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RESOLUTION OF CONFLICTING TREATY-BASED INTERNATIONAL OBLIGATIONS: THE DILEMMASAND ALTERNATIVES UNDER INTERNATIONAL LAW

By

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ABSTRACT:

From the time ofThales, the western philosopher, to the Stoics and Skeptics, ancient Greek philosophy has provided the roots for western intellectual traditionswhen it relates to the life of reasoning, rational thinking andconflict resolution. Today, unlike the days of old, conflicts have transcended from the occasion of wars and battles for territories to the proliferation of treaties under international law. Overtime, it hasnow been discovered that the viability of international law, as a legal system, rests principally on the viability of treaties as a source of law. In fact, in the second half of the 20th century,the international system was supported by the development of treaties. As such, these came with states making use of treaties as the primary tool in the construction of international institutions and in the codification of norms. Notwithstanding, with the passage of time, the very success of treaties as an instrument of policy sustenance has birthed a new dilemma: a superfluity of treaties which tend to overlap and with increasing frequency, conflict with one another. To this end, this essay addresses conflict between treaties, and considers how lawyers and policy makers may react to the challenges of treaty-basedconflictscum proliferation. Sufficient arguments are laid to prove that current rules are inadequate to provide clear, systematic remedies to the resolution of treaty-basedconflicts under international law.Responding to treaty-based conflicts requires more than just a revision of the relevant provisions of the VCLT. Given this, new landscapestowards the resolution of treaty conflict and congestionare mapped out.

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Introduction

How are treaties between the United States and its European partners being affected by the construction of the European Union? Should the rules of the World Trade Organizationsupersede International Environmental Agreements? What can be done to avert the rising conflicts among Iran, Russia, and certain Asian statesin relation to the control of the oil beneath the Caspian Sea? Although these topics are distinctly disparate, all of these dilemmas are, in part and fact, disputes over whether treaties should be given preference over the other.[1] As a matter of pertinence, these matters are propelled by diverse political and economic concerns. Regardless of the source of concern, notwithstanding, the question remains but one: Is there a principled method by which states in the international system can resolve conflicting obligations between treaties? As a result of the proliferation of treaties in recent years, this question become more important than ever.

After the unarguable success of international law in the last fifty years, there is also no doubt that international law has become increasingly dysfunctional within this decade of the 21st century due to the ravaging number of treaties and the absence of a useful method in resolving them. As it is, the International Law Commission (ILC)has turned its focus to the problem of treaty-based conflict and the potential fragmentation of international law.[2] Nevertheless, a neck-deep setback remains that there is no generally accepted definition of what constitutes a conflict between treaties. In the strict sense, a conflict occurs when a party to two treaties cannot honor the obligations under both treaties simultaneously. However, in fact,states are not only concerned with when it becomes impossible for a state to abide to two treaties, but also when one frustrates

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[1] Thomas M. Franck, *the courts, the state department and national policy: a criterion for judicial abdication,* 44 minn. l. rev 1101, 1101 (1959-1960) (disorder, as it is known to a lawyer, is perhaps less frequently an absence of legal order, than a surfeit of it): see also, David Kennedy, *Tom Franck and The Manhattan School*, 35 N.Y.U.J, int'l & pol 397, 397 (2003)

[2] The sixth committee of the general assembly (which deals with legal affairs) supported the International Law Commission (ILC) recommendation for a broad study dealing with treaty conflicts and that such a treaty should be oriented on the guide provided by the Vienna convention on the law of treaties. Int'l law comm'n*report of the study group on fragmentation of international law*. U.N GAOR 55th session.

the motive of the other. Under either of these, the question for policymakers stands still: Which treaty should prevail? Are there any potent methods of resolving these conflicts?

Factually, the method for resolving treaty is clearly made for in the Vienna Convention on The Law of Treaties (VCLT). Finalized in 1969 and made effective as of January 27, 1980, the VCLT is regarded as the "treaty on treaties" which sets out to govern how treaties are to operate and provides the means of resolving and avoiding potential disputes.[3] Article 30 of the VCLT in particular addresses conflicts between 'successive treaties relating to the same subject-matter'. Beyond the normative framework of Article 30, disputes are solved through references to general principles of treaty interpretation adapted from the law of contract and state practices in regards to treaties, amongst few others.

