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Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?

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Abstract
Treaties are contractual instruments that may provide special rules of priority in case they conflict with other treaties. When a treaty does not provide such rules, however, priority is determined by the rules of the Vienna Convention on the Law of Treaties (VCLT) and/or general principles of law. This article argues that both the VCLT and general principles of law do not provide an adequate solution to treaty conflicts. It suggests that the solution to treaty conflicts rests in a value-oriented reading of international law and the norms incorporated in treaties. Norms represent values and values represent interests or benefits for which international society requires protection. Conflicts of treaty norms are, therefore, conflicts of values that courts and dispute settlement bodies resolve by ordering a hierarchy of competing interests and protecting the most important interests in a given context.

This article focuses on the law of treaties or, more precisely, the hierarchy among conflicting treaties.[1] Treaties are a means by which states undertake binding obligations under international law towards one another.[2] Due to their contractual formation, treaties are horizontal instruments that have no priority among each other. An uncontroversial role of treaties in international law is the creation of rights and obligations for the states party to them, as well as for their citizens.[3] Treaties are, therefore, composed of norms commanding, permitting, or prohibiting state actions

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1. Cf. *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 15, para. 17 [*ILC's Report on Fragmentation*].
2. See art. 2(1)(a) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 115 U.N.T.S. 331 (entered into force on 27 January 1980) [*VCLT*].
3. *Ibid*., art. 26.

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or practices.[4] In other words, all treaties are normative expressions of rights and obligations that a state accepts and promises to honour with respect not only to other party states but also to these states' citizens.[5] What happens when norms incorporated in one treaty conflict with those in another treaty? The contracting states have defined binding norms for themselves in both treaties. How would one of the contractual instruments be prioritized over the other? Any ambiguity regarding the meaning of a treaty norm falls within the scope of interpretation,[6] as does the question of whether the two treaties can be reconciled. If they cannot be so reconciled, a hierarchical ordering of norms would be required to resolve the conflict. This article deals with the achievement of this ordering.

The article argues that every treaty norm espouses a value since it is meant to protect certain interests. When treaties conflict, a norm representing a higher-level value within the given context is to be preferred over that representing a lower-level value. The textbook example is trade versus human rights.[7] Both trade and human-rights norms represent interests for which party states require protection.[8] Both norms are equally important and should be protected. If they happen to be in an irreconcilable conflict, however, a determination of hierarchy between these conflicting values would be required,[9] which would result in preferring one interest over the other. For example, in *Soering v. the United Kingdom* [*Soering*], the European Court of Human Rights (ECtHR) declared that the United Kingdom's obligation under the European Convention on Human Rights (ECHR) would prevail over the violation of the extradition treaty between the United Kingdom (UK) and the United States of America (US).[10] Likewise, in *Matthews v. the United Kingdom* [*Matthews*], the same court found the UK responsible for violating the ECHR irrespective of its obligations arising from another conflicting treaty.[11] The European Court of Justice (ECJ), in the *Schmidberger Case* [*Schmidberger*], faced a similar issue of conflict of norms where the court preferred freedom of expression over free movement of goods, as guaranteed by the Treaty on the Functioning of the European Union (TFEU).[12]

This article argues that there are significant unanimities in international experience—or global values—that must form the basis of a collective discourse in

4. Seyed Ali SADAT-AKHAVI, *Methods of Resolving Conflicts Between Treaties* (Leiden: Brill Academic Publishers, 2003) at 5.

5. Christopher J. BORGEN, "Resolving Treaty Conflicts" (2005) 37 George Washington International Law Review 573 at 579.

6. For what is and what is not within the scope of interpretation in treaty conflict, see Jan KLABBERS, *Treaty Conflict and the European Union* (Cambridge: Cambridge University Press, 2009) at 34–5.

7. See *ILC's Report on Fragmentation*, *supra* note 1 at 34, para. 55.

8. Cf. Klabbers, *supra* note 6 at 100, including references thereto.

9. See *ILC's Report on Fragmentation*, *supra* note 1 at 34, para. 55.

10. *Soering v. United Kingdom*, [1989] 161 ECHR (Ser. A) Rep. [*Soering*].

11. *Matthews v. United Kingdom*, Judgment of 18 February 1999, [1999] Eur. Ct. H.R. [*Matthews*].

12. *Case C-112/00, Schmidberger v. Austria* [2003] ECR I-5659 [*Schmidberger*]. Formerly known as the EC Treaty, the Treaty of Rome or the Treaty establishing the European Community, the TFEU was given its name and amended by the Lisbon Treaty (signed at Lisbon on 13 December 2007), and sets out organizational and functional details of the European Union. Treaty on the Functioning of the European Union, 13 December 2007, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF> [*TFEU*].

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the study of international law. International law is, therefore, conceived as both a "normative order" and a "factor of social organization".[13] Section I addresses these two ideas: first, the hegemonic construction of international law that suggests that the development of international law and the international legal system are not based on any collective values,[14] and second, the so-called Hobbesian presentation alleging a value-less construction of international society and its legal framework.[15] In this section, the article outlines the foundations of international society and its legal order as a system based on collective values. It argues for the existence of a value-based international society having a fundamental role in international law-making. It establishes that the normative conflicts that result from the clash of two treaties are in effect value conflicts. This section also touches on the effect of "regionalism", or particular orientations of legal thought and culture,[16] on the universalization of values in international law, with particular reference to the debate on "Asian Values".[17] Section I concludes by reiterating that a value-oriented reading of international law not only facilitates a better understanding of normative conflicts but also provides a valid legal basis to resolve them.

Section II elaborates on the value-based paradigm of treaty conflicts. Here, in contrast to the general understanding of treaty conflicts as the conflicts of parallel rights or obligations, the article argues that they should instead be understood as conflicts of values representing interests. Section III establishes that the normative tools contained in the VCLT[18] or outside its framework fail to provide adequate legal solutions to resolve treaty conflicts and fall back on the unprincipled political determination of these conflicts by party states. It explains why treaty conflicts cannot be resolved by reviewing tactical considerations regarding conflicting norms,[19] but would instead require value-oriented thinking about the forms and functions of treaty norms and of the international legal system as a whole. Section IV analyzes how courts and tribunals deal with the issue of treaty conflicts. The analysis uncovers the incompetence of the so-called "principle of political decision", which would leave the resolution of treaty conflicts to political considerations. The article shows how courts and tribunals are empowered and, despite their avoidance of the

13. See generally Prosper WEIL, "Towards Relative Normativity in International Law?" (1983) 77 American Journal of International Law 413 at 413. Cf. Jean D'ASPREMONT, "The Foundations of the International Legal Order", online: SSRN <http://ssrn.com/abstract=1265525>.

14. Martti Koskenniemi is a leading contemporary advocate of the hegemonic construction of international law, and the *ILC's Report on Fragmentation* (*supra* note 1) also presents the same notion of international law. The present article will discuss Koskenniemi's several scholarly writings in this regard, especially this article: Martti KOSKENNIEMI, "International Law and Hegemony: A Reconfiguration" (2004) 17 Cambridge Review of International Affairs 197.

15. For instance d'Aspremont has advocated the rejection of values in the formation of international law (although not in the context of the resolution of normative conflicts) on the basis of a somewhat eccentric distinction between "common interests" and "global values". See d'Aspremont, *supra* note 13.

16. See *ILC's Report on Fragmentation*, *supra* note 1 at 103, para. 199.

17. On the concept and critique of "Asian Values", see e.g. Michael C. DAVIS, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (1998) 11 Harvard Human Rights Journal 109.

18. *Supra* note 2.

19. Cf. Borgen, *supra* note 5 at 580.

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issue, compelled to consider and pronounce on treaty conflicts. It also shows how they evaluate norms, in terms of interests and values, and determine hierarchy among them. Finally, Section V gives a summary of conclusions.

This article does not claim, however, that fundamental value conflicts can always be resolved judicially in the decentralized international legal system. It is also acknowledged that the actions of the members of international society can neither be always motivated nor compelled by the social forces calling for legal determinations of normative conflicts.[20] Furthermore, this article does not advocate that the value-based ordering of conflicting treaty norms will absolve a state from responsibility under international law for the breach of one of two conflicting treaty obligations. It also does not contribute towards the debate on the determination of hierarchy among treaties on the basis of their subjective characterization.[21]

I. VALUES IN INTERNATIONAL LAW

A norm represents a value, and a value represents interests in terms of benefits or advantages that an individual or a community derives from that norm.[22] A society desirous of impeding the construction of factual and counter-factual recurrences that may impair values constructs norms by recruiting specific value representations. Accordingly, any discourse in the construction of international law that disconnects norms from the represented values blurs the necessary component of the social element in international law-making. In real-life situations, norms may conflict with one another, with the resolution of these conflicts being of foremost importance for any legal system. Once we hold that every norm represents a value, these normative conflicts can be treated as conflicts of values. This juxtaposition of norms with values helps us better understand and solve the normative conflicts.

Martti Koskenniemi, however, presents international law as a technique of articulating political claims in terms of legal rights and duties.[23] He holds that the construction of international law is based on unilateral pronouncements of self-appointed hegemonic states.[24] He rejects the existence of any "absolutes" of international law, and describes international law as "a process of articulating

20. For a detailed discussion on the formation and functioning of the international civil society, see Georges ABI-SAAB, "Whither the International Community?" (1998) 9 European Journal of International Law 248.

21. See e.g. Catherine M. BRÖLMANN, "Law-Making Treaties: Form and Function in International Law" (2009) 74 Nordic Journal of International Law 383.

22. See generally Weil, *supra* note 13; John TASIOULAS, "In Defence of Relative Normativity: Communication Values and the Nicaragua Case" (1996) 16 Oxford Journal of Legal Studies 85; Jost DELBRÜCK, "Laws in the Public Interest—Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law" in Volkmar GÖTZ *et al.*, eds., *Liber Amicorum Gunther Jaenicke* (Berlin: Springer, 1998) at 17–18, 28. Cf. Joost PAUWELYN, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (New York: Cambridge University Press, 2003) at 101–6. However, unlike this article, which is focused entirely on the conflicting norms found in two different treaties, both Delbrück and Pauwelyn discuss the question of how treaty norms might become binding on third parties on the basis of their nature as a "public interest norm". Cf. d'Aspremont, *supra* note 13.

