Exceptions in International Law

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1 Introduction

'The exception proves the rule' is a commonplace statement in everyday language. Logically speaking, matters are more complicated than that, however: if a universal statement such as 'All owls can fly' has an 'exception', this means that the statement is false because it turns out that not *all* owls can fly after all. In legal theory, meanwhile, rules attach consequences to factual situations, and they typically do so when their conditions are satisfied by a factual situation (a 'case'). Sometimes, however, they do not attach consequences to a case, even though the case satisfies the rule conditions: despite being applicable, the rule is not applied to the case. Then we speak of an exception to the rule. Such an exception, as long as it is exceptional, does not make the rule false or—better—invalid. The rule remains valid, but if there is an exception to it, the rule is not applied.

1.1 Exceptions in international law

Rules take a central place in law, and accordingly, rule exceptions play an important role. This is particularly the case in international law, because international law has many features that make conflicts of rules frequent and recalcitrant, and rule conflicts are a major reason for exceptions. There are several reasons why international law is ripe for rule conflict. First, international law is 'fragmented': it is not clear whether it constitutes a single legal system or an archipelago of mutually interacting international legal regimes. This, together with the growing interaction between international, domestic, and regional legal orders, implies that any discussion of rule conflicts in international law will have to account for conflicts across different legal orders.[1]

Secondly, the importance of the formal sources of international law has decreased: the list of formal sources has little power to control what counts as law and what does not. In fact, many academics suggest that having a clear view of international law requires us to bypass the doctrine of sources and identify as law those rules that have real world effectiveness and/or political legitimacy.[2] The resulting obscurity regarding what counts as international law is also a potential cause of rule conflicts. Thirdly, and related to the second point, international law operates without a central legislator. Treaties and customs are generated through the

* The authors thank Lorand Bartels and the other participants in the Cambridge seminar on Exceptions in International Law for useful comments on earlier versions of this contribution.

[1] See Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553.

[2] See Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990) and Anthony C Arend, *Legal Rules and International Society* (Oxford University Press 1999).

Jaap Hage, Antonia Waltermann, and Gustavo Arosemena, *Exceptions in International Law* In: *Exceptions in International Law*. Edited by: Lorand Bartels and Federica Paddeu, Oxford University Press (2020).
DOI: 10.1093/oso/9780198789321.003.0002

agency of more or less uncoordinated actors, which means that no central authority can attempt to minimize rule conflicts or prevent them from arising.

Apart from these three reasons which apply especially to international law, there is also the wish of the rule creator—for example, the parties to a treaty—to divide the burden of proof, which can underlie the existence of rules with exceptions (see sections 6 and 9.1). In short, international lawyers as well as academics will inevitably be confronted with exceptions in international law, whether these exceptions have their grounds in international, domestic, or other (possibly non-legal) sources.

1.2 Aim

Because exceptions play a crucial role in (international) law, a thorough understanding of what goes on when we make exceptions to rules is an essential precondition for international legal science. Our purpose in this contribution is to provide clarity with regard to the nature of exceptions to rules, in particular as concerns international law, by creating a precise conceptual framework in which important notions are interconnected. As will become clear from our argument, this conceptual framework must account for exceptions, rules, their applicability, and application, and shifts in the burden of proof which, as we will argue, differentiate exceptions to rules from 'mere' negative rule conditions.

Two caveats are in place here. The first one is that a conceptual framework is—and should be—neutral with regard to the content of the law. Conceptual jurisprudence, the theory according to which the content of the law is to some extent determined by the concepts used in creating and describing that content, has rightly attracted much criticism.[3] The inverse of this neutrality is that readers should not expect that the conceptual framework that is developed here can provide them with the solutions for specific legal controversies. Clear concepts can contribute to clear thinking, but it is the substantive law itself, and not the concepts by means of which law is created or described, that provides cases with their solutions.

The second caveat is that, in their standard usage, the concepts and the terms used to express them are not always very clear and a theory which aims to provide clear concepts and precisely defined terms cannot and should not be in complete accordance with actual usage. A copy of how words are used in actual legal discourse would also copy all the ambiguities and vagueness of this discourse. The conceptual and terminological proposals of this contribution should therefore be judged on their usefulness for the production of legal science, and not—at least, not in the first place—on their conformity with the actual practice. Our aim is to improve, not to describe.

1.3 Roadmap

As mentioned, the purpose of this contribution is to provide clarity with regard to the nature of exceptions to rules, in particular as concerns international law, by creating a precise conceptual framework in which important notions are interconnected. In order to do so, we will consider the notions of rules and reasons in sections 3 and 4, respectively. However,

[3] See Michael Marx, 'Systeme des 19 Jahrhunderts' in Arthur Kaufman and Winfried Hassemer (eds), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart* (Müller 1977).

before doing so, we will present in section 2 two examples that will often be referred to in our argument.

Section 5 will consider the applicability and application of rules, two notions that are highly relevant to our definition of an exception. Section 6 takes a closer look at the grounds for making exceptions to rules. One of the main grounds for making exceptions is that rules conflict with each other. Section 7 distinguishes two ways in which rules can conflict, and section 8 discusses a number of ways in which rule conflicts can be avoided, thereby taking away the need for exceptions to rules.

In section 9, we take a closer look at the shape in which exceptions to rules can occur. Sections 10 and 11 are devoted to the alleged necessity of allowing exceptions to rules. Section 10 discusses a technique to make exceptions superfluous, while section 11 argues that exceptions are unavoidable if one wants to maintain the possibility to divide the burden of proof in legal argumentation.

The argument of this contribution is summarized in section 12.

2 Recurring Examples

We will use two examples repeatedly in the arguments that follow. In this section, we will briefly introduce these recurring examples and the provisions on which they rest.

2.1 Prohibition of force

The first example concerns the use of force in international law. Article 2(4) of the UN Charter prohibits the use of force: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'
An exception to this general prohibition of force can be based on Article 42 of the Charter:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

2.2 State responsibility

The second example concerns the responsibility of states to make full reparation for injury caused by an internationally wrongful act. This topic is dealt with by the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

Article 1 states: 'Every internationally wrongful act of a State entails the international responsibility of that State.'

Article 2 provides the main rule defining what counts as an internationally wrongful act: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.'

Exceptional circumstances may make that the breach of an international obligation nevertheless does not count as an internationally wrongful act. One of those is when a state has acted out of self-defence. Article 21 of the ARSIWA reads: 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.'

Lastly, Article 31 of the ARSIWA defines what the state responsibility brings about. It states that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

3 Rules

Before we turn to exceptions to rules, we need to have a solid understanding of what rules are in the first place. However, rules—or, as some prefer, norms—are hard to characterize.[4] They may be seen as social artefacts which mandate, prohibit, or permit certain forms of conduct. Following Hart's distinction of primary and secondary rules,[5] the behaviour in question can be the conduct of human affairs generally, or conduct dealing with the creation, modification, application, and extinction of rules. Even this distinction is unsatisfactorily narrow, however, because some rules, rather than governing behaviour, constitute states of affairs. In this contribution, we will be using the following circumscription of rules: that rules are a kind of thing which attach new facts to already existing ones. These new facts exist purely because they are the result of rule application, and they are constituted by the rule.[6]

3.1 Kinds of rules

Different kinds of rules can be distinguished, such as:

- 'Counts-as' rules, which make some things also count as (be) other things. For example, the king of the Belgians also counts as (is) the commander-in-chief of the Belgian army. These rules include legal definitions, such as 'Vehicles in the sense of the Traffic Law are cars, motorcycles, and bicycles'.
- 'Fact-to-fact rules', which attach new facts to other facts which exist simultaneously. Examples are that the government of a state has the power to conclude treaties on behalf of that state, and that car drivers have the duty to carry a driver's licence.
- Dynamic rules, which attach legal consequences to the occurrence of an event. For instance, if a state commits an internationally unlawful act, and thereby causes damage

[4] For a more extensive analysis than can be provided here see Jaap Hage, *Studies in Legal Logic* (Springer 2005) 159–202.

