Asian Journal of International Law (2025), **15**, 47–75
doi:10.1017/S2044251324000031

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Reconceptualizing Norm Conflict in International Law

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(Received 13 August 2023; revised 11 February 2024; accepted 3 March 2024; first published online 11 April 2024)

Abstract

This article reconceptualizes norm conflict in international law by uncovering the experiential dimension of its definition and the intentional dimension of its resolution that has been missing from traditional accounts. The article locates the basis of recognizing norm conflict in the experienced sense of incompatibility between norms in view of their contexts rather than in the predesignated constellation of norms with contrary or contradictory functions according to their texts. Concomitantly, it argues that the justification for using certain legal techniques to resolve norm conflicts lies in the intended relationship deducible only between those norms that share the same regulatory purpose rather than between norms merely applying to the same factual situation. This reconceptualization generates a new typology of norm conflicts in light of the norms' end goals and the means they provide to achieve them: "Ends Conflict", "Means Conflict", and "Unexperienced Conflict", and suggests apposite ways to tackle them.

Keywords: norm conflict definition; norm conflict resolution; *jus ad bellum*; *jus in bello*; hegemony

The traditional approach to conceptualizing norm conflict in international law relies heavily on the different functions of norms in deontic logic[1] expressed in the text,[2] which enables the predesignation of certain constellations of norms as being in conflict. This article focuses on three such constellations of norms: between a norm commanding something and a norm prohibiting the same; between a norm commanding something and a norm exempting the same; and between a norm prohibiting something and a norm permitting the same.[3] It argues that the traditional conception of norm conflict,

[1] Situated within the tradition of analytic philosophy, deontic logic is a branch of logic concerned with the contribution that certain notions make to what follows from what, such as permission, prohibition, command, exemption, etc. See Paul MCNAMARA and Frederik VAN DE PUTTE, "Deontic Logic" in Edward N. ZALTA and Uri NODELMAN, eds., *The Stanford Encyclopedia of Philosophy* (California: Metaphysics Research Lab, Stanford University, 2022).

[2] In the context of customary international law, the "text" includes that expressing the content of the determined rules of customary international law, see Conclusion 1 of the *Draft conclusions on identification of customary international law, with commentaries*, UN Doc. A/73/10(2018), at para. 66.

[3] These three main types of norm conflicts were analysed in Joost PAUWELYN'S *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) at 176, 184–8. For a more theoretical elaboration of these three types of norm conflicts, see Erich VRANES, "The Definition of 'Norm Conflict' in International Law and Legal Theory" (2006) 17 European Journal of International Law 395. Although there has been more recent literature concerning the concept of

based on the predesignation of certain constellations of norms with specific functions according to their texts, bypasses the mental experience of norm conflict based on a sense of incompatibility between the relevant norms, a sense that they should not coexist and be co-applied with the same normative force in view of their contexts.[4] The traditional approach to defining norm conflict is, therefore, stipulative[5] and in effect, mechanizes the identification of norm conflict in international law doctrine, paving the way to its conflation with its conceptual counterpart, the resolution of norm conflict, which is equally prone to mechanization through bypassing the intent on the relationship between different norms inferable through certain legal techniques. By inquiring into what triggers the mental experience that two norms should not coexist and be co-applied with the same normative force, this article uncovers the experiential dimension of norm conflict and seeks to reintegrate it into its doctrinal definition. By examining how the intended relationship between norms may be inferred through certain legal techniques to resolve certain norm conflicts, this article also uncovers the intentional dimension of the resolution of norm conflicts and seeks to reintegrate it into the doctrinal principles for the use of legal techniques. The reintegration of the experiential dimension into the definition of norm conflict and the reintegration of the intentional dimension into the resolution of norm conflict will then deconflate the two concepts.

This article is divided into three parts. The first part of the article presents two constellations of norms from *jus in bello* and *jus ad bellum*, which fall respectively within the "strict definition" and "broader definition" of norm conflict as traditionally defined in theory but which are not understood in practice as "norm conflicts" because they are not mentally experienced to be incompatible in their contexts. It then examines three contextual configurations that differently shape the mental experience of (in)compatibility between norms. They are (a) norms serving different end goals that are experienced to be incompatible in the sense that, given their contexts, these goals should not coexist with the same priority (triggering an Ends Conflict); (b) norms serving the same end goal but prescribing different means that are experienced to be incompatible in the sense that, given their contexts, these means should not coexist with the same priority (triggering a Means Conflict); and (c) norms serving different end goals or serving the same end goal but prescribing different means, that are experienced to be compatible in the sense that, given their contexts, they should coexist with the same priority (triggering an Unexperienced Conflict).

norm conflicts in international law, they adopt this traditional approach in conceptualizing norm conflicts. See e.g. Dirk PULKOWSKI, *The Law and Politics of International Regime Conflict* (Oxford: Oxford University Press, 2014) at 145–53; João Ernesto CHRISTÓFOLO, *Solving Antinomies Between Peremptory Norms in Public International Law* (Zurich: Schulthess Verlag, 2016) at 15; Valentin JEUTNER, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford: Oxford University Press, 2017) at 27–33. Therefore, the texts by Pauwelyn and Vranes are used as the primary points of reference in this article. For a comparison between the terminology used by Pauwelyn and Vranes, see note 9. This article will not focus on (a) two commands with different degrees of leniency (which are analogous to the constellation of a norm commanding something and a norm exempting the same) or two mutually exclusive commands (which are analogous to the constellation of a norm commanding something and a norm prohibiting the same) or (b) the prohibition on the creation of a norm and the creation of that norm, which is rarer in practice. See further Pauwelyn, *supra* note 3 at 178–84.

[4] Oxford Learners' Dictionary states, with respect to "conflict" as a verb, that "if two ideas, beliefs, stories, etc. conflict, it is not possible for them to exist together or for them both to be true". See Oxford Learners' Dictionary, "Conflict verb", online: https://www.oxfordlearnersdictionaries.com/definition/american_english/conflict_2. The etymology of the word "conflict" consists of "con", meaning "together", and "fligere", meaning "fought", Oxford Learners' Dictionary, "Conflict noun", online: https://www.oxfordlearnersdictionaries.com/definition/english/conflict_1

[5] Vranes, *supra* note 3 at 396–7.

https://doi.org/10.1017/S2044251324000031 Published online by Cambridge University Press

The second part of the article examines certain "conflict resolution" legal techniques, the application of which is conditional upon the norms' relation to the "same subject matter". It argues that the traditional understanding of "same subject matter" as "same factual situation" mistakes the real basis on which the intended relationship between norms can be inferred from the norms' relative temporality (*lex posterior*), speciality (*lex specialis*), or relevance (systemic integration):[6] their pursuit of a common regulatory purpose. Uncovering this intentional dimension of the resolution of norm conflict clarifies that these legal techniques can and should only be used to resolve conflict between norms that pursue the same regulatory purpose with incompatible means, that is, Means Conflict but not Ends Conflict (which concerns norms that do not pursue the same regulatory purpose), nor Unexperienced Conflict (which concerns norms that are experienced to be compatible in the sense that they pursue different ends, or the same ends with different means, that should coexist with the same priority and, therefore, require no "resolution").

The reconceptualization of norm conflict, by uncovering the experiential dimension of its definition and the intentional dimension of its resolution, disentangles the two notions and exposes the hegemonic potential of "resolving" Ends Conflicts or even Unexperienced Conflicts by using these legal techniques to conform one norm to another without any basis in an intended relationship between them. The third part of the article uses practical examples from jurisprudence and literature to illustrate the proper use of these legal techniques and argues for its reinvigoration as an anti-hegemonic strategy in international law.

I. Uncovering the Experiential Dimension of Norm Conflict Definition: Incompatibility Stemming from Context rather than Text

Norm conflict in international law has traditionally been defined by reference to different directions given by different norms. For example, the ILC Fragmentation Report defined norm conflict as a situation where the norms "point to different directions"[7] or where "two rules or principles suggest different ways of dealing with a problem".[8] Under the traditional approach, the "different directions" given by these norms stem from the "fundamental functions" of norms in deontic logic: command, prohibition, exemption, and permission.[9] In other words, norms function fundamentally to give directions to the addressees of the norms, and a "norm conflict" arises when these functions of different norms "conflict". The key debate in the existing literature has been whether only the constellation of two norms that function respectively to prohibit and to command the same thing qualifies as "conflict" ("strict definition")[10] or the constellations of two norms which function respectively to prohibit and to permit the same thing or which function

[6] This article does not address the legal technique of *lex superior,* which operates differently from the other three legal techniques in that it is part of "a vocabulary that gives expression to something like an informal hierarchy in international law" based on the perceived relative importance of different norms, see *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc. A/CN.4/L/682 (2006), at para. 327 [*ILC Fragmentation Report*].

[7] *Ibid*., at para. 23.

[8] *Ibid*., at para. 25.

[9] This article adopts Pauwelyn's terminology throughout for ease of reference; see Pauwelyn, *supra* note 3 at 179. In Vranes' terminology, "command" is expressed as "obligation" and both (a) "permission", by which Pauwelyn refers to the "right to do something", and (b) "exemption", by which Pauwelyn refers to the "right not to do something" are expressed as "permission" by Vranes, see Vranes, *supra* note 3 at 408.

[10] Vranes, *supra* note 3 at 395; Pauwelyn, *supra* note 3 at 167.

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respectively to command and to exempt the same thing also qualify as "conflict" ("broader definition").[11] This traditional approach to defining norm conflict in international law aims to use the texts of two norms to discern their respective functions in deontic logic as the basis, in abstraction from their contexts, for identifying norm conflict, be it under the "strict definition" of conflict or the "broader definition" of conflict.[12] The result is the identification of norm conflict, be it strictly or more broadly defined, *a priori* based on the norms' functions as expressed in text,[13] without regard to whether or not applying these norms in their contexts would give rise to the mental experience of incompatibility between these norms in the sense that they should not coexist and be co-applied with the same normative force and the reasons for it.

This part demonstrates that this traditional approach is inadequate to describe the mental experience of norm conflict in the sense of incompatibility between two norms, which provokes the desire to "resolve" or "avoid" it, and is also inadequate to identify the appropriate ways to deal with such experienced norm conflicts. It uses the example of two constellations of co-applied norms in *jus ad bellum* and *jus in bello*,[14] which fall respectively within the "strict definition" and the "broader definition" of norm conflict under the traditional approach to defining norm conflicts but which are not experienced in practice as norm conflicts at all. It attributes this inadequacy of the traditional approach to the neglect of the mental experience of the (in)compatibility between two norms in the sense of whether or not they should, as a policy matter, coexist and be co-applied with the same normative force in view of some larger rationale embedded in the contexts of the norms. In this experiential dimension, two norms are

[11] Vranes, *supra* note 3 at 396; Pauwelyn, *supra* note 3 at 167–8. The majority view favours the broader definition of norm conflict.

[12] Pauwelyn, *supra* note 3 at 180.

[13] According to certain phenomenological traditions, claims and obligations in law are "entities" that have a synthetic a priori character "universally and necessarily grounded in the essence of the claim as such", independent of experience, see e.g. Adolf REINACH, *The Apriori Foundations of the Civil Law* (Berlin: De Gruyter, 2012) at 9–10. However, the concept of a "conflict" between norms discussed in this article is qualitatively different and cannot be reduced to that of a "claim" or "obligation" in law.

