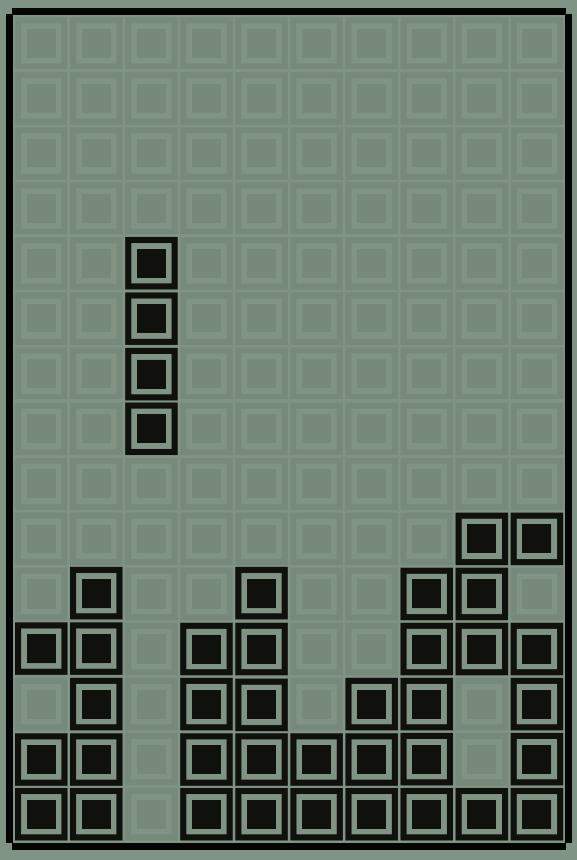
Consistency in international law

CONSISTENCY IN INTERNATIONAL LAW

How to Make Sense of a
Decentralised and
Expansive Rule-Based World



Henrique Marcos

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Henrique Jerônimo Bezerra Marcos

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How to Make Sense of a Decentralised and Expansive Rule-Based World

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Henrique JB Marcos,

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Abbreviations

AB	World Trade Organization Appellate Body
ACHR	American Convention on Human Rights
Art.	Article
CTSCZ	Convention on the Territorial Sea and Contiguous Zone
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
EU	European Union
HRL	Human rights law
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
LOSC	Law of the Sea Convention
OAU	Organization of African Unity
OSPAR Convention	Oslo Paris Convention for the Protection of the Marine Environment of the North-East Atlantic
R-consistency	Consistency of rulesets
S-consistency	Consistency of statement sets
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on Law of Treaties
WTO	World Trade Organization

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1 Introduction

Suppose we are going to try out a new board game. Players can win this game by moving their pieces from the start to the end square. Players must follow rules that specify how each piece should move. They should also avoid placing their pieces on forbidden squares, as doing so means 'game over'. To win, players must know and follow the rules, just like in any other game. However, the starting rules of this game are distinctive in that they can change in every round as players agree to add new rules, change previous rules, and even remove rules from the game.[1]

With each round, keeping track of all the rules that limit our next moves will become increasingly difficult. It will be even more challenging to remember which rules apply to which players so that we can plan where to move our pieces next, not to mention deciding what to do if our opponents introduce conflicting rules. In fact, even the proper way to deal with these conflicts may itself depend on a different rule that players suggested in an earlier round. But it would also be possible for these rules for the resolution of conflicts to themselves conflict with other rules.

Does playing this game sound baffling? It is not so different from international law.

Unlike domestic law, where rule-making is the job of institutionalised legislative houses, rule-making in international law is *decentralised*. Instead of a central authority or unified government crafting international legal rules, the subjects of international law are also those who create its rules. States sign treaties with one another, establishing the main body of rules governing their interactions, State practise becomes customary law, and States' domestic rules are incorporated as 'general principles of international law'. A consequence of decentralisation is that international law is primarily horizontal. Most of the time, international legal rules have no clear priority relationship set between them. Rules sprout organically without consideration for the other rules already in place. So, new rules are clustered next to older ones without an overarching plan or a preset order.

[1] Peter Suber (1990, app. 3) suggested a similar game in the 80s, 'Nomic'. All the aspects of his game are variable, thus allowing players to add, change, and repeal any rules they want; this can include making mutable rules immutable or immutable ones mutable.

The scenario became even more complicated after 1945 with the *expansion* of international law. After the United Nations (UN) was formed, there was a period of accelerated growth in the number of rules in international law. Not only that, but international law's thematic scope has since diversified to include many new areas, such as international environmental law, labour law, trade law, international humanitarian law, human rights law, the law of the sea, and even space law. These subsets of rules, known as 'self-contained' or 'special regimes', are noteworthy as they often include rules governing similar situations in incompatible ways.

Contemporary international law's decentralised and expansive character has led some to wonder whether it is '*fragmented*' (International Law Commission, 2000). They question whether international law is still a single ruleset or has devolved into a collection of disconnected rulesets with rules that may result in incompatible outcomes in cases where these rules apply. In other words, international legal rules may conflict. Conflicts have become even more problematic due to international law's decentralised character. There is no general plan or framework to help legal subjects find their way around these conflicts.

For many years, 'fragmentation' has been a point of contention, but today, the general opinion is that, regardless of decentralised expansion, international law remains 'systemic' (International Law Commission, 2006b). No matter how diversified special regimes have become, they are all still part of international law. All international legal rules are elements of a single ruleset. This wide-ranging ruleset stays consistent due to some 'internal logic' that allows subjects to make sense of any potential conflict between international legal rules.

So, as Anne Peters (2017, p. 672) puts it, 'it is time to bury the f-word' and to concentrate on how the 'systemic' conception contributes to the consistency of international law. This book takes up Peters' invitation to fill this research gap. This research aims to help the legal subjects of international law (such as States, international organisations, diplomats, lawyers, and anyone dealing with its rules) navigate its decentralised and expansive ruleset.

As this book will explain in detail in the following chapters, the subjects of international law face a problem of uncertainty—their legal positions are not always clear. These legal positions are the direct and indirect outcomes that international legal rules bring about when they apply to cases. Given that international law's ruleset is decentralised and expansive, many international legal rules end up conflicting: these rules are applicable to the same cases, but if applied, they would lead to incompatible outcomes in such cases. Conflicts are problematic because they leave subjects uncertain about which of the possible outcomes will

form their legal positions. Subjects must understand those legal positions in order to plan their actions and decide what to do. In light of this, this book aims to help legal subjects by providing a structure to guide them through the complexity of international law's decentralised expansion.

The next few sections of this first chapter will give us an overview of this book's structure. The following section describes its research question, its objective, and the thesis it presents (1.1). The section after that offers a bird's-eye view of the road taken in the following chapters (1.2). Then, we will read about the methods and the theoretical backing this book adopts (1.3). This chapter's last section argues for the relevance of this research and how it may contribute to the current body of knowledge (1.4).

1.1 Question, Objective, Thesis

This book's *research question* asks how legal subjects can make sense of international law despite its decentralised expansion. In other words: how can those subjects extract a consistent set of legal positions from the international legal ruleset, even though international law is decentralised and ever-expanding? This book's *objective* is to supply a conceptual analysis of the notion of consistency in international law. We will speak about method later on (section 1.3), but we should understand 'conceptual analysis' as breaking down the concept that we are studying (consistency in international law) into its constituent parts to gain a better understanding of the issue that it applies to (international law's consistency or lack thereof) (Beaney, 2021).

To anticipate what this book will explain in detail in the following chapters, there is a significant difference between descriptive sentences (statements) and rules. This difference leads to two concepts of consistency. There is the consistency of statement sets (*S-consistency*) and the consistency of rulesets (*R-consistency*). A statement set is S-consistent if all statements in that set can be true at the same time. If they cannot, that set is S-inconsistent. A ruleset is R-consistent when it cannot lead to conflicts. If it can lead to conflicts, it is R-inconsistent.

With these two kinds of consistency, this book will advance its two-part *thesis: (1)* more rules do not always lead to a ruleset's R-inconsistency; *(2)* even if a ruleset is R-inconsistent, we can still extract an S-consistent statement set based on what outcomes obtain as subjects' legal positions. Subjects can extract S-consistent statement sets from R-inconsistent rulesets

by reasoning with and about rules to determine which rules apply and what outcomes result from these rules. These rule-based outcomes are the legal positions of the subjects of international law.

This book's thesis supports the following *corollaries*, which are of particular interest to the subjects of international law:

(1) International law's decentralised expansion does not necessarily lead to its R-inconsistency. Even if international law remains decentralised and ever-expanding, that does not necessarily mean it is R-inconsistent. By reasoning with and about rules, we may notice that what seemed like an R-inconsistent ruleset is, in fact, R-consistent and thus does not lead to conflicts. Since avoiding conflicts is desirable, legal subjects should strive to introduce an overarching ruleset comprised of rules that serve as constraints against which we judge the applicability of other rules. This ruleset can help maintain international law's R-consistency by avoiding conflicts and making it easier for subjects to determine their legal positions.

(2) Even if the ruleset of international law is R-inconsistent, subjects can make sense of it by constructing an S-consistent set of statements about their legal positions. Subjects can extract S-consistent statement sets from the (R-consistent or R-inconsistent) ruleset of international law by reasoning with and about the rules of international law to determine which rules apply and what outcomes result from these rules. These outcomes are the legal positions of subjects. In this way, international law remains 'consistent' because subjects can get an S-consistent statement set from international law's (R-consistent or R-inconsistent) ruleset. However, the subjects of international law would benefit from an overarching ruleset governing the priority relationships between international legal rules. This ruleset would help subjects by establishing reasons that would allow for unambiguous conclusions about what outcomes would result in terms of their legal positions.

1.2 Roadmap

This book is divided into six chapters. Chapter 1 serves as an introduction, and chapter 2 explains the background of the present work in more detail. Chapter 2 demonstrates that international law develops without a central body coordinating it (decentralised) and that the international law ruleset is always growing (expansion).

Chapter 3 aims to show that the difficulty that subjects face when dealing with international law's decentralised expansion is one of uncertainty concerning their legal positions. Given that international law is decentralised and expansive, subjects have to deal with many applicable rules that could lead to incompatible outcomes. This is problematic, as incompatibility leaves subjects unsure about what outcomes obtain as their legal positions. Chapter 3 also lays down the theoretical building blocks for chapter 4's development of a logical framework to help subjects find their legal positions.

Chapter 4 begins by listing the axioms that compose its logical framework for reasoning with and about rules. Using this framework, the chapter explains compatibility as determined by the constraints in place, which allows it to define rule conflicts as well as R- and S-consistency. With these definitions at hand, chapter 4 explains how to avoid and deal with conflicts. Then it puts forward this book's two-part thesis and its corollaries.

Chapter 5 draws on earlier chapters to supply some applications for the logical framework this research develops. It shows how this framework can help bring clarity to our reasoning, thus helping us see what rules apply and what outcomes result from them, which allows us to reveal the legal positions of the subjects of international law.

This study ends with chapter 6, which goes over the conclusions reached in each of the previous chapters. That chapter starts by summarising what we have learned in the previous chapters, and its last section considers directions for future research.

1.3 Method and Theoretical Backing

This is a self-contained work in the field of analytic philosophy of law, which addresses a problem of international law. In this regard, it is worth clarifying that this book does not engage in strict-sense doctrinal research on international law. Its aim is in no way to survey how past lawyers have engaged in the topic of international law's consistency, much less to supply a historical recollection of this matter. Likewise, it is not a guide to the literature about consistency in international law.

This book provides a theory that draws on current philosophical research, particularly recent insights into logic and social ontology, to help lawyers deal with some issues around international law. More specifically, this book will attempt to assist lawyers in determining how to deal with the complexity of contemporary international law's decentralised

expansion. But while the theory in this book draws from logic and social ontology, it is not itself research in either of those fields.

The objective of this study is to supply a conceptual analysis of consistency in international law. When analytic philosophy of law investigates concepts used (or presupposed) in knowledge domains such as international law, it fulfils the same goals as those that are attributed to similar efforts in analytic philosophy of mathematics or art, but for a different specialised discourse (Bix, 1999, chap. 1; Berlin, 2013).[2] In all such cases, the goal is to improve conceptual apparatuses by making the *implicit* inner workings *explicit* (Brandom, 1994, pp. 649–650; Russell, 2009, p. 35).

In its conceptual analysis, this book offers a *rational (re)construction* of its object of study (Lorenzen, 1987, chap. 1; Davia, 1998; Ashooh, 2007). Rather than contributing a descriptive account of how people understand and tend to use the concept of consistency in international law, this research pieces it together in ways that may depart from everyday discourse to offer a *consistent* account of consistency in international law. In other words, a theory of consistency in international law composed of a consistent set of statements—as all these statements can be true at the same time—and that takes as the parameter of consistency those statements that are themselves elements of that set. In other words, this book aims at a 'coherent' theory of consistency in international law.

While self-contained, this book does not exist in isolation. It takes lessons from and builds upon earlier research by philosophers, legal theorists, and international lawyers. This study draws from earlier work on *reasons* by Aristotle, passing through Aquinas, and is strongly influenced by Anscombe (2000). More specifically, it adopts a factualist view of reasons, as it holds that all reasons are facts that plead for conclusions (Alvarez, 2010). Moreover, Anscombe-influenced research on social ontology, with its new insights into the nature and properties of the social world, directs the approach taken by this book when looking at the law. In this respect, the present work is indebted to Searle (1992, 1995, 2010) and to MacCormick and Weinberger (1986).

This book also draws from findings on *constitutive rules*. Even though Searle deserves praise for putting such rules in the spotlight in recent years, the approach to (constitutive) rules that this book adopts is closer to that developed by Hage's (2018a, 2022) recent work on how

[2] It is important to emphasise, as does MacCormick (1986, p. 94), that to recognise the value of analytic philosophy of law is certainly not to dismiss the relevant bearing of different kinds of philosophy of law.

our cognitive apparatuses explain the construction of law. Hage's earlier work also influences this book's theory, as it uses his Reason-Based Logic (1997, 2005c) to develop a logical framework for reasoning with and about rules.

The present work endorses Streck's (2010, 2011, chaps 4 and 8, 2017, p. 78 f.) criticism of a descriptivist approach to legal reasoning. It draws from *interpretivism*, particularly from the idea that (international) law has a *point* or *purpose* (Dworkin, 1986, pp. 47–48; Postema, 2011, pp. 425–426; Macedo Junior, 2013, chap. 5; Bustamante, 2017, pp. 270–271). It adopts an 'interpretive attitude' as it acts from the assumption that rules serve international law's purpose. Rules are liable to be affected by that purpose so that they can best serve it. As such, the views adopted by this research can be best described as *rule-sensitive particularism*, as it recognises that a rule may not apply if its application would not best serve the purpose behind that rule (Postema, 1991, pp. 804, 811).

This book adopts a *reason-based approach* to law. It believes that due to its reason-giving character, the law finds itself within social practices that have to do with what subjects *ought to do* and what *ought to be* the case. Yet, this book focuses on a depersonalised account of 'ought', as it understands that rule application is not a matter of personal insight but a shared or public practice (Postema, 1982, pp. 188–189; Wittgenstein, 1986, paras 143–242; Glock, 1996, pp. 323–329). So, rather than speaking of an agent (such as a judge or a court) applying a rule to a case, this book assumes that rules apply to cases they ought to apply to. Subjects must find out which rules apply to the cases they are dealing with.

From international lawyers we adopt the assumption that international law is law, setting aside any discussions, however interesting, on the legal nature of the rules of international law. Moreover, we will assume that international law is 'systemic'—international legal rules find themselves within a single ruleset and interact with one another according to some 'internal logic' that this book aims to clarify. On these points, the present research is indebted to the work of international law theorists such as Benvenisti (2008), Delmas-Marty (2006, 2009), Dupuy (2002, 2020), and Menezes (2013, 2017).

It is also worth mentioning that this book recognises the importance of legal principles in international law. In this regard, following the ILC's recent work (2019), there is a fascinating new trend that delegates the job of keeping consistency in international law to 'general principles' such as *lex specialis*, *superior*, and *posterior* (Kwiecień, 2018; Andenas *et al.*, 2019; Eggett, 2021; Shao, 2021). Nonetheless, this book adopts an integrationist

approach to rules and principles, treating principles as a specific kind of rule. So, when this book says 'rules', we should read it as 'rules and principles'.[3]

1.4 Intended Outcome and Value

This book intends to contribute to the existing literature on the philosophy of (international) law by supplying a theory of consistency in international law. Considering the explanations above, we can say that the present work's theory is an effort to explore the methods of international law rather than its substance. This book is not about resolving substantive problems in international law, such as saying that one rule applies or does not apply to a particular case. Instead, it studies the nuts and bolts of international law to provide a background theory on the basis of which lawyers can conduct the discussions needed to resolve these substantive problems.

While it focuses on international law, this book's findings may also be of interest to non-international lawyers as well as non-legal researchers. The theoretical framework it offers is not exclusive to international law. In truth, with some minimal modifications, this book's findings can be applied to any area of study dealing with rules. So, an ethical theorist or a linguist could use part of the theory developed here to deal with rule conflicts in their areas of expertise. Also, this book is written with the assumption that its potential reader is not a theorist or a philosopher herself, but is willing to delve into a certain level of abstraction to understand the complexities affecting rule-based practices. As such, no prior specialised knowledge of contemporary philosophy or logic is necessary to understand the arguments made in this book. With this goal in mind, this study develops its logical framework using natural language.

Regarding the value of theoretical work in the philosophy of international law, in some ways, we could look at this book as another voice in the long dialogue on international law's characteristics as a legal order. However, as explained above, it is better to look at this work as withdrawing from the current dialogue. It avoids making substantive claims in order to focus on assisting lawyers to better understand one another, allowing them to continue to converse and figure out answers to persistent questions.

[3] Many authors adopt a similar terminological choice (Wittgenstein, 1986; Schauer, 1991; Brandom, 1994; Hart, 2012a; Hage, 2018a).

To this end, this book takes some steps away from international law to dive into logic. International law is a complicated beast; if we want to understand it, we need to strip it of some of its elements and get down to its essence. Logic can help with that. Logic supplies us with tools that help us better understand one another, agree about things, and pinpoint the exact instances on which we disagree (Cheng, 2019). Despite all its uses, logic has the disadvantage of taking our feet off the ground, as it only deals with abstractions. In this regard, it is essential to emphasise that logic is not intended to be a tool for solving legal problems, nor does it impose its answers on us (Hage, 2001a, 2001b).

Still, using logic when researching international law can help us gain the much-needed clarity that allows us to build, communicate, and follow complex arguments. Clarity should be a high priority in contemporary discussions on international law. Many of the problems that the ILC is dealing with in its current work on 'general principles' are leftovers from earlier reports, such as the one on 'fragmentation'. Continuing to work without concern for clarity will only result in these issues being relegated to the following report, and the one after that. This book is an attempt to help break this cycle.

2 International Law's Decentralised Expansion

Chapter 1 introduced us to this book's topic, its roadmap, and, most importantly, its *research question*: how can subjects make sense of international law despite its decentralised expansion? The current chapter introduces the complex situation that gives rise to this question: the decentralised expansion of international law.

The chapter begins by explaining that international law's decentralised character is one of its traditional or classical features (2.1). It then explains how international law's ruleset has expanded. There has been a process of accelerated growth in the number of international legal rules, international law's thematic scope has diversified, and international institutions have proliferated (2.2). This chapter then dives into the discussion on whether international law is 'fragmented' as a result of its decentralised expansion or whether it is a 'legal system' (2.3). The chapter ends by summarising its contents and linking itself to the next chapter (2.4).

This is an important chapter, as it helps explain how the research question for this book was chosen. The next chapter (3) will use this present chapter's explanation of international law's decentralised expansion to clarify that the difficulty that subjects face is one of uncertainty concerning their legal positions.

2.1 Decentralisation

Scholars like to distinguish 'new' or 'contemporary' from 'old' or 'classical' international law (McWhinney, 1985). International law has a long history; there is evidence of international treaties being written over four thousand years ago (Truyol y Serra, 1996, p. 19; Sand, 2018). Still, the signing of the two Treaties of Westphalia at the end of the Thirty Years' War in 1648 is a popular historical milestone in classical international law (Gross, 1948).

Classical international law is distinguished by three characteristics (Menezes, 2005, pp. 36–38): *(1)* the assumption that the only subjects of international law are equally sovereign States; *(2)* the primacy of voluntarism as expressed in States' ability to freely choose whether or not to assume obligations under international law and to reject any authority greater than their own; *(3)* and having as its sole aim that of ensuring a minimum level of peaceful coexistence among States.

International law has changed since the 1600s, but some of its older characteristics are still present, and thus it has remained *decentralised*. Even with the undeniable relevance of the UN's General Assembly, Security Council (UNSC), and the International Court of Justice (ICJ) (Serpa Soares, 2020), even today there is still no single authoritative institution overseeing the development of international law. International legal rules sprout organically as subjects act without any determinative supervisor coordinating the rule-making processes. Subjects sign their own treaties, their own practice becomes international customary law, and their own domestic rules are elevated to the status of 'general principles of international law'.

It is true that, nowadays, many treaties are drafted between State representatives in the context of multilateral conferences and congresses. A contemporary example is the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction. This conference aims at elaborating the text of an instrument under the Law of the Sea Convention (LOSC) (1982) on the conservation and sustainable use of marine biological diversity (United Nations General Assembly, 2017; Lijnzaad, 2020; Veiga, 2021, sec. 2.2). Still, the point remains: international law's subjects are also those who create it.

A consequence of decentralisation is that international law is primarily *horizontal*. Unlike many domestic legal orders, where we find a sharp hierarchy of constitutional rules on top and progressively less 'important' rules as we go down the legal ladder (Kelsen, 1949, chap. XI, 1967, chap. V), international legal rules have no clear priority relationships between them. In international law, rules are created without consideration for the other rules already in force. So, without either coordination, an overarching plan, or a preset order, international legal rules are bundled together in a shapeless mass.

Some international legal rules, such as those derived from the UN Charter, stand out from the rest (1945, art. 103; Vidmar, 2012). Nevertheless, most international legal rules have no clearly set priority relationships between them. Moreover, it is not unusual for there to be paradoxical arrangements whereby these priority relationships are themselves contradictory. Think of a case where a rule stemming from a recently signed treaty points to an outcome incompatible with the outcome pointed at by a more specific rule. *Lex posterior* tells us that the newer rule has priority, and *lex specialis* tells us that the more specific rule does.

International law's decentralisation, its horizontality, and some of its other, similar features have led both Hart (2012b, pp. 236–237) and Kelsen (1948, p. 784, 1952, p. 34) to compare

international law to the 'primitive law' of tribal groups. In both international law and primitive legal orders, subjects (States or tribe members) are personally responsible for setting their own legal arrangements, without reference to any preset order or centralised institutional authority. This situation leads to disagreements and quarrels between the subjects, who often resort to force to settle their differences.

2.2 Expansion

As pointed out above, international law has changed since the 1600s. Three characteristics identify 'contemporary international law' or international law after 1945 (Menezes, 2005, pp. 39–114, 2007a, p. 460, 2007b): *(1)* Firstly, the institutionalisation of international law. Encouraged by the success of the UN as a permanent forum for dialogue between nations, States developed new organisations with diverse purposes and arrangements. *(2)* The second characteristic is the shift in the guiding purposes of international law as a legal order. What started as a ruleset focused on governing the interests of sovereign States has gradually become a kind of 'universal standard', as its concerns have grown to encompass human rights and the protection of the environment (Friedmann, 1959, p. 417 f.). *(3)* The third distinctive feature is the institution of an internationally administered globalised economy. Currency, finance, and trade are now dealt with on a global level by the International Monetary Fund, the International Bank for Reconstruction and Development, and the World Trade Organization (WTO) (Friedman, 2000).

These three aspects tie into international law's *expansion*. Contemporary international law has more rules than its classical counterpart. There is a continuous upsurge in the volume of rules that belong to international law, as ever more treaties are signed, customs identified, and 'general principles' named (Cantú-Rivera, 2014). Yet, this expansion not only takes the form of growth in sheer numbers; international law has also *diversified*. Contemporary international law has a greater thematic scope than its classical counterpart. It now includes many new areas, such as international labour law, trade law, investment law, human rights law, international humanitarian law, refugee law, criminal law, environmental law, the law of the sea, and even space law. The examples are plentiful, which shows how diverse contemporary international law has become, with its many regulatory subsets, often referred to as '*self-contained*' or '*special*' *regimes.*

Special regimes are subsets of rules of international law that are each centred around a different purpose.[4] As an example, we can compare and contrast the special regimes for protecting the environment and for international trade. What is most interesting to us is that these subsets contain rules that are frequently applicable to the same cases but, if applied, would result in incompatible outcomes. In other words, the rules belonging to these special regimes can *conflict*.[5]

To put this in context, consider a diplomat who is faced with two rules. One rule, aimed at safeguarding free trade, prohibits States from discriminating against like imports. The other rule, an environmental law rule, allows States to discriminate against imports if that discrimination is directed against products that endanger protected wildlife. Assume this diplomat is dealing with a situation in which canned tuna imports are produced in a way that endangers the dolphin population—the fishing nets used to catch tuna also catch dolphins. Because it is unclear which rule applies to this case, the diplomat would be unsure of her State's legal position. Is her State permitted or prohibited to discriminate against that product? In this regard, it is worth mentioning that this example is not far from legal practice; we often find WTO cases dealing with equivalent conflicts (Calle Saldarriaga, 2018; Marcos, 2021).[6]

Expansion also manifests itself in what has come to be known as *proliferation* (Guillaume, 1995). International law is now plural; it is no longer a practice engaged in by a few States. Instead, nearly all the States around the globe practise international law in all kinds of asymmetric interactions (bilateral, multilateral, regional) (Thin, 2022). Against this backdrop, it is not unusual for newly signed treaties to give rise to conflicting rules. In the field of international trade, for instance, some authors go as far as to compare the throng of

[4] The expressions 'special regimes' and 'self-contained regimes' have sometimes been used to refer exclusively to special sets of rules on State responsibility. This seems to be the case in the ICJ's *United States Diplomatic and Consular Staff in Tehran* (1980, para. 86). Yet, in a contemporary context, the usage of these expressions goes beyond State responsibility, as they can refer to a special set of rules on any topic. This definition is favoured by the ILC (2006b, paras 128–129) and the Permanent Court of International Justice in *S. S. Wimbledon* (1923, p. 22). We will also adopt this broader definition in this book.

[5] Chapter 4 provides an in-depth analysis of our definition of conflicts. For now, it suffices to say that two or more rules conflict in a particular case when these rules are applicable to that case but, if applied to it, would lead to incompatible outcomes.

[6] For example, *US-Tuna (Mexico)* (1991), *US-Tuna (EEC)* (1994), *US-Shrimp* (1998), *US-Tuna II (Mexico)* (2012), *EC-Seal Products* (2014).

international conventions tangling with one another to the intertwining of spaghetti in a bowl (Bhagwati, 1995).

Proliferation has opened international law to new subjects, such as international organisations, non-governmental agencies, and a multitude of international courts beyond the ICJ. There are now both regional and thematic courts, such as the European Court of Justice (ECJ), the International Tribunal for the Law of the Sea (ITLOS), criminal and human rights courts, ad hoc tribunals, and many more (Han, 2006; Dupuy, 2007; Menezes, 2013). These organisations are also responsible for developing international law and articulating their views on how its rules should interact with one another. Moreover, they act without supervision, as there is no hierarchy between them (Jennings, 1998, pp. 62–63). As such, it is not impossible for these courts to issue contradictory rulings (Cardoso Squeff *et al.*, 2021).

A recurring example used to illustrate the complications brought about by international law's decentralised expansion is the set of cases known as *MOX Plant* (Lavranos, 2006; Koskenniemi, 2007a; Varella, 2009). These cases are all linked to the United Kingdom's construction of a power plant near Irish territory. Ireland urged the United Kingdom to close down the facility, but the British refused. What is noteworthy is that this contention led to not one but three judicial disputes. Ireland filed the first against the United Kingdom before an Arbitral Tribunal (2003) for the Oslo Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (1992). The second, also by Ireland against the United Kingdom, but this time under LOSC, began as a request for ITLOS to prescribe provisional measures (2001) that later turned into a proceeding before the Annex VII Tribunal (2003). The third one was instituted by the European Commission against Ireland before the ECJ (2006).

MOX Plant is a fascinating instance of a joint filing of three cases under three different sets of rules—the OSPAR Convention, LOSC, and European Union (EU) law—each with their own thematic focus, geographical range, and dispute settlement procedures. Even more fascinating is that the ECJ (2006, para. 168 f.) found that Ireland had failed to follow specific EU rules by instituting a procedure before another international court—ITLOS—without consulting with the European Commission. But Ireland filed that lawsuit following the rules contained in LOSC that permitted such a procedure to occur. In this manner, *MOX Plant* exemplifies how international law's decentralised expansion makes it difficult for subjects

to identify their legal positions. To put it bluntly, the simultaneous applicability of rules that point to incompatible outcomes (rule conflicts) leaves subjects uncertain about what they are allowed to do. After all, was Ireland permitted to file a lawsuit under ITLOS before checking in with the EU, or was it prohibited from doing so?

