THE DETERMINATION OF PRIORITY BETWEEN CONFLICTING TREATY OBLIGATIONS

By

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ABSTRACT

When parties enter into a treaty, they receive rights and interest and in turn create obligations which they are bound to perform. Most states do not enter just one treaty but multiple treaties, what happens when a state's obligation in a particular treaty conflicts with another obligation contained in a different treaty? How is the choice made on which obligation should be given priority? What is the yardstick for deciding hierarchy? To answer these questions, the writer will take a critical look at what treaties are, why they are formed, what rules are used to decide priority in case of conflict, where they are applied and their inadequacies.

This work will be divided into five parts, Part I introduces the topic by defining what treaties are, and Part II will explain the foundations of international law. In Part III conflicting treaties and the provision of the VCLT and other rules and principles of international law in resolving these conflicts as well as their shortcomings are analyzed; the lex posterior, lex prior and lex specialis rules are discussed in detail, the writer will also discuss where they are applicable and also where they are not. Part IV will explain the role of the court in resolving conflicting treaty based obligations and the method they may employ and Part V will be the conclusion.

Introduction

A treaty is defined as

> "… *an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instrument and whatever its particular designation"*[1]

Treaties have also been defined as follows;

> *written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular*

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[1] International Convention on the Law of Treaties 1969, Article 2.

> *relations between themselves. A series of conditions and arrangements are laid out which the parties oblige themselves to carry out*[2]

Several words can be used to refer to a treaty including convention, protocol, act, charter, covenant, pact and concordat

It is important to decide what the ultimate aim of a treaty is as most treaties have ingrained them norms which in turn create rights and obligations in certain states. Treaties are usually horizontal and not vertical. When their hierarchy is discussed this becomes a major issue especially when one obligation contained in a treaty conflicts with another treaty based obligation. When this happens, if one of the obligation is *jus cogens* then the other conflicting obligation is void but when neither of the obligations have attained the status of *jus cogens* then it become necessary to determine which obligation carries more weight and as a result should be preferred over the other.

1.0. The Foundation of International Law

Ahmad Ali GhourI in his article *"Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?"* argues that "every treaty norm espouses a value since it is meant to protect certain interests. When treaties conflict, a norm representing a higher-level value within the given context is to be preferred over that representing a lower-level value".

Martti Koskenniemi, however, proposes international law to be a technique of articulating political claims in terms of legal rights and duties.[3] He believes that there are no absolutes in international law and posits international law to be ''a process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made''

Koskenniemi states that international law ''is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles and institutions on their side, making sure they do not support the adversary". The view of international law put forward is one of

[2] Shaw M.N., International Law 5th Edition, (2003) Cambridge University Press, Cambridge.
[3]Martti KOSKENNIEMI, ''International Law and Hegemony: A Reconfiguration'' (2004) 17 Cambridge Review of International Affairs 197

domination of one's view point over another and not a collective value agreed by the international community on a standard that is believed to be universally good for everyone.

However this view is faulty as the words like ''interest of mankind as a whole'', ''international community of states as a whole'', or ''common heritage of mankind'' used in proclamations and instruments of international law seem suggest that this is contrary to actual practice.

Jean d'Aspremont also disagrees with the point that there exists a value system in the international legal order. His argument is the "driving forces" in international law are not fixed but rather subject to different variables and changing factors. He believes that the consensus among nations when making international law is based on self serving reasons of the states and not some global value system or some common ground, it means that he believes that the reason states agree to create international law is because it aligns with their individual selfish interest.

The issue with the perspectives of both Koskenniemi and d'Aspremont is that they do not take into account the social factor in international law, no society is composed of equal individuals the same can be said in the world of international law. Koskenniemi fails to recognize the persuasive influence some states may have over other states not based on solely political reason but also on other grounds. D'Aspremont argument fails to recognize there are certain values that the international community holds in high esteem.

It is also important to factor in the confusion that occurs concerning the difference between "norms" and "values". Norms are not values; they are the means by which values are given practical expression especially when it relates to legal terms. In every society, values exist and are only internalized in the form of norms.