[5] See Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford University Press 2012) 91–99.

[6] See Jaap Hage, 'Separating Rules from Normativity' in Michal Araszkiewicz, Pawel Banaś, Tomasz Gizbert-Studnicki, and Krzystof Pleszka (eds), *Problems of Normativity, Rules and Rule-Following* (Springer 2015) 13–30.

to another state, the former state incurs at that moment the liability to compensate the latter state for the damage it suffered.

Mandatory norms, which prescribe behaviour, are either fact-to-fact rules, as when a state has the duty to respect the human rights it has recognized through conclusion and ratification of a human rights treaty,[7] or dynamic rules, as when a state is assigned the obligation to compensate the damage it has unlawfully caused to another state.

3.2 Rules and language

It is important to distinguish between, on the one hand, rules as entities which are to a large extent language-independent[8] and, on the other hand, rule formulations and the sources through which rules are created—treaties, legislation, and judicial decisions—which are both necessarily language-dependent. A rule, as we use the concept here, is the connection between kinds of facts. For instance, the rule that the king of the Belgians counts as the commander-in-chief of the Belgian army connects the fact that somebody is the king of the Belgians to the fact that this particular person is commander-in-chief of the Belgian army. The rule is defined by its content, which consists of the kinds of facts the rule connects. The rule about the Belgian king is defined by the fact that it connects facts of the kind 'being the king of the Belgians' to facts of the kind 'being the commander-in-chief of the Belgian army'. This connecting rule may be formulated in any of the three official languages of Belgium—Dutch, French, and German—but they are all formulations of the same rule. Therefore, all formulations of the rule must mention the same rule conditions and the same rule conclusion, be it not necessarily in the same language. We also see that the rule itself is independent from the rule formulation when considering that the prohibition of slavery can be expressed in many different languages, such as 'la esclavitud está prohibida' or 'slavernij is verboden'.

Equally, we see the difference between rule and rule source when considering that the prohibition of slavery is, at once, brought about by Article 4 of the European Convention on Human Rights (ECHR) and Article 8 of the International Covenant on Civil and Political Rights, and is also part of customary international law, and of *jus cogens*.[9]

Furthermore, the formulation of a rule is not identical to the official text by means of which the rule was created: the formulation mentions only the conditions and the conclusion of the rule. One-on-one correspondence is not required, as the example of Article 330 of the Treaty on the Functioning of the European Union (TFEU) shows. This article, which is not subdivided into sections, is arguably the source of four different rules:

a. All members of the Council can (have the competence to) participate in its deliberations.

[7] Notice that the rule imposing the duty to respect a particular human right came about as the result of a dynamic rule, namely a rule of change in the Hartian sense, but that the rule itself is a fact-to-fact rule, which attaches the fact that a state has a duty to respect the human right to the fact that the state in question is party to the treaty. On rules of change see Hart, *The Concept of Law* (n 5) 95–96.

[8] Rules are only 'to a large extent' language-independent, because every rule needs to have a formulation, and this formulation requires a language to formulate the rule in. This means that the conditions and the conclusion of a rule, although not linguistic entities themselves, must be expressible in some language.

[9] We assume here, for the sake of argument, that these sources all underlie the same rule. Of course, this may be disputed, as it may be disputed for any concrete example. However, disputing the example amounts to recognition of the point we want to make, namely that there may be more than one source for the same rule.

b. Only members of the Council representing the Member States participating in enhanced cooperation can (have the competence to) take part in the vote.
c. Only the votes of the representatives of the participating Member States are relevant for the determination of whether unanimity exists.
d. A qualified majority is established in accordance with Article 238(3).

The conditions and conclusions of these rules can be formulated in different ways, and in different languages, but to the extent that they all convey the same conditions and conclusion, they are all formulations of the same rules. Moreover, none of the rule formulations actually coincides with Article 330 of the TFEU.

We emphasize this distinction between rule formulations and the sources by means of which rules are created, because interpretation is the step from a rule source to a rule formulation. Sometimes, interpretation is a means to avoid rule conflicts or exceptions to rules and, if it is, it can fulfil this function because it leads to a different rule (formulation) on the basis of the same source. This is something we elaborate on in section 8.3. On this terminology, only sources for rules are interpreted, but rules themselves never are.[10] This also means that, when we speak of exceptions, we mean exceptions to rules, rather than something which takes place at the level of rule formulations.

4 Reasons

Another basic notion that plays a central role in our theory about rule exceptions is the notion of a reason. Perhaps even more than rules, reasons are the topic of an overwhelming amount of literature, both in legal[11] and in ethical theory.[12] Apodictically brief, reasons might be circumscribed as facts that are relevant for some conclusion. So there are two aspects to each reason:

a. the reason is a fact
b. this fact is relevant for some conclusion.

4.1 Classification of reasons

Reasons can plead for or against different kinds of conclusions. For example, the fact that a witness declared that Alice stole perfume from the shop is a reason—not necessarily a decisive one—to *believe* that Alice is a thief. In this case, the reason is a *reason to believe* and the conclusion is that somebody is justified in believing something.

[10] The determination whether a particular fact situation falls under a rule depends on the conditions of the actual rule—e.g. was this act internationally unlawful?—but this step in the application of a rule is better labelled as classification of the facts than as interpretation of the rule. See Jaap Hage, *Reasoning with Rules* (Kluwer 1997) 95–97.

[11] See e.g. Joseph Raz, *Practical Reason and Norms* (OUP 1999); and María Cristina Redondo, *Reasons for Action and the Law* (Springer 2013).

[12] See e.g. Thomas M Scanlon, *Being Realistic about Reasons* (OUP 2014) and Maria Alvarez, 'Reasons for Action: Justification, Motivation, Explanation' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2017 edn) https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/.

The fact that the United Nations Security Council (UNSC) has authorized intervention in Libya is the reason why (it was the case that) foreign troops were allowed to intervene in the Libyan civil war. This reason is a reason why something is the case, a *constitutive reason*.

And, finally, the fact that a state is liable to repair injury caused to another state, is a reason for the International Court of Justice (ICJ) to order the former state to pay damages. The last example illustrates a *reason for action*, a reason for or against doing something.

4.2 Universalizability of reasons

Reasons are concrete facts, such as the fact that a witness declared that Alice stole perfume from the shop. Concrete facts can only be reasons for particular conclusions if similar facts are also reasons for similar conclusions. Authorization by the UNSC can only be a reason why armed intervention is permissible in a particular case if authorization by the UNSC tends to be a reason that allows armed interventions in general. This move from particular cases to more general statements can be expressed by saying that reasons are universalizable, or—which boils down to the same thing—by saying that underlying every concrete reason for a particular conclusion is a rule (or principle[13]) which makes facts of that kind into reasons for that kind of conclusion.[14]

Every reason has an underlying rule, and that is important because the rules underlying reasons are amenable to exceptions. If there is such an exception, a fact which normally would be a reason exceptionally does not count as a reason anymore. For instance, the rule that thieves are punishable makes the fact that somebody is a thief into a legal reason why this person is punishable. However, if there is an exception to the rule, for instance because the person in question is only three years old, the fact is not a legal reason for punishment. As we will see later (in section 9), this 'exclusion' of a reason[15] should be distinguished from the situation that the reason is outweighed by some colliding reason.