2.3 Fragmentation and Systematicity

So far in this chapter we have explored the decentralised nature of international law as one of its traditional characteristics, and we have seen that contemporary international law is expansive. We have also found that the decentralised expansion of international law makes it difficult for legal subjects to understand what is expected of them, as they are occasionally confronted with applicable rules that, if applied, would result in incompatible outcomes. In other words, subjects face rule conflicts, and these conflicts leave subjects uncertain about their legal positions.

Situations like those illustrated by *MOX Plant* have led the ILC to wonder whether international law is 'fragmented'. At its 52nd Session in 2000, the ILC added the report titled *Risks Ensuing from Fragmentation of International Law* (2000) to its syllabuses on topics recommended for inclusion in the long-term work programme. In that report, the ILC questions whether contemporary international law is still a single ruleset or has become an assortment of disconnected rulesets riddled with conflicts. The report understands that 'fragmentation' is mainly generated by an increase in international legal rules (expansion) and 'regional and global interdependence' in areas such as the economy, the environment, energy, and weapons of mass destruction (2000, pp. 143–144; Hafner, 2004). According to the Commission, contemporary international law is not 'homogenous' but 'unorganised', which leads to conflicts (2000, p. 144).

After the publication of the 2000 report, the UN General Assembly requested the ILC to consider 'fragmentation' further. Heeding this appeal, at its 54th session in 2002, the ILC included the item in its work programme, setting up a study group. In 2006, at its 58th session, the ILC's study group published a report finalised by Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006b). In the 2006 report, the Commission emphasises that international law's decentralised expansion leads to rule conflicts, as more and more rules are introduced to international law without any central coordination (2006b, para. 5 f.). According to the ILC, although conflicts are commonplace when dealing with international and domestic law,

domestic law organises itself hierarchically while international law is horizontal; this disparity makes resolving conflicts even more difficult (2006b, paras 21–26).

Despite the difficulties posed by 'fragmentation', the ILC concluded that international law is 'systemic'. According to the Commission, the rules of international law 'act in relation to and should be interpreted against the background of other rules […]' (2006a, para. 14). The ILC asserts that we should not look at international law as a random collection of rules, as '[t]here are meaningful relationships between them' (2006a, para. 14).[7] Even though the systemic view is quite popular, it is not immediately clear what the ILC and international lawyers mean when they say that international law is a 'legal system'.

Dupuy (2002, 2005, 2020) puts forward one of the most influential arguments for international law's 'systemic' character. He argues that regardless of its decentralised expansion, international law remains 'unified' due to the operation of rules about rules (metarules) and the existence of a 'community of States' built around shared ideals. Dupuy also stresses the relevance of art. 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) (1969). According to him, this provision 'systemically integrates' general international law with special regimes.

Delmas-Marty, in turn, conceives of international law as a 'system' built up from 'ordering pluralism'. She speaks of 'systemic permeability' and 'multiform interactions' which allow lawyers to fight for 'ordered pluralism'. In her words, '"pluralism" because differences are tolerated; "ordered" if global law succeeds in overcoming the contradiction between the one and the many' (2009, pp. 12–13). In this regard, she speaks of 'another logic' which guides the 'underlying legal reasoning' of international law (1992).

Benvenisti follows a similar line of thought when portraying international law as a 'system' held together by some 'internal logic'. The 'systemic vision', in his words, is 'the effort to envision the various legal [rules] as arranged within a hierarchy, composing together a coherent, logical order' (2008, p. 1). Benvenisti also points out that the 'systemic view' creates a space for operating under the 'rhetoric of law', which allows subjects to 'draw

[7] One of the key figures behind the 2006 report, Koskenniemi, seems to have changed his stance on the matter (Murphy, 2013, pp. 300–301). Taking Koskenniemi's earlier scholarship into account, we can find explicit references to his fragmentarian views (2002, 2006; Koskenniemi and Leino, 2002), but if we read his publications following the ILC's 2006 report, we find that he recognises international law's 'systemic' character (2007b, p. 17).

inferences and resolve conflicts not only by resorting to the specific treaties at hand but also by relying on the basic [rules] of the system' (2008, p. 4).

In a similar vein, Menezes (2013, 2017) argues that international law is 'conceived in a logical system with its own characteristics and elements', built around 'the value that the law itself is conceived as an instrument of the human society' (2017, p. 1237). He holds that international law can expand without losing its 'systemic unity' due to a series of 'mechanisms' for articulating its rules (2013, pp. 371–372), which determine 'the extension of [their] application and absorption' (2017, p. 1238).

In this fashion, lawyers who proclaim the 'systematicity' of international law share a common thread that ties their thoughts around two central ideas: namely, that international law is 'unified' and that it remains consistent due to its 'internal logic'.

(1) International law is 'unified'. According to the ILC's report (2006b, paras 21, 193, 254), labels such as environmental law, human rights law, or trade law 'have no value per se'; they are just 'arbitrary forms of professional specialisation', as 'no legal regime is isolated from general international law'. So, going against the idea that international law is an assortment of disconnected rulesets, the 'systemic' view conceives of international law as a single ruleset.

(2) International law is consistent due to its 'internal logic'.[8] Regardless of complications brought about by international law's decentralised expansion and conflicting international legal rules, it is still possible to provide a consistent reading of international law because of a 'logic' that guides rule application (International Law Commission, 2006a, 2006b, para. 487). This 'logic' ensures that legal subjects can make sense of international law and thus identify their legal positions.

Many lawyers are confident in the effectiveness of international law's 'internal logic'. Anne Peters, for one, embraces the 'spirit of systemic harmonisation' and proclaims that it is time to 'bury fragmentation' (2017, pp. 671–672). She calls upon lawyers to concentrate on how the contributions that the 'techniques' made available by international law's 'internal logic' help 'coordinate the various subfields of international law' in supporting its consistency. Peters even mentions *MOX Plant* as an example of how the systemic conception deals with

[8] We will study consistency in chapter 4. For now, it suffices for us to know that a set of rules is consistent if it cannot lead to conflicts. If it can lead to conflicts, it is inconsistent.

the challenges of international law's decentralised expansion (2017, p. 696). She believes *MOX Plant* helped 'refine' international law by clarifying how international courts such as the ECJ and ITLOS should interact (2017, p. 696; see also Churchill, 2018; Sands *et al.*, 2018, p. 236 f.).

Indeed, the systemic conception is appealing, as it promises that subjects can find their way around international law's decentralised expansion. However, a crucial question remains. We must still figure out how this logic works. Lawyers often talk of a 'systemic spirit', or how international law's logic enables 'harmonisation' and 'integration', but that does not clarify much. The subjects of international law need a more detailed account of how they can avoid and deal with the conflicts brought about by decentralised expansion and, thereby, identify their legal positions.

The next chapter (3) will explain that the legal positions that the subject of international law find themselves in are the outcomes brought about by international legal rules when they apply to cases. Chapter 3 argues that the challenge presented by international law's decentralised expansion is one of uncertainty concerning legal positions. In other words, subjects do not know what rule-based outcomes obtain with regard to their legal positions. The chapter will examine the relationship between facts, rules, and their application to cases. It will also clarify the difference between applicability and application. On the basis of these building blocks, chapter 4 develops a logical framework for reasoning with and about rules, thus illuminating how it is possible to avoid and deal with rule conflicts. In this respect, chapter 4 will explain how, regardless of whether decentralised expansion leads to conflicts, subjects can still extract a consistent set of legal positions from international law's ruleset.

2.4 Chapter Summary

The present chapter has demonstrated the complex situation that gave rise to this book's research question. It has analysed international law's decentralised expansion and shown some of the problems it poses for legal subjects.

We began this chapter by identifying that international law's decentralised nature is one of its traditional or classical features. Despite the relevance of the UN and other institutions, international law still lacks a central authority coordinating its development. Thus, international law's subjects are also those who create it. International law's decentralised character leaves it horizontal—its rules have no clear priority relationships between them.

We then identified that one of the key features of contemporary international law is its expansive character. International law's ruleset has grown, its thematic scope has diversified, and its institutions have proliferated.

As we have seen, international law's decentralised expansion leaves legal subjects in a tight spot, as they sometimes have to face applicable rules that would lead to incompatible outcomes (rule conflicts). We then considered the 'fragmentarian' and 'systemic' views. The latter are characterised by conceiving international law as a single ruleset that remains consistent due to some 'internal logic'. The chapters that follow will attempt to contribute to our knowledge of international law's 'systemic' nature by examining how this 'internal logic' works.

The next chapter (3) will show that the complexity posed by international law's decentralised expansion is a matter of uncertainty concerning the legal positions of subjects. It will also lay the foundations for chapter 4's development of a logical framework to help subjects make sense of international law's decentralised expansion.

3 Facts, Rules, Reasons

This book started in chapter 1 by asking how subjects can extract a consistent set of legal positions from international law's ruleset even though international law is decentralised and ever-expanding. The chapter above (2) analysed international law's decentralised expansion. It explained that international law is decentralised because its rules are created without overarching coordination. It also showed that international law is expansive, as its ruleset is continuously growing, its thematic scope is diversifying, and its institutions are proliferating.

The present chapter aims to demonstrate that the difficulty that subjects face when dealing with international law's decentralised expansion is one of uncertainty concerning their legal positions. Let us recall one of the examples that we read in chapter 2. A diplomat faces two rules. One of these rules prohibits States from discriminating against imports between like products. The other rule permits States to discriminate against imports if such discrimination is directed against imports harmful to protected wildlife. That diplomat is unsure about her State's legal position—she is uncertain whether her State is allowed to discriminate or prohibited from discriminating against a specific product, canned tuna, that is produced in a way that causes dolphins to be killed.

This chapter will explain that legal positions are the outcomes that rules bring about when they apply to cases. To determine their legal positions, subjects must first figure out what rules apply to cases, as rules lead to direct and indirect outcomes that form these positions. So, for that diplomat to determine whether her State is permitted to discriminate against that product or prohibited from doing so, she must find out what rule applies to that case and what outcome (prohibited, permitted) that rule brings about.

In this connection, reading this chapter will allow us to understand the relationship between facts, rules, and the reasons that lead to rule application. Reading it will also introduce us to some of the theoretical building blocks that will form the basis for the next chapter (4) to develop a logical framework for reasoning with and about rules and to answer the question of how the subjects of international law can make sense of their legal positions.

This chapter begins by showing how facts interact with language (3.1). It then takes into consideration that some facts depend on what people collectively recognise as taking place, pointing out that some of these facts exist because of rules (3.2). The chapter then explains that rules attach different facts to each other (3.3) and considers the gap between the

applicability and application of rules, showing that rules only attach their consequence to a case when applied (3.4). The chapter then adopts a reason-based approach to rule application by affirming that rules apply to cases when the reasons that plead for their application outweigh the reasons that plead against it (3.5). The last section summarises this chapter and links its discussions with the contents of the following one (3.6).

A caveat before we begin: this chapter engages with topics that may sometimes feel distant from international law. Let us have a bit of patience and indulge ourselves a little in these theoretical questions. We cannot solve problems that we do not already understand, and, paraphrasing Jean-Pierre Rives, to understand such problems, we must break down each complicated part into its simplest components and build our problem back up from there (Williamson, 2020, chap. 1). The breaking down and rebuilding of our fundamental theoretical elements—facts, rules, and reasons—is the business of this chapter.

3.1 Facts

As pointed out above, this chapter will demonstrate that the difficulty that subjects face when dealing with international law's decentralised expansion is one of uncertainty—subjects are unsure about their legal positions. As we will understand after reading this chapter, legal positions are *facts* that depend on rules. For example, the fact that States have a prohibition against using force and the fact that foreign vessels have the right to innocent passage through a coastal State's territorial sea are legal positions. These legal positions are the factual outcomes that rules bring about when rules apply to cases. To understand this, let us begin by studying facts.

We could define facts narrowly, allowing only 'material occurrences', such as the fact that the Earth is round, to count as 'real facts'. But this would come at the cost of excluding many occurrences from what is factual. For instance, a narrow definition would block the existence of the UN from counting as a fact. It would also preclude us from stating that the UN Charter contains a rule prohibiting the use of force. As a result, we should broaden our definition of facts to include more than 'material facts'.

Let us define *facts* as states of affairs that obtain. A *state of affairs* is any occurrence or situation that we can describe. To *obtain* is the same as to exist, to take place, or to be the case. So, if the state of affairs that the UNSC is meeting in New York obtains, then it is a

fact that the UNSC is meeting in New York. Likewise, if the state of affairs that there is a rule in the UN Charter prohibiting the use of force obtains, then that too is a fact.

Facts are significant because they are the parts of the world that make descriptive sentences (*statements*) true.[9] Any statement corresponding to a state of affairs that obtains (a fact) is true. Thus, the statement 'there is a rule in the UN Charter prohibiting the use of force' is indeed a true statement. But some states of affairs do not or have not obtained, and because of that, they do not qualify as facts. Hence, statements that describe these non-facts are not true (false). If the UNSC is not meeting in Geneva, then that state of affairs is a non-fact as it does not obtain, and so a statement expressing that state of affairs is false. Analogously, the statement 'the UN Charter instituted the International Criminal Court (ICC)' is false because it is not a fact that the UN Charter instituted the ICC.

Alongside facts, we can also talk of *individuals*. Now, for our purposes, individuals are not only persons. The ICC, the UN Charter, and an act of the use of force are all individuals. By themselves, individuals do not make statements true or false. Yet, when we say that a particular individual has a specific property or is related to another individual, we express a state of affairs leading to a statement's truth or falsehood (Russell, 2010, p. 7). In the paragraph above, the statement that the UN Charter (an individual) instituted the ICC (another individual) is not true because it does not correspond to a fact. If we replace one individual with another, we might arrive at a true statement. For instance, 'the Rome Statute instituted the ICC' is true.

We can now see that facts work as truth-makers and statements as truth-bearers, which reveals an interesting relationship between them. The conditions for a state of affairs to obtain—for it to be a fact—are equivalent to the conditions for the statement expressing that state of affairs to be true (Tarski, 1944, pp. 371–376). As such, it is possible to say not only that facts are the parts of the world that make statements true but also that facts are parts of the world expressed by true statements (Strawson, 2004, p. 196). Therefore, facts are language-dependent. But this does not imply that language alone decides what states of affairs obtain. It also does not imply that we can tell facts from non-facts simply by examining language (Hage, 2018a, p. 33).

[9] Thus, this book adopts a 'correspondence theory of truth' (David, 2016).

Yet, within these definitions, we can say that any true statement expresses a fact. Highlighting this allows us to push the boundaries of what we intuitively accept as factual. If a statement expressing an ought judgement, such as 'all States ought to act in good faith', is true, then it is a fact that all States ought to act in good faith. However, this does not mean we can derive ought facts from 'not-ought facts'. The point is simply that our language allows for ought facts and other facts that may seem weird at first, such as deontic or normative facts.[10]

3.2 Social Facts and Rule-Based Facts

As pointed out above, we are being lenient with what we allow to count as factual, as we say that any state of affairs that obtains is a fact. So, in the same way that it is a fact that the Earth is round, it is a fact that there is a rule in the UN Charter prohibiting the use of force. Highlighting this is relevant because lawyers have ingrained expectations regarding what they consider factual. For instance, Hart (1983, p. 23) says that words like 'corporation' or 'rights' do not have 'counterparts in the world of fact'. Hart says this because he uses a stricter definition than ours. Our definition also includes facts that depend on people: social facts.

Social facts depend on what a sufficiently large number of influential members of a group collectively recognise to be the case (Anscombe, 1958, 2000; Searle, 1995, 2010). Social facts are possible because people can collectively hold a relevant social attitude in the form of being mutually committed to what they consider to be taking place (Lagerspetz, 2001; Tuomela, 2003). Mutual commitment works with the same cognitive mechanisms that allow young children to play games of make-believe (Gräfenhain, Carpenter, and Tomasello, 2013; Roversi, 2021a).

It is only because of people's collective recognition that a river counts as the frontier between two countries, a piece of paper is money, and a particular person is the ambassador for the UN. If it were not for people's beliefs, there would be no frontiers, money, or ambassadors.

[10] There is a time-honoured philosophical discussion on the tension between law as a social fact and law's 'normative' or 'deontic' role in guiding behaviour. This tension exists because of the (assumed) gap between what *is* and what *ought to be* and between *fact* and *norm*. According to those who recognise these gaps, we could not reach *ought-conclusions* from exclusively *is-premises* nor *deontic-conclusions* from exclusively *factual-premises* (Hume, 2009, pp. 715–716; Cohon, 2018). Although some authors believe it is possible to bridge these gaps (Searle, 1964; Hage, 2018b), what matters in this book is that there can be ought facts and deontic facts as far as there can be true statements about them. So, even if we cannot conclude that States ought to act in good faith from the fact that they usually act that way, if it is true that States ought to act in good faith, then it is a fact (an ought fact, no less) that States ought to act in good faith.

We can say the same about social facts with no material referents (Smith, 2003, p. 19). Even if they have no material form in our world, it is still a fact that corporations, nation-States, and international organisations exist because people recognise them as existing.

It is interesting to point out that the recognition of social facts can be delegated to a group of experts (Peczenik and Hage, 2000). In other words, the relevant social group can delegate their recognition to a subgroup, thus allowing this subgroup to employ their recognition in these matters. This is often the case when it comes to sophisticated social facts that, while impacting most people's lives, are only understood by a few experts.[11] Think of inflation, for instance. While most people noticed prices went up after the Covid-19 pandemic, only a subgroup of experts understand how public debt may lead to (or avoid) price increases (Dumitrescu, Kagitci, and Cepoi, 2022).

Likewise, in many sophisticated social groups, we deal with social facts that are not immediately dependent on what people recognise but instead are based on what the *rules* governing such practices cause to be the case.[12] This is what goes on in legal practice when it comes to many facts of the law. Think, for example, of the fact that the UN Charter prohibits the use of force. While that fact is still a social fact as it depends on people's recognition, it obtains because of a rule prohibiting the use of force. It is a special kind of social fact; it is a *rule-based fact* as it is immediately dependent on rules and only indirectly grounded in collective recognition.[13]

Several facts of international law are rule-based. As mentioned, the fact that the use of force is prohibited is a rule-based fact based on a rule stemming from the UN Charter, which prohibits the use of force. But the existence of this rule is also a rule-based fact based on the rule that created the UN Charter. The UN Charter's existence is also a rule-based fact based on a rule that came into existence after its ratification by the five permanent members of the UNSC. The fact of the UNSC's existence is also a rule-based fact that came to be during the

[11] This delegation of recognition between members of a community relates to Putnam's (1975) sociolinguistic hypothesis on meaning.

[12] Section 3.4 will explain that rules only attach their consequences to outcomes and lead to those outcomes when they apply to cases. For now, let us assume that all the rules we refer to apply to their respective cases, thus attaching their consequences and leading to their outcomes.

[13] The terminology of 'rule-based facts' was introduced by Hage (2018a, 2022). Some authors would prefer to talk of 'institutional facts', following Anscombe-influenced terminology (Anscombe, 1958; MacCormick and Weinberger, 1986).

United Nations Conference on International Organization (1945), and the list of rule-based facts keeps on going.

The *legal positions* of the subjects of international law are also facts that depend on rules; legal positions are the outcomes that rules bring about. For instance, the fact that State X has a prohibition against using force is a fact because of the rule prohibiting the use of force. The fact that X has permission to use force in self-defence is a fact based on a rule permitting the use of force in self-defence. The fact that State W has an obligation to make reparations to State Z because W is responsible for committing an internationally wrongful act against Z is also rule-based. It is a fact based on the rule that responsibility for wrongful acts leads to an obligation to make reparations in favour of the injured party (International Law Commission, 2001; Creutz, 2020).

The paragraph above focuses on legal positions that are the *direct* outcomes of rules, but legal positions can also be the *indirect* outcomes that rules bring about. To understand the difference between direct and indirect outcomes, let us consider the step from *having an obligation* to *being obligated*.

We use the terms 'having an obligation' and 'being obligated' interchangeably in everyday speech, but this book distinguishes between the two. Having an obligation is often the result of a legal rule that attaches an obligation to some subject. For instance, W has an obligation to make reparations to Z because of the rule mentioned in the paragraph above that attaches an obligation to make reparations to those responsible for committing wrongful acts. Let us call this rule the 'Reparations Rule'. When the Reparations Rule applies to W's case, it assigns to W an obligation to make reparations to Z. W's obligation is a legal position brought about as a *direct outcome* of the Reparations Rule.

Meanwhile, for the purposes of this book, we should consider being obligated to be more than simply having an obligation. Indeed, having an obligation usually leads to being obligated, but, according to this book, one can have an obligation without being obligated. For instance, W's obligation to make reparations to Z is likely to obligate W to make reparations to Z. However, if there are exculpatory circumstances, W may not be obligated to make reparations to Z (Lowe, 1999; Abass, 2004). For example, if Z also committed wrongful acts against W, it is possible that, despite W's obligation to make reparations to Z, W is not obligated to make reparations to Z.

Whether W is obligated to make reparations to Z is an *indirect outcome* of the Reparations Rule. W being obligated to make reparations depends not only on this rule attaching an obligation to W but also on the absence of other factors that could block the transition from having an obligation (direct outcome) to being obligated (indirect outcome). In any case, it is important to note that both direct and indirect outcomes are legal positions.[14]

3.3 Rules

Thus far in this chapter, we have started to examine facts as parts of the world that make statements true. We have also considered social facts and rule-based facts, as well as how rules lead to the outcomes that count as subjects' legal positions. In this regard, we have begun to form an understanding of the difficulties caused by international law's decentralised expansion.

Subjects need to know their legal positions so they can plan their actions and decide what to do next. Legal positions are nothing other than facts that obtain because of the application of rules. The legal positions of the subjects of international law are the direct and indirect outcomes of international legal rules. Due to international law's decentralised expansion, subjects are faced with many applicable rules which, if applied, would lead to different outcomes that are sometimes incompatible. This incompatibility leaves subjects uncertain about their legal positions.

Legal positions are affected by the complication that they are not just lying around waiting for subjects to stumble upon them. The tables are turned; instead of a traditional scheme where facts come first and our knowledge of them second, in social practices, collective recognition plays a crucial role in defining what facts there are. A further complication is that rule-based social practices—such as international law—are built around social facts that, while dependent on collective recognition, result from the operation of rules. With that in mind, let us continue our study by focusing on rules. In this section, we try to understand how rules relate to facts.

[14] We will further consider the relationship between direct and indirect outcomes later in this chapter and in the next. For now, it is important to point out that, in truth, the indirect outcomes of one rule are nothing other than the direct outcomes of some other rule. As such, if we wish to be precise, we should not speak of direct and indirect outcomes but merely of how the fact that a rule leads to its direct outcomes in a case can lead to another rule also attaching its direct outcomes to that case (we refer to this second rule's direct outcome as the indirect outcome of that first rule). Nonetheless, in this book we prefer to speak of indirect outcomes, as this terminology streamlines our discussion and helps us better understand international law.

We can better visualise the relationship between rules and facts by contrasting it with the relationship between facts and statements (Figure 1 *infra*).[15] As we saw earlier, statements aim to describe the facts of the world. When statements are successful in doing so, they are true. If they fail, they are false. Rules, in turn, have no interest in describing the world—rules are neither true nor false. Instead, rules affect the world by imposing themselves on it.

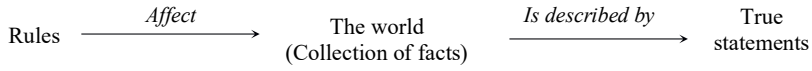

Figure 1. Relationship between rules, the world, and true statements

Consider once more the rule prohibiting the use of force. For convenience, let us call this the 'Force Prohibition Rule'. This rule does not describe a pre-existing fact in the world, such as that States are not allowed to use force, or even that States tend to refrain from using force. Instead, it is because of this rule that it is a fact that States have a prohibition to use force against one another. Also, for this rule to make it the case that States are prohibited from using force, it does not need to be complied with by its subjects. (As we will see later, some rules cannot even be complied with.) Even if States persist in using force, they are still prohibited from doing so because this rule imposes itself on them, thus prohibiting States from performing such acts.[16]

Legal or not, all rules are in the business of attaching facts to other facts (Hage, 2018a, p. 58). In this regard, we should keep in mind that the relationship between rules and the law is contingent (Schauer, 1991, p. 10); we also have rules about games, etiquette, concepts, culture, and religion. Despite the different activities in which rules are engaged, we can define a rule (legal or not) as an abstract individual that attaches one fact to another.

Some examples: the Force Prohibition Rule attaches the fact that a subject has a prohibition against using force to the fact that the said subject is a State. A chess rule attaches the fact that a particular piece can only move forwards, backwards, or sideways to the fact that this piece is a rook. A rule of hospitality attaches the fact that a person has an obligation to serve food to their guests to the fact that that person is a host at a dinner party. A conceptual rule

[15] Their opposite 'directions of fit' explain some of the differences between them (Searle, 1975; Anscombe, 2000, p. 56 f.; Hage, 2018a, chap. III, 2018b).

[16] That is a general picture. It certainly seems possible to argue that continuous disregard of a particular rule can negatively affect that rule's existence. The extent of sufficient disregard required to remove a rule from existence is an interesting discussion, but it can be sidelined for our purposes here.

attaches the fact that a polygon is a triangle to the fact that this polygon has three edges and three vertices. Lastly, one of the rules of Halakha attaches the fact that religious Jews have a prohibition against travelling to the fact that today is the Shabbat.

Three points concerning this definition of rules deserve emphasis.

(1) This definition does not ignore the importance of principles, as it covers both strict-sense rules and principles. Although it is possible to propose parameters to distinguish principles from strict-sense rules, in terms of the interests of this book, there is no definite separation between them. Even if there might be some difference in their 'attaching force', both strict-sense rules and principles attach facts to each other. Therefore, this book refers to them as 'rules', a category encompassing both principles and strict-sense rules.[17]

(2) This definition covers both deontic and non-deontic rules. *Deontic rules* deal with at least one deontic element in the form of an obligation, a prohibition, or permission. A prohibition against acting is an obligation not to act; permission to act is equivalent to not having an obligation not to act (Von Wright, 1963, p. 86 f.; Hansson, 2013). For example, the Force Prohibition Rule is deontic because it attaches a prohibition to using force. In turn, *non-deontic rules* are rules that do not directly attach obligations, prohibitions, or permissions to legal subjects. For example, consider the rule attaching the capacity to sign treaties to States (VCLT, art. 6). Or the rule that attaches the fact that an area of the sea is an exclusive economic zone to the fact that that area extends 200 nautical miles from the baseline (LOSC, art. 57). Non-deontic rules cannot be complied with because they do not directly prescribe behaviour to subjects (Hage, 2015a).

(3) This definition of rules runs parallel to categorising them as regulative or constitutive. There are interesting discussions on the role of rules in defining the practices they deal with alongside the more traditional role of simply prescribing behaviour (Rawls, 1955; Searle, 1995, 2010; Roversi, 2010, 2018, 2021b). Regardless, this book only needs to endorse the claim that all rules—whether constitutive or regulative—are fact-attaching rules, as all rules can connect facts to each other, which leads to facts that obtain because of such rules (Hage, 2018a, chap. V, 2018b; Roversi, 2019).

[17] This integrationist view goes against the fashionable trend set by Alexy (2000, 2016) and others who go to great lengths to distinguish principles from rules. This book approaches this discussion from a viewpoint closer to Dworkin's *Model of Rules II* (1978, p. 76). Many authors have adopted a similar integrationist approach (Soeteman, 1991, p. 33; Sartor, 1994, p. 189; Verheij, Hage, and Van Den Herik, 1998, p. 5; Streck, 2011, p. 302 f.).

3.4 Applicability and Application

In the pages above, we saw how rules work by attaching facts to each other, thus leading to new facts. This fact-attaching nature of rules is critical to our interests because it enables us to understand how rules lead to the facts that comprise subjects' legal positions. It also highlights that to figure out legal positions, we must first determine what rule-based facts obtain as legal outcomes.

This section will explain that it is not enough for a rule to be *applicable* to a case for this rule to lead to outcomes. Rules only attach facts to each other and, thus, lead to outcomes when rules *apply* to cases. So, we now turn our focus to rule applicability and application. We begin this section by differentiating rules from the provisions from which we derive them. We then distinguish the existence of rules from compliance with rules. Next, we analyse applicability to a case as a matter of rules being valid and of cases satisfying the (internal and scope) conditions of rules. Finally, we account for rule application, as when rules attach consequences to a case, thus leading to (direct and indirect) outcomes.