On an international scale, this internalization is reflected by the development of *jus cogens*, customs, or general principles of law, or by way of incorporating norms in treaties, each representing a different stage of internalization. Simply put values are lofty ideals, often times abstract in nature, while norms are the measures put in place to ensure that those lofty ideals move from being mere abstractions, which are indefinite to ascertain, to actual practices that have measured consequences. The process of these values becoming recognized practice among states is internalization.

Jus cogens, in this way of estimation, refers to norms that are recognized as fundamental values that have been fully internalized by international society. *Jus cogens*, hence, can be termed value consensus or universal values

Ahmad Ali Ghouri argues that value- internalization was based neither on the conversion of authority-seeking, lobbied, and politically motivated views into universal preferences nor on the self-serving reasons contemplated by d'Aspremont and there is a social element to the development of norms which is the collective good of the society. He states that during this internalization process certain norms emerge which confer societal benefits which trumps individual interests or "unilateral preferences". He believes that in every civilized society there are certain interests that are prioritized and this practice in itself reveals a hierarchy system.

Some norms have reached the status of *jus cogens* through the norm-internalization process. These norms are superior to other norms and international society agrees that a norm amounting to *jus cogens* is to be prioritized over conflicting norms[4].

However when neither of the two norms have achieved this then it is up to the courts by employing various means of interpretations and prioritizing whichever value is most desired. If, for example, the norms of trade and human rights—neither of which has attained the status of jus cogens—cannot be simultaneously achieved, then the social needs of the international community determine how they are to be ordered.

2.0. Conflicting Treaties And The Provision of the VCLT and other Rules and Principles Of International Law in Resolving these Conflicts as well as their Shortcomings

A conflict or incompatibility arises where two obligations cannot be complied with by all addressees of the obligations under all conditions so specified. To resolve this issue the following principles of law will be discussed in relation to resolving conflicting treaty based obligations.

I. The Lex Posterior Rule
II. The Lex Prior Rule

[4] Vienna Convention on the Law of Treaties (VCLT), Art. 53

III. The Lex Specialis Rule

2.1.The Lex Posterior Rule

If two conflicting treaties deal with the same subject matter and are concluded by the same parties, then, according to the *lex posterior* rule promulgated by Article 59 VCLT, the later treaty shall prevail.

An example is the decision of Argentina's Cámara Nacional Especial in *Cía. Territorial de Seguras (S.A.) v. The Clara Y.*[5] The case dealt with the 1879 Montevideo Convention and the 1910 Brussels Convention, both of which bound Argentina and provided conflicting rules regarding the temporal limitations of maritime collision claims. The Court ruled it a classic principle of law that ''a later legislative act will supersede an earlier one''.

Article 30 of the VCLT contains three tests for the application of the *lex posterior* rule to resolve the problem of conflicting treaty obligations.

1. What is the subject matter of the treaties in question? (The subject matter test)

2. What is the chronology of their adoption or accession? (The chronology test)

3. Who are the parties to the conflicting treaties? (The contracting parties test)

There have been complaints that the provisions of the VCLT are largely unhelpful, they are only applicable when the parties to both the earlier and latter treaties are the same. There is also the issue of determining subject matter of a treaty and the time it as concluded. The subject matter of a treaty can be defined as the interest a treaty intends to protect, however there are times when a treaty might govern a particular interest although it is not expressly stated in the treaty. For example an Investment Treaty may contain some provisions which expressly or impliedly create guidelines for human rights norms. The subject matter is the same when the norms in one treaty directly conflicts with the norms contained in another treaty.

[5] *Cía*. Territorial de Seguras (S.A.) v. The Clara Y, Judgment of 4 May 1953, [1953] 20 I.L.R. 429.

Furthermore, adjudicators faced with a treaty that has possibly conflicting objects identify its subject matter in the light of it's ''primary'' object

2.2. Lex Prior Rule

The *lex posterior* rule, however, cannot solve all types of treaty conflicts and its opposite, the *lex prior* rule, may sometimes be applied. For example, the World Court applied *lex prior* instead of *lex posterior* in the *Reservations of the Genocide Convention*.[6] The *Court* pronounced as generally recognized the principle that parties to a multilateral convention are not entitled to conclude an agreement that frustrates or impairs its purpose and *raison d'être.* This essentially is the point of the *lex prior* rule.