Notwithstanding, this essay contends that the VCLT's treaty conflict provisions are neither an accurate description of the current state of practice, nor are they a sufficient prescription for how states should act. Nonetheless, even though the VCLT is highly flawed in regards to the resolution of conflicting treaties, there still exist no preferable set of rules as to how to resolve such conflicts. On this basis, in lieu of relying solely on the VCLT, there is a need to adopt new "standard operating procedures" to address treaty-based conflicts. Given that dilemmas have more than one source, tackling them should require more than one technique.

1.0. Typology of Treaty Conflict in International Law

Treaties are a vital source of international law, and at the fore of its development. According to the VCLT, "a treaty is an international agreement concluded between states in a written form and governed by international law, whether embodied in a single document or more related instruments". By their actual contractual nature, treaties are horizontal instruments that possess no inherent priority over the other.[4]As a result, they are commonly analyzed in terms of rights and obligations created by treaty norms, thus, rendering treaties as bundles of public or private

[3] Christopher J. Borgen*, 'resolving treat conflicts'*, (st. john's law scholarship repository, 2005) <https://scholarship.law.stjohns.edu> last accessed 16th march 2021

[4]Christopher J. Borgen*, 'resolving treat conflicts'*, (st. john's law scholarship repository, 2005) <https://scholarship.law.stjohns.edu> last accessed 16thmarch 2021

rights and obligations. In turn, this suggests that treaty-based conflict can be resolved by balancing the rights which are being guaranteed by norms. This balancing of rights, however, leads to a discussion concerning the "right-obligation" equation. That is, who holds what right, against whom, by whom and on what legal basis those rights can be prioritized or enforced.[5]In this regard, concerns are levelled in terms of how existing treaty-based conflicts can be resolved.

Noteworthy, although there are numerous ways of describing how treaties conflict, two descriptive methods stand out in response to the effect of treaty congestion: The subject-matter perspective which focuses on whether treaties overlap in terms of substantive provisions and the structural analysis of treaty-based conflict.[6]To begin with, the VCLT's conflict provision apply only to successive treaties with the same subject-matter. This formulation has resulted in several debates over whether or not certain treaties are concerned with the same subject-matter. For instance, NAFTA[7] and the General Agreement on Tariffs and Trade (GATT) cover much of the same subject-matter, although the GATT covers several others as well. Similarly, the Inter-American Convention on Human Right and The International Covenant on Civil and Political Rights also cover same subject matter as well.[8] Analysis which focus solely on overlapping subject-matters are often propelled bynormative concerns favoring one regime over another. However, although it is important to consider the substantive results of treaty-based conflicts, it is similarly vital to consider its underlying structural issues.

In considering the structure and forms of treaties, one can describe a treaty in several forms. In other words, it could be bilateral or multilateral.[9] While several treaties can generally be described as regulating or liberalizing, a more precise study of treaty norms reveals that norms in international law have one of four basic functions: (1) prohibiting norms obligating states not to

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[5]*Ibid*

[6] Christopher J. Borgen*, 'resolving treat conflicts'*, (st. john's law scholarship repository, 2005) <https://scholarship.law.stjohns.edu> last accessed 16th march 2021

[7] North America Free Trade Agreement (Nafta)

[8] C. Wilfred Jenks, *the conflict of law-making treaties*, 30 Brit. Y.B int'l 401, 426 (1953) (Hereinafter Jenks, law-making treaties); see also, JoostPauwelyn, Conflict Of Norms In International Law: How Wto Law Relates To Other Rules Of International Law (2003)

[9]JoostPauwelyn, Conflict Of Norms In International Law: How Wto Law Relates To Other Rules Of International Law (2003) <https://scholarship.law.stjohns.edu> last accessed 13th march 2021

do something (2) command norms obligating states to do something (3) permissive norms giving states the right to do something; and (4) exempting norms giving states the right not to do something.[10]