[14] For examples of judicial or quasi-judicial recognition of the co-application of *jus ad bellum* and *jus in bello*, see *Legality of the Threat or Use of Nuclear Weapons Case,* Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 42 [*Nuclear Weapons Advisory Opinion*] ("a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict"); *Armed Activities on the Territory of the Congo (DRC v. Uganda),* [2005] I.C.J. Rep. 116 at para. 144 (the "armed activities" of Ugandan forces in the DRC in 1998, while clearly regulated by *jus in bello*, were also considered by the ICJ to be regulated by *jus ad bellum*); Eritrea-Ethiopian Claims Commission, *Partial Award, Jus Ad Bellum – Ethiopia's Claims 1–8*, Decision of 19 December 2005, at paras 15–16 (Eritrea's "[resort] to armed force to attack and occupy Badme … in an attack that began on May 12, 1998", clearly regulated by *jus in bello*, was also held by the Commission to have violated Article 2(4) of the UNC). For scholarly treatment of the issue, see in general Christopher GREENWOOD, "The Relationship between Ius Ad Bellum and Ius in Bello" (1983) 9 Review of International Studies 221; Judith GARDAM, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004); Robert SLOANE, "The Cost of Conflation: Preserving the Dualism of *Jus Ad Bellum* and *Jus in Bello* in the Contemporary Law of War" (2009) Yale Journal of International Law 47; Keiichiro OKIMOTO, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Oxford: Hart Publishing, 2011); Ka Lok YIP, "Separation between Jus Ad Bellum and Jus in Bello as Insulation of Results, Not Scopes, of Application" (2020) 58 The Military Law and the Law of War Review 31; Ralph WILDE, "Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation" (2021) 22 The Palestine Yearbook of International Law 1. The two sets of norms can be co-applied because it is an "absolute dogma that international humanitarian law [*jus in bello*] applies equally to all parties to a conflict, irrespective of which is acting in self defence; this has been confirmed by very long-standing State practice and universally acknowledged in legal literature". See Louise DOSWALD-BECK, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (1997) 37 International Review of the Red Cross 35 at 53.

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"incompatible" or "in conflict", not because they differ in their normative functions as expressed in their texts but because that difference is undesirable in their contexts. Uncovering this experiential dimension of norm conflict also illuminates the different qualities of (in)compatibility mentally experienced in different contexts, which can be used to derive a new typology of norm conflicts.

A. Inadequacy of the Traditional "Strict Definition" of Norm Conflict

There are different formulations of the strict definition of norm conflict, but they share a common reference to the impossibility of simultaneous compliance with two norms, one with the function of commanding something and the other with the function of prohibiting the same. The ILC Fragmentation Report finds it a "logical incompatibility" if "[a]n obligation [e.g. to do something] may be fulfilled only by thereby failing to fulfil another obligation [e.g. not to do the same]".[15] Pauwelyn termed it "*necessary conflicts* ... whenever one norm is complied with as required, a breach or conflict with the other norm will necessarily arise".[16] Vranes termed "[t]he relation between obligation and prohibition ... *contrary conflict*, since both norms cannot be applied at the same time".[17] Jenks termed it a "direct incompatibility ... where a party to the two treaties cannot simultaneously comply with its obligations under both treaties".[18]

The inadequacy of this traditional approach of defining a strict conflict in describing the mental experience of "conflict" or "incompatibility" between two norms and in identifying the appropriate course of action can be illustrated by those norms of *jus ad bellum*, which prohibit certain conduct that is commanded to be taken by other norms of *jus in bello*.[19] For example, *jus ad bellum* prohibits the use of force in international relations against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.[20] Yet, *jus in bello* commands an occupying power, even one that violates *jus ad bellum* in initiating and sustaining the occupation,[21] to take all the measures in its power to restore and ensure, as far as possible, public order and safety,[22] which call for positive actions that could involve the use of force.[23] According to the traditional approach of defining norm conflict in a strict sense, this constellation of prohibitive norms under *jus ad bellum* and commanding norms under *jus in bello* would be deemed to give rise to norm conflict.

[15] Study Group of the International Law Commission, *supra* note 6 at para. 24.

[16] Pauwelyn, *supra* note 3 at 180.

[17] Vranes, *supra* note 3 at 409. However, strictly speaking, the mere fact that an obligation for and a prohibition against the same conduct cannot be complied with at the same time does not mean that they cannot be applied at the same time. See Mark Eugen VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Brill, 2009) at 402. See further below in this section on this point.

[18] C. Wilfred JENKS, "The Conflict of Law-Making Treaties" (1953) 30 British Year Book of International Law 401 at 426.

[19] See in general *supra* note 14.

[20] See in general *the Charter of the United Nations*, 26 June 1945, T.S. 993 (entered into force 24 October 1945) [UNC], art. 2(4).

[21] See the general Definition of Aggression, GA Res. 3314 (XXIX), UN Doc. A/Res/3314 (XXIX) (1974), annex. Ruys has characterized certain kinds of occupation as "armed attacks of an ongoing nature"; see Tom RUYS, "Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge: Cambridge University Press, 2010), in general Definition of Aggression, GA at 100.

[22] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, (entered into force 26 January 1910), art. 43.

[23] Yutaka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (Leiden: Brill, 2009) at 98–9.

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This traditional approach of defining strict norm conflict does not match the reality that such a constellation is scarcely recognized to be in "conflict" in practice.[24] This mismatch suggests that our actual recognition of a "strict conflict" between two norms is not based on their deontological incompatibility in the sense that their normative functions according to their texts cannot be fulfilled simultaneously[25] but on the experiential incompatibility arising from the mental experience that the norms should not, in view of their contexts, coexist and be co-applied with the same normative force. The fact that two legal norms cannot, without logical contradiction,[26] be complied with simultaneously according to their texts (triggering a strict conflict as defined under the traditional approach) does not dictate the mental experience that these norms should not, as a policy matter coexist and be co-applied[27] with the same normative force, in view of their contexts.

In the example above, even though an aggressor, in complying with the *jus in bello* norm to use force to maintain public order in occupied territories, would necessarily violate the prohibition on the use of force under *jus ad bellum*, the two norms can meaningfully, and should as a matter of policy, coexist and be co-applied with the same normative force because they pursue distinct yet compatible goals in their contexts. The goal of *jus ad bellum* to prohibit political violence in international relations, subject to justified exceptions, and the goal of *jus in bello* to manage political violence, whether or not that violence is justified, are distinct but compatible in their contexts, which render the norms that implement them, despite their contrary directions,[28] experientially compatible.

This experiential compatibility is reflected in the complementary and incremental nature of the two norms. A state that occupies another without a valid justification or defence and uses force to maintain public order and safety in the occupied territories in compliance with *jus in bello* merely violates *jus ad bellum*.[29] But if the same state fails to maintain public order and safety by not using the necessary force in the occupied territories, it commits "a double illegality" by also violating *jus in bello*.[30] Conversely, a state that occupies another with a valid justification or defence but fails to maintain public order and safety by not using the necessary force in the occupied territories merely violates *jus in bello*. But if the same state extends its occupation beyond the extent allowed by its justification or defence, it commits a "double illegality"[31] by also violating *jus ad bellum*. If these two norms were experienced to be incompatible, then they would have been considered a dilemma to which there was no operable solution, yet these rules under *jus in bello* and *jus ad bellum* have not been so considered in practice.

It can be seen from this example that the traditional approach of defining strict norm conflict by reference to the contrary functions of two norms according to their texts cannot adequately describe the mental experience of (in)compatibility between two norms in their contexts or help identify the course of action appropriate to such (in)compatibility.

[24] For instance, the relationship between the prohibitive norms under *jus ad bellum* and the commanding norms under *jus in bello* was never mentioned in the ILC Fragmentation Report.

[25] Study Group of the International Law Commission, *supra* note 6 at para. 24. See also Jenks, *supra* note 18 at 426.

[26] For the problem of understanding norm conflict as a logical contradiction, see Section B of Part II below.

[27] Villiger, *supra* note 17 at 402.

[28] Vranes, *supra* note 3 at 409.

[29] UNC, *supra* note 17 at 402.

[30] Greenwood, *supra* note 14 at 232.

[31] *Ibid*.

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B. Inadequacy of the Traditional "Broader Definition" of Norm Conflict

The "broader definition" of norm conflict also comes in different formulations, but they share a common reference to the merely "different directions" given by different norms.[32] The ILC Fragmentation Report adopted "a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem".[33] Jenks described a "divergence" as a "departure from uniformity".[34] Pauwelyn identified a "potential conflict" where "a breach or conflict will emerge only in case the exemption or permission … is actually exercised".[35] Vranes identified a "contradictory conflict" in the relation "between the obligation to adopt a given conduct C and the permission not to adopt this conduct" or in the relation "between a prohibition to do C and a permission to do C".[36]

The inadequacy of this traditional approach of defining a broader conflict in describing the mental experience of "conflict" or "incompatibility" between two norms and in identifying the appropriate course of action can be illustrated by those norms of *jus ad bellum* which expressly prohibit certain conduct that is permitted by other norms of *jus in bello*.[37] For instance, *jus ad bellum* prohibits the use of force in international relations against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.[38] Yet, *jus in bello* precisely permits a warring party to use force in accordance with *jus in bello*,[39] even if such use of force violates *jus ad bellum*.[40] According to the traditional approach of defining norm conflict in a broader sense, this constellation of prohibitive norms under *jus ad bellum* and permissive norms under *jus in bello* would be deemed to give rise to norm conflict.

Just like in the case of strict norm conflict, this traditional approach of defining broader norm conflict does not match the reality that such constellation is scarcely recognized to be in "conflict" in practice.[41] This mismatch suggests that our actual recognition of a "broader conflict" between two norms is not based on their deontological incompatibility, in the sense that their normative functions according to their texts suggest different ways of dealing with a problem,[42] but on the experiential incompatibility arising from the mental experience that the norms should not, in view of their contexts, coexist and be co-applied with the same normative force. The fact that two legal norms point in different directions according to their texts (triggering a broader conflict under the traditional approach) does not dictate the mental experience that they should not, as a policy matter, coexist and be co-applied with the same normative force in view of their contexts.

[32] Study Group of the International Law Commission, *supra* note 6 at para. 23.

[33] *Ibid.*, at para. 24.

[34] Jenks, *supra* note 18 at 427. The wide definitions adopted by Jenks and in the ILC Fragmentation Report would technically also include conflicts that fall within the "strict definition" of norm conflict, which have been analysed in Section A above and will not be the focus of analysis in Section B.

[35] Pauwelyn, *supra* note 3 at 180.

[36] Vranes, *supra* note 3 at 409.

[37] See in general *supra* note 14.

[38] See in general UNC, *supra* note 20 at art. 2(4).

[39] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978) [API], especially arts. 35, 43, 44, 48–60.

[40] *Ibid.*, at art. 1(1), which provides that API applies "in all circumstances", generally interpreted to mean that the same set of obligations applies to each party to the conflict, regardless of the differences in the character of its participation in the conflict, whether it is "just" or "unjust", a war of aggression or resistance to aggression, see Jean PICTET, ed., *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) at 16.

[41] For instance, the relationship between the prohibitive norms under *jus ad bellum* and the permissive norms under *jus in bello* was never mentioned in the ILC Fragmentation Report.

[42] Study Group of the International Law Commission, *supra* note 6 at para. 25.