The reasons discussed above are contributory reasons. This means that they plead for (pro-reasons) or against (con-reasons) a particular conclusion, but are not necessarily decisive by themselves. If there are contributory reasons both for and against a particular conclusion, these reasons need to be 'weighed', or 'balanced'. In this connection, weighing and balancing are mere metaphors; what really goes on is that some decision is made which set of reasons wins against the other set. Such a decision, which can itself be based on one or more reasons, can be laid down as a premise of an argument.

An example may illustrate this. The fact that the publication of a photograph is an exercise of the freedom of the press is a reason against prohibiting the publication. The fact that this publication would violate the privacy of the person in the photo is a reason for prohibiting its publication. The fact that the publication of the photograph does not serve a public interest is a reason why the contributory reason based on privacy outweighs the contributory reason

[13] At this place we do not distinguish between rules and principles. A distinction between the two can well be made, however. For instance, while rules can have exceptions, it does not make sense to speak of exceptions to principles. More about the difference between rules and principles in Hage, *Reasoning with Rules* (n 10) 110–13.

[14] The universalizability of reasons is discussed more extensively in Jaap Hage, 'The Justification of Value Judgments: Theoretical Foundations for Arguments about the Best Level to Regulate European Private Law' in Bram Akkermans, Jaap Hage, Nicole Kornet, and Jan Smits (eds), *Who Does What? On the Allocation of Regulatory Competences in European Private Law* (Intersentia 2015) 15–56, with references to earlier literature.

[15] See Raz, P*ractical Reason and Norms* (n 11) 35–48.

based on the freedom of the press. Therefore, the former reason outweighs the latter reason, and the court should prohibit the publication of the photograph in question.[16]

If the sets of reasons are in balance, which includes the situation that there are neither pro- nor con-reasons, nothing follows, unless the burden of proof decides the issue. We will consider this in section 11.

5 Applicability and Application

We define an exception to a rule as the situation where a rule is applicable to a case, but is nevertheless not applied to it. In this connection, 'applicability' and 'application' are technical terms with a precise meaning that we will explore in this section.

If a rule is applied to a case, it attaches its consequence to the case. So, if the rule which makes a state responsible for internationally wrongful acts is applied to the case that Outopia breached an international obligation, it makes Outopia responsible for that breach.

Applicability of a rule to a case is determined by three factors:

1. the rule must exist
2. the case must fall within the—territorial, temporal, and personal—scope of the rule and
3. the case must satisfy the ordinary conditions of the rule.

Let us talk about each of these factors, starting first with the requirement that a rule must exist. It may seem obvious that a rule needs to exist in order to be applied, yet the existence of rules becomes the subject of legal debate at times. In a legal dispute, one party may argue that a rule invoked by the other party does not exist. This is usually formulated as a claim that the rule is not valid, as a rule that lacks validity cannot be applied to any case. This is different for exceptions, which only make that the rule is not applied to this particular case. There is a further difference between the two arguments that has to do with the burden of proof; we will consider this in section 11.

Secondly, a case must fall within the scope of the rule in order for it to be applicable. Typically, rules have certain scope conditions: the rule applies only on a particular territory, during a particular time frame, or to particular persons. We will talk about scope conditions in more depth in section 8.2.

Thirdly, the case must satisfy the ordinary conditions of the rule for it to be applicable. These conditions are given with the rule formulation. For example, if it were binding, Article 36 of the ARSIWA would create a rule that defines a state's liability for particular damage. It mentions four conditions for this liability:

1. there must have been an internationally wrongful act,
2. a state must have been responsible for this act,
3. the damage was caused by this act, and
4. the damage was not (yet) made good by restitution.

[16] See European Court of Human Rights (ECtHR) *Von Hannover v Germany* App no 59320/00 (24 September 2004).

These four factors determine the applicability of the rule. At times, it happens that a rule is not applicable to a case but is nevertheless applied to it. This is most often a case of rule application by analogy. We will not pay attention to this possibility here.[17]

If a rule is applicable to a case, this is a contributory reason for applying the rule to that case. Since applicability is only a contributory reason for application of the rule, this reason may have to be balanced against reasons against application. Because we define an exception to a rule as non-application of an applicable rule, reasons against the application of an applicable rule are ipso facto reasons for making an exception to the rule.

6 Grounds for Exceptions

Before continuing our argument it is useful to take a step back and look at the grounds for making an exception to a rule. We have defined an exception as the situation in which a rule is applicable to a case, but is nevertheless not applied to this case. There are several reasons for making an exception to a rule.

First, the rule-exception structure can be used in order to create a division in the burden of proof. For instance, Article 2 of the ARSIWA defines what counts as an internationally wrongful act, while Article 21 says that this wrongfulness is precluded if, amongst others, the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations. Article 21 is meant to make an exception to Article 2, and by using this rule-exception construction, the maker of these rules has created a division in the burden of proof. The state that wants its damage to be compensated bears this burden for the conditions of the rule defining international wrongfulness, while the state that wants to avoid being held responsible has the burden of proof for the exception. We will return to the relation between exceptions and the burden of proof in section 11.

Secondly, it may be deemed undesirable that the legal consequences of the rule come into being for a particular case, although the rule is applicable to this case. There are three variants of this possibility:

a. Application of the rule in this case would violate the purpose of the rule. We return to this possibility in section 9.
b. Application of the rule would lead to legal consequences that are incompatible with the consequences of some other rule that is also applicable to the case. These so-called 'rule conflicts' will be discussed in the sections 7, 8, and 9.2.
c. Application of the rule in this case would harm values or goals that were not, or insufficiently, taken into account when the rule was created. When the application of a rule to a particular case has bad consequences, this seems at first sight to be a reason against applying the rule, and therefore for making an exception to the rule. This may be different if these bad consequences were sufficiently taken into account when drafting the rule, because then, apparently, the bad consequences were deemed to be outweighed by the advantages of the rule. This reason against applying an applicable rule is also discussed in section 9.2.

[17] The interested reader may consult Hage, *Reasoning with Rules* (n 10) 118–21.

7 Rule Conflicts

As we mentioned in the previous section, rule conflicts, when they arise, are a frequent cause of exceptions to rules. As such, exceptions are a tool to deal with, rather than to avoid, rule conflicts. There are at least two different types of rule conflicts, namely conflicts of imposition and conflicts of compliance. The former are conflicts whereby the conflicting rules impose incompatible states of affairs upon the world,[18] which cannot coexist. The latter are conflicts whereby the conflicting rules prescribe incompatible forms of behaviour.

7.1 Conflicts of imposition

Consider, by way of example, the situation of Latin America in the early 19th century, where *uti possidetis facto* and *uti possidetis juris* developed as separate principles. According to *uti possidetis juris*, Spanish legal documents were decisive for locating borders; according to *uti possidetis facto*, the land actually held by a state at independence would determine its borders.[19] Suppose that a certain territory is under the factual possession of Province A, while legal documents state that it belongs to Province B. Province A becomes State A upon independence, and the territory remains in State A's factual possession. Province B becomes State B upon independence. According to the principle of *uti possidetis facto*, the territory falls within the borders of State A. According to the principle of *uti possidetis juris*, the territory falls within the borders of State B. Owing to the nature of territory, it cannot belong to both State A and State B at the same time, and so the effects of the rules are incompatible.

It is important here to note that the incompatibility of the consequences of these rules, and therefore also the rule conflict in this case, depends on the existence of other rules, namely those of how territory works and that territory cannot belong to two or more states at the same time. Generally speaking, whether rules conflict can depend on a presupposed background, which means that some facts cannot go together and that some states of affairs are incompatible with one another.[20]

Another example of a conflict of imposition is the following: the UN Charter prohibits the use of force, but military action with authorization by the UNSC is permitted.[21] One rule prohibits an armed intervention into another sovereign state, while the other permits precisely this behaviour. The state of affairs that armed intervention is prohibited and the state of affairs that it is permitted are incompatible, and therefore these rules are in conflict. Note that the focus here is on the states of affairs imposed on the world: given that a permission is not a duty to intervene, there is no conflict of compliance in this case.[22]

[18] We use the expression 'state of affairs' to denote a possible fact. A fact is then a state of affairs that actually obtains. Cf Ludwig Wittgenstein, *Tractatus Logico Philosophicus* (1921, Suhrkamp 1984) Thesis 2; and Mark Textor, 'States of Affairs' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016 edn) https://plato.stanford.edu/archives/win2016/entries/states-of-affairs/.