23. Koskenniemi, *supra* note 14 at 198.

24. *Ibid.*

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political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made".[25] Although the hegemonic patterns of international legal order cannot be altogether brushed aside, I contend that due to the interdependency of its members, international society is experiencing a gradual evolution that is revolutionizing the nature of international law.[26] There is indeed a gradual subordination of individual sovereignties to the common good and the absorption into contemporary international law of the values that this common good encompasses.[27]

The proclamation of concepts like "interest of mankind as a whole", "international community of states as a whole", or "common heritage of mankind" explains why the international community recognizes, for example, a ban on the unilateral use of force or insists on the promotion of the right of peoples to self-determination or the protection of human rights. In other words, there is a collective experience in international society of being part of an integrated system reflecting and protecting the deepest values and most basic expectations of its subjects. This collective experience does not rest only on immediate calculations of utility,[28] but is instead progressing towards those "absolutes of international law", which also becomes the basis of resolving normative conflicts.

As a consequence of functional and regional fragmentation, the International Law Commission's (ILC) Report recognizes the loss of an "overall perspective of law".[29] However, it absolutely connects the nature and development of international law with its being a means of articulating political preferences as legal claims, which cannot therefore be detached from the conditions of political contestation in which they are made.[30] The ILC Report, indeed, explicitly states that political preferences drive the development of international law:

> In law, political struggle is waged on what legal words such as "aggression", "self-determination", "self-defence", "terrorist" or *jus cogens* mean, whose policy will they include, whose will they oppose. To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*. (emphasis in the original)[31]

Koskenniemi similarly claims that international law "is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles and institutions on their side, making sure they do not support the adversary".[32]

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25. *Ibid.*
26. Juan Antonio CARRILLO SALCEDO, "Reflections on the Existence of a Hierarchy of Norms in International Law" (1997) 8 European Journal of International Law 583 at 588.
27. *Ibid.*
28. Tom FARER, "Toward an Effective International Legal Order: From Coexistence to Concert?" (2004) 17 Cambridge Review of International Affairs 228.
29. *ILC's Report on Fragmentation*, *supra* note 1 at 11.
30. *Ibid.*, at 198.
31. *Ibid.*, at 199.
32. Koskenniemi, *supra* note 14 at 200.

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From a different perspective, Jean d'Aspremont also rejects the existence of a value system in the international legal order.[33] His argument is based on the proclamation that the "driving forces" of international law-making are not immutable but subject to constant and contingent changes.[34] He claims that these driving forces are in fact variable "common interests" as compared to constant "global values".[35] The gist of his argument is that an agreement of the international community on a particular norm does not reflect common ground—an ultimate goal or value—on the basis of which it has accepted that norm, but is instead based solely on the self-serving reasons of states. For example, the norms relating to peace preservation are backed by the major powers because of a desire to avoid the detriments of war, whereas the small states back the prohibition on the use of force to protect themselves from the more powerful states.[36] Thus, while accepting the norm of prohibition on the use of force, states do not have a belief in the preservation of peace as an objective value represented by that norm.

How do we consolidate Koskenniemi's and d'Aspremont's views? While d'Aspremont's distinction between values and the mutualization of interests is particularly eccentric, as it deviates from the conventional understanding on the formation of values and undermines the role of values in the construction of norms in international law, there also appears to be something missing in this juxtaposition of law, politics, and individualism that patronizes the development of international law. These approaches appear to be a misreading of the study of values by presenting them as self-serving and lobbied preferences.[37] Where is the social element of law in these readings?[38] No society is composed of equals, and no norms emerge on the basis of equality among all subjects.[39] The same holds true for international society, which is highly pluralistic and heterogeneous.[40] The diverse process by which consensus is achieved for the formulation of norms does not change the basic ideals prevalent in and cherished by international society. There are certain social causes and ultimate purposes that international society strives to achieve.[41] International society may, however, be conceived of as an anarchic society as compared to a "moral project",[42] where one cannot categorically conclude that the members of this society do not share dominant values of state security and join the growing demand to

33. d'Aspremont, *supra* note 13 at 7.

34. *Ibid.*

35. *Ibid.*

36. *Ibid.*, at 16.

37. *ILC's Report on Fragmentation*, *supra* note 1.

38. d'Aspremont does not deny the existence of an international civil society. See d'Aspremont, *supra* note 13 at 12.

39. Art. 2(1) of the United Nations Charter proclaims that "[t]he organization is based on the principle of sovereign equality of all its members". In the *Declaration On Principles Of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV) (entered into force 24 October 1970), the sixth out of seven principles is the "Sovereign Equality of States". States have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political, or other nature. See also Weil, *supra* note 13 at 419.

40. Weil, *supra* note 13 at 418.

41. *Ibid.*, at 419.

42. Farer, *supra* note 28 at 230.

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emphasize human security.[43] A logical interpretation of d'Aspremont's view makes his theory based on alternative realities analogous to asserting that a law-maker voted for the criminalization of homicide for the sole reason that she was afraid of being murdered herself.

Such readings of international law also erroneously conflate "values" with "norms".[44] Norms are the medium to realize corresponding prevalent values.[45] In every society, values exist and are only internalized in the form of norms.[46] On an international level, this internalization is reflected by the development of *jus cogens,* customs, or general principles of law, or by way of incorporating norms in treaties,[47] each representing a different stage of internalization. This internalization no doubt progresses in the presence of varied political motivations and complicated international relations. It would, therefore, be difficult to capture all intentions underlying a given norm.[48] It can be done, however, in some cases: for "aggression", the corresponding value can clearly be identified as "peace"; for "self-determination", "freedom"; for "self-defence", the "protection of life and property"; and for the term "terrorist", the value can be "security". This necessarily abstract norm/value juxtaposition may lead to different characterizations or may also result in the overlapping of two values in respect of one norm, or vice versa. For example, the corresponding value for "aggression" may be identified as "security" and for "terrorism" as "peace".[49] This overlapping in no way suggests that there exists no corresponding value for a given norm.

Jus cogens, in this way of estimation, refers to norms that are recognized as fundamental values[50] that have been fully internalized by international society.[51] *Jus cogens*, hence, can be termed value consensus or universal values. Most importantly, however, is that this value-internalization process in international law was based neither on the conversion of authority-seeking, lobbied, and politically motivated views into universal preferences nor on the self-serving reasons contemplated by d'Aspremont. There is a social element in the development of norms in international law that is based on the collective good of the society. Through the course of this

43. *Ibid.*, at 222.

44. Cf. Martti KOSKENNIEMI, "The Normative Force of Habit: International Custom and Social Theory" (1990) 1 Finnish Yearbook of International Law 77 at 149.

45. See Weil, *supra* note 13. Inspiration was derived from the work of Jürgen HABERMAS, *Between Facts and Norms*, trans. William REHG (Cambridge: Polity Press, 1996) at 67.

46. Koskenniemi, *supra* note 44 at 149 (where he is not referring to the internalization process but perhaps to such internalization as a novelty that presents itself as "fragmentation" of the old world). Cf. *ILC's Report on Fragmentation*, *supra* note 1 at 16–17, para. 20.

47. George SCHWARZENBERGER, *International Law: vol. 1, International Law as Applied by Courts and Tribunals*, 3rd ed. (London: Stevens & Sons Limited, 1957) at 422.

48. Jan KLABBERS, "The Meaning of Rules" (2006) 20 International Relations 295; d'Aspremont, *supra* note 13 at 22.

49. This is perhaps due to what is conceived about Weber's indication of "value pluralism". See Steven SEIDMAN, "Modernity, Meaning, and Cultural Pessimism in Max Weber" (1983) 44 Sociological Analysis 267.

50. Carrillo Salcedo, *supra* note 26 at 592. Cf. Abi-Saab, *supra* note 20 at 262. For a detailed treatment of *jus cogens*, *see ILC's Report on Fragmentation*, *supra* note 1 at 166–7, paras. 325–7 and 361.

51. Cf. Koskenniemi, *supra* note 44 at 83 (referring to H.L.A Hart and stating that "laws are obeyed because citizens have internalized the legal structure, they have recognized that obeying laws is a matter of duty and not one of mere constraint").

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internalization process, the gradual realization by the international community of the social benefits secured by the resulting norms overpowered any differences arising from unilateral preferences or individual benefits. This internalization process represents a value system in international society, which not only explains norms in terms of values but also facilitates their hierarchical ordering in any given context.

Koskenniemi's denial of the role of values in the development of international law is also based on the conceptual disagreement of the international community on the understanding of particular norms.[52] I, however, contend that the international community is not utterly divided on values in respect of the norms to which they correspond. In other words, while there might be disagreement on the conception of a norm, there is hardly any disagreement on its corresponding value. For example, there is no disagreement on the maintenance of "peace" in international relations, although there are disagreements on what constitutes "aggression". International law provides for a norm prohibiting aggression in view of the fact that it corresponds to the value of peace, representing the benefit and interest to all members of the international community whether perceived as weak or strong. Aggression, in whatever way defined, would amount to a disturbance of peace. The norms are, therefore, based on facts and are subject to interpretation, whereas values are based on the collective wisdom of the international community and subject to legal identification, allocation, and, in cases of conflict, hierarchical ordering. The disagreement might, however, be on the extent to which these values have been internalized by international society. The ILC Report has, in fact, suggested of this value orientation in the development of international law:

> New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. The emergence of "environmental law" is a response to growing concern over the state of the international environment. "Trade law" develops as an instrument to regulate international economic relations. "Human rights law" aims to protect the interests of individuals and "international criminal law" gives legal expression to the "fight against impunity".[53]

A significant problem with this legal evolution is illustrated by this question: What would happen when the norms in these legal specializations evolve in a way that they clash with each other? In international law, it has been presumed that there exists no predetermined authoritative hierarchy of values,[54] resolving any normative conflicts on an a priori basis. This primarily suggests that all values stand on equal footing since each one of them protects fundamental interests. It is generally recognized that any ambiguity regarding the meaning of a value-representing norm must be solved by interpretation.[55] Whether two conflicting norms can be reconciled is also a matter of interpretation. I contend, however, that if they cannot be so reconciled, the norm representing a higher-level value in the given context is to be preferred over the norm

52. See the arguments of "hegemonic contestation" by Koskenniemi, *supra* note 14.
53. *ILC's Report on Fragmentation*, *supra* note 1 at 14.
54. *Ibid.*, at 4, para. 15.
55. For what is and what is not within the scope of interpretation in treaty conflict, see Klabbers, *supra* note 6 at 34–5.

