Supersession of Treaties in International Law

Hans Aufricht
At the present an impressive number of bilateral and multilateral treaties establishing a complex and expanding network of rules are in force between the members of the community of nations. New treaties are being concluded in rapid succession. As treaty arrangements increase in number and scope, the problem of whether and to what extent these treaties are mutually compatible assumes increased importance. The purpose of this paper is to consider this problem in light of the principle that "the later law supersedes the earlier law" (lex posterior derogat priori) which is taken to be one of the "general principles of law recognized by civilized nations" and, as such, applicable to conflicts between earlier and subsequent treaties.¹

A conflict between an earlier and a later treaty² arises if both deal with

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¹ On "general principles of law recognized by civilized nations" as a source of international law, see Article 38, Section 1(c) of the Statute of the International Court of Justice; see also, FINCH, THE SOURCES OF MODERN INTERNATIONAL LAW 97 (1937); LAUTERPAchT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 67-71 (1927); SORENSON, LES SOURCES DU DROIT INTERNATIONAL 123-152 (1946); Verdross, Les principes Généraux du Droit dans la Jurisprudence Internationale, 52 RECUEIL DES COURS 195-249 (1935). Lauterpacht and Verdross have repeatedly emphasized in their writings the necessity for distinguishing between these "general principles" and "international custom" in the sense of Article 38, Section 1(b) of the Statute of the Permanent Court of International Justice. A considerable number of writers have adopted this view and discussed these "general principles" primarily in terms of principles of private law. For a rather unsympathetic treatment of this approach see GUTTERIDGE, COMPARATIVE LAW 64-71 (1946). On the affinity of the concept of "general principles" with the philosophical jus gentium as defined by Gaius including rules and legal institutions found everywhere, the bulk of which consists of private law, see NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS pp. 20 and 267 (1947). To the extent that the charters of international organizations include public law functions certain principles of public law, e.g., the principle of implied powers, are also considered as "general principles of law recognized by civilized nations." In Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion of April 11th, 1949) the majority of the International Court of Justice stated: Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926, and must be applied to the United Nations. (Italics added).

² In this and the following sections the term "treaty" covers "treaties" as well as other international agreements, except where another meaning of "treaty" or "agreement" is specifically mentioned.
the same subject matter in a different manner and if at least one State is party to both treaties. In the absence of at least one common party, no conflict is possible.3

With reference to the parties to treaties the following conflict situations may be distinguished: conflicts between bilateral treaties concluded between the same parties A and B; conflicts between multilateral treaties concluded between the same parties ABCD and so on; conflicts between bilateral treaties concluded between three different parties one of which is party to two or several bilateral treaties, i.e., between treaties between AB, and treaties between BC; conflicts between multipartite treaties concluded between different parties. If the number of parties to a later multilateral treaty is smaller than the number of parties to the prior treaty such an arrangement is designated as *inter se* agreement or treaty. For the purposes of discussion these conflict situations will be grouped as follows: Conflict of Treaties of the same Level irrespective of *inter se* Arrangements, (Part I) and Conflict of Treaties of the same Level with special Reference to *inter se* Arrangements, (Part II). Also, the most-favored-nation clause will be dealt with in reference to the maxim the later law supersedes the earlier law (Part III). In addition, conflicts between treaties of different level will be discussed (Part IV) as well as the problem of the relationship of special rules to general rules (Part V).

Since in addition to the parties the subject matter must be identical, it is clear that the *in pari materia* principle is applicable to conflicts between treaties.4 Accordingly, in international as well as in domestic law is the *in pari materia* principle a necessary corollary to the rule that the later law supersedes the earlier law.

A conflict between an earlier and a later treaty may be resolved in one of the following ways: (A) The earlier treaty may be deemed superseded by the later treaty;5 (B) An express declaration may be con-

3 See on this point Kelsen, *Conflicts between Obligations under the Charter of the United Nations and Obligations under other International Agreements*, 10 U. of Pitt. L. Rev. 284, 285 (1949). "If two treaties are concluded by totally different parties, no conflict of obligations is possible. At least one party must be common.

4 On the *in pari materia* doctrine as a principle of statutory construction see, e.g., 2 Sutherland, *Statutes and Statutory Construction*, c. 52, §§ 5201-5211; especially § 5205 (3d ed., Horack, 1943).

5 A distinction has frequently been made between "supersession" (which presumably leaves the prior rule potentially effective should the later obligation be abrogated) and "abrogation" (which presumably voids once and for all the prior obligation). This distinction is, however, not generally observed in the practice of states or international courts. In addition, "abrogate" is the closest English equivalent of *derogare*. For these reasons, the words "abrogate", "supersede", and "terminate" will be used as synonyms throughout this paper, unless a different connotation is expressly indicated.
tained in the later treaty to the effect that the earlier treaty has been repealed; (C) The later treaty may contain an express provision that it is not at variance with the letter or spirit of an earlier treaty; (D) A treaty may contain an express provision declaring that in future no conflicting treaty may be concluded; (E) A treaty may contain a pactum de contrahendo, i.e., an agreement to agree on new terms and to supersede thereby existing treaty obligations.

Although the foregoing clauses or devices are designed to forestall or resolve conflicts between treaties, it may be controversial in actual situations whether or not they are adequate to resolve “automatically” such conflicts. At times, the applicability of these clauses or devices to specific treaty situations may be at issue. Illustrations of such controversies are rendered throughout this essay, but more particularly in Part I.

I. CONFLICT OF TREATIES OF THE SAME LEVEL IRRESPECTIVE OF Inter Se Arrangements

As previously indicated the maxim lex posterior derogat priori is applicable only to conflicts between treaties to which at least one party is identical. Although, identity of parties is an essential feature of conflicts between treaties the discussion in this section will not concentrate on conflict situations which arose primarily because different obligations have been created vis-à-vis different parties to two or more treaties. The discussion will be focussed rather on various situations or controversies in which the applicability of the above mentioned five traditional clauses or devices which are designed to forestall or resolve conflicts between treaties was the main issue or one of the main issues.

(A) Earlier Treaty deemed to be superseded by Later Treaty. It is submitted that the maxim lex posterior derogat priori is, in principle, designed to justify “implied” or “tacit” supersession of an earlier by a later treaty. Nevertheless, the application of the maxim may be qualified by the principle that “tacit or implied abrogation is not favored” and therefore a court or any other agency which is called upon to resolve conflicts between treaties will endeavour to harmonize the meaning of the several treaty instruments. However that may be, there can be no doubt that tacit or implied supersession is normally one of the essential features of the lex posterior derogat priori maxim.

6 See The Franciska, 2 Eng. Pr. Cas. 371 (1855). In this case Dr. Lushington, Judge of the Prize Court stated:

In order to constitute revocation by implication, the inference must be free from doubt; it must be proved that the provisions contained in the latter instrument are such as to be wholly irreconcilable with those of the former; that the two cannot reasonably co-exist together. The presumption is against such a revocation. . .

Id. at 404. See on this case also McNair, THE LAW OF TREATIES 476-477 (1938).
Whether in the absence of an express clause to this effect a later treaty actually supersedes an earlier on the same subject matter may be determined by appropriate international or domestic agencies.

Treaties, like other legal instruments, frequently contain specific provisions as to their termination as well as to their effect on previous treaties on the same matter. In the absence of such express provisions the question may arise whether a treaty should \textit{ipso iure} be considered as terminated merely because it is deemed incompatible with a subsequent treaty; in other words, whether the \textit{express consent} of the parties to conclude and put into effect a new treaty includes an \textit{implied consent} on the termination of the antecedent treaty on the same subject.\footnote{See on this point, with special emphasis on treaties between same parties, Article 22(a) and comment \textit{Harvard Research, Draft Convention on the Law of Treaties}, 29 Am. J. Int'l L. 1009 \textit{et seq.} (Supp. 1935).}

In the practice of states the principle of implied supersession of treaties by treaties has frequently been invoked. Thus the United States Department of State took the position that the Treaty of Commerce and Navigation of 1830 between the United States and the Ottoman Empire\footnote{2 \textit{Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers} 1318 (Malloy, 1910). Hereinafter referred to as \textit{Treaties}, etc.} should be considered as having been terminated through the entry into force of the Treaty of Establishment and Sojourn of October 28, 1931,\footnote{Id. at 4667. See on the State Department's view 5 Hackworth, \textit{Digest of International Law} 306-307 (1943).} although neither the latter Treaty nor the related Treaty of Commerce and Navigation,\footnote{Id. at 4670 (Trenwith 1938).} effective April 22, 1930, contained any specific reference to the termination of the 1830 Treaty.

Similarly, several authors recognize that the entry into force of a new treaty on the same matter which is in conflict with a prior one is to be considered a legitimate procedure of terminating an earlier treaty.\footnote{4 \textit{Treaties}, etc. 4670 (Trenwith 1938).} Certain French authors go even further. They combine the principle \textit{lex posterior derogat priori} with the principle of the \textit{contrarius actus}. This approach in its most extreme version implies that a treaty can legally be terminated only by another treaty which is at variance with the former.\footnote{10 Id. at 4667. See on this principle French Nat. Ry. v. Chavannes, (1943) in Lauterpacht, \textit{Annual Digest and Reports of Public International Law Cases}, 1943-1945 266-267 (1949). Although this case involved a conflict between a domestic measure and an international convention and not a conflict between an earlier and a later treaty the decision of the French Court of Appeal of Aix, of February 9, 1943, is noteworthy in this context. The Court held}
Whereas decisions by international or domestic tribunals on conflicts between treaties are comparatively rare, the practice of states, as evidenced, e.g., in their diplomatic correspondence abounds with instances where states accuse each other of having concluded new treaties, usually with third states, which are deemed incompatible with earlier treaties.\textsuperscript{13}

If the parties to the new treaties have failed to insert express provisions relating to the status of earlier treaties such silence may be interpreted as an intent to uphold the continued validity of the previous treaties. However, whether an alleged conflict is tantamount to a real conflict will in the last analysis depend on the wording of the allegedly conflicting treaties as well as on their interpretation and application by the parties concerned.

In the \textit{Free Zones of Upper Savoy and the District of Gex} case\textsuperscript{14} the Permanent Court of International Justice was \textit{inter alia} called upon to decide whether Article 435, paragraph 2 of the Treaty of Versailles with its Annexes "has abrogated or is intended to lead to the abrogation" of that the Convention of Rome of November 23, 1933, on the Transport of Goods by Rail prevails over the French Law of July 27, 1940, on the ground that:

The Convention of Rome is an international treaty which binds the States parties to it until such time as they withdraw therefrom in the form and after the giving of the notice provided by the Treaty itself, and no one of the High Contracting Parties can withdraw therefrom of its own accord.

\textit{Id.} at 266. Prof. Suzanne Bastid in her note on this case sees in this decision a direct application of the doctrine of the termination of treaties by \textit{contrarius actus} as espoused, by \textsc{Chailley}, \textit{La Nature Juridique Des Traites Internationaux Selon De Droit Contemporain} 109-130, 318f (1932); see on this point Prof. Bastid's comment in \textit{Semaine Juridique} pt. 2418 (1943); on the preceding page Chailley's doctrine is summarized in the following sentence:

\textit{Pour qu'une norme juridique \textit{\'elabor\'ee} suivant une certaine proc\'edure cesse d'\'etre en vigueur elle doit faire l'objet d'une \textit{abrogation} r\'ealis\'ee au moyen d'un \textit{acte contraire}, c'est \a dire suivant les \textit{formes m\'emes} observ\'ees lors de sa \textit{cr\'eation}.}

It is doubtful, however, whether the French Court accepted this doctrine without qualification, since it expressly recognizes that termination of an international convention is permissible "in the form and after the giving of the notice provided by the Treaty itself." Accordingly, whenever a treaty expressly permits its unilateral renunciation by one of the parties no \textit{contrarius actus}, i.e., no new treaty is required to supersede or invalidate such treaty. However, if there is no express provision for unilateral or agreed termination of a Treaty it may be argued that conclusion of a new treaty is, though not the only conceivable, but certainly the most appropriate form of terminating the antecedent treaty. On Chailley's doctrine see \textsc{Rousseau}, \textit{Principes G\'en\'eraux Du Droit International Public} 361-363 (1944). It has also been argued that a treaty which does not contain any clauses relating to its termination may never be terminated. The correct view is probably that, in the absence of a termination clause, a treaty should be considered a "permanent" or "eternal" treaty if the nature of the treaty, its purpose, or the intention of the parties would justify such an interpretation.

\textsuperscript{13} For examples of such allegations see \textsc{Rousseau}, \textit{Principes G\'en\'eraux Du Droit International Public} 766-780 (1944).