[19] Cf Steven R Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1996) 90(40 American Journal of International Law 594

[20] Jaap Hage, 'Rule Consistency' (2000) 19 Law and Philosophy 369 and Hage, *Studies in Legal Logic* (n 4) 135–57 explore the theme of how rules themselves can be part of the background that causes rule conflicts.

[21] Confusingly, this permission to intervene is sometimes called a 'right' to intervene.

[22] The conflict may seem to some to be a conflict of compliance, because the conflicting norms deal with actions. However a conflict between a prohibition and a permission is not one of compliance. It is possible to comply with both norms by abstaining from the prohibited behaviour, since such abstinence does not violate the permission. (Permissions cannot be violated at all.) However, there is a conflict of imposition, since the states of affairs that some kind of action is prohibited and permitted are not compatible.

7.2 Conflicts of compliance

Consider a state which is obliged, on the basis of two human rights treaties it has signed and ratified, to invest money in both education and health care, while the state has only sufficient money and resources to invest in one of them. Alternatively, think of the example of the journalist who is obliged to reveal her sources for a controversial publication, while she promised her informant not to reveal his identity. In both cases, a conflict arises because the agent in question cannot comply with both obligations.

Conflicts of compliance can arise because the obligations themselves are in conflict (such as a prescription and a prohibition of the same behaviour[23]), or because factual circumstances make compliance impossible, as was the case for the state with too limited resources. These kinds of conflicts can only exist between mandatory rules (prescription and prohibitions) and should be avoided. When they occur, they force the obligated agent to choose which obligation to violate. Conflicts of imposition, meanwhile, can exist between all kinds of rules, including those that assign statuses (e.g. the status of a piece of land as belonging to one or the other state).

8 Making Exceptions Superfluous

Exceptions are, amongst others, a way to deal with rule conflicts when they arise. In this section, we will consider a number of tools and techniques that can keep such conflicts from coming into existence in the first place, thereby taking away the need to make an exception at all. The list of tools and techniques in the following is not meant to be exhaustive.

8.1 Subscripting

Rule conflicts can arise between rules of one system, or between rules of different normative systems. Think again of the example of a journalist who promised not to reveal her source. This example illustrates a conflict between a legal requirement to reveal, and a moral obligation not to do so. The distinction between normative systems becomes visible in the necessity to add subscripts ('legally' and 'morally', or 'according to German law' and according to French law') to legal judgments. Take, for instance, the question of whether State A may use military force to intervene in State B to prevent gross human rights violations. If normative systems are distinct, the judgment must be that, legally, State A is prohibited from intervening (in the absence of UNSC authorization), but morally, it should. In this example, the subscripts distinguish between the legal and the moral point of view. However, it is also possible to distinguish between different legal points of view. For instance, according to European Union law, certain forms of positive discrimination are not permissible, whereas according to the Committee on the Elimination of Discrimination against Women, they are required.[24]

[23] If the same *kind* of behaviour is both mandatory and prohibited because of two conflicting rules, there is a conflict of imposition, because the states of affairs that some kind of behaviour is prohibited and mandatory are incompatible. If a kind of action is a sub-kind of two different more general kinds of action, and one of these more general kinds is mandatory while the other kind is prohibited, the conflict is one of compliance.

[24] See Lisa Waddington and Laura Visser, 'Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?' in Ingrid Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks, and Prospects* (Intersentia 2012). This example presupposes that

If the legal and other judgments are subscripted, seemingly conflicting judgments are rendered logically consistent because we see that, for a legal decision, the moral rules are simply not applicable. A legal permission is consistent with a moral prohibition, and a competence that exists according to the law of one country may be absent according to the law of another country. Nevertheless, an agent who is confronted with mandatory rules from different legal systems that both demand obedience but the rules of which cannot both be complied with, is still burdened with a conflict of compliance.

8.2 The scope of rules

One of the factors determining the applicability of a rule is its scope. Most legal rules identify by means of their conditions to what kind of cases and to which persons they are applicable. This can be everybody, as in Article 2 of the ECHR, or sets of agents such as the judges in the European Court of Human Rights, as in Article 21 of the same Convention. However, there are also limitations on the cases and persons to which a rule applies that are not mentioned in the ordinary conditions of the rule. These are scope conditions, which combine with the ordinary rule conditions to determine to which cases or persons rules are applicable.[25]

There can be personal, spatial (territorial), and temporal scope conditions. Personal scope limitations occur when a rule only applies to a certain class of persons, even though this is not necessarily mentioned in the rule conditions. So, for instance, WTO law applies to members of the WTO, but not to non-WTO members. Spatial or territorial scope limitations, meanwhile, refer to a distinction depending on the place where certain events take place. So, for instance, the penal laws of states typically apply to events that take place in their own territory, but not in the territory of another state. Temporal scope limitations postulate that the rules apply in different time periods. For example, the customary rules of treaty interpretation and the rules found in the Vienna Convention on the Law of Treaties 1969 are different and thus they seem bound to conflict, but the conflict can be avoided by postulating that the rules of the Vienna Convention apply only to treaties that entered into force after 1980, as in fact stated in the Convention itself.

By limiting the applicability of rules, scope conditions prevent rule conflicts, because two rules can only conflict if they are both applicable to the same case.

8.3 Interpretation

Another technique to avoid conflicts is to interpret a legal source in such a way that the resulting rule is not applicable to the case in question. The following example[26] illustrates this.

different legal regimes created by different legal instruments, such as the human rights regimes of the European Union and of the Convention on the Elimination of All Forms of Discrimination against Women, constitute different legal systems. Whether and to what extent this is the case is a difficult question, which cannot be dealt with in the present contribution.

[25] The recognition of scope conditions which are not mentioned in the rule and which are therefore not rule conditions is important because it makes clear that rule conflicts may not exist, even where the explicit rule conditions suggest their presence.

[26] The example was inspired by, but is not identical to, the circumstances of the case *Avena and Other Mexican Nationals*. See International Court of Justice Avena and Other Mexican Nationals *(Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12.

Assume that the constitution of a federal state prescribes that the state respect the constraints of federalism, while international law prescribes that the federal state stop one of its constituent states from certain forms of behaviour. These actions cannot both be performed. The rule conflict seems clear, and a breach of either an international or domestic duty seems unavoidable. Given this impasse, it may be possible to interpret an obligation of a specific type—for example, stop damage-causing behaviour—as an obligation of a more general type—for example, avoid causing lasting damage. It is possible to comply with this latter obligation without violating the former obligation, for instance by compensating the damage that results from the behaviour. If this is done, the demands of both legal systems are deemed to be satisfied, and the conflict is avoided.

A related technique is that a new type of action is created, which can solve the impasse between two colliding norms for an important range of cases. On a straightforward interpretation, the UN Charter rules out all acts of aggression that are non-defensive and not authorized by the UNSC. It has been argued that there is a developing rule of international law that suggests that states have a duty to intervene in cases of genocide, war crimes, and crimes against humanity to defend the civilian population, and this duty exists irrespective of whether UNSC authorization has been given or not. If a case of genocide breaks out, and the UNSC does not authorize action, the two rules will conflict. One way to ease the conflict is to devise new action types such as 'peacekeeping' or 'humanitarian intervention' that do not fall within the concept of aggression that is prohibited by the UN Charter.

