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A CRITICAL APPRAISAL OF THE EFFICACY OF INTERNATIONAL LAW INRESOLVING CONFLICTING TREATY-BASED OBLIGATIONS

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Abstract

There is no doubt that the system of international law has become increasingly fragmented and has created a situation where the probability of contradictory obligations is extremely high owing to the absence of a well-establishedhierarchical normative structure. This makes the interpretation and application of overlapping treaty obligationsuncertain, as where the rights and duties of parties to a treaty under international law are unclear because of contradicting obligations established by another treaty,compliance with either of the instruments becomes difficult. It is against this background that this paper attempts to address the issue of resolving conflicts existing between treaty norms and obligations in international law.

Keywords:Treaty Conflict, Conflict Resolution, International Law

1.0 Introduction

There is no universally accepted definition of 'conflict of treaties' in international law.In the strict sense, a conflict arises when it would impossible for a party to twotreaties to apply one without necessarily violating the other.[1]This approach has been criticised for being too restrictive as it fails to take into consideration the varying degree of contradictions which may exist between treaty obligations and their effect on the coherence and effectiveness of international law.[2]Conflict of treaties may however be interpreted broadly to include not only situations whenit is impracticable for a State to comply with two treaties simultaneously but also when a treaty will frustrate the objectives and purpose of another treaty.[3] In the event of such conflicts, the question of which treaty should prevail and whether there are existing

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[1] H. Kelsen, 'Derogation', in RA Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (Bobbs-Merrill New York 1962) 339–55.

[2]NeleMatz-Lüc, 'Treaties, Conflicts between' (2010) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1485?print=pdf> accessed 12 March 2021.

[3]C.J. Borgen, 'Resolving Treaty Conflicts' (2005) 37 GW Intl L Rev 573 https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1122&context=faculty_publications accessed 12 March 2021.

principles at law to resolve this conflict has been raised. This paper therefore seeks to examine how treaties conflict in international law and the principles to be applied in resolving such conflicts. Following the introduction, the rest of this paper has the following structure. Conflicts between Treaties and other Sources of International Legal Obligations are addressed in Section 2. Resolving Conflicting Treaty-Based International Obligations is covered in Section 3. The Inadequacies of the VCLT andGeneral Principles of Law in Conflict Resolution are examined in Section 4. This paper is concluded in Section 5.

2.0 Conflictsbetween Treaties and other Sources of International Legal Obligations

Normative conflicts may arise between a treaty and another treaty, *jus cogens*, and customary international law. *Jus cogens*, which is also known as a peremptory norm, is a fundamental principle of international law binding on all States within the international community by virtue of *Articles 53 and 64 of the Vienna Convention on the Law of Treaties*(VCLT).[4]The *jus cogens* norm is superior in hierarchy and overrides a treaty in the event of conflict notwithstanding which of the two was first in time.[5]With respect to conflicts between a treaty and custom, the VCLT does not expressly present a stance on this issue as in the case of a*jus cogens* norm. However, *Article 31(3)(c)* provides that "there shall be taken into account, together with the context...any relevant rules of international law applicable in the relations between the parties". It has therefore been argued that contradictory obligations arising between a treaty and customary international law will most likely be resolved either by establishing the parties' manifest intent or applying the general maxims of interpretation (*lexspecialis*,*lex posterior*, or *lex prior*)in the absence of evidence of an intended relationship between the treaty and custom.[6]

3.0 Resolving Conflicting Treaty-Based International Obligations

For the purpose of reconciling treaty conflicts in international law, solutions ranging from the operation of VCLT rulesand conflict clauses to the application of general canons of construction and the harmonious interpretation of treaties are discussed under this section.

[4]United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 331 UNTS 1155 https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed 12 March 2021.
[5]S.A. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (MartinusNijhoff, Leiden 2003) 53.
[6]Matz-Lüc (n 2 above).

3.1 The Vienna Convention on the Law of Treaties

The VCLT, commonly known as the "treaty on treaties", is an international agreement which establishes general rules and guidelines for the interpretation and operationof treaties. *Article 30 of the VCLT*addresses conflicts that may arise between "successive treaties relating to the same subject-matter."A clear reading of *Article 30(1)*indicate that the set of rules laid down in the subsequent paragraphs (2-5)are to be applied to all treaty conflicts except to conflicts with the United Nations Charter. This provision is a reflection of thehierarchical conflictprinciple embodied in *Article 103 of the United Nations Charter* which provides that members' obligations in the Charter shall overridetheir conflicting obligations under any other treaty.[7]According to *Article 30(2),* when a treaty specifies that it is not to be considered incompatible with an earlier or later treaty, the provisions of that other treaty prevail. This provision makes reference to subordination clauses, that is, clauses concluded by State parties which concede priority to other treaties.[8]An example of such a subordination clause is found in *Article 73(1) of the Vienna Convention on Consular Relations* which stipulates that "the provisions of the present Convention shall not affect other international agreements in force as between States Parties to them."[9] Asides from subordination clauses, there is another type of conflict clauses not mentioned in*Article 30(2)* and these are clauses claiming priority over other treaties.[10]This type of conflict clause is illustrated in *Article 8 of the North Atlantic Treaty* where States parties undertake to refrain from establishing any international engagement which is in conflict with the treaty.[11]