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representing a lower-level value. In every civilized society, whether national or international, some interests are prioritized. This state of affairs subscribes to an inherent hierarchy of values based on the collective wisdom of the international community. Some norms have already attained the status of *jus cogens* through the norm-internalization process. These norms are superior to other norms and international society agrees that a norm amounting to *jus cogens* is to be prioritized over conflicting norms.[56] With respect to norms other than *jus cogens*, however, courts and dispute settlement bodies prioritize the most desired value at the expense of the other.[57] This ordering is a fundamental requirement for harmonious societal functioning.[58] If, for example, the norms of trade and human rights—neither of which has attained the status of *jus cogens*—cannot be simultaneously achieved, then the social needs of the international community determine how they are to be ordered.

The development of international legal norms, hence, is not solely based on hegemonic political choice; such development is rather based on social integration, corresponding to and resulting in an international civil society. The extent to which Koskenniemi undermines the role of civil society in the formation and development of international law is questionable. To proceed with the discussion of international law as a value-oriented system, it is helpful to import two quotes from Koskenniemi's article. On one occasion, he quotes Antonio Cassese as follows:

> [A]t least at the normative level the international community is becoming more integrated and—what is even more important— … such values as human rights and the need to promote development are increasingly penetrating various sectors of international law that previously seemed impervious to them.[59]

On another occasion, he quotes Judge Mohammed Bedjaoui as follows:

> The resolutely positivist, voluntarist approach of international law … has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and a response to the social necessities of States organized as a community.[60]

These quotes both refer to the gradual transformation of the international community as a society reflecting values that are realized through a gradual value-internalization process. As stated earlier, this value-internalization process has already reached a consensus in the case of, for example, *jus cogens*. In international society, therefore, modern international law is evolving in the presence of complex international relations with various political motivations. In other words, there exists a quasi-natural social order in the development of international law.[61] Where the

56. See e.g. *VCLT*, *supra* note 2, art. 53.
57. See Section IV of this article.
58. Weil, *supra* note 13 at 421.
59. Koskenniemi, *supra* note 14 at 198.
60. *Ibid.*, at 200.
61. Cf. Abi-Saab, *supra* note 20, especially at 249–50 and 265. Weil put it in terms of "irreducible natural law". Weil, *supra* note 13 at 423.

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influence of political power in its formation and development cannot be completely ruled out, then the logical conclusion is that there are, notionally, two constructions of international law. There is, on the one hand, a top-down construction where international law is developing under the influence of political power, as suggested by Koskenniemi.[62] On the other hand, as proclaimed by Judge Mohammed Bedjaoui, there is a bottom-up construction where international law is evolving in a way similar to domestic laws in that it is influenced by the social necessities of the states comprising the community. In this regard, Koskenniemi at one occasion also appears to have conceded the latter type of construction:

> Freedom and equality, however, can be realised only if the international world is understood as a political community, that is, a form of interaction where social power turns into political authority through claims about rights and duties that are universalisable, that is, claims of law.[63]

The ICL Report has also reflected a similar opinion:

> A law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and authoritarian simultaneously.[64]

A third construction of international law is a hybrid of the above two constructions, where there are many actors, some top-down and some bottom-up. This construction, which reflects the divided interests of the international community, is perhaps closer to the thinking of d'Aspremont. In this context, however, d'Aspremont has rightly pointed out that the wellbeing of individuals is subject to continuous reappraisal and is fundamentally relative.[65] This relativity is, as we shall see later, a necessary part of the solution to normative conflict in the decentralized system of international law. Once we revert to values to explain norms, we can not only understand norms in the light of the interests they serve but also solve normative conflicts, whether in treaties or elsewhere, by assigning a contextual hierarchy. This relative—as compared to an absolute—hierarchy is more feasible and accommodating, given the evolving normative structure of international society as compelled by the continuous changes in the preferences of its members. This evolution will ultimately lead to an absolute hierarchy, if required and agreed to by the international society, as in the case of *jus cogens*.

"Regionalism", which calls for values to be perceived in regional contexts and therefore divides international society into distinct groups, is a possible attack on the advocated "universalism" of values. The regionalism argument surfaced in the formation and development of international law on the basis of legal orientations and methods adopted by a particular group of states—for example, Anglo-American,

62. Koskenniemi, *supra* note 14 at 198–200.
63. *Ibid.*, at 215.
64. *ILC's Report on Fragmentation*, *supra* note 1 at 15.
65. d'Aspremont, *supra* note 13 at 12.

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European, Soviet, Third World, or Asian.[66] Regionalism is also analyzed as an instrument of hegemony where hegemonic blocks are created by "[a] great power in order to ensure supremacy or to redress the balance of power disturbed by the activities of another power elsewhere in the world".[67] It is also frequently used as an explanation for rules that originated from or are identified with a specific territory—the Calvo, Drago, and Tobar doctrines, for example—and that operate as an exception to the general principles of international law.[68]

Regionalism is a major obstacle to any universalist international legal order,[69] as it suggests the absence of a universal character of values, and therefore of the resulting norm formation.[70] For example, political leaders and intellectuals in the economically successful societies of Southeast Asia used regionalism to question the universality of human rights by referring to "Asian Values".[71] The claim of "Asian Values" proposes that human-rights norms can be weighed differently in Asia than, for example, in the European Union, when they conflict with other norms like trade or investment. Although regionalism is believed to have little normative import,[72] and rarely takes the shape of a general "rule" or a "principle",[73] it nevertheless connotes a "rule or a principle with a regional sphere of validity or a regional limitation to the sphere of validity of a universal rule or principle".[74] This suggests that regionalism is a kind of *lex specialis*,[75] and calls for different hierarchies of conflicting norms and values.[76] The idea of Asian Values subjects the evaluation of norms and values to specific cultural environments and presupposes that the norm-creation and value-internalization processes stand at different stages in different parts of the world.[77]

II. TREATY CONFLICT IN INTERNATIONAL LAW

Treaties are an important source of international law, and are frequently the forerunners of its developments.[78] Borgen suggests that "the viability of international law, as a legal system, rests largely on the viability of treaties as a source of law".[79]

66. See *ILC's Report on Fragmentation*, *supra* note 1 at 106, para. 205.
67. *Ibid.*, at 107, para. 208.
68. *Ibid.*, at 108, para. 214.
69. Roda MUSHKAT, "Cultural and International Law: Universalism v. Relativism" (2002) 6 Singapore Journal of International and Comparative Law 1028 at 1030.
70. See *ILC's Report on Fragmentation*, *supra* note 1 at 103, para. 199.
71. See e.g. Davis, *supra* note 17; Michael FREEMAN, "Human Rights and Real Cultures: Towards a Dialogue on 'Asian Values'" (1998) 16 Netherlands Quarterly of Human Rights 25.
72. *ILC's Report on Fragmentation*, *supra* note 1 at 105, para. 204.
73. *Ibid.*, at 102, para. 195.
74. *Ibid.*, at 108, para. 211. See also Michael C. DAVIS, "The Price of Rights: Constitutionalism and East Asian Economic Development" (1998) 20 Human Rights Quarterly 303.
75. *ILC's Report on Fragmentation*, *supra* note 1 at 102, para. 195.
76. Davis, *supra* note 74.
77. *ILC's Report on Fragmentation*, *supra* note 1 at 106, paras. 205–7.
78. Schwarzenberger, *supra* note 47 at 422; Borgen, *supra* note 5 at 573–4.
79. Borgen, *supra* note 5 at 573.

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By their contractual nature, treaties are horizontal instruments that have no inherent priority over each other. Treaties, however, perform important functions in the formation of norms in international law, which may be understood in the light of the value-oriented underpinnings on the construction and development of international law. The ILC Report provides that although there is no single legislative will behind international law (which may not, however, always be the case),[80] legal reasoning involves an objective analysis of rules incorporated in treaties:

> [I]f legal reasoning is understood as a *purposive* activity, then it follows that it should be seen not merely as a mechanic application of apparently random rules, decisions or behavioural patterns but as the operation of a whole that is directed toward some human objective. Again, lawyers may disagree about what the objective of a rule or behaviour is. But it does not follow that no such objective at all can be envisaged. (emphasis in the original)[81]

Koskenniemi also has suggested:

> Legal reason is a hierarchical form of reason, establishing relationships of inferiority and superiority between units and levels of legal discourse. [Koskenniemi then references this statement and further explains.] A *unit* (or topos) of legal discourse is any distinguishable entity of legal meaning; a *level* is a group of *topoi* identifiable by a common property. To speak of levels instead of groups is to highlight the hierarchical character of the principles of identification. Thus, regular treaty provisions constitute *topoi* that are normally situated at a level different from the *topoi* of legislative purpose or principle underlying the treaty. (emphasis in the original)[82]

For the purposes of legal discourse, the juxtaposition of norms and values suggests something akin to Koskenniemi's division, that is, the norms are the units and values are the levels constituted by a group of norms identifiable by a common property. Treaty norms (units) may represent only a mutual value (level) between the states party to that treaty or a universal value (higher level),[83] depending on the legislative purpose or principles underlying the treaty. In Koskenniemi's terms this amounts to "[a] systematization [that] aims to make explicit the origin and relationship of norms so as to answer questions about normative authority and to solve problems of normative conflict".[84] The legal discourse of studying treaty norms in terms of values has a twofold outcome. First, and obviously, it suggests that these norms should be studied in the broader context of the values they represent. Conflict in treaties can thus be understood as conflicts of values in the international society.[85] Second, it

80. *Ibid.*

81. *ILC's Report on Fragmentation*, *supra* note 1 at 23, para. 34.

82. Martti KOSKENNIEMI, "Hierarchy in International Law: A Sketch" (1997) 8 European Journal of International Law 566 at 566.

83. The terms "mutual" and "universal" should not be confused with "bilateral" and "collective" in terms of private or public law or obligations *erga omnes*. Cf. Roscoe POUND, *Jurisprudence*, vol. III (Minnesota, MN: West Publishing Co., 1959) at 16 and 327–8.

84. Koskenniemi, *supra* note 82 at 569.

85. Klabbers, *supra* note 6 at 165.

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allows the possibility that some treaty norms stand superior to other conflicting ones, depending upon the values they represent.

Treaty conflicts are commonly analyzed in terms of rights and obligations created by treaty norms, rendering treaties as bundles of public or private rights and obligations.[86] This suggests that treaty conflicts can be resolved by balancing the rights guaranteed by the norms.[87] The balancing of rights, however, leads to a discussion regarding the "right-obligation" equation, that is, who holds what rights and by whom, against whom, and on what legal basis those rights can be enforced or prioritized.[88] In this regard, the arguments in this article do not derive from the so-called deontic logic that understands rights in the context of obligations.[89] In contrast to "rights" and their "balancing", the arguments in this article are based on "interests" and their "valuing" (levelling in terms of determining hierarchy).