8.4 Derogation

At times, rules conflict with factual necessity, or with rules made to cope with factual circumstances such as in states of emergency. Human rights on privacy might, for instance, conflict with measures taken to prevent terrorist attacks or to investigate them. One tool to prevent such conflicts from arising is derogation. Derogation allows a state to take measures derogating from its obligations under a treaty, to the extent necessary to handle certain situations (see e.g. Article 15 of the ECHR). Logically speaking, there is no conflict in cases of derogation between the rule of the treaty and the rule on the basis of which the measures are taken, because derogation means that the treaty rule is inapplicable for the duration of the derogation. In short, derogation involves the temporary suspension of applicability of a potentially conflicting rule, thereby avoiding the conflict.[27]

8.5 Incorporation and reference

The easiest way to avoid the dilemma of inter-systemic rule conflicts is to ensure that such conflicts do not occur. We have seen that interpretation and derogation, but also scope limitations, can fulfil this function, in that, for example, the national law of one state is limited in its application to the territory of that state only. With regard to international law in particular, however, scope limitations do not manage to avoid all conflicts. Methods such as incorporation and reference can prevent inter-systemic conflicts from arising as well.

[27] It may also be argued that derogation is making a temporary exception to the derogated rule. On this interpretation the derogated rule is still applicable, but should temporarily not be applied. Derogation would then not be a way to avoid rule conflicts, but a way to deal with them.

Rules of a foreign system can be used in a legal system through a technique which may be called 'reference'. The foreign rules are not incorporated in the legal system, but their existence and content is considered by the system as facts that are legally relevant from the point of view of the legal system. Reference avoids conflicts between the rules of the referring system and the rules of the system to which reference is made, because the content of the referring system is adapted to the content of the referred system. Private international law provides many examples of this, because it contains meta-rules that determine which national legal system provides the applicable rules. For example, the judgment whether a couple has divorced is given in country A on the basis of the rules of country B, the validity of which is from the perspective of country A, a matter of fact. These rules are not incorporated in some international set of object-level rules, and neither is there an independent international system. Sometimes there are treaties dealing with conflicts of rules of different national systems, but the rules of these treaties are applied because they become part of the national systems of the parties to the treaties. As a consequence, the rules of the national systems determine the outcomes of cases, without a potential conflict with rules of another national system. In this way, rule conflicts can be avoided.

In cases of reference, the content of a foreign system is treated by the own legal system as a matter of fact that co-determines the application of the domestic law. In case of *incorporation*, meanwhile, foreign law becomes part of domestic law. The typical example of this phenomenon is the incorporation of international law in a national legal system in so-called 'monist' legal systems. The Dutch legal system nicely illustrates incorporation. Provisions from international treaties ratified by the Netherlands and rules created by international organizations in which the Netherlands participates (in particular the European Union) automatically become part of the Dutch legal system (Article 93 of the *Grondwet*). The foreign rules are not foreign anymore, except in the sense that they were not created by native Dutch legislative bodies. They are part of the Dutch legal system to the same extent as home-made rules.

Strictly speaking, incorporation is not a technique to deal with conflicts between rules of different systems, but a way to ensure that only one legal system is relevant.[28] If European Union (EU) regulations become automatically part of Dutch national law, there is no need any more to pay attention to EU law as such, because the relevant rules are already part of Dutch national law. In the case of the EU one may even ask whether there exists such a thing as the EU legal system which contains rules that are directly applicable in the Member States. For those directly applicable rules arguably it holds that the EU only provides organs which can create (uniform) law that becomes part of the national legal systems of the Member States. If all counties would have similar monist systems with regard to the relation between laws of domestic and laws of non-domestic origin, the same might be said about the provisions of human rights treaties that are directly applicable.[29] These treaties would then create uniform human rights in different legal systems and it might be argued then that there is no separate international human rights system. However, theoretically it is imaginable that some legal system incorporates part of a foreign legal system, while that foreign system has

[28] This holds at least from the perspective of the incorporating system. However, the mere incorporation of rules of international law into a national legal system does not make any statement about the place of the incorporated rules in the hierarchy of norms of that legal system. International law will hold itself to be above the constitution, while national law might give the incorporated rules a different status. This brings us back to the issue of subscripting, whereby the national legal system holds that it is the only relevant system because it has incorporated rules of international law, while international law might nevertheless claim relevance.

[29] Since not all countries use a monist system, this exercise is theoretical. However, it is useful to see what the effects of incorporation might be.

independent existence. The situation is then comparable to one country that uses the national currency of some other country.

If 'foreign' rules are incorporated in a national legal system they are not foreign rules anymore but merely rules with a foreign origin. Such rules may still conflict with rules of a national origin, or with other rules of foreign origin. However, because of the incorporation, such conflicts are not conflicts between legal systems anymore. What is avoided by incorporation is not a conflict of rules, but a conflict of legal systems.[30] If there is still a conflict of rules, the techniques used within a single legal system to deal with conflicts, such as making exceptions, can be used to deal with possible conflicts between rules from national and international sources.

8.6 Limitation of rule-creating powers

A common way to avoid inconsistencies within a single legal system is to avoid rule conflicts by preventing conflicting rules from entering into existence at all. A national legislator, for instance, might make an exception to the general right of free speech for cases of hate speech. This will disempower a local legislator to make an exception to this exception for hate speech against people of a particular origin, such as French speaking people from Wallonia. If a local legislator nevertheless attempted to do so, its rules would simply not be recognized as valid law: the local legislator does not have the power to make rules that conflict with the 'higher' rules of the national legislator. This limitation of power avoids conflicting rules by impacting the first of the three factors determinative of applicability.

With regard to international law, however, limitations of the powers of states occur less frequently.[31] This is because such limitations suggest an overarching organization of the distribution of rule creating power that can divest certain actors of their ability to create rules. Such organization is absent on the international plane. As mentioned in the introduction, rule creation in international law is decentralized and tends towards anarchy as even the doctrine of the sources of law has only relative weight. Instead of limitation of state power, international law usually creates prohibitions, which can be violated. The typical sanction is not invalidity, but the need to make full reparation, which may range from monetary compensation, to restitution, to guarantees of non-repetition.

9 Classification of Exceptions

In the previous section, we considered tools to prevent rule conflicts. Given that rule conflicts are a frequent cause of exceptions, these tools can negate the need for exceptions. However, not all rule conflicts can be avoided, and we saw in section 6 that there are other grounds for exceptions as well. In short, exceptions cannot always be avoided. In this section, we will have a closer look at exceptions and how to classify them.

An exception is made to a rule if the rule is not applied to a case, although it is applicable to that case. If a rule is applicable to a case, this is normally a contributory reason for applying

[30] As a matter of fact, incorporation makes more rule conflicts possible, because rules from different systems can, because of subscripting (see section 8.1), only lead to conflicts of compliance, while rules that belong to the same system can also lead to conflicts of imposition.

[31] The powers of international organizations are often limited.

the rule to that case. Barring additional contributory reasons against application, this means that the rule should be applied to the case.

This last clause indicates how exceptions to a rule may come into play.[32] First, it may be the case that, because of exceptional circumstances, the applicability of the rule does not count as a contributory reason to apply the rule. This possibility is studied in section 9.1. Secondly, it may be the case that, although the applicability of the rule counts as a contributory reason for application, this reason is outweighed by one or more reasons against application. This possibility will be explored in section 9.2.

9.1 Exceptions in the shape of undercutting

So far, we have said that the applicability of a rule to a case is a contributory reason for its application to that case. Sometimes, however, it turns out that this reason for applying the rule is exceptionally not a reason at all. Why, however, should we make such an exception to the general rule that applicability is a contributory reason for application?