\textsuperscript{14} \textit{P.C.I.J.}, Ser. A/B, No. 46 (1932).
the Treaties of Paris of 1815 and of other supplementary acts regarding
the customs and economic regime of the free zones of Upper Savoy and
the District of Gex.\footnote{By Article 1 of the Special Agreement, signed at Paris on October 30, 1924, Switzerland
and France formulated the question at issue as follows:
It shall rest with the Permanent Court of International Justice to decide whether,
as between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles,
with its Annexes, has abrogated or is intended to lead to the abrogation of the pro-
visions of the Protocol of the Conference of Paris of November 3rd, 1815, of the
Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816,
and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829,
regarding the customs and economic regime of the free zones of Upper Savoy and the
Pays de Gex, having regard to all facts anterior to the Treaty of Versailles, such as
the establishment of the Federal Customs in 1849, which are considered relevant by the
Court.
Quoted in P.C.I.J., Ser. A/B, No. 46 pp. 5-6 (1932).} Judge Dreyfus in his Dissenting Opinion interpreted the clause in Article 435, (2) of the Treaty of Versailles "that the stipulations of the Treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex district are no longer consistent with present (i.e., post 1919) conditions" as follows:

I continue to think that Article 435, paragraph 2, of the Treaty of Versailles
has abrogated the stipulations which established the zone of the District
of Gex, and that it was intended to lead to the abrogation of those pro-
visions which relate to the zones of Upper Savoy and Saint-Gingolph.\footnote{Id. at 110. It is not quite clear how Judge Dreyfus, arguing on the premise of implied abrogation, arrived at the conclusion that Article 435(2) of the Treaty of Versailles has abrogated the regime of the District of Gex, but that it was only intended to abrogate the zones of Upper Savoy and Saint-Gingolph. See on this point also the submissions of the French Government. Id. at 8-9.} (Italics added).

By contrast, the majority of the Court, by six votes to five, held:

That, as between France and Switzerland, Article 435, Paragraph 2, of
the Treaty of Versailles, with its Annexes, \textit{neither has abrogated nor is
intended to lead to the abrogation of the provisions}. . . .\footnote{P.C.I.J., Ser. A/B, No. 46 at 79 (1932).} (Italics added).

of the various treaties of 1815 and of the relevant supplementary acts.\footnote{Ibid.}

The majority held in particular:

The text itself of Article 435, paragraph 2, of the Treaty of Versailles
draws from the statement that the former provisions are not consistent
with present conditions no other conclusion but that France and Switzer-
land are to settle between themselves the status of the free zones. . . . In
particular, this text does not set forth the conclusion that abrogation of
the old stipulations relating to the free zones is a necessary consequence
of this inconsistency.\footnote{Id. at 48.}

Thus Judge Dreyfus, at least as regards the District of Gex, considered
Article 435(2) as containing an implied abrogation of the existing customs and economic regime in the Free Zones. By contrast, the majority understood this provision requiring France and Switzerland to agree between themselves on a modification of the existing regime. Pending the conclusion of such an agreement "this regime must continue in force so long as it has not been modified by agreement between the Parties."²¹

(B) Express abrogation of earlier treaty. A treaty may contain a clause that a particular provision or that all provisions of an earlier treaty are abrogated by a subsequent treaty.²² Strictly speaking, the maxim _lex posterior derogat priori_ renders such express clauses redundant, for, as previously indicated, it is the rationale of the clause to compare the relative validity of a later with an earlier clause even in the absence of express abrogation. However, it cannot be denied that express abrogation may help to clarify an otherwise confusing situation by indicating which provision is to be considered as repealed.

Express abrogation may also be a useful technique, in order to forestall a situation where the maxim _lex posterior derogat priori_ would be nullified by the principle that tacit abrogation is not favored or not presumed.

Express repeal of an earlier treaty by a later treaty may be embodied in a clause revoking an earlier treaty _in toto_ or in a clause which more specifically states that the later treaty supersedes all those provisions of the earlier treaty which cover the same subject matter and which are inconsistent with the later treaty.²³

The _In re Ross_ case²⁴ furnishes an illustration of the principle that even an express clause in a later treaty that all the provisions of an earlier convention are revoked is subject to judicial scrutiny. Article 4 of the Convention executed by the Consul General of the United States and the governors of Simoda on June 17, 1857, granted to American consuls in Japan authority to try "Americans committing offenses in Japan"²⁵ in accordance with American law. By contrast, Article 6 of the Treaty of 1858 with Japan provided that "Americans committing offenses against Japanese shall be tried in American consular courts under American law."²⁶ Article 12 of the 1858 Treaty further provided

²⁰ _Id._ at 110; see also note 16 _supra_.
²¹ _Id._ at 80.
²² For quotations of and references to such clauses see 2 _HYDE_, _INTERNATIONAL LAW_ 1522 (2d ed. 1943), and 5 _HACKWORTH_, _DIGEST OF INTERNATIONAL LAW_ 304-306 (1943).
²³ See 2 _HYDE_, _INTERNATIONAL LAW_ 1521-1523 (2d ed. 1943).
²⁴ 140 U. S. 453 (1891).
²⁵ _Id._ at 465.
²⁶ _Id._ at 466.
that "as all the provisions of a convention executed by the Consul General of the United States and the governors of Simoda, on the 17th of June, 1857, are incorporated in this Treaty, that convention is also revoked."27 The Court, in considering the question whether American consuls in Japan could try an American for an offense committed against a non-Japanese, held that the express repeal of the Treaty of 1857 was based on the assumption that all its provisions were incorporated into the Treaty of 1858. The revocation is therefore limited only to those provisions which have been incorporated; the 1857 Treaty remains in force "as to the unincorporated provisions"28 and thus American consuls had the jurisdiction contended for. The Court upheld thereby "the practical construction to the alleged revocation by the authorities of both countries" and declared as "erroneous" the statement in the 1858 Treaty that all provisions of the former have been incorporated.29 It may be added that the Court, presumably after having compared the content of both treaties, found that the later treaty did not, as alleged, cover the same subject matter as the earlier one, since it did not provide for the case of Americans committing offenses in Japan against non-Japanese, and that therefore the provisions of the earlier treaty relating to those subject matters which have not been covered in the later treaty are still in force. In short, the Court apparently interpreted even an "express revocation" in the light of the in pari materia principle.30

Article 11 of the Convention relating to Liquor Traffic in Africa, signed in Saint-Germain on September 10, 1919, furnishes an interesting example of express abrogation by reference to the in pari materia principle (see below "matters dealt with in the present Convention"); it expressly repeals not one or all the provisions of one particular earlier Convention, but all former general Conventions on the same subject matter to the extent that they are incompatible with the 1919 Convention. It reads:

All the provisions of former general international Conventions relating to the matters dealt with in the present Convention shall be considered as abrogated in so far as they are binding between the Powers which are parties to the present Convention.31

Certain clauses providing for express abrogation provide that the new treaty abrogates an earlier treaty only between or among the parties to

27 Ibid.
28 Ibid.
29 Id. at 467.
30 Id. at 466.
the new treaty, and that the earlier treaty shall remain in force between those parties which do not subscribe to the new treaty.\footnote{See, for example, Article 27(1) of the International Convention for the Protection of Literary and Artistic Works, Revised at Brussels, June 26th, 1948 which reads:
This Convention shall replace, in relations between the Countries of the Union, the Convention of Berne of the 9th September 1886, and the subsequent revisions thereof. The instruments previously in force shall continue to be applicable in relations with countries which do not ratify this Convention.}

The amended version of Article XXIX, Section 5,\footnote{As amended by the Protocol of September 12, 1948 (not yet in force); for text of the amended version of Article XXIX see \textit{The General Agreement on Tariffs and Trade (Amended Text)} U.S. DEP'T OF STATE COMMERICAL POLICY SER. No. 124, pp. 61-62 (1950).} of the General Agreement on Tariffs and Trade (hereafter sometimes referred to as GATT) may be cited as an illustration of this statement; it provides that pending an agreement between those contracting parties which have not accepted the Havana Charter for an International Trade Organization, the General Agreement of Tariff and Trades shall remain in force in respect to those parties, notwithstanding the fact that Article XXIX, paragraph 2 of the GATT (as amended) provides that Part II of the GATT “Shall be suspended on the day on which the Havana Charter enters into force.”

In view of the declaration of the Department of State of the United States of December 6, 1950,\footnote{It should be noted that on December 6, 1950, the U.S. Department of State issued a Press Release relating to the Trade Agreements program, including the proposed Charter for an International Organization. This Release states that the interested United States agencies have reviewed this program; as a result of this review they have recommended and the President has agreed that while the proposed Charter for an International Trade Organization should not be resubmitted to the Congress, Congress should be asked to consider legislation which will make American participation in the General Agreement more effective. It thus seems extremely unlikely that the Havana Charter for an ITO will come into force in the near future. The question remains, however, whether and to what extent the contracting parties to GATT are obligated or consider themselves obligated by Article XXIX of GATT to apply to the fullest extent of their executive authority the general principles of the Geneva Draft of the ITO Charter as provided for in the original version of paragraph 1 of Article XXIX of GATT. See on this point, also Hexner, \textit{The General Agreement on Tariffs and trade and the Monetary Fund in International Monetary Fund 1 Staff Papers 436 (1951).}} on the intention of the United States not to submit to Congress for its approval the Havana Charter it appears extremely unlikely that the provisions of the GATT will be superseded in the near future by the proposed Havana Charter. In any case, the draft amendment to Article XXIX, paragraph 5 of GATT is a noteworthy application of the principle that certain parties to a multilateral treaty reserve the right to remain governed by an earlier treaty, even if the majority of the Treaty-partners are willing and in a position to abandon an earlier treaty in favor of a new one.
Later treaty contains express provision that it does not conflict with earlier treaty. In several treaties there are express statements to the effect that the later treaty is not designed to abrogate one or several earlier international arrangements or conventions. Article 21 of the Covenant of the League of Nations provides that nothing in the Covenant shall be deemed to affect the validity of international engagements "such as treaties of arbitration or regional understandings such as the Monroe Doctrine." In other words, the Covenant is not to be considered as overriding arbitration treaties or regional understandings which were in force at the time the League of Nations was established. Similarly, Article 52 of the United Nations Charter provides that "nothing in the Charter precludes the existence of regional arrangements. . . ." Whereas the League of Nations Covenant and the United Nations Charter expressly recognize the validity of certain regional arrangement as "special law" (lex specialis) which does not yield to the "general law" of the Covenant or the Charter, the North Atlantic Treaty, for example expressly states that the special commitments embodied in this Treaty are not incompatible with the rights and obligations under the United Nations Charters of those parties to the Treaty which are members of the United Nations.37

The above mentioned clauses which expressly contend the compatibility of two or several Treaties, which were concluded at different dates, are not necessarily conclusive. A realistic appraisal of these clauses


37 Article 7 of the North Atlantic Treaty, signed on April 4, 1949 in Washington reads:

This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.


Except Article 1—of which as pointed out, it might be doubtful whether it fully complies with Article 52, paragraph 2 of the Charter—the North Atlantic Treaty does not contain any provisions incompatible with Chapter VIII of the Charter.

In reference to Article 1 Kelsen states that it is doubtful whether the provisions "establishing the obligation of the parties to settle international disputes by peaceful means—an obligation which has nothing to do with collective self-defence" suffices to fulfill the requirement of Article 52(2) of the Charter, i.e., that settlement of local disputes shall be achieved.
would perhaps more appropriately consider them as establishing a presumption against a conflict between the earlier and later treaty; however, this presumption is rebuttable. 38 Actually, the alleged compatibility may be challenged by a state or international organization declaring that certain treaties or their application are mutually incompatible.

Usually there is no special procedure provided in the treaty instruments for the settlement of such conflicts. If the conflict is considered "through" the regional arrangement or by regional agencies. Id. at 924. For the North Atlantic Treaty in relation to Italy see id. at 925-926. See also, BECKETT, THE NORTH ATLANTIC TREATY, THE BRUSSELS TREATY AND THE CHARTER OF THE UNITED NATIONS, especially p. 34-35 (1950). See also Article 10 of the Inter-American Treaty of Reciprocal Assistance, signed in Rio de Janeiro, on September 2, 1947, which provides that "None of the provisions of this Treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations." T.I.A.S. 1838, at 26.