Where a conflict clause is lacking in the conflicting treaties, the rules laid down in *Article 30(3) and (4)* will apply.[12]*Article 30(3)* concerns situations where all the parties to the earlier treaty are also parties to the later treaty while *Article 30(4)* governs situations where the parties to the later treaty do not include all the parties to the earlier one. Theprinciple of *lex*

[7] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed 12 March 2021.
[8]O. Dörr and K. Schmalenbach, Vienna convention on the law of treaties: A Commentary, (Berlin: Springer, 2012).
[9] United Nations, *Vienna Convention on Consular Relations*, 24 April 1963 <http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf> accessed 12 March 2021.
[10]Dörr and Schmalenbach (n 8 above).
[11]North Atlantic Treaty Organization, *The North Atlantic Treaty Organization*, (1950) <www.nato.int/nato_static_fl2014/assets/pdf/stock_publications/20120822_nato_treaty_en_light_2009.pdf> accessed 12 March 2021.
[12]Dörr and Schmalenbach (n 8above).

*posterior*is applicable to both provisions according to which the later treaty overrides the earlier one. The operation of paragraph 3 is however based on two differentcases. The first case relates to where the earlier treaty has been terminated or suspended in operation under *Article 59 of the VCLT*. In this case, there is no conflict of treaties since the earlier treaty is no longer in force and therefore no longer applicable.[13] In the second case where the later treaty does not intend to terminate or suspend the earlier treaty, a conflict ensues between both treaties. In the event of such conflict, the earlier treaty remains in force and applies only to the extent that its provisions are compatible with those of the later treaty.[14]The rules in paragraph 4 are applicable where the parties to the later treaty do not include all the parties to the earlier one. Two different cases can also be seen in this provision. The first case involves the relationship between States parties to both treaties according to whichthe same rule applies as in paragraph 3. The second case involves the relationship between a State party to both treaties and a State party to only one of the treaties. In this case, the treaty to which both States are parties to governs their mutual rights and obligations. The rules under *Article 30(5)*indicate that where the conclusion or the application of a priority treaty leads to the breach of an inferior treaty, the States parties to the latter have the right to terminate or to suspend the treaty according to *Article 60 of the VCLT*, in conjunction with the right to invoke the international responsibility of the State which has infringed their treaty rights.[15]

3.2 Application of Canons of Construction

In resolving treaty conflicts, recourse may be made to the canons of construction such as the *lex posterior*, *lex prior*and*lexspecialis*principle which were originally derived from domestic legal orders but have now been generally accepted in international law as mechanisms of conflict resolution. In this section, the three canons of construction will be discussed with the *lex prior* principle treated in concert with the doctrine of *pactasuntservanda*.

3.2.1 Lex posterior

The*lex posterior derogatlegi priori*principle applies to situations where twoconflicting treaties govern the same subject matter and are concluded by the same parties, the result of

[13]*Ibid.*
[14]*Mavrommatis PalestineConcessions (Greece v UK*) [1924] PCIJ Rep Series B No 2.
[15]Dörr and Schmalenbach (n 8 above).

which the later treaty will prevail over the earlier one. The principle has sometimes been referred to 'as a general principle of law recognized by civilized nations' under *Article 38(1)(c) of the Statute of the International Court of Justice*(ICJ),[16] as a customary law principle of interpretation.[17] The principle has been applied by the Permanent Court of International Justice (PCIJ) in a plethora of cases including the *Mavrommatis Concession cases*[18] and the *Electricity Company of Sofia case*.[19] It has been noted that the application of the *lex posterior* principle is subject to five requirements which must be established.First, the later treaty must have the same subject matter as the earlier treaty. Second, the later treaty must be concluded by the same parties as the earlier treaty. Third, the later treaty must be on the same level or a higher level as the earlier treaty. Fourth, the scope of the later treaty is of the same degree of generality as the earlier treaty and finally, the legal effects of the later treaty are different from the earlier.[20]