As a matter of fact, this characterization is necessary when comparing the legal obligation of competing treaties. Although these treaties could be categorized as "legislative" or "contractual" treaties, the VCLT does not recognize this categorization.[11] The variety of treaty-based conflicts have led to a number of possible solutions which include the techniques of drafting treaties, the application of general principles of law and interpretation, and ultimately, the codified rules in the VCLT. Even though these potential solutions exist, their relationship to each other is sometimes at unease.[12]

Prior to the codification of the VCLT, the majority of reported international tribunal cases addressing the resolution of two conflicting treaties were decided during the period between World War 1 and 11.[13] Some of whichranged from the case of *Costa Rica*v. *Nicaragua*, 1916, *TheAustro-German Customs Union*, 1931 to *TheOscar Chinn Case*, 1934. However, what is most notable is that before the codification of the VCLT,several techniques were adopted to resolve these treaty-basedconflicts. First was the drafting technique, which is probably the most effective way to avoid or resolve potential treat conflicts. And second was policymakers relying heavily on general rules of interpretation derived from Roman law and from domestic canons of contractual or structural constructions.[14]In this case, certain rules of interpretations focused on which treaty was earlier or later in time. *Lex prior*, for instance, would specifically enforce the earlier or first treaty. Nevertheless, by contrast, *lex posterior derogate legi priori (lex posterior)* considered the evolving intent of the parties and finally favored the most recent treaty of the

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[10] *Ibid*

[11] U.N Charter art. 103; see also Restatement (Third) Of The Foreign Relations Law Of The United States 323 cmt. B (1987)

[12] Wolfram Karl, *conflict between treaties*, in 4 Encyclopedia Of Public International Law 935, 936 (Rudolf Bernhardt Ed, 2000)

[13] Wolfgang Friedmann, *the uses of 'general principles' in the development of international law*, 57 AM. J. int'l l. 279, 282 (1963)

[14] Christopher A. Ford, *judicial discretion in international jurisprudence*: article 38(1)(c) and *'general principles of law'* 5 Duke J. Comp. & int'l l. 35, 66-72 (1994) (critiquing comparativism as a technique)

same parties as seen in the *Mavrommatis Concession Cases* and the *Electricity Company of Sofia Case*.[15]

Notwithstanding, three major problems have been highlighted with pre-VCLT treaty-based conflict doctrine and techniques. Principally, it was unclear when a treaty conflict actually existed. The *Oscar Chinn Case* dissenters brought this problem to light by insisting that a treaty conflict existed but that the majority were blind to it.[16] More so, there was a disagreement over the status of the conflicting later-in-time treaty. In failing to apply the strict form of *lex prior* or *lex posterior*, the court seemed not interested in finding out whether the earlier treaty was in controlor the later treaty abrogated it. The *San Juan River Case* exemplified the third dilemma of the conflict doctrine. This was the limits of a decentralized legal system. As a result of the lack of jurisdiction, judges could not affect the rights of parties who were not part of the treaty system to which the court belonged.[17]

As a result, in order to tackle these weaknesses, as well as the unnecessary vagueness of the general principles and customary rules regulating treaty-based conflicts resolution, the international community resulted to the codification of the VCLT. Unfortunately, as it is, these codifications have turned out to be less potent solution to treaty conflicts, and has further led to fresh challenges.

2.0. The Despondence of the VCLT and the Modern Response to Treaty-Based Conflict

As with any treaty, only states that have ratified and signed the VCLT can be bound be it. However, an appreciable number of the convention's provisions reflect pre-existing practices and the prevailing *opinio juris*.[18] In spite of the fact that the international community largely views the VCLT as a codification of current customary international law, at the instance of its

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[15] *Id.* (citing *MavrommatisPalestine Conscessions* (Greece V. Gr. Brit) 1924 P.C.I.J. (ser. A) no. 2, at 31 (Aug 30); *Electricity Company of Sofia*, 1939 P.C.I.J (ser, a/b) no. 77 at 92 (Apr. 4); see also the *jurisdiction of the European commission of the danube advisory opinion*, 1927 P.C.I.J

[16] Christopher J. Borgen*, 'resolving treat conflicts'*, (st. john's law scholarship repository, 2005) <https://scholarship.law.stjohns.edu> last accessed 16th march 2021