Let us begin by speaking about the difference between rules and legal provisions. Lawyers commonly use metonymies such as 'art. 2.4 of the UN Charter prohibits the use of force', but in this book, we try to keep provisions separate from rules. Provisions are means of deriving rules; rules are abstract individuals that we derive from such provisions. In this manner, art. 2.4 of the UN Charter is a legal provision from which we can derive the Force Prohibition Rule, but art. 2.4 is not itself a rule. When looking for rules, we usually focus on pieces of text found in a treaty or a relevant document, but we can also look for rules in non-textual practices, which often happens when dealing with customary international law (Merkouris, 2017; Chasapis Tassinis, 2020).[18]

As mentioned above, we should also not confuse the existence of rules with compliance with them on the part of subjects. The Force Prohibition Rule still exists even if States insist on using force against one another. Also, as pointed out, while deontic and non-deontic rules can exist, only deontic rules can be complied with. That is because complying with a rule involves obeying its deontic element in a case. For instance, if State X refrains from using force because of a prohibition against using force, we can say that X has obeyed this deontic

[18] On the interpretation of customary international law, see Judge Tanaka's Dissenting Opinion in *North Sea Continental Shelf* (1969, p. 182), the merits in *Military and Paramilitary Activities in and against Nicaragua* (1986, para. 178), and the ILC's recent report on customary international law (2018, pp. 134, 142).

element (the prohibition). If this prohibition that X has is attached by a rule, such as the Force Prohibition Rule, then we can also say that X has obeyed or complied with this rule.

We must now differentiate *applicability* (the fact that rules are *applicable* to cases) from *application* (that rules *apply* to cases). A rule is applicable if it is both *valid* and a case matches the *internal* and *scope conditions* of this rule. A rule applies when it attaches its *consequence* to a case. In the following paragraphs, we will study applicability by examining validity and (internal and scope) conditions. Then we will turn our attention to application.

Let us begin with validity. We can understand the validity of rules as their mode of existence. Rules are valid when they exist, meaning they can attach facts to each other if they apply to cases. We should also distinguish the validity of rules from the validity of legal provisions. Although the invalidity of a provision is a reason to conclude that a rule stemming from that provision is also invalid, in exceptional situations, an invalid provision can lead to a valid rule. We only have to think of cases where despite a treaty being invalid, the rules that stem from this treaty still lead to consequences in cases in order to protect parties who acted in good faith before the treaty's invalidity was invoked (VCLT, art. 69).

Now, let us focus on conditions, beginning with *internal conditions*. It is easier to understand them by looking at the conditions–conclusion formulation of rules. For instance, let us think of the rule stemming from the UN General Assembly Resolution 3314 (1974) and the Rome Statute of the ICC (1998) on acts of aggression. Let us call it the 'Aggression Rule'. We can formulate this rule as having the internal conditions that a State performs an act of force against another State's sovereignty, territorial integrity, or political independence. This rule's conclusion is that the said act is an act of aggression.

Internal conditions are satisfied by a set of states of affairs that match them. We can refer to that set of states of affairs as a *case*. When discussing the applicability of rules, we can speak of both *actual cases*—cases that take place—and *non-actual cases*. For our purposes in this book, when we speak of cases, we are referring to both actual and non-actual cases. The difference between them is that an actual case is composed of states of affairs that obtain (facts), while a non-actual case is composed of states of affairs that did not obtain (non-facts). So, suppose we are dealing with a case where State X supports paramilitary insurgents in State Y's territory.[19] If the set of states of affairs of that case obtains, that case is actual.

[19] This example is inspired by *Armed Activities on the Territory of the Congo* (2005).

If they do not obtain, then that case is non-actual. Assuming the states of affairs of this case match the internal conditions of the Aggression Rule mentioned above, then we can say that the internal conditions of this rule are satisfied by that (actual or non-actual) case.

Having looked at internal conditions, let us now focus on *scope conditions*. While internal conditions are found in the formulation of rules, scope conditions are specified by rules about rules (metarules), which affect the applicability of other rules by determining their personal, spatial, or temporal scope. Cases satisfy the scope conditions of rules when they do not fall outside of such scope conditions. For example, we understand temporal scope limitations when we recognise that rules typically do not apply to cases that occurred before these rules were created. In this manner, the rules stemming from the Rome Statute of the ICC (1998) have a temporal scope limitation to the effect that they are only applicable to cases of crimes committed after the Statute entered into force. The jurisdiction of the ICC over the crime of aggression has an even stricter temporal scope limitation, as it was only activated on 17 July 2018 after the adoption of the ICC Assembly of State Parties Resolution 5 (2017).

We can also point to rules with clear *personal* scope limitations, found in the Vienna Convention on Diplomatic Relations (1972) and the Geneva Convention Relative to the Treatment of Prisoners of War (1949). These treaties give rise to rules applicable only to cases with persons in specific categories—diplomats and prisoners of war, respectively. Similarly, we can think of *spatial* scope when considering rules applicable to specific spatial demarcations of our planet and beyond. That is the case of rules stemming from the Antarctic Treaty (1959) or the Outer Space Treaty (1967). Also, LOSC lays down rules with specific spatial scopes, meaning that some of its rules are only applicable to cases that take place in internal and archipelagic waters, the exclusive economic zones, the continental shelf, the high seas, and so on.

Now that we have understood applicability, let us focus on *application* by studying how rules attach *consequences* to cases. Think back to the conditions–conclusion formulation of rules. As mentioned above, we can formulate the Aggression Rule as having the internal conditions that a State performs an act of force against another State's sovereignty, territorial integrity, or political independence; its conclusion is that the said act is an act of aggression. When a rule such as the Aggression Rule applies to a case, the state of affairs of its conclusion obtains as a fact, which is attached to the facts of that case as that rule's consequence. So, when the Aggression Rule applies to X and Y's case referred to above, the

state of affairs of the Aggression Rule's conclusion obtains as the fact of the Aggression Rule's consequence, which is attached to X and Y's case to the effect that X's act of supporting paramilitary insurgents is an act of aggression.

As seen earlier, rules can lead to *direct* and *indirect outcomes* that count as legal positions. Both direct and indirect outcomes depend on rules applying to cases. Direct outcomes are equivalent to the consequences that rules attach to cases when rules apply to cases. In X and Y's case, the direct outcome of the Aggression Rule is that X's act of supporting paramilitary insurgents in Y's territory is an act of aggression. Rules *necessarily* lead to direct outcomes when they apply to cases. If the direct outcome of a rule does not obtain in a particular case, we can safely say that this rule has not applied to that case.

Indirect outcomes, in turn, go beyond the states of affairs that necessarily obtain because of rule application and rules attaching their consequences to cases. Indirect outcomes are outcomes that *can* result from rules attaching their consequences to cases. That is, it is *possible* that rule application leads to indirect outcomes, but not necessary. Recall W and Z's case to illustrate this explanation. Remember that the Reparations Rule assigns an obligation to W to make reparations to Z because W is responsible for committing a wrongful act that injured Z. W's *obligation* to make reparations to Z is the direct outcome of that rule as it is the state of affairs that necessarily obtains as a fact, due to that rule applying to W and Z's case. Meanwhile, W's status of being *obligated* to make reparations to Z is an indirect outcome of the Reparations Rule. That rule applies, and its consequence—W's obligation—is attached to this case, which can result in a subsequent state of affairs—W being obligated. As previously stated, W's obligation will usually result in W being obligated; however, if there are relevant exculpatory circumstances, that obligation will not result in W being obligated. As a result, indirect outcomes are dependent not only on rule application but also on other factors that do not prevent indirect outcomes from occurring.[20]

Let us now focus on the gap between applicability and application. As explained earlier in this section, a rule is *applicable* to a case if this rule is both valid and its internal and scope

[20] Let us recall that, as mentioned in footnote 14, saying that a rule leads to indirect outcomes in a case is shorthand for saying that this rule led to direct outcomes in that case, which led to another rule attaching its direct outcomes to this case. The direct outcomes of this second rule are referred to as the indirect outcomes of that first rule. When we say that a rule that leads to direct outcomes in a case does not necessarily lead to indirect outcomes in that case, we mean that it is possible for this rule to apply to that case (leading to direct outcomes) while another rule does not apply (and thus, does not lead to direct outcomes, which we call the indirect outcomes of that first rule). We will make sense of the non-application of rules in the next section.

conditions are satisfied by that case. An applicable rule only attaches its consequence to a case (thus leading to outcomes) when it applies to that case. Underlining the distinction between applicability and application is critical because it allows us to see that rules may not always apply to cases to which they are applicable.[21] We have only to think about everyday examples, such as the rule that makes thieves punishable not applying to petty shoplifting, and the no vehicles in the park rule not applying to an ambulance responding to an emergency. Similarly, we could argue that the Aggression Rule should not apply when acts of force do not exceed a certain level of gravity (Corten, 2021, chap. 2).

We could contend that the rules mentioned in the paragraph above are not actually applicable to those cases. For instance, we could say that the conditions of the rule that makes thieves punishable are not satisfied by petty shoplifting, and that the Aggression Rule should include more conditions so that it is not applicable in cases where States engage in insignificant acts of force. Even though this option is possible in theory, it goes against our current interests. The concept of 'hidden conditions' in rules renders them ineffective tools for determining the outcomes of cases (and, thus, the legal positions of subjects). We would first need to know the outcome of a case to determine what rule is applicable (and applies) to that case (Hage and Verheij, 1994).

As explained in chapter 1, our goal is to provide an account of how subjects can use international legal rules to make sense of their legal positions. To that end, this book invites us to abandon a depiction of rule application that is blind to anything other than applicability in favour of a more flexible approach that sees rules as tools for legal reasoning. This book's approach acknowledges applicability as a reason that a rule applies to a case, but it also accepts that competing reasons can outweigh applicability, resulting in the non-application of an applicable rule.[22] In other words, this book makes sense of rule non-application by examining the reasons for and against rule application. Such an approach asserts that rules only apply when the reasons pleading for their application outweigh the reasons that plead against it. When reasons for application do not outweigh reasons against, then rules do not apply, even if they are applicable.

[21] The non-application of applicable rules has been called an 'exception' in other publications (Hage and Waltermann, 2017; Hage, Waltermann, and Arosemena Solorzano, 2018; Marcos, 2021; Marcos, Waltermann, and Hage, 2021).

[22] Chapter 1 explained that this view is called 'rule-sensitive particularism'. The notion that rules do not apply to cases that go against their purpose echoes Fuller's (1958, p. 664 f.) ideas on fidelity to the law.

3.5 Reasons

We began this chapter by trying to understand the difficulty decentralised expansion poses for the subjects of international law. As explained above, this difficulty is, in truth, a matter of subjects trying to figure out their legal positions. Legal positions are particularly tricky because they depend on rule application. As mentioned in the last couple of paragraphs, this book accounts for a gap between applicability and application as it allows for applicable rules not to apply. This book works with reasons to explain the step from rule applicability to rule application. Now, let us ask the obvious question: what do reasons have to do with rules?

A *reason* is a fact that pleads for a conclusion. We can also say that some reasons plead against conclusions, but that is the same as saying that these reasons plead for a conclusion contrary to the conclusion they plead against. For instance, the fact that there is a thunderstorm is a reason against going to the beach, which amounts to the same as saying that it is a reason pleading in favour of *not* going to the beach. We can thus speak of pros and cons as reasons that plead for and against conclusions—*pro* and *con reasons*, respectively.

Pro and con reasons motivate us in our acts (and omissions) and justify our beliefs and desires. We can also talk of reasons when we explain why something is (or is not) the case and when we give reasons why someone acted. In that regard, reasons can justify, motivate, and explain (Alvarez, 2009, 2010; Hage, 2013). In practice, it is not so easy to distinguish between these roles. A reason that explains why someone acted is often the reason that motivated that person to act. Similarly, a reason that justifies a State's refusal to sign a treaty can be used to explain why it acted that way and tell us what motivated the State representatives to oppose signing that treaty.

In this book, we are interested in reasons that tell us what states of affairs obtain as the facts of subjects' legal positions. We are interested in explanatory reasons. But these explanatory reasons also play a justifying role. This is because the law finds itself within the social practices that have to do with what *ought to be* the case (Postema, 1982). From this perspective, we can say that a rule applies to a case if it ought to apply to that case. In this regard, it is relevant to note that the 'ought' we are working with is an 'ought of reason', meaning that a rule ought to apply if the reasons favouring its application outweigh the reasons against it. So, we are working with a 'self-contained ought' or '*pro tanto* ought' as

it is always relative to a particular set of reasons. As such, even if we have reasons for a conclusion, these reasons can be outweighed if we find heftier reasons against that conclusion.[23]

As explained in chapter 1, this book chooses a depersonalised account of ought. Instead of saying that an agent ought to apply or has applied a rule to a case, we say that a rule ought to apply or applies to a case. This book does not ignore the relevant role of judges and courts in 'applying the law' (Duarte d'Almeida, 2021). This choice is motivated by the insight that rule application is a public practice (Wittgenstein, 1986, paras 143–242; Glock, 1996, pp. 323–329). As Postema (1982, pp. 188–189) explains: 'the structure of practical reasoning on which the practical import of rules of law depend cannot be a matter of private insight but must be part of a shared, public practice of rule understanding and rule following'. In other words, rule application is a collaborative practice for which no one agent is individually responsible.[24] So, in our account, when international law subjects deal with rule application, they are attempting to determine which rules apply to the cases before them. That is, subjects are not seeking to identify which rules they (the subjects) will apply to those cases.

In the following sections, we will continue to assess how our reason-based approach can help subjects determine their legal positions. We begin by focusing on rule application and how rules lead to direct outcomes. We then focus on states of affairs that obtain as the indirect outcomes of rules. Finally, we consider how our reason-based approach can help with the elements of applicability—whether a rule is valid and that a case satisfies the conditions of a rule are often dependent on reasons for those conclusions outweighing reasons against. In this regard, we should recognise that in these discussions, we are weighing arguments for and against a particular conclusion on the basis of whether some state of affairs obtains as a fact. These are *reason-based states of affairs*; they are states of affairs that become facts if the reasons for which they obtain outweigh the reasons for which they do not obtain.

[23] Although Raz (2002, p. 28 f.) says that 'one ought to act' is equivalent to 'there is a reason for acting', we take a different approach. We understand that the reasons against some conclusion on what ought to be the case can outweigh the reasons for that very conclusion. So, when the reasons against the conclusion that one ought to act outweigh the reasons for that conclusion, we cannot conclude that one ought to act but only that there is a reason for one to act.

[24] Regardless of our depersonalised approach, legal subjects are still indirectly responsible for rule application. This is because their collective recognition forms the social facts that function as the reasons determining what rules apply to what cases. Subjects are not directly responsible for rule application, however, as they are not the ones who apply rules to cases.

3.5.1 Reasons for Rule Application

As explained above, from the standpoint of our reason-based approach, we say that a reason-based state of affairs obtains if the reasons it obtains outweigh the reasons it does not obtain. If we look at rule application from this point of view, we can say that a rule applies if the reasons it applies outweigh the reasons it does not. A good candidate for a reason that a rule applies to a case is that said rule is applicable to that case. *A contrario*, the fact that a rule is not applicable to a case is a reason this rule does not apply to it.

If there are no reasons against applying an applicable rule to a case, it will apply to the case to which it is applicable. This is what occurs in most scenarios. For instance, in a case where State X performs an act of use of force against State Y's territorial integrity, the fact that the Aggression Rule is applicable to this case is a pro reason this rule applies to it. If there are no con reasons, then the Aggression Rule applies, attaching its consequence to X and Y's case.

Nonetheless, as mentioned above, our reason-based approach allows for instances where an applicable rule does not apply. Let us keep working on X and Y's case. Suppose that X's act of force was carried out on such a small scale and with such limited purposes that its insignificance acts as a reason why the Aggression Rule does not apply.[25] In other words, alongside the pro reason the Aggression Rule applies (its applicability), we now have a con reason for its application. If, after weighing these reasons, the con reason outweighs the pro reason, then the Aggression Rule does not apply to X and Y's case (Figure 2 *infra*).[26]

Does the Aggression Rule apply to X and Y's case?

Pro reasons: {the Aggression Rule is applicable to this case}	Con reasons: {the acts of force that X performed are insignificant}
Outweighed	Outweighs

Conclusion: the Aggression Rule does not apply to this case.

Figure 2. X and Y's case

[25] This hypothetical case is roughly inspired by the Georgian attack on Tskhinvali and the surrounding villages (*Independent International Fact-Finding Mission on the Conflict in Georgia*, 2009, pp. 242–243).

[26] Against the trend followed by some (Alexy, 2003a, 2003b; Duarte, 2017, 2021), this book draws no distinction between 'weighing' and 'balancing', treating the terms as synonyms.

The fact that the Aggression Rule does not apply to X and Y's case does not allow us to conclude that this rule stops existing, is no longer valid, or will not be applicable to future cases. The Aggression Rule simply does not apply to X and Y's case. Because it does not apply, it does not attach its consequence, and thus, it does not lead to its outcomes in this case. Nevertheless, this rule can still apply to another case in which we deal with different reasons pleading for or against its application.

3.5.2 Reasons for Indirect Outcomes

Let us now speak of how rules can lead to indirect outcomes alongside their direct outcomes. As explained above, *direct outcomes* are the consequences that rules must attach to cases when these rules apply to such cases. *Indirect outcomes,* in contrast, are states of affairs that rules can lead to when they attach their consequences to cases (so, indirect outcomes can obtain but they can also not obtain). Under our reason-based approach, the fact that a rule has applied to a case, attaching its consequence to it, thus leading to its direct outcome, is a reason this rule also leads to indirect outcomes in that case. If there are no con reasons, then this rule leads both to direct and indirect outcomes. However, if there are con reasons, we must balance them against the pro reasons. If the pro reasons do not outweigh the con reasons, then even if this rule has applied to a case, attaching its consequence to this case as this rule's direct outcome, this rule does not lead to indirect outcomes in that case.[27]

To put this in context, let us consider the case of W and Z once more. We will remember that the Reparations Rule applies to that case, thus attaching to that case its consequence that W has an *obligation* to make reparations to Z as that rule's direct outcome. Let us now try to find out whether the Reparations Rule also leads to indirect outcomes in the form of W being *obligated* to make reparations to Z. The fact that this rule applies to W and Z's case, thus attaching its consequence to it, is a reason to conclude that it also leads to its indirect outcome in this case. If there are no con reasons, we can conclude that the said rule applies to W and Z's case and leads to direct and indirect outcomes in that case. So, W would have an obligation and would also be obligated to make reparations to Z.

[27] As pointed out in footnotes 14 and 20, the indirect outcomes of a first rule are nothing other than the direct outcomes of a second rule. So, instead of reasoning whether this first rule leads to indirect outcomes in a specific case, we could reason whether the second rule applies, thus leading to direct outcomes in this case (which we refer to as the indirect outcomes of the first rule). From this viewpoint, the fact that the first rule applies to a case is a reason the second rule also applies to that case. Like any rule, the second rule applies if the reasons it applies outweigh the reasons it does not apply. If this second rule applies, it leads to its direct outcomes in that case (the indirect outcomes of the first rule).

Assume, however, that in the case of W and Z, each State has committed equivalent wrongful acts against the other. W is responsible for a wrongful act that injured Z, and Z is also responsible for a wrongful act committed against W. If that is the case, even if W has an obligation to make reparations to Z, the fact that Z has committed a wrongful act against W should also be considered.[28] In this scenario, we have a pro reason W is obligated to make reparations to Z (given by the obligation assigned to W) and a con reason W is obligated to make reparations to Z (given by the fact Z also committed a wrongful act against W). If we conclude that the pro reasons do not outweigh the con reasons, then even if W has an obligation to make reparations to Z, W is not obligated to make reparations to Z. So, while the Reparations Rule applies (and thus results in direct outcomes), it does not result in indirect outcomes in this case (Figure 3 *infra*).

Is W obligated to make reparations to Z?

Pro reasons: {W has an obligation to make reparations to Z}	Con reasons: {Z is also responsible for committing a wrongful act that injured W}
Outweighed	Outweighs

Conclusion: W is not obligated to make reparations to Z.

Figure 3. W and Z's case

3.5.3 Reasons for Rule Applicability

In some situations, we can also use our reason-based approach to reach conclusions on the elements of applicability. Whether a rule is valid and whether a case satisfies the internal and scope conditions of a rule are often reason-based states of affairs. That is, they are often states of affairs that obtain if the reasons they obtain outweigh the reasons they do not obtain.

Let us consider a different litigious case between States X and Y. In this new case, Y detained a military vessel flying X's flag.[29] While Y's act may initially seem like an act of force against X's sovereignty under the precedent set by *ARA Libertad* (2012, para. 94; Lott, 2022), Y claims that it detained X's vessel to protect it from a coming storm. In its defence, Y says that this case does not meet the internal conditions of the Aggression Rule; it is not an act of force against X's sovereignty, territorial integrity, or political independence.

[28] This example assumes that we are only dealing with bilateral injuries between W and Z, as breaches involving human rights violations should not be considered reciprocal (Bird, 2010).

[29] This hypothetical case is loosely based on *Detention of Three Ukrainian Naval Vessels* (2019).

Assume that Y's claim is true. If the reasons pleading against the conclusion that Y's act was an act of force outweigh the reasons arguing for that conclusion, then Y's act was not an act of force. Therefore, this case does not satisfy the conditions of the Aggression Rule (Figure 4 *infra*). Consequently, this rule is not applicable to this case.

Does Y and X's case satisfy the Aggression Rule's internal conditions?

Pro reasons: {}	Con reasons: {Y's act was not an act of force against X's sovereignty, territorial integrity, or political independence}
Outweighed	Outweighs

Conclusion: this case does not satisfy the Aggression Rule's internal conditions.

Figure 4. X and Y's second case

Now, let us imagine another case between W and Z. States W and Z have between them a treaty called the 'Border Treaty', from which stems a rule called the 'Border Rule' separating their territories.[30] State Z challenges the rule's validity, claiming that the treaty is invalid because Z's representative exceeded her competence. Assume that Z is telling the truth and that its claim is based on a rule of treaty invalidity outlined in the VCLT. Call this rule the 'Treaty Invalidity Rule'. According to it, treaties concluded by incompetent representatives are invalid.

To understand W and Z's second case, we must ask ourselves two questions. *(1)* Is the Border Treaty invalid? *(2)* Does the Border Treaty's invalidity lead to the invalidity of the Border Rule?

The first question asks whether the Treaty Invalidity Rule applies to this case. Assume that the Treaty Invalidity Rule is valid and that this case matches the internal and scope conditions of the Treaty Invalidity Rule. In other words, the Treaty Invalidity Rule is applicable to this case. If there are no con reasons against applying it, we can conclude that it does apply, making the Border Treaty invalid (Figure 5 *infra*).

[30] This example draws some inspiration from *Land and Maritime Boundary between Cameroon and Nigeria* (1998).

Does the Treaty Invalidity Rule apply to W and Z's case?

Pro reasons: {the Treaty Invalidity Rule is valid, and the case matches its conditions}	Con Reasons: {}
Outweighs	Outweighed

Conclusion: the Treaty Invalidity Rule applies to this case.

Figure 5. First question on W and Z's second case

Facing the second question, we must now consider whether the Border Treaty's invalidity leads to the Border Rule's invalidity. The fact that the Border Treaty is invalid is a pro reason the Border Rule is invalid. However, let us assume that there is also a con reason for that conclusion. Suppose the Border Rule also stems from a custom set between States W and Z, and that before the Border Treaty was signed, the borders between W and Z's territory were already set by that customary rule. If the pro reasons do not outweigh the con, the Border Rule is valid despite the Border Treaty's invalidity (Figure 6 *infra*).

Is the Border Rule invalid?

Pro reasons: {the Border Treaty is invalid and Border Rule stems from it}	Con Reasons: {the Border Rule also stems from custom}
Outweighed	Outweighs

Conclusion: the Border Rule is not invalid.

Figure 6. Second question on W and Z's second case

3.6 Chapter Summary

Our goal in this chapter was to clarify that the difficulty that subjects face when dealing with international law's decentralised expansion is one of uncertainty concerning their legal positions. As this chapter explained, legal positions are the outcomes that rules bring about when they apply to cases. Thus, to find their legal positions, subjects must figure out what rules apply and what outcomes they lead to in the cases before them.

We began this chapter by examining how facts and language interact as facts work as truth-makers and statements function as truth-bearers. We saw that social facts obtain because of what people recognise as being the case, and some social facts result from rule application—

rule-based facts. We also saw that the legal positions of the subjects of international law are facts that depend on rules—legal positions are the direct and indirect outcomes that rules bring about. We then examined the gap between applicability and application. A rule is applicable to a case if this rule is both valid and its internal and scope conditions are satisfied by that case. A rule only attaches its consequence to a case when it applies to that case. When a rule applies, it leads to direct outcomes (that rule's consequence), and it can also lead to indirect outcomes (reason-based states of affairs based on the direct outcomes of that rule).

This chapter adopted a reason-based approach to rule application that allows for applicable rules not to apply. It explained that the fact that a rule is applicable is a reason that it applies, but that reason can be outweighed by reasons against application, thus allowing for the non-application of an otherwise applicable rule. This reason-based approach also explained how rule application leads to indirect outcomes. When a rule applies to a case, it leads to direct outcomes, which can be a reason pleading for indirect outcomes. If the reasons this rule leads to indirect outcomes outweigh the reasons this rule does not lead to indirect outcomes, then its indirect outcomes obtain. We also used this reason-based approach to reach conclusions on the applicability of rules. Whether a rule is valid and whether a case satisfies the (internal and scope) conditions of a rule are often reason-based states of affairs.

This chapter has clarified the underlying difficulty that motivated the choice of this book's research question. It has also served the purpose of laying down the building blocks that will allow the next chapter (4) to develop a logical framework for reasoning with and about rules and answer the question of how the subjects of international law can make sense of their legal positions.

4 Reasoning With and About Rules

This book started, in chapter 1, by asking how subjects can make sense of international law despite its decentralised expansion, a complication discussed in chapter 2. International law is decentralised because its rules are developed without any overarching coordination, and it is expansive because its ruleset is constantly growing. Chapter 3 showed that the difficulty that subjects face when dealing with international law's decentralised expansion is one of uncertainty concerning their legal positions. As chapter 3 explained, legal positions are the direct and indirect outcomes that rules bring about when they apply to cases. We thus concluded that the question guiding our research is, in truth, a matter of figuring out what outcomes obtain as the legal positions of the subjects of international law.

In this chapter, we take the next step towards answering our research question. Building on the theoretical findings of chapter 3, this chapter develops a logical framework to help legal subjects make sense of their legal positions. This logical framework is built for the purpose of reasoning with and about rules. It thus provides structure to help with the complex task of figuring out what rules apply and what rule-based outcomes obtain as legal positions. From this logical framework, this chapter will derive this book's two-part thesis and explain its two corollaries.

This chapter begins by listing the axioms of its logical framework (4.1). It then considers compatibility between states of affairs as determined by the constraints in place (4.2). Using the notion of compatibility, the next section defines conflicts (4.3), which allows for the definition of ruleset consistency (R-consistency). This chapter then differentiates R-consistency from the consistency of a set of statements (S-consistency) (4.4). It then moves on to consider how to avoid conflicts (4.5) and deal with them (4.6). It then advances this book's thesis (4.7), and its last section summarises this chapter's findings (4.8).

Before we begin, let us reinstate the caveat added at the beginning of chapter 3. Like that chapter, this present one deals with abstract topics that sometimes seem quite remote from international law. We should do our best to tolerate such abstractness, particularly in the examples that illustrate the explanations given in this chapter. It is sometimes necessary to use simpler examples than the actual cases that international lawyers deal with in their practice. To understand complicated things, it is first necessary to simplify them. One way to simplify things is by stripping them of some of their details, which allows us to see their essence and concentrate on it for a while. In the next chapter (5), we will apply the present

chapter's findings to international law in a way that, hopefully, feels more grounded in practice.

4.1 A Logic for Rules

In this section, we will first consider how logic can help legal subjects make sense of (international) law. Then, we will list the axioms that make up the logical framework we will use to supply a structure for our reasoning with and about rules.

4.1.1 Law and Logic

It is common to think of logical reasoning in the legal sphere as a deductive syllogism. In this syllogism, a rule plays the role of a major premise, the minor premise consists of a description of a case, and the outcome of that case is the conclusion inferred from the two premises.[31] For instance, deductive modelling would depict the Aggression Rule as a conditional statement that 'if an act is an act of force against the sovereignty, territorial integrity, or political independence of a State, then that act is an act of aggression', a case as 'an act is an act of force against the sovereignty, territorial integrity or political independence of another State', where the conclusion 'that act is an act of aggression' is inferred from these two premises. Some find this model attractive, as a conditional statement mimics the conditions–conclusion formulation of rules, and deductive reasoning leads to certainty. After all, if all premises are true and the rules of deductive logic are followed, then the conclusion is necessarily true.[32]

Deductive modelling has some shortcomings, however. It is unclear how it can account for the non-application of rules. That is, not applying an applicable rule seems impossible in a deductive argument where a rule acts as a conditional statement playing the role of the major premise. If an act is an act of force against the sovereignty, territorial integrity, or political independence of a State, but that act is not an act of aggression, then the statement 'if an act is an act of force against the sovereignty, territorial integrity, or political independence of a State, then that act is an act of aggression' is not true. If instead, that statement is true, and the case satisfies the conditions of a rule, then the conclusion of that rule necessarily obtains.

[31] This view can be depicted either as 'vulgar formalism' (Leiter, 2010) or 'deductivism' (Duarte d'Almeida, 2019).