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In the example above, even though an aggressor in exercising the permission to use force under *jus in bello* would breach *jus ad bellum*, and the permission to use force under *jus in bello* would be frustrated when the potential aggressor abstains from using force to observe *jus ad bellum*, the two norms can meaningfully, and should as a policy matter, coexist and be co-applied with the same normative force because they pursue distinct yet compatible goals. The goal of *jus ad bellum* to prohibit political violence in international relations subject to justified exceptions and the goal of *jus in bello* to manage political violence, whether or not that violence is justified, are distinct but compatible, which render the norms that implement them, despite their contradictory directions,[43] experientially compatible in the same ways as explained in Section A above.

It can be seen from this example that the traditional approach of defining broader norm conflict by referring to the contradictory functions of two norms according to their texts cannot adequately describe the mental experience of (in)compatibility between two norms in their contexts or help identify the course of action appropriate to such (in)compatibility.

C. A New Typology of Norm Conflicts

The traditional approach to defining norm conflict, by reference to the different functions of norms in deontic logic according to their texts, misdescribes the mental experience of norm conflict in the sense that two norms should not, in policy terms, coexist and be co-applied with the same normative force given their contexts. Interrogating this experiential dimension of norm conflict can help discern the different contextual configurations that trigger different mental experiences of (in)compatibility between norms, which in turn generates a new typology of norm conflicts that call for different treatments.

The mental experience that two norms should not coexist and be co-applied with the same normative force arises not from a mechanical, generic comparison of their different functions according to their texts but from a situated appraisal of the end goals of these norms and the means to achieve them in their contexts. Where two norms serve end goals that are not merely different but are experienced to be incompatible in the sense that they should not coexist and be pursued with the same priority as a policy matter, the norm conflict may be called an "Ends Conflict", whose potential resolution would require political, not merely legal, processes of compatibilization of their social rationalities.[44] Where two norms serve the same end goal by means that are not merely different but are experienced to be incompatible in the sense that they should not coexist and be adopted with the same priority as a policy matter, the norm conflict may be called a "Means Conflict", which may be resolved by the application of certain legal techniques to discern the underlying intention on which means should take priority.[45] Where two norms serve different end goals, or the same end goal using different means, that are nonetheless experienced to be compatible in the sense that they should coexist and be pursued or adopted with the same priority as a policy matter, these norms would not be experienced to be incompatible. This last type of "norm conflict", included in the traditional approach to its definition, may thus be called "Unexperienced Conflict". The

[43] Vranes, *supra* note 3 at 409.

[44] Teubner and Fischer-Lescano observed that "conflict-resolving legal instance must, in the final analysis, revisit underlying rationality conflicts and attempt their compatibilization" and that "[l]egal instruments cannot overcome contradictions between different social rationalities" in Gunther TEUBNER and Andreas FISCHER-LESCANO, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25 Michigan Journal of International Law 999 at 1029, 1045. See also Margaret A. Young, ed., *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012).

[45] See further Parts II and III below.

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traditional approach to defining norm conflict, by reference to the norms' functions according to their texts, could qualify as "norm conflicts" those constellations of norms that either pursue end goals that are experienced as compatible contextually or adopt means that are experienced as compatible contextually to pursue the same end goal, thereby systematically producing Unexperienced Conflicts.

The contextually experiential (in)compatibility between two norms discussed in this part is not often captured in stylized hypothetical examples of "conflict" of norms precisely because they lack contexts.[46] One frequently cited example is the provision for copyright protection of forty years under one norm and fifty years under another.[47] According to the traditional approach, since the two norms suggest different ways of dealing with a problem, point to different directions and impose obligations with different degrees of leniency, which is analogous to the constellation of a norm commanding something and a norm exempting the same, the two norms fall within the definition of "broader conflict", regardless of the context. Yet, if we assess these norms in context following the reconceptualization of "norm conflict" according to this article, we may or may not classify these norms as being in conflict.

Take the example of the copyright concerning astrophotographs, which are recognized for their contribution to scientific data while remaining art objects. Let us imagine an international art treaty that requires art objects to be entitled to a fifty-year copyright period, while an international space exploration treaty requires all publications on space scientific data to be entitled to a forty-year copyright period. The former norm pursues the end goal of encouraging artistic creation, while the latter norm pursues the end goal of furthering space exploration. Arguably, the two norms pursue two different end goals and in that sense, they do not create a Means of Conflict.[48] To the extent that the two different end goals are deemed incompatible as a policy matter because the encouragement of artistic creation (through a lengthier copyright period) is considered an unacceptable hindrance to space exploration (through unrestricted reproduction after a shorter copyright period), there would be an Ends Conflict.[49] To the extent that the two different end goals are deemed compatible as a policy matter, for instance, because the encouragement of artistic creation (through a lengthier copyright period) is considered an addition to the encouragement of scientific discovery through proprietary rights to further space exploration, this is merely an Unexperienced Conflict.[50] Which would be experienced depends on the actual contexts in which these treaties operate. Assuming the parties to the two treaties are identical, the variations in exceptions, enforcement mechanisms, and remedies under the two treaties, not included in our hypothetical contexts for simplicity, may further affect the mental experience of (in)compatibility between the two norms.

Now, as an alternative scenario, let us imagine that both treaties govern art publications with the same goal of encouraging artistic creation. The two norms then represent

[46] See the discussion in Vranes, *supra* note 3 at 413–14.

[47] Pauwelyn, *supra* note 3 at 180–1.

[48] It is also possible to argue that the two norms actually pursue the same end goal by conceptualizing this goal very broadly (e.g., promoting mankind's cultural legacy) at the expense of contextual specificity. However, the broader the common goal, the weaker the inference of an intended relationship between the two norms that might be made through legal techniques to resolve Means Conflict. See these points below in this Section and Section A of Part III.

[49] As explained above, an Ends Conflict cannot be resolved by legal techniques but requires compatibilization at a political level.

[50] As will be explained further below, an Unexperienced Conflict should not be treated as a norm conflict that requires political or legal resolution. The result in this hypothetical example is that the divergent copyright periods should remain the same for the purposes of the respective treaties.

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divergent means to the same end. To the extent that the two means are deemed incompatible as a policy matter, for instance, because it is considered that they create unacceptable administrative confusion, there would be a Means Conflict. To the extent that the two means are deemed compatible as a policy matter, for instance, because it is considered that a longer copyright period merely represents a strengthened but complementary measure to encourage artistic creation, this is merely an Unexperienced Conflict. As the common end goal here is narrowly circumscribed, the different means to achieve it have a more procedural character, rendering it easier to see their difference as incompatible, thus resulting in a Means Conflict. Contrast that with an end goal conceptualized in very broad terms between norms that are seen to prescribe different means of a more substantive character to achieve it. For instance, if the end goal of the relevant norms under *jus ad bellum* to prohibit political violence and the end goal of the relevant norms under *jus in bello* to manage political violence, as discussed above, were subsumed under one broadly conceptualized end goal of "human welfare",[51] the two sets of norms could be seen as two different means to achieve that broad end goal. But as they have a strongly substantive character, it is more difficult to see their difference as incompatible, thus avoiding a Means Conflict.

As even "[multi-sourced equivalent norms] are never fully equal",[52] recognizing a "conflict" between norms based only on the textual consideration of whether or not the functions of the norms "suggest different ways of dealing with a problem", without any contextual consideration of whether or not they are experienced as incompatible as a policy matter, risks characterizing all norms of international law dealing with the same problem as being in "conflict". Reconceptualizing norm conflict in international law by reintegrating the experiential dimension of the recognition of norm conflict in view of the contexts invites consideration of the goals intended to be achieved by the norms, the means used to do so, and the desirability of their coexistence with the same priority. The resulting new typology of norm conflict more accurately captures the qualitative distinctions between different norm constellations experienced to be (in)compatible, which call for different treatments, as will be further illustrated in Part II below.

II. Uncovering the Intentional Dimension of Norm Conflict Resolution: Commonality of Regulatory Purpose rather than Factual Situation

The traditional approach to defining norm conflicts, as elaborated in the preceding Part I, identifies conflict between norms by their functions in deontic logic according to their texts, thereby portraying "norm conflict", be it strictly or more broadly defined, as an objective aspect of the world revealed mechanically through the norms' texts without reference to the mental experience of these norms in their contexts. This mechanization of the definition of norm conflict paves the way to its conflation with its conceptual counterpart, that is, the resolution of norm conflict, which is equally prone to mechanization through the neglect of its rationale rooted in intentionality. This part traces the process of conflation of the two notions and seeks to disentangle them.

The existing literature refers to a number of legal techniques for resolving norm conflicts. Key among these legal techniques are *lex posterior*, *lex specialis*, and a stronger form of systemic integration, the application of which is subject to a common condition that

[51] "[A] treaty's purpose . . . will usually be something akin to the protection of human life or the promotion of human welfare or human dignity", as pointed out in Jan KLABBERS, "Some Problems Regarding the Object and Purpose of Treaties" (1997) 8 Finnish Yearbook of International Law 138 at 148.

[52] Tomer BROUDE and Yuval SHANY, "The International Law and Policy of Multi-Sourced Equivalent Norms" in Tomer BROUDE and Yuval SHANY, eds., *Multi-Sourced Equivalent Norms in International Law* (Bloomsbury Publishing, 2011), 1 at 7.

https://doi.org/10.1017/S2044251324000031 Published online by Cambridge University Press

the supposedly conflicting norms relate to the "same subject matter". Echoing the mechanization of the definition of norm conflict, this condition to the resolution of norm conflict has often been interpreted to mean relation to the "same factual situation", a purportedly mechanical criterion that would qualify the use of these legal techniques to "resolve" or "avoid" norm conflicts[53] without reference to the existence or otherwise of the intention on the relationship between the relevant norms. This mechanization traditionally pervades both the definition and the resolution of norm conflicts and facilitates a fusion of the criteria for resolving norm conflict with those for defining norm conflict. The resulting implication is that any norm conflict, once qualified under its traditional definition, can be resolved through these legal techniques.

In parallel to the preceding Part I, which uncovered an experiential dimension missing from the traditional account of norm conflict definition, this Part uncovers an intentional dimension missing from the existing, mainstream understanding of the "same subject matter" condition to the use of certain legal techniques to resolve norm conflicts. It argues that the legal techniques of *lex posterior*, *lex specialis,* and a stronger form of systemic integration to interpret one norm to conform it to another can help infer the intended relationship between norms based on their relative temporality, speciality, and relevance only because they pursue the same end goal by incompatible means (that is, in a Means Conflict). Therefore, the phrase "same subject matter" can only be meaningfully understood as "same regulatory purpose", a referent grounded in intentionality. Uncovering this intentional dimension to the resolution of norm conflict will help disentangle it from the definition of norm conflict and clarify the justifications and limits of these three legal techniques.

A. Conflation between Norm Conflict Definition and Norm Conflict Resolution

As their nomenclature suggests, defining a norm conflict and resolving a norm conflict are two distinct concepts, one involving how a "norm conflict" is identified through certain criteria, the other involving how that "norm conflict" is to be resolved by using certain legal techniques. The former precedes the latter, for without having identified a "norm conflict", there is nothing to be resolved. Yet, the two concepts are often conflated in the literature through the mechanization of their respective intellectual operations. The traditional approach to norm conflict definition mechanizes it by grounding it on the difference between the norms' functions according to their texts, without regard to the mental experience of the norms in context. A considerable amount of existing literature on norm conflict resolution also mechanizes it by interpreting the condition to using certain legal techniques to resolve conflicts, the norms' relation to the "same subject matter", as these norms' relation to the "same factual situation", a purportedly mechanical criterion devoid of intentionality.

