) 537–65 at 557; Kälin, *Non-refoulement*, *supra* note 158, at 58, 166; Stöcker, 'Grund- und Menschenrechte', *supra* note 245, at 46–48, esp. 48; Vierdag, 'The Time', *supra* note 178, at 99–100 (without taking a position himself).

266. Manley O. Hudson, 'Integrity of International Instruments', 42 *American Journal of International Law* (1948) 105–8; Lagodny, *Die Rechtsstellung*, *supra* note 21, at 106–07; Klabbers, *Treaty Conflict*, *supra* note 24, at 95. *Contra* Stöcker, 'Grund- und Menschenrechte', *supra* note 245, at 47; F. Blaine Sloan, 'Human rights, the United Nations and international law', 20 *Nordisk Tidsskrift for International Ret: Acta scandinavica juris gentium* (1950) 23–42 at 31; Quincy Wright, 'National Courts and Human Rights – The Fujii Case', 45 *American Journal of International Law* (1951) 62–82 at 69–74.

267. Stöcker, 'Grund- und Menschenrechte', *supra* note 245, at 46–47; Sloan, 'Human rights', *supra* note 266, at 30–31. Klabbers, *Treaty Conflict*, *supra* note 24, at 95, leaves open whether

even if they were applicable to the observance of human rights by states, they would be merely exhortatory and therefore not fall under Article 103. And third, the promotion of human rights is by far not the sole object of Articles 1 and 55. Very many, if not all, other treaty obligations could also be traced back to one of the purposes enumerated in Articles 1 and 55 (like 'economic and social progress and development' and the 'solution[] of international economic [or] social … problems'), which would offset any elevated status of human rights treaties.[268]

Kälin offers another line of argument resulting in a priority of human rights obligations. For him, it can usually not be presumed that the parties to an extradition treaty did intend to commit themselves to extradite a person if this would lead to a violation of his 'fundamental human rights'.[269] Thus, he reads a tacit conflict clause in favour of human rights into extradition treaties. However, if such an understanding has found no expression in the wording of the treaty, and not even in the *travaux préparatoires*, it is not possible to follow Kälin under the established rules of treaty interpretation.

In practice, as we have seen, the *ECHR* is usually given priority over other treaties. Due to the dearth of cases of real conflict and the frequent absence of expressions of *opinio iuris*[270], it is, however, difficult to claim that a customary rule requiring or justifying such a priority already exists; at most, it is *in statu nascendi*. As to the scope of that arguably emerging rule, it would probably have to be limited to the ECHR, because other human rights treaties have not been given the same treatment. This could be explained by the particular enforcement mechanism of the ECHR, which creates a risk for member states to be 'convicted' for human rights violations by a formal judgment of an international court.[271] In order to avoid this, they implement the ECHR, even over other commitments. It can only be speculated whether a similar treatment would be accorded to treaties in other areas, like environmental or trade law, if they had similar enforcement mechanisms.

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these articles establish a legal obligation to cooperate; but at any rate he excludes a binding obligation to observe human rights.

268. See Klabbers, *Treaty Conflict*, *supra* note 24, at 94–95.

269. Kälin, *Non-refoulement*, *supra* note 158, at 165.

270. For an explicit 'opinio *non*-iuris', see the decision of the Dutch Supreme Court in the *Short* case, 22 *Netherlands Yearbook of International Law* (1991) 433 at 436 *in fine* ('The submission … that the European Convention [on Human Rights] takes precedence [over the NATO Status of Forces Agreement] under international law finds no support in law'). – But see the Swiss pronouncements in section 2.1.6 *supra*, where a preference for human rights treaties was expressed as a matter of law (but maybe Swiss constitutional rather than international law).

271. *Cf.* Ulrich Häfelin, Walter Haller and Helen Keller, *Schweizerisches Bundesstaatsrecht* (8th edn, Schulthess: Zürich, 2008) at 629, para. 1926a (the institutional enforcement mechanisms of the ECHR make it easier for the Swiss courts to accord it primacy over national statutory law; the courts would be more reluctant to accord a similar preference to other human rights treaties which lack such mechanisms).

If, nonetheless, 'human rights treaties' as such were to prevail, it would have to be defined what that includes – for instance, the Refugee Convention of 1951? All ILO Conventions – or at least the eight 'core Conventions'? The Council of Europe Framework Convention for the Protection of National Minorities of 1995? Or would one be misguided to categorise whole treaties, because the particular provision at issue would be decisive? In the latter case, would all provisions guaranteeing or conferring rights on individuals qualify for an elevated status, or only the more 'fundamental' ones?