[32] In truth, this arrangement displays a complication of the syllogistic model as it uses a major premise with no truth value (remember that, as seen in chapter 3, rules are neither true nor false). The complication is that since one of the premises is not truth apt, the argument cannot be deductively valid, as the notion of deductive validity is dependent on arguments built around premises with truth values.

There is no alternative unless we change at least one of the premises. Also, deductive modelling leaves no room for balancing competing considerations before reaching a conclusion. Meanwhile, in legal practice, it is often necessary to consider reasons for and against a particular conclusion to figure out the outcome of a case. The problem is that it is not clear how we can model opposing input within a deductivist view of legal reasoning.

There is a good chance that these limitations of deductive modelling are to blame for why many lawyers are sceptic about the usefulness of using logic to deal with the law; they have the impression that logic is too rigid to allow for the fluidity and sophistication of legal arguments. As Holmes famously said, 'the life of the law has not been logic: it has been experience' (Tushnet, 1977). The ILC shares this scepticism: 'Focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption' (2006b, para. 24).

Like any tool, logic has its limitations, but it also has its uses. This might come as a surprise, but there is more to logic than just deductions. Also, there is no such thing as 'the logic'. The truth is that, in a broad sense, a logic is just a set of standards and techniques that help us distinguish good reasoning from bad (Knachel, 2017, chap. 1).[33] There are many viable logics, and none is in principle better than the others (Pollock, 1987; Haack, 2007). Our choice of logic depends on the purpose it will serve (Hage, 2001a, 2001b).

In this book, our purpose is to help subjects to find their legal positions despite the difficulties of international law's decentralised expansion. Chapter 3 explained that legal positions are direct and indirect outcomes that rules bring about when they apply to cases. In this connection, we need a logical framework that allows us to see through the complexity of international law's decentralised expansion by supplying structure to the way in which we reason with and about rules and, as such, allows us to reveal the outcomes these rules lead to when they apply to cases.

For that purpose, we will adopt an informal version of a logic called 'Reason-Based Logic'.[34] This logic does not dictate how legal problems must be solved. It leaves as many as possible of the factors contributing to a conclusion to be decided by substantive international law. So, this logic does not try to replace legal professionals. It only aims to help us tame the complexity of rule application by stripping it down to its essential characteristics. This logic

[33] Also, logic is more than just formal logic as expressed in formal languages. An informal logic that studies arguments expressed in natural languages is also possible. This book develops its logical framework informally.

[34] On other iterations of Reason-Based Logic, see Hage and Verheij (1994) and Hage (1997, 2005a).

is here to help us understand the core of what is at stake when we try to figure out the legal positions of the subjects of international law.

In this respect, Reason-Based Logic allows for reasoning with and about rules. Following the account developed in chapter 3, it allows for reasoning *with* a rule when we deal with its internal structure to argue that some case satisfies (or does not satisfy) the conditions of a rule. We are also reasoning with a rule when we consider the consequences it attaches to if it applies to a case and the direct and indirect outcomes that the said consequences bring about as legal positions. This logic also allows us to reason *about* rules when our reasoning takes place 'above' the rule, as we are not dealing with its internal structure. For instance, we reason about rules when we discuss whether an applicable rule applies or does not apply to a case and even when disputing the validity of a rule. We are also 'above' a rule when we deal with rules about rules (metarules). In this respect, this logic allows us to engage in both object- and meta-level discussions.[35]

4.1.2 A Logical Framework

Our logical framework contains a number of axioms. 'Axiom' is a fancy term for the starting point in our logical reasoning (Cheng, 2019, chap. 11; Mazur, 2020). Axiomatising is the process of searching for these starting points that will guide our reasoning. There are various ways to axiomatise the same things. It is generally preferable to have as few axioms as possible, but this may compromise clarity. When developing its axioms, this book prioritised clarity over conciseness.

Bearing this in mind, let us point out the axioms that compose our logical framework:

- *(Compatibility)* The states of affairs in a set S are *compatible* relative to a set of constraints Con if and only if the states of affairs in S can all obtain together within the confines of Con.
- *(Cases)* A case C relative to a set of constraints Con is a set of states of affairs S that are compatible relative to Con; if C is actual, the states of affairs of S have all obtained and, so, S is a set of facts; if C is non-actual, the states of affairs of S have not all obtained and, so, S is a set of non-facts.
- *(Reasons I: Reason-Based States of Affairs)* A reason-based state of affairs Soa obtains if and only if the reasons Soa obtains outweigh the reasons Soa does not obtain.

[35] Object-level and meta-level are distinctions on levels of abstraction. Object-level discussions focus on a topic, and meta-level discussions refer to discussions on discussing a topic. For instance, claiming that anti-abortion rules oppress women is an object-level discussion on gender equality. Discussing whether men should have a say in women's reproductive rights is a meta-level discussion on gender equality. In natural language, the distinction is muddied (De Brabanter, 2019); we often step from object- to meta-level discussion without noticing it. For example, in a single sentence, we can shift from a discussion on the applicability of a rule to debating what consequences that rule would bring about if applied to a case. This is why our logic must allow for both levels of discussion.

- *(Reasons II: Incompatibility)* If the states of affairs Soa1 and Soa2 are incompatible relative to a set of constraints Con, reasons Soa1 obtains are reasons Soa2 does not obtain relative to Con.
- *(Applicability)* A rule R is applicable to a case C if and only if R is valid and C satisfies the internal and scope conditions of R.
- *(Reasons III: Applicability)* The fact that a rule R is applicable to a case C is a reason R applies to C; the fact that R is not applicable to C is a reason R does not apply to C.
- *(Reasons IV: Application)* A rule R applies to a case C if and only if the reasons R applies to C outweigh the reasons R does not apply to C.
- *(Application)* If a rule R applies to a case C, then R's consequence attaches to C.
- *(Conflicts)* Two rules R1 and R2 conflict relative to a set of constraints Con in a case C if and only if R1 and R2 are both applicable to C and R1 and R2 would, if applied to C, lead to outcomes that are incompatible relative to Con.
- *(Leads to Conflicts)* A ruleset S leads to a conflict relative to a set of constraints Con in a case C if and only if S contains at least two rules which conflict in C relative to Con.
- *(R-Consistency)* A ruleset S is R-consistent relative to a set of constraints Con if and only if there is no possible case (no set of compatible states of affairs) in which S leads to a conflict relative to Con.
- *(S-Consistency)* A set of statements S is S-consistent relative to a set of constraints Con if and only if all states of affairs expressed by the statements of S are compatible relative to Con and, thus, such statements can all be true together relative to Con.

In the next sections, we will go over each of these axioms so we can fully understand what they mean and their purpose within our overarching goal of helping subjects figure out their legal positions.

4.2 Compatibility and Constraints

We should begin by distinguishing *possible* states of affairs from *compatible* states of affairs. To briefly recap what we saw in chapter 3, we know that facts are states of affairs that obtain. If the state of affairs that the UNSC is meeting in New York obtains, then it is a fact that the UNSC is meeting in New York. If the state of affairs that the UNSC is meeting in Geneva does not obtain, then it is not a fact that the UNSC is meeting in Geneva. Yet, some states of affairs have not obtained but might have obtained under different circumstances. Although in our example the UNSC is meeting in New York, it is just as possible that they could meet in Geneva—these are *possible* states of affairs.[36] The UNSC may or may not meet in Geneva. But the UNSC cannot both be meeting and not meeting in Geneva simultaneously—these are *incompatible* states of affairs. States of affairs are compatible if they are possible individually and can obtain together. They are incompatible if they are possible individually but cannot obtain together.

[36] We are assuming that the UNSC is meeting in New York, so that is not only a possible state of affairs but also one that has obtained and is thus a fact. Meanwhile, since we assume that the UNSC is not meeting in Geneva, that is a merely possible situation, as it could have obtained but did not obtain. As such, it is a non-fact.

The *constraints* in place on our world are what determine what states of affairs are compatible or incompatible. In other words, constraints make it so that states of affairs can or cannot obtain together.[37] Some constraints are geographical, such as the constraint that no one person can be in two non-adjacent countries simultaneously. Other constraints are physical. For example, only particles with zero rest mass can travel at the speed of light. We can also speak of logical constraints. Non-contradiction, for instance, tells us that contradictory statements cannot both be true at the same time (Barker-Plummer *et al.*, 2011, p. 137 f.). Due to non-contradiction, we can say that the states of affairs expressed by 'The UNSC is meeting in Geneva' and 'The UNSC is not meeting in Geneva' are incompatible as they cannot obtain together.

We also find conceptual and legal rules imposing constraints.[38] If a conceptual rule makes it that a polygon with three edges and three vertices is a triangle, a polygon cannot both have three edges and three vertices and not be a triangle. Likewise, if a legal rule makes it the case that the permanent UNSC members have veto powers, it is impossible for a State to be a permanent UNSC member and not have veto powers. Another example of a legal constraint is that territory can only be under a single State's sovereignty. Because of this constraint, the United States and the Netherlands cannot hold sovereignty over the same piece of land, as clarified in *Island of Palmas* (1928, p. 8; Milano, 2006, chap. 3).

The constraints outlined by legal rules seem 'softer' than some of the constraints mentioned above (Hage, 2018a, p. 68). This is because legal rules are contingent. If there were no rule making it the case that the five permanent UNSC members have veto powers, it would be possible for a State to be a permanent UNSC member and not have veto powers. If we got rid of the above-mentioned constraint on territorial sovereignty, it would be perfectly possible for the United States and the Netherlands to share sovereignty over the Island of Palmas.[39] We can also feel such 'softness' when we consider that some legal rules have a limited personal, spatial, or temporal scope of applicability, while we presuppose that those 'harder' constraints have no such limitations.[40]

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[37] This notion of (in)compatibility of states of affairs as defined by a set of constraints ties into the idea of 'possible worlds' (Hage, 2000, 2005b, 2018a, chap. III, 2020; Stalnaker, 2012, chap. 1). Along the same line, Streck (2017, chap. 6, 2020) speaks of legal reasoning working as an 'epistemic constraint'.

[38] For these examples' sake, we assume these rules apply.

[39] In this respect, the *Island of Palmas'* Arbitral Award referred to the possibility of joint sovereignty (1928, p. 8).

[40] 'Presuppose' because, in truth, even logical possibility depends on what constraints are put in place by our logic of choice. The constraints of paraconsistent logics are not the same as intuitionistic logics (Robles, 2009;

Among these 'softer constraints', we can include a *deontic constraint* that makes it impossible for subjects to be simultaneously obligated to perform acts that these subjects cannot perform together. In the next few paragraphs, we will unwrap what we can bring to our theory by introducing this constraint.

Recall from chapter 3 that there is a difference between a subject having an *obligation* and that subject being *obligated*. An obligation to act (or not to act) gives one a reason to conclude that one is obligated to act (or not to act). So, the fact that a State W has an obligation to make reparations to Z is a reason to conclude that W is obligated to make reparations to Z. But, as explained at that time, if the pro reasons W is obligated to make reparations to Z do not outweigh the con, we can conclude that even though W has an obligation to make reparations, W is not obligated to make reparations.

Obligations that cannot be complied with by subjects are commonplace in legal practice; subjects often face obligations that go against one another. For example, suppose State V has to deal with an obligation to extradite an individual named Ava because she is a wanted criminal, and, at the same time, V has to deal with an obligation not to extradite Ava because she is an asylum seeker facing political persecution.[41] V is facing a challenging situation as it can either extradite or not extradite Ava, and, in either case, V will have to choose which obligation to comply with and which one to breach. In this regard, international law has found several ways to deal with subjects who violate obligations.[42] For instance, breaching an obligation may lead to the termination or suspension of the treaty from which said obligation stems (VCLT, art. 60), as well as the responsibility to make reparations (International Law Commission, 2001).

Against this backdrop, it would be unwise to say that obligations that cannot be met simultaneously cannot coexist. V can have obligations to extradite and not extradite Ava. What is problematic is that V can either extradite or not extradite her. In other words, obligations that cannot be complied with together can coexist even if the acts which these obligations expect from their subjects cannot be performed at the same time.

Priest, Tanaka and Weber, 2022).

[41] This example refers to the guarantee of *non-refoulment* as explained by the IACtHR in *Pacheco Tineo Family* v *Plurinational State of Bolivia* (2013).

[42] Some authors even point out that breaching obligations is sometimes desirable (Posner and Sykes, 2011).

Bearing this in mind and considering this book's aim of helping subjects figure out their legal positions, we can understand the point of including the deontic constraint mentioned above. This constraint allows us to account for the fact that sometimes subjects have multiple obligations that they cannot comply with simultaneously. Although undesirable, that is the experience that subjects face in day-to-day practice. At the same time, this deontic constraint accounts for the fact that subjects still need help in figuring out what to do. They need to identify which obligation they ought to comply with and which obligation to breach.

Relative to this deontic constraint, it is compatible for a subject to have multiple *obligations* even if these obligations demand incompatible acts. However, it is incompatible for a subject to be *obligated* to perform acts that are themselves incompatible. So, V has an obligation to extradite Ava and an obligation not to extradite her. The coexistence of these two obligations is possible relative to the deontic constraint. However, since extraditing and not extraditing Ava cannot both be performed simultaneously relative to the constraint of non-contradiction, the deontic constraint makes it impossible for V to be both obligated to extradite Ava and obligated not to extradite her. Relative to the confines of the deontic constraint, V must now figure out what V is obligated to do (which, as we will see later in this chapter, is a question that V can answer by balancing reasons pleading for each of these conclusions).

With all this in mind, let us revisit the first axiom of our logical framework:

- *(Compatibility)* The states of affairs in a set S are *compatible* relative to a set of constraints Con if and only if the states of affairs in S can all obtain together within the confines of Con.

It is now clear what this first axiom aims towards. Any set of states of affairs is compatible if the constraints in place allow for these states of affairs to obtain together. For instance, the states of affairs expressed by the statements belonging to the set {W is responsible for injuring Z; W has committed a wrongful act against Z} are compatible as they can all obtain under the set of constraints in place. Conversely, the set {W has committed a wrongful act against Z; W has not committed a wrongful act against Z} contains statements expressing incompatible states of affairs as the constraint of non-contradiction makes it impossible for contradictory statements to be true at the same time. This leads to the conclusion that the states of affairs these statements express cannot obtain together (they are incompatible). Furthermore, the set {State V has an obligation to extradite Ava; State V has an obligation not to extradite Ava} contains only compatible elements relative to the constraints in place. Meanwhile, the set {State V is obligated to extradite Ava; State V is obligated not to extradite Ava} contains incompatible elements relative to the deontic constraint.

The explanation above leads us to consider our second axiom:

- *(Cases)* A case C relative to a set of constraints Con is a set of states of affairs S that are compatible relative to Con; if C is actual, the states of affairs of S have obtained and, so, S is a set of facts; if C is non-actual, the states of affairs of S have not obtained and, so, S is a set of non-facts.

A *case* is any set of states of affairs that are compatible relative to the constraints in place. For instance, the set of states of affairs {W is responsible for injuring Z; W has committed a wrongful act against Z} counts as a case. Contrarily {W has committed a wrongful act against Z; W has not committed a wrongful act against Z} is not a case. The difference is that the elements of the first set are compatible relative to the constraints in place, while the elements of the second set are incompatible. If the states of affairs expressed by the statements in the first set obtain, then it is not just a case but an *actual case,* as these states of affairs are facts. If the states of affairs do not obtain, that is still a case, but it is a *non-actual case*, as these states of affairs, while compatible, are not facts.

4.3 Conflicts

So far in this chapter, we have discussed the notions of compatibility, constraints, and cases under the first two axioms of our logical framework. These notions will be necessary to allow us to understand conflicts, which is what we focus on now.

We often find references to rule conflicts as 'normative conflicts' or 'antinomies', that is, conflicts involving deontic rules such as a conflict between rules attaching obligations, prohibitions, or permissions. When the ILC (2006b, para. 24) speaks of conflicts, for instance, it describes them as when rules lead to a situation where subjects cannot fulfil simultaneous obligations. However, as seen in chapter 3, not all rules are deontic. Instead, what all rules have in common is their fact-attaching nature. So, a definition of conflicts built around the impossibility of fulfilling simultaneous obligations would not account for non-deontic rules. To address this, we need a definition of conflicts based on the idea of the (in)compatibility of states of affairs.

Let us define *conflicts* as occurring when two or more rules are applicable to a case, but if these rules applied to that case, they would lead to (direct or indirect) outcomes that are incompatible relative to the constraints in place. To understand this definition of conflicts, let us first review chapter 3's reason-based approach to rule applicability and application.

Reasons, as explained then, are facts that plead for or against a conclusion—pro and con reasons, respectively. Reason-based states of affairs obtain if the reasons they obtain

outweigh the reasons they do not obtain. We used this reason-based approach to explain how rules apply to cases and how indirect outcomes obtain. Rules apply to cases and indirect outcomes obtain if the reasons rules apply and the reasons indirect outcomes obtain outweigh the reasons against such conclusions.

The definition of incompatibility developed in the earlier section, alongside what we learned in chapter 3 about pro and con reasons, allows us to understand that if two states of affairs are incompatible relative to the constraints in place, a reason one of these states of affairs obtains is a reason the other one does not obtain. So, a pro reason for concluding that W's act is wrongful is a con reason for concluding that W's act is not wrongful, insofar as W's act can be wrongful or not wrongful in relation to the constraints in place. In the same manner, given that relative to the deontic constraint, V is either obligated to extradite Ava or obligated not to extradite her, a pro reason V is obligated to extradite Ava is a con reason V is obligated not to extradite her.

The explanation above can be summarised in the next two axioms of our framework:

- *(Reasons I: Reason-Based States of Affairs)* A reason-based state of affairs Soa obtains if and only if the reasons Soa obtains outweigh the reasons Soa does not obtain.
- *(Reasons II: Incompatibility)* If the states of affairs Soa1 and Soa2 are incompatible relative to a set of constraints Con, reasons Soa1 obtains are reasons Soa2 does not obtain relative to Con.

Now, let us briefly review what we learned in chapter 3 about applicability and application. A rule is applicable to a case if that rule is valid and that case satisfies the internal and scope conditions of that rule. The fact that a rule is applicable to a case is a reason it applies to that case. In contrast, the fact that a rule is not applicable to a case is a reason it does not apply to it. Reasons can be outweighed, so con reasons can outweigh the pro reasons a rule applies. A rule only applies to a case if the pro reasons it applies outweigh the con. If the pro reasons do not outweigh the con, a rule, however applicable, does not apply. When a rule applies to a case, it attaches its consequence to that case.

With these ideas in mind, it is easy to understand the following axioms:

- *(Applicability)* A rule R is applicable to a case C if and only if R is valid and C satisfies the internal and scope conditions of R.
- *(Reasons III: Applicability)* The fact that a rule R is applicable to a case C is a reason R applies to C; the fact that R is not applicable to C is a reason R does not apply to C.
- *(Reasons IV: Application)* A rule R applies to a case C if and only if the reasons R applies to C outweigh the reasons R does not apply to C.
- *(Application)* If a rule R applies to an actual case C, then R's consequence attaches to C.

As chapter 3 clarified, rules can lead to direct and indirect outcomes. *Direct outcomes* are equivalent to the consequences that rules attach to cases when rules apply. As previously explained, when a rule applies to a case, thus attaching its consequence to that case, that rule *necessarily* leads to its direct outcome. If the direct outcome of a rule does not obtain in a particular case, we can say that this rule has not applied to that case. *Indirect outcomes*, in turn, go beyond the states of affairs that necessarily obtain because of rule application and rules attaching their consequences to cases. Indirect outcomes *can* result from rules attaching consequences to cases; indirect outcomes are possible but not necessary.

Under our reason-based approach, the fact that a rule has applied to a case, attaching its consequence to it and, so, leading to its direct outcome in that case, is a reason this rule also leads to indirect outcomes in that case. If the pro reasons this rule leads to indirect outcomes outweigh the con, then that rule leads to indirect outcomes. If the opposite happens, then, even if that rule applies, it does not lead to indirect outcomes.

To press this point home, let us once more speak of W and Z's case. The Reparations Rule applies to W and Z's case, thus attaching its consequence to that case to the effect that W has an obligation to make reparations to Z. That obligation typically (but not inevitably) leads to W being obligated to make reparations to Z. The fact that W has an *obligation* to make reparations to Z is the *direct outcome* of the Reparations Rule applying to this case. If this rule applies to W and Z's case, then W has an obligation to make reparations to Z. In turn, that W is *obligated* to make reparations to Z is an *indirect outcome* of the Reparations Rule. As chapter 3 explained, it is possible for there to be reasons that prevent W's obligation from turning into W being obligated.

The discussion above allowed us to pick apart all the pieces that comprise our definition of conflicts. Let us now review the pertinent axiom, discuss a couple more of its elements, and then consider examples to ensure we have everything cleared out. Here is the axiom:

- *(Conflicts)* Two rules R1 and R2 conflict relative to a set of constraints Con in a case C if and only if R1 and R2 are both applicable to C and R1 and R2 would, if applied to C, lead to outcomes that are incompatible relative to Con.

It is worth noting that this definition of conflicts speaks exclusively of rules, not provisions such as a treaty. Although it is common to hear people speaking about 'conflicts between treaties', as chapter 3 advised, in this book, we should not confuse rules with the provisions from which we may derive said rules. So, under our definition of conflicts, we may not speak

of conflicts between treaties. At most, we could talk of conflicts between rules derived from treaties.

We should also note that this definition of conflicts focuses on applicability. For rules to conflict, these rules do not need to apply. It suffices that these rules are *applicable* to a case and that they would lead to incompatible outcomes if these rules applied to that case.[43] Also, it is not necessary for there to be an actual case for a conflict to occur. As clarified in the preceding section, when we speak of cases, we are accounting for both actual and non-actual cases. For a set of states of affairs to count as a case, it is sufficient for these states of affairs to be compatible relative to the constraints in place. These states of affairs do not need to obtain for it to be a case. In this manner, rules can conflict in both actual and non-actual cases.

We must pay close attention to how this definition ties into our notion of incompatibility. Conflicting rules would lead to direct or indirect outcomes that are incompatible relative to the constraints in place. In this respect, there are at least two types of conflict.

(1) Conflicts where the incompatibility is between direct outcomes. In this kind of conflict, the direct outcomes of rules as the consequences attached by these rules are themselves incompatible relative to the constraints in place. This happens in the diplomat's case mentioned in chapters 2 and 3. Let us recall that a diplomat faces two rules applicable to a case she is dealing with. The first rule attaches to States a prohibition against discriminating imports between like products. The second rule attaches to States a permission to discriminate against imports if such discrimination is directed against products harmful to protected wildlife. These two rules leave that diplomat unsure about her State's legal position. It is unclear if her State is permitted to discriminate or prohibited from discriminating against a particular product (canned tuna) that is produced in a way that causes the needless deaths of protected wildlife (dolphins).

As discussed in chapter 3, a prohibition against acting is an obligation not to act; having permission to act is equivalent to not having an obligation not to act. Thus, those two rules would attach the states of affairs that this diplomat's State has, at the same time, an obligation not to discriminate and that it does not have an obligation not to discriminate. These states of affairs are incompatible relative to non-contradiction. Consequently, the direct outcomes

[43] Another way to put it is to say that our definition focuses on 'abstract conflicts' (Weinberger, 1989, p. 242 f.; Moniz Lopes, 2019, p. 333 f.).

of these rules are incompatible. Given that the states of affairs of these direct outcomes are incompatible, these rules cannot both apply to the same case. (As explained above, when rules apply, they necessarily lead to direct outcomes, and if these two rules were to apply, they would lead to incompatible facts, which, by definition, cannot go together.)

(2) Conflicts where the incompatibility is between indirect outcomes. In this kind of conflict, although the direct outcomes of rules are compatible, these rules can lead to indirect outcomes that are incompatible relative to the constraints in place. Let us return to V's example. Assume that V's obligations to extradite Ava and not to extradite her are attached as the consequences of applicable rules that apply to V's case. One rule attaches an obligation to extradite Ava, and another rule attaches an obligation not to extradite her. The coexistence of these obligations is possible. So, the direct outcomes of these rules (their consequences) are compatible; thus, these rules can apply to the same case.

Nonetheless, these rules are still conflicting in this case as they can lead to V being obligated to extradite Ava and V being obligated not to extradite her. These states of affairs are the indirect outcomes that these rules can lead to in this case, which are incompatible states of affairs relative to the deontic constraint. To put it briefly, the direct outcomes are compatible, but the indirect outcomes are incompatible, so these rules conflict in this case.[44]

Let us consider another example. Suppose there is a rule attaching an obligation to States to freeze the assets of any person whose name the UNSC points out, and another rule attaching an obligation to States not to freeze persons' assets without a court order.[45] Say that the UNSC includes Mia's name on its blocklist, but no court order dismisses the obligation not to freeze Mia's assets. Assume that these two rules are applicable to Mia's case as they are valid and Mia's case satisfies their internal and scope conditions.

If these two rules applied to Mia's case, the first rule would attach to some State U an obligation to freeze Mia's assets, while the second rule would attach the obligation not to freeze her assets. While the direct outcomes of these rules (the obligations) are compatible,

[44] Recall what footnotes 14, 20, and 27 in chapter 3 explained to us. When we say that a rule leads to indirect outcomes in a case, we mean that it leads to direct outcomes in that case, which have led to another rule leading to its direct outcomes in that case. We simply refer to one rule's direct outcome as another rule's indirect outcome. In this regard, when we have two rules that conflict because their indirect outcomes are incompatible, we actually have two other rules whose direct outcomes are incompatible, and we are simply calling the direct outcomes of these latter rules the indirect outcomes of those two first rules.

[45] A scenario not entirely unlike that of *Kadi and Al Barakaat International Foundation* v *Council and Commission* (2008; Milanovic, 2009).

they can lead to indirect outcomes that are incompatible relative to the deontic constraint. One obligation can lead to U being obligated to freeze Mia's assets, while the other can lead to U being obligated not to freeze her assets. Thus, we can say that these two rules are conflicting in Mia's case as they are both applicable to that case, but if they applied to it, they could lead to (indirect) outcomes that are incompatible relative to the constraints in place.

It is worth mentioning that Mia's case does not even need to be an actual case for there to be a conflict between those two rules. As explained above, a case is a set of states of affairs that are compatible relative to the constraints. If these states of affairs obtain, then Mia's case is actual. If not, then Mia's is a non-actual case, but even if Mia's case is non-actual, it is still a case in which these rules conflict.

It is also relevant to point out that our definition allows conflicts to occur due to provisional situations. For example, consider that State T is a party to the UN Charter, from which stems a rule attaching an obligation to its members to contribute to the organisation's expenses as apportioned by the General Assembly. Call it the 'UN Expenses Rule'. T is also party to the Organization of African Union, whose Charter (1963) also gives rise to a rule attaching a similar financial obligation.[46] Call it the 'OAU Expenses Rule'.

Suppose that due to a budgetary crisis, T cannot comply with both obligations—T cannot pay both the UN and the OAU's expenses. Assuming that both the UN Expenses Rule and the OAU Expenses Rule are applicable to this case, they can be said to conflict. If these rules applied to this case, they would impose obligations on T, potentially obligating T to perform acts that T cannot perform at the same time as each other. Even if T is only temporarily unable to carry out these acts, the statuses of being obligated to carry them out are incompatible relative to the deontic constraint. As a result, the UN Expenses Rule and the OAU Expenses Rule are conflicting in T's case.

4.4 Two Kinds of Consistency

In the section above, we defined conflicts as occurring when two or more rules are applicable to a case, but if these rules applied to that case, they would lead to incompatible outcomes. As we know, the notion of incompatibility is relative to the constraints in place. These

[46] This example is inspired by the funding crisis currently faced by the Organization of African Union. See: Pharatlhatlhe and Vanheukelom, (2019).

constraints determine which states of affairs are compatible (or incompatible) as they can (or cannot) obtain together. Building on these ideas, we will consider the concept of consistency for sets of rules and statements in this section.

Consistency is traditionally defined for sets of statements (Hodges, 1977, p. 13; Tarski, 1994, p. 125). This is what we will call *S-consistency*. A statement set is S-consistent if all statements in that set can be true at the same time. As explained in chapter 3, the conditions for a statement's being true are equivalent to the conditions for the state of affairs expressed in that statement to obtain (for it to be a fact). As we have seen above, constraints determine what states of affairs can obtain together.

For instance, relative to the constraint of non-contradiction, the set {France is a member of the EU; France is a member of the UN} is S-consistent while the set {France is a member of the UN; France is not a member of the UN} is S-inconsistent. The difference between these sets is that the former set holds only elements expressing compatible states of affairs, while the latter set has elements expressing incompatible states of affairs relative to non-contradiction (France either is or is not a member of the UN, not both).

The point of S-consistency is that the statements in an S-consistent statement set can all express compatible states of affairs, as these states of affairs can all go together relative to the constraints in place. That is, the states of affairs expressed by the elements of an S-consistent statement set can all be facts together, so the statements expressing such facts can all be true simultaneously.

We have thus clarified another axiom of our logical framework:

- *(S-Consistency)* A set of statements S is S-consistent relative to a set of constraints Con if and only if all states of affairs expressed by the statements of S are compatible relative to Con and, thus, such statements can all be true together relative to Con.