In *Matthews and Prince Hans-adam II of Liechtenstein v. Germany*[7], the ECHR prioritized the ECHR over later conflicting treaties.

There is however a lack of certainty of when the *lex posterior* or the *lex prior* should be applied, even the *ILC's Report on Fragmentation* states as much

> *"If the lex prior has general application in contract law, lex posterior has in public law and legislative enactments. So the relationship between the two reflects on the way one views the nature of treaties. Both analogies, however, have their problems."*[8]

The *lex posterior* rule and the *lex prior* have been judged by a few scholars as inadequate and there has been an argument raised that in place of those two rules the *lex specialis* rule should be used instead.

2.3. Lex Specialis Rule

Pauwelyn suggests the *lex specialis* rule or that the special norm should prevail over a general norm.[9] This rule, as applied in its various forms, also cannot, however, resolve treaty conflicts in an orderly manner. Pauwelyn believed that *lex specialis* is just as effective as lex posterior for

[6] *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, [1951] I.C.J. Rep. 15
[7] *Matthews and Prince Hans-adam II of Liechtenstein v. Germany*, Application No. 42527/98, Judgment of 12 July 2001, [2001] Eur. Ct. H.R. para. 47
[8] *ILC's Report on Fragmentation*, at 124–5, para. 241.
[9] . Joost PAUWELYN, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (New York: Cambridge University Press, 2003) at t 378

deciding what the contemporary position of the state's will is. The ICL describes *lex specialis* as either a ''new interpretation'' of the general law or an exception to it.[10] The words ''new interpretation'' suggests that there exists an uncontroversial or exhaustive interpretation of a general rule, this shows an oversight into the fact that the policy considerations of different institutions applying the general rule may trigger its varying interpretations. This aspect of *lex specialis* makes it more applicable in political situations and not in circumstance where the main objective is to determine the hierarchy of norms

This interpretative divide can be classified as an intuitional conflict and not a rationality conflict. This is because different institutions will tend to vary in their interpretation of treaties as their perspective will tend to be colored by their main objective. For example, a trade institution like the World Trade Organization and a human-rights institution like the European Court on Human Rights may have conflicting interpretations of one rule, as a consequence of the difference in their perspectives. In this situation which will be considered to be the general rule and the other the "new interpretation" of "*lex specialis*" While using the *lex specialis* rule may be practical within a particular system, conflicts may arise where a specialized institution is required to apply and interpret norms from the perspective of another system (for example, a trade body applying or interpreting a norm from the perspective of environmental law).

Ahmad Ali Ghouri opines that this conflict is not just merely a normative one but a value oriented one and can only be solved be establishing a hierarchy between conflicting norms and/or their interpretations and he believes that none of the aforementioned rules can be so.[11]

The use of the *lex specialis* as an exception to the general rule is also believed to be unhelpful in resolving institutional conflict. In its narrower sense, *lex specialis* is considered a conflict-resolution technique for when two valid and applicable legal provisions provide incompatible directions for the same facts. In this situation, the ILC Report suggests that the ''special'' provision, that is, the rule with a more precisely ''delimited scope of application'', should be

[10] *ILC's Report on Fragmentation* at 30 -5
[11]Ahmad Ali GHOURI, *Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?,* Asian Journal of International Law, (2012) at 19

prioritized[12]. However it also admits that it is difficult to determine what would characterize a provision with a more precisely ‘‘delimited scope of application’’.

The ILC Report has also suggested that conflicts between a territorially limited general regime and a universal treaty can only be decided on their ‘‘merits’’, and not on the basis of *lex specialis*, without explaining what those ‘‘merits’’ are.

Lex specialis, as an exception to a general rule, nevertheless remains helpful in resolving conflicts arising within a regime, especially where a treaty itself provides special rules of priority; even if it is unhelpful in the context of a regime-to-regime conflict.