38 The decision of the Central American Court of Justice of September 30, 1916, in the case of Costa Rica v. Nicaragua may be recalled in support of the above statement. Nicaragua was obligated under Article 8 of the Treaty of Limits with Costa Rica, signed on April 15, 1856, not to make any grants to third states for the purpose of building an inter-oceanic canal across its territory without first consulting Costa Rica. For text of Article 8 of this Treaty see 11 AM. J. INT'L L. 193 (1917). Nicaragua's duty to live up to this obligation was subsequently reaffirmed by the award of President Cleveland, March 22, 1888, on the boundary dispute between Costa Rica and Nicaragua; see especially point 10 of this award in 2 MOORE, INTERNATIONAL ARBITRATIONS 1945, 1966 (1898). In 1916 Nicaragua without consulting Costa Rica, concluded a Treaty with the United States, the so-called Bryan-Chamorro Convention, which granted in Article I to the United States exclusive proprietary rights which are necessary and convenient for the construction, operation and maintenance of an inter-oceanic canal. The text of the Bryan-Chamorro Treaty is quoted in 11 AM. J. INT'L L. 190-191 (1917); for United States proviso see id. at 192. Costa Rica protested against this treaty and submitted a complaint against Nicaragua to the Inter-American Court of Justice. On September 30, 1916 this Court, decided that the Government of Nicaragua has violated, to the injury of Costa Rica, the rights conferred upon the latter by the Cañas-Jerez Treaty of Limits of April 15, 1858, the Cleveland Award of March 22, 1888, and the Central American Treaty of Peace and Amity of December 20, 1907.

11 AM. J. INT'L L. 210 (1917). It is noteworthy that the Court arrived at this decision although the Bryan-Chamorro Treaty had been ratified by the United States with the proviso that the Senate's advice and consent to the ratification of the said Convention are given with the understanding to be expressed as part of the instrument of ratification that nothing in said convention is intended to affect any existing rights of any of the said named states [i.e., Costa Rica, Salvador, and Honduras], (Italics added), quoted in 11 AM. J. INT'L L. 192 (1917). In reference to Costa Rica's request "for the nullification of the Bryan-Chamorro Treaty the Court held that it "can make no declaration whatsoever, because of the fact that the Government of the United States of North America [sic] is not subject to the jurisdiction of the Court." 11 AM. J. INT'L L. 210 (1917). On this case see also U.S. FOREIGN RELATIONS, 1916 (1923) at 811-890, and HUDSON, INTERNATIONAL TRIBUNALS 98 (1944); for Nicaragua's refusal to accept this decision see id. at 130-131. On the Court's Order of May 1, 1916 requiring Costa Rica and Nicaragua "to maintain the status quo existing between them before negotiating the treaty which is the cause of the present contention" see 6 HACkWORTH, DIGEST OF INTERNATIONAL LAW 114 (1943).
a "justiciable dispute" and the parties concerned are signatories to the "optional clause" (Article 36, paragraph 2 of the Statute of the International Court of Justice) the Court may be called upon to settle the dispute by virtue of its jurisdiction to settle "all legal disputes concerning (a) the interpretation of a treaty . . . ." If, however, the conflict between two or more treaties is not considered a "legal" conflict, the dispute may, in the absence of any procedural provisions, be settled in any of the traditional forms for the peaceful settlement of international disputes, such as diplomatic channels, international conference, arbitration.

In general, alleged incompatibilities between regional and universal or quasi-universal treaties are frequently not incompatibilities between specific provisions of these treaties as such, but rather incompatibilities between a specific action, actually taken or contemplated, under one of these treaties. A defensive alliance, for example, may rightly be considered by its members as indispensable "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." Accordingly, any statement that such a defensive alliance is a threat to the peace of the non-participants in such alliance may appear preposterous. Nevertheless, defensive alliances are often attacked for having a hostile, if not offensive, character vis-à-vis non-members of the alliance. Such an alliance, however, could be considered as offensive rather than defensive only, if one or several of its members, under a pretext of being attacked, actually resort to armed hostilities or war. In such a case, however, the incompatibility of certain defensive alliances with more comprehensive undertakings for maintaining or reestablishing peace and security does not stem from the letter or purpose of the alliance itself, but rather from the ignoring of its terms.

(D) Clause providing that no future treaty which would be inconsistent with the present treaty may be concluded. At times treaties contain a clause providing that none of the parties to the treaty may in the future conclude any treaty or agree to individual clauses that would be inconsistent with an earlier treaty. Such a clause is designed to operate as an exception to the maxim lex posterior derogat priori or in other

39 On justiciable disputes see, e.g., LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933), especially pp. 19-21, 139-144, 153-165.
40 The question whether another than a peaceful settlement may be considered a "settlement" is outside the scope of this paper.
41 The words in quotation marks are quoted from Paragraph 2 of the Preamble to the United Nations Charter.
words to resolve a possible conflict between an earlier and a later treaty in favor of the earlier treaty.

It may suffice to quote in this context Article 20 of the League of Nations Covenant and Article 103 of the United Nations Charter. Under paragraph 1 of Article 20 of the League of Nations Covenant the Members of the League "solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms" of the Covenant. By contrast, Article 103 of the United Nations Charter does not expressly differentiate between treaties entered into prior to the entry into force of the United Nations Charter and treaties concluded subsequent to the effective date of the United Nations Charter. In the light of the legislative history of Article 103 there is, however, no doubt that it is also designed to cover obligations arising under agreements which constitute the later law as compared with the United Nations Charter.42

(E) Agreement to agree. Several treaties contain clauses which in effect constitute an agreement to agree (pactum de contrahendo). Such a clause may contain a promise to abrogate existing treaty obligations which antedate a later treaty to the extent that the earlier treaty is inconsistent with the later treaty; to conclude an entirely new agreement on a certain subject matter or on certain subject matters, but leaving wide discretion to the parties as to the terms of the new agreement; or to conclude a new agreement which is to be governed by certain guiding principles set forth in the pactum de contrahendo.

Article 20, paragraph 2 of the Covenant of the League of Nations furnishes an example of a clause in which members of the League, who, prior to joining the League, have undertaken any obligation inconsistent with the terms of the Covenant, pledge "to take immediate steps to procure . . . release from such obligations."

In the International Commission of the River Oder case43 the Permanent Court of International Justice was called upon to determine whether the Commission's jurisdiction extended to tributaries of the

42 See the Report of the Third Meeting of Committee IV/2 of the San Francisco Conference Doc. No. 933, 13 U.N. Conf. Doc. 703, 708 (1945), which contains the following statement:

Concerning the second rule of Article 20 of the Covenant, by which the members undertook not to enter thereafter into any engagement inconsistent with the terms thereof, the Committee has thought it to be so evident that it would be unnecessary to express it in the Charter, all the more since it would repeat in a negative form the rule expressed in paragraph 2 of Chapter II of the Charter.

See also GOODRICH & HAMRO, CHARTER OF THE UNITED NATIONS 517-519 (2d ed. 1949) and Kelsen, Conflicts between Obligations under the Charter of the United Nations and Obligations under other International Agreements, 10 U. of PIT. L. REV. 287-289 (1949).

Oder within Polish territory. A dispute arose as to whether the Treaty of Versailles or the subsequent Barcelona Convention of 1921, which had not been ratified by Poland, should supply the basis of decision. The Treaty of Versailles by Articles 332 to 337 established a regime of navigable waterways of international concern and by Article 338 further provided that:

The regime set out in Articles 332 to 337 above shall be superseded by one to be laid down in a General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognized in such Convention as having an international character.

Stating that the parties to the Treaty of Versailles “have agreed that certain provisions of that Treaty shall be superseded by those of the future General Convention,” the Court described the issue as “whether this supersession depends on ratification of the said [Barcelona] Convention by the States concerned—in this particular case on ratification by Poland.” The Court concluded:

... it must be considered that reference was made to a Convention made effective in accordance with the ordinary rules of international law amongst which is the rule that conventions, save in certain exceptional circumstances, are binding only by virtue of their ratification.

Finding that neither the Treaty of Versailles nor the Barcelona Convention intended “to derogate from that rule,” the Court held that the territorial jurisdiction question was to be decided solely on the basis of the Treaty of Versailles. Although Judge Huber agreed with the final outcome of the case under the Treaty of Versailles rule, in his separate “Observations” he felt compelled to comment on the Court’s laying aside of the Barcelona Convention as follows:

It is difficult to admit that the carrying out of Article 338, which lays down imperatively—and not simply as a possible alternative—the supersession of the “regime set up in Articles 332 to 337 ... by one to be laid down in a general convention”, can depend on the ratification of that convention as such by States which have already ratified the Treaty of Versailles, and therefore on an act left to the free will of each of the Parties.

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44 For text of the Convention on the Regime of Navigable Waterways of International Concern, opened for signature at Barcelona, April 20, 1921 see 1 H U D S O N, I N T E R N A T I O N A L L E G I S L A T I O N, 638-644 (1931); Text of the Statute on the Regime of Navigable Waterways of International Concern, of the same date, see id. at 645-659.
46 Id. at 20.
47 Ibid.
48 Ibid.
49 Id. at 33.
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It appears thus that Judge Huber interpreted Article 338 of the Treaty of Versailles as *pactum de contrahendo,* as a binding agreement to agree on the new terms of a general convention. It may be added that the parties who "drew up" the Barcelona Convention had wide discretion in drafting its terms, since Article 338 of the Treaty of Versailles did not lay down any specific standards with which the new convention was to conform.

Article VII of the Mutual Aid Agreement between the United States and the United Kingdom, signed on February 23, 1942, may illustrate an agreement to agree which sets forth certain guiding principles with which the future agreement has to conform. In particular, it is agreed to include in future agreements "provision for agreed action" by the United States and the United Kingdom with a view to the elimination of all forms of discriminatory treatment in international commerce, to the reduction of tariffs and other trade barriers, and, in general, to the attainment of all the economic objectives set forth in the Atlantic Charter of August 14, 1941.

Article VII constituted the prototype of in substance identical clauses which were subsequently inserted into bilateral Mutual Aid (Lend-Lease) Agreements between the United States and other powers. In addition, from 1942 to 1945 Article VII served as the focal point of international discussions between the United States and other powers

50 *Ibid.* On *pactum de contrahendo* in international law see *McNair, The Law of Treaties* 56-57 (1938). McNair states here that it is the view of the United Kingdom Government that preliminary agreements to enter into a later and final agreement, if expressed with sufficient precision, create valid obligations. McNair rightly adds the following warning: "It is, however, necessary to distinguish between a true obligation to enter into a later treaty and an obligation merely to embark upon negotiations for a later treaty and to carry them on in good faith and with a genuine desire for their success." *Id.* at 57. See also on this point the Opinion and Award of President Coolidge as Arbitrator in the so-called Tacna-Arica Arbitration, March 4, 1925, in 19 Am. J. Int'l L. 393-432 (1925), especially the following statement at 398: "The agreement to make a special protocol with undefined terms, did not mean that either party was bound to make an agreement unsatisfactory to itself provided it did not act in bad faith." (Italics added). On the question as to whether President Wilson's "Fourteen Points," embodied in his address to Congress of January 8, 1918, and the principles of settlement enunciated in his subsequent addresses are to be considered a *pactum de contrahendo* in reference to the Treaty of Versailles, see *The Treaty of Versailles and After, Dept of State, Conf. Ser.* No. 92, pp. 49, 51, 52, 54 (1947). See on this point also 1 *Rousseau, Principes Généraux Du Droit International Public* 353-354 (1944) and the citations therein.

51 Text in U.S. *Dep't of State Executive Agreement Ser.* No. 241 (1943); for a discussion of this provision in reference to United States foreign economic policy see *Brown, The United States and the Restoration of World Trade* 48-49 (1950). For genesis of Article VII see also *Postwar Foreign Policy Preparation, 1939-1945, Dept of State, Gen'l Foreign Policy Ser.* No. 15, pp. 54, n. 8, 83-84, 190-194, 463-464, 560-564 (1950).
on proposed multi-lateral agreements relating to monetary, financial and commercial matters. It no doubt influenced the formulation of Article VIII, Section 3 of the Fund Agreement\(^\text{52}\) relating to the avoidance of discriminatory currency arrangements or multiple currency practices as well as the provisions of GATT relating to General-Most-Favored-Nation Treatment (Article I), non-discriminatory administration of quantitative restrictions (Article XIII) and non-discriminatory treatment on the part of state trading enterprises (Article XVII).\(^\text{53}\)

Also, Article XV, Sections 6 and 7 of GATT\(^\text{54}\) may be considered a *pactum de contrahendo* since it provides that contracting parties not members of the International Monetary Fund shall enter into a special exchange agreement with the contracting parties to GATT. The terms of such a special exchange agreement shall not impose on the contracting party obligations in exchange matters which would be more restrictive than those which apply under the Articles of Agreement of the International Monetary Fund to the members of the Fund. In addition, such a special exchange agreement shall expressly provide that the objectives of the GATT will not be frustrated by the contracting party as a result of action in exchange matters. Accordingly, Article XV, Sections 6 and 7 impose on individual contracting parties which are not members of the International Monetary Fund the obligation to agree to a special exchange agreement the terms of which shall conform with certain guiding principles which are to be found in GATT and/or the Fund Agreement.\(^\text{55}\)

II. CONFLICT OF TREATIES OF THE SAME LEVEL WITH SPECIAL REFERENCE TO INTER SE ARRANGEMENTS

As previously indicated the maxim *lex posterior derogat priori* is, in principle, applicable only if the later rule applies to the same subject as well as to the same parties.\(^\text{56}\) In other words, application of the maxim normally presupposes identity of the subject matter as well as identity of all parties. In practice, however, the principle of the identity of

\(^{52}\) T.I.A.S. 1501 at 12.