It is easy to see that S-consistency makes little sense for rulesets. Defining consistency as the possibility that all elements of a set are true together is not helpful if such elements lack truth values. As chapter 3 showed, rules are not truth apt. Thus, we need a different definition for ruleset consistency than the one we use for the consistency of statement sets.

Let us define the consistency of rulesets, *R-consistency*, according to the notion of conflicts developed in the previous section. A ruleset is R-consistent when it cannot lead to conflicts. If it can lead to a conflict, it is R-inconsistent. We can say that a ruleset *leads to a conflict* when it contains at least two rules that conflict in an actual or non-actual case.

Like S-consistency, R-consistency is dependent on the constraints in place. Whether a ruleset leads to a conflict is a matter of what states of affairs are (in)compatible, as these states of affairs can(not) go together as determined by the constraints in place. In the same way, constraints determine whether there can be a case where specific applicable rules conflict. After all, a case is nothing other than a compatible set of states of affairs, and, as we know, constraints determine compatibility.

To illustrate this explanation, consider the following ruleset {States have permission to perform acts of humanitarian intervention; States are prohibited to perform acts of use of force}. This ruleset is R-inconsistent as it leads to a conflict in a case where an act is performed as an act of force and as a humanitarian intervention.[47] Assuming these rules are valid and this case satisfies their scope conditions, it is clear that a case where an act of humanitarian intervention is also an act of force will satisfy the internal conditions of both rules. So, these rules would be applicable to this case. If these rules applied to this case, one rule would lead to the outcome that a State is prohibited to perform (an obligation not to perform) a certain act, and the other rule would lead to the outcome that this State has permission to perform that same act (it does not have an obligation not to perform it). These states of affairs are incompatible relative to the constraint of non-contradiction. Thus, these rules are conflicting in this case, which allows us to say that this ruleset leads to a conflict and is R-inconsistent.

With this in mind, we can understand the last few axioms of our logical framework:

- *(Leads to Conflicts)* A ruleset S leads to a conflict relative to a set of constraints Con in a case C if and only if S contains at least two rules which conflict in C relative to Con.
- *(R-Consistency)* A ruleset S is R-consistent relative to a set of constraints Con if and only if there is no possible case (no set of compatible states of affairs) in which S leads to a conflict relative to Con.

It is significant to highlight that conflicts are a matter of individual cases; rules conflict in an actual or non-actual case to which said rules are applicable. In turn, R-consistency deals with the prospect of conflicts in all possible cases. R-consistency depends on the constraints which allow for the possibility of a case (as a set of compatible states of affairs) in which a ruleset can lead to a conflict. A ruleset is only R-consistent if there cannot be a case in which

[47] Think of an armed intervention along the lines of what 'Responsibility to Protect' advocates (International Commission on Intervention and State Sovereignty, 2001).

this ruleset leads to a conflict. So, for a ruleset to be R-inconsistent, it is sufficient that there is an (actual or non-actual) case where at least two of its rules conflict.[48]

Let us consider an example. As pointed out in chapter 2, international humanitarian law (IHL) and human rights law (HRL) are subsets of the ruleset of international law. In many instances, they provide similar rules. For example, HRL and IHL rules prohibit torture and cruel treatment. Yet sometimes, IHL and HRL provide rules that would attach to incompatible conclusions. An example is that there are both IHL and HRL rules on the deprivation of liberty through detention.

Assume that there is an IHL rule stemming from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), which posits that during hostilities, the detention of individuals for security reasons is lawful even if such detention is not promptly submitted to judicial review.[49] Call it the 'IHL Detention Rule'. Also, assume that the International Covenant on Civil and Political Rights (ICCPR) (1966) supports that individuals have the guarantee that a court of law will review their detention. That is, an HRL rule posits that detentions that are not promptly judicially reviewed are unlawful. Call it the 'HRL Judicial Review Rule'.

Now, suppose that during a scenario of international hostilities, a civilian named Sue is causing unrest by protesting against the deployment of State Y's troops and disrupting their operations. Y's agents then detain Sue, but a judge does not promptly review her detention because Y has more pressing matters to deal with at the moment. Assuming that these two rules are applicable to Sue's case, under the IHL Detention Rule, Sue's detention is lawful, and under the HRL Judicial Review Rule, it is unlawful. These two rules are thus conflicting in Sue's case. They conflict because there is a case to which they are both applicable, and if applied to it, these rules would lead to incompatible outcomes. They would render Sue's detention both lawful and unlawful, which, relative to non-contradiction, are states of affairs that cannot go together.

The ruleset {IHL Detention Rule; HRL Judicial Review Rule} leads to a conflict in Sue's case. So, this ruleset is R-inconsistent. The case in which this ruleset leads to a conflict does not need to be an actual case. It is sufficient that a case such as Sue's can occur, since the set

[48] Therefore, we can say that we are treating all three of Ross' types of inconsistency—total–total, total–partial, or partial–partial (intersection)—as full-fledged R-inconsistency (Elhag, Breuker, and Brouwer, 2000; Ross, 2019, p. 149 f.).

[49] This book refers to 'armed conflicts' as 'hostilities' to avoid confusion with rule conflicts.

of states of affairs that compose her case are themselves compatible under the constraints in place. If this case can occur, the ruleset is already R-inconsistent.

4.5 Avoiding Conflicts

Before moving forward, let us pause for a moment and recap what we have seen so far in this chapter. We began by listing the axioms that compose our logical framework. We then considered these axioms by examining the notions of compatibility, constraints, cases, conflicts, and consistency. We saw that compatible states of affairs can obtain together as determined by the constraints in place. There are geographical, physical, logical, conceptual, and legal constraints (constraints set by legal rules). We also saw that cases are sets of states of affairs that are compatible relative to these constraints. If these states of affairs obtain, the case is actual. If not, the case is non-actual (but still a case).

We then defined conflicts as when two or more rules are applicable to a case and, if applied, they would lead to incompatible outcomes relative to the constraints in place. We also saw that a ruleset leads to a conflict if at least two of its rules conflict. Next, we saw that a ruleset is R-consistent when there is no (actual or non-actual) case in which that ruleset leads to a conflict. If there is such a case (even if non-actual), then that ruleset is R-inconsistent. In turn, a statement set is S-consistent relative to the constraints in place if the states of affairs expressed by the elements of that set are all compatible relative to these constraints. The compatibility of these statements means they can all be true simultaneously. If that is not the case, that set is S-inconsistent.

We should also take this moment to remind ourselves of our goal with this book. We wish to help subjects find their legal positions despite the difficulties presented by international law's decentralised expansion. As explained in chapters 2 and 3, the subjects of international law face uncertainty in finding their legal positions. Legal positions are the outcomes that rules lead to when applied to cases. Subjects face uncertainty because, due to decentralised expansion, more and more rules are introduced to international law's ruleset without any central control. It is intuitive to conclude that international law's decentralised expansion turns its ruleset R-inconsistent. After all, the more rules a ruleset has, the more opportunities there are for this ruleset to lead to conflicts. Conflicts are problematic as the availability of many applicable rules leading to incompatible outcomes leaves subjects wondering which of these outcomes obtain as their legal positions.

Faced with this reality, the subjects of international law must either try to find a way around these conflicts by *avoiding* them or face conflicts head-on by *dealing* with them. On the one hand, we *avoid* conflicts when we reason with and about rules and realise that what at first sight seemed like a conflict is not a conflict at all. When we avoid all possible conflicts that a ruleset can lead to, we have effectively shown that said ruleset is R-consistent. On the other hand, we *deal* with conflicts when facing a real conflict. When faced with a conflict, we can determine what conflicting rules apply and what outcomes result from them by reasoning with and about rules. When we deal with conflicts, we still face an R-inconsistent ruleset (as it can still lead to conflicts). Nevertheless, by successfully dealing with conflicts, we can use an R-inconsistent ruleset to construct an S-consistent statement set about the facts that rules bring about, thus revealing the legal positions that said rules assign to subjects.

In this section, we will focus on how to avoid conflicts. We will examine each of the two elements of applicability and show that (meta)rules that affect the validity and the (internal and scope) conditions of rules can help us avoid conflicts and prevent R-inconsistency. We will leave to section 4.6 the job of explaining how to deal with conflicts.

The present section will explain that (against our intuitions) adding more rules can sometimes make an R-inconsistent ruleset R-consistent. This reveals an intriguing difference between R- and S-consistency. Adding more elements will never make an S-inconsistent set S-consistent. The only way to make an S-inconsistent statement set S-consistent is by removing incompatible elements.[50] Unlike S-inconsistent statement sets, however, an R-inconsistent ruleset can be made R-consistent not only by removing rules but also by adding more rules. This is because rules can act as the constraints relative to which we judge the compatibility of states of affairs. In this regard, by introducing more rules that act as constraints, we can affect what states of affairs can and cannot go together. This is particularly relevant, as rules acting as constraints can alter the applicability of other rules and, thus, avoid conflicts between them. By avoiding conflicts, these rules can effectively make an R-inconsistent ruleset R-consistent.

[50] Think back on this S-inconsistent set {France is a member of the UN; France is not a member of the UN}. We can add 'France is very much a member of the UN' to it, but that will not have any influence as that set still has incompatible elements relative to the constraint of non-contradiction. To make it S-consistent, we need to remove either 'France is not a member of the UN' or the other two elements. Even if the statement in the set {France is not a member of the UN} is false, it is still S-consistent as all the states of affairs expressed by its single element are compatible relative to the constraints in place.

4.5.1 Conditions

As mentioned in chapter 3, rules have both internal and scope conditions. Internal conditions are found in rules' conditions–conclusion formulation. Cases satisfy the internal conditions of a rule when they match the states of affairs of such internal conditions. Scope conditions are specified by metarules that affect the applicability of rules by determining their personal, spatial, or temporal scope. Cases satisfy the scope conditions of rules when they do not fall outside of such scope conditions.

Rules acting as constraints that determine whether the conditions of other rules are satisfied by a case can help us avoid conflicts. Recall the following ruleset {States have permission to perform acts of humanitarian intervention; States are prohibited to perform acts of use of force}. As mentioned before, this ruleset is R-inconsistent. It leads to a conflict in a case where an act of force is also an act of humanitarian intervention. Both rules are applicable to this case because their internal conditions are met (and we assume that these rules are both valid and that the case does not fall outside their scope limitations so that their scope conditions are met as well). But if these rules applied to this case, they would lead to facts that could not obtain together.

The situation would change if we found a rule acting as a constraint that excludes acts of force from counting as acts of humanitarian intervention. If this rule determines that an act can either be an act of force or an act of humanitarian intervention, but not both (as these states of affairs are incompatible relative to this rule's constraint), then the two rules mentioned in the paragraph above are no longer applicable to the same case. Therefore, there can no longer be a conflict between them. In other words, the introduction of this rule acting as a constraint makes it so that the ruleset {States have permission to perform acts of humanitarian intervention; States are prohibited to perform acts of use of force} no longer leads to conflicts. As a result, this ruleset is now R-consistent.

When it comes to scope conditions, there are even more options on how to affect applicability by introducing metarules that determine the personal, spatial, or temporal scope conditions of rules. Let us think back to this ruleset {IHL Detention Rule; HRL Judicial Review Rule} and consider how a metarule could make it R-consistent by limiting the scope of these rules. If a metarule were to act as a constraint that affects the HRL Judicial Review Rule's temporal scope in the sense that this rule is only applicable to cases that occur before or after hostilities, the HRL Judicial Review Rule and the IHL Detention Rule could no

longer conflict. This metarule would act as a constraint, meaning that there could not be a case to which these rules were both applicable.

Relative to the above-mentioned metarule, no case to which the IHL Detention Rule is applicable will satisfy the temporal scope conditions of the HRL Judicial Review Rule. Since the IHL Detention Rule is only applicable during hostilities (due to its internal conditions), and the HRL Judicial Review Rule is not applicable during hostilities (due to its temporal scope limitation), they are no longer applicable to the same cases.[51] Given that we have defined conflicts relative to the joint applicability of rules to a case, and seeing that the rules above are no longer applicable to the same cases, then, effectively, they cannot conflict. Under the confines set by this metarule, the ruleset {IHL Detention Rule; HRL Judicial Review Rule} no longer leads to conflicts. In other words, this ruleset is now R-consistent.

4.5.2 Validity

As mentioned above, validity is one of the two elements that define whether a rule is applicable to a case. Chapter 3 has distinguished the validity of rules from the validity of provisions from which we derive such rules. It clarified that a provision's (in)validity is a reason to conclude that a rule stemming from that provision is also (in)valid. In this regard, barring other reasons for the validity of a rule, the invalidity of the provision from which that rule stems from leads to its invalidity and its non-applicability to any case.

One way to invalidate a rule is by abrogating the treaty from which this rule stems. An instance of abrogation comes from a rule derived from the Law of the Sea Convention (LOSC), art. 311, which abrogates the four 'Geneva Conventions on the Law of the Sea' between State-parties to these treaties (Treves, 2008). Let us reflect upon the following example.[52] Consider that art 24.1 of the Convention on the Territorial Sea and Contiguous Zone (CTSCZ) (1958) provides for a rule prohibiting States from regulating activities taking place in the contiguous zone. Meanwhile, LOSC, art. 303 supports a rule permitting States to regulate the removal of archaeological and historical objects from the seabed of its

[51] The ICJ in *Legality of the Threat or Use of Nuclear Weapons* (1996, para. 25) and *Construction of a Wall in the Occupied Palestinian Territory* (2004, para. 106) considered the possibility of suspension with derogation as a way to avoid conflicts between IHL and HRL rules. We will further consider derogation in chapter 5.

[52] This example is inspired by the historical development of the legal treatment of the contiguous zone (Noyes, 2016).

contiguous zone. Call these rules the 'CTSCZ Contiguous Zone Rule' and the 'LOSC Contiguous Zone Rule', respectively.

The ruleset {CTSCZ Contiguous Zone Rule; LOSC Contiguous Zone Rule} appears to be R-inconsistent. Its rules seem to conflict in a case where a State tries to regulate the removal of archaeological objects from its contiguous zone. If these rules were to apply to this case, the CTSCZ Contiguous Zone Rule would point to the conclusion that there is a prohibition on this State's regulating this matter, while the LOSC Contiguous Zone Rule would point to that State's having permission to do so. In other words, this State would both have and not have an obligation not to regulate this matter. Since these states of affairs are incompatible relative to the constraint of non-contradiction, if the CTSCZ Contiguous Zone Rule and the LOSC Contiguous Zone Rule applied to this case, they would lead to incompatible outcomes.

Suppose that the rule stemming from LOSC, art. 311 abrogates the CTSCZ, thus leading to the invalidity of its provisions. As previously stated, the fact that a provision is invalid is a reason the rules derived from that provision are also invalid. So, the fact that the provisions of the CTSCZ are invalid is a reason that the CTSCZ Contiguous Zone Rule is invalid. In the absence of reasons pleading against this conclusion,[53] we can infer that the CTSCZ Contiguous Zone Rule is also invalid (Figure 7 *infra*).

Are the provisions of the CTSCZ invalid?	
Pro reasons: {The CTSCZ was abrogated}	Con reasons: {}
Outweighs	Outweighed
Conclusion: the provisions of the CTSCZ are invalid.	

Is the CTSCZ Contiguous Zone Rule invalid?	
Pro reasons: {The provisions of the CTSCZ are invalid}	Con reasons: {}
Outweighs	Outweighed
Conclusion: the CTSCZ Contiguous Zone Rule is invalid.	

Figure 7. Invalidity of the CTSCZ Contiguous Zone Rule

The fact that the CTSCZ Contiguous Zone Rule is invalid allows us to conclude that it is not applicable to this case. Since the CTSCZ Contiguous Zone Rule is not applicable, and we

[53] In chapter 3, we considered an example where a treaty (the Border Treaty) is invalid, but a rule that stems from it (the Border Rule) is still valid as it also stems from custom. Analogously, if the CTSCZ Contiguous Zone Rule also stems from custom, that would be a reason it would be a valid rule even if the treaty from which it stems (the CTSCZ) is invalid. Nonetheless, in this present example, we assume that the CTSCZ Contiguous Zone Rule is not (also) customary.

have defined conflicts in terms of applicability, we can conclude that it cannot conflict. Hence, the ruleset {CTSCZ Contiguous Zone Rule; LOSC Contiguous Zone Rule} cannot lead to conflicts, so it is R-consistent.

4.5.3 More Rules, More Conflicts?

In the sections above, we focused on avoiding conflicts. Examining the examples on validity and conditions allowed us to see that adding rules can affect the applicability of other rules and make R-inconsistent rulesets R-consistent. Thus, adding more rules does not always lead to a ruleset's R-inconsistency. Quite the opposite: adding more rules may ensure a ruleset's R-consistency.

The same is not possible when dealing with statements because they have a different relationship with the compatibility of states of affairs. Although the notion of compatibility required for S-consistency is also dependent on the constraints in place, statements do not affect such constraints as they do not add, remove, or change them. That is one of the reasons why adding more statements cannot make an S-inconsistent set S-consistent. In contrast, as we have just seen, rules can function as the constraints relative to which we judge the compatibility of facts and, therefore, adding rules that act as constraints can contribute to a ruleset's R-consistency.

This conclusion above is interesting as it allows us to consider that even if international law remains decentralised and ever-expanding, that does not necessarily mean that it is R-inconsistent. Adding the right kinds of rules that function as constraints relative to which we judge the applicability of other rules can contribute to international law's R-consistency by avoiding conflicts, making it easier for subjects to determine their legal positions.

4.6 Dealing with Conflicts

As pointed out above, conflicts are undesirable as they make it hard for subjects to find their legal positions. It would be ideal if international law had no conflicts, yet conflicts are commonplace in complex rulesets such as international law. If we cannot avoid conflicts, the next best thing is to try to deal with them. In this section, we will see that even if a ruleset is R-inconsistent, it is still possible to handle the conflicts it leads to by reasoning with and about rules, determining which rules apply and what outcomes they lead to in the cases at hand. We begin by examining how reasons and priority relationships can help us deal with

conflicts. Then, we consider how to deal with conflicts when faced with metarules attaching to opposite-priority relationships.

Before we dive into all that, however, it is interesting to observe that we can deal with conflicts by arranging it so that there is no actual case to which the conflicting rules are applicable. To put it differently, although rules may still be conflicting in a *non-actual* case, there is no *actual* case (as the states of affairs of that case do not obtain), and, thus, there is no incompatibility to manage. Let us think back to T's case. Recall that T is a State experiencing a budgetary crisis that is a member of the UN and the OAU. The Charters of these two organisations support rules that attach to T obligations to contribute with certain expenses. These rules are known as the UN Expenses Rule and the OAU Expenses Rule.

Assuming that these rules are applicable to T's case, they would result in outcomes that are incompatible relative to the deontic constraint. If these rules apply to this case, they will impose obligations on T, which may obligate T to perform acts that T cannot perform together due to its current budgetary crisis. However, if T overcomes its financial difficulties, the statuses of being obligated to perform these acts will no longer be incompatible. As a result, there will be no incompatibility to manage. The ruleset would still be R-inconsistent because it could lead to conflicts in a non-actual case, but we would have no actual case to deal with. This demonstrates how changes to 'non-legal' states of affairs can also aid in conflict resolution. Of course, this is easier said than done, but dealing with a conflict in this manner is theoretically possible.

4.6.1 Reasons and Priority Relationships

Let us again consider this ruleset {IHL Detention Rule; HRL Judicial Review Rule}. When discussing how to avoid conflicts, we saw that introducing a metarule that affects the scope conditions of the HRL Judicial Review would leave this ruleset R-consistent. But let us suppose there is no such metarule, thus forcing us to deal with a conflict between these two rules. A conflict is indeed what occurs in Sue's case, which we talked about earlier. Remember that Sue was causing unrest during international hostilities, so State Y's agents detained her. But Y did not promptly submit Sue's detention to judicial review because Y was in the midst of hostilities. As seen above, the IHL Detention Rule and the HRL Judicial Review Rule are both applicable to Sue's case, but if these rules applied to it, they would lead to incompatible direct outcomes. These rules would make it so that Sue's detention is

both lawful and unlawful, which, relative to non-contradiction, are states of affairs that cannot go together.

Notice that this conflict has to do with an incompatibility between *direct* outcomes. The direct outcomes of the IHL Detention Rule and the HRL Judicial Review Rule are incompatible. As explained earlier in this chapter, in this kind of conflict, the conflicting rules cannot both apply to the same case. If they applied, they would lead to facts that, by definition, cannot go together (the same act would be lawful and unlawful). We also know that if two states of affairs are incompatible relative to the constraints in place, a reason one of these states of affairs obtains is a reason the other (incompatible) state of affairs does not obtain. So, a reason the IHL Detention Rule applies to Sue's case is a reason the HRL Judicial Review Rule does not apply and vice versa. As both rules are applicable to this case, they each have a reason to apply. Let us assume that there are no more reasons at play other than their applicability. Since these rules cannot both apply to Sue's case, we deal with this conflict by figuring out which rule's applicability has more weight as a reason to apply to this case.[54]

We can use metarules that define priority relationships—*priority metarules*—to help us figure out the weight assigned to the applicability of each rule as a reason they apply. These priority metarules posit that when two rules conflict, one type of rule has priority over the other because these metarules give more weight to the applicability of one type of rule over another. In this regard, priority metarules work by giving us *meta-reasons*; they give us reasons some reason outweighs another reason. A popular example of a priority metarule is *lex specialis*. This metarule gives us meta-reasons that the reason for a more specific rule's applicability outweighs the reason for a less specific rule's applicability. *Lex specialis* can assist us in determining which of the two rules applies to Sue's case, as the IHL Detention Rule is more specific than the HRL Judicial Review Rule. This is because the former rule is only applicable to detentions for security reasons during hostilities, whereas the latter rule is applicable to any detention.[55]

[54] It is also possible that none of the conflicting rules apply to that case. However, we will ignore this possibility as it does not bring much clarity to subjects seeking their legal positions.

[55] The conclusion that this IHL rule is more specific than the HRL rule is aligned with the ICJ's opinions on *lex specialis* in both *Legality of the Threat or Use of Nuclear Weapons* (1996, para. 25) and *Construction of a Wall in the Occupied Palestinian Territory* (2004, para. 106).

Let us assume that the IHL Detention Rule is indeed more specific than the HRL Judicial Review Rule and that *lex specialis* is both applicable and applies to this case. Thus, *lex specialis* attaches its consequence to this case. *Lex specialis* provides a meta-reason that the reason for the applicability of the IHL Detention Rule outweighs the reason for the applicability of the HRL Judicial Review Rule. Assuming there are no more meta-reasons to consider, we can conclude that, in Sue's case, the applicability of the IHL Detention Rule outweighs the applicability of the HRL Judicial Review Rule. This conclusion can then be used as a bridge to determine whether the IHL Detention Rule or the HRL Judicial Review Rule applies to Sue's case. While both rules are applicable to this case, we know that the IHL Detention Rule's applicability outweighs the HRL Judicial Review Rule's applicability due to *lex specialis*. As a result, the first rule applies while the second does not (Figure 8 *infra*).

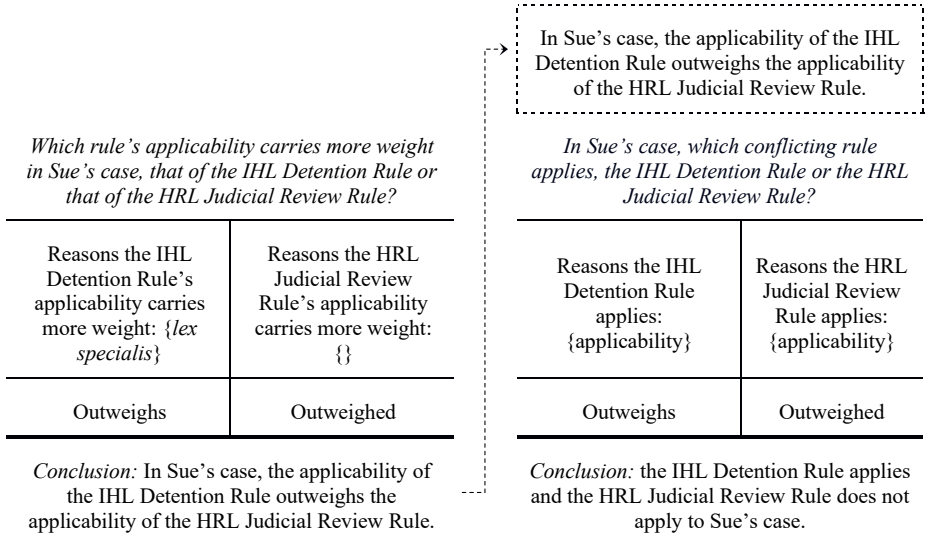

Figure 8. Conflict between an IHL and an HRL rule

Alongside *lex specialis*, there are other well-known priority metarules, such as *lex superior* and *lex posterior*, and even lesser-known ones, such as *pro persona. Lex superior* prioritises rules found in a more important or fundamental provision over rules found in lesser provisions. In this respect, the metarule stemming from art. 103, UN Charter posits that rules derived from that treaty have priority over rules derived from other documents. *Lex posterior* prioritises rules emanating from newer provisions over rules that emanate from older ones. In *Slivenko and Slivenko* v *Latvia's* admissibility decision (2002, paras 61–62), for example,

the European Court of Human Rights held that rules stemming from the European Convention on Human Rights (ECHR) (1950) have priority over rules found in a prior bilateral treaty between Latvia and Russia. *Pro persona* assists us in dealing with conflicts by prioritising which rule promotes a more favourable outcome for individuals' rights. In *Guerrilha do Araguaia* (2010, para. 178), the IACtHR referred to this metarule while balancing government interests against the interests of victims.

There is a slight difference between the way we can deal with conflicts depending on whether the incompatibility is between direct outcomes or indirect outcomes.[56] The conflict in Sue's case is between two rules whose direct outcomes are incompatible relative to the constraints in place. Conflicting rules cannot apply to the same case when their direct outcomes are incompatible. So, we deal with this type of conflict by weighing the reasons for each rule to apply in order to determine which conflicting rules apply and which do not. This is exactly what we did in Sue's case.

But, as mentioned earlier, there are conflicts where direct outcomes are compatible, and the incompatibility is between the indirect outcomes that rules can lead to. These conflicts can also be dealt with by the non-application of conflicting rules. Nonetheless, we can deal with these conflicts even if the conflicting rules apply, attaching consequences to the cases before us and leading to direct outcomes in those cases. We can deal with these conflicts by considering the indirect outcomes of these rules. These indirect outcomes cannot coexist because they are incompatible. So, we weigh the reasons for each indirect outcome to determine which obtain and which do not.

Let us return to T's case and its ongoing budgetary crisis. Recall that there are two rules applicable to T's case. On the one hand we have the UN Expenses Rule, which stems from the UN Charter and would attach to T an obligation to pay the UN's expenses. On the other, we have the OAU Expenses Rule, which stems from the OAU Charter and would attach to T an obligation to pay the OAU's expenses. The UN Expenses Rule and the OAU Expenses Rule's direct outcomes (the two obligations) are compatible relative to the constraints in place. Thus, they can attach their respective obligations to T even if T cannot pay both

[56] As pointed out in footnote 44 earlier in this chapter, when we face two rules that conflict because of an incompatibility between their indirect outcomes, we are actually facing two other rules whose direct outcomes are incompatible—we simply call the direct outcomes of these latter two rules the indirect outcomes of those first two rules. Therefore, we deal with conflicts between the indirect outcomes of rules by dealing with the conflicts between other rules whose direct outcomes are incompatible.

expenses. In contrast, due to the deontic constraint and due to T's budgetary crisis, it is incompatible for T to be obligated to pay the UN's expenses and obligated to pay the OAU's expenses. Consequently, the UN Expenses Rule and the OAU Expenses Rule are conflicting in T's case. These rules are applicable to T's case, but, if applied, they would lead to indirect outcomes that are incompatible relative to the constraints in place.

Rather than arguing about which rules do not apply, let us assume that both the UN Expenses Rule and the OAU Expenses Rule apply to this case. These rules attach the two obligations to T as their direct outcomes. We now need to figure out which of these indirect outcomes obtains in this case. That is, we want to know whether T is obligated to pay the UN's or the OAU's expenses.[57] The application of the UN Expenses Rule and the OAU Expenses Rule to T's case results in T having an obligation to pay the UN and an obligation to pay the OAU's expenses as a direct outcome of these rules. Each obligation provides a reason that T is obligated to pay the UN's and the OAU's expenses. However, because T can be obligated to pay either the UN's or the OAU's expenses, a reason for T to pay the UN's expenses is a reason not to pay the OAU's expenses, and vice versa.