3.2.2 Lex prior and the doctrine of pactasuntservanda

As opposed to the *lex posterior* principle, *lex prior* is applicable only for the purpose of specifically enforcingan earlier treaty.[21]According to the ILC Study Group,most of the cases in support of the *lex prior*principle originated from the beginning of the twentieth century fromthe Central American Court of Justice and the PCIJ. Both courtsapplied the*lex prior*principle where there was a diversity of parties between the first and second treaty,[22] but was reluctant to pronounce the later treatyvoid either due to jurisdictional issues[23]or by not explicitly recognizing a conflict between the later and earlier treaties as seen in *Oscar Chinn's case* decided by the PCIJ.[24]The VCLT codifies the doctrine of *pactasuntservanda*which can be regarded as a similar rule of interpretation to the *lex prior* principle.According to the principle, States are bound by the obligationsthey undertake in

[16]Hans Aufricht, 'Supersession of Treaties in International Law', Cornell Legal Quarterly vol. 37 (1951-52) p. 655.
[17] M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing, 2005) p. 322.
[18]*Mavrommatis Concessioncases* (n 14above).
[19]*Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* [1939] PCIJ Rep Series A/B No 77, 92.
[20]Aufricht(n 16 above) p. 700.
[21]Borgen (n 3 above).
[22]*San Juan River (Costa Rica v Nicaragua)* reprinted in (1917) 11 AJIL 181 (Cent Am Ct of Justice 1917); *Customs Regime between Austria and Germany (Advisory Opinion)* 1931 PCIJ Rep Series A/B No 41, 50.
[23]*Ibid.*
[24]*Oscar Chinn Case (UK, Ireland v Belgium)* 1934 PCIJ Rep Series A/B No 63 (Hurst, J, dissenting) in (1938) 3 WCR 416, 462.

treaties and are expected to perform these obligations in good faith.[25]In the event of treaty conflict, the doctrine has been interpreted by some legal scholars as not favouring the earlier treaty but rather to ensure that boththe earlier treaty and later oneareenforceable, even though this may create a situation of incompatible obligations.[26] However, others have claimed that the doctrine favours the earlier treaty while preventing the enforcement of the later one.[27] It is clear that under both views, the earlier treaty must be honoured. However, there seems to be no consensus as to what the effect of the doctrine of *pactasuntservanda* will be on the later treaty. This has led to the burning question of whether the later treaty is to be pronounced void or be allowed to operate without frustrating or impairing the earlier treaty.[28]

3.2.3 Lex specialis

The principle of *lexspecialisderogatlegigenerali*suggests that if a particular matter is being regulated by a general norm as well as a more specific one, the special norm is to prevail over the general standard.[29]In the event of a conflict between a general and a specific treaty, it has been noted that by applyingthe*lexspecialis* principle, the specific treaty is either interpreted within the context of the general standard, or replaces the general treaty.[30]An example of the application of the *lexspecialis*can be seen in the relationship between international human rights and humanitarian law. The ICJnoted in *Legality of the Threat or Use of Nuclear Weapons case*,[31] that in situations relating to armed conflict, both international humanitarian law and international human rights law were applicable and the former was *lexspecialis* with regard to the latter. Another example of the application of the *lexspecialis*is found in *Article 55 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful*

[25]VCLT (n 4 above) Article 26.
[26] See A Schulz, *The Relationship Between the Judgments Project and Other InternationalInstruments* (Hague Conference on Private International Law, December 2003) Preliminary Doc No 24, 14.
[27]See Aufricht (n 16 above) p. 672 - 673 (arguing for interdiction of later conflicting treaties even in cases of non-identical parties).
[28]C.J. Borgen, 'Part IV Treaty Application, 18 Treaty Conflicts and Systemic Fragmentation' (2020) <https://opil.ouplaw.com/view/10.1093/law/9780198848349.001.0001/law-9780198848349-chapter-19?print=pdf> accessed 12 March 2021.
[29]D. Banaszewska, 'Lex specialis' (2015) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2171?print=pdf>accessed 12 March 2021.
[30]General Assembly, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (13 April 2006) Fifty-eighth session A/CN.4/L.682 https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf accessed 12 March 2021.
[31]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226.

Acts[32]which provides that the Draft Articlesdo not apply where an internationally wrongful act or the implementation of the international responsibility of a State are governed by special rules of international law.[33] In relation to the law of the sea in international law, some attempts have been made to establish the relationship between the UNCLOS and specific treaties as one reflecting a *lexspecialis* relationship. For example, in the *Southern Bluefin Tuna Case*,[34]Japan had contended that the Convention on the Conservation of the Southern Bluefin Tuna was both *lexspecialis* and *lex posterior* with regard to the UNCLOS and therefore excluded the application of the latter. However, the Arbitration Tribunal noted that both legal instruments were applicable in parallel, because "there is no reason why a given act of a State may not violate its obligations under more than one treaty".[35]