In section 6, we identified one possible reason to do so, namely that a rule-exception construction was used by the maker of the rule in order to create a division in the burden of proof. The party in a dispute which wants the rule to be applied has the burden of proving that the rule conditions are satisfied; the party which does not want the rule to apply has the burden of proving that the exception-creating rule applies. When the maker of the rules has chosen this mechanism for distributing the burden of proof, and if it has been proven that the exception-generating rule applies, there is no need any more to balance the applicability of the main rule against the ground for the exception. This balance was already made by the creator of the rules and normally this decision should be respected.

Another possibility is that the application of the rule would be against the rule's purpose in this case. An example by Fuller[33] illustrates this point: there is a rule that forbids sleeping in railway stations, which has as its purpose to keep tramps from occupying the station as a place to spend the night. An old lady who wants to meet a friend at the station dozes off when the evening train turns out to be delayed. If the prohibition were applied to this old lady, this would arguably not be encompassed by the purpose of the rule. One might argue that because the case of the old lady is not caught by the purpose of the rule, the fact that the rule is technically applicable to her case is irrelevant and therefore loses its function as a contributory reason for application. If this argument is made, we are not weighing reasons for applying the rule (applicability) against reasons against applying the rule. Instead, we are saying that there is no reason to apply the rule at all.[34]

When we have a reason or reasons why a fact, such as the applicability of a rule, that would normally count as a reason should exceptionally not count as a reason after all, we speak of 'undercutting defeaters' in epistemology[35] or of 'exclusionary reasons' in cases of reasons for action.[36] It is important to note, however, that undercutting defeaters are not only relevant in

[32] In legal practice, exceptions to rules are often avoided by interpreting the need for an exception away. Sections 10 and 11 discuss this technique and its limitations.

[33] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630.

[34] We will see in the following section, however, that the same example can be construed differently.

[35] See John L Pollock and Joseph Cruz, *Contemporary Theories of Knowledge* (Rowman & Littlefield 1999) 196 ff. These undercutting defeaters are also discussed in Henry Prakken, *Logical Tools for Modelling Legal Argument. A Study of Defeasible Reasoning in Law* (Kluwer 1997) 102–103; and Giovanni Sartor, *Legal Reasoning. A Treatise of Legal Philosophy and General Jurisprudence* (Springer 2005) 682–85.

[36] Raz, *Practical Reason and Norms* (n 11) 35–48.

connection with reasons to believe (Pollock and Cruz) or reasons for action (Raz); they are relevant for all reasons.

9.2 Exceptions in the shape of rebuttal

As we have mentioned, if a rule is applicable to a case, this is usually a contributory reason to apply the rule to this case. However, a contributory reason is not as such decisive. If there are contributory reasons against applying the rule as well, then the reasons for and against application must be balanced. If the balance favours the con-reasons, the rule does not apply. Since the rule was, *ex hypothesi*, applicable, the result would be non-application of an applicable rule and therefore an exception to the rule.

Because application of a rule leads to the facts that the rule attaches to the case to which it is applied, reasons against applying a rule are usually reasons why the attached facts are undesirable. They may be undesirable for reasons which have nothing to do with law, as when, because of exceptional circumstances, the application of a rule about free trade leads to a decrease rather than an increase of welfare. They may also be undesirable because the consequences of one applicable rule conflict with the consequences of another rule which is applicable too, as we saw in section 7. And, finally, they may be undesirable because the actual consequences would violate the rule's purpose.[37]

This brings us back to the example of the old lady who falls asleep at the train station. While the argument can be made, as we did in the previous section, that the irrelevance of the rule's purpose negates the function of applicability as a contributory reason for application, a different interpretation is equally possible.[38] On an alternate account, we can still consider applicability of the rule a contributory reason for its application to the case of the old lady, while we consider the irrelevance or even violation of purpose a reason against application. If, in balancing the two, the reason against application wins out, we make an exception to the rule in the case of the old lady.

If application of a rule to a particular case leads to undesirable consequences, this is a reason against the application of the rule to that case. This reason still needs to be balanced against the applicability of the rule as reason for application. Usually, the balancing of these reasons is conceptualized as the determination of which rule prevails over the other rule. The reason based on the prevailing rule outweighs the reason based on the other rule. Several contributory reasons can be—and in fact are—recognized in this connection:[39] one option is that the rule that better fits in the overall legal system prevails over the less fitting rule (*coherence*). Another option is that the rule that was made by the 'higher' authority prevails over the rule made by the 'lower' authority (*lex superior*). Equally, the more specific rule could prevail over the more general rule (*lex specialis*), or the more recent rule over the older one (*lex posterior*).[40]

[37] This distinction between three categories, which harkens back to section 4, does not claim that the three categories are mutually exclusive.

[38] This also shows that logic and legal theory can be of great help in classifying possibilities, but that it depends on substantive arguments or reasons which choices should be made. We briefly talk about the role of legal theory in this context in section 11.

[39] The following is a non-exhaustive list.

[40] Taking the *lex posterior* rule even one step further is the tool of implied repeal, whereby it is presumed that if the later rule conflicts with the earlier rule, the later rule not only prevails, but the earlier rule is in fact repealed. However, if one of the 'conflicting' rules counts as repealed, there is no real conflict, since the repealed rule does not exist anymore and can for that reason not be applicable.

There is much more to be said about what should become the outcome of this operation of balancing competing rules, and in particular about the authority of law in this connection,[41] but this is not the place to go into the details of these substantive reasons. We will confine ourselves to the logical aspects of these so-called 'rebutting defeaters'.[42] They are as follows. If a rule applies to a case, its consequences are attached to the case. If these consequences are for some reason undesirable, the same reason is also a reason why the rule should not be applied. This reason must be balanced against the applicability of the rule as reason for application, and depending on the outcome of this balancing, it may be the case that the rule should not be applied. If the rule does not apply, even though it is applicable, there is an exception to the rule.

Let us use the example of the old lady in the railway station (in its second construal) again to clarify this. Since the old lady was not allowed to sleep in the station, a rule prescribes the manager of the station to send her away. If it is not desirable that the old lady will be sent away, it is also not desirable that the rule, which prescribes to send her away, is applied. This undesirability is a reason not to apply the rule, and this reason should be balanced against the applicability of the rule as a reason for application. If the result of this balancing operation is that the rule should not be applied, an exception is made to the rule.

9.3 Two observations concerning exceptions

We would like to make two observations in connection with exceptions to rules. The first concerns the difference between exceptions based on undercutting defeaters and exceptions based on rebutting defeaters. In the former situation, there are no reasons for applying the rule, because applicability exceptionally does not count as a reason for application. In the latter situation, there is at least one reason for applying the rule, the rule's applicability, but this reason is outweighed by reasons against application, typically reasons involving the undesirability of the rule conclusion.

The second observation concerns the role of exceptions in relation to the non-application of a rule. That there is an exception to a rule is, in the terminology proposed here, not a reason against the application of the rule, but a conclusion based on the premise that the rule is applicable and that the rule does not apply. There must be a reason why the rule does not apply, and this can be an undercutting defeater or a rebutting defeater. However, neither one kind of defeater *is* the exception to the rule. It is at best what brings about the exception to the rule. So we would not call the fact that causes an exception to a rule an exception, and neither would we call the rule which makes this fact into a defeater an exception. In our terminology, an exception to a rule is never itself a rule.

An example may clarify this point. (See Table 2.1.)

In this example, the rule of Article 2 does not apply even though it is applicable, which means that there is an exception to that rule. This exception was brought about by the self-defence of the state, which in turn derived its legal relevance from the rule of Article 21. However, neither the self-defence nor the rule of Article 21 *is* the exception to the rule of Article 2. They both contributed in their own way to that exception, but neither one of them

[41] See e.g. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991) 38–111.

[42] Pollock and Cruz, *Contemporary Theories of Knowledge* (n 35) 196.