\(^{54}\) Id. at 34-36.

\(^{55}\) See, e.g., Special Exchange Agreement between the Government of Haiti and the Contracting Parties to the General Agreement on Tariffs and Trade, done at London, October 20, 1950. The text of this Agreement has been published by the United Nations as a separate document (no date, no identification symbols); it is to be expected that it will also be published in the *UNITED NATIONS TREATY SERIES*.

\(^{56}\) See note 4 supra, and note 87 infra.
SUPERSESSION OF TREATIES

parties, is applicable to questions of supersession if only several of the parties to the treaties involved are, and even if only one party is identical.

In conjunction with multipartite treaties special problems arise if the number of the parties to the later treaty is smaller than the number of the parties to the earlier treaty, i.e., if the later treaty takes on the character of an inter se arrangement or treaty. It is in these situations that attention is most frequently focussed on the issue as to whether or which parties to the earlier treaty are identical.

Here again two situations may be distinguished: (1) situations where some of the parties to an earlier treaty conclude a new treaty but no new party, i.e., a party which did not participate in the earlier multipartite treaty, participates in the new treaty; this situation may be styled "inter se treaty in the strict sense"; (2) situations where some of the parties to an earlier treaty as well as "new parties" participate—this situation may be styled "inter se treaty in the broader sense." It should be noted that in the practice of states the foregoing distinction is not always observed and that both types of treaties are frequently considered as inter se treaties.

(A) Modification or Abrogation of Multipartite Treaty Without Consent of All Original Parties. If several, but not all, of the contracting parties to a multipartite treaty conclude subsequently another multipartite treaty whose substantive provisions are at variance with the earlier treaty or if these parties disregard procedural safeguards of the earlier treaty, e.g., by not securing the consent of all contracting parties to the earlier treaty, the question may arise whether the later treaty is valid.

1. In certain cases such inter se treaties have been declared invalid on the ground that they run counter to an essential principle of international law, i.e., the principle pacta sunt servanda and/or to the provisions of the earlier more comprehensive treaty. In his dissenting opinion in the Oscar Chinn case, for instance, Judge Eysinga, considered invalid the action taken in 1919 by some of the parties to the General Act of Berlin (1885) and the Declaration of Brussels (1890) whereby these parties replaced these instruments inter se through signature and subsequent ratification of the Convention of Saint-Germain (September 10, 1919). Judge Eysinga arrived at this conclusion on the following grounds: first, Article 36 of the General Act of Berlin expressly required "common accord," i.e., the consent of all Signatory Powers, to any subsequent modification of the Act. Second, the parties

to the 1919 Convention acted contrary to an essential principle of international law, which would apply "even if Article 36 had not existed."\footnote{Id. at 134; the principle of international law which is invoked here is presumably the principle \textit{pacta sunt servanda}.}

Third, the pre-1919 agreements do not constitute a \textit{jus dispositivum}, but a regime, a statute, a constitution for the Congo basin which forms an indivisible whole and which may be modified only by agreement of all contracting parties.\footnote{Id. at 134; the last of Judge Eysinga's reasons assumes that the regime of the Congo basin as established in the last decades of the 19th century is to be considered as "higher law" as compared with other treaties; see also \textit{infra}. p. 685, note 101.}

2. Certain multilateral treaties expressly provide that subsequent \textit{inter se} treaties shall be valid for the consenting parties only, while the parties to the original multilateral treaty, which do not consent to the subsequent treaty, may still consider the earlier treaty as binding. Thus Article 91 of the 1907 Hague Convention for the Pacific Settlement of Disputes states that the present convention, when duly ratified, shall replace as between the contracting parties the 1899 Hague Convention relating to the same subject.\footnote{Text of the 1907 Convention in \textsc{Scott}, \textit{THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 and 1907} 41-81 (1915). See also Article 168 of the Sanitary Convention, opened for signature at Paris, June 21, 1926 in \textsc{Hudson}, \textit{INTERNATIONAL LEGISLATION} 1972 (1931).}

A clause of this type which has been inserted into a considerable number of multilateral treaties concluded after 1900 obviously constitutes a compromise between the principle that a multilateral treaty may be modified only with the unanimous consent of all contracting parties, and the other view which in effect authorizes a limited number of the contracting parties to a multilateral treaty to terminate such a treaty.\footnote{See also the proposed Amendment to Article XXIX of GATT, note 33 \textit{supra}.}

3. Certain multilateral treaties, although concluded only by some of the contracting parties to the corresponding earlier treaty, may be considered effective vis-à-vis \textit{all} parties to the earlier treaty, even vis-à-vis those that have not consented.

In this connection it should be recalled that there are two principles of customary international law which, if applied without qualification, would deny the validity of \textit{inter se} arrangements between some, but not all of the contracting parties to a multipartite agreement. The one principle (\textit{pacta sunt servanda}) interdicts the conclusion of a treaty between States A and B without the consent of State C, if the treaty between A and B would in effect be at variance with previous treaty obligations of A or B toward C. The other principle (\textit{pacta tertiis ne nocent ne prosunt}) may in practice lead to at least two legal conse-
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(1) the party to the earlier multilateral treaty which has not consented to the later treaty may consider the later treaty as invalid; or

(2) the later treaty may be considered as invalid vis-à-vis all states (erga omnes) on the ground that it has been concluded in violation of a binding principle of international law. However that may be, there is evidence in the practice of states that multilateral treaties have been replaced by later treaties concluded between some but not all the contracting parties to the earlier treaty and that these treaties have nevertheless been considered effective vis-à-vis all parties, even vis-à-vis those which have not consented, and despite the absence of an express clause in the earlier pact authorizing the modification inter se by some but not all the contracting parties.

In the course of the nineteenth and twentieth centuries numerous inter se arrangements have been concluded between the Great Powers which in effect superseded preceding treaties on the same subject. Such arrangements are, of course, exceptions to the principle of the “equality of states,” in that the consent of the Great Powers suffices to amend or modify an earlier treaty, irrespective of the consent of the other parties. Thus the requirement of unanimous consent to the amending of multilateral treaties gave way to one which lends greater weight to the consent of the Great Powers and recognizes the special interest of these powers in the settlement of specific questions. This trend is illustrated in the practice of states of recognizing as valid, or at least acquiescing in the validity of multilateral treaties which have been concluded without the consent of all the parties to an earlier treaty on the same subject.

Perhaps the most widely known example of abrogation of a multilateral treaty without the consent of all the contracting parties is the Munich Agreement of September 29, 1938, which abrogated inter alia Article 82 of the Treaty of Versailles, which determined the frontier between Austria-Hungary and the

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62 On this trend in the “public law and Concert of Europe” see Tobin, The Termination of Multilateral Treaties 244 (1933). Tobin holds that in practice there have been numerous deviations from the requirement of unanimous consent to the termination of multipartite treaties, but that up to the nineteenth century the question was of minor importance. Beginning with the nineteenth century, however, “Failure of one or more signatories of a treaty to participate in a revision need not render that revision invalid,” was considered as one of the basic principles involved in the concept of the public law and Concert of Europe. Id. at 225.

63 See also the principles concerning the modification of earlier multilateral treaties set forth in Tobin, op. cit. supra, at 225. For examples of modification or abrogation of the provisions of multipartite treaties without the consent of all the original parties see also, Kunz, The Meaning and the Range of the Norm Pacta sunt Servanda, 39 Am. J. Int’l L. 193 (1945) especially n. 35, 36.

64 Article 82 reads:

The old frontier as it existed on August 3, 1914, between Austria-Hungary and the
Czechoslovakia and Germany. By this Agreement, France, Germany, Italy, and the United Kingdom modified Article 82 of the Treaty of Versailles at the expense of Czechoslovakia without securing the consent of either Czechoslovakia, or the other parties to the Treaty of Versailles. Although its legality has been questioned by many, the Munich Agreement entered into force, temporarily at least.

From a legal viewpoint, the practice of *inter se* agreements of the Great Powers is noteworthy also because it evidences that in treaty law the principle that a treaty cannot confer rights or impose obligations upon states which have not consented to it may be subject to significant exceptions and qualifications.

4. Certain multilateral treaties contain an express provision for modification or amendment by the majority of the contracting parties or by the consent of specifically mentioned contracting parties. Accordingly, such changes are effective also vis-à-vis the dissenting minority. Thus Article 14 of the Postal Union Convention, in force since July 1, 1930, in effect permitted repeal of Acts of the preceding Congress of the Union by majority vote. Under this Article the members of the Union did not have the choice of ratifying the new provision or being bound by the old. The revised Convention came into effect on the date fixed by the Congress—usually twelve to eighteen months after the Congress—

German Empire will constitute the frontier between Germany and the Czecho-Slovak State.


65 See on this point also Prime Minister Chamberlain's statement in the House of Commons (September 28, 1938):

I cannot help reflecting that if Article XIX of the [League of Nations] Covenant providing for the revision of the Treaties by agreement had been put into operation, as was contemplated by the framers of the Covenant, *instead of waiting until passions became so exasperated that revision by agreement became impossible*, we might have avoided the crisis. (Italics added).


66 See on this point 1 *Oppenheim, International Law* (7th ed.: Lauterpacht, 1948). See especially p. 834. Lauterpacht states here that Article 2, paragraph 6 of the United Nations Charter which provides that the United Nations shall ensure that States which are not members of the United Nations act in accordance with the principles set forth in Article 2, paragraphs 1-5 in so far as may be necessary for the maintenance of international peace and security is a mandatory provision which is effective vis-à-vis non-members of the United Nations. See on this point also Kelsen, *The Law of the United Nations* 85-86, 106-110 (1950). For a discussion of the question of the effect of treaties on third states see also Rousseau, *Principes Généraux Du Droit International Public* 452-484 (1944).
and was then binding on all members, except those which withdrew from
the Union.67

The amendment provisions of the Articles of Agreement of the In-
ternational Monetary Fund constitute a combination of the majority and
the unanimity rules. Under Article XVII(a)68 of the Fund Agreement
amendments to the Agreement require concurrence of three fifths of
the members, having four-fifths of the total voting power. Such amend-
ments shall enter into force for all members within the time prescribed
in Article XVII(c). Under Article XVII(b) of the Fund Agreement,
however, unanimous consent is required in the case of an amendment
which modifies the right to withdraw from the Fund (Article XV, Section
1); the provision that no change shall be made in a member's quota
without its consent (Article III, Section 2); and the provision that no
change may be made in the par value of a member's currency except
on the proposal of that member (Article IV, Section 5(b)).

Also, Article VIII of the Articles of Agreement of the International
Bank for Reconstruction and Development69 provides that within the
time prescribed in Article VIII(c) amendments shall enter into force
for all members if approved by three-fifths of the members having four-
fifths of the total voting power. Unanimous approval is required in case
an amendment modifies the right to withdraw from the Bank under
Article VI, Section 1, the right of a member not to subscribe to capital
stock of the Bank which is due to increase in the Bank's capital in ac-
cordance with Article II, Section 3; or the rule of Article II, Section

67 Article 14 of the Postal Union Convention in force since July 1, 1930 and Article 15
of the Universal Postal Union Convention, signed at Paris July 5, 1947 read
1. The Acts of Congresses are ratified as soon as possible, and the ratifications are
communicated to the government of the country where the Congress was held, and
by that government to the governments of the contracting countries. 2. In the event
that one or more of the contracting countries should not ratify one or another of
the Acts signed by them, the latter would nevertheless be valid for the countries which
have ratified them. 3. Those Acts are put into effect simultaneously and have the same
duration. 4. As of the date fixed for the entry into force of the Acts adopted by a
Congress, all the Acts of the preceding Congress are abrogated. (Italics added).
T.I.A.S. 1850 at 161, French original version, id. at 15. See also RICHES, MAJORITY RULE
IN INTERNATIONAL ORGANIZATION (1940) who comments on the application of Article 14
(of the 1930 Convention) as follows:

In actual practice, all administrations start applying the revised convention and regula-
tions on the date fixed by the Congress [i.e., of the Universal Postal Union] for their
entering into force without taking into consideration the extent to which ratifications
have been deposited. Indeed, although the Convention and Regulations revised at
London entered into force for all members of the Union [on] July 1, 1930, twenty-one
states, among them Great Britain, Germany, and Italy, did not deposit ratifications
until 1931 and several had not ratified by the time of the Congress in Cairo in 1934.
The practice of the Union in this respect is admittedly extra-legal.
Id. at 73.
68 For text of Article XVII of the Fund Agreement see T.I.A.S. 1501, pp. 24-25.
69 For text of Article VIII of the Bank Agreement see T.I.A.S. 1502, pp. 22-23.
6 that the liability on shares shall be limited to the unpaid portion of
the issue price of the shares.