3.3 Harmonizing interpretation of conflicting treaties

The ILC has considered harmonizing interpretation as a feasible instrument which can be applied to resolve conflicts between treaties.[36]According to the ICJ in the *Right of Passage case*,[37] it is "a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it".The principle ofharmonizing interpretation was recognised in *SD Myers v Canada*[38] and *SPP v Egypt* cases[39]where tribunals sought the harmonious readings of parties' obligations in such a way that there was no true conflict between the treaties. The VCLT, while establishingsome rules of interpretation,[40]makes no mention of harmonizing interpretation in the event of treaty conflict. *Article 31(3)(c)* can however be usedas a means of resolving conflicts by 'systemic integration' of norms, as it

[32]International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf accessed 13 March 2021.
[33]See *Case of the SS Wimbledon (Great Britain v Germany)* [1923] PCIJ Rep Ser A No 1; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3.
[34]*Southern Bluefin Tuna (New Zealand and Australia v Japan) (Award on Jurisdiction and Admissibility)* (2000) 23 RIAA 1.
[35]*Ibid*, para 38(c).
[36]Matz-Lüc (n 2 above).
[37]*Case concerning the Right of Passage over Indian Territories (Portugal v India) (Preliminary Objection)* [1952] ICJ Rep 125, 142.
[38]*SD Myers Inc v Canada (US-Canad*a) (13 November 2000) [2001] 40 ILM 1408 (NAFTA/UNCITRAL Tribunal).
[39]*SPP (ME) v Egypt*, ICSID Case No ARB/84/3 (1994) 19 Ybk Commercial Arbitration 51.
[40]VCLT (n 4 above) Article 31.

provides that in the interpretation of a treaty, one should take into consideration any other relevant rules of international law applicable in the relations between the parties.

4.0 Inadequacies of the VCLT and General Principles of Law in Conflict Resolution

It has been argued that both the VCLT and the general principles of law have proven inadequate in resolving treaty-based obligations in international law. The VCLT techniques prescribed in *Article 30*on conflict resolution have been criticised for being too narrow and restrictive.Emphasis is particularly placed on the difficulties in determining which treaties have the same subject matter.Some scholars contend that although treaties about different policy areas such as trade and the environment may overlap, they are not about the same subject matter.[41] Others have responded that this argument represents a narrow reading and interpretation of the VCLT, as where the obligation of one treaty frustrates or causes the violation of obligations under another treaty; both treaties aredeemed to cover the same subject matter.[42] There are also those who have interpreted the 'same subject matter' phrase in terms of the generality or specificity of each treaty.[43] Treaties with the same level of specificity may be on the same subject matter, with those that are not falling into the category of *lexspecialis.*[44]The canons of construction have also been criticised for not providing a clear solutionto treaty conflicts.A significant problem concerning the application of the *lex posterior* principle to conflicting treaties in particularis the determination of which treaty is the earlier and which is the later.[45]Different temporal elements such as the date of adoption of the treaty, its entry into force, or the date of ratification by each of the States parties can be considered. The VCLT makes no clear pronouncement on this issue. However, the decisive daterecognized by the ILC and affirmed by several scholars of international law is the date of adoption of the treaty, since the adoption of a treaty always constitutes a new legislative intention.[46]

[41]Borgen (n 3 above) pp. 603-604.
[42]J. Klabbers, *Treaty Conflict and the European Union* (CUP, Cambridge 2009) p. 93.
[43]P. Daillier, M. Forteau, and A. Pellet, *Droit International Public* (8th edn LDGJ, Paris 2009) 291.
[44]*Ibid.*
[45]Matz-Lüc (n 2 above).
[46]Dörr and Schmalenbach (n 8 above).

Conclusion

This paper has examined how treaties conflict in international law and the various principles to be applied in resolvingconflicting treaty-based obligations. It has further attempted to evaluate the specific inadequacies of the VCLT and the general principles of law in conflict resolution. The fragmentation of international law has no doubt created a system of normative conflict arising between treaties. International courts and tribunals are known to have the tendency of avoiding treaty conflicts and have therefore developed certain techniques such as declaring treaties as parallel rather than conflicting,[47]limiting their jurisdiction to only one of the treaties concerned,[48] or simply denying the existence of a conflict between treaties.[49]It is clear that the current rules of conflict resolution contained in the VCLT and the canons of construction are unable to solve all treaty conflicts. It has therefore been suggestedthatfocus be made on minimizing the effects of a treaty conflict, rather than applying a formalistic solution which does not address the underlying problems.[50] Where methods of treaty drafting take into consideration the structure of the international legal system and methods of treaty interpretation recognize how treaties in one policy area can affect treaties in another, the scope of subsequent treaty conflicts can be effectively minimized.[51]

[47]*Southern Bluefin Tuna case* (n 34 above).
[48]*San Juan River case* (n 22 above).
[49]*Oscar Chinn Case* (n 24 above).
[50]Borgen (n 3 above).
[51]*Ibid.*

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