3.3.6. Balancing of all Relevant Factors

Instead of a priority rule based on a single factor like speciality, temporal precedence or the content of the treaty, it could be submitted that a balancing of all relevant factors in the specific case is necessary. The treaty will be preferred which, in view of all aspects, has the best claim to priority. This approach was adopted by the Dutch Supreme Court in the *Short* case.[272] The Swiss Federal Council also appears to support it for the resolution of conflicts among international law norms in general.[273]

The downside of this approach is that it leads to unpredictable results, at least as long as it does not develop clearer contours. In the final analysis, it would hardly differ from the 'principle of political decision', because a state could justify any result by invoking one of the various principles at hand, concealing the political nature of the decision.

While it is possible that in the future, a balancing-of-interests rule emerges which develops into customary law, it does certainly not exist at present.[274]

3.3.7. Successive Application of Several Priority Rules

If several priority rules could simultaneously be considered as recognized under international law, the question would arise how they relate to each other – the question of the 'priority of priority rules'. An order of succession or subsidiarity would have to be set up, so that, e.g., the content of the treaties would be decisive in the first place, and only if this would not resolve the conflict (because both treaties would be on the same level in that regard), the *lex prior* rule would apply.

At this time, the lack of any accepted priority rules may make such considerations appear purely theoretical. However, it is well possible that two priority rules with a relationship of subsidiarity are currently emerging: one granting priority to human rights treaties (or at least to the ECHR), and a subsidiary one

272. See text accompanying note 10 above.
273. See note 39 above and accompanying text.
274. See also Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 267, who rejects this rule because it leads to 'unsatisfactory results' and 'has not been approved by the VCLT'.

granting priority to the *lex prior*. This could well explain the seeming inconsistencies in state practice, where the earlier treaty is usually granted precedence, while in some ECHR cases, the later treaty (being the ECHR) was preferred[275]. As suggested here, all cases involving human rights treaties or the ECHR could be considered as decided on the basis of the content of the treaties, while (only) the remaining cases were decided on account of the temporal succession of the treaties. Thus, the seeming inconsistencies regarding a *lex prior* or *posterior* rule would largely disappear.

3.3.8. 'Principle of Political Decision'

As has been seen, the VCLT does not provide any priority rules for the resolution of treaty conflicts, and customary law on this point is at least uncertain. If this is so, then it is up to the state which faces such a conflict to decide which of the conflicting obligations it wants to give preference to. Zuleeg calls this the 'principle of political decision'.[276] According to him, this decision belongs to the legislative and executive branches of the state. If they have not expressed a preference for one of the treaties, the (national) courts will have to give priority to the later one, according to the supposed will of the political branches.

It is submitted that at its current stage of development, the principle of political decision or 'equality' of treaties represents the state of international law. The great majority of the literature agrees with this position.[277] It is also implicitly shared by those who content themselves with stating that two conflicting treaties are both valid, without mentioning any priority rules,[278] and by those who deny

275. See text after note 166 *supra*.
276. Zuleeg, 'Vertragskonkurrenz', *supra* note 5, at 267.
277. Lucius Caflisch and Antônio A. Cançado Trindade, 'Les conventions americaine et européenne des droits de l'homme et le droit international général', *Revue générale de droit international public* (2004) 5–62 at 24–25; Jean Combacau, *Le droit des traités* (Presses Universitaires de France: Paris, 1991) at 98–100, 113; Guerchon, 'La primauté', *supra* note 28, at 733–36; Lagodny, *Die Rechtsstellung*, *supra* note 21, at 102–08; Mus, 'Conflicts', *supra* note 132, at 230–31; Pauwelyn, *Conflict*, *supra* note 5, at 426–28 (with the exception of treaties directly conflicting with an earlier treaty that explicitly forbids such treaties, so called 'illegal' treaties; see at 298–301, 426, 427 n.212); Sadat-Akhavi, *Methods*, *supra* note 92, at 64–66, 72; Seidl-Hohenveldern and Stein, *Völkerrecht*, *supra* note 106, at 95, no. 439; Seidl-Hohenveldern, 'Hierarchy of Treaties', *supra* note 48; Wilting, *Vertragskonkurrenz*, *supra* note 92, at 113. – Many of these authors only note the absence of a priority rule under the VCLT and do not discuss whether one exists under customary law. However, their not even mentioning this possibility strongly indicates that they do not seriously consider such a customary rule either.
278. Aust, *Modern treaty law*, *supra* note 102, at 216; Doehring, 'Vertragskollisionen', *supra* note 22, at 421 *in fine*, 424–25; the same, *Völkerrecht*, *supra* note 109, at 150–51 no. 349 (but with the important exception of acting in 'bad faith', meaning in knowledge of the earlier treaty); Hans Kelsen, 'Conflicts Between Obligations Under the Charter of the United Nations and Obligations Under Other International Agreements', 10 *University of Pittsburgh Law Review* (1949) 284–94 at 286–87; the same, *The Law of the United Nations* (Stevens & Sons: London,

the existence of priority rules[279] – if there are no such rules, the state bound by two treaties has to decide how to prioritize them.