Similarly, Article 108 of the United Nations Charter provides that
amendments to the Charter become effective if adopted by a two-thirds
of the members of the General Assembly\textsuperscript{70} and ratified by two-thirds of
the members of the United Nations, including all the permanent members
of the Security Council. In other words, amendments to the Charter are
binding upon all non-permanent members of the United Nations, even
upon those which voted against them or which abstained from voting on
these amendments. The majority principle, however, is not effective
vis-à-vis the permanent members of the Security Council whose "concur-
ring votes"\textsuperscript{71} constitute an indispensable prerequisite for the adoption
and effectiveness of amendments to the Charter.

5. Certain treaties permit revision or amendment only after a con-
ference for this purpose has been convened. Such a conference may be
authorized to decide on amendments by majority vote. Thus, under
Section 48 of the Convention on the Privileges and Immunities of the
Specialized Agencies,\textsuperscript{72} the Secretary-General of the United Nations is
required to convene a conference for the purpose of revising of the
Convention, whenever one-third of the parties to the Convention makes
a request to this effect. Article 109 of the United Nations Charter
provides that a General Conference of the Members of the United
Nations for the purpose of reviewing the Charter as adopted on June
26, 1945, in San Francisco, shall be convoked whenever two-thirds of
the members of the General Assembly and seven members of the

\textsuperscript{70} On Article 108, see Goodrich & Hambro, \textit{Charter of the United Nations} 537-539
(2d ed. 1949):

There can be no doubt whatever that \textit{Members which vote against proposed amend-
ments and refuse to ratify them are bound by them} if they are ratified by two-thirds
of the Members, inclusive of the states with permanent membership on the Council.
\textit{Id.} at 539. In this connection it is noteworthy that in contrast to the Covenant of the
League of Nations, and to the Articles of Agreement of the Bank and Fund, the United
Nations Charter does not contain any express provision permitting members to withdraw.
See on this point Goodrich & Hambro, \textit{Id.} at 142-145, 539; and Kelsen, \textit{The Law of

\textsuperscript{71} On the meaning of "concurring votes" in Article 27, \S 3 of the United Nations
from Meetings}, 60 \textit{Yale L. J.} 209-210 (1951). McDougall and Gardner, \textit{The Veto and
the Charter: An Interpretation for Survival}, 60 \textit{Yale L. J.} 258-292 (1951), disagree with
the interpretation by Gross and favor an interpretation that "concurring votes" means
"concurring votes of the permanent members who participate in the voting." \textit{Id.} at 273.
By contrast, Gross maintains that under Article 27, \S 3 "the affirmative vote of all the
five permanent members is required in addition to the affirmative vote of two elected
members." \textit{Id.} at 210.

\textsuperscript{72} For text of the Convention see 33 U.N. \textit{Treaty Ser.} 261-303 (1949).
Security Council so request. In case no such conference has been held before the Tenth Annual Session of the General Assembly, that is presumably before 1955, the question whether such a General Conference shall be held shall be placed on the Agenda of the Tenth General Assembly to convocation the Conference may be taken by a majority vote of the General Assembly with the concurrence of seven members of the Security Council.

(B) Are inter se treaties concluded by some of the parties to the original treaty valid if they comply with certain standards? The Harvard Draft Convention on Treaties suggests in Article 22(b) that subsequent inter se treaties between some of the parties to an earlier multilateral treaty are valid on two conditions: (1) if the conclusion of such a treaty "is not forbidden by the provisions of the earlier treaty"; (2) if "the later treaty is not so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose." This rule reflects positive international law and is not merely a rule de lege ferenda if the first condition is understood to refer to the procedure of amending or modifying the original treaty, and if the second condition is understood to refer to a substantive provision in the later treaty which makes performance of the earlier treaty impossible. As for individual substantive provisions it may be difficult to determine which provisions of a later treaty are implicitly or explicitly "forbidden" by the earlier treaty. Moreover, in an actual case it may be controversial whether the later treaty conflicts with the earlier, because it is incompatible with the specific terms, or because it is incompatible with the "purposes" of the earlier treaty.

The Austro-German Customs Regime case may serve to illustrate this problem. In this case the Permanent Court of International Justice, at the request of the Council of the League of Nations, was called upon to render an Advisory Opinion on the question whether a proposed customs union between Germany and Austria is compatible with prior multilateral treaty commitments of Austria, in particular, whether it was compatible with Article 88 of the Treaty of Saint-Germain and a Geneva Protocol No. I, signed on October 4, 1922.

Article 88 of the Treaty of Saint-Germain provided:

The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes

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74 See on this point also infra footnote 83.
in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another power.76

Similarly by Geneva Protocol No. I Austria undertook, in accordance with Article 88, to abstain from negotiations which would compromise her independence and

that she shall not violate her economic independence by granting to any State a special regime or exclusive advantages calculated to threaten her independence.77

By eight votes to seven the Court held that the proposed customs regime “would not be compatible with Protocol No. I signed at Geneva on October 4th, 1922.”78 Although the Opinion of the Court stated that strictly speaking Austria’s independence was not endangered by the proposed regime,79 the proposed customs union was deemed objectionable on the ground that it constituted a “special regime” affording Germany, in relation to Austria, advantages which were withheld from third Powers.80 It should be added that six judges of the majority considered the proposed customs union not only incompatible with the above-mentioned Geneva Protocol, but also at variance with Article 88 of the Treaty of Saint-Germain.

By contrast, the Joint Dissenting Opinion of Judges Adatci, Kellogg, Rolin-Jaquetemyns, Hurst, Schücking, Eysinga, Wang stated that none of the provisions of the Vienna Protocol of March 19, 1931, “when considered individually, are inconsistent with the maintenance of Austria’s position as a separate and independent State,” and that the regime as a whole did “not prejudice the independence of Austria.”81 The Joint Dissenting Opinion concluded furthermore that the proposed regime did not meet the test of Article 88, since special regimes were proscribed only if calculated to threaten Austria’s independence.82

Generally speaking, one may be able to find more examples for treaties or treaty provisions permitting special agreements inter se than those expressly prohibiting such agreements. If the earlier treaty lays down certain standards for inter se treaties, the later treaty has to be interpreted in the light of these standards. But even in the absence of any

76 Id. at 9.
77 Id. at 10.
78 Id. at 53.
79 Id. at 52.
80 Ibid.
81 Id. at 86.
82 Id. at 81-82. See also on this point Judge Anzilotti’s dissenting opinion, id. at 56-70.
express permissions or prohibitions in the earlier treaty the later treaty may always be scrutinized by reference to the earlier treaty.\textsuperscript{83}

III. **The Most-Favored-Nation Clause and the Maxim "The Later Law Supersedes the Earlier Law."**

In the context of this study it should be emphasized that the operation of the most-favored-nation clause constitutes but a special application of the principle *lex posterior derogat priori*. To the extent that the clause provides that a Treaty between State A and State B may subsequently be modified by a future Treaty between State B and C, the clause says in effect that the later treaty between B and C, supersedes the earlier between A and B. This inherent time element in the clause,\textsuperscript{84} although of great legal significance, has frequently been ignored in the discussion of the clause.

At times the question has been posed whether the equality of treatment which is granted to the contracting parties in a most-favored-nation clause applies only to concessions existing at the moment of conclusion of a treaty or also to all concessions which may be granted in the future.\textsuperscript{85}

One school of thought holds that extension of future benefits must be expressly stated in the clause; in other words, the parties must expressly pledge that they will accord all benefits which are granted at present and those which may hereafter be granted. By contrast others hold, and this appears to be the correct view, "that most favored nations treatment must mean equality at all times."\textsuperscript{86} If this view is adopted, it becomes clear beyond doubt that the extension of benefits by a later treaty concluded between States B and C affects and modifies the scope and content of the concessions made in an earlier treaty between States A and B. In other words, the later treaty—provided it covers the same subject and provided furthermore that at least one party is identical—in our example

\textsuperscript{83} See, however, Article 18 of the 1928 Havana Convention on Treaties providing: "Two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated [sic] by them with other states." (Italics added). This provision has been frequently referred to as a clause authorizing *inter se* treaties without condition or restriction and without regard to the effect which such treaties may have on the earlier multipartite treaties. Text in 4 HUDSON, INTERNATIONAL LEGISLATION 2383 (1931). See on this clause, Harvard Draft Convention, op. cit. supra note 73, at 1016, and Kunz, The Meaning and Range of the Norm *Pacta sunt Servanda*, 39 AM. J. INT'L L. 191 (1945).

\textsuperscript{84} On most-favored-nation treatment in general see SNYDER, THE MOST-FAVORED-NATION CLAUSE (1948).

\textsuperscript{85} Id. at 34f.

\textsuperscript{86} Id. at 35; see also Visser, *La Clause de la Nation la Plus Favorisée dans les Traités de Commerce*, 4 REVUE DE DROIT INTERNATIONAL 83 (2d Ser. 1902).
State B—modifies the earlier treaty. The effective modification of the earlier treaty may be explained by reference to the nature and intention of the most-favored-nation clause. In any case, the significance and effectiveness of the most-favored-nation clause can be fully appreciated only if it is recognized that the clause has to be interpreted in conjunction with the principle that the later rule supersedes the earlier rule (lex posterior derogat priori) which, in turn, is applicable only to rules covering the same subject matter (in pari materia).  

It may be added that the most-favored-nation clause is perhaps the most striking exception to the alleged principle of international law that treaties do not legally affect third states (pacta tertiis nec prosunt nec nocent). For, in law and practice one of the primary purposes of the most-favored-nation clause is to secure equality of treatment by extending to State A all those benefits which State B subsequently accords to State C without necessitating the conclusion of a treaty between States A and C. Very often it is expressly stated in the clause that benefits of later treaties shall “immediately” be accorded to parties to earlier treaties. The benefits accruing by means of the most-favored-nation clause to State A through the grant of new benefits by State B to State C are necessarily contingent benefits, that is to say, contingent on benefits accorded to third states. It is thus conceivable that in practice the most-favored-nation clause remains a dead letter and that State A never will benefit from it, if State B does not subsequently conclude any treaty with third states which contains more benefits than those accorded by State B in its earlier treaty with State A. In this case, the most-favored-nation clause is at best dormant law; it becomes operative only if State B grants to third States benefits over and above those previously accorded to State A.

Since, as previously indicated, claims to equal treatment which are based on the most-favored-nation clause are contingent claims, it may be inferred that contraction as well as expansion of the scope of the clause may ensue in the course of time. Here again the time element is significant. Suppose new benefits have been granted to State C by agreement with State B and furthermore that these benefits are subsequently

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87 On the in pari materia rule in reference to the most-favored-nation clause see National Provincial Bank v. Dollfus (1947) in Lauterpacht, Annual Digest and Reports of Public International Law Cases, Year 1947 (1951). "But a most-favored-nation clause can only be invoked if the subject matter of the treaty containing it is identical with that of the particularly favourable treaty the benefit of which is claimed." Id. at 166.

88 In favor of the view that the most-favored-nation clause is closely related to the question of the effect of treaties on third states see I Guggenheim, Lehrbuch des Völkerrechts 96 (1948).
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withdrawn or limited by termination of modification of that agreement, such modification of benefits affects, of course, State A which, as an indirect beneficiary of the most-favored-nation treatment, participates in the extension as well as in the limitation of benefits which are accorded to third states under the most-favored-nation clause.\textsuperscript{89}

The view has been advanced, however, that the most-favored-nation clause does not constitute a genuine exception to the \textit{pacta tertii} rule, since there appears to be an intent, at least on the part of one of the signatories of the earlier treaty (of which the clause constitutes an integral part) that subsequent treaties (to which this signatory is not a party), shall nonetheless affect the earlier treaty.\textsuperscript{90} This is, of course, correct. On the other hand, it can hardly be denied that State A can only derive benefits from State B under the clause, if State B subsequently concludes a treaty with State C which includes benefits over and above those previously accorded to State A. Actually, State A cannot legally insist that State B conclude a treaty with C, so as to make the clause operative; nor can State A legally prevent termination of such a treaty between States B and C, which termination, in turn, renders the clause ineffective. In addition, States B and C have, even under most-favored-nation arrangements, usually wide discretion in conceding to each other particular substantive benefits as well as to withdraw them, whereas State A has no direct influence on the scope and content of the substantive concessions agreed upon by States B and C. In short, although the most-favored-nation clause cannot exclusively be considered as \textit{res inter alios acta}, since State A gives thereby, though in very general terms, its advance consent to certain subsequent arrangements between B and C, the clause becomes operative only if subsequently an agreement is concluded between States B and C to which State A, by definition, is not a party. Accordingly some of the major legal and economic characteristics of the most-favored-nation-clause should be seen in those elements which partake in the specific criteria of a \textit{res inter alios acta}, rather than in the more formal and, in this writer's view, secondary feature of an advance consent to certain subsequent treaty arrangements. Moreover, it may be argued that to the extent that State A agrees with

\textsuperscript{89} See on this point \textsc{anzelotti, cours de droit international} 437-438 (1929) and \textsc{lippert, code of international financial law} § 53, p. 118 (1935). In time of war, however, benefits granted to belligerent powers prior to the outbreak of war may be discontinued vis-à-vis the belligerent powers, but maintained vis-à-vis neutral powers. See on this point \textsc{anzelotti} and \textsc{lippert}, \textit{op. cit. supra}.