Assuming there are no other reasons at work besides the ones provided by these two obligations, we can use a priority metarule to help us find the answer to T's case. Priority metarules can assist us in this type of conflict by providing meta-reasons that the reasons given by a rule's direct outcome outweigh the reasons given by another rule's direct outcome. Assume that *lex superior* is applicable and that it applies to this case. *Lex superior* thus provides us with a meta-reason that the obligation imposed by the UN Expenses Rule weighs more than the obligation imposed by the OAU Expenses Rule in determining what T is obligated to do. *Lex superior* prioritises the obligation to pay the UN's expenses because the UN Expenses Rule attaches this obligation, and this rule stems from a more fundamental provision (the UN Charter) than the provision from which the rule attaching the obligation to pay the OAU's expenses stems (the OAU Charter). If there are no other (meta-)reasons to consider, we can conclude that the obligation attached by the UN Expenses Rule outweighs the obligation attached by the OAU Expenses Rule. This allows us to conclude that T is obligated to pay the UN's expenses and not obligated to pay the OAU's expenses (Figure 9 *infra*).

[57] We are assuming that T is obligated to comply with either one of these obligations. If it were not for this assumption, we could consider that T is not obligated to comply with either of them but that T is obligated to save money or invest in infrastructure, for example.

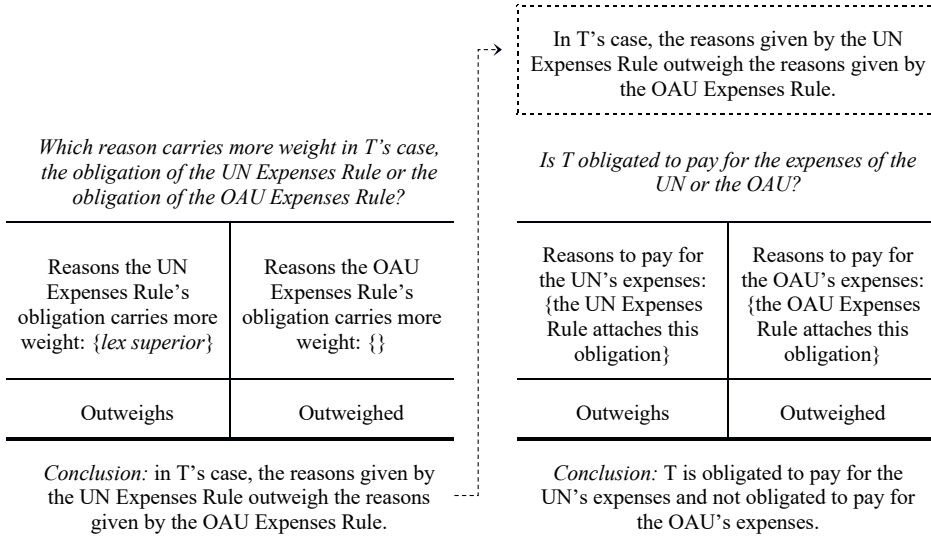

Figure 9. Incompatibility between the UN and OAU Expenses Rules

4.6.2 Multi-Level Conflicts

The conflicts we saw in the examples above are relatively straightforward. In those cases, we have rules that conflict, and in each case, there is a single metarule pointing to a priority relationship that allows us to figure out what rules apply and what rule-based outcomes obtain. We are dealing with a less straightforward scenario when we have rules conflicting in a case, and the available priority metarules are attaching to opposite-priority relationships.

Let us try to visualise this scenario with an example. Take the situation of a State that is unsure whether it is permitted to commercialise a genetically modified microorganism or prohibited from doing so.[58] Suppose that under a rule stemming from the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), there is a permission to commercialise that microorganism. Also, suppose that under a rule stemming from the Biological Weapons Convention (1972), there is a prohibition on trading this microorganism because it is considered a biological weapon. Call these two rules the 'Biosafety Rule' and the 'Biological Weapons Rule', respectively.

Assuming these rules are both applicable to this case, these rules are conflicting as they would lead to direct outcomes that are incompatible relative to the constraints in place. A State would both have a prohibition and permission to trade this microorganism. In other

[58] This example is inspired by the ILC's report (2006b, para. 273). See also Safrin (2002).

words, a State would both have an obligation not to and *not* have an obligation not to trade the same thing. Since the states of affairs of these rules' direct outcomes are incompatible, these rules cannot both apply to the same case. As we saw above, we deal with this type of conflict by weighing the reasons one rule applies against the reasons the other rule applies. Assume that, aside from their applicability, there are no other reasons for the Biosafety Rule and the Biological Weapons Rule to apply to this case.

Thus far in this book, we have dealt with conflicts by looking for a priority relationship between the conflicting rules. But suppose that, in this case, we have to deal with metarules attaching to opposite-priority relationships. Assume *lex specialis* prioritises the Biological Weapons Rule, while *lex posterior* prioritises the Biosafety Rule.[59] So, *lex specialis* gives us a meta-reason that the applicability of the Biological Weapons Rule outweighs the applicability of the Biosafety Rule. Meanwhile, *lex posterior* gives a meta-reason that the applicability of the Biosafety Rule outweighs the applicability of the Biological Weapons Rule.

To deal with the conflict between the Biosafety Rule and the Biological Weapons Rule and answer the initial question of which rule applies to this case, we must answer the question of which applicability has more weight. But to answer this second question, we need to answer a third question on which (meta-)reason has more weight, the one attached by *lex specialis* or the one attached by *lex superior,* as they each point to a different answer for the second question. To put it another way, determining which rule applies to this case requires us to answer three questions about the conflict between the Biosafety Rule and the Biological Weapons Rule. To answer the first question, we must answer the second, but to answer the second, we need to answer the third.

We must seek reasons that will aid us in answering our third question. In this regard, 'meta-metarules' can help us determine the weight of the meta-reasons given by priority metarules. An example of a 'meta-metarule' stems from art. 30(1), VCLT. It posits that a meta-reason given by *lex superior* outweighs a meta-reason given by *lex posterior*. But we can also find reasons not directly attached by legal (meta)rules. As explained in chapters 1 and 3, we take a reason-based approach that recognises that rules are sensitive to reasons. This is significant

[59] Assume that both *lex specialis* and *lex posterior* are applicable and apply to this case.

because reasons found elsewhere other than legal (meta)rules can also tip the balance against applying an applicable rule.[60]

For instance, the fact that the purpose of a rule is best served by its non-application is a reason that a rule (albeit applicable) does not apply (Fuller, 1958, p. 664 f.; Postema, 1991, pp. 804, 811). Likewise, cohesion with precedents may also serve as a reason an applicable rule does not apply to a specific case. As stated earlier in this chapter, our logical framework does not impose a particular approach to conflict resolution by assigning weight to reasons. Our logical framework's purpose is simply to provide structure to help legal subjects reason with and about rules. We should delegate to the law the task of determining which reasons are important and how these reasons stack up against one another.

For the sake of this explanation, however, let us assume that international law accounts for a 'meta-meta-reason' pleading for the conclusion that the meta-reason given by *lex specialis* outweighs the meta-reason given by *lex posterior*. This assumption is not too controversial, as the adage *generalia specialibus non derogant*[61] is quite popular with international lawyers (Aufricht, 1952; Wolfrum and Matz, 2000; Pauwelyn, 2003, p. 405). It was also explicitly mentioned by the Arbitral Tribunal in *Beagle Channel* (1977, para. 39). We can also find implicit reference to this adage in *Legality of the Threat or Use of Nuclear Weapons* (1996, para. 30).

Armed with the 'meta-meta-reason' given by this adage, we can begin to answer the three questions that will allow us to deal with this conflict and reveal which rule applies to this case. We will do this in three steps.

(Step 1) We begin at the 'meta-meta-level' with the third question (Figure 10 *infra*). Here we must figure out which meta-reason has more weight, the one attached by *lex specialis* or the one attached by *lex posterior*. The *generalia specialibus non derogant* adage gives us a 'meta-meta-reason' that the meta-reason given by *lex specialis* has more weight than the one given by *lex posterior*. Assuming there are no reasons to contradict this outcome, we conclude that the meta-reason given by *lex specialis* outweighs the one given by *lex posterior.*

[60] While we do not need a legal (meta)rule to find reasons, all reasons can be universalised with (legal or non-legal) rules. Since reasons are facts that plead for conclusions (another fact), we can universalise the connection made by any reason with a rule (as rules are nothing other than logical individuals that attach facts together) (Hage, 2015b; Marcos, 2021).

[61] This adage can be translated as 'the general does not detract from the specific'.

Which reason has more weight in this case, the one given by lex specialis or the one given by lex posterior?

Reasons the reason given by *lex specialis* has more weight: {*Generalia specialibus non derogant*}	Reasons the reason given by *lex posterior* has more weight: {}
Outweighs	Outweighed

Conclusion: the reasons given by *lex specialis* outweigh the reasons given by *lex posterior* in this case.

Figure 10. Conflict at the 'meta-meta-level'

(*Step 2)* We can now move to the second level, the meta-level, where we deal with the meta-reasons given by the priority metarules (Figure 11 *infra*). We are now dealing with the second question, which determines which applicability weighs more in the conflict between the Biological Weapons Rule and the Biosafety Rule. While *lex specialis* pleads for the conclusion that the reason of the Biological Weapons Rule's applicability outweighs the reason of the Biosafety Rule's applicability, *lex posterior* pleads for the opposite conclusion. We can use the conclusion we reached at the third level to help us determine this matter: the reasons given by *lex specialis* outweigh the reasons given by *lex posterior*. Assuming there are no other reasons to consider, we can conclude that the applicability of the Biological Weapons Rule carries more weight in this case than the applicability of the Biosafety Rule.

The reasons given by *lex specialis* outweigh the reasons given by *lex posterior* in this case.

Which rule's applicability carries more weight in this case, that of the Biological Weapons Rule or that of the Biosafety Rule?

Reasons the Biological Weapons Rule's applicability has more weight: {*lex specialis*}	Reasons the Biosafety Rule's applicability has more weight: {*lex posterior*}
Outweighs	Outweighed

Conclusion: in this case, the Biological Weapons Rule's applicability carries more weight than the Biosafety Rule's applicability.

Figure 11. Conflict at the meta-level

(Step 3) We have finally reached the ground level, the object-level, where we deal with the conflict between the Biological Weapons Rule and the Biosafety Rule as we try to answer

our first question and, thus, find out which of these two rules apply to this case (Figure 12 *infra*). We have one reason the Biological Weapons Rule applies, which is its applicability, and we have a reason the Biosafety Rule applies, which is also its applicability. We can use the conclusion we reached at the level above to determine which applicability has more weight. As previously stated, the applicability of the Biological Weapons Rule carries more weight in this case than the applicability of the Biosafety Rule. Assuming there are no more reasons to balance, we can conclude that the Biological Weapons Rule applies while the Biosafety Rule does not.

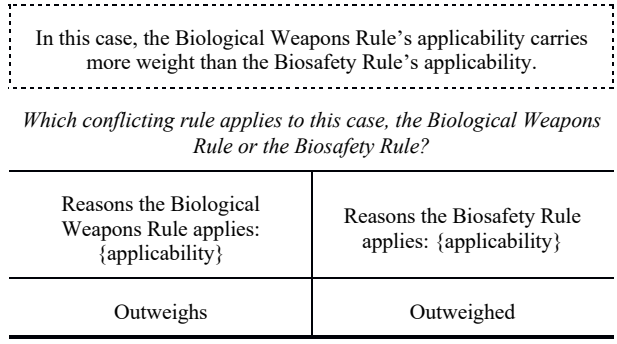

Figure 12. Conflict at the object-level

We must take note that the conclusion we reached in the example above will not necessarily repeat in other conflicts between the Biological Weapons Rule and the Biosafety Rule. The 'meta-meta-reason' given by *generalia specialibus non derogant* is not an end-all answer to deciding whether the meta-reason given by *lex specialis* outweighs the meta-reason given *lex posterior*. Another 'meta-meta-reason' may outweigh the one given by *generalia specialibus non derogant* and, thus, lead to the conclusion that the *lex posterior* meta-reason outweighs the *lex specialis* meta-reason. If a case involves distinct reasons, balancing them might result in a different conclusion. The reasons pleading for the priority of the Biosafety Rule might outweigh those pleading for the Biological Weapons Rule, allowing us to conclude that the Biosafety Rule applies and the Biological Weapons Rule does not.

There is no reason why we may not, in the future, have to deal with a conflict that leads us to an even more abstract level than the example we considered above. For instance, the 'meta-meta-reason' provided by *generalia specialibus non derogant* may need to be balanced against a 'meta-meta-reason' provided by another adage pleading for the opposite

conclusion. This would compel us to search for a 'meta-meta-meta-reason' to help us resolve the conflict between the Biological Weapons Rule and the Biosafety Rule.

In theory, this could lead to an infinite regress as we continue to weigh ever more abstract reasons against one another. In practice, our balancing will come to an end when international law runs out of pertinent reasons for us to consider. In this regard, it is worth emphasising once more that the law (rather than logic) should specify which reasons are relevant and how they compare to one another. The law should provide determinative reasons to assist us to reach conclusions by balancing reasons, which would allow legal subjects to determine what rules apply to cases and to make it clear that the outcomes are brought by rules and not the subjects.

4.7 A Two-Part Thesis on R- and S-Consistency

Drawing from our logical framework and from what we learned in the sections above, we can now understand this book's two-part thesis. More rules do not always lead to a ruleset's R-inconsistency, and even if a ruleset is R-inconsistent, we can still extract an S-consistent statement set on what outcomes obtain as subjects' legal positions. Let us pick this thesis apart.

(Part 1) 'More rules do not always lead to a ruleset's R-inconsistency…'

As previously stated, adding more rules can sometimes make an R-inconsistent ruleset R-consistent. A ruleset that is R-inconsistent can be made R-consistent not only by removing rules, but also by adding more of the right kind of rules. This is because rules can serve as constraints against which we assess the compatibility of states of affairs. In this regard, we can influence what states of affairs cannot coexist by introducing more rules that act as constraints. This is significant because rules acting as constraints can change the applicability of other rules to cases, avoiding conflicts between them. These rules can effectively make an R-inconsistent ruleset R-consistent by avoiding conflicts.

(Part 2) '... and even if a ruleset is R-inconsistent, we can still extract an S-consistent statement set on what outcomes obtain as subjects' legal positions.'

It would be ideal if rulesets led to no conflicts. But the reality is that when faced with complex rulesets, subjects will likely have to deal with conflicting rules. Nonetheless, we have seen above that irrespective of a ruleset's R-inconsistency, it is still possible to deal

with conflicts by reasoning with and about rules, determining what rules apply and what outcomes result from them in the cases before us. The information on what rules apply and what outcomes they lead to gives us a set of statements expressing the facts of subjects' legal positions. Regardless of a ruleset's R-consistency, the statement set we can extract from this ruleset is itself S-consistent as its statements express states of affairs that obtain together relative to the constraints in place. Not only are these states of affairs compatible, but the statements expressing them can all be true at the same time. Effectively, we can obtain an S-consistent statement set from an R-inconsistent ruleset.

If we understand this book's two-part thesis, its two corollaries are easy to follow.

(Corollary 1) International law's decentralised expansion does not necessarily lead to its R-inconsistency.

Even if international law remains decentralised and continuously expanding, that does not necessarily mean it is R-inconsistent. The act of reasoning with and about rules may sometimes make it possible for us to realise that what might first appear to be an R-inconsistent ruleset is, in fact, R-consistent and, so, does not lead to conflicts. Likewise, seeing that avoiding conflicts is desirable, legal subjects should strive to introduce an overarching set of (meta)rules that act in the background as constraints relative to which they judge the applicability of other rules. This overarching set of (meta)rules can contribute to international law's R-consistency by avoiding conflicts and, so, help subjects determine their legal positions.

(Corollary 2) Even if international law's ruleset is R-inconsistent, subjects can make sense of it by extracting an S-consistent set of statements on their legal positions.

Irrespective of whether international law's decentralised expansion makes it challenging for subjects to figure out their legal positions, and even if said decentralised expansion leaves international law riddled with conflicts, subjects can still make sense of international law, as it is still possible to extract S-consistent outcomes from it. Subjects can use international law's (R-consistent or R-inconsistent) ruleset to rationally construct an S-consistent statement set on which rules apply (and which ones do not apply), as well as by figuring out which (direct and indirect) outcomes these rules lead to as legal positions.

That is not to say that the decentralised expansion of international law does not place subjects in a difficult position. The point is that no matter how complicated the situation, subjects can

still deal with conflicts by reasoning with and about rules. To help them through this ordeal, subjects should work to formulate an overarching set of (meta)rules that establish priority relationships between international legal rules. Subjects would benefit from such a set of (meta)rules because it would give them reasons to draw clear conclusions about which rules apply and what outcomes result in legal positions. As stated throughout this chapter, this book does not impose a specific method of resolving conflicts by assigning weight to reasons. Its sole purpose is to provide structure in the midst of the complexities of international law. International lawyers are better suited to the task of debating and working to uncover what reasons are important for international law and how these reasons weigh against one another in cases where they need to be balanced.

We can now answer this book's *research question*. How can subjects make sense of international law despite its decentralised expansion? Subjects make sense of international law by avoiding and dealing with conflicts. If subjects avoid all conflicts, they are left with an R-consistent ruleset. But, even if they face an R-inconsistent ruleset, they can still deal with conflicts and thus find the legal positions that the rules of international law assign to them. Subjects can extract an S-consistent set of legal positions from international law's ruleset by reasoning with and about rules, thus revealing what rules apply and what outcomes result in legal positions.

4.8 Chapter Summary

We began this chapter by examining a logical framework for reasoning with and about rules. After that, we saw that states of affairs are compatible if they can obtain together and that (in)compatibility is determined by the constraints in place. We also saw that cases are sets of states of affairs that are compatible relative to these constraints. If these states of affairs obtain, the case is actual; if not, the case is non-actual, but it is still a case.

We then defined conflicts as occurring when two or more rules are applicable to a case, but if these rules applied to that case, they would lead to (direct or indirect) outcomes that are incompatible relative to the constraints in place. Next, we defined both R- and S-consistency. A ruleset is R-consistent if there can be no (actual or non-actual) case in which that ruleset leads to a conflict. If such a case can exist (even if non-actual), then that ruleset is R-inconsistent. In turn, a statement set is S-consistent if the states of affairs expressed by the elements of that set are all compatible, so the statements expressing such states of affairs can all be true simultaneously. If not, that set is S-inconsistent.

Next, we studied how adding more rules that function as constraints can make an R-inconsistent ruleset R-consistent. These rules acting as constraints can affect the applicability of other rules to cases by affecting their (internal and scope) conditions and their validity and, so, avoid conflicts. Finally, we saw that even when facing an R-inconsistent ruleset, we can still deal with the conflicts this ruleset leads to by reasoning with and about rules. We finally considered this book's two-part thesis and corollaries, which allowed us to answer its research question.

In the next chapter (5), we will employ these findings to contemporary international law to highlight some applications of what we have learned thus far in this book. We will analyse two cases from international law, *EC-Hormones* and *Vélez*, to study how the theory developed by this book can contribute to legal practice.

5 Theory Application

Our research began in chapter 1 by asking how subjects can make sense of international law despite its decentralised expansion. Chapter 2 explained that international law is built without any central coordination (decentralised), and its ruleset is continuously growing (expansion). Chapter 3 showed that the difficulty that subjects face when dealing with the decentralised expansion of international law is one of uncertainty concerning their legal positions. As we learned in that chapter, legal positions are the (direct and indirect) outcomes that rules bring about when they apply to cases. We thus concluded that the question guiding our research is, in truth, a matter of figuring out what outcomes obtain as the legal positions of the subjects of international law.

Chapter 4 answered our research question. It developed a logical framework for reasoning with and about rules that allowed us to understand that subjects can make sense of international law by avoiding and dealing with conflicts. If subjects avoid all conflicts, they are left with an R-consistent ruleset. But even if they face an R-inconsistent ruleset, they can still deal with conflicts and thus find the legal positions that the rules of international law assign to them. Subjects can extract an S-consistent set of legal positions from international law's ruleset by reasoning with and about rules, thus revealing what rules apply and what outcomes obtain as legal positions.

The present chapter draws on the findings of earlier chapters to provide some applications for the theory developed in this book. It shows how this theory can help supply structure to our reasoning with rules, clarifying the premises we can use to reach conclusions on what rules apply and what outcomes obtain. In other words, chapter 5 shows how this book's theory can help us figure out legal positions. For this purpose, we will consider two examples—one example from trade law and another taken from human rights law (HRL).[62]

The first example (5.1) deals with the relationship between trade law, general international law, and environmental law rules by focusing on the *European Communities—Measures Concerning Meat and Meat Products* case ('*EC-Hormones*') (1998). This example demonstrates how priority relationships help us deal with conflicts by explaining why some rules apply and others do not. Studying this case can also help us understand how a rule can

[62] The choice of topics for these examples is motivated by the ILC's second report on the 'fragmentation' of international law (2006b, paras 161–171), which considered the interaction between rules on general international law and these two 'special regimes'.

have priority over another rule in some cases while, in other cases, the priority relationship can be reversed.

The second example (5.2) deals with derogating human rights law (HRL) rules. By focusing on the *Zambrano Vélez et al.* v. *Ecuador* case ('*Vélez*') (2007), this example considers conflicts between HRL rules and rules enacted to deal with states of emergency (emergency rules). Our theory explains how the derogation of HRL rules can be done by metarules that affect the scope conditions of these HRL rules. When such metarules derogate HRL rules, they become non-applicable to certain cases, avoiding some conflicts between these HRL rules and emergency rules.

This chapter does not intend to offer an exhaustive list of applications for the theory developed in this book. Instead, it aims to use these two examples to clarify how this book's theory can help us better understand some of the issues that subjects have to deal with in legal practice. It is worth emphasising that this book's theory does not resolve substantive problems. Rather, it seeks to clarify the terms and positions in which subjects should have the necessary discussion to resolve said problems.

5.1 EC-Hormones

EC-Hormones is an interesting case for our purposes, as conflicts between rules on trade, the environment, and general international law are often a source of difficulty for subjects in terms of finding their legal positions. For instance, the ILC directly references *EC-Hormones* as an example of the 'fragmentation' of international law (2006b, para. 55). The Commission also mentions that trade-law rules are still controversial, as scholarly opinion is divided on whether and how such rules should interact with other international legal rules (2006b, para. 165 f.; Capucio, 2017, p. 45 f.). Nevertheless, as explained in chapter 2, the majoritarian view (which this book supports) regards trade law, environmental law, and general international law as subsets of the superset of international legal rules. They are all rules of international law.

Our theory may help legal subjects find their way around conflicts between these rules by shedding some light on the present discussion. It helps explain the relationship between international legal rules and enlightens the priority relationship between them; it also accounts for the fact that the priority between trade-law rules and non-trade-law rules may get reversed from case to case. We begin by examining the WTO Appellate Body's (AB)

decision, thus pointing out some aspects that would benefit from more clarity (5.1.1). After that, we will consider some interpretations of this decision according to our theory (5.1.2) and discuss how future interactions could be formulated to allow subjects to see legal positions more clearly (5.1.3).

5.1.1 The AB's Decision

EC-Hormones is a well-known and controversial case dealing with the Precautionary Principle and a rule on the protection of health originating from art. 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) (1994), which we will call the 'SPS Agreement Rule'. The Precautionary Principle is a rule on the impact of human activity and technology on the environment and public health (Schröder, 2014). It posits that it is lawful for States to adopt provisional measures to constrain the imports and exports of products while assessing the risks posed by such products.[63] The SPS Agreement Rule is also a rule protecting public health, but the measures it considers lawful are not as broad as those that the Precautionary Principle deems lawful.

A legal subject that deals with a case to which both the Precautionary Principle and the SPS Agreement Rule are applicable might find herself in a tight spot. If both rules applied to this case, one rule could consider some measure lawful while the other could deem that same measure unlawful. In other words, these rules appear to conflict. This scenario is not so different from the one faced by the parties involved in *EC-Hormones*.

In *EC-Hormones*, the European Communities barred the import of North American beef containing growth hormones, for public health reasons. Canada and the United States filed complaints against the European Communities in the WTO Dispute Settlement Body. The AB ruled that the measures adopted by the European Communities were unlawful under the SPS Agreement Rule. The issue is that those European measures would be lawful under the Precautionary Principle.

The AB decided that 'the status of the precautionary principle in international law continues to be the subject of debate' (*EC-Hormones* 1998, para. 123). It also pointed out that whether States have widely accepted the principle 'as a principle of general or customary international law appears less than clear' (1998, para. 123). The AB admitted that 'the precautionary principle indeed finds reflection in art. 5.7 of the SPS Agreement' (1998, para.

[63] As explained in chapter 3, our definition of rules covers both strict-sense rules and principles.

124) but that 'the principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement' (1998, para. 124). As such, it concluded that 'the precautionary principle does not override the provisions of arts. 5.1 and 5.2 of the SPS Agreement' (1998, para. 125).

At the outset, the AB seems to question the status of the Precautionary Principle as a valid rule of international law. But the AB mixes the principle's status as a valid rule with the question of whether it belongs to general international law or if it is a rule of customary international law. Next, the AB recognises that the principle 'finds reflection' in art. 5.7 of the SPS Agreement, but it is unclear whether 'finding reflection' means the principle is a valid rule. Also, the AB states that the principle does not 'override' the SPS Agreement Rule. Does the use of the word 'override' mean that the principle cannot apply in this case because it is not a valid rule? Or does it mean that even if the Precautionary Principle is valid, it still does not apply to this case because the SPS Agreement Rule has priority over it? The decision of the AB is not clear.

5.1.2 Interpreting the Decision

Without going into the question of how adequate the AB's ruling is, our theory can supply at least two charitable interpretations of its decision in *EC-Hormones*. A *first interpretation* is that the AB does not consider the Precautionary Principle a valid rule of international law. The AB indirectly referred to this when it did not assert that the Precautionary Principle was a rule of customary or general international law. Let us try to unwrap this to understand the consequences that the invalidity of a rule can have within our theory.

As chapter 3 explained, when looking for rules, we usually focus on pieces of text found in a treaty or a relevant document. But we can also look for rules in non-textual practices, which often happens when dealing with customary international law. A rule can belong to general international law and be a customary rule, yet it can also belong to environmental law or trade law and still be a customary rule (Mendelson, 1998, p. 155). The Precautionary Principle can be a customary rule and a rule of general international law, but it can also be a rule of general international law originating elsewhere (in a treaty, for example). It may also be a customary or not-customary rule that belongs to environmental or trade law.

What is interesting, however, is that under our theory, the fact that rules stem from custom or treaty, that they belong to general international law, environmental law, or trade law, does not, by itself, define their applicability to cases. Under chapter 3's explanation and chapter 4's logical framework, a rule is applicable to a case if that rule is valid and its internal and scope conditions are satisfied by that case.

A charitable reading of the *EC-Hormones* decision allows us to interpret it as meaning that when the AB said that it is 'less than clear' that the Precautionary Principle is a rule of (general or customary) international law, the AB is questioning the validity of the Precautionary Principle. It is not evident whether the AB thinks the principle is invalid. However, for the sake of this explanation, let us assume that the AB is indeed arguing that the Precautionary Principle is invalid. If the Precautionary Principle is invalid, it is not applicable to this case. Meanwhile, to the AB, the SPS Agreement Rule is applicable.

We now know which rules are *applicable* to this case, but, as chapters 3 and 4 explained, under our theory, a rule only *applies* to a case if the reasons it applies outweigh the reasons it does not apply. So, our attention turns to balancing the reasons each rule applies against the reasons it does not apply. Under our logical framework, the fact that a rule is applicable to a case is a reason that that rule applies to that case; the fact that a rule is not applicable to a case is a reason that that rule does not apply to it.

Since the Precautionary Principle is invalid, it is not applicable to this case, which is a reason the principle does not apply to this case. Assuming there are no other reasons to consider, we can conclude that the Precautionary Principle does not apply to this case, as the reasons it applies do not outweigh the reasons it does not apply. Meanwhile, the fact that the SPS Agreement Rule is applicable to this case is a reason it applies. Assuming there are no other reasons to consider, we can conclude that the reasons the SPS Agreement Rule applies outweigh the reasons it does not apply, leading to the conclusion that it applies to this case (Figure 13 *infra*).

Take note that there is no real conflict between these two rules in this first interpretation. One of these rules is not applicable, and only applicable rules can conflict under our logical framework. Remember that chapter 4 defined conflicts as occurring when two or more rules are applicable to a case, but if these rules both applied to that case, they would lead to incompatible outcomes. Because the Precautionary Principle is not applicable to this case, it cannot conflict with the SPS Agreement Rule.

Does the Precautionary Principle apply to this case?		*Does the SPS Agreement Rule apply to this case?*	
Pro Reasons: {}	Con Reasons: {Precautionary Principle is invalid and, thus, is not applicable to this case}	Pro Reasons: {SPS Agreement Rule is applicable to this case, as it is valid and the case satisfies its conditions}	Con Reasons: {}
Outweighed	Outweighs	Outweighs	Outweighed
Conclusion: the Precautionary Principle does not apply to this case.		*Conclusion:* the SPS Agreement Rule applies to this case.	

Figure 13. Precautionary Principle and SPS Agreement Rule I

In contrast, a *second interpretation* of the AB's decision recognises that there is a conflict. According to this interpretation, the AB concluded that the Precautionary Principle is valid and applicable to the present case but still does not apply to it. In turn, the SPS Agreement Rule is applicable and applies to this case. This second interpretation maintains that the AB is dealing with a conflict, as both the Precautionary Principle and the SPS Agreement Rule are applicable to this case, but if both were applied to it, they would lead to incompatible outcomes. The same act would be lawful and unlawful, which are states of affairs that cannot obtain together relative to non-contradiction.