[17] *Ibid*

[18] Rudolf Bernhardt, *Treaties*, in 4 ENCYCLOPEDIAS of PUBLIC INTERNATIONAL LAW, at 926, 930.

conclusion, there was no agreed-upon state practices for the resolution of treaty-based conflict. Generally, as is in the case in codifications, the VCLT attempts to draw clear lines. Thus, the VCLT treaty conflict rules appear in Article 30, and they apply to 'successive treaties relating to the same subject matter'. Although originally a cause of some disagreement, states now consensually agree that determining the time of the earlier treaty is reliant on the date of adoption, and not the entry into force.[19]

Moving further, Paragraph 2 of the VCLT Article 30 provides drafters with the opportunity to decide on how successive treaties should be prioritized with regards to their legal effects. However, the most common challenge is when the parties have not signaled their intentions. In this case, the VCLT then considers, in Paragraph 3, the case of complete unity of parties, providing that: "If the earlier treaty is not suspended or terminated under Article 59 of the VCLT, the earlier treaty only applies to the extent that its provisions are compatible with those of the later".[20] Also, as provided in Article 30, earlier treaties would only apply to the extent that it is compatible with the later treaty. Article 30(3) goes further to effectively codify the *lex posterior* rule, while Article 30(4) considers the more difficult case of when the later does not include all of the parties of the earlier treaty.[21]

Although the preceding efficiently indicates that the VCLT was a good attempt at the problem of treaty conflicts, its innate flaws are becoming more evident as general state practice continues to evolve. As such, there are some problems that have become apparent in the theory laid down by Article 30 of the VCLT. By the provisions of Article 30 of the VCLT, there are 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) what are the parties to the

[19] *The Treaty Maker's Handbook* 210-22 (Hansblix&Jirina H. Emerson Eds, 1973).
[20] *Id. Art. 30(3)*
[21] Vienna convention on the law of treaties, opened for signature may 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan 27, 1960) (hereinafter VCLT) article 30, entitled application of successive treaties relating to the same subject-matter, states.

conflicting treaties? (The contracting parties test).[22]Nonetheless, holistically and generally, the VCLT's technique of resolving treaty-based conflicts have been criticized as unhelpful.[23]

Moreover, even though these rules are workable where parties to a later and earlier treaty are the same, there are problems with the determination of the subject-matter of treaties as well as the time of their conclusion. First, by its terms, the VCLT is only applicable when supposedly conflicting treaties are successive and related to the same subject-matter. Consequently, there may be difficulty applying the VCLT to thornier issues of what happens when treaties have different foci but overlapping issue areas.[24]

In regards to the problem of successive treaties, the drafting of Article 30 presents yet another issue. This provision refers to "states parties to successive treaties".AsVierdaghas pointed out "a treaty that is only adopted hasno 'parties' in the sense of Article 2(1)(g) of the VCLT".[25]By this, the question is when a state becomes truly bound by the rules of Article 30. As such, although Article 30 constructs a conflict resolution regime based on the idea of successive treaties, this does not necessarily correspond with the actual acquisition of rights and the incidence of obligations under treaties in forceby particular states which are parties to them. Overall, the *lex posterior* and *lex prior* rules provided by the VCLT sometimes fail to offer a certain and adequate solution to normative conflict, thereby,creating room for uncertainty. Recent instances of this include the decisions of the ECtHR in the case of *Matthews and Prince Hans-Adam 11 of Liechenstein v. Germany.*[26]

Furthermore, alongside the VCLT, the general principles of conflict still arise, as do various procedural and drafting techniques, such as clauses of abrogation or precedence. According to

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[22] Ahmad Ali, GHOURI, "Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options" (2010) 16 European Journal 806 at 808-10. <https://sro.sussex.ac.uk> last accessed 16th march 2021

[23] Jan Klabbers*, Treaty Conflict and The European Union* (Cambridge: Cambridge university press, 2009) at 34-5

[24] Vienna convention on the law of treaties, opened for signature may 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan 27, 1960) (hereinafter VCLT) article 30, entitled application of successive treaties relating to the same subject-matter, states.