In this vein, the arguments in this article have been developed on the basis of "interests" representing "values", as compared to rights and duties, and differ from Ronald Dworkin's "rule-principle" paradigm in three ways.[90] First, as compared to the determination of an objective hierarchy, the deontic content of the rule-principle approach calls for a corrective stance on the part of courts in terms of the "right-wrong" equation, that is, right as compared to its opposite (wrong).[91] This approach works well only where one of the conflicting treaty norms is *jus cogens*, thus rendering the other norm void,[92] but cannot be applied where the equation is rather "right-right" or when the conflicting treaties give "right" norms that conflict with each other. Second, the deontic approach may lead to understanding treaty conflict in terms of a "right-obligation" equation in which a conflict between two norms arises only where a party to two treaties cannot simultaneously comply with both treaties' "obligations".[93] This leads to an analysis of the conflict of treaty norms in terms of treaty obligations having corresponding rights, as compared to mere "permissive" or "voluntary" obligations, and suggests that a norm that creates an obligation having a corresponding right should be prioritized over one that is only permissive and voluntary and whose violation does not infringe any rights.[94] This approach is obviously unhelpful where both norms create obligations that have corresponding rights. Finally, the abstract subtext of rules and principles, suggested by the deontic

86. Wilfred JENKS, "The Conflict of Law-Making Treaties" (1953) 30 British Yearbook of International Law 401 at 426.

87. Klabbers, *supra* note 6 at 34–5.

88. See Ahmad Ali GHOURI, "Positing for Balancing: Investment Treaty Rights and the Rights of Citizens" (2011) 4 Contemporary Asia Arbitration Journal 95.

89. For an assessment of the deontic logic, see e.g. Erich VRANES, "The Definition of 'Norm Conflict' in International Law and Legal Theory" (2006) 17 European Journal of International Law 395.

90. Ronald M. DWORKIN, "The Model of Rules" (1967) 35 University of Chicago Law Review 14 at 23. On Dworkin's view of conflict of values, see Ronald M. DWORKIN, "Do Values Conflict: A Hedgehog's Approach" (2001) 43 Arizona Law Review 251. Also see the discussion on Dworkin by Habermas, *supra* note 45 at 211.

91. Habermas, *supra* note 45 at 212–13.

92. *VCLT*, *supra* note 2, art. 53. Cf. Pauwelyn, *supra* note 22 at 278.

93. See Vranes, *supra* note 89.

94. *Ibid.*

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approach,[95] leaves room for political preference to justify the prioritization of one principle over the other.[96] The perception of treaty conflict in terms of competing rights or obligations, however, remains relevant to understanding the factual nature of a conflict.[97]

As compared to rights, an interest is:

> [A] demand or desire or expectation which human beings, either individually or in groups or associations or relations, seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behaviour through the force of politically organized society must take account.[98]

Interests are required to be protected and are fundamentally relative in their legal character. Pound explains the relativity of interests as follows:

> [I]nterests … as they cannot all be secured, much less fully secured since many of them overlap and many are more or less in conflict, questions arise which are fundamental for legislative lawmaker and frequently confront the courts in choice of starting points for reasoning, in interpretation, and in application of standards,[cit] namely, how are these interests to be weighed.[cit] How are they to be valued? What principle to determine their relative weight? Which shall give way in case of conflict?[99]

A levelling among conflicting interests can, therefore, be achieved even when the interests stand on equal footing, which may be determined by an estimation of the stage reached by the value-internalization process of such interests. An interest may have become a custom or *jus cogens*. This suggests that in international civil society a hierarchy of values exists that is both predetermined, in the case of one of the conflicting norms is *jus cogens*, and relative, as in other cases. This hierarchy, both pre- and post-determined, is established on the basis of interests and values protected by norms, and enables the ordering of conflicting norms. In other words, other than normative conflicts involving *jus cogens*, this hierarchy can only be determined through a contextual evaluation and not by a general rule.[100] The ILC Report concedes to this objectivism when it comes to solving normative conflicts: "[m]oving from the prima facie view to a conclusion, legal reasoning will either have to seek to harmonize the apparently conflicting standards through interpretation or, if that seems implausible, to establish definite relationships of priority between them".[101]

In the face of a weaker institutional structure of international law, the members of the ILC were aware of the problems confronting such a hierarchal ordering of norms.

95. *ILC's Report on Fragmentation*, *supra* note 1 at 20, para. 28.
96. *Ibid.*, at 24, para. 35.
97. See Sadat-Akhavi, *supra* note 4, Chapters II–III at 25–96.
98. See Pound, *supra* note 83 at 16.
99. *Ibid.*, at 327–8.
100. Cf. Koskenniemi, *supra* note 44 at 126.
101. *ILC's Report on Fragmentation*, *supra* note 1 at 24–5, para. 36.

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The ILC Report, nonetheless, observes the need for a legal, as opposed to a political, solution to normative conflict:

> The problem is, how can such [contextual] evaluation be imposed on a state which fails to share the evaluator's view of contextual significance? If it can be imposed nevertheless, then we seem to be arguing on the basis of the assumption that matters of political—different conceptions of contextual equity—are capable of legal (objective) decision. If it cannot, then we have nothing to legal solve the conflict with.[102]

Appropriate interpretive tools and legal devices are, nonetheless, required for the legal determination of normative treaty conflicts. The existing legal framework for such resolution in international law, available both within and outside of the VCLT,[103] however, fails to provide an appropriate, principled, and legal solution for the resolution of treaty conflicts.

III. TREATY CONFLICTS AND THE DESPONDENCY OF THE VCLT AND OTHER RULES AND PRINCIPLES OF INTERNATIONAL LAW

As discussed earlier, treaty conflicts can be identified as conflicting state obligations acquired under two treaties.[104] They give rise to problems regarding the validity or enforceability of conflicting state obligations.[105] More precisely, a conflict or incompatibility arises where two obligations cannot be complied with by all addressees of the obligations under all conditions so specified.[106] Article 30 of the VCLT contains three tests for the application of the *lex posterior* rule to resolve the problem of conflicting treaty obligations:

1. What is the subject matter of the treaties in question? (The subject matter test)
2. What is the chronology of their adoption or accession? (The chronology test)
3. Who are the parties to the conflicting treaties? (The contracting parties test)[107]

The VCLT's techniques to solve treaty conflicts have been criticized as unhelpful.[108] While its rules are workable where parties to an earlier and a later treaty are the same, there are problems with the determination of the subject matter of treaties as well as the time of their conclusion.[109] The subject matter of a treaty is

102. *Ibid.*
103. *Supra* note 2.
104. For detailed description of several types of treaty conflicts, see Sadat-Akhavi, *supra* note 4, II–III at 25–96.
105. *Ibid.*
106. *Ibid.*, at 5–24.
107. *VCLT*, *supra* note 2, art. 30. For a detailed discussion on these three tests, see Ahmad Ali GHOURI, "Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options" (2010) 16 European Law Journal 806 at 808–10.
108. Klabbers, *supra* note 6 at 14, 87–9, and 92.
109. See the comments of Ian Sinclair at the 1969 Vienna Conference on the Law of Treaties, Committee of the Whole, 85 Meeting, Summary records of the plenary meetings and of the meetings of the

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the interest it primarily purports to protect,[110] but may encompass specific norms embodying interests to which it does not specifically refer. In other words, an investment-protection treaty may expressly or impliedly contain norms governing human rights. The subject matter of two treaties is the same when any norm incorporated in one treaty is incompatible with that in another.[111] In other words, the subject matter of two treaties is the same when their individual norms generate a clash of interest.[112]

That a series of treaties dealing with different subject matter create complementary relationships between old and new treaties has been suggested.[113] For example, with respect to certain bilateral and trilateral treaties on the legal status of the Caspian Sea[114] and the recent Framework Convention for the Protection of the Marine Environment of the Caspian Sea,[115] Russia has adopted a "stage approach" whereby specific agreements, such as on fishing, are considered as "incremental" to a comprehensive agreement.[116] In this sense, the subject matter of two treaties can be treated as the same when any terms defined or norms incorporated in two or more such treaties reciprocate each other, even if both treaties deal with different subject matter.[117] The Russian "stage approach" to the Caspian Sea agreements that deal with apparently different subject matter and have been *inter se* concluded between different members of the Caspian Sea littoral states would highly complicate (if not render entirely unmanageable) the application of the Article 30 VCLT tests for the resolution of potential conflicts between these treaties.

Furthermore, adjudicators faced with a treaty that has possibly conflicting objects identify its subject matter in the light of its "primary" object. If all specific agreements are included in a comprehensive treaty on the status of the Caspian Sea, such a treaty will create a situation like that addressed by Article XX of the General Agreement on Tariff and Trade (GATT). While the GATT/World Trade Organization (WTO) Agreement contains various provisions for trade liberalization,[118] Article XX GATT lists certain environmental measures as exceptions to them.[119] Inclusion of two

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Committee of the Whole, online: <http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/docs/english/2ndsess/a_conf_39_c1_sr85.pdf#page=5>, at 221–2, para. 39. Cf. Klabbers, *ibid*.

110. Cf. *ILC's Report on Fragmentation*, *supra* note 1 at 21, paras. 21–2. See also Ghouri, *supra* note 107 at 8–10.

111. *ILC's Report on Fragmentation*, *supra* note 1 at 18.

112. Cf. *ibid*.

113. Kaveh L. AFRASIABI, "The Legal Regime of the Caspian Sea: Beyond the Conflicting Treaties" *Payvand Iran News* (17 September 2003), online: Payvand Iran News <www.payvand.com/news/03/sep/1106.html>.

114. On details of treaties concluded by littoral Caspian states, see Mehrdad HAGHAYEGHI, "Russia's Regional Role: Conflict or Cooperation, The Coming of Conflict to the Caspian Sea" (2003) 50 Problems of Post-Communism 32.

115. Signed by five littoral Caspian states: Azerbaijan, Iran, Kazakhstan, Russian Federation, and Turkmenistan in Tehran (Iran) on 4 November 2003.

116. *Ibid*.

117. *Ibid*.

118. *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1143 (entered into force 15 April 1994).

119. See Article XX of the *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 187 (entered into force 1 January 1948) [*GATT*].