\textsuperscript{90} See on this point \textsc{rosseau, principes généraux du droit international public} 465 (1944).
State B on a most-favored-nation clause, such agreement constitutes a pledge on the part of State A not to protest vis-à-vis State B against subsequent modifications of its agreement with State B, through agreement between States B and C, provided these modifications are compatible with the most-favored-nation clause.

IV. CONFLICTS BETWEEN TREATIES OF DIFFERENT LEVELS

(A) League of Nations Covenant and United Nations Charter as the "Higher Law". Even in the field of treaty law at least two different levels may be distinguished as evidenced by the hierarchical structure of the League of Nations91 and United Nations92 legal system. Article 20 (1) of the League of Nations Covenant provides:

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

Similarly, Article 103 of the United Nations Charter reads:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Whereas Article 20 of the Covenant "abrogates" all obligations inter se inconsistent with the terms thereof, Article 103 states that the obli-

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... the Court's opinion is that fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims. (Italics added). Id. at 15.

See also the Dissenting Opinion of Judge Alvarez in I.C.J., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion, May 28, 1951). Judge Alvarez, after referring to several categories of multilateral conventions, states that these categories present characteristics which differentiate them markedly from ordinary multilateral conventions. To begin with, they have a universal character; they are in a sense, the Constitution of international society, the new international constitutional law. (Italics added). Id. at 51.
gations under the Charter "shall prevail." It appears that the authors of the United Nations Charter replaced "abrogate" by "prevail" with the intent (1) to cover not only conflicts between the Charter and earlier treaties—the term "abrogate" is usually applied to this situation—but also to conflict between the charter and later treaties; (2) to avoid the impression that an "obligation" which is at variance with the United Nations Charter, including of course a treaty obligation, is deemed "automatically" abrogated. In other words, the conflicting treaty is to be considered voidable rather than void.\(^9\)

In any case, the distinction between treaties of different levels is of special significance in reference to the maxim *lex posterior derogat priori*, since in effect it may reverse this rule. In general, a later treaty supersedes an earlier only if (1) it is on the same level as the earlier treaty, (2) or if it is on a higher level than the rule which it supersedes, *e.g.*, in a conflict between a later treaty and earlier statute. By contrast, a later treaty may not abrogate an earlier treaty if it is on a lower level than the earlier treaty. This principle is in line with general principles of constitutional law, for instance, with the ruling of Chief Justice Marshall in *Marbury v. Madison*.\(^{94}\) The principle is inherent in the hierarchic structure of the legal order.

A decision whether in a given case, the later or the earlier law prevails is usually based on the consideration whether or not the later law is on the same level as the earlier one. It is this consideration which determines the choice between the maxims *lex posterior derogat priori* and the opposite principle *lex prior derogat posteriori*.\(^9\) In other words, a

\(9\) See on this point the Report of Committee IV/2 of the San Francisco Conference, Doc. 933, 13 U.N. Conf. Doc. 703, 707 (1945):

... the Committee has concluded that it is necessary to incorporate in the Charter a provision regarding inconsistency between the obligation of members under other treaties and under the Charter itself, if only because the omission of such a provision could give rise to inaccurate interpretations. Moreover, it has decided that it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof.


The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.


It is, however, possible that a treaty establishes the contrary principle: *Lex prior derogat posteriori*, that is to say that a later treaty (concluded by the same parties) shall be null and void if incompatible with the first treaty.

It is submitted that even in the absence of an express provision in a treaty the earlier law may prevail, if the earlier treaty may be considered as being of a higher level than the later treaty and/or, if the later treaty consists only of special rules which are but
later rule of the lower level may not abrogate an earlier rule of a higher level.

(B) **International “constitutions” and rules of the subconstitutional level.** The major international institutions have been established by virtue of their respective “organic laws.” The terms “Covenant” and “Charter” have been deliberately selected to add special dignity and legal significance to the “organic law” of the League of Nations and of the United Nations.

The “organic laws” or “basic instruments” of the major international institutions, especially the Covenant of the League of Nations and the Charter of the United Nations, reflect a certain tendency to confer the character of a “rigid constitution” on these charters. The major features of such rigidity are: (1) the clause that agreements *inter se* which conflict with the basic charter are voidable; (2) special procedural provisions concerning amendments to the basic charter; (3) charter obligations are obligations of members toward the organization rather than obligations of members vis-à-vis each other; (4) provisions that in relation to non-members the members of an international organization will be guided by the principles of the basic charter.

International treaties which conflict with the pertinent provisions of the basic charter may therefore be declared “unconstitutional.” Such a finding may be made by the organ which is authorized to interpret the constitution of an international organization. For example Article XVIII of the Articles of Agreement of the International Monetary Fund and Article IX of the Articles of Agreement of the International Bank for Reconstruction and Development confer, in principle, the final authority to interpret these agreements upon the Executive Directors of the Fund and Bank, subject to review by the Board of Governors of these insti-

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supplementary to the earlier treaty. On this latter point see note 142 *infra*, and 1 GUGGENHEIM, *LEHRBUCH DES VÖLKERRECHTS* 134-135 (1948).

96 On Woodrow Wilson's emphasis on the religious implications of the term “Covenant,” see his Kansas City Address (September, 1919), quoted in 1 BAKER, *WOODROW WILSON AND WORLD SETTLEMENT* 213 (1922):

My ancestors were troublesome Scotchmen and among them were some of that famous group that were known as Covenanters. Very well, there is the Covenant of the League of Nations. I am a Covenanter.

97 The term “charter” has its roots in “carta.” In early Franco-Germanic and Anglo-Saxon law a “carta” was considered an instrument of special evidentiary force; see article “Carta” in 2 DU CANOE, *GLOSSARIUM MEDIAE ET INFIMAE LATINITATIS* 192 (1883-1887). On the conclusive effect of certain “charters,” HOMES, *THE COMMON LAW* 272 (1946); see also 2 MURRAY, *NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES*, part 1, p. 294 (1893).

98 See *supra* p. 683, note 93.

99 See note 66 *supra*. 
tions. By contrast, the United Nations Charter does not confer on any one organ of the United Nations the exclusive jurisdiction to interpret the United Nations Charter. Any one of the principal organs of the United Nations may interpret the relevant provisions of the Charter. However that may be, the International Court of Justice is by Article 92 of the Charter designated as "the principal judicial organ of the United Nations." In particular, the International Court of Justice is the only organ whose decisions take on the form of a "judgment" or of an "advisory opinion." The Court applies "international conventions whether general or particular" (Article 38(1)(a) of the Statute of the Court). Moreover, under the so-called optional clause the compulsory jurisdiction of the Court is recognized in all legal disputes concerning the interpretation of a treaty (Article 36(2)(a) of the Statute of the Court). Accordingly, the Court is competent to deal with the interpretation and the interrelationship of several treaties, since it is assumed that the word "treaty" is used in a generic sense in Article 36(2)(a) of its Statute. Moreover, the Court, under Article 38(1) of its Statute, is competent to determine the relative significance of a special convention as compared with a general convention.

Actually, conflicts between inter se arrangements and controlling international constitutions are rarely discussed in terms of the "constitutionality" or "unconstitutionality" of the conflicting rules. The problems usually present themselves as conflict between two or more bilateral or multilateral treaties. Nevertheless, the reasoning by which such conflicts are resolved often resembles closely the reasoning applied in settling disputes on the constitutionality of domestic measures in accordance with the constitutional law of individual states. In particular, the reversal of the maxim lex posterior derogat priori into its logical opposite whereby the earlier law prevails over the later law can perhaps best be understood by reference to analogous principles of constitutional law.

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101 See on this point the Separate Opinion of Jonkheer van Eysinga in the Oscar Chinn case (P.C.I.J., Ser. A/B, No. 63) p. 133:

The General Act of Berlin does not create a number of contractual relations between a number of states, relations which may be replaced as regards some of these States by other contractual relations it does not constitute a jus dispositivum, but it provides the Congo Basin with a regime, a statute, a constitution. This regime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required. An inextricable legal tangle would result if, for instance, it were held that the regime of neutralization provided for in Article II of the General Act of Berlin might be in force for some contracting Powers while it had ceased to operate for certain others.

102 See note 95 supra.
(C) Scope of the jurisdiction of individual international organizations. In addition to conflicts between multilateral treaties on the constitutional level and multilateral or bilateral treaties on the sub-constitutional level, there may be jurisdictional conflicts between various constitutions of intergovernmental organizations.

The great increase of the number of inter-governmental organizations since 1920, and more particularly since 1944, increases the possibility, if not probability of such conflicts. These conflicts may result in conflicting obligations of members vis-à-vis the various inter-governmental organizations in which they participate or they may be conflicts between the organizations proper.

1. Obligations of members. From the viewpoint of the members of these organizations it is significant that their constitutions are not confined to the determination of the structure and functions of international organizations per se. On the contrary, they also determine the powers of these organizations vis-à-vis their members as well as the obligations of individual members vis-à-vis the organizations.

It is obvious that any conflict between the individual provisions or the general purpose of these constitutions may subject the members of these organizations to conflicting obligations, a situation which is apt to result in international disorganization rather than in international order.

Certain international agreements or clauses provide expressly for "uniformity of obligations." Thus, the "standard clauses" (Articles II to IX) of the Convention on the Privileges and Immunities of the United Nations are designed to ensure uniform obligations of the members in matters relating to the privileges and immunities of specialized agencies.103

The General Agreement on Tariffs and Trade (GATT) may be cited as an example of an agreement which tends to ensure far-reaching assimilation of the obligations of contracting parties to GATT which are not members of the International Monetary Fund with those of the members of the Fund. To this end, non-members of the Fund which are parties to GATT are required by Article XV, paragraph 6 to enter "into a special exchange agreement with the Contracting Parties."104 Article XV, paragraph 7(b) of GATT is designed to harmonize as far as feasible the obligations of members and non-members of the Fund: it provides that the terms of such a special exchange agreement shall not impose on the contracting party obligations in exchange matters which are gener-

104 See GATT edition, note 33 supra, pp. 61-62.
ally more restrictive than those imposed by the Fund Agreement on members of the Fund.

In general, there is every indication that the multiplicity of the specialized agencies is intended to create parallel rather than mutually conflicting obligations of the members. There may even be a presumption, though a rebuttable one, that membership in the various specialized agencies does not entail conflicting obligations for the members. This presumption may be deemed reinforced in those instances where joint membership is in principle required such as in the Bank and Fund.\footnote{See Article II, Section 1 of the Articles of Agreement of the International Bank for Reconstruction and Development which in effect makes membership in the Fund a prerequisite for membership in the Bank. T.I.A.S. 1502, p. 2.}

2. Co-operation between and co-ordination of specialized and other agencies. The co-operation between the major international organizations is to be insured by various legal techniques. Thus the charters of most of the specialized agencies which have been set up after 1944 contain general clauses on co-operation with other international organizations.\footnote{See, for example, Article X of the Fund Agreement, T.I.A.S. 1501, p. 16, Article V, Section 8 of the Bank Agreement, T.I.A.S. 1502, p. 15; Article X of the Constitution of UNESCO, 4 U.N. TREATY SER. 290 (1947); Article XII of the Constitution of FAO T.I.A.S. 1554, p. 6; Article 12 of the Constitution of the ILO, 15 U.N. TREATY SER. 60 (1948).}

Several constitutions of international organizations, and in particular the Charter of the United Nations, designate expressly certain organs as being charged with fostering such co-operation.