3.0. The Role Of International Courts In Resolving Conflicting Treaty Based Obligation

International courts and tribunals have a tendency to avoid and not resolve treaty conflicts, for which they have developed various techniques[13] like reconciling conflicting norms, declaring treaties as parallel instead of conflicting,[14] limiting their jurisdiction to only one of the treaties concerned,[15] or simply denying the existence of a treaty conflict.[16]

Borgen, however, has rightly said that these harmonizing efforts may resolve superficial conflicts but not genuine conflicts[17] but there have been situations where the court has resolved international issues.

In *Soering v. the United Kingdom [Soering]*[18], the European Court of Human Rights (ECtHR) declared that the United Kingdom’s obligation under the European Convention on Human Rights

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[12] *ILC’s Report on Fragmentation*, at 35, para. 57
[13] *ILC’s Report on Fragmentation,* at 25 (stating that ‘‘[t]reaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflicts
[14] *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) (*Jurisdiction and Admissibility), Judgment of 4 August 2000, [2000] International Tribunal for the Law of the Sea, online: ,http:// untreaty.un.org/cod/riaa/cases/vol_XXIII/1-57.pdf., at para. 52.
[15] *Costa Rica v. Nicaragua*, Central American Court of Justice (CACJ), Judgment of 30 September 1916, (1917) 11 American Journal of International Law 181 at 227–8. For a detailed analysis of the case, see Borgen, supra note 5 at 591–4 and El Salvador v. Nicaragua, (CACJ), Opinion and Decision of 9 March 1917, (1917) 11American Journal of International Law 674 at 729.
[16] See Oscar Chinn *(U.K. v. Belgium),* [1934] P.C.I.J (ser. A/B) No. 63 (Dec. 12)
[17] Christopher J. BORGEN, *‘‘Resolving Treaty Conflicts’’* (2005) 37 George Washington International Law Review 573 at 640.
[18] *Soering v. United Kingdom*, [1989] 161 ECHR (Ser. A) Rep. [Soering].

(ECHR) would prevail over the violation of the extradition treaty between the United Kingdom (UK) and the United States of America (US).

In this case the European Union Commission attempted to decide on the matter an argument was raised that if the EU Commission did so, it would be tantamount to them interfering with an international treaty, the reason was because the U.S was not a party to the ECHR and it was upon this document that the EU Commission had based their case. By prioritizing the *non-refoulement* obligation (as contained in Article 3 ECHR) over the extradition obligation, the Court neither pronounced the *non-refoulement* obligation as jus cogens nor declared the UK/US extradition treaty void. On the contrary, it created an exception based on value-oriented reasoning.

The Court did not deny the beneficial interest of extradition in preventing fugitive offenders from evading justice, but instead declared that the *non-refoulement* norm represented an interest that was superior to it. This *non-refoulement* interest may indeed attain the status of jus cogens, 216 and only then can it declare a conflicting treaty void. And in that case, it will be unnecessary to have a convention like the ECHR to establish the right of the individual. By creating this exception, the Court has nonetheless contributed to this value-internalization process and set a precedent.

Conclusion

Treaties are an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instrument and whatever its particular designation. There are contain norms that seek to internalize values and not simply enforce political preferences or self seeking interest of states parties.

Where two obligations treaty based obligations cannot be complied with, conflict has occurred and such conflict must be resolved. In doing so the following rules may be used

I. *lex posterior* rule (which suggests that the latter enactment should be given priority over the former enactment)
II. *lex prior* rule (which state that where there is a conflict the earlier treaty ranks higher)
III. *lex specialis* (which believes that the specific should be picked over the general rule) but most of these rules are either ambiguous or not clearly explained which is why the court tend to refrain from adjudicating on conflicts. But on the few times they have it has been based on the context of the case. E.g the *Soering case*

The best approach in order to resolve the conflicting treaty based obligation would seem to be establishing a value hierarchy based on the situation and subject matter as suggested by Ahmad Ali GHOURI, creating a hard and fast rule may end up being ineffective as seen in the case of the lex posterior rule, the *lex prior* rule and the *lex specialis*, as these rules seem to work when applied within the framework of the same regime but are majorly unhelpful in regime against regime conflict (e.g. trade interest vs. human rights). Rather an objective analysis of the issue at hand by an international court as was done in *Soering*[19] by the ECtHR.

[19] *Soering v. United Kingdom* supra

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