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occasionally conflicting norms (trade liberalization and environmental protection) in GATT compelled the WTO Dispute Settlement Body (DSB) to look into the object of the GATT to determine which of these norms should prevail when they conflict.[120] For example, in the *Shrimp-Turtle* dispute,[121] certain governments challenged US-imposed embargos on the import of shrimp or shrimp products harvested in conditions that allegedly affected sea turtles, on the grounds that those conditions were not covered by the exceptions under Article XX(b) and (g) GATT.[122] The DSB interpreted Article XX GATT in purview of its primary objective, which was to protect the multilateral trading system, and concluded that the measures taken by the US under Article XX GATT operated as a trade restriction in violation of the WTO Agreement.[123] The delineation between the primary and secondary purposes of a multipurpose treaty further obscures the application of the Article 30 VCLT's subject-matter test to resolve treaty conflicts.

In respect of the chronology of adoption or accession of treaties, the *lex posterior* rule provided by the VCLT sometimes fails to offer a certain and adequate solution for normative conflict, and its opposite, the *lex prior* rule, may be considered as appropriate in certain instances of conflict.

A. *Uncertainty Regarding* Lex Posterior *and* Lex Prior *Rules*

If two conflicting treaties deal with the same subject matter and are concluded by the same parties, then, according to the *lex posterior* rule promulgated by Article 59 VCLT, the later treaty shall prevail. An example is the decision of Argentina's Cámara Nacional Especial in *Cía. Territorial de Seguras (S.A.) v. The Clara Y.*[124] The case dealt with the 1879 Montevideo Convention and the 1910 Brussels Convention, both of which bound Argentina and provided conflicting rules regarding the temporal limitations of maritime collision claims. The Court ruled it a classic principle of law that "a later legislative act will supersede an earlier one".[125]

The *lex posterior* rule, however, cannot solve all types of treaty conflicts and its opposite, the *lex prior* rule, may sometimes be applied. For example, the World Court applied *lex prior* instead of *lex posterior* in the *Reservations of the Genocide Convention*.[126] The Court pronounced as generally recognized the principle that parties to a multilateral convention are not entitled to conclude an agreement that frustrates or impairs its purpose and *raison d'être*.[127] Recent examples of the

120. See e.g. *United States—Standards for Reformulated and Conventional Gasoline*, [1996] 35 I.L.M. 603 [*Reformulated Gasoline*]; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, [1998] WT/DS58/AB/R [*Shrimp-Turtle Appellate Body Report*]; *United States—Import of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, [2001] WT/DS58/AB/RW [*Shrimp-Turtle Recourse Action*].

121. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, [1998] WT/DS58/R [*Shrimp-Turtle Panel Report*].

122. *Ibid.*, para. 3.1.

123. *Ibid.*, para. 7.45.

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

125. *Ibid.*

126. *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, [1951] I.C.J. Rep. 15.

127. *Ibid.*, at 21.

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application of *lex prior* instead of *lex posterior* include the decisions of the ECtHR in *Matthews* and *Prince Hans-adam II of Liechtenstein v. Germany*,[128] where the ECtHR prioritized the ECHR over later conflicting treaties.[129] Another example is the decision of the District Court of The Hague *In re B*.[130] The uncertainty in the application of *lex posterior* or *lex prior* rules to resolve treaty conflicts threatens the predictability of their application:

> If the *lex prior* has general application in contract law, *lex posterior* has in public law and legislative enactments. So the relationship between the two reflects on the way one views the nature of treaties. Both analogies, however, have their problems.[131]

Neither rule, therefore, provides certainty in the resolution of treaty conflicts. Pauwelyn suggests that certain conflicts may be solved by disapplying the VCLT's temporal rules,[132] and argues that the contents of most multilateral treaties evolve through the interpretation of and application to emerging situations by judicial bodies, as well as the accession of new states.[133] The United Nations (UN) Charter as it was in 1945 is not how it is today.[134] As it is consequently impossible to resolve treaty conflicts effectively by applying either the *lex posterior* or *lex prior* rule, Pauwelyn instead suggests the *lex specialis* rule or that the special norm should prevail over a general norm.[135] This rule, as applied in its various forms, also cannot, however, resolve treaty conflicts in an orderly manner.

B. *Incompetence of* Lex Specialis *as a Tool to Resolve Treaty Conflicts*

The principle *lex specialis derogat lege generali* or "special law derogates from general law" is a widely accepted maxim of legal interpretation and a technique for the resolution of normative conflicts.[136] There are, however, problems with its precise definition.[137] Pauwelyn considers *lex specialis* to be as effective as *lex posterior* for the determination of the most current expression of the state's will.[138] The ILC Report has devoted significant attention to *lex specialis*,[139] and portrays it as either a "new interpretation" of the general law or an *exception* to it.[140] The words "new interpretation" presuppose the existence of an uncontroversial or exhaustive

128. *Matthews*, *supra* note 11 and *Prince Hans-adam II of Liechtenstein v. Germany*, *Application No. 42527/98*, Judgment of 12 July 2001, [2001] Eur. Ct. H.R. para. 47.
129. See *Prince Hans-adam II of Liechtenstein v. Germany*, *ibid*. For discussions on *Matthews*, see *infra* notes 219 to 226 and accompanying text.
130. *In re B*, Judgment of 26 May 1952, [1952] 19 I.L.R. 318.
131. *ILC's Report on Fragmentation*, *supra* note 1 at 124–5, para. 241.
132. Pauwelyn, *supra* note 22 at 378.
133. *Ibid*.
134. Cf. Klabbers, *supra* note 6 at 97.
135. Pauwelyn, *supra* note 22 at 385. Cf. *ibid*., at 99.
136. *ILC's Report on Fragmentation*, *supra* note 1 at 34, para. 56.
137. *Ibid*., at 35, para. 58.
138. Pauwelyn, *supra* note 22 at 388. Cf. Klabbers, *supra* note 6 at 97.
139. *ILC's Report on Fragmentation*, *supra* note 1 at 56–122.
140. *Ibid*., at 30–5.

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interpretation of a general rule, which overlooks the fact that the policy considerations of different institutions applying the general rule may trigger its varying interpretations. This aspect of *lex specialis* makes it perhaps more suitable for the establishment of political preferences rather than normative determination.

The interpretive divide of different institutions, therefore, may well be classified as an institutional or systems conflict rather than a rationality conflict.[141] For instance, a trade institution like the WTO[142] and a human-rights institution like the ECtHR may have conflicting interpretations of one rule, owing to the difference in their perspectives. Which of the two interpretations is to be recognized as a new interpretation or a *lex specialis*? Designating a new interpretation of a norm as *lex specialis*, therefore, appears to be a misreading of the interpretation of *lex specialis* as a general rule of treaty interpretation. While it could be argued that this reading is helpful in resolving normative conflicts within a particular system, rationality conflicts arise where a specialized institution is required to apply and interpret norms from the perspective of another system (for example, a trade body applying or interpreting a norm from the perspective of environmental law).[143] This rationality conflict would only be resolved by establishing a priority between conflicting norms and/or their interpretations. Such conflicts are essentially value conflicts and not merely normative conflicts, and these, I contend, cannot be resolved by available interpretive devices and harmonizing maxims such as *lex specialis*.

The definition of *lex specialis* as a rule that operates as an exception to the general law is equally unhelpful in resolving institutional conflicts. In its narrower sense, *lex specialis* is considered a conflict-resolution technique for when two valid and applicable legal provisions provide incompatible directions for the same facts.[144] In this situation, the ILC Report suggests that the "special" provision, that is, the rule with a more precisely "delimited scope of application", should be prioritized.[145] It concedes the difficulty of determining the "delimited scope of application" of a rule, and acknowledges the indeterminate nature of the "substantive coverage" of a provision and its legal subjects. The ILC Report has also suggested that conflicts between a territorially limited general regime and a universal treaty can only be decided on their "merits", and not on the basis of *lex specialis*,[146] without explaining what those "merits" are. The ILC Report also admits problems with the application of *lex specialis* in contrast to a general rule protecting an objective sociological interest[147] and possibly enjoying hierarchical status.[148]

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141. Cf. Klabbers, *supra* note 6 at 35–6.
142. For an analysis of the resolution of treaty conflicts within the WTO regime, see Sabrina SAFRIN, "Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements" (2002) 96 American Journal of International Law 606. See also Lorand BARTELS, "Treaty Conflicts in WTO Law—A Comment on William J. Davey's Article 'The Quest for Consistency'" in Stefan GRILLER, ed., *At the Crossroads: The World Trading System and the Doha Round, I* (Vienna: Springer, 2008), at 130–45.
143. KLABBERS, *supra* note 6 at 36–9.
144. *ILC's Report on Fragmentation*, *supra* note 1 at 35, para. 57.
145. *Ibid.*
146. *Ibid.*
147. *Ibid.*, at 37, para. 61.
148. *Ibid.*, at 38, para. 62.

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Lex specialis, as an exception to a general rule, nevertheless remains helpful in resolving conflicts arising within a regime, especially where a treaty itself provides special rules of priority; even if it is unhelpful in the context of a regime-to-regime conflict.[149]

After admitting the indeterminate nature of the "substantive coverage" of a provision and the number of legal subjects to whom it applies, the ILC Report nevertheless attempts to distinguish the application of the maxim with regard to parties and the subject matter.[150] With regard to the parties, it concludes that where a state has undertaken conflicting obligations towards two or more states, the *lex specialis* approach is largely irrelevant,[151] and inevitable recourse must be had to political determination.[152] With regard to the subject matter, the *lex specialis* rule may operate as a conflict-resolving technique only when both the general and special rule deal with the same subject matter.[153] The requirement of the same subject matter effectively rules out the capacity of *lex specialis* to resolve regime-to-regime conflicts, such as human rights and investment regimes, as the two regimes deal with different subject matter.