4. Conclusions and Outlook

With an ever-increasing number of treaties, conflicts among them could be expected to be on the rise as well. For a neat resolution, international law would have to indicate how to prioritize incompatible treaty obligations. Yet while it provides such rules for conflicts between treaties with identical parties (AB/AB type),[280] no similar rules have developed for conflicts of the AB/AC or ABC/AD type. There is some support in practice and scholarship for a priority of human rights treaties, especially the ECHR, and of the earlier over the later treaty, but these rules have not yet crystallized into customary law. Thus, states still have to decide between irreconcilable obligations on the basis of political or other extra-legal considerations.

Does this mean that international law steers towards chaos, with ever more conflicting treaties piling up, each of them equally valid and binding? Does the lack of a hierarchy among treaties further jeopardize the unity und certainty of international law, which require that each legal question finds a single and (theoretically) predictable answer?

Such concerns, while theoretically understandable, are hardly justified in practice. Admittedly, conflicts between treaties with partially overlapping membership have sometimes challenged courts and governments, forcing them to flout one of the engagements in breach of the principle *pacta sunt servanda*. Yet overall, true conflicts, which could not be resolved othery than by disregarding one of the treaties and incurring state responsibility, are surprisingly rare. Partially, this can be explained by the ability of states to work out solutions beyond the narrow

1950) at 113–14; McNair, *The Law of Treaties*, *supra* note 97, at 221–22; Reuter, *Introduction*, *supra* note 97, at 99, para. 164; 119–20, paras 202–03.

279. Opinion of the Dutch Attorney-General Strikwerda in the *Short* case, 29 ILM (1990) 1385 ('[T]he law of nations does not provide a way out of the dilemma caused by the incompatibility of [treaty] obligations'); Comment of the Netherlands on a draft article for treaty conflicts, YILC 1966 II, at 75 and 322 ('There might be some justification for concluding that the problem [of successive treaties between parties, some of which are the same parties, giving rise to incompatible obligations] is not yet ripe for codification. Customary international law has not yet crystallized in this respect'); Forteau, 'L'ordre public', *supra* note 33, at 17, para. 56; György Haraszti, *Some Fundamental Problems of the Law of Treaties* (Akadémiai Kiadó: Budapest, 1973) at 297 (no 'differences of rank among the various kinds of treaties, as in all of them the will of subjects of international law finds an expression'); see also 'Fragmentation, Final Report', *supra* note 238, at 416–17 ('The question which of the incompatible treaties should be implemented and the breach of which should attract State responsibility cannot be answered by a general rule').

280. See section 3.2. *supra*.

framework of priority rules. Not infrequently, it seems that one of the parties refrains from asserting its rights, probably as result of diplomatic arrangements. However, the great number of possible conflicts is obviously avoided in the first place. When contracting, states are seldom oblivious of their previous commitments towards other states. Most often, this will prompt them not to enter into conflicting engagements, or to include a treaty clause granting priority to existing treaties. Apart from such avoidance of conflicts in the first place, states may also try to ensure that if a conflict arises, there will be a way to accommodate both treaties. This can be achieved by including sufficiently wide exception clauses, such as reserving the *'ordre public'*. The *ordre public* may then be interpreted to encompass obligations under other treaties, particularly those on human rights. A more direct way of conflict prevention is to include substantive provisions corresponding to those of another treaty. This would be the case, for instance, if the law of an inter- or supranational organisation contained comparable or identical provisions on human rights as those of a specific human rights treaty. Such concurrence may even be achieved, most elegantly, by direct reference to the human rights treaty, whose provisions would thereby be adopted wholesale into the law of the organisation.[281]

Despite frequent misgivings about the fragmentation of international law – its splitting into different régimes which operate independently of each other, bound to generate conflicting obligations –, it is the opinion of this author that there is, in fact, a reverse trend, at least with regard to human rights and environmental law. There is growing awareness that, for instance, extradition law or trade law cannot ignore the human rights obligations or environmental responsibilities of the parties. It is to be expected that treaty clauses preventing or addressing such conflicts will be included in future non-human rights and non-environmental treaties with increasing frequency. As this happens, the question of priority rules in customary law becomes less and less relevant. At some point, one might ask whether such treaty clauses themselves could generate customary priority rules – but this will be the task of a future researcher.

281. See, for instance, Art. 6(3), Treaty on European Union (7 February 1992, in force 9 November 1993, consolidated version at OJ 2012 No. C326/13), declaring that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ..., shall constitute general principles of the Union's law.'