The use of three legal techniques is subject to this condition. *Lex posterior*, based on the principle *lex posterior derogat legi priori* (later law overrides prior law), embedded in Article 30 of the Vienna Convention on the Law of Treaties (VCLT), is only applicable where "successive treaties [relate] to the same subject-matter".[54] *Lex specialis*, based on the principle *lex specialis derogat lege generali* (special law overrides general law),[55] is only applicable

[53] This article acknowledges, but due to space constraints and its immateriality to the conclusions reached here, it cannot delve into the perceived distinction between conflict resolution and the interpretive avoidance of conflict. However, as the ILC Fragmentation Report noted, "contrary to what is sometimes suggested, conflict-resolution and interpretation cannot be distinguished from each other". Study Group of the International Law Commission, *supra* note 6 at para. 412.

[54] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [VCLT].

[55] Study Group of the International Law Commission, *supra* note 6 at para. 255.

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where different norms relate to the same subject or matter.[56] Systemic integration is reflected in the principle that "[t]here shall be taken into account [in treaty interpretation], together with the context … any relevant rules of international law applicable in the relations between the parties", as codified in Article 31(3)(c) VCLT.[57] The "relevance" of one norm to another has been interpreted by reference, in some circumstances, to their relation to the "same subject matter" while in other circumstances, to some other factors.[58] They correspond to two forms of interpretive presumption supported by systemic integration. Under a stronger form of systemic integration, the interpreted norm is presumed to be "intended to produce effects in accordance with existing law and not in violation of it"[59] (as they relate to the same subject matter). Under a weaker form of systemic integration, the interpreted norm is presumed to be "applied and interpreted against the background of the general principles of international law"[60] (which may prove relevant in some other way than relating to the same subject matter as the interpreted norm). As the stronger form of systemic integration can be used to interpret one norm to conform it to another while the weaker form of systemic integration can be used only to interpret one norm in light of another without conformance, [61] the "same subject matter" criterion usefully distinguishes between the two forms of systemic integration. Only where two norms relate to the "same subject matter" can the stronger form of systemic integration be applied to interpret one norm to conform it to the other.

In a lot of the existing literature, the use of these legal techniques to resolve conflicts between two norms relating to the "same subject matter" has been mechanized through interpreting the phrase "same subject matter" as "same factual situation". For instance, when the ILC Fragmentation Report criticized the "same subject matter" criterion as "too unspecific to be useful", it reasoned that "[d]ifferent situations may be characterized differently depending on what regulatory purpose one has in mind",[62] implying the interpretation of "subject matter" as "situation". According to this interpretation, these legal techniques can be applied to "resolve conflict" as long as the norms relate to the same

[56] See the frequent invocation of "the subject" or "the matter" in describing *lex specialis* in *ibid*., 59–60. See also Jenks, *supra* note 18 at 446; Gerald FITZMAURICE, "The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points" (1957) 33 British Year Book of International Law 203 at 237; *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* UN Doc. A/56/83 (2001), art. 55 and its commentary at paras 4–5.

[57] VCLT, *supra* note 54 at art. 31(3)(c).

[58] See e.g. Richard GARDINER, *Treaty Interpretation*, 2nd ed. (Oxford: Oxford University Press, 2015) at 299. See also Villiger, *supra* note 17 at 433; Oliver DÖRR, "Article 31" in Oliver DÖRR and Kirsten SCHMALENBACH, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Springer Science & Business Media, 2011), 557 at 565.

[59] *Right of Passage over Indian Territory (Portugal v. India),* Preliminary Objections, [1957] I.C.J. Rep. 125 at 142 [*Right of Passage* (Preliminary Objections)]. See also Robert JENNINGS and Arthur WATTS, eds., *Oppenheim's International Law: Volume 1 Peace,* 9th ed. (Longman, 1992) at 1275.

[60] Arnold Duncan MCNAIR, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 466; also quoted in Study Group of the International Law Commission, *supra* note 6 at para. 414.

[61] Crawford has noted the divergence of consequences of taking something into account in treaty interpretation:

> [L]awyers can take things into account in a variety of ways. They can take things into account by giving them effect, such as you might take a statute into account. Alternatively, things might be taken into account in the sense of 'we take this into account, but do not give it much attention'. There is a spectrum of cases.

See James CRAWFORD, "Subsequent Agreements and Practice from a Consensualist Perspective" in Georg Nolte, ed., *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013) 29 at 29–30.

[62] Study Group of the International Law Commission, *supra* note 6 at para. 117.

https://doi.org/10.1017/S2044251324000031 Published online by Cambridge University Press

factual situation, regardless of any intention as to how these norms should relate to each other.

The mechanization of the definition and the resolution of norm conflict paved the way for the collapse of the two. Vierdag, in analysing the "same subject matter" condition to applying *lex posterior* according to Article 30 VCLT, argued that "[i]f an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied".[63] In this argument, the applicability of *lex posterior*, a legal technique for norm conflict resolution, is merely conditioned on the finding of "incompatibility", a defining feature of norm conflict.[64]

Vierdag's approach of collapsing the criterion for defining and resolving norm conflict was endorsed by the ILC Fragmentation Report:

> The criterion of "same subject-matter" already seems to be fulfilled if two different rules or sets of rules are invoked with regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point in different directions in terms of their application by a party.[65]

Understanding the "same subject matter" to mean the "same situation" or "one set of facts or actions" in resolving norm conflicts and understanding "incompatibility" to mean "different directions" given by the norms in defining norm conflict both display a mechanistic approach that melds the two otherwise distinct notions. This conflation between the definition and resolution of norm conflict can be discerned throughout the ILC Fragmentation Report in its raison d'être, substantive reasoning and internal structure.

In articulating its own raison d'être, the ILC Fragmentation Report stated, "[t]his report examines techniques to deal with conflicts (or *prima facie* conflicts) in the substance of international law. This raises the question of what is a 'conflict'?"[66] This formulation suggests that the examination of techniques to deal with conflicts (a presupposed solution) raises the question of what a conflict is (the problem), the latter being merely a byproduct of the former, which was the *real* raison d'être of the report. It is not the examination of conflicts (the problem) that raises the question of how to address them (the appropriate solution), with the two inquiries retaining their conceptual distinction and repercussive parity.

In the substantive reasoning of the ILC Fragmentation Report, the fulfilment of the condition to using legal techniques to resolve norm conflict (two norms relating to the "same subject matter") was treated as an answer to the question of what a norm conflict is:

> This question [of what is norm conflict] may be approached from two perspectives: the subject matter of the relevant rules or the legal subjects bound by them. Article 30 [VCLT], for example, appears to adopt the former perspective. It suggests techniques for dealing with successive treaties relating to the "same subject-matter".[67]

[63] E. W. VIERDAG, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions" (1989) 59 British Yearbook of International Law 75 at 100.

[64] Vierdag, together with most other commentators, did not distinguish textual difference and contextual incompatibility between norms explained in the preceding Part I, but it is clear that the term "incompatibility" was used in Vierdag's formulation to denote "conflict".

[65] Study Group of the International Law Commission, *supra* note 6 at para. 23.

[66] *Ibid.*, at para. 21.

[67] *Ibid.*

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That the ILC Fragmentation Report has come to recognize norm conflict definition as a problem only through the lens of norm conflict resolution is also reflected in the ILC Fragmentation Report's internal structure. The ILC Fragmentation Report is organized according to "four types of relationships that lawyers have traditionally understood to be involved in normative conflicts", each of which relates to a legal technique for "dealing with tensions or conflicts".[68] In other words, the legal techniques used for resolving norm conflicts have structurally shaped the narrative of norm conflict in the ILC Fragmentation Report.

This conflation between the definition and the resolution of norm conflict due to their respective mechanization can also be discerned in the reasoning of other commentators. Pauwelyn argued that "the words 'relating to the same subject-matter' [in Article 30 VCLT conditioning the use of *lex posterior* to resolve norm conflicts] are important in that they require the existence of a conflict. That is their ordinary meaning."[69] Vranes' main concern with leaving "conflicts in a broader sense" outside the definition of conflict was that "[c]onsequently, established conflict principles such as the *lex posterior* and *lex specialis* maxims cannot be applied".[70]

The drastic, if under-appreciated and under-explored, implication of this conflation is that any identification of a norm conflict will also trigger the application of legal techniques to resolve it, all in a mechanistic way. This conflation seems to be motivated by the use of a presupposed solution (the use of legal techniques) for an under-analysed problem (norm conflict) and risks inventing the "problem" (as in an Unexperienced Conflict) just to be resolved by a presupposed "solution" that will result in the unnecessary and inappropriate conformation of legal norms, as will be further elaborated below.

B. Disentangling Norm Conflict Definition and Norm Conflict Resolution

As criticized by Borgen, understanding the relation to the "same subject matter" as a criterion not just for applying legal techniques to resolve norm conflicts but also for defining norm conflicts:

> [R]einterprets what was essentially jurisdictional language in the VCLT – stating that Article 30 *would apply* in cases of successive treaties of the same subject-matter – as definitional language stating that a treaty conflict can only exist when treaties are concerned with the same subject-matter. This misconstrues the purpose of the VCLT, which does not attempt to define when a conflict does or does not exist but rather only assigns rules of conflict resolution in certain circumstances.[71]

This criticism is in line with Villiger's observation that Article 30 VCLT generally addresses the rights and obligations of state parties to successive treaties relating to the same subject matter, and its scope extends beyond the notions of conflict and incompatibility.[72] Oppenheim's International Law contemplated that "in a sense if a course of conduct is such as to attract the application of two different treaties they can be said to be related to the same subject matter",[73] but ultimately criticized such a wide

[68] *Ibid.*, at para. 18.

[69] Pauwelyn, *supra* note 3 at 365. Note , however, that the criterion of compatibility is included in only some but not all of the subsequent paragraphs of art. 30 VCLT; see Villiger, *supra* note 17 at 402.

[70] Vranes, *supra* note 3 at 396, 398.

[71] Christopher J BORGEN, "Resolving Treaty Conflicts" (2005) 37 George Washington International Law Review 573 at 607.

[72] Villiger, *supra* note 17 at 402.

[73] Jennings and Watts, *supra* note 59 at vol. II, 1212, note 2.

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definition of "same subject matter" for "depriv[ing] the phrase 'the same subject matter' of its significance".[74] It recognized that "there may be conflicts between successive treaties not relating to the same subject matter, and the regulation of such conflicts is thus outside the scope of Article 30".[75] This critique implies that not all "incompatible results" of applying two rules to "one set of facts or actions"[76] are regulated by Article 30 VCLT because they might not relate to "the same subject matter", which ought to refer to something narrower than any "one set of facts or actions". This echoes the common concerns of Sinclair,[77] Waldock,[78] and Aust[79] that an overly wide definition of "same subject matter" would lead to the over-application of Article 30 VCLT.

Indeed, Vierdag's equation of incompatibility (as a hallmark of norm conflict definition) and relation to the same subject matter (as a condition to the use of certain norm conflict resolution techniques) deliberately sidestepped what he acknowledged to be "extremely difficult problems in theory",[80] thus forgoing the opportunity for a more robust interrogation of the elusive meaning of "subject matter". To better grasp the meaning of this otherwise anodyne-sounding phrase, "the same subject matter", it is worth re-examining the criticism directed at it by the ILC Fragmentation Report: that it is "too unspecific to be useful" because "[d]ifferent situations may be characterized differently depending on what regulatory purpose one has in mind".[81] This criticism is telling. While it presupposes the "same subject matter" to mean the "same situation" (that is, a purportedly mechanical criterion devoid of intentionality), it also articulates, perhaps only semi-consciously, what the "same subject matter" ought to mean: the "same regulatory purpose" (a criterion explicitly based on intention).