The ILC's defiance of the role of these interpretive maxims (*lex specialis*, *lex generalis*, *lex prior*, and *lex posterior*) therefore appears to be more accommodating of value orientation in the legal reasoning for the resolution of treaty conflicts, as explained below:

> They [*lex specialis*, *lex generalis*, *lex prior*, and *lex posterior*] enable seeing a systemic relationship between two or more rules, and may thus justify a particular choice of the applicable standards, and a particular conclusion. They do not do this mechanically, however, but rather as "guidelines",[cit] suggesting a pertinent relationship between the relevant rules in view of the need for consistency of the conclusion with *the perceived purposes or functions of the legal system as a whole*. (emphasis added)[154]

On another occasion, again referring to the interpretive maxims, the ILC Report provides:

> This [the inefficiency of *lex specialis*, *lex generalis*, *lex prior*, and *lex posterior*] reflected the pragmatic sense that some criteria are, in particular contexts, more important than others – for example because they better *secure important interests or protect important values*. (emphasis added)[155]

The ILC's references to the purposes or functions of the international legal structure and pragmatic treaty interpretation to secure certain interests and values clearly reveal the value-oriented components of the international legal framework and their role in the resolution of treaty conflicts. *Lex specialis*, therefore, either as a

149. *Ibid.*, at 38, para. 64. Cf. *ibid.*, at 41, para. 71.
150. *Ibid.*, at 61, para. 112.
151. *Ibid.*, at 62, para. 115.
152. *Ibid.*
153. *Ibid.*, at 63, para. 116.
154. *Ibid.*, at 25, para. 36.
155. *Ibid.*, at 167, para. 325.

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new interpretation or an exception to a general rule, does not solve all types of treaty conflicts; and neither do the temporal rules of *lex posterior* and *lex prior*. Apart from these rules, which deal with the chronology and subject matter of treaties, the VCLT rules relating to parties in successive but conflicting treaties are also unhelpful in resolving treaty conflicts.

C. *Problems with the VCLT Rules where Parties to an Earlier Treaty are Different from Parties to a Subsequent Conflicting Treaty*

The VCLT rules governing the conflict of two treaties between the same states are relatively unambiguous and helpful, and its rules dealing with successive treaties involving different states are problematic.[156] Article 30(4) VCLT, which deals with the "application of successive treaties relating to the same subject matter" that involve different parties, provides:

> When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) As between states parties to both treaties the same rule applies as in paragraph 3; [the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty]
>
> (b) As between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations. (emphasis added)[157]

By virtue of Article 30(4)(b), the resolution of treaty conflicts between different states favours the preservation of the validity of both incompatible treaties rather than determining priority inter se. Article 30 declares neither of the treaties, nor their conflicting norms, void or superseded. On the contrary, a state can choose which obligation to violate in the light of the "relative effects" of such violations, or what is commonly referred to as the "principle of political decision".[158] In other words, the VCLT shifts the focus from the normative prioritization of the conflicting treaties to state responsibility under international law for the treaty violation.[159] Article 30(5) VCLT affirms this position by making the application of Article 30(4) without prejudice to the responsibility of a state for a treaty violation due to the legal consequences of incompatibility maintained by Article 30(4).

The shift from normative determination to political preference allows the state to violate the less onerous treaty obligation, even though in so doing it would also violate fundamental interests of both individual actors and the international society.[160]

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156. Ghouri, *supra* note 107 at 8–10.
157. *VCLT supra* note 2, art. 30(4).
158. Klabbers, *supra* note 6 at 88 and 91.
159. Sadat-Akhavi, *supra* note 4 at 72.
160. Such fundamental interests can be viewed in the context of an individual as well as the national and international societies at large, the observance of which is of fundamental importance to the international community as a whole. See Weil, *supra* note 13 at 424.

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D. *The Principle of Political Decision in the Resolution of Treaty Conflicts*

In applying the "principle of political decision", a state may arbitrarily choose one treaty obligation over another conflicting one.[161] The principle of political decision, whether termed as a "right" or a "power" of election,[162] cannot solve treaty conflicts neutrally.[163] First, the principle does not provide a "principled method" of resolution, as it deals not with legal principle but with power and politics.[164] Consequently, it undermines the basic goal of treaty-making, namely, decreasing the politicization of international relations and increasing rule-based decision-making and conflict resolution.[165] Second, the principle provides no guidance where values conflict, as a state can opt for a treaty norm representing trade values over one representing human rights. The question arises as to whether the decision of states to prefer one treaty over another is based purely on political considerations? Klabbers, for instance, opposes the treatment of the political decision principle as a general principle of law.[166] Just as he is convinced that political judgements may not always be for the better,[167] he is also convinced that co-ordination mechanisms[168] to resolve treaty conflicts would be unable to solve the value conflicts.[169] Still he holds that the problem of conflicting treaties cannot be solved on the basis of a value-based approach:

> [I]nternational lawyer's insistence that values are somehow capable of underpinning the entire international legal order and turning it into a constitutional or quasi-constitutional order is unhelpful:[cit] people can, and do, change their values overnight, and tend to be in fundamental disagreement over values: what some hold dear may leave others cold …[170]

He seems not to be referring to the levelling of values inter se but rather to the disagreement on the universal acceptance of one value as a value per se. He further states:

> But that is not to deny that much international politics (and international law, by extension) takes place so as to promote certain values over others: indeed, for that very reason, sometimes fairly innocent treaty conflicts come to be recast as value clashes …[171]

While he seems to be agreeing with this article, he concludes that international law cannot resolve this clash of values.[172] He correctly observes that conflicting treaty norms covering the same subject matter can be resolved by balancing the rights

161. Klabbers, *supra* note 6 at 88; see also discussions in Section III(C) of this article.
162. See Sir Gerald FITZMAURICE, "Third Report on Law of Treaties" (1958) II Yearbook of the International Law Commission, Draft Article 18, para. 5 at 27.
163. For a detailed discussion on the principle of political decision, see Klabbers, *supra* note 6 at 90–3.
164. Cf. Borgen, *supra* note 5 at 576.
165. Cf. *ibid.*
166. Klabbers, *supra* note 6 at 92. See also Jan B. MUS, "Conflicts Between Treaties in International Law" (1998) 45 Netherlands International Law Review 227.
167. Klabbers, *ibid.*
168. Cf. *ILC's Report on Fragmentation*, *supra* note 1 at 25–8.
169. Klabbers, *supra* note 6 at 93.
170. *Ibid.*, at 12–13.
171. *Ibid.*, at 13–14.
172. *Ibid.*, at 14 and 35.

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concerned.[173] I believe that this balancing is also possible where treaties deal with different subject matter (for example, trade and the environment), by treating normative conflicts as value conflicts that require the ordering of interests.[174]

According to Klabbers, international law solves treaty conflicts by forcing a choice of one value over another, which means that treaty conflicts cannot be solved when this choice is impossible.[175] He posits that this choice must be based on what constitutes a good life.[176] He seems to have overlooked the fact that the issue is not a "good life" sometimes, but life itself, as was seen in *Charles D. Short v. The State of Netherlands* [*Short*].[177] Mr Short, a member of the US military and based in the Netherlands, pleaded guilty to murdering his wife. The 1953 NATO Status of Forces Agreement (SOFA), binding both the US and the Netherlands, required his transfer to US authorities, where he could be punished by death under US law. The Sixth Schedule of the ECHR, which binds the Netherlands, prohibits the death penalty in all circumstances. The Court acknowledged both the conflict between the SOFA and the ECHR and the absence of a rule in international law that would resolve the conflict. It nevertheless ranked the competing interests implicated, not leaving the matter for political determination by the Netherlands,[178] and ultimately prioritized the interest of an individual (Mr Short) over that of NATO.[179] If the ECHR had left this decision to the Netherlands, the Netherlands could have chosen to extradite Mr Short for political reasons.

Klabbers posits that the *Short* Court acknowledged only a clash of interests and not a clash of values, and argues that the "national and international interests" in this case were abstracted to the point that they would cover all agreements.[180] Klabbers appears to have reached this conclusion because he perhaps understood "interests" in terms of "rights" having corresponding "obligations".[181] In contrast to Klabbers, I contend that the question before the Court was not whether the conflicting interests have value but rather how these interests should be ordered. While ordering the conflicting interests, the Court took them all into account and prioritized that which gave the most effect to the totality as far as possible and with the least sacrifice.[182] This ordering is no doubt "relative" and can only be determined through a contextual evaluation and not by any general rule.[183] The ordering process, therefore, determines hierarchy between

173. *Ibid.*, at 34–5.

174. See discussions under Section II of this article.

175. Klabbers, *supra* note 6 at 34–5.

176. *Ibid.*, at 100.

177. *Charles D. Short v. The State of Netherlands*, before Dutch High Court, decision of 30 March 1990, (1991) 22 The Netherlands Yearbook of International Law at 432 [*Short*]. See Klabbers, *supra* note 6 at 108–10.

178. *Short*, *ibid.*, at 437.

179. *Ibid.*

180. Klabbers, *supra* note 6 at 110.

181. *Ibid.*, where he observes that "states, and international society at large, have something of an interest in keeping even the most mundane treaties". See also Klabbers, *supra* note 6 at 34–5 and Klabbers, *supra* note 48. For the distinction between interests and rights, see Section II of this article.

182. Pound, *supra* note 83 at 331.

183. On relativity of norms in international law, see Weil, *supra* note 13 and Tasioulas, *supra* note 22. Cf. Koskenniemi, *supra* note 44 at 126.

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competing values, as was seen in the ECJ's decision in *Schmidberger v. Austria* [*Schmidberger*].[184] In *Schmidberger*, the ECJ found that the violation of the TFEU's guarantee of free movement of goods was justifiable in a case where Austrian authorities allowed the blockade of a mountain pass in the name of freedom of expression and assembly.[185]

This does not mean, however, that no value has an inherent priority over other values. *Jus cogens* has that priority and would nullify treaty norms conflicting with it.[186] But for norms other than *jus cogens*, there is no mathematical formula that would determine hierarchy for every instance of conflict.[187] In this regard, the ILC Report also suggests:

> Much more often, priority is "relative". The "other law" is set aside only temporarily and may often be allowed to influence "from the background" the interpretation and application of the prioritized law.[188]

When resolving normative conflicts, nevertheless, courts do not leave the matter to states for political determination but rather strive to maintain a relative normative order between the competing norms. This normative relativity is a necessary part of the solution for treaty conflicts.[189] Courts indeed solve normative conflicts by assigning relative weights to values. This relative, as compared to an absolute, hierarchy is more feasible in the context of the changing structure of international society that is marked by continuous changes in the preferences of its members. This is also more accommodating, as it does not nullify conflicting norms. The progressive value-internalization process will, when possible, ultimately lead to an absolute hierarchy, as is the case for *jus cogens*.

IV. TREATY CONFLICTS BEFORE INTERNATIONAL COURTS

International courts and tribunals have a tendency to avoid and not resolve treaty conflicts, for which they have developed various techniques[190] like reconciling conflicting norms,[191] declaring treaties as parallel instead of conflicting,[192] limiting their jurisdiction to only one of the treaties concerned,[193] or simply denying the

184. *Schmidberger*, *supra* note 12.