[25]Vierdag, *The Time of Conclusion of Multilateral Treaty*, 59 Brit. Y.B int'l l. 75, 91 (1988)

[26]*Matthews and Prince Hans-Adam 11 of Liechenstein v. Germany, application no. 42527/98,* judgement of 12 July 2001, [2001] Eur. Ct. H.R Para 241

Schulz, the "same subject-matter" clause is generally read narrowly in a bid to have recourse to the *lexspecialis* rules. Given that the *lexspecialis* rules were not incorporated in the VCLT, it can be applied where treaties are not the same subject-matter and thus, not within the purview of the VCLT's Article 30.[27] In this case, we find policymakers facing a potential conflict as to whether the issue is governed by the VCLT and which general principle would apply.

Taking a close examination, in an era of greater-than-ever treaty congestion, evidence shows that the VCLT is still not in great use. First, although formal adjudication may assist conflict resolution, it may be difficult for parties to decide which tribunal has jurisdiction. Consequently, states may choose to avoid the use of tribunals for fear of complicating issues.[28] Secondly, states have rarely mentioned the possibility that treaties may conflict. Most, if not all, recent incidents of treaty-based conflicts have not been resolved by tribunals but by political negotiations.[29] Case in point is the Caspian Sea Treaties[30] and the clash between the E.U regulations and a preexisting treaty between Germany and the United States.[31]

Overall, the VCLT, indeed, provides no real solution to underlying conflicts. Rather, it could be said that the VCLT rules merely puts the problem back into the arena of diplomatic negotiations. On this basis, it is important to set out various techniques and practices that would be useful in attempting to minimize the frequency and severity of treaty conflicts.

3.0. Alternative Paradigms to the Resolution of Treaty-Based Conflicts

Of importance, implicit in the critique of the present state of the treaty conflict doctrine is the issue of black-letter rules which are only of nominal use in practice. As recognized by the United Nations in the *Final Clauses of Multilateral Treaty Handbook*, VCLT's Article 30 may not be

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[27]Christopher J. Borgen, *'resolving treat conflicts'*, (st. john's law scholarship repository, 2005) <https://scholarship.law.stjohns.edu> last accessed 16th march 2021

[28]*Ibid*

[29]*Ibid*

[30]KamyarMehdioun, *Ownership of Oil and Gas Resources in The Caspian Sea*, 94 Am. J. Int'l 179 (2000); FarazSanci, note, the *Caspian Sea Legal Regime, Pipeline Diplomacy, And the Prospects of Iran Isolation From The Oil and Gas Frenzy: Reconciling Tehran's Legal Options With Its Geopolitical Realities*, 34 VAND.J TRANSNAT'L 681 (2001)

[31] Julie Grimes, comment, *Conflicts Between EC Law and International Treaty Obligations: A Case Study of The German Telecommunication Dispute*, 35 HARV INT'L.J535 (1994)

sufficient to address all the problems arising with respect to the priority of the application of a particular treaty.[32] In fact, *ad hoc* negotiations are more prevalent than the consistent application of Article 30. Perhaps, even more worrisome than the inconsistent application of the provisions of Article 30 is that, in this era of congestions and proliferation of treaties, there has been no in-depth consideration of the application of treaty-based conflict rules by an international court or institution since the 1930s.[33]Probably, it may well be the fact that the international community would prefer to address rules of treaty-basedconflicts through political negotiations without being restricted by the bounds of fixed rules. Nevertheless, if the projection of international lawyers is to foster coherence among the sources of international law, then some form of strategy is necessary to address the manner in which the structure of international law has changed.