This unwitting articulation was only developed later in the ILC Fragmentation Report when it recognized that, where different legal norms belong to the same "treaty regime", it is much easier to infer parties' intent in their relationship using "legal techniques".[82] In distinguishing between the "same subject matter" and the "same regime", the ILC Fragmentation Report observed that while "[i]t may not be possible to determine in an abstract way when two instruments deal with the 'same subject-matter'", legal techniques are more probative of the relationships between treaties envisaged as part of the "same concerted effort" of the parties.[83] This suggests that the "same subject matter" condition is intended to capture those norms where parties have a "conscious sense" that they are addressing the "same project", only on the basis of which can the intended relationships between these norms be inferred from the criteria embedded in the legal techniques.[84] In other words, when different legal norms prescribe incompatible means to pursue the same "project", the fact that a norm is later in time (*lex posterior*), or more specific in content (*lex specialis*), or relevant to be taken into account in interpreting the other (systemic integration) becomes a meaningful indicator of their intended relationship, "expressive of common sense and normal grammatical usage".[85]

[74] *Ibid.*
[75] *Ibid.*
[76] Vierdag, *supra* note 63 at 100.
[77] *Official Records of the United Nations Conference on the Law of Treaties*, Vol. II Second Session, UN Doc. A/CONF.39/11/Add.l (1968), 222.
[78] *Ibid.*, at 253.
[79] Anthony AUST, *Modern Treaty Law and Practice*, 3rd ed. (Cambridge: Cambridge University Press, 2013) at 229.
[80] Vierdag, *supra* note 63 at 100.
[81] International Law Commission Study Group, *supra* note 6 at para. 117.
[82] *Ibid.*, at para. 256.
[83] *Ibid.*, at para. 255.
[84] *Ibid.* See also Pulkowski, *supra* note 3 at 329.
[85] Jennings and Watts, *supra* note 59 at 1270.

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The ILC Fragmentation Report identified institutional arrangements as evidence of relation to the "same project", "same regime", or "same concerted effort", all of which reflect the idea of the "same regulatory purpose". Only when parties create different norms to pursue the same end goal or "regulatory purpose" can they form an at least implicit intention, discernible by applying these legal techniques, on the relationships between these norms in case of incompatibility (that is, a Means Conflict).

Uncovering this intentional dimension of the condition of two norms' relation to the "same subject matter" can thus disentangle the notion of resolving norm conflict through legal techniques in a Means Conflict from the notion of defining norm conflict, which could encompass either a Means Conflict, resolvable by legal techniques, or an Ends Conflict. An Ends Conflict cannot be resolved by legal techniques that seek to infer, from one norm being later than another, more special than another, or relevant to the interpretation of another an intention that it should override the other. Such intention can only be inferred where the incompatible ends pursued by the norms are considered a "logical contradiction", the impossibility of which implies the intention that one must override the other. Yet the understanding of norm conflict as a "logical contradiction" has long been rejected by Kelsen, who saw "no analogy between the truth of a statement, so far as it is the meaning of an act of thought, and the validity of a norm, which is the meaning of an act of will".[86] Without a common end goal to infer the intended relationship between the two norms, Ends Conflicts "cannot be resolved either according to the logical principle of non-contradiction, or by any principle analogous to this"[87] in the "normative jungle" of international law "where each system may create solutions entirely opposite to the solutions of another system".[88] Hence, these legal techniques are only probative of the intended relationship between norms that pursue the same regulatory purpose with incompatible means in a Means Conflict, but not norms that pursue incompatible ends in an Ends Conflict.[89]

Conflating the criteria for defining norm conflict and the criteria for its resolution leads to an under-analysis of what precisely triggers a sense of "incompatibility" between legal norms and why a given solution is appropriate. This leads to a neglect of both the possibility that finding compatibility between the different goals, or between the different means that serve the same goal, pursued by different norms could have avoided the problem (of Ends Conflict or Means Conflict) and the possibility that certain legal techniques do not provide "solutions" (to Ends Conflict). Thus, while recognizing a great many types of problems stemming from "conflict", such as "loss of an overall perspective on the law",[90] "technical",[91] "legal",[92] "institutional",[93] or "substantive",[94] the ILC Fragmentation Report never precisely explained how each of them may arise, giving the misimpression that any "conflict" can entail any of these problems and any legal technique can address all of them. This confusion provides the hotbed for the unreflective use of "legal techniques" to unify different legal norms, resulting, intentionally or not, in the hegemonic

[86] Hans KELSEN, *Essays in Legal and Moral Philosophy: Selected and Introduced by Ota Weinberger. Translated [from the German] by Peter Heath* (Dordrecht: Reidel, 1974) at 233.

[87] *Ibid*. See also Reinach, *supra* note 13 at 64.

[88] Anja LINDROOS, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of 'Lex Specialis'" (2005) 74 Nordic Journal of International Law 27 at 31.

[89] As Section C of Part I above explains, Ends Conflicts can only be resolved at a political level. See further Teubner and Fischer-Lescano, *supra* note 44 at 1046.

[90] Study Group of the International Law Commission, *supra* note 6 at para. 8.

[91] *Ibid*., at para. 9.

[92] *Ibid*., at para. 10.

[93] *Ibid*., at para. 13.

[94] *Ibid*.

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domination of some legal norms (and their underlying social rationalities) over others, as will be further examined in Part III below.

III. Reinvigorating the Proper Use of Legal Techniques to Resist Hegemony

As *lex posterior*, *lex specialis*, and the stronger form of systemic integration are only equipped to resolve conflicts between legal norms that use incompatible means to pursue the same regulatory purpose, that is, Means Conflict, the identification of a common regulatory purpose pursued by different norms is key to ascertaining the proper scope of use of these legal techniques. While the ILC Fragmentation Report criticized the condition to using these legal techniques, that the relevant norms relate to the "same subject matter", as "too unspecific to be useful", the preceding Part II has argued that it makes a meaningful condition if "subject matter" is understood, not as a purportedly mechanical criterion unaffected by intentionality, but as a criterion explicitly based on intention. This part draws on jurisprudence and literature on these legal techniques to illuminate the understanding of the "same subject matter" as the "same regulatory purpose", the pursuance of which by different norms with incompatible means enables inferences to be made on their intended relationship based on temporality, speciality, or relevance. It argues that shunning the inquiry on the regulatory purpose pursued by legal norms enables the misuse of these legal techniques to "resolve" Ends Conflicts and Unexperienced Conflicts by making the result of applying one legal norm conform to that of applying another in a process unhinged from authorial intents and vulnerable to hegemonic co-optation. Reinvigorating the proper use of legal techniques to infer the intended relationship between different legal norms by scrutinizing their regulatory purposes thus performs an anti-hegemonic function in international law.

A. Resisting the Liquidation of Intention

The ILC Fragmentation Report used the example of maritime carriage of chemical substances to illustrate its concern with the indeterminacy of the "subject matter" to which a norm relates:

> If there are no definite rules on such classification [of subject matters], and any classification relates to the interest from which the instrument is described, then it might be possible to avoid the appearance of conflict by what seems like a wholly arbitrary choice as to what interests are relevant and what [is] not: from the perspective of marine insurers, say, the case would be predominantly about carriage, while, from the perspective of an environmental organization, the predominant aspect of it would be environmental. The criterion of "subject-matter" leads to *reductio ad absurdum*.[95]

The ambiguity in this example lies in its elision of the subject matter as a purportedly factual "case" (a situation) to which different legal norms apply and the subject matter as an explicitly intentional "case" (a regulatory purpose) pursued by different legal norms. While interpreting the "subject matter" of a legal norm as its "regulatory purpose" accepts it as a product of intention, to which "much legal interpretation is geared",[96] interpreting the "subject matter" of a legal norm as its "factual situation" is inevitably coloured by the interpreter's subjective perspective in opaque ways. Indeed, whether

[95] *Ibid*., at para. 22.
[96] *Ibid*., at para. 34; Villiger, *supra* note 17 at 403, para. 7.

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one characterization of a factual situation (for example, as carriage of goods) is any closer to its reality (an "is") than another characterization (for example, as environmental hazards) defies objective measurement for the lack of a meta-perspective. While "regulatory purpose" is also subject to different potential characterizations, their relative proximity to its reality (an "ought") can more feasibly be measured by comparison with parties' intention as may be inferable from the circumstances surrounding the norm, as the ILC Fragmentation Report has acknowledged in the context of "treaty regimes".[97]

This is not to suggest that determining "subject matter" as "regulatory purpose" does not entail any indeterminacy concern, for "there seems to exist no way of objectively ascertaining the overriding policy-consideration which prompted the rule itself",[98] at least not in the abstract. However, it is a concern that can be alleviated by reference to a spectrum of the breadth of commonality of purpose shared by different norms – from the broadest (or weakest) commonality (for example, virtually all norms share the purpose of advancing human welfare)[99] to the narrowest (or strongest) commonality (for example, each norm, by virtue of its unique wording or practice, serves a distinct purpose).[100] The narrower (or stronger) the commonality of purpose shared by different legal norms, the stronger the inference of an intended relationship based on temporality, speciality, or relevance to be considered in its interpretation. Vice versa, the broader (or the weaker) the commonality of purpose shared by different legal norms, the weaker the inference that the norms are intended to relate to each other in those ways. The ILC Fragmentation Report recognized a similar spectrum of the breadth of commonality of purpose – "[t]he way a WTO treaty links with a human rights treaty, for example, is not identical to the way a framework treaty on an environmental matter relates to a regional implementation instrument".[101]

Jurisprudence and literature contain illustrative examples of commonality vis-à-vis distinction between the regulatory purposes pursued by different norms, which can be divided into three categories: norms included in the same instrument, norms included in the same institution, and other norms.

1. Norms included in the same instrument

Including two norms in the same instrument could indicate the commonality of their regulatory purpose. In *Brannigan and McBride v. UK*,[102] the European Court of Human Rights (ECtHR) considered two procedural norms under the European Convention on Human Rights (ECHR) on a complaint for the violation of the liberty rights under Article 5 ECHR: Article 13 ECHR, providing for the right to an effective remedy and Article 5(4) ECHR, providing for the right to take legal proceedings to challenge detention. The ECtHR held Article 5(4) ECHR to be *lex specialis* to Article 13 ECHR, under which the requirements were considered "less strict".[103] In *Nikolova v. Bulgaria*,[104] the ECtHR made a similar finding: Article 5(4) ECHR was *lex specialis* to Article 13 ECHR, the requirements under which were considered "more general".[105] In invoking *lex specialis*, the ECtHR

[97] Study Group of the International Law Commission, *supra* note 6 at paras 255–6.

[98] Martti KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006) at 51.

[99] "[A] treaty's purpose . . . will usually be something akin to the protection of human life or the promotion of human welfare or human dignity", as pointed out in Klabbers, *supra* note 51 at 148.

[100] See Broude and Shany, *supra* note 52 at 7.

[101] Study Group of the International Law Commission, *supra* note 6 at para. 255.

[102] *Brannigan and McBride v. the United Kingdom* (1993) 17 EHRR 539.

[103] *Ibid*., at para. 76. See *De Jong, Baljet and van den Brink v. the Netherlands* (1986) 8 EHRR 20 at para. 60.

[104] *Nikolova v. Bulgaria* (2001) 31 EHRR 64.

[105] *Ibid*., at para. 69.