185. *Ibid*. Cf. Klabbers, *supra* note 6 at 165.

186. *VCLT*, *supra* note 2, art. 53.

187. Cf. Koskenniemi, *supra* note 44 at 126.

188. *ILC's Report on Fragmentation*, *supra* note 1 at 16, para. 19.

189. See e.g. Vranes, *supra* note 89 at 404.

190. *ILC's Report on Fragmentation*, *supra* note 1 at 25 (stating that "[t]reaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflicts").

191. Klabbers, *supra* note 6 at 104.

192. *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) (Jurisdiction and Admissibility)*, Judgment of 4 August 2000, [2000] International Tribunal for the Law of the Sea, online: <http://untreaty.un.org/cod/riaa/cases/vol_XXIII/1-57.pdf>, at para. 52.

193. *Costa Rica v. Nicaragua*, Central American Court of Justice (CACJ), Judgment of 30 September 1916, (1917) 11 American Journal of International Law 181 at 227–8. For a detailed analysis of the case, see Borgen, *supra* note 5 at 591–4 and *El Salvador v. Nicaragua*, (CACJ), Opinion and Decision of 9 March 1917, (1917) 11American Journal of International Law 674 at 729.

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existence of a treaty conflict.[194] Borgen, however, has rightly noted that these harmonizing efforts[195] may resolve apparent but not genuine conflicts.[196] The ECtHR has, nonetheless, resolved the problem of genuine treaty conflict in *Soering* and *Matthews*.[197]

In *Soering*,[198] the US, pursuant to the UK-US extradition treaty,[199] sought the extradition of Soering, a German citizen detained in a UK prison, for offences carrying the death penalty. In accordance with the Article 4 of the Treaty, the UK had secured a waiver from the US of the death penalty if extradition was approved. Unsatisfied with the US assurances on this matter, Soering unsuccessfully petitioned the English Courts for judicial review, which led to his application to the ECtHR that extradition would lead to a serious likelihood of his execution in the US. In addition to the death penalty itself, he also claimed that the circumstances surrounding this punishment, like the likelihood of an extended period on death row, would constitute inhuman or degrading punishment contrary to ECHR Article 3,[200] which binds the UK but not the US.

The EU Commission argued as established law that ECHR Article 3 is implicated when there are serious reasons to believe that a person's extradition would lead to the receiving state treating the person in a manner contrary to Article 3.[201] The UK characterized the EU Commission's approach as an interference with international treaty rights, leading to a conflict with the norms of international judicial process.[202] As such interference would involve adjudication on the affairs of states not party to the ECHR, the UK further argued that this would require the Court to examine alien systems of law and conditions in foreign states, cause a serious risk of harm in the ECHR party state that is obliged to harbour the protected person, and leave criminals at large and unpunished.

While the Court observed that the ECHR neither governs the actions of non-party states nor requires contracting states to impose ECHR standards on other states,[203] it acknowledged the incompatibility of the obligations acquired by the UK under the extradition treaty and the ECHR.[204] Although acknowledging that state parties to the

194. See *Oscar Chinn (U.K. v. Belgium)*, [1934] P.C.I.J (ser. A/B) No. 63 (Dec. 12). For a detailed analysis of the case, especially with regard to the dissenting opinions, see Borgen, *supra* note 5 at 596–9. For an analysis of these conflicts-avoiding techniques, especially within the WTO regime, see Marko MILANOVIC, "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law" (2009) 14 Journal of Conflict and Security Law 459.

195. Cf. *ILC's Report on Fragmentation*, *supra* note 1 at 27.

196. Borgen, *supra* note 5 at 640.

197. *Matthews*, *supra* note 11.

198. *Soering*, *supra* note 10. For a detailed discussion on *Soering*, see Richard B. LILLICH, "The Soering Case" (1991) 85 American Journal of International Law 128.

199. *United Kingdom-United States Extradition Treaty*, 8 June 1972, 28 U.S.T. 227, Supplementary Treaty, 25 June 1982 and an Exchange of Notes, 19–20 August 1986.

200. As compared to the *Short* case discussed at *supra* note 177, Soering could not claim that the death penalty itself constituted such treatment as ECHR Article 2 explicitly affirms the death penalty. It was only in January 1999 that the then Home Secretary Jack Straw signed the Sixth Protocol of the ECHR that provides for the formal abolition of the death penalty.

201. *Soering*, *supra* note 10 at para. 82.

202. *Ibid.*, para. 83.

203. *Ibid.*, para. 86.

204. *Ibid.*

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ECHR are not responsible "under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction",[205] the Court considered the "special character" and "object and purpose" of the ECHR as "an instrument for the protection of individual human beings [to] require that its provisions be interpreted and applied so as to apply its safeguards practical[ly] and effective[ly]".[206] It noted that Article 3 contains an absolute prohibition on torture and inhuman punishment, and that this "enshrines one of the fundamental values of the democratic societies making up the Council of Europe".[207] The Court also observed that other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights enshrine this same value, which is an internationally accepted standard.[208]

The Court observed that the absence of a specific obligation in the ECHR that a party state refrain from extraditing fugitives when there are substantial grounds for believing they would be subjected to conduct in violation of the treaty[209] does not mean that such an obligation is not already inherent in Article 3. The Court unflinchingly declared that:

> It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.[210]

The *Soering* Court declared that the ECHR obligation would prevail at the expense of another obligation acquired by a party state on behalf of a third state. It could not have been clearer about prioritizing the interest of the individual, as embodied in the ECHR, over the obligation embodied by the extradition treaty, on the basis of a value-based hierarchy between the two norms.[211] ECHR Article 3, according to the Court, contains a non-*refoulement* obligation that prohibits the UK from transferring a person to the US if a real risk of that person being subjected to inhuman treatment in the US was established.[212] On the other hand, however, was the UK/US extradition treaty that required the UK to extradite Soering,

205. *Ibid.*
206. *Ibid.*, para. 87.
207. *Ibid.*, para. 88.
208. *Ibid.*
209. As it is in the case of, for example, art. 3 of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, GA Res. 39/46, UN Doc. A/39/51 (entered into force 26 June 1987).
210. *Soering*, *supra* note 10 at para. 88.
211. See Christine CHINKIN, *Third Parties in International Law* (Oxford: Clarendon Press, 1993) at 80.
212. Milanovic, *supra* note 194 at 17.

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without exception. Both treaty norms provided obligations for which there were corresponding rights, and the normative conflict between the ECHR and the UK/US extradition treaty could only be resolved by establishing a hierarchy between the conflicting treaty norms in terms of their represented values and protected interests.[213] Instead of leaving the matter for the UK to decide, possibly based on political considerations, the Court determined an objective hierarchy between the conflicting treaty norms.

By prioritizing the non-*refoulement* obligation over the extradition obligation, the Court neither pronounced the non-*refoulement* obligation as *jus cogens* nor declared the UK/US extradition treaty void.[214] On the contrary, it created an exception based on value-oriented reasoning. The Court did not deny the beneficial interest of extradition in preventing fugitive offenders from evading justice,[215] but instead declared that the non-*refoulement* norm represented an interest that was superior to it. This non-*refoulement* interest may indeed attain the status of *jus cogens*,[216] and only then can it declare a conflicting treaty void.[217] And in that case, it will be unnecessary to have a convention like the ECHR to establish the right of the individual. By creating this exception, the Court has nonetheless contributed to this value-internalization process and set a precedent.[218]

In *Matthews*, the Court dealt with both the ECHR, which qualified the European Parliament (EP) as a legislature in respect of which states had to organize free elections, and a treaty concluded among the EU members that prohibited the UK from extending the franchise for the EP to Gibraltar.[219] The context was the election in Gibraltar for the EP. The Court found the UK responsible for violating the ECHR, irrespective of its other treaty obligations. The applicant alleged a violation of her right to free election under ECHR Article 3 Protocol 1. While the Court did not find this right absolute, it observed that the conditions imposed on it must neither impair the very essence of the right to vote nor render it ineffective and must be in pursuit of a legitimate aim; as well, the means employed must not be disproportionate.[220] In addition to a violation of Article 3 of Protocol 1 to the ECHR,[221] the applicant also alleged discrimination in violation of ECHR Article 14.[222] The Court did not find it necessary to consider the latter as it had already found a violation of the former.[223]

213. Cf. the dissenting views in the otherwise concurring opinion of Judge de Meyer annexed to the Judgment in *Soering*, *supra* note 10.
214. Cf. Milanovic, *supra* note 194 at 17.
215. *Soering*, *supra* note 10 at para. 86.
216. *VCLT*, *supra* note 2, art. 53.
217. *Ibid.*, art. 64.
218. The Court applied the same exception to a case where the conflict was between the ECHR and a public international law obligation rather than another treaty; see *Case of Al-Saadoon and Mufdhi v. United Kingdom*, (2010) Eur. Ct. H.R., App. No. 61498/08. Cf. Chinkin, *supra* note 211 at 80–1, note 134.
219. *Matthews*, *supra* note 11 at para. 26.
220. *Ibid.*, para. 63.
221. *Ibid.*, para. 24.
222. *Ibid.*, para. 66.
223. *Ibid.*

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Unlike in *Soering*, the *Matthews* Court did not explicitly resort to value-oriented analysis. It can be argued, however, that such an orientation played a role in the Court's decision, where, for example, it stated that the ECHR guarantees practical and effective—as opposed to theoretical—rights, and found that the UK had failed to secure the applicant's right to free elections.[224] It nonetheless prioritized the individual's interests over the state's interest as embodied in the EC treaty (now TFEU) regime. In both *Soering* and *Matthews*, the Court prioritized the individual's interest over more general obligations, and did not allow states to settle the matter based on political preferences.[225] The Court instead determined a hierarchy among the conflicting interests, just like the ECJ did in *Schmidberger*.[226]

WTO agreements may also have implications for obligations, such as human rights or environmental protection, that fall either inside[227] or outside the WTO regime.[228] The Appellate Body (AB) has adopted a case-by-case balancing between trade norms and conflicting norms.[229] In so balancing, the AB in *Korea-Beef*[230] and *EC-Asbestos*[231], but not in *Shrimp-Turtle*, adopted a value-oriented approach to determine a hierarchy between trade and the protection of human health.

In *Korea-Beef*, the AB was required to decide whether measures taken by Korea in purview of GATT Article XX to protect human health fulfilled the sine qua non of "necessary" as stipulated by the Article XX(d).[232] The AB stated:

> It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.[233]

While the AB found that Korea had not met its Article XX(d) burden of demonstrating that alternative WTO-consistent measures were not "reasonably available" to it,[234] the above-quoted dicta strongly indicates what the AB's decision would have been if Korea had in fact met its burden.