Given that the Precautionary Principle and the SPS Agreement Rule's direct outcomes are incompatible, these rules cannot both apply to the same case. As explained in chapter 4, when rules apply, they necessarily lead to direct outcomes. If the Precautionary Principle and the SPS Agreement Rule were to apply, they would lead to states of affairs that cannot obtain together. In this respect, under our logical framework, if two states of affairs are incompatible relative to the constraints in place, a reason one of these states of affairs obtains is a reason the other (incompatible) state of affairs does not obtain. So, a reason the SPS Agreement applies is a reason the Precautionary Principle does not apply, and vice versa. The fact that these rules are both applicable is a reason they both apply, but since they cannot both apply to this case, we must figure out which rule applies to it.[64]

Apart from their applicability, it appears that there is no reason to apply these rules. As a result, we must determine which of these rules' applicability carries more weight as a reason

[64] It is also possible that none of the conflicting rules apply to that case. However, we will ignore this possibility, as it does not bring clarity to our understanding of the AB's decision.

they apply in this case. In this connection, we can interpret that when the AB says that the Precautionary Principle does not override the SPS Agreement Rule, it means that the SPS Agreement Rule has priority over the Precautionary Principle. As explained in chapter 4, certain metarules, known as priority metarules, hold that one type of rule has priority over another in the event of a conflict because these metarules give more weight to the applicability of one type of rule over another.

For example, the AB could have argued that *lex specialis* applies to this case, which would mean that the SPS Agreement Rule has priority over the Precautionary Principle because the former rule is more specific than the latter. If *lex specialis* applies in this case, we have a (meta-)reason that the applicability of the SPS Agreement Rule has more weight than the applicability of the Precautionary Principle. Assuming no other reasons are at play, the (meta-)reason provided by *lex specialis* aids us in concluding that the reasons the SPS Agreement Rule applies outweigh the reasons the Precautionary Principle applies. Therefore, the former rule applies in this case, while the latter does not (Figure 14 *infra*).

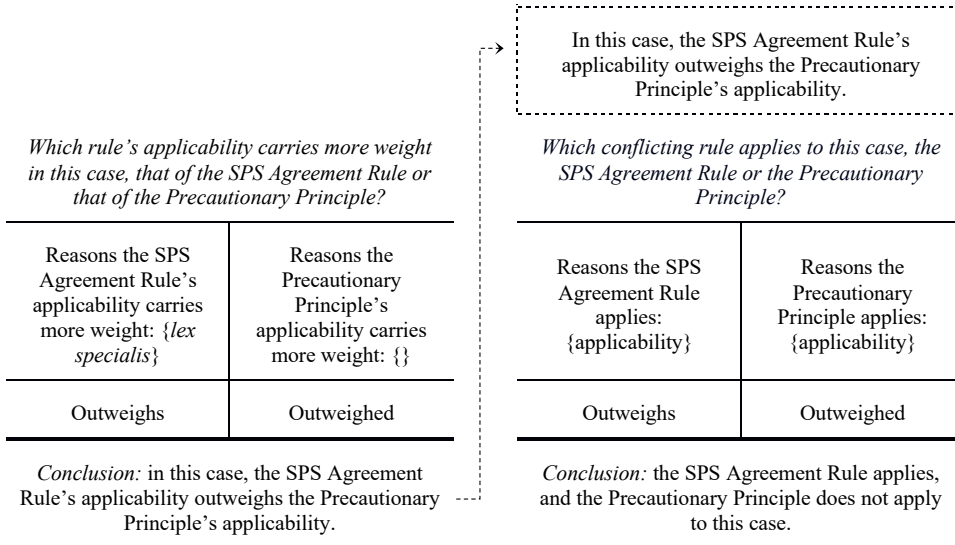

Figure 14. Precautionary Principle and SPS Agreement Rule II

What we have seen in the paragraphs above appears to be a reasonable interpretation of what the AB meant (or could have meant) when it noted that the Precautionary Principle could not lead to measures incompatible with the provisions of the SPS Agreement (1998, para. 124). The AB's (implicit) reasoning could have been that *lex specialis* (or some other priority

metarule) leads to the non-application of the Precautionary Principle in favour of the SPS Agreement Rule's applying to this case.

5.1.3 Contribution

We have not discussed whether the AB's decision is adequate. As explained throughout this book, our theory does not impose a particular way of dealing with conflicts by assigning weight to reasons. Its aim is only to supply structure in dealing with the complexity of international law. This book leaves to the law itself the job of revealing what reasons are significant and how they weigh against one another when they need to be balanced. The point of our theory is that it allows us to see what premises the AB might have used to reach its conclusion. That is, by replacing the fuzzy reasoning used by the AB with the structured reasoning we have just used, we could see what potential reasons could have led the AB to draw the conclusions it did, as well as what rules it considered to be applicable and why one of them did not apply.

Although our theory does not tell us whether the AB's decision is right or wrong, it can help us by clarifying the terms in which we should have that discussion. In this respect, by providing the AB's decision with a structure, our theory can even be used to criticise that very decision. A critic, for example, may argue that the AB is incorrect because the Precautionary Principle is a valid rule of international law. A critic may also argue that the AB ignored relevant legal reasons, such as interests of public health, that could have shifted the balance in favour of the Precautionary Principle over the SPS Agreement Rule. Similarly, the use of *lex specialis* could be criticised by citing reasons why the Precautionary Principle is more specific than the SPS Agreement Rule and not the other way around. It is also possible to argue that using *pro persona* would prioritise the Precautionary Principle over the SPS Agreement Rule, as that metarule favours the rule that promotes a more favourable outcome for individuals' rights.

Our theory can also help explain how trade-law rules interact with general international- and environmental-law rules. There have indeed been some attempts to explain such interaction. Pauwelyn, for instance, asserts that States may 'contract out' of a part of international law, but they may not 'contract out of the system of international law' (2003, p. 37). Nevertheless, there is still some difficulty in explaining this matter. Why is it that in certain cases, trade-

law rules prevail over non-trade-law rules, while in other cases, the opposite occurs?[65] Here, we must keep in mind that, under our theory, labels such as trade law, environmental law, and general international law do not define whether a rule is applicable to a case. What is relevant to applicability is whether rules are valid and their (scope and internal) conditions are satisfied by a case. What defines rule application is the reasons pleading against rules applying being outweighed by those pleading for them to apply.

In our second interpretation of the AB's decision in *EC-Hormones*, we entertained the possibility that a trade-law rule (the SPS Agreement Rule) had priority over a non-trade-law rule (the Precautionary Principle) due to *lex specialis*, given that it could be said that the trade-law rule was more specific than the non-trade-law rule. Still, it would also be possible for the opposite to take place. If a trade-law rule conflicted with a rule stemming from the UN Charter, for example, *lex superior* would prioritise the non-trade-law rule because it stems from a more fundamental provision.

We can also think of a conflict between a trade-law rule and an environmental-law rule, where *lex specialis* would point to the priority of the environmental-law rule over the trade-law rule. Let us recall the example mentioned in chapters 2, 3, and 4, where a diplomat is confronted with two rules. A trade-law rule attaches to States a prohibition against discriminating imports between like products. An environmental-law rule attaches to States permission to discriminate against imports if such discrimination is directed against like products that are produced in a way that poses risks to protected wildlife. These two rules leave that diplomat unsure about her State's legal position. It is not clear whether her State is prohibited from discriminating or permitted to discriminate against a specific product (canned tuna) if its production poses risks to protected wildlife (dolphins).

We could argue that, in this diplomat's case, *lex specialis* would prioritise the environmental-law rule over the trade-law rule, thus giving us reasons the former rule applies and the latter one does not. The environmental-law rule is arguably more specific than the trade-law rule, as the latter applies to similar products, whereas the former applies to similar products manufactured in a way that harms protected wildlife (Marcos, 2021). When we compare this diplomat's case to *EC-Hormones*, we can see how the priority relationship can

[65] Contrast these cases *US-Gasoline* (1996), *US-Shrimp* (1998), *Korea-Procurement* (2000), and *EC-Aircraft* (2011) against *EC-Hormones* (1998), *EC-Biotech* (2006), and *Peru-Agricultural Products* (2014).

be reversed, and thus the environmental-law rule would apply while the trade-law rule would not. In other words, the inverse of what occurred in *EC-Hormones*.

As explained in chapter 4, introducing more priority metarules may help us define which rules are determinative when dealing with conflicts, thus clarifying which rules apply and which do not. In this respect, there is no preset limit regarding priority relationships defined by metarules. We can think of introducing a 'pro-environment' or a 'pro-free-trade priority metarule', which would give priority to rules that support a more favourable outcome in terms of, respectively, the environment or free trade, against rules that do not. We also have to keep in mind that we can still deal with conflicts even if no priority metarules are available. As explained in chapter 4, we can also find reasons not directly attached by legal (meta)rules.[66] For example, the fact that a rule's purpose is best served by its non-application can be a reason that rule does not apply, even though it is applicable.

The point here is that there is no definitive answer as to whether trade-law rules have priority over non-trade-law rules. What rule applies in case of a conflict depends on the balance of reasons weighed up on a case-by-case basis in the light of the rules applicable to each case and the reasons at stake. In this connection, it is worth pointing out that under our theory, the AB's decision in *EC-Hormones* is not the final word on whether the SPS Agreement Rule has priority over the Precautionary Principle. The fact that the AB decided that the Precautionary Principle does not apply to this case serves only as a reason that the principle does not apply to that case. The AB's decision may also serve as a reason in a future case, but it must be balanced against potential opposing reasons. Balancing reasons may result in a different result—one in which the Precautionary Principle applies and the SPS Agreement Rule does not.

5.2 Vélez

Vélez deals with the derogation of HRL rules. Recently, there has been a noticeable resurgence in scholarly research on derogatory measures. This is partially due to the use of human rights derogations to allow for far-reaching counterterrorist measures to be implemented, together with concerns that, rather than being exceptional, these measures have become the dominant paradigm (Agamben, 2005, chap. 1). The Covid-19 pandemic has also led many States to roll out emergency measures restricting human rights—the

[66] As explained in footnote 60 in chapter 4, we do not need a *legal* (meta)rule to find reasons, but any reason can be universalised with a rule.

immediacy of the situation explains the quick reaction, yet it is not clear whether the means of carrying them out and the extent of these measures are entirely legal (Lebret, 2020; Menezes and Marcos, 2020; Valutytė, Jočienė, and Ažubalytė, 2021).

Even more recently, the Russian invasion of Ukraine in 2022 has shown how armed conflicts frequently lead to the adoption of emergency measures that jeopardise the full realisation of human rights (Storf, 2022). Likewise, long-standing conflicts in parts of Africa and Asia have over a period of several years led to an equivalent scenario of human rights restrictions in those areas.[67] Such restrictions are also found in Latin American States that are not engaged in hostilities but are still afflicted by political unrest and urban violence on levels comparable to war (Peterke, 2010). These States often adopt emergency measures to deal with such scenarios. This is precisely what happened in the case of *Vélez*.

Against this background, our theory explains how derogations can help us avoid conflicts between HRL rules and emergency rules. In this section, we will look at how metarules affect the scope conditions of HRL rules, relieving them of their applicability in certain cases and preventing them from conflicting in those cases. We will begin by examining the Inter-American Court of Human Rights (IACtHR) decision in *Vélez*, emphasising some aspects of this ruling that would benefit from clarification (5.2.1). Next, we will see some interpretations of this decision under our theory (5.2.2). After that, we will consider how our theory can contribute to a better understanding of the derogation of HRL rules as limiting their applicability (5.2.3).

5.2.1 The IACtHR's Decision

Vélez took place in a context of national disorder, at a time when many Ecuadorian cities were suffering from frequent rioting, vandalism, and social unrest. To deal with this crisis, Ecuador issued a decree authorising military intervention. During a military operation, Ecuadorian agents executed Zambrano Vélez, Segundo Cobeña, and José Cobeña. Despite a series of appeals, Ecuador conducted no investigations into that operation and punished none of its agents. The case was then brought to the IACtHR by the Inter-American Commission on Human Rights.

[67] For an overview of ongoing conflicts in 2022, see International Crisis Group (2022).

Ecuador confessed to the Court that it was responsible for its 'failure to comply with Article 27' (*Vélez*, 2007, para. 43) of the American Convention on Human Rights (ACHR) (1969).[68] ACHR's art. 27 is its provision on the derogation of HRL rules (Ludovic and Hélène, 2022, pp. 801–821). We find similar provisions in the International Covenant on Civil and Political Rights (ICCPR) (1966, art. 4), the Arab Charter on Human Rights (2004, art. 4), and the European Convention on Human Rights (ECHR) (1950, art. 15).[69]

The ACHR divides art. 27 into three paragraphs. The first paragraph posits that in times of emergency, a State 'may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation'. The same paragraph goes on to mention that 'such measures [must not be] inconsistent with its other obligations under international law and do not involve discrimination'. Its second paragraph provides for articles to which '[the] foregoing provision does not authorize any suspension'. These 'non-derogable' articles refer to several human rights, such as the rights to life (art. 4), humane treatment (art. 5), and freedom from slavery (art. 6), as well as the judicial guarantees essential for the protection of such rights. Art. 27's third paragraph proclaims that any State Party that exercises its right to suspension must immediately notify the other States Parties of the provisions it has suspended, the causes of the suspension, and the date on which the suspension will end. This notification must be made through the Secretary General of the Organization of American States.

In analysing the Ecuadorian decree that embodied the emergency measures, the IACtHR observed that the 'said decree did not set a defined territorial limit. On the contrary, it provided for "the intervention of the Armed Forces throughout the national territory […] as a means to safeguard the security of the persons and of the public and private property"' (2007, para. 48). To which the Court added that the decree 'neither fixed a time limit for the military intervention, which would allow knowing its duration; nor did it lay down the rights which would be suspended, that is, the material scope of the suspension' (2007, para. 48). The Court highlighted that States have 'to ensure that the suspension decreed is limited "to the extent and for the period of time strictly required by the exigencies of the situation"' (2007, para. 47).

[68] See also the IACtHR's *Habeas Corpus in Emergency Situations* advisory opinion (1987).
[69] The African Charter on Human and Peoples' Rights (1981) does not account for a similar provision.

Referencing the UN Human Rights Committee (2001, p. 29), the IACtHR clarified that emergency measures must meet requirements of 'duration, geographical coverage, and material scope' (2007, para. 48). The Court considered that the Ecuadorian decree had failed either to define such limits in its derogation measure or to point out which HRL rules would be suspended (2007, para. 48). Because of that, the Court asserted that the suspension '*exceeded* the powers attributed to the States by the Convention' (2007, para. 52, emphasis added). It thus concluded that Ecuador had 'failed to fulfill its obligations regarding the suspension of guarantees, established in Article 27(1), 27(2) and 27(3) of the American Convention on Human Rights in conjunction with its obligations to respect rights and to adopt domestic measures with regard to the rights to life, judicial guarantees and judicial protection' (2007, para. 169).

The Court's ruling is ambiguous on whether any HRL rules were derogated in this case. Given that Ecuador 'exceeded' the Convention, we may ask whether the decree suspended any HRL rules. A positive answer leads us to the questionable conclusion that States can derogate any HRL rules they wish, including those that are 'non-derogable'. A negative answer leads us to conclude that since Ecuador's measure 'exceeded' the Convention's rules, it could not derogate the relevant HRL rules. In other words, Ecuador simply did not comply with certain HRL rules—it acted unlawfully. But then, the IACtHR's statement about 'the suspension of guarantees which took place in the instant case' (2007, para. 52) becomes perplexing. The issue is to determine what the IACtHR means by 'exceeding' and what legal consequences that entails.

5.2.2 Interpreting the Decision

As pointed out above, the IACtHR's ruling is unclear on whether the relevant HRL rules were derogated. Nevertheless, it is still possible to use our theory to supply a charitable interpretation of the Court's decision in *Vélez*.

Let us begin by taking a closer look at ACHR's art. 27. We can interpret this article as giving rise to several rules. One of them is a metarule whose internal conditions are that there is a state of emergency and a State has adopted lawful measures to suspend some HRL rule (suspension measures). This metarule's conclusion is that the scope conditions of a particular HRL rule are limited according to the suspension measures. Let us call this metarule the 'Derogation Metarule'.

ACHR's art. 27 also provides many rules on what counts as an unlawful suspension measure. Discriminatory measures, measures with insufficient delimitation, and measures that surpass their necessary extent are unlawful. Measures that do not individualise what HRL rules are to be suspended are also unlawful. The same can be said about measures that try to suspend HRL rules that are 'non-derogable', such as the rights to life, judicial guarantees, and judicial protection. Also, art. 27's third paragraph supports a rule attaching to States an obligation to inform other State Parties of any suspension measures adopted.

Under our theory, the Derogation Metarule is a scope-limitation metarule. As explained in chapter 3, a rule is applicable if it is valid and if a case matches the internal and scope conditions of that rule. Internal conditions are satisfied by a case that matches the said conditions. Scope conditions are determined by metarules that affect applicability by limiting the personal, spatial, or temporal scope of rules. Cases satisfy rule-scope conditions when they do not fall outside the scope limitations of such rules.

On these terms, adding metarules that alter the scope conditions of other rules can affect which cases satisfy the scope conditions of these rules and, thus, determine their applicability to cases. This point is vital as chapter 4 defined conflicts relative to applicability. Two or more rules conflict when applicable to a case, and, if applied, would lead to incompatible outcomes relative to the constraints in place. So, if a metarule acts by altering the scope conditions of another rule in such a way that the said rule is no longer applicable to a case, then, by definition, that rule cannot conflict in that case.

The Derogation Metarule is one such metarule. It acts as a constraint that affects the scope conditions of an HRL rule according to the conditions laid down in a lawful suspension measure. For example, suppose there is a state of emergency, and State X enacts a lawful measure directed at the HRL rule on freedom of thought and expression.[70] State X's measure aims to suspend this HRL rule for one year within some regions of X's territory facing public disorder. This case meets the Derogation Metarule's internal conditions. Assuming that the Derogation Metarule is valid and that this case satisfies its scope conditions, we can conclude that this metarule is applicable to X's case. If this metarule applies to X's case, it will impact the applicability of the HRL rule on the freedom of thought and expression by affecting its scope conditions. The Derogation Metarule will limit the temporal and spatial scope of this HRL rule under X's lawful measure. As a result, cases occurring within the regions affected

[70] The ACHR does not include freedom of thought and expression in the 'non-derogable' rights list.

by disorder during that time period will not satisfy the scope conditions of this HRL rule. Consequently, this HRL rule will not be applicable to such cases.

We can also think of suspension measures that lead to personal-scope limitation. Imagine that, during a pandemic, State Y enacts a lawful suspension measure directed at the HRL freedom-of-movement rule to stop foreigners from entering Y's territory for six months.[71] If the Derogation Metarule applies, it will limit the applicability of the HRL freedom-of-movement rule by affecting its temporal- and personal-scope limitation, as cases that occur within that period and involve foreigners will not satisfy the HRL rule's scope conditions. Thus, this HRL rule will not be applicable to those cases.

Against this backdrop, we can interpret the IACtHR's ruling in *Vélez* as recognising that the Derogation Metarule did not apply to the case because Ecuador's suspension measures were unlawful. As seen above, according to the Court, the Ecuadorian decree failed to set the 'duration, geographical coverage, and material scope' of the suspension measures (2007, para. 48). We can interpret that as the Court saying that the decree supports an unlawful measure under the rules on lawful suspension measures stemming from ACHR's art. 27. Ecuador's measure is unlawful because it does not individualise which HRL rule it is directed at ('material scope'), and it also does not provide for sufficient delimitation on its temporal and spatial scope ('duration and geographical coverage'). The fact that Ecuador's suspension measure is unlawful means that the Derogation Metarule's internal conditions are not satisfied, so the Derogation Metarule is not applicable to this case.

According to chapter 4's logical framework, the fact that a (meta)rule is not applicable to a case is a reason it does not apply to that case. Since a rule only applies to a case if the reasons it applies outweigh the reasons it does not apply, and assuming there are no other reasons to consider, we can conclude that the Derogation Metarule does not apply to this case (Figure 15 *infra*). Since the Derogation Metarule does not apply, it does not attach its consequence to the case. So, Ecuador's decree did not suspend the HRL rules on rights to life and judicial guarantees and protection. Consequently, these HRL rules are still applicable to cases taking place during that state of emergency.

We can understand the IACtHR's decision as meaning that these HRL rules apply to the case in question and that Ecuador failed to comply with them when it acted the way it did.

[71] Freedom of movement is also not included in the 'non-derogable' list.

In other words, there was no derogation in the present case as Ecuador's measures were unlawful, which led to the non-applicability and, finally, the non-application of the Derogation Metarule. From this viewpoint, we can read the IACTHR's statement on 'the suspension of guarantees which took place in the instant case' (2007, para. 52) as a reference to the HRL rules that Ecuador tried but failed to suspend with its decree. It failed because these rules were not suspended, as the Ecuadorian measure embodied by the decree was unlawful.

Does the Derogation Metarule apply to this case?

Pro Reasons: {}	Con Reasons: {the Derogation Metarule is not applicable to this case as its internal conditions are not satisfied by this case}
Outweighed	Outweighs

Conclusion: the Derogation Metarule does not apply to this case.

Figure 15. Derogation Metarule's non-application

5.2.3 Contribution

In international law, 'derogation' assumes a different meaning from that it holds according to the law in general. In domestic law, this term means 'the partial repeal or abrogation of a law by a later act' (Garner and Black, 2009, p. 509). Under our theory, that would be analogous to invalidating a provision or a rule. As we have seen in our analysis of *Vélez*, however, in international law, derogation does not mean that the affected rules have lost their validity. Derogated HRL rules are still valid rules. Derogation limits the scope conditions of rules in a way that may impact their applicability to cases. In that regard, our depiction of derogation not only matches the IACtHR's decision in *Vélez,* but also follows the UN Human Rights Committee, which pointed out that 'no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party' (2001, para. 4).

The Derogation Metarule stemming from the ACHR, and analogous metarules found in the ICCPR, ECHR, and the Arab Charter, can help avoid conflicts between HRL rules and emergency rules. It is true that our conclusion in *Vélez* was that there was no derogation. So, the HRL rules were applicable, and according to our reading of the IACtHR's decision, these

HRL rules applied to that case. Ecuador simply failed to comply with them. Nonetheless, our depiction of the Derogation Metarule as a metarule that affects the scope conditions of an HRL rule can still help avoid conflicts.

Consider a hypothetical case where W, a State party to the ACHR, deals with a state of national disorder similar to that faced by Ecuador in *Vélez*. Suppose that, on the one hand, there is an emergency rule positing that in states of emergency, State agents have permission to conduct searches and seizures without a warrant. On the other hand, there is an HRL rule on the right to privacy, positing that there is a prohibition on State agents interfering with citizens' homes without warrants. These two rules conflict in a case to which they are both applicable. If applied, these rules would lead to incompatible outcomes relative to the constraints in place. State agents would simultaneously have an obligation not to (a prohibition on conducting), and they would *not* have an obligation not to (a permission to) conduct warrantless searches and seizures in citizens' homes during states of emergencies.

Suppose that W issues a measure to suspend the right-to-privacy rule from 1 March to 30 May 2020.[72] Assuming that this measure is lawful, that the Derogation Metarule is valid, and that W's case does not fall outside the scope limitation of this metarule, we can conclude that the Derogation Metarule is applicable to this case. As we know, the fact that the metarule is applicable is a reason it applies. In the absence of reasons against its application, we can conclude that this metarule does apply to this case. It thus affects the scope conditions of the HRL rule on the right to privacy. Consequently, cases arising between 1 March and 30 May 2020 do not satisfy the scope conditions of this HRL rule. So, this HRL rule is not applicable to those cases. In this manner, we can say that the Derogation Metarule has avoided conflicts between this HRL rule and any other rules in cases that arise in that period.

We can also think of how analogous 'derogation metarules' can deal with the interaction between HRL and IHL rules. According to our theory, the fact that an armed struggle going on does not affect the applicability of HRL rules. But an emergency measure aimed at the Derogation Metarule can render specific HRL rules not applicable to cases taking place during hostilities by limiting their temporal scope of applicability. We discussed this possibility in chapter 4 when examining scope conditions.

[72] The ACHR does not include the right to privacy in its 'non-derogable' list.

In that chapter, we also considered that a conflict between IHL and HRL rules could be dealt with by a priority metarule such as *lex specialis*. There is no contradiction between these views. Derogation helps us *avoid* conflicts by affecting the scope conditions of rules and, consequently, their applicability to cases. In turn, priority relationships help us *deal* with conflicts by giving us reasons for the application and non-application of applicable rules. Our theory is malleable enough to allow for cases where more than one rule is applicable, but only some of them apply, and cases where a derogation changes the scope conditions of rules so that only some rules are applicable.

In this respect, our theory can account for the ICJ's views in the advisory opinions *Legality of the Threat or Use of Nuclear Weapons* (1996, para. 25) and *Construction of a Wall in the Occupied Palestinian Territory* (2004, para. 106). In these advisory opinions, the ICJ explained that the applicability of HRL rules does not cease during hostilities, except by derogation. Furthermore, according to the ICJ, IHL rules are more specific than HRL rules, so *lex specialis* prioritises the former over the latter (Marcos, 2022).

The fact that our theory can account for the ICJ's views does not mean it assumes that the said views are an optimal interpretation of the interaction between IHL and HRL rules. Lawyers may use our theory to argue against the ICJ's views by, for example, pointing out that priority relationships set up by *lex specialis* are not directed to categories such as IHL or HRL but to individual rules on a case-by-case basis. Also, our account of priority metarules allows for an HRL rule to apply to cases where *lex specialis* favours an IHL rule. As chapter 4 showed us, when multiple priority metarules point to different conclusions, we must go one or more levels above the conflict we are dealing with. When deciding which (meta-)reasons have more weight, we may discover that an HRL rule applies to a case even if *lex specialis* prioritises an IHL rule.

To conclude this section, we should note that while we have dealt with examples of states of emergency that lead to the derogation of HRL rules, we can extend our theory on scope limitation far beyond these issues. There is no obstacle to introducing metarules that limit the scope conditions of rules in scenarios where there is no emergency and to topics that have little to do with human rights. As pointed out in chapters 3 and 4, we can think of metarules that limit the personal scope of applicability of rules, similar to how some metarules limit the scope of rules stemming from the Vienna Convention on Diplomatic Relations (1972). We can also think of spatial scope limitations found in rules stemming

from the LOSC, such as those only applicable to cases in internal waters or on the high seas. Similarly, we can point out temporal scope limitations in rules laid down in the Rome Statute of the ICC (1998), to the effect that its rules are only applicable to cases concerning crimes committed after the Statute entered into force.

6 Conclusions

We began this book by comparing international law to a board game whose rules are created by its players. International law, like that game, is decentralised. Instead of a central legislative body overseeing the creation of its rules, international legal rules are created by 'players' (subjects), acting in their own self-interest. Contemporary international law is also expanding, as more and more subjects are now 'playing', and proposing new rules for the game of international law. This expansion has resulted in a diversification of the thematic scope of international law and a proliferation of the number of institutions that discuss how these rules interact.

It is clear how this scenario has led to problems. Despite some changes over the years, international law is still decentralised. Its players keep acting without supervision, as there is no hierarchy among them and no authority coordinating their actions. This has brought about a scenario whereby it is not uncommon for different rules to be applicable to the same cases but lead to incompatible outcomes if applied to those cases. In other words, international legal rules are often conflicting.

Conflicts between game rules are troublesome. How can players be sure they are allowed to make a move if one rule says this move is allowed but another says it is forbidden? The subjects of international law face this exact issue. They are often unsure about their legal positions—is this measure lawful or unlawful? Is that act obligatory or prohibited? Like players in a board game, legal subjects need to know their positions in order to plan their moves and decide what to do next.

With this in view, this book has sought to answer the following *research question*: how can subjects make sense of international law despite its decentralised expansion? The answer we have discovered is that subjects can make sense of international law by avoiding and dealing with conflicts. If subjects avoid all conflicts, they are left with an R-consistent ruleset. Even if they are confronted with an R-inconsistent ruleset, they can still deal with conflicts and thus find the legal positions that the rules of international law assign to them. Subjects can extract an S-consistent set of legal positions from the ruleset of international law by reasoning with and about rules, revealing which rules apply and what outcomes result from them. These outcomes are the legal positions of the subjects of international law.

In this last chapter, we shall review the conclusions drawn in earlier chapters and summarise their main findings. The present chapter begins by revisiting international law's decentralised expansion and the relationship between rules and the facts of legal positions (6.1). It then considers how to contribute to R-consistency by avoiding conflicts (6.2), and how to make sense of R-inconsistency by dealing with conflicts (6.3). Its last section identifies possible directions for future research (6.4).