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was, in effect, addressing a Means Conflict between Article 13 ECHR and Article 5(4) ECHR, which could entail incompatible means (for example, if their different procedural requirements create unacceptable ambivalence in policy terms) to achieve their shared regulatory purpose to address violations of the ECHR.[106] The holdings that Article 13 ECHR was "less strict" or "more general" than Article 5(4) ECHR were enabled by this shared regulatory purpose against which the quality of the two norms could be meaningfully compared to infer the intention that the more special would override the more general. The ECtHR similarly invoked *lex specialis* to establish the relationship between Article 13 ECHR on the right to an effective remedy and Article 6 ECHR on the right to a fair trial, which could similarly trigger a Means Conflict.[107]

Even if individual legal norms seem to pursue different ends, their inclusion within the same instrument implies consideration of their differences and may suggest a new, synthesized, common regulatory purpose. The ILC Fragmentation Report regarded the inclusion in the UNC of Article 2(4) (prohibiting the use of force in international relations) and Article 51 (preserving the right of self-defence) as a possible example where "[b]oth rules are now rationalized under the same purpose".[108] This synthesized purpose is the maintenance of international peace and security through effective collective measures.[109] The prohibition on using force and the permission for using force for self-defence may then be seen as constituting a Means Conflict between the incompatible means of this common purpose, which is resolvable by *lex specialis*. Thus, the right to self-defence preserved in Article 51 UNC, being more "special" as an exception to the general prohibition on the use of force under Article 2(4) UNC, derogates from it.[110] Article 31(1) VCLT provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*",[111] and since context includes the entire text of the treaty itself,[112] each legal norm in a treaty should be interpreted in view of the other norms in that treaty. The fact that the parties consciously included two apparently incompatible norms into one instrument lends weight to the inference that the more special norm is intended to derogate from the more general one in pursuing a new, synthesized purpose.[113]

However, the inclusion of two legal norms into the same instrument is only a potential, not a definitive, indication that they share the same regulatory purpose. An overall contextual interpretation of that instrument could well demonstrate otherwise. In *Neumeister*

[106] See similar examples cited in Lindroos, *supra* note 88 at 54.

[107] *Yankov v. Bulgaria* (2005) 40 EHRR 36 at para. 150. See also *Vasilescu v. Romania* (1999) 28 EHRR 241 at para. 43.

[108] International Law Commission Study Group, *supra* note 6 at para. 95.

[109] UNC, *supra* note 20 at art. 1(1). The right to self-defence subsists only "until the Security Council has taken measures necessary to maintain international peace and security", see UNC, *supra* note 20 at art. 51.

[110] As art. 51 UNC, *ibid*., starts with "[n]othing in the present Charter shall impair …", which explicitly derogates from other provisions of the UNC, including art. 2(4); one might also argue that the operation of *lex specialis* is embedded in this explicit language itself which, rather than resolving a Means Conflict by rendering art. 51 UNC an exception to art. 2(4) UNC avoids it by rendering art. 51 UNC merely an application of art. 2(4) UNC. See further in the Study Group of the International Law Commission, *supra* note 6 at paras 88, 95.

[111] VCLT, *supra* note 54 at art. 31(1), emphasis added.

[112] *Ibid*., at art. 31(2).

[113] Another example can be found in the EC – Tariff Preferences case, where the WTO Appellate Body, in recognizing the purpose of GATT to promote growth in international trade and trade and export earnings for developing countries commensurate with their needs, with which preferential measures are required to be consistent, could be seen to have synthesized two different purposes within GATT, namely the elimination of discriminatory treatment in international trade on the one hand and economic development for developing countries on the other. See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WTO Doc. WT/DS246/AB/R (7 April 2004) at paras 168–9.

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v. Austria,[114] the ECtHR rejected the characterization of Article 5(5) ECHR (providing for the right to compensation for violations of Article 5 ECHR) as *lex specialis* to the then Article 50 ECHR (providing for the ECtHR's jurisdiction to afford just satisfaction in case the internal law of the state party allows only partial reparation) for they were "placed on different levels".[115] The distinction between the substantive purpose of Article 5(5) ECHR and the jurisdictional purpose of Article 50 ECHR discounted the commonality of their end goals and precluded the finding of a Means Conflict that could admit the application of *lex specialis* to infer the intention that Article 5(5) ECHR would override Article 50 ECHR.[116] The regulatory purposes of the two legal norms were different but did not create an Ends Conflict if they were compatible and should coexist and be co-applied as a policy matter, as the ECtHR held.[117] In a similar vein, although the ECtHR held Article 11 ECHR (on the freedom of assembly) to be *lex specialis* to Article 10 ECHR (on the freedom of expression),[118] implicitly portraying a Means Conflict between them, the quite distinct regulatory purposes of the two freedoms have cast doubt on the soundness of such holdings.[119]

Another example of different norms contained in the same instrument but pursuing distinct regulatory purposes can be found in the *S.S. Wimbledon case*.[120] In that case, the Permanent Court of International Justice (PCIJ), in considering whether or not the Kiel Canal should be open to all nations at peace with Germany according to the Treaty of Versailles, rejected conforming to the interpretation of the provisions relating to the Kiel Canal to those relating to the inland navigable waterways of Germany lest the former "would lose their 'raison d'être'".[121] Instead, it held that:

> [T]he idea which underlies [the provisions relating to the Kiel Canal] is not to be sought by drawing an analogy from [the provisions relating the inland navigable waterways of Germany] but rather by arguing *a contrario*, a method of argument which excludes them.[122]

Thus, the PCIJ implicitly distinguished between the regulatory purposes of the two sets of norms to preclude the finding of a Means Conflict and the interpretation of one norm to conform with the other. Nor did the two norms create an Ends Conflict for their different regulatory purposes, which were compatible in that the distinct regulations of an international waterway and inland waterways should, as a policy matter, coexist and be co-applied with the same normative force.

2. Norms included in the same institution

The inclusion of different legal norms in a common legal institution could be another potential indication of the commonality of their regulatory purpose. In *Iran-United States Case A/2*,[123] the Iran-US Claims Tribunal (IUCT) declined jurisdiction over claims made by

[114] *Neumeister v. Austria* (1974) Series A No 17.
[115] *Ibid*., at para. 30.
[116] *Ibid*.
[117] *Ibid*.
[118] *Ezelin v. France* (1992) 14 EHRR 362 at para. 35; *Djavit An v. Turkey* (2005) 40 EHRR 45, at para. 39.
[119] Study Group of the International Law Commission, *supra* note 6 at para. 73; Lindroos, *supra* note 88 at 61–4.
[120] *Case of the S.S. Wimbledon,* P.C.I.J. Rep. Series A No. 1.
[121] *Ibid*., at 24.
[122] *Ibid*. This method is similar to the "exclusory" or "negative" interpretation described in Panos MERKOURIS, Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave (Leiden: Brill, 2015), at 66.
[123] *Iran v. United States Declaration,* Award No. 1-A2-FT, Decision of 26 January 1982, 1 Iran-U.S. CTR 101 [*Iran v. United States Case A/2*].

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Iran against US nationals on the basis of the General Declaration of 19 January 1981[124] between Iran and the United States to "terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration".[125] The IUCT did so because the specific provisions of the Claims Settlement Declaration,[126] made on the same date as and referring to the General Declaration, listed the types of claims within the IUCT's jurisdiction, which did not include claims brought by Iran against US nationals. The IUCT concluded that "the terms of the Claims Settlement Declaration are so detailed and so clear that they must necessarily prevail over the purported intention of the parties".[127] The conclusion was reached in light of the extensive institutional linkages between the two instruments,[128] which evidenced a shared regulatory purpose to settle the Iran-U.S. disputes arising from the 1979 Iranian Revolution by arbitration. In light of this shared regulatory purpose, the potentially different scopes of the IUCT's jurisdiction drawn by the two Declarations may be considered incompatible as their coexistence and co-application would create unacceptable procedural uncertainty in policy terms, thereby triggering a Means Conflict resolvable by the criterion of speciality.

Similar institutional relationships existed between Protocol XII to the Treaty of Lausanne 1923[129] (Protocol XII) and the British Mandate for Palestine[130] (BMP), both of which regulated certain concessions in Palestine granted by the Ottoman Empire but administered by Britain. In a dispute on such concessions in the *Mavrommatis Palestine Concessions* case,[131] the PCIJ held that the special jurisdiction for the assessment of indemnities established by Protocol XII excluded the general jurisdiction given to the PCIJ by the BMP.[132] The PCIJ's conclusion that Protocol XII "being a special and more recent agreement, should prevail"[133] was made after finding that the power granted by the BMP to Britain was subject to Protocol XII,[134] the BMP "refers to [Protocol XII] in general terms"[135] and "[Protocol XII] is the complement of the provisions of the [BMP] in the same way as a set of regulations alluded to in a law indirectly form part of it".[136] The institutional relationships between the two instruments[137] evidenced a conscious sense of their common regulatory purpose to avail public property in the former

[124] *Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States*, 19 January 1981, (1981) 20 I.L.M 224 [*General Declaration*].

[125] *Ibid*., at para. B.

[126] *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, 19 January 1981, (1981) 20 ILM 229 [*Claims Settlement Declaration*].

[127] *Iran v. United States Case A/2, supra* note 123 at 104.

[128] *Ibid*.

[129] *Treaty of Peace, signed at Lausanne*, 24 July 1923, 28 L.N.T.S. 11 (entered into force 6 August 1924) [*Treaty of Lausanne*].

[130] *The Mandate for Palestine*, online: UN https://www.un.org/unispal/document/auto-insert-201057/ (entered into force on 29 September 1923) [BMP].

[131] *The Mavrommatis Palestine Concessions*, P.C.I.J. Rep. Series A No. 2.

[132] *Ibid*., at 31.

[133] *Ibid*.

[134] BMP, *supra* note 130 at art. 11; *Mavrommatis Palestine Concessions, supra* note 131, at 26.

[135] *Ibid*., at 31.

[136] *Ibid*.

[137] While the BMP was granted by the League of Nations to Britain over a former part of the Ottoman Empire, both Britain and Turkey (successor to the Ottoman Empire) were parties to the Treaty of Lausanne in which Turkey recognized the proposed BMP, paving the way for the latter to come into effect. See Treaty of Lausanne, *supra* note 129, art. 4 and Minutes of Meeting of Council of the League of Nations held at Geneva on 29 September 1923, noting the BMP entering into force, online: https://www.un.org/unispal/document/auto-insert-204395/..

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Ottoman Empire for use.[138] In light of this common purpose, the different fora for dispute settlement assigned by the two norms could be considered incompatible in policy terms for creating unacceptable procedural uncertainty, thereby presenting a Means Conflict resolvable by the criterion of speciality.

The ILC Fragmentation Report identified similar institutional relationships in other treaty regimes, such as the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer *vis-à-vis* the 1985 Vienna Convention on the Protection of the Ozone Layer[139] and the World Trade Organization treaties regime.[140] While the parties did not enter into a single treaty with a "rationalized regulatory purpose" that reconciles different legal norms, the fact that they include these norms in the same "regime" strongly suggests that they would have addressed their minds to their co-presence, giving grounds to infer their intention that these norms pursue a common goal, in view of which any incompatible means they prescribe would trigger a Means Conflict resolvable by the relevant legal techniques.