To commence with, there is a need to revise how states decide which conflicts are worthy of attention by implementing comprehensive clauses of priority. Although the VCLT attempts to solve conflicts between treaties with the same subject-matter, it may not apply to the problems of greatest concern today. As Jenks has suggested, "whether or not these treaties happen to have the same subject-matter is less important than the effect of the treaties themselves and how those effects concern the underlying purpose of the treaty".[34]

More so, treaties need to be drafted to avoid potential conflicts. Nodoubt, the best type of conflict avoidance takes place in the drafting stages as is evidenced by Article 30(2) of the VCLT. Commentators have highlighted the necessity of clauses of abrogation or precedence. However, their effectiveness depends on how well they were drafted.[35] Perhaps, of greatest use are the *Final Clauses of Multilateral Treaty Handbook*, which was published by the United Nations and *TheTreaty Maker's Handbook*, both of which collect instances of diverse types of conflict avoidance clauses. As we have seen, the main areas of concern in treaty-

[32] U.N Office of Legal Aff. *Final Clauses of Multilateral Treaties: Handbook*85, U.N SALES NO. E.04.V.3 (2003) <https://untreaty.un.org/english/finalclauses/handbook.pdf> last accessed 13th march 2021

[33] Christopher J. Borgen*, 'resolving treat conflicts'*, (st. john's law scholarship repository, 2005) <https://scholarship.law.stjohns.edu> last accessed 16th march 2021

[34] C. Wilfred Jenks, *the conflict of law-making treaties*, 30 Brit. Y.B int'l 401, 426 (1953) (Hereinafter Jenks, law-making treaties); see also, JoostPauwelyn, CONFLICT OF NORMS IN INTERNATIONAL LAW: How WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003)

[35] C. Wilfred Jenks, *The Need for An International Legislative Drafting Bureau*, 39 Am. J. Int'l. 163, 175 (1945)

basedconflictsare the effects of treaties with different subjects but overlapping interests. Saving clauses that take into consideration these broader perspectives are more likely to anticipate and avoid a high number of possible future conflicts. This method requires negotiator to visualize the international system as a web of related agreements that can influence one another. Not only will these techniques prevent conflict, but it will also encourage mutual consultations by international organizations prior to the submission of draft conventions for ratification.[36]

Furthermore, purposivist interpretations should be used more frequently. As previously mentioned, one of the aching aspects of treaty-basedconflict is the deafening silence of international tribunals. As a result of the 'generally accepted' presumption against conflicts of norms, the state relying on a conflict of norms will have the burden of proving it as is seen in the *EC-Hormones case* before the WTO.[37] However, while this practice describes the distribution of burden in a formal judicial proceeding, it is in the interest of negotiators to be cautious and presume that clauses that may conflict will end up conflicting and as such, they should utilize clear conflict avoidance devices such as third part agreements and the clauses of abrogation or precedence. Resolving conflicts requires intentionality and purpose in the matter of treaty construction, and this must be adopted.

Finally, Assurances should be used in an expanded and more formalized manner. Even though interpretations alone cannot resolve a conflict, it is possible for parties themselves to do so. Accordingly, where a party has interpreted the text of the treaties and believes that there could be a potential conflict, the first step should be to seek assurance.Overall, making assurance-seeking a standard procedure in international relations would facilitate resolution of conflicts by parties.[38]

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[36] C. Wilfred Jenks, *the conflict of law-making treaties*, 30 Brit. Y.B int'l 401, 426 (1953) (Hereinafter Jenks, law-making treaties); see also, JoostPauwelyn, Conflict Of Norms In International Law: How Law Relates To Other Rules Of International Law (2003)

[37] European Communities – Measures Concerning Meat and Meat Products (Hormones) PARA. 9. WT/DS26/ARB (Decision by the WTO On European Communities, July 12 1999)

[38]Christopher J. Borgen*, 'resolving treat conflicts'*, (st. john's law scholarship repository, 2005) <https://scholarship.law.stjohns.edu> last accessed 16thmarch 2021

Conclusion

There is no doubt that the lack of a principled method of treaty conflict resolution debases the value of treaties. Evidences have been laid to prove that no single rule will resolve the problem of treaty-based conflicts. Rather, what is needed is a recognition of the implications of a lack of connection between the norms of the VCLT and the action of states, and that the current rules maintains a level of uncertainty that is detrimental to the functioning of the international system. Although no simple solution exists, it is better to minimize the effects of a treatyconflict by adopting several potent alternative paradigms. Perhaps, even though treaty-based conflicts may never be eliminated wholly, with these, the subsequent scope of treaty conflicts canbe managed at best, if not eradicated.

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