6.1 A Decentralised and Expansive Rule-Based World

This book set out in chapter 1 by asking the research question mentioned above. Reading about decentralised expansion in Chapter 2 enabled us to better understand this question. Chapter 2 clarified that international law's *decentralised* nature is one of its traditional features. Despite the relevance of the UN and other institutions, international law still lacks a central authority coordinating its development. So, international law's subjects are also those who create it. Its decentralised character leaves international law horizontal; there are no clear priority relationships set between international legal rules.

Chapter 2 also explained that contemporary international law is *expansive*. International law's ruleset has grown. There is a continuous upsurge in the volume of rules that belong to international law as ever more treaties are signed, customs picked out, and 'general principles' named. Expansion leads to proliferation. International law is now plural, as nearly all States around the globe are practising it, in all kinds of bilateral, multilateral, and regional interactions. Proliferation has also opened international law to new non-State subjects that act without supervision. Chapter 2 then demonstrated how international law's decentralised expansion makes it challenging for its subjects to make sense of their legal positions. There are many rules applicable to the same cases, but if applied, these rules would lead to incompatible outcomes. In other words, there are *rule conflicts* in international law.

Following these ideas, chapter 3 sought to clarify the challenges of decentralised expansion. That chapter began by explaining that *social facts* are facts that depend on what a sufficient number of the members of some group recognise as being the case. Furthermore, as that chapter explained, some social facts are not directly dependent on what people recognise, but rather on what the rules governing such practices cause to be the case. These social facts are only indirectly grounded in collective recognition. They are *rule-based facts*.

Chapter 3 then highlighted that social and rule-based facts impact our understanding of international law and legal positions. Unlike a scheme whereby facts come first and knowledge of them second, the facts of legal positions are not just waiting for subjects to stumble upon them. The tables are turned. Subjects' collective recognition and the application of legal rules determine what facts obtain as the legal positions of subjects. In this respect, that chapter turned its gaze to rules and their application to cases. It adopted a reason-based approach in order to explain the difference between *applicability* and *application*. A rule is applicable to a case if this rule is valid and its internal and scope conditions are also satisfied by that case. A rule applies when it attaches its consequence to a case. The fact that a rule is applicable to a case is a reason that rule applies to that case, but that reason can be outweighed by contrary reasons that lead to the non-application of applicable rules.

Thus, chapter 3 helped us understand that legal positions are the direct and indirect outcomes that rules bring about when they apply to cases. A rule *necessarily* leads to its *direct outcomes* when it applies to a case. Direct outcomes are the facts of a rule's consequence being attached to a case. In turn, a rule *can* lead to *indirect outcomes* when it applies to a case. The fact that a rule applies to a case is a reason this rule also leads to indirect outcomes in that case. If the reasons this rule leads to indirect outcomes outweigh the reasons against it, then its indirect outcomes obtain. With this in mind, we could see how the challenge presented by decentralised expansion is, in truth, a matter of subjects having a tough time figuring out which rules apply as well as which direct and indirect outcomes these rules lead to, as these outcomes are the legal positions that subjects are looking for.

6.2 Contributing to Consistency by Avoiding Conflicts

Equipped with the findings of chapter 3, chapter 4 began by developing a logical framework to help legal subjects see through the complexity of international law's decentralised expansion by supplying them with a structure to reason with and about rules. Building on this logical framework, chapter 4 explained how to avoid conflicts, thus contributing to consistency, and how to deal with conflicts, thus making sense of inconsistency. To review how to avoid and deal with conflicts, we should first recap the two kinds of consistency that this book has defined.

The first kind is *S-consistency*, the consistency of sets of statements. A statement set is S-consistent if all statements in that set can be true at the same time. If those statements cannot

be true at the same time, then the set is S-inconsistent. As explained in chapter 3, the conditions for statements to be true are equivalent to the conditions for the states of affairs expressed by those statements to obtain (for these states of affairs to be facts).

Whether states of affairs can obtain together and whether statements expressing those states of affairs can be true simultaneously are matters determined by the *constraints* in place in the world. An example of such a constraint is non-contradiction. Non-contradiction makes contradictory statements incompatible and, thus, renders it impossible for them to be true at the same time, as the (incompatible) states of affairs that these statements express cannot be facts simultaneously. In this regard, the point of S-consistency is that the statements in an S-consistent statement set can all express compatible states of affairs relative to the constraints in place. Compatible states of affairs can all be facts at once and, so, the statements expressing them can all be true at the same time.

The second kind is *R-consistency*, the consistency of rulesets. A ruleset is R-consistent if it cannot lead to conflicts. If it can lead to a conflict, it is R-inconsistent. A ruleset leads to a conflict when it contains at least two rules that conflict in an actual or non-actual case. Two or more rules conflict when applicable to a case, and when, if applied, they would lead to incompatible outcomes relative to the constraints in place.

Both R- and S-consistency depend on the constraints in place in the world. Whether a ruleset leads to a conflict is a matter of what states of affairs are (in)compatible, as these states of affairs can(not) go together as determined by the constraints in place. However, there is a significant disparity between R- and S-consistency due to the difference between rules and statements. Constraints are not affected by statements as statements do not add, remove, or change constraints. In contrast, rules can act as the constraints relative to which we judge the compatibility of facts.

By distinguishing between R- and S-consistency, chapter 4 showed us that although adding more statements will never make an S-inconsistent statement set S-consistent, adding rules that act as constraints can contribute to a ruleset's R-consistency. Introducing rules acting as constraints can affect what states of affairs can and cannot go together, which is relevant, as these rules can alter the applicability of other rules to cases. To illustrate how this is possible, chapter 4 worked with examples of (internal and scope) conditions and validity, thus showing how the introduction of (meta)rules can affect the applicability of rules to cases. Since rules can only conflict in cases to which they are applicable, if we reveal that these

rules are not applicable to the same cases, we have effectively shown that they cannot conflict. When we avoid all possible conflicts that a ruleset can lead to, we have guarded that ruleset's R-consistency.

The explanation above allows us to understand the first part of this book's two-part *thesis*—more rules do not always lead to a ruleset's R-inconsistency—and its first *corollary*—international law's decentralised expansion does not necessarily lead to its R-inconsistency. In other words, even if international law remains decentralised and ever-expanding, that does not necessarily mean it is, will be, or will even remain R-inconsistent. Reasoning with and about rules sometimes leads us to realise that what might first appear like an R-inconsistent ruleset is, in fact, R-consistent and, so, does not lead to conflicts. Because avoiding conflicts is desirable, legal subjects should strive to introduce an overarching set of rules that serve as constraints, against which the applicability of other rules are judged. This overarching set of rules can help subjects determine their legal positions, by contributing to international law's R-consistency.

6.3 Making Sense of Inconsistency by Dealing with Conflicts

As explained above, conflicts are undesirable as they leave legal subjects (even more) uncertain about their legal positions. In an ideal world, all the conflicts that a ruleset could lead to would be avoided. But the harsh reality is that complex rulesets often lead to conflicts, and international law is no exception. Fortunately, chapter 4 showed us that we can deal with conflicts by reasoning about what rules apply and what outcomes result from these rules in the cases before us. That chapter explained how we can distinguish conflicts based on whether the incompatibility is between direct or indirect rule-based outcomes.

When facing a conflict between rules with *incompatible direct outcomes*, we can safely infer that these rules cannot apply to the same case. This is because direct outcomes are the consequences that rules have when they apply to cases. So, when we say that specific rules would produce incompatible outcomes if applied to the same case, we mean that if these rules were applied, they would produce incompatible facts, which cannot, by definition, go together given the constraints in place. Because these conflicting rules cannot both apply to the same case, we deal with this type of conflict by determining which applicable rules apply and which do not.

If, however, we are facing a conflict between rules whose direct outcomes are compatible but can lead to *incompatible indirect outcomes*, then these rules can apply to the same case. But these rules cannot lead to their indirect outcomes in the same case. We can deal with this type of conflict by determining that some of these applicable rules do not apply; but we can also resolve these conflicts by balancing reasons for each of these rules' indirect outcomes to obtain against reasons they do not obtain. Balancing reasons allows us to determine which rules lead to indirect outcomes and which do not.

We can deal with any kind of conflict by balancing *reasons* to figure out which rules apply (and which ones do not apply) and which outcomes obtain (and which ones do not obtain). These reasons are often given to us by priority metarules such as *lex superior*, *lex specialis*, and *lex posterior*. Nonetheless, we can also find reasons not directly attached by legal (meta)rules. For instance, the fact that the purpose of a rule is best served by its non-application can act as a reason that an applicable rule does not apply to a particular case. This book, however, has not attempted to point out such reasons. It is the place of the law, rather than this particular work, to determine the relevant reasons and how they weight against one another. The goal of this research is simply to provide a structure to assist legal subjects in reasoning with and about rules.

So, we deal with conflicts by reasoning about what rules apply and what outcomes result from these rules. The knowledge of which rules apply and what outcomes obtain provides us with a set of statements expressing the facts of subjects' legal positions. Regardless of the R-inconsistency of a ruleset, the statement set we can extract from it is S-consistent because these statements express states of affairs that obtain together relative to the constraints in place, and thus not only are these states of affairs compatible but the statements expressing them can all be true at the same time. We can effectively generate an S-consistent statement set from an R-inconsistent ruleset.

With this in mind, we can understand the second part of this book's two-part *thesis*—even if a ruleset is R-inconsistent, we can still extract an S-consistent statement set on what outcomes obtain as subjects' legal positions. We can also understand this book's second *corollary*—even if international law's ruleset is R-inconsistent, subjects can make sense of it by extracting an S-consistent set of statements on their legal positions.

Irrespective of whether international law's decentralised expansion makes it challenging for subjects to figure out their legal positions, and even if decentralised expansion leaves

international law riddled with conflicts, subjects can still make sense of international law as it is still possible to extract S-consistent outcomes from it. Subjects can use international law's (R-consistent or R-inconsistent) ruleset to rationally construct an S-consistent statement set on which rules apply (and which do not), as well as figuring out which (direct and indirect) outcomes these rules lead to as their legal positions.

This conclusion does not deny that the decentralised expansion of international law presents its subjects with many challenges. The point is that subjects can still make sense of their legal positions, despite any difficulties. Nonetheless, subjects should strive to create an overarching set of (meta)rules that establish priority relationships among international legal rules. This set of (meta)rules could assist subjects by providing reasons for them to reach unmistakeable conclusions about the outcomes of these rules. These rule-based outcomes, as previously stated, are the legal positions that subjects often try to find.

6.4 Looking Ahead

This book's objective was to supply a conceptual analysis of the notion of consistency in international law. In doing so, it offered an account of rule consistency itself. Many of the findings presented in this book are not exclusive to international law or legal practice, for that matter. Non-legal researchers could use part of the theory here in studies dealing with non-legal rules. This theory may be of particular interest to those whose research deals with decentralised and expansive rule-based practices. For instance, an ethical theorist or a linguist could use part of the theory developed here to deal with rule conflicts in their areas of study.

In true Popperian fashion, we should appreciate that any work that aims to be scientific must confess to being subject to refutation. The conclusions reached by this book are tentative, as future research may refine or even rebut them. However, we must also keep in view what this book intended to offer and, most importantly, what it was not aiming to do.

As explained in chapter 1, this book was not interested in supplying substantive claims about international law, nor did it intend to defend one solution over another in concrete cases. Moreover, as clarified at the beginning of chapters 3 and 4, many of the examples used in this book were presented as deliberately simplified versions of the issues we deal with in legal practice. The reason for this simplicity is straightforward: to understand complicated things, we should first try to simplify them. One way of simplifying things is by stripping

them of some of their details, thus allowing us to see their essence. This book in no way intends to portray the issues faced by international lawyers as though they were as simple as some of these examples.

This book supplied two case studies in chapter 5 to provide some illustrations that feel more grounded in practice. Nonetheless, as pointed out in that chapter, those two cases are not an exhaustive list of applications of the theory developed in this book. In this respect, it would be scientifically interesting to continue applying this theory to legal matters—not only to public international law but also to matters of private international law and issues faced by domestic law. It would also be interesting to research what reasons are relevant to international law and what weight we should assign them.

Working with or adapting the theory in this book to develop an overarching framework of (meta)rules to contribute to the R-consistency of international law would also benefit legal subjects. This framework should include rules that affect the applicability of other rules by influencing their (internal and scope) conditions and validity. This framework should also establish priority relationships that allow for unambiguous conclusions on what rules apply and what rule-based outcomes obtain as the legal positions of the subjects of international law.

It is also fascinating to continue exploring how rules function as background constraints on our world; not only legal rules, but also those concerning other social practices and rules that we might consider to belong to the 'non-social' aspects of life. For instance, is there a difference between legal rules and the rules of causality? What about the rules of logic and mathematics? Do reasons play a role in the application of such rules? This book does not attempt to have the last say on how rules shape our world. On the contrary, it wants to make sure we keep talking.

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Summaries

Abstract (English)

Unlike domestic law, where rule-making is the job of legislative houses, rule-making in international law is decentralised. No central authority or unified government creates international legal rules. Instead, its subjects build international law by signing treaties, practising customs, and recognising general principles. A consequence of decentralisation is that most of the time, international legal rules have no clear priority relationships between them. The scenario grew even more complicated after 1945 with the expansion of international law. We are undergoing a period of accelerated growth in the number of rules of international law; at the same time, its thematic scope is diversifying and its institutions are proliferating. This scenario leaves the subjects of international law in a tight spot, as it is common for them to face a mass of applicable rules that, if applied, would lead to incompatible outcomes. That is, these subjects often face conflicts. Conflicts leave subjects uncertain about their legal positions, which, in turn, hinders their ability to plan and decide what to do.

Against this background, this PhD dissertation's research question asks how subjects can extract a consistent set of legal positions from international law's ruleset despite the fact that international law is decentralised and ever-expanding. This dissertation explains that there is a significant difference between statements and rules, which leads to different concepts of consistency. There is the consistency of statement sets (S-consistency) and the consistency of rulesets (R-consistency). A statement set is S-consistent if all statements in that set can be true at the same time. If they cannot, that set is S-inconsistent. A ruleset is R-consistent when it cannot lead to conflicts. If it can lead to conflicts, it is R-inconsistent. With these two kinds of consistency in place, this dissertation advances a two-part thesis: more rules do not always lead to a ruleset's R-inconsistency; even if a ruleset is R-inconsistent, we can still extract an S-consistent statement set on what outcomes obtain as subjects' legal positions. This thesis leads to two corollaries: international law's decentralised expansion does not necessarily lead to its R-inconsistency; even if international law's ruleset is R-inconsistent, subjects can make sense of it by extracting an S-consistent statement set on their legal positions. Subjects can extract S-consistent statement sets from R-inconsistent rulesets by reasoning with and about rules to figure out what rules apply and what outcomes obtain and, so, reveal their legal positions.

This dissertation is divided into six chapters. Chapter 1 introduces the research. Then, chapter 2 explains international law's decentralised expansion. Chapter 3 clarifies that the complexity underlying international law's decentralised expansion is one of uncertainty concerning the legal positions of subjects. Chapter 4 develops a logical framework for reasoning with and about rules to help subjects figure out their legal positions. Chapter 5 draws on earlier chapters to supply some applications for the theory developed in this text. Finally, chapter 6 concludes this study by summarising its main findings.

Resumo (Portuguese)

Diferente do direito interno, onde a regulamentação é função de casas legislativas, a regulamentação do direito internacional é descentralizada. Não existe uma autoridade central ou um governo unificado que crie regras jurídicas internacionais. Em vez disso, são os próprios sujeitos do direito internacional que o constroem assinando tratados, praticando costumes e reconhecendo princípios gerais. Uma consequência da descentralização é que, na maioria das vezes, as regras jurídicas internacionais não têm uma relação de prioridade clara entre si. O cenário fica ainda mais complicado depois de 1945, com a expansão do direito internacional. Há atualmente um processo de crescimento acelerado do número de regras do direito internacional, seu escopo temático se diversificou e suas instituições se proliferaram. Este cenário deixa os sujeitos de direito internacional em uma situação difícil, pois é comum que eles enfrentem uma massa de regras aplicáveis que, se aplicadas, levariam a resultados incompatíveis. Ou seja, estes sujeitos muitas vezes enfrentam conflitos de regras. Tais conflitos deixam os sujeitos incertos sobre suas posições legais, o que, por sua vez, dificulta sua capacidade de planejar e decidir o que fazer.

Diante disto, esta Dissertação de Doutorado pergunta como os sujeitos podem extrair um conjunto consistente de posições legais do conjunto de regras do direito internacional apesar do direito internacional ser descentralizado e permanecer em contínua expansão. Esta Dissertação explica que existe uma diferença significativa entre declarações e regras, o que leva a diferentes conceitos de consistência. Há a consistência dos conjuntos de declarações (S-consistência) e a consistência dos conjuntos de regras (R-consistência). Um conjunto de declarações é S-consistente se todas as declarações nesse conjunto puderem ser verdadeiras ao mesmo tempo. Se isso não for possível, esse conjunto é S-inconsistente. Um conjunto de regras é R-consistente quando não pode levar a conflitos. Se pode levar a conflitos, é R-inconsistente. Com estes dois tipos de consistência, esta Dissertação avança as teses de que

mais regras nem sempre conduzem a um conjunto de regras R-inconsistente, e mesmo que um conjunto de regras seja R-inconsistente, ainda podemos extrair uma declaração S-consistente definida sobre posições legais dos sujeitos de direito. Estas teses levam a dois corolários: a expansão descentralizada do direito internacional não leva necessariamente à sua R-inconsistência; mesmo que o conjunto de regras do direito internacional seja R-inconsistente, os sujeitos podem dar sentido ao direito internacional ao extrair um conjunto de declarações S-consistentes sobre suas posições legais. Os sujeitos podem extrair conjuntos de declarações S-consistentes de um conjunto de regras R-inconsistentes, ao raciocinar com e sobre regras para descobrir quais regras se aplicam e quais resultados obtêm e, assim, revelar suas posições legais.

Esta Dissertação divide seu texto em seis capítulos. O capítulo 1 apresenta a pesquisa. Em seguida, o capítulo 2 explica a expansão descentralizada do direito internacional. O capítulo 3 esclarece que a complexidade subjacente à expansão descentralizada do direito internacional é de incerteza quanto às posições jurídicas dos sujeitos. O capítulo 4 desenvolve uma estrutura lógica de raciocínio com e sobre regras para ajudar os sujeitos a descobrir suas posições legais. O Capítulo 5 extrai as conclusões de capítulos anteriores para fornecer algumas aplicações para a teoria desenvolvida nesta Dissertação. Finalmente, o capítulo 6 termina esta Dissertação resumindo suas principais conclusões.

Samenvatting (Dutch)

Anders dan in het nationale recht, waar het opstellen van regels de taak is van wetgevende lichamen, is het opstellen van regels in het internationale recht gedecentraliseerd. Er is geen centrale autoriteit die internationale rechtsregels opstelt. In plaats daarvan construeren haar rechtssubjecten internationaal recht door verdragen te ondertekenen, gewoontes toe te passen en algemene beginselen te erkennen. Deze decentralisatie heeft tot gevolg dat internationale rechtsregels meestal geen duidelijke onderlinge prioriteitsrelatie hebben. Het scenario is na 1945 nog ingewikkelder geworden door de uitbreiding van het internationaal recht. Het aantal regels van het internationaal recht neemt steeds sneller toe, de thematische werkingssfeer wordt steeds breder en het aantal instellingen groeit. Dit scenario brengt de subjecten van het internationaal recht in een lastig parket, aangezien zij vaak geconfronteerd worden met verscheidene toepasselijke regels die, indien zij worden toegepast, tot onverenigbare resultaten zouden leiden. Met andere woorden, rechtssubjecten van het internationale recht worden vaak geconfronteerd met conflicten. Conflicten zijn

problematisch omdat ze de betrokkenen in onzekerheid laten over hun rechtspositie, wat op zijn beurt hun vermogen om te plannen en te beslissen belemmert.

Tegen deze achtergrond heeft dit proefschrift de onderzoeksvraag hoe rechtssubjecten een consistente reeks rechtsposities uit de regelset van het internationaal recht kunnen afleiden, ook al is het internationaal recht gedecentraliseerd en breidt het zich voortdurend uit. In dit proefschrift wordt uitgelegd dat er een belangrijk verschil is tussen beweerzinnen en regels, wat leidt tot verschillende concepten van consistentie. Er is de consistentie van verzamelingen beweerzinnen (S-consistentie) en de consistentie van regels (R-consistentie). Een verzameling beweerzinnen is S-consistent als alle beweerzinnen in die verzameling tegelijkertijd waar kunnen zijn. Als dat niet het geval is, is de verzameling S-inconsistent. Een regelset is R-consistent als hij niet tot conflicten kan leiden. Als hij wel tot conflicten kan leiden, is hij R-inconsistent. Door deze twee soorten consistentie te onderscheiden, leidt dit proefschrift tot de conclusies dat meer regels niet altijd leiden tot R-inconsistentie van een regelset en dat zelfs als een regelset R-inconsistent is, we nog steeds een S-consistente uitsprakenverzameling kunnen afleiden over de rechtsposities van subjecten. Deze stellingen leiden tot twee verdere conclusies. Ten eerste dat de gedecentraliseerde uitbreiding van het internationaal recht niet noodzakelijkerwijs leidt tot zijn R-inconsistentie. En ten tweede dat zelfs als de regelset van het internationaal recht R-inconsistent is, subjecten er wijs uit kunnen worden door er een S-consistente verzameling over hun rechtsposities uit af te leiden. Ze kunnen dat door te redeneren met en over regels, om uit te zoeken welke regels van toepassing zijn en welke uitkomsten er zijn.

Dit proefschrift bevat zes hoofdstukken. Hoofdstuk 1 introduceert het onderzoek. Vervolgens wordt in hoofdstuk 2 de gedecentraliseerde uitbreiding van het internationaal recht toegelicht. Hoofdstuk 3 verduidelijkt dat de complexiteit die aan de gedecentraliseerde expansie van het internationaal recht ten grondslag ligt, er een is van onzekerheid over de rechtspositie van subjecten. Hoofdstuk 4 ontwikkelt een logisch kader voor het redeneren met en over regels om subjecten te helpen hun rechtspositie te bepalen. Hoofdstuk 5 put uit eerdere hoofdstukken om enkele toepassingen te bieden voor de in dit proefschrift ontwikkelde theorie. Hoofdstuk 6 ten slotte sluit dit proefschrift af met een samenvatting van de belangrijkste bevindingen.

Propositions

(1) There is a difference between the consistency of sets of statements (S-consistency) and the consistency of rulesets (R-consistency). A set of statements is S-consistent if all of its statements can be true at the same time. A ruleset is R-consistent if it cannot lead to conflicts.

(2) Two or more rules conflict if they are applicable to a case, but if applied, would lead to incompatible outcomes.

(3) More rules do not always lead to a ruleset's R-inconsistency. Adding the right rules can sometimes help avoid conflicts and make an R-inconsistent ruleset R-consistent.

(4) Even if a ruleset is R-inconsistent, subjects can still make sense of it by extracting an S-consistent set of statements about their legal positions. They can do so by reasoning with and about rules to figure out what rules apply and what outcomes they lead to. These outcomes are the legal positions of subjects.

(5) The theory developed by this research could be used or adapted by the stakeholders of international law to develop an overarching set of rules about rules. This set of rules could help avoid conflicts by defining the applicability of other rules, and it could also include rules that help deal with conflicts by setting up priority relationships between rules, which would help subjects figure out the rules that apply and the outcomes they lead to.

(6) International law is a discipline of crisis as it is the legal field that deals with emergencies such as nuclear threats and global pandemics. International law is also facing a crisis of discipline as its reactive agenda constantly shifts from one global crisis to the next. While the reactiveness of international law can be justified because it is a discipline of crisis, such reactiveness risks hindering researchers from deepening their understanding of what is at the core of these issues.

(7) International law has always been accused of 'not really being law' because it lacks some elements of domestic law, such as the existence of centralised institutions dedicated to legislating, judging cases, and enforcing their rulings. It is unclear why some lawyers take these elements of domestic law as the incontestable standards of what gets to count as law.

(8) It is not so controversial that rules constitute social practices such as law and language. It would be more controversial to say that rules play a similar role in matters commonly considered non-social (or non-dependent on humans), such as mathematics and the natural sciences. But we can begin to see that rules also have their place in such matters if we consider that concepts depend on rules. Whether or not the number 2 is a prime number or marine corals are animals depends on conceptual rules about prime numbers and animals that apply to the number 2 and marine corals. It is not evident that these conceptual rules differ fundamentally from legal ones.

(9) The dichotomy between prescription and description in science is more complicated than some might assume. All description is prescriptive due to the normativity of meaning, and all meaning is subjectively tainted by the observer's theoretical bias. But meaning depends on use; prescription can only have any meaning as a result of shared linguistic practices and under the collective standards set by the participants of such practices.

(10) Complicated words and bloated text often hide underdeveloped ideas. We should portray ideas in terms that are as simple as possible but no simpler, and with as few words as clarity allows, but not fewer.

Impact Paragraph

What is this research about?

When we think of how the law is made and rules are created, we often think of legislators who meet in a large hall to debate and vote on bills. International law is different; there are no legislative houses that decide how rules are made. Instead, in most cases, the rules of international law are created when States, such as Argentina, Belgium, and Canada, get together to discuss what they are willing to accept as law. When they agree, they sign a convention or a treaty, which works in a similar way to a contract between ordinary people.

The intriguing part is that no central authority oversees how the rules of international law are made. So, nothing is stopping Argentina from signing a treaty with Belgium and a completely different treaty with Canada. What would happen if some rule in the treaty between Argentina and Belgium were to conflict with a rule in the treaty signed between Argentina and Canada? Should Argentina follow the treaty with Belgium and disregard the one with Canada, or vice versa?

Conflicts such as these leave the subjects of international law unsure about how they should act. This PhD dissertation attempts to help them make sense of what international law expects from them. It does this by supplying a framework to guide subjects in figuring out what they should do to avoid and deal with conflicts. This research shows that, against our intuitions, more rules do not always lead to more conflicts; sometimes, adding the right kinds of rules can help avoid those conflicts. Also, this research shows that it is possible to deal with conflicts by balancing reasons in favour of and against different conclusions, allowing subjects to figure out what rules apply and what outcomes they lead to.

Who are the target group of this research, and how is this research relevant to them?

As pointed out above, the target group of this research are the subjects of international law, such as States, international organisations (like the United Nations and the European Union), diplomats, and lawyers. This research is relevant to them because it could help them to reason about rule conflicts and find a way to avoid or deal with them.

It is worth pointing out that this research focuses on the philosophy and logic of (international) law and not on substantive or individualised legal matters. It assumes that logic should not determine what the law is, nor should it dictate answers to legal questions.

The goal of logic is simply to provide structure to help legal subjects reason and find answers to their own questions. So, instead of providing answers such as 'follow this treaty and disregard that other one', this PhD dissertation gives tools to legal subjects so that these legal subjects can figure out for themselves what international law expects from them.

While this research focuses on international law, it may also be of interest to non-international lawyers, as its theory is not only applicable to international legal rules. So, lawyers dealing with domestic law (such as Dutch or English law) can benefit from the findings of this research. Likewise, non-legal researchers whose field of study focuses on rule-based practices (such as linguistics or ethics) can also use the findings of this research with some minimal adaptations.

What is the envisaged impact of this research?

Concerning social impact, the theory proposed by this research can be used or adapted by the stakeholders of international law to develop an overarching set of rules about rules. This set of rules can help avoid conflicts by defining the applicability of other rules, and it can also include rules that help deal with conflicts by setting up priority relationships between rules, which would help subjects figure out the rules that apply and the outcomes they lead to.

Concerning scientific impact in the short term, the results of this research have been presented at over a dozen scientific conferences in Europe and Latin America. This research will also be published as a monograph, and some parallel findings that did not make it into the finalised dissertation will be published as separate papers in journals with a high impact factor. In the long term, it is hoped that this research can foster continued discussion on rule-making and rule conflicts in international law and show that theoretical research can impact legal practice.

Curriculum Vitae

Henrique Jerônimo Bezerra Marcos was born in 1991 in João Pessoa, Paraíba, Brazil. He obtained his bachelor's degree (LL.B.) in law from the University Centre of João Pessoa (Centro Universitário de João Pessoa, UNIPê) in 2012. From 2013 to 2016, Henrique focused on his work as a lawyer and a legal consultant. In 2016, he began his master's degree (M.Sc., LL.M.) in legal sciences, with a focus on international and human rights law, from the Federal University of Paraíba (UFPB). While working on his master's, he worked as a teaching and research assistant in the Public Law department of UFPB's Centre for Legal Sciences. Henrique obtained his master's diploma in 2018. In 2019, he began his doctoral research at the University of São Paulo (USP), where he worked as a teaching and research assistant in the department of International and Comparative Law, financed by USP's Educational Improvement Programme (PAE). In 2020, Henrique began his doctoral research at Maastricht University (UM). In 2021, Henrique held a temporary position as a lecturer at UM's Foundations and Methods of Law department. In the same year, he received an international internship grant from Coordenação de Aperfeiçoamento de Pessoal de Ensino Superior (CAPES). In 2022, Henrique finished writing his doctoral dissertation and took up a lecturer's position at the Foundations and Methods of Law department, UM.

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