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224. *Ibid.*, para. 34.
225. Cf. Milanovic, *supra* note 194 at 16.
226. *Schmidberger*, *supra* note 12.
227. See Nita GHEI, "Evaluating the WTO's Two Step Test for Environmental Measures under Article XX" (2007) 18 Colorado Journal of International Environmental Law and Policy 117.
228. Joost PAUWELYN, "A Typology of Multilateral Treaty: Are WTO Obligations Bilateral or Collective in Nature?" (2003) 14 European Journal of International Law 907 at 945.
229. See e.g. *EC Measures Concerning Meat and Meat Products (Hormones)*, [1998] WT/DS26/AB/R, WT/DS48/AB/R, at para. 177; *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, [2001] WT/DS135/AB/R, at para. 172 [*EC-Asbestos*].
230. *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, [2001] WT/DS161/AB/R, WT/DS169/AB/R, at paras. 163 and 166 [*Korea-Beef*].
231. *EC-Asbestos, supra* note 229 at para. 172.
232. See *supra* notes 119–22.
233. *Korea-Beef*, *supra* note 230 at para. 162.
234. *Ibid.*, at para. 182.

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In *EC-Asbestos*, the AB, referring to *Korea-Beef*, noted:

> "[T]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends.[cit.] In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.[235]

This time, the AB found that the impugned European Community's measure was indeed "necessary" to protect human health.

While questions relating to treaty conflicts may inevitably become necessary for the resolution of a matter, the jurisdiction of courts and tribunals over treaty conflicts is complicated. It might be considered limited to the application of a specific treaty or set of treaties,[236] and tribunals may have an exclusive jurisdiction over disputes arising from a particular treaty.[237] Likewise, the jurisdiction of dispute-settlement tribunals may be limited by the treaty itself to issues arising under it.[238] In this manner, then, treaties may be treated as self-contained regimes.[239] It cannot be stipulated, however, that such regimes are entirely self-contained.

The WTO is perhaps the most prominent example of a self-contained regime.[240] *Shrimp-Turtle*, *Reformulated Gasoline*, *EC-Asbestos*,[241] and *Korea-Beef*,[242] however, reveal that the jurisdiction of the WTO Dispute Settlement Understanding (DSU) is not limited to matters pertaining to trade alone. In *Shrimp-Turtle*, the DSB Panel in fact looked into whether any other treaty obligated the US to take the measures that allegedly violated the WTO Agreement.[243] In this regard, the ILC Report has rightly distinguished between the jurisdiction of a court or tribunal and the scope of applicable law in the interpretation and application of a treaty; for example, while the jurisdiction of the DSU is limited to the application of the WTO Agreement, there is no explicit provision limiting the applicable law to its normative framework.[244]

A tribunal may, on the other hand, have extensive jurisdiction to entertain all matters that relate to or affect the subject matter of a treaty. For example, Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[245] provides that the jurisdiction of the

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235. *EC-Asbestos*, *supra* note 229 at para. 172.
236. Klabbers, *supra* note 6 at 106.
237. Art. 23 of the WTO Dispute Settlement Understanding provides that issues arising under the WTO Agreements may only be submitted to the WTO's DSB. Cf. Klabbers, *supra* note 6 at 107.
238. Art. 3(2) of the WTO Dispute Settlement Understanding.
239. M. NOORTMANN, *Enforcing International Law: From Self-help to Self-contained Regimes* (Aldershot: Ashgate Publishing Company, 2005) at 141.
240. See e.g. Anja LINDROOS and Michael MEHLING, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO" (2005) 16 The European Journal of International Law 857.
241. *EC-Asbestos, supra* note 229.
242. *Korea-Beef, supra* note 230.
243. See *Shrimp-Turtle Panel Report, supra* note 121 at paras. 7.52, 7.57, and 7.58.
244. Cf. *ILC's Report on Fragmentation*, *supra* note 1 at 28.
245. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 575-I U.N.T.S., at 160–234 (entered into force on 14 October 1966) [*ICSID Convention*].

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International Centre for Settlement of Investment Disputes (ICSID) shall extend to any legal dispute arising directly out of an investment. States must consent to ICSID jurisdiction, however, by including, for example, a general dispute-resolution clause in their bilateral investment treaty (BIT).[246] Once a state's consent is established, any state measure in respect of human rights or the environment that offsets the legitimate expectations of an investor will bring the dispute within ICSID's jurisdiction. When those measures are based on treaties other than the BIT, tribunals would indeed be empowered to exercise jurisdiction to entertain arguments based on other treaty regimes.[247] Though the ICSID Convention allows disputing parties to choose the law applicable to their dispute, the fall-back provision for the application of international law in the case of disagreement between parties would effectively bring the application of other treaty regimes to an investment dispute.[248] Furthermore, even if the parties opt to consider the investment-treaty regime as a self-contained regime, tribunals may still apply the enabling rules of international law contained in other regimes when it is unable to find guidance on a particular issue in the investment treaty itself.[249] The ILC Report remarks on the scenario of jurisdiction of courts and tribunals as follows:

> [I]t has never been seriously doubted by any international tribunal or treaty-body, namely that even as the jurisdiction of a body is limited (as it always – even in the case of the International Court of Justice – is), its exercise of that jurisdiction is controlled by the normative environment.[250]

According to Schwarzenberger, when a court or tribunal has jurisdiction to deal with only one of the conflicting treaties, it would always be entitled to claim jurisdiction over matters that are incidental to its decision on the main issue.[251] Interestingly, and also correctly, Schwarzenberger suggests that a court or tribunal is required to exercise jurisdiction over conflicting treaties in order to properly discharge its duty of determining their accumulative legal effects.[252]

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246. The consent needs to be provided in writing, but there is no indication that one way is preferred over another. The consent can be given in a treaty, a contract, or local law. In the *Olguin Case* (*Eudoro Armando Olguin v. Republic of Paraguay,* Award of 8 August 2000, ICSID Case No. ARB/98/5), the *CSOB* case (*Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic*, Award of 24 May 1999, ICSID Case No. ARB/97/4), and the *Tradex* case (*Tradex Hellas S.A. v. Republic of Albania*, Award of 29 April 1999, ICSID Case No. ARB/94/2), the tribunals have referred to the possibility of consent being granted by the state in a BIT. That will not grant jurisdiction per se to ICSID, for the consent of the investor will be lacking. But once the investor files a claim with ICSID, the parties are considered to have consented to submit the dispute to ICSID arbitration.

247. According to art. 42(1) of the ICSID Convention, *supra* note 245, the tribunal is the judge of its own competence.

248. *ICSID Convention*, *supra* note 245, art. 42(1).

249. See ICSID Course on Dispute Settlement, 2.6 Applicable Law, UNCTAD/EDM/Misc.232/Add.5, at 7–8.

250. *ILC's Report on Fragmentation*, *supra* note 1 at 30, para. 45.

251. Schwarzenberger, *supra* note 47 at 475.

252. *Ibid*. The ILC is also convinced with this contention: "[b]ut when a party raises a point about conflict and about the precedence of one obligation over another, then a stand must be taken". *ILC's Report on Fragmentation*, *supra* note 1 at 28, para. 43.

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V. CONCLUSION

The most important conclusion to be drawn from this research is that the outright disregard of values in the international normative framework is manifestly fallacious. In international society, common values are identified and recognized by states even though they operate according to different ideologies. All norms are value norms since they protect interests for which members of international society require protection. These values directly conflict on occasion and thereby require ordering by way of determining hierarchy. The value-internalization process in international society is pursuing gradual value optimization where norms like *jus cogens* have already achieved an absolute superiority over other norms. The conception of norms without values is misconceived and the discourse to resolve normative conflict devoid of value orientation is unprincipled, misleading, and ineffective.

Norms are subject to interpretation and may be applied and interpreted differently by the various institutions entrusted with their interpretation.[253] In other words, there is no solitary and consistent meaning ascribed to a particular norm. However, once we resolve that every norm has a corresponding value in terms of the interests it is meant to protect, then the question of the existence or recognition of a particular value fades away. This value-orientation of norms not only helps in understanding normative conflicts but also facilitates the prioritization of competing norms.

Another important conclusion is that a description of the conflict of a particular norm in one treaty with a norm contained in another treaty in terms of rights and obligations moves the treaty conflict up a level of abstraction into the subtext of rules and principles suggested by the deontic approach. Any normative hierarchy in the deontic context either results in the nullification of one of the conflicting norms or brings in an unworkable debate of corresponding obligations. Understanding norms in terms of rules and principles is also unhelpful in the resolution of conflicts as it leads to the political preference of one principle over another, depending upon which a state chooses in the relevant situation.

We have also learned that the international law rules both inside and outside the framework of the VCLT (*lex posterior*, *lex prior*, and *lex specialis*) do not provide adequate solutions to the normative conflict found in treaties. For the purposes of hierarchy, treaty norms are better understood in terms of values protecting interests. The estimation of values is not restricted to mere regular devices of treaty interpretation; that is, textual or contextual analysis, employed for the determination of disputes over the meaning of a particular treaty norm. It goes well beyond that into the objective exploration of social necessities as represented in values for the purposes of calculating a relative hierarchy of interests. The regular devices to resolve treaty conflicts fall back on the principle of political decision, which is unpredictable and is not a principle at all in the legal sense of the term since it does not involve legal reasoning or rationality. The principle of political decision is meant to preserve not the interests of individuals or a society but the political interests of states. Moreover, resort to this non-legal principle does not solve the actual normative conflicts.

253. Cf. *ILC's Report on Fragmentation*, *supra* note 1 at 30–3.

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In cases of irreconcilable treaty conflicts, the courts and tribunals have assumed—and would continue to assume—jurisdiction to discharge their duty of determining the accumulative legal effects of conflicting treaty obligations. While doing so, courts do not leave the issue to be decided by states on the basis of arbitrary political choice. On the contrary, courts determine an objective hierarchy among competing norms by ordering them in terms of interests and values. Where all values stand *pari passu* in that they are all goal values, this precisely constitutes a value dilemma. Apart from *jus cogens*, which always trumps lesser values, values can be ranked only at the instance of conflict and not on an a priori basis. The resolution of the value conflict would, therefore, require the relative estimation of facts to determine which of the competing values is most important and deserving of an ad hoc preference. Thus, the most important interest in a particular situation is protected at the