Table 2.1 Exceptions and the Burden of Proof

Substance	Effect
According to Article 2 ARSIWA, there is an internationally wrongful act if the act constitutes the breach of an international obligation.	Article 2 ARSIWA is applicable.
In case X, State A acted in a way that breached an international obligation.	
According to Article 21 ARSIWA, the wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the UN Charter.	Article 21 ARSIWA is applicable.
State A acted in self-defence.	
State A's act is not internationally wrongful.	Due to Article 21, the applicability of Article 2 does not count as a reason for application of that rule (undercutting defeater).
	Article 2 is not applied despite its applicability.
	The facts that Article 2 is applicable, but nevertheless not applied, together mean that an exception is made to (the rule of) this article.

should be identified with it. The exception is the combination of the facts that the rule is applicable and nevertheless not applied.

10 Derived Rules

If an exception to a rule is made—be it for reasons undercutting the application of the rule or for reasons rebutting it—some cases or persons are excluded from the application of the rule. The same effect can be brought about by means of scope conditions or 'negative' rule conditions. The ordinary conditions of Article 10 of the ECHR (freedom of expression), for instance, contain such 'negative conditions', since they explicitly exclude amongst others the licensing of broadcasting from the protection of this article. It is also possible to 'read' such negative rule conditions into the rule by means of interpretation, as we will see later in the discussion of Article 2(4) of the UN Charter.

When we ask which cases are governed by rules of international law, there are at least three kinds of reasons why some cases are not governed by particular rules, and they are negative rule conditions, scope conditions, and exceptions. How can exceptions be distinguished from ordinary negative rule conditions?[43] The answer is provided in this and the following section, and the burden of proof plays a central role in it.

The idea that legal rules are open to exceptions is somewhat controversial. This has to do with a certain ambiguity in the notion of a legal rule. In section 3.1, we talked about the

[43] To withhold this contribution from becoming too lengthy, we ignore scope conditions from here on.

distinction between rules and rule formulations. A legal rule may be seen as something that can be found in a legal source, such as a treaty, legislation, international custom, or case law. It may also be seen as a general connection between operative legal facts and legal consequences. The latter is the understanding of 'legal rules' with which we operate here. A simple example may again illustrate that these two understandings are not identical.

According to Article 2(4) of the UN Charter, the use of force is prohibited. Article 42 of the Charter holds that the UNSC may authorize military intervention, in which case it is deemed to be permitted. These two rules seem to conflict, and since the second rule is a *lex specialis* with regard to the rule that the use of force is prohibited, it would normally prevail over it. Application of the second rule then makes an exception to the first.

However, it comes naturally to state that there is just one rule, namely that the use of force is prohibited unless authorized by the UNSC. We can arrive at this rule by 'interpreting' Articles 2(4) and 42 in combination. We will call this a 'derived rule'. For this derived rule, there is no need to make an exception. In fact, it has the absence of the exceptional circumstance as one of its conditions, and hence the prohibition would not be applicable if the UNSC has authorized the use of force. Since exceptions are made when an applicable rule is not applied, no exception would be necessary—or even possible—in case of authorized use of force.

Let us have a closer look at this phenomenon of derived rules.[44] If a rule is applicable to a case this normally means that the rule is applied to that case and attaches its legal consequences to it. This is so normal that the logic of rule application seems to be nothing else than an ordinary syllogistic argument.[45] The facts of a case are subsumed under a general rule, and the conclusion that describes the legal consequences of the case follows deductively. This deductive application of rules seems so natural that it requires explanation that exceptions to rules are possible. If a rule seemingly has an exception, why not say that the rule was not formulated properly, and that it actually has an additional condition namely that the exceptional circumstances are absent?

The insight that rules can have exceptions can be reconciled with the impression that rules can be applied in deductive arguments by means of so-called 'case-legal consequence pairs' (CLCPs).[46] CLCPs describe the effects of rules such as the prohibition of the use of force and the permission of military action when authorized by the UNSC. The two inconsistent rules are combined into a single 'rule' that leads to a single consistent result. We use quotation marks here to indicate that this 'rule' differs from the two rules that were used to construct it. Both the rule prohibiting the use of force and the rule permitting it in cases of UNSC authorization are based on an official legal source, in this case the UN Charter. The derived 'rule', however, cannot be traced back directly to such a source, but is the result of combining the two original rules in light of their apparent purposes, thereby creating a CLCP.

It is possible to characterize a legal system as defined by an exhaustive set of such CLCPs: for every kind of case that has legal consequences, there exists a CLCP that gives the characteristics of the kind of case and the legal consequences attached to it. These CLCPs are

[44] The question whether it is possible to derive rules (or 'norms', which is the more frequently used term) from other rules is highly debated. For an overview see Pablo E Navarro and Jorge L Rodriguez, *Deontic Logic and Legal Systems* (Cambridge University Press 2014) ch 2.

[45] Robert Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (Suhrkamp 1983) 273–83; Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) 19–53

[46] Hage, *Studies in Legal Logic* (n 4) 27. This idea of CLCPs was inspired by the theory of Alchourrón and Bulygin about the Universe of Cases. See Carlos Alchourrón and Eugenio Bulygin, *Normative Systems* (Springer 1971) 24–30.

the outcome of the original rules (including rights and legal principles or incorporated or referred rules) of the system, interpretation and solutions of potential rule conflicts by means of prevalence (such as *lex superior*), or any other technique the system in question employs to resolve rule conflicts.

The CLCPs are constructed in such a way that no particular case can fall under two different generic cases to which incompatible consequences are attached. For example, there will be a case for 'military action without Security Council authorization' and one for 'military action with Security Council authorization', but not one for military action in general, because the latter might give different legal consequences in concrete cases of military actions with and without UNSC authorization. Understanding a legal system as an exhaustive set of CLCPs, it is not possible that a case has inconsistent legal consequences. Imminent inconsistencies are filtered out in the step from the original (conflicting!) rules to the CLCP. Moreover, there are no exceptions to CLCPs. If there seems to be an exception, this means that the CLCP was formulated too broadly: there should be two different CLCPs, one for the normal cases and one for the exceptional cases.

If a legal system is interpreted as an exhaustive set of CLCPs, exceptions to rules only play a role in this step from the original rules based on legal sources to the derived 'rules'—the CLCPs—that define the outcome of all the interacting original rules. It is this step that cannot be handled well by means of deductive logic. When we discuss exceptions to rules, we are not necessarily talking about the immediate application of rules to cases; we may also be talking about the construction of CLCPs which can in turn be used for legal justification is a deductively valid manner. The derivation of the legal consequences of a case by applying the relevant CLCP to that case can be purely deductive, because all exceptions have already been filtered out in constructing the CLCP.[47]

11 Burden of Proof

As we have seen in section 10, it is theoretically possible to maintain the syllogistic form of legal argument and to remove exceptions entirely from a legal system by viewing a legal system as an exhaustive set of CLCPs. However, in this section we argue that, while theoretically possible, this view neglects an important function of exceptions, which is connected to the burden of proof.

In order to understand this function, we must replace our understanding of legal arguments as ordinary syllogisms with a view of the legal system as a dialogic practice.[48] Imagine a dialogue between two parties: the one party, the proponent, wants to establish a particular legal consequence for a case and to do so it invokes a legal rule and wants it to apply. The other party, the opponent, does not want that consequence and therefore does not want the rule to be applied. Both proponent and opponent can adduce reasons: the proponent reasons why the rule should be applied, the opponent reasons why the rule should not be applied. For instance, the proponent should adduce that the rule conditions are satisfied by the case to which he wants the rule to apply. The opponent might adduce reasons why the rule

[47] Notice that we merely discuss logic here. In practice it is not possible to construct a complete set of CLCPs for a legal domain, or even a complete legal system.