(i) The role of the principal organs of the United Nations. Co-ordination between the United Nations and the specialized agencies is, by virtue of Article 63, paragraph 2 of the United Nations Charter, expressly entrusted to the Economic and Social Council (hereafter occasionally referred to as ECOSOC). This Council may "coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies." In addition, the Council may make recommendations to this end to the General Assembly and to the Members of the United Nations. The General Assembly in turn may make recommendations to the Economic and Social Council for the purpose of co-ordinating the policies and activities of the specialized agencies.\footnote{See, e.g., UNITED NATIONS CHARTER Art. 13 (b) and Art. 60.}

Thus the primary responsibility for co-ordination is conferred on the General Assembly and the Economic and Social Council. In principle, the power to make recommendations for the co-ordination of the policies\footnote{Article 58 of the United Nations Charter confers implicitly this power on the General Assembly; see also Article 17, §3 and Article 60 of the Charter.}
and activities of the United Nations is also bestowed on other organs, since under Article 58 of the Charter it is "the Organization" which shall make such recommendations. Of the principal organs of the United Nations other than the General Assembly and the Economic and Social Council, it is the Secretariat and the International Court of Justice (rather than the Security Council and the Trusteeship Council) whose co-ordinating activities are at times noteworthy.

The procedural requirement that agreements between the United Nations and the specialized agencies may be "entered into" by the Economic and Social Council and are "subject to the approval by the General Assembly" clearly indicates the special role which in this field has been assigned to the Council and to the General Assembly. Moreover, the Agreements between the United Nations and individual specialized agencies usually contain a clause that any formal agreement between two or several specialized agencies shall be submitted to the Economic and Social Council of the United Nations for information as to their nature and scope, before they are concluded in final form.

(ii) Other organs of co-ordination. In addition to the principal organs of the United Nations which are charged with the exercise of co-ordinating functions there have been established by General Assembly and ECOSOC Resolutions two organs which are composed of representatives of the Secretariat and of individual specialized agencies: the Administrative Committee on Co-ordination (ACC) and the Technical Assistance Board (TAB).

The Administrative Committee on Co-ordination has two major

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109 For the Secretariat as one of the principal organs of the United Nations see Article 7 and Articles 97-101 of the United Nations Charter. See also infra note 114 on the membership of the Secretary-General in the Administrative Committee on Co-ordination (ACC) and in the Technical Assistance Board (TAB).

110 For the International Court of Justice as one of the principal organs of the United Nations see Article 7 and Article 92-96 of the United Nations Charter. On the "Use of the Court by the United Nations" see Lissitzyn, The International Court of Justice 90-95 (1951).


114 This Committee was originally styled "Co-ordination Committee," see ECOSOC Resolution 13(III), adopted on September 21, 1946. Subsequently, the name was changed to "Secretary-General's Committee on Co-ordination." The name "Administrative Committee on Co-ordination" was suggested in U.N. Doc. E/1038, August 28, 1948. The new name of the Committee was formally adopted by the Committee on November 12, 1948; see U.N. Doc. E/1076, p. 3 (1948).
objectives: (1) to take all appropriate steps to ensure the fullest and most effective implementation of the agreements between the United Nations and the specialized agencies;115 (2) to forestall, through cooperation between the executive heads of the specialized agencies, possible instances of duplication or divergences of policy and suggest solutions for related problems whenever they arise.116 The Economic and Social Council stands, in principle, ready to review special problems which the Administrative Committee on Co-ordination might not have been able to settle.117

The Technical Assistance Board (TAB) was established by virtue of Resolution 222(IX) of the Economic and Social Council of the United Nations.118 In addition, this Resolution provides for a Technical Assistance Committee (TAC). The Technical Assistance Board (TAB) is composed of the executive heads, or their representatives of the United Nations and of the specialized agencies. The Secretary-General of the United Nations, or his representative, shall be the Chairman of the Board. The specialized agencies which are members of the TAB are designated as "participating organizations." These organizations are ex officio members of the TAB and are entitled to receive a specified percentage of the United Nations Technical Assistance account. Other specialized agencies take part in the TAB, but not as full-fledged or "participating organizations"; they are represented by observers without voting right and do not receive contributions from the United Nations Technical Assistance account.

The Technical Assistance Committee (TAC) of the Economic and Social Council includes representatives of all the members of ECOSOC. The provision of paragraph 6 of Resolution 222(IX)119 that the TAC "shall sit while the Council is not in session" was subsequently modified by the recommendation of the Committee that its sessions should be held twice a year; and that the Chairman of the Committee should be authorized to call further sessions of the Committee whenever necessary.

The Technical Assistance Board (TAB) shall inform the Technical Assistance Committee of the Council (TAC) of any requests for tech-

115 See ECOSOC Resolution 13(III), adopted on September 21, 1946, ECOSOC OFFICIAL RECORDS, 3d Sess. No. 3 p. 16 (1946).
117 Id., at 73.
119 Id. at 6-7.
technical assistance for economic development as soon as they have reached the TAB, so that TAC shall always be in possession of a list of projects being discussed or reviewed by the TAB or TAC. The Secretary-General of the United Nations is authorized after consultation with the other participating organizations to designate the Executive Secretary of the TAB.

The TAC is required to examine the technical assistance activities which have been undertaken, the results achieved as well as future programs. The TAC is furthermore charged with reporting on these activities and making recommendations thereon to ECOSOC. It should be noted that under paragraph 6(c) of Resolution 222 (IX), the TAC is authorized "to interpret this resolution in cases of conflicts or questions submitted to it by the TAB, through its Chairman, and decide any such conflicts or questions."\(^\text{120}\)

In accordance with paragraph 7 of Resolution 222(IX) the TAB and TAC in performing their functions shall be guided by the "Observations on and Guiding Principles of an Expanded Program of Technical Assistance for Economic Development." (Annex I to Resolution 222(IX)).\(^\text{121}\)

In general, it is advisable in discussing principles and problems of inter-agency co-ordination to distinguish clearly between the following four major functions of international organizations: (1) Fact Finding and Research; (2) Operations; (3) Advice to member governments; (4) Coordination of policies (a) of members; (b) of the policies of the various intergovernmental organizations concerned. It is comparatively easy to avoid jurisdictional conflicts in matters relating to factfinding and research as well as operations; but it requires utmost goodwill and vigilance to avoid conflicting advice and policy recommendations.

Moreover, it should be noted that the actual obligations of members cannot always be determined by the words of the organic law of the international organization alone. Obligations of individual members may arise at times in the course of the application of the agreement, and it may be difficult to foresee whether and to what extent the organic charter of an international organization will be put in action. In addition, the principal organs of the various organizations have usually broad discretionary powers. Through the exercise or lack of exercise of these powers the obligations of individual members may be increased or decreased. In other words, jurisdictional conflicts may arise not because

\(^{120}\) Id. at 7.

\(^{121}\) Ibid.
of conflicts inherent in the letter of the basic laws, but as a consequence of practices which may or may not be authorized under the organic law of the individual institutions or because of practices which conflict with inter-agency agreements or commitments.

3. Impact on specialized agencies of Security Council and General Assembly action for maintaining or restoring peace. It has previously been indicated that conflicts between the United Nations Charter and inter se agreements may be considered analogous to conflicts between rules of the constitutional and of the sub-constitutional level. Here the question will be considered as to whether the constitution of one international agency may be deemed of a higher level than the constitution of another. This problem is not a merely academic one. To illustrate its practical significance it may be sufficient to refer to several provisions contained in agreements between the United Nations and the individual specialized agencies and to refer to the “Uniting for Peace” Resolution of the General Assembly of the United Nations.

(i) Relationship between Security Council and specialized agencies.

Article VI of the Agreement between the United Nations and the International Labour Organization (ILO) reads:

*Assistance to the Security Council*

The International Labour Organization agrees to cooperate with the Economic and Social Council in furnishing such information and rendering such assistance to the Security Council as that Council may request including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security. (Italics added).

By contrast, Article VI of the Agreement between the United Nations and the Fund provides:

The Fund *takes note* of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decision of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter. (Italics added).

It is conspicuous: (1) that this provision emphasizes the individual

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122 See note 115 supra.
123 1 U.N. TREATY SER. 183, 192-194 (1947).
obligations of the members of the Fund under Article 48(2) of the United Nations Charter rather than the obligations of the specialized agency in corporate capacity which may be read into Article VI of the Agreement between the United Nations and the International Labour Organization; (2) that the Fund does not undertake any obligation to render assistance to the Security Council; (3) that the Fund is only obligated, in the conduct of its activities to have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter, whereas under the Agreement with the ILO the Security Council "may request...assistance in carrying out decisions for the maintenance or restoration of international peace and security"; (4) that the Fund is only obligated to assist the Security Council by furnishing to it information "to the fullest extent practicable," a qualification which is not to be found in the agreement between the ILO and the United Nations. However, the agreements of the United Nations with the Fund and the ILO both contain a proviso that the obligation to furnish information is subject to such arrangements as may be necessary for the safeguarding of confidential material.

In any case it should be noted that there is an ostensible difference as to the binding force of the above quoted clauses. One is probably justified in assuming that the ILO is required to comply with "requests" addressed to it by the Security Council. By contrast, the Security Council is precluded from addressing such "requests" to the Bank or Fund. In other words, provisions such as Article VI of the Agreement between the United Nations and the ILO constitute a contingent obligation to "implement" valid decisions of the Security Council. However that may be, it is difficult to determine in advance what will be the actual scope of such implementing action on the part of the specialized agencies or their members. The type of action or inaction which in such instances will be expected from individual specialized agencies will, of course, depend to a great extent on the field for which these agencies are responsible under their charters and on the nature of the measures which the Security Council adopts or recommends.

127 See on this point Report of the Collective Measures Committee, U.N. Doc. A/1891, especially paragraphs 148-161, at 19-20, which deal with the question of existing international bodies who might assist in the application of "collective measures." It is conspicuous that paragraph 151 of the Report assumes that decisions of the Security Council...
In general, it is submitted that clauses such as Article VI of the UN-ILO Agreement presuppose that in a conflict between the obligations of the members under the charters of the respective specialized agencies with obligations arising out of the United Nations Charter, the obligations under the United Nations Charter prevail.

However that may be, any assertion of the “binding force” of the decisions of the Security Council on members of the United Nations and of specialized agencies presupposes that the “decisions . . . for the maintenance of international peace and security” which are referred to in Article 48(1) of the United Nations Charter are legally in the nature of “decisions” rather than of “recommendations.”

There is every indication that the majority of commentators and writers on the United Nations Charter have heretofore considered the Security Council’s decisions under Articles 41 and 48 on measures to safeguard peace and security as “decisions” which are binding upon the members. It may be argued, however, that even the “decisions” under these Articles are in the nature of recommendations.

Under Article 41, the Security Council may decide what measures, not involving the use of armed force, are to be employed to give effect to its decisions and it may call upon the Members of the United Nations to apply such measures. It is submitted that the answer to the question whether or not such decisions are binding as decisions hinges on the meaning of the term “call upon” in this context. A comparison with other official versions of the Charter reveals that the French text renders “call upon” in Article 41 as inviter while the Spanish text employs the word instar, that is, “urge.” It is conspicuous that the French and Spanish wording is apt to cast serious doubt on any attempt to give “call upon” a mandatory meaning which could be considered as an equivalent of “require,” for example.

It would follow that the power of the United Nations under Articles 41 and 48 is limited to decisions to invite members to adopt certain measures. Hence, such “decisions” may be looked upon as “recom-

(presumably under Article 41 or 44 of the United Nations Charter) are binding on the members. Paragraph 151 of the Report reads in part as follows:

Both the Bank and the Fund have included in their special agreements with the United Nations a provision that their operations would be carried on with ‘due regard’ to decisions of the Security Council, retaining the right of final decision for themselves, even though their member nations would be bound by such decisions. (Italics added).

Id. at 19.

mendations" to members\textsuperscript{120} rather than as decisions in the technical sense. If this reasoning is adopted, it would have to be inferred that the above mentioned ostensible differences as to the binding force of Article VI of the Agreement between the United Nations and the ILO as compared with the corresponding provision of the Agreement between the United Nations and the Fund would be considerably reduced, if not nullified.

In general, it is submitted that clauses such as Article VI of the UN-ILO Agreement presuppose that in a conflict between the obligations of the members under the charters of the respective specialized agencies with obligations arising out of the United Nations Charter, the obligations under the United Nations Charter prevail.

(ii) Relationship between General Assembly and specialized agencies.

The Fifth General Assembly of the United Nations resolved on November 3, 1950 by Resolution 377(V)\textsuperscript{130} that whenever the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force if necessary.