However, the refutability of this inference means that institutional relationships do not always evidence the sharing by two legal norms of the same regulatory purpose. In *JT's Corporation Ltd v. Commission of the European Communities*,[141] concerning a rejection of a request for access to custom documents, the Court of First Instance (CFI) of the EU examined (1) EU Regulation No 1468/81[142] (providing for the confidentiality of information obtained in customs investigations by EU institutions) (the "Custom Confidentiality Regulation") and (2) the EU Code of Conduct[143] annexed to Decision 94/90[144] (providing for the right of public access to documents held by EU institutions) (the "Transparency Code of Conduct").[145] While assigning the label "lex specialis" to the Custom Confidentiality Regulation, the CFI held that it cannot override the Transparency Code of Conduct.[146] In support of this holding, the CFI emphasized the aim of the Transparency Code of Conduct to make "the Community more transparent, the transparency of the decision-making process being a means of strengthening the democratic nature of the institutions and the public's confidence in the administration" and its "fundamental objective ... to give citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers".[147] The CFI's refusal to defer the transparency

[138] *Ibid.*

[139] *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 U.N.T.S. 3 (entered into force 1 January 1989) and *Vienna Convention on the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 323 (entered into force 22 September 1988). See Study Group of the International Law Commission, *supra* note 6 at para. 98.

[140] Different agreements, together with annexes and schedules, are all linked to and contemplated in one umbrella agreement, i.e., *the Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154 (entered into force 1 January 1995) [*Marrakesh Agreement*], "as a 'single package' at one point in time". See Pauwelyn, *supra* note 3 at 397.

[141] Case T-123/99, *JT's Corporation Ltd v. Commission of the European Communities,* Judgment of the Court of First Instance of 12 October 2000, ECR (2000) II-3269 [*JT's Corporation Ltd*].

[142] Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, 1), as amended by Council Regulation (EEC) No 945/87 of 30 March 1987 (OJ 1987 L 90, 3).

[143] The Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, 41), designed to establish the principles governing access to the documents held by the European Council and the European Commission. See *JT's Corporation Ltd*, *supra* note 141, at 3274, para. 2.

[144] Decision 94/90/ECSC, EC, Euratom: Commission Decision of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, 58).

[145] *JT's Corporation Ltd*, *supra* note 141, at 3292, para. 50.

[146] *Ibid.*

[147] *Ibid.*

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norm to the customs confidentiality norm, therefore, denied in substance the applicability of *lex specialis* between these two norms with different regulatory purposes. The CFI eventually relied on an exception to the Custom Confidentiality Regulation concerning the use of documents in legal proceedings, within which the request in that case fell,[148] to avoid a policy incompatibility between the goals of the two norms, but it remains to be seen whether an Ends Conflict could arise in the context of other requests.

3. Other norms

Without a common instrument or institutional relationship, finding a common regulatory purpose between different legal norms is more difficult unless sufficient circumstantial evidence suggests the same. An example is parallel norms between a treaty and a custom. The IUCT held in *Amoco International Finance Corporation v. Iran*[149] that the rules on compensation for nationalization under a treaty, as *lex specialis*, supersede those under customary international law.[150] Since the relevant treaty and its corresponding customary international law rule serve the same narrow regulatory purpose, their different compensation calculations could easily be considered incompatible as a matter of policy, thus triggering a Means Conflict resolvable by *lex specialis.* Incompatible treaties and customary rules on methods of dispute settlement have likewise been reconciled by *lex specialis* in *Nicaragua v. US* (Merits),[151] which is in line with the understanding that they share a common regulatory purpose for dispute settlement. While the ILC Fragmentation Report characterized treaties' priority over custom as "merely incidental to the fact that most general international law is *jus dispositivum*",[152] the underlying reason for this lies in the latter's relative generality to the former by reference to the same goal. When parallel rules in a treaty and a custom serve the same end goal, the treaty becomes more "special" (at least in the sense of its narrower scope of application unless it is universally ratified) than the custom as a means to that goal. In case of incompatibility, the inference is that the treaty is intended to prevail over the custom.

Similarly, the overlap between a special customary rule and a general customary rule serving the same regulatory purpose underlies the ICJ's recognition in the *Right of Passage Case* (Merits)[153] that a special customary rule on the right of passage developed locally in the Indian territories prevailed over the general rule in international custom.[154] Given that narrow common purpose between the overlapping customary rules, their different scopes of rights became incompatible, triggering a Means Conflict resolvable by the criterion of speciality (local custom being more "special" in the sense of its narrower scope of application).

Absent a clear parallel, some contextually proximate norms may still be seen as pursuing a common regulatory purpose, the means to which as prescribed by these norms may be considered incompatible in policy terms, thus triggering a Means Conflict resolvable by legal techniques, particularly the stronger form of systemic integration. Comparatively, however, the finding of a common regulatory purpose between different norms on the basis of their contextual proximity would be more debatable as it requires

[148] *Ibid.*

[149] *Amoco International Finance Corporation v. Iran*, Award No. 310-56-3, Decision of 14 July 1987, (1987) 15 Iran-U.S. CTR 189.

[150] *Ibid.,* at para. 112. See a similar holding in *INA Corporation v. Iran*, Award No. 184-161-1, Decision of 13 August 1985, (1985) 8 Iran-U.S. CTR 378.

[151] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, [1986] I.C.J. Rep. 14 at para. 274.

[152] Study Group of the International Law Commission, *supra* note 6 at para. 79.

[153] *Right of Passage over Indian Territory (Portugal v. India),* Merits, [1960] I.C.J. Rep. 6.

[154] *Ibid.*, at 44.

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a more nuanced assessment of circumstantial evidence of intention. In the *Right of Passage Case* (Preliminary Objections),[155] the ICJ interpreted Portugal's reservation, from its consent to the ICJ's compulsory jurisdiction, of its right to exclude any dispute by notification as not extending to unilateral, retroactive withdrawal of consent, in line with a pre-existing, generally accepted rule of law.[156] Although Portugal's reservation from its consent to the ICJ's jurisdiction is not a "parallel" to the general principle of law against retroactive withdrawal of consent in the same way illustrated in the above examples, their contextual proximity suggests a common purpose of delineating the ICJ's jurisdiction, in view of which their divergence over retroactive withdrawal of consent to the ICJ's jurisdiction appears incompatible in policy terms. This triggered a Means Conflict resolvable by a stronger form of systemic integration under which Portugal's reservation was interpreted to be consistent with the rule against retroactive withdrawal of consent, which Portugal should have been aware of when formulating its reservation.

Another example is the *US-Shrimp* case,[157] where the WTO Appellate Body implicitly found a common regulatory purpose between GATT,[158] Article XX(g) of which exceptionally allows trade restrictions "relating to the conservation of exhaustible natural resources" and various environmental conventions in view of the preamble to the WTO Agreement referencing "the objective of sustainable development".[159] In considering whether the US ban on shrimp and turtle imports qualified as exceptional measures under Article XX(g) GATT, the WTO Appellate Body took into account environmental conventions[160] in interpreting "natural resources" to include living resources[161] and "exhaustible" natural resources to include turtles as a "species *threatened with extinction*".[162] The common regulatory purpose of sustainable development shared between these environmental conventions and Article XX(g) GATT thus rendered the difference in the scope of protection they afford to living, threatened species a Means Conflict, resolvable by a stronger form of systemic integration.

A similar example can be found in *Golder v. UK*,[163] where the ECtHR interpreted the right to a "fair and public hearing" under Article 6(1) ECHR to include the right of access to a court by reference to the "general principles of law recognized by civilized nations" that "a civil claim must be capable of being submitted to a judge".[164] Although the two norms were not clearly parallel, their contextually proximate pursuit of procedural justice led to their characterization by the ECtHR as "rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined

[155] *Right of Passage* (Preliminary Objections), *supra* note 59.

[156] *Ibid*., at 142.

[157] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (12 October 1998), online: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds58/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# [*US—Shrimp*].

[158] *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 U.N.T.S. 187 (entered into force 1 January 1995) [GATT].

[159] *Marrakesh Agreement*, *supra* note 140 at Preamble.

[160] These included *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994), *Convention on Biological Diversity*, 22 May 1992, 1760 U.N.T.S. 79 (entered into force 29 December 1993), *Convention on the Conservation of Migratory Species of Wild Animals*, 23 June 1979, 1651 U.N.T.S. 333 (entered into force 1 November 1983) and *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 U.N.T.S. 243 (entered into force 1 July 1975).

[161] *US – Shrimp, supra* note 157 at para. 131.

[162] *Ibid*., at para. 132.

[163] *Golder v. the United Kingdom* [1975] ECHR 1.

[164] *Ibid*., at para. 35.

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in the narrower sense of the term".[165] Their potentially different court access requirements could be seen as incompatible procedures to achieve this common regulatory purpose. This triggered a Means Conflict resolvable by a stronger form of system integration under which Article 6(1) ECHR was interpreted to conform to the pre-existing general principle of law requiring claims to be capable of being submitted to a judge, which parties should have been aware of when adopting the ECHR.

Golder v. UK can be contrasted with the subsequent case of *Al-Adsani v. UK,*[166] where the ECtHR further interpreted the right of access to a court under Article 6(1) ECHR in light of the generally recognized rules of international law on state immunity to hold that the right was not violated by the domestic procedural bar on suing a foreign sovereign for torture.[167] This, in effect, interpreted Article 6(1) ECHR to conform with the sovereign immunity rule against domestic lawsuits against foreign sovereigns under a stronger form of systemic integration. This interpretation could only be justified by an inferred intention that Article 6(1) ECHR would not contradict the sovereign immunity rule on the basis that they are pursuing a common regulatory purpose with incompatible means in a Means Conflict. However, this basis is disputable because of the sharp distinction between the purpose of Article 6(1) ECHR to guarantee fair legal proceedings to individuals and the purpose of the state immunity rule to maintain sovereign equality in international relations. If one were to argue that the two norms serve a common but very broadly scoped objective of, say, "regulating civil proceedings", then its probative value in inferring the intended relationship between the two norms will be considerably reduced, as explained above in this Section A.

Absent parallel norms or contextual proximity between norms, it is more difficult to discern a shared regulatory purpose to infer an intended relationship between them. In the *Mutual Assistance in Criminal Matters (Djibouti/France) Case,*[168] the ICJ acknowledged that the 1977 Treaty of Friendship and Co-operation between Djibouti and France (the "1977 Treaty"),[169] which posits friendship and cooperation as the basis of their mutual relations, were "relevant rules" to be taken into account in interpreting the Convention on Mutual Assistance in Criminal Matters of 1986 between them (the "1986 Convention").[170] However, the ICJ declined to allow the 1977 Treaty to override the express provision in the 1986 Convention excusing the performance of mutual assistance obligations.[171] In arriving at its conclusion, the ICJ noted that the 1986 Convention neither referred to nor specified cooperation in an area chosen by the 1977 Treaty.[172] Implicit in these holdings was that while the two legal norms pursue regulatory purposes that have some very broad (or weak) commonality (for example, to advance the mutual relations between Djibouti and France), their respective regulatory purposes remain distinct enough to preclude the finding of a Means Conflict for resolution by the relevant legal techniques. While different, the regulatory purposes of maintaining friendship and providing mutual procedural assistance were compatible as a policy matter, precluding any Ends Conflict.

[165] *Ibid.*, at para. 28.

[166] *Al-Adsani v. United Kingdom* [2001] ECHR 761 [*Al-Adsani v. United Kingdom*], followed by *Jones and Ors v. the United Kingdom* [2014] ECHR 176.

[167] *Al-Adsani v. United Kingdom*, *supra* note 166 at paras 55–6.

[168] *Mutual Assistance in Criminal Matters (Djibouti v. France) Case,* [2008] I.C.J. Rep. 177 [*Djibouti v. France*].