[48] An overview of this 'dialogical' approach to logic can be found in Else M Barth and Erik C Krabbe, *From Axiom to Dialogue: A Philosophical Study of Logics and Argumentation* (Walter de Gruyter 1982). See also Hage, *Studies in Legal Logic* (n 4) 227–64.

should nevertheless not be applied and which would lead to an exception if they outweigh the reasons adduced by the proponent.

If all reasons for and against application of the rule have been adduced, there are three possibilities:

1. the reasons for application outweigh the reasons against application;
2. the reasons against application outweigh the reasons for application;
3. the reasons are, at least for the purpose of decision making, in balance; there is a draw.

In the first case, the rule should be applied and its consequences are attached to the case as the proponent would want. In the second case, the rule should not be applied and its consequences are not attached to the case as the opponent would want. But what to do with the third case, when the reasons are in balance? Here is where the burden of proof comes in. The third case should either lead to an outcome that favours the proponent, or to an outcome that favours the opponent. In the former case we say that the burden of proof lies with the opponent, because if the opponent does not want the rule to apply, he must make sure that the balance of reasons does not end in a draw. In the latter case we say that the burden of proof lies with the proponent, because then the proponent has an interest in avoiding a draw in the balance of reasons.

The burden of proof translates into the burden of production, with which the burden of proof is easily confused.[49] If the balance of the reasons that have been adopted at a certain moment during a legal dialogue would lead for an outcome that favours the proponent, it is up to the opponent to produce more reasons.[50] At that moment, the opponent has the burden of production. It is possible that the opponent succeeds in doing so, and then the burden of production shifts to the proponent. The process of the production of more reasons, with a shift in the burden of production as result, may continue for some time, and the burden of production may shift several times during a dialogue. However, it is the situation at the end of the dialogue, and in particular which side in the dialogue benefits from a draw, which determines who has the burden of proof. The burden of proof never shifts, but it determines, together with the state of the dialogue, which party has at a certain moment the burden of production.

This connection between exceptions and the burden of production (and ultimately of proof) cannot be accounted for if we abolish exceptions by viewing the legal system as an exhaustive set of CLCPs. To illustrate further the view of a legal system as dialogic and to show how dialogues can be used to model legal reasoning and the operation of exceptions, we will consider an example. Our example will feature State O and State V. State O breaches an international obligation, and State V, which suffered damage as result, wants reparations from State O.

[49] We took the distinction between the burden of proof and the burden of production from the contribution of Joost Pauwelyn to this volume.

[50] Actually, there are more possibilities to make the burden of production shift, including showing that the seeming reasons adduced by the other party cannot withstand criticism. However, this is not the place to discuss these possibilities.

11.1 Step 1: straightforward rule application

A party who wants a rule to apply must prove that the normal conditions of the rule are satisfied.[51] Given the rule of Article 31 of the ARSIWA, State V must prove that State O committed an internationally wrongful act.[52] Given the rule of Article 2 of the ARSIWA, State V must therefore prove that State O conducted itself in a way that was either an act or omission, conduct that can be attributed to State O, and that breached an international obligation of State O. We ignore the attribution aspect, to find that, according to the rule of Article 12 of the ARSIWA, concerning breach of obligations, State V has to prove that the act of State O was not in conformity with an international obligation of State O.

We see a chain of rules, where the conclusion of the one rule means that some condition of another rule is satisfied, and the chain ends with an obligation to repair for State O. State V must prove that the conditions of all these rules are satisfied, and can sometimes fulfil this burden by justifying the application of another rule in the chain.

11.2 Step 2: preclusion

Suppose that State V in Example 1 has proven that State O breached an international obligation and that this can be attributed to State O. Normally, this means that the rule of Article 2 of the ARSIWA is applicable and that would be a reason to apply that rule with the consequence that the conduct of State O counts as a wrongful act. However, State O can block the step from the applicability of the rule to its application by invoking the rule of Article 21 of the ARSIWA. To do so it must prove that it acted in self-defence, that therefore the rule of Article 21 of the ARSIWA is applicable, that therefore this rule applies, and that that the wrongfulness of what State O did is precluded. If State O succeeds in doing so, the rule of Article 2 is applicable, but does not apply, and there is an exception to this rule.

Note that State V has the burden of proof with regard to the question of whether State O must repair the damage, but that State O has the burden of proof for the presence of self-defence. If State V would have had the burden of proving that there was no self-defence, the absence of self-defence would have been a negative condition of the rule of Article 2. Apparently, the burden of proof is relative to the issue at stake. State V bears the burden of proof regarding the obligation to make reparations, while State O bears the burden of proof regarding self-defence.

Because there are two burdens of proof, for two issues, there is no shift in the burden of proof. However, there is a shift in the burden of production, because State O does not have to do anything until State V proves that State O breached an international obligation. Only when State V succeeds does the burden of production shift to State O, which must prove self-defence.

[51] In these examples we will ignore the possibility of analogous rule application, and also the role of scope conditions.

[52] We will assume, for the sake of exposition, that the validity of the rule does not have to be proven, because the court knows the law (*ius curia novit*). Strictly speaking this introduces a third party (the court) into the dialogue, but, again for the sake of exposition, we ignore this complication.

11.3 The role of legal theory

Whether the applicability of Article 21 of the ARSIWA makes for an exception, with a shift in the burden of production, or whether this article combines with Article 2 (and some other articles) as sources for a complicated rule that has some negative conditions, is something that must be established by interpretation of the ARSIWA. There is no simple test for it, and the difference between negative rule conditions and exceptions is therefore a matter of interpretation too. The only thing that legal theory has to offer in this connection is that, if there is no shift in the burden of production, we have reason to regard the relevant article as a negative rule condition, and that if there is such a shift, we have reason to regard it as an exception.[53]

12 Conclusion

Exceptions to rules play an important role in law, and in particular in international law. A proper understanding of exceptions is therefore of crucial importance for legal practice, legal doctrine, and legal theory. The aim of this chapter is to contribute to this understanding; it is not to describe the law or the present usage with regard to rules and exceptions.

As background for the development of a theory about exceptions to rules, sections 3 and 4 have gone into some detail concerning rules, rule formulations, legal sources, reasons, and their logic. In section 5, the distinction between the applicability and the application of a rule was elaborated. A rule is applicable to a case if the rule is valid, and if its ordinary and scope conditions are satisfied by the case. If a rule is applied to a case, the rule attaches its legal consequences to the facts of the case. Normally the applicability of a rule to a case is a contributory reason why the rule should be applied to the case. An exception to a rule in a case is defined as the situation in which a rule is applicable to, but nevertheless not applied to the case.

In section 6, two main grounds for making an exception to a rule were identified. First, the maker of the rule may use the rule-exception construction to create a division in the burden of proof. As argued in section 9, this leads to a so-called undercutting defeater. Secondly, there may be reasons why the legal consequences of the rule in the case are undesirable. This leads to a reason against applying the rule, which needs to be balanced to the applicability of the rule as reason for application. In this situation we speak of rebutting defeaters (see section 9.2).

An important reason why it is undesirable to apply a rule to a case is that application would generate a conflict with another applicable rule. Section 8 discussed a number of tools and techniques that can be used to avoid rule conflicts and which would in that way make exceptions superfluous.

Finally, the question may be raised of whether legal rules really have exceptions. Is it not the case that if a rule is well-formulated, it mentions all 'exceptions' as negative rule conditions? Such a well-formulated 'derived' rule can then be applied deductively to cases that satisfy the rule conditions. In sections 10 and 11, we discussed this possibility and showed that this use of derived rules blocks the possibility of modelling the division of burden of proof which is implicitly given with the rule exception model.

[53] Again, we ignore possible third ways, such as scope conditions.