The Economic and Social Council requested by Resolution 363(xii)\textsuperscript{131} that the Secretary-General in consultation with specialized agencies prepare specific arrangements for the furnishing of information and the rendering of appropriate assistance in the maintenance of international peace and security as may be requested by the Security Council or the General Assembly. The reference to the General Assembly in this context was an innovation as compared with the relevant clauses of the agreements between the United Nations and individual specialized agencies. Accordingly, the question arose as to whether or not these agreements require amendment in order to be harmonized with General Assembly Resolution 377 (V). Several specialized agencies have solved this question by regularizing their relationship to the United Nations through the adoption of appropriate resolutions which expressly recognize

the recommendatory powers of the General Assembly as to the main-
tenance or restoration of international peace and security.\textsuperscript{132}

4. \textit{Relationship between the constitutions of international agencies which have come into force at different times.} Heretofore, conceivable conflicts between the terms of the various charters of the major international organizations have been discussed \textit{without} taking into account the time element. But here again conflicts arising between earlier and later charters may present themselves.

In the first place, it is clear that not all charters of the specialized agencies were drafted at the same time. The Charters of the Bank and Fund, for instance, were drafted prior to the United Nations Charter and prior to the liquidation of the League of Nations. Thus they contain references to "mandates"\textsuperscript{133} and the "Permanent Court of International Justice," that is to two institutions which were closely related to the League of Nations system. However, provision is made in Article XVIII(c) of the Fund Agreement, for example, that the reference therein to the Permanent Court may be replaced "by regulation adopted by the Fund." Accordingly, By-Law Section 23\textsuperscript{134} of the Fund provides that the President of the International Court of Justice is prescribed as the authority to appoint an umpire whenever there arises a disagreement of the type referred to in Article XVIII(c) of the Articles of Agreement.

In the second place, the Charter of an organization which has similar responsibilities, but which entered into force prior to the Charter of a more recent organization, may expressly be revoked by the contracting parties to the earlier Charter. Thus by denunciation of the Charter and by liquidation of the earlier organization every conceivable conflict between the old and the new organization may be eliminated. With a view to avoiding such conflicts between the World Health Organizations (WHO) and its two major predecessors in the health field, \textit{i.e.}, the \textit{Office International d'Hygiène Publique} and the League of Nations Health Organization, the prospective members of the World Health Organization agreed that the assets and functions of the older organizations shall be


\textsuperscript{133} Article XX, Section 2(g) of the Fund Agreement, T.I.A.S. 1501, p. 28 and Article XI, Section 2(g) of the Bank Agreement, T.I.A.S. 1502, p. 25.

\textsuperscript{134} \textit{International Monetary Fund, By-Laws and Rules and Regulations} 18 (Eleventh Issue, November 30, 1951).
transferred to the WHO\textsuperscript{135} and, pending the establishment of WHO, to the Interim Commission of the WHO.\textsuperscript{136}

Similarly, the International Institute of Agriculture in Rome adopted on March 30, 1946, a protocol for the dissolution of the Institute on July 8 of the same year. The functions and activities of the Institute have thereby been transferred to the Food and Agriculture Organization of the United Nations (FAO).\textsuperscript{137}

Also the property rights of the League of Nations in the International Institute of Intellectual Cooperation were transferred to the United Nations by resolution of the last assembly of the League. Subsequently, the Secretary-General invited the United Nations Educational Scientific and Cultural Organization (UNESCO) to utilize these assets. The Institute was dissolved as of December 31, 1946, and its functions taken over by UNESCO.\textsuperscript{138}

In the third place, the charter of an existing international organization may be thoroughly revised in order to harmonize its provisions with that of a subsequently established organization.

Accordingly, the new Constitution of the International Labour Organization, adopted in Montreal on October 9, 1946,\textsuperscript{139} does not constitute a complete revocation of the original “statute” of the ILO, but rather a far-reaching and formal amendment of the latter with a view to eliminating all references to the League of Nations system and to replacing them by appropriate references to the United Nations. On the basis of its new Constitution the ILO was transformed into a specialized agency while, in principle, it is financially independent of the United Nations. In contrast to the Office International d'Hygiène Publique, the International Institute of Agriculture, and the International Institute of Intellectual Cooperation, the ILO has, of course, not been liquidated as an

\begin{footnotesize}
\begin{enumerate}
\item[135] See Arrangement concluded by the Governments Represented at the International Health Conference, held in the City of New York, from 19 June to 22 July 1946 in Yearbook of the United Nations, 801-802 (1946-1947).
\item[136] See Article 2 of the Protocol concerning the Office International d'Hygiène Publique; it reads:

The parties to this protocol further agree that, as between themselves, from the date when this protocol comes into force, the duties and functions conferred upon the Office by the international agreements listed in Annex I shall be performed by the Organization or its Interim Commission.

\textit{Id.} at 803-804. This Protocol was done in New York on July 2, 1946.
\item[137] Text in T.L.A.S. 1719.
\item[139] For text of the 1946 constitution of the ILO indicating in italics the changes from the 1919 Statute, as amended in 1934 and 1945, in 15 U.N. Treaty Ser. 36-122 (1948).
\end{enumerate}
\end{footnotesize}
international organization and its charter was thoroughly amended, but not terminated.

Finally, a conflict between a later and earlier charter may be resolved by termination of the earlier charter through "desuetude." The demise of the League of Nations furnishes perhaps the most striking illustration for this statement. It has often been overlooked that the Covenant of the League of Nations has never been expressly revoked. Actually, the Assembly Resolution of April 18, 1946, was but designed to terminate the activities of the League and to transfer its assets and functions to the United Nations and the appropriate specialized agencies. It did not expressly revoke the Covenant, but provided that "with effect from the day following the close of the present Session of the Assembly, the League of Nations shall cease to exist except for the sole purpose of the liquidation of its affairs as provided in the present resolution."

In general, the principles relating to conflicts between treaties of the same level and inter se arrangements as well as the principles relating to conflicts between treaties of different level which have been discussed heretofore apply also to conflicts between treaties of different level and inter se arrangements. It is submitted that these principles apply, in particular, to the law of those international institutions whose charters are embodied in multipartite treaties.

V. SPECIAL RULE MAY SUPERSEDE GENERAL RULE

Whenever a legal document (constitution, statute, international agreement) contains a general clause and one or more special clauses the question of the "relative weight" of these clauses may be raised for purposes of interpretation.

According to general principles of interpretation three alternative solutions of conflicts between general and special clauses are conceivable:

(1) The special clause may be considered as cancelling out the general clause in accordance with the maxim lex specialis derogat generali;

(2) The special clause may be considered as supplementary to the general clause;

(3) The general clause may be considered as an overriding provision prevailing over conflicting provisions of a special clause.

It is difficult, if not impossible, to state in general terms which of

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these three conceivable approaches will be selected in interpreting one or more provisions of a particular legal document.

It is obvious, however, that general provisions are not superseded by special provisions if the special clause is considered supplementary to the general clause or if the general clause has the character of an over-riding or controlling provision. Only if the special clause is cancelling out the general clause does it "supersede" or "abrogate" the general clause. This situation is reflected in the maxim *lex specialis derogat generali*. This maxim is primarily a principle of legal logic; it applies, irrespective of the time element, that is to say, in reference to treaty law it applies to the interpretation of the relationship between a special and a general clause in the same treaty as well as to conflicts between such clauses in two or several treaties. The maxim *lex specialis derogat generali* may, however, be combined with the maxim that the later law prevails over the earlier law. A combination of these two maxims, if applied to the relationship between later and earlier treaties, leads to the conclusion that a later treaty prevails over an earlier treaty, if (1) the scope of the later treaty is of the same degree of generality as the earlier treaty, or (2) if the later treaty is a *lex specialis* in relation to the earlier treaty of the type which cancels out the general clause. If, however, the provisions of the later treaty are in effect special clauses which either supplement the earlier treaty provisions or have to give way to a controlling or overriding clause the later treaty does not prevail over the earlier treaty. Moreover, if the scope of the later treaty provisions is broader than that of the earlier ones the maxim *lex posterior generalis non derogat priori specialis* applies.

For the purposes of this paper the possible combination of the maxim *lex posterior derogat priori* with the maxim *lex specialis derogat generali* is of greatest interest. The *Mavrommatis* case furnishes a noteworthy

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142 See on this point also Maxwell, The Interpretation of Statutes 183 (9th ed. 1946) who illustrates the maxim *Generalia specialibus non derogant* by the following quotation:

*where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation . . . that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so.*

Steward v. The Vera Cruz, 10 A.C. 59, 68 (1884) (Lord Shelbourne, C.), and other cases quoted therein. See also 1 Sutherland, Statutes and Statutory Construction § 2021 (3d ed. 1943). " . . . where the later general statute does not propose an irreconcilable conflict, the prior special statute will be construed as remaining in effect as a qualification of or exception to the general law." See furthermore, 1 Anzilotti, Cours de Droit International 104 (1929).
example of a simultaneous application of both principles. Here the Permanent Court of International Justice held:

It is certain that Protocol XII [of the Peace Treaty of Lausanne] is an international instrument, quite distinct from and independent of the Mandate for Palestine. It deals specifically and in explicit terms with concessions such as those of M. Mavrommatis, whereas Article 11 of the Mandate deals with them only implicitly. Furthermore it is more recent in date than the Mandate. All the conditions therefore are fulfilled which might make the clauses of the Protocol overrule those of the Mandate. . . .

The fact that Article 11 [of the Mandate for Palestine] only refers to the Protocol in general terms, and that the Protocol is more recent in date than the Mandate, does not justify the conclusion that the Protocol would only be applicable in Palestine in so far as it is compatible with the Mandate. On the contrary, in cases of doubt, the Protocol, being a special and more recent agreement, should prevail.143 (Italics added).

By contrast, the *Upper Silesia Minorities* case confirms the principles that a general clause whose overriding character is beyond dispute cannot validly be modified by a subsequent *lex specialis*. In this case the Permanent Court of International Justice held:

Before considering the case on its merits, the Court deems it necessary to establish what is the relationship existing between the provisions of Division I of the third Part of the Geneva Convention and those which are to be found in Division II of the same Part.

The Court in this respect recalls the fact that the provisions of Division I are provisions the terms of which were settled beforehand by the Conference of Ambassadors. They had to be accepted such as they were and subject to no modifications. . . . These provisions constitute a separate category among the provisions relating to the protection of minorities, and subsequent provisions entered into between the contracting Parties cannot modify them or be construed as being contradictory and thus diminishing the extent of the protection provided. . . .

In view of the particular and predominant character of the provisions of Division I of the Convention, it follows that any construction of the provisions of Division II which would conflict with the meaning of the provisions of Division I must be excluded. The stipulations of Division II must be construed in the light of the stipulations of Division I and not the reverse.144 (Italics added).

It follows from the foregoing consideration that any realistic analysis of the maxim *lex posterior derogat priori* has to take into account the relative scope or degree of generality of the earlier and the later rule.

143 P.C.I.J., Ser. A No. 2 at 30, 31 (1924).
144 P.C.I.J., Ser. A No. 15 at 30, 31 (1928).
VI. Conclusion

First, the principle *lex posterior derogat priori* is applicable to treaty law if the following five requirements are met: (1) if the later treaty covers the same subject as the earlier treaty; (2) if the later treaty involves the same parties as the earlier treaty; (3) if the later treaty is of the same level as or of a higher level than the earlier treaty; (4) if the scope of the later treaty is of the same degree of generality as the earlier treaty; (5) if the legal effect or effects provided for in the later treaty is or are different from that of the earlier treaty.

Second, if these five requirements are met the earlier treaty is voidable to the extent that it is incompatible with the later treaty.

Third, if one or more of the above five requirements are met only in part, the extent to which the earlier treaty is superseded by the later treaty is to be determined by way of interpretation. It may be controversial, in particular: (1) whether and to what extent a later treaty concluded by two or more parties to a multilateral treaty without consent of all the original parties is valid; (2) whether and to what extent a treaty of the higher level prevails over a treaty of the lower level, *e.g.*, the United Nations Charter over arrangements *inter se* of the members of the United Nations; (3) whether and to what extent a later treaty whose scope is less general than the original treaty (*lex specialis*) conflicts with an earlier treaty which is broader in scope; (4) whether, in case a treaty is declared voidable by the appropriate organ or organs of the community of nations or by appropriate domestic agencies on the ground that it is at variance with a later treaty, such a treaty becomes invalid *ex nunc*, *i.e.*, from the time it has been declared invalid; or whether it becomes invalid *ex tunc*, *i.e.*, from the date it entered into force.

It should be clear that these admittedly controversial questions cannot "automatically" be solved by reference to more or less general principles. Whenever conflicting provisions give rise to reasonable doubt which of two or more rules should be applied in the light of the above principles, the ultimate decision will have to be arrived at with due regard to all relevant circumstances and in accordance with traditional standards of interpretation.