[169] *Treaty of Friendship and Co-operation between Djibouti and France*, 27 June 1977, 1482 U.N.T.S. 193 (entered into force 31 October 1982).

[170] *Convention on Mutual Assistance in Criminal Matters between Djibouti and France*, 27 September 1986, 1695 U.N.T.S. 298 (entered into force 1 August 1992).

[171] *Djibouti v. France*, *supra* note 168 at para. 114

[172] *Ibid.*, at para. 111.

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The *Oil Platforms case* (Merits)[173] illustrates the over-enthusiasm to find commonality between different regulatory purposes pursued by different norms unrelated by instruments, institutions, or contextual proximity. The majority of the ICJ in that case held that the "measures ... necessary to protect its essential security interests" as an exception to the "freedom of commerce clause" in the 1955 Iran-US Treaty of Amity, Economic Relations and Consular Rights (the "Iran-US Treaty")[174] was not "intended to operate wholly independently of the relevant rules of international law on the use of force" and could not be invoked in an unlawful use of force.[175] This, in effect, interpreted the exception to the freedom of commerce clause to limit it by the prohibition of the use of force embedded in the UNC under a stronger form of systemic integration, which requires a common regulatory purpose found lacking by Judge Higgins, who urged more attention to their "contexts" (bilateral economic relations versus international peace and security).[176] Her characterization of the exception to the freedom of commerce clause as "not a provision that on the face of it envisages incorporating the entire substance of international law on a topic not mentioned in the clause – at least not without more explanation than the Court provides"[177] may be seen as an invitation for further reflection of the respective regulatory purposes of these legal norms and their potential compatibilization.

B. Resisting Hegemony

The unreflective, mechanistic use of legal techniques to "resolve" norm conflicts, the traditional definition of which has been similarly mechanized and often conflated with the resolution of norm conflict, provides a legal-technical formula for hegemony.[178] In the decentralized international law system, countless legal norms relate to the same factual situation (the purportedly mechanical condition to norm conflict resolution unaffected by intentionality), providing different directions (the purportedly mechanical definition of norm conflict without reference to experience). If different normative directions over one factual situation mechanically give rise to norm conflicts that are mechanically resolvable through the relevant legal techniques, one could come up with many Unexperienced Conflicts or Ends Conflicts for "resolution" by these legal techniques, as if they were Means Conflicts. Unmoored from the actual mental experience of conflict and the intentionality that grounds the justifications for and limits the use of these legal techniques, such a "resolution" can easily be co-opted to serve ulterior, hegemonic aims.

This can be illustrated by the treatment of the legal norms in *jus in bello* and international human rights law that give different directions on matters in armed conflicts, thereby qualifying them as norm conflict under its traditional conception. Bearing out the conflation between the definition and resolution of norm conflicts, legal techniques such as *lex specialis* and the stronger form of systemic integration have been used extensively to address the perceived conflicts between these norms, with little regard for their distinct yet compatible regulatory purposes, an in-depth consideration of which would

[173] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, [2003] I.C.J. Rep. 161 [*Oil Platforms*].

[174] *Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States of America*, 15 August 1955, 284 U.N.T.S. 93 (entered into force 16 June 1957).

[175] *Oil Platforms*, *supra* note 173 at para. 41.

[176] *Ibid.*, separate opinion of Judge Higgins, at para. 46. "Context" is explicitly mentioned in VCLT, *supra* note 54 at art. 31(3)©.

[177] *Ibid.*

[178] Martti KOSKENNIEMI, "Hegemonic Regimes" in Margaret A. Young, ed., *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 305.

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render them merely Unexperienced Conflicts. These Unexperienced Conflicts were then "resolved" by legal techniques to conform one norm to another in ways that serve hegemonic interests.

In the *Nuclear Weapons Advisory Opinion*,[179] the ICJ considered the legality of nuclear weapons under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits the arbitrary deprivation of life. Denying that the meaning of arbitrary deprivation of life could be "deduced from the terms of the [ICCPR] itself", the majority of the ICJ interpreted it by reference to the rules regulating the conduct of hostilities in *jus in bello*, designated as *lex specialis*.[180] Although recent commentaries characterize the ICJ's approach as a weaker form of systemic integration that did not interpret Article 6 ICCPR to conform it to the conduct of hostilities rules in *jus in bello*,[181] many commentaries at the time characterized it as exactly having that conforming effect by way of *lex specialis*.[182]

As explained, *lex specialis*, or the stronger form of systemic integration under which one norm is interpreted to conform to another, can only be justified if these norms prescribe incompatible means to achieve the same regulatory purpose, thereby triggering a Means Conflict. While the ICJ referred to the "design" of *jus in bello* norms to regulate the conduct of hostilities and rejected the idea that the right to life in the ICCPR only applies in peacetime,[183] it never considered the regulatory purpose of the latter in war. Had the ICJ referenced the preamble to the ICCPR recognizing human rights as foundational to "peace in the world" and as achievable only when the right conditions are created,[184] the distinction between the regulatory purposes of the *jus in bello* rules on the conduct of hostilities and the right to life under the ICCPR would have been made apparent. While regulating the conduct of hostilities in *jus in bello* accepts the reality of armed conflict to protect its victims,[185] the ICCPR seeks to accomplish "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want" through the condition of peace.[186] Their distinct end goals would have precluded the implicit finding of a Means Conflict.

Even if these distinct end goals were to be grouped under one broadly conceptualized end goal of, say, the protection of human welfare, it is still difficult to envision the two sets of norms as merely means to the same goal because of the substantive, as opposed to procedural, nature of these norms. Even if somehow, they were construed as mere means to a common goal and giving rise to a Means Conflict, the very broad (or weak) commonality of the regulatory purpose of the two norms would significantly weaken the probative power of the legal techniques, as explained in Section A of this Part.

If one accepts that the regulatory purpose of *jus in bello* to manage political violence and the regulatory purpose of the ICCPR to achieve peaceful conditions for the enjoyment

[179] *Nuclear Weapons Advisory Opinion*, *supra* note 14.

[180] *Ibid.*, para. 25.

[181] For example, Andrew CLAPHAM, "The Complex Relationship between the 1949 Geneva Conventions and International Human Rights Law" in Andrew CLAPHAM, Paola GAETA and Marco SASSÒLI, eds., *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), 701 at 722; Marko MILANOVIC, "The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law" in Jens David OHLIN, ed., *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge: Cambridge University Press, 2016), 78 at 107, fn 93.

[182] For example, Doswald-Beck, *supra* note 14 at 50–1; Dapo AKANDE, "Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court" (1998) 68 British Yearbook of International Law 165 at 175.

[183] *Nuclear Weapons Advisory Opinion*, *supra* note 14 at para. 25.

[184] International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976), Preamble [ICCPR].

[185] API, *supra* note 39 at Preamble.

[186] ICCPR, *supra* note 184 at Preamble.

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of human rights are distinct, strong arguments can be made for their policy compatibility, thus precluding an Ends Conflict. The purported management of political violence does not undermine the goal of achieving peaceful conditions and vice versa, as implied in the many observations that their implementing norms complement each other.[187] This complementarity is reflected in the following general rule articulated by the ICJ:

> There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.[188]

In sum, the distinct regulatory purposes of the right to life under the ICCPR and the conduct of hostilities rules under *jus in bello* and their contextual compatibility preclude the finding of either a Means Conflict or an Ends Conflict and render the different directions given by them an Unexperienced Conflict.

In the *Nuclear Weapons Advisory Opinion*, the misuse of *lex specialis* or the stronger form of systemic integration to conform Article 6 ICCPR to the conduct of hostilities rules in *jus in bello* to "resolve" this Unexperienced Conflict, in reality, accomplished the political objective of making the legal consequences of the use or threat of use of nuclear weapons more manageable at the expense of the right to life protected by Article 6 ICCPR. Even though the *Nuclear Weapons Advisory Opinion* was merely an advisory opinion, and some have argued that the ICJ only used a weaker form of systemic integration without interpretive conformation,[189] the Inter-American Commission of Human Rights[190] and the ECtHR[191] followed it in concrete cases to precisely conform the relevant human rights treaty provisions to the relevant rules in *jus in bello*. These cases demonstrate how the abandonment of principles in the use of legal techniques "as an aspect of the pragmatics of the [ICJ's] reasoning"[192] creates a vacuum readily occupied by hegemonic forces to substitute the norms' regulatory purposes with the hegemons' own political agendas. Resisting the hegemonic manipulation of international law requires the reinvigoration rather than the obscuration of these principles.

IV. Conclusion

This article challenges the mechanization of the identification of "norm conflict" by uncovering its experiential dimension and reintegrating it into its doctrinal definition. It also challenges the mechanization of the resolution of norm conflict by uncovering its

[187] See e.g. *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, United Nations Human Rights Committee (HRC), UN Doc. CCPR/C/GC.36 (2018), at para. 67; *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004), at para. 11.

[188] *Application of the Convention on the* Prevention *and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015] I.C.J. Rep. 3 at para. 474.

[189] See the text accompanying note 180 above.

[190] For the use of *lex specialis*, see *Juan Carlos Abella v. Argentina*, Inter-American Court of Human Rights, Case 11.137, Decision of 18 November 1997, as reported in *Annual Report of the Inter-American Commission of Human Rights 1997,* OEA/Ser.L/V/II.98 (13 April 1998), Report No. 55/97, at para. 166. See *Coard et al. v. United States*, Inter-American Court of Human Rights, Case 10.951, as reported in *Annual Report of the Inter-American Commission of Human Rights 1999*, OEA/Ser.L/V/II.106. (13 April 1999), Report No. 109/99, at para. 42.

[191] For the use of the stronger form of systemic integration, see *Hassan v. United Kingdom* [2014] ECHR 1145 at para. 104.

[192] Study Group of the International Law Commission, *supra* note 6 at para. 104.

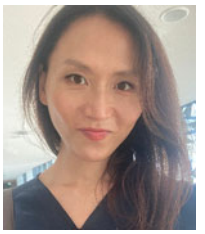
https://doi.org/10.1017/S2044251324000031 Published online by Cambridge University Press

intentional dimension and reintegrating it into the doctrinal principles for the use of legal techniques to resolve norm conflicts. While appreciating that "'fragmentation' and 'coherence' are not aspects of the world but lie in the eye of the beholder",[193] the article does not descend into solipsism but interrogates the different contextual factors that give rise to the mental experiences of (in)compatibility between norms to generate a new typology of Ends Conflict, Means Conflict, and Unexperienced Conflict. Recognizing the intentional dimension in the use of certain legal techniques to resolve norm conflict unveils the principled mechanisms of inferring the intended relationship between norms that are in Means Conflicts and reveals the hegemonic implications of their use to "resolve" End Conflicts, which cannot be resolved by legal techniques or Unexperienced Conflicts, which need not and should not be "resolved" at all. The article thus calls for the reinvigoration of the proper, principled use of these legal techniques as an anti-hegemonic strategy in international law.

Acknowledgements. The author would like to express her gratitude to the philosophers affiliated with the Centre for Subjectivity Research at the University of Copenhagen for discussing the ideas developed in this article. The author would also like to thank Jan Klabbers and the anonymous reviewers for their comments on the manuscript.

Funding statement. Open Access funding provided by the Qatar National Library.

Competing interests. The author declares none.



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[193] *Ibid.*, at para. 20.

Cite this article: YIP KL (2025). Reconceptualizing Norm Conflict in International Law. *Asian Journal of International Law* **15**, 47–75. https://doi.org/10.1017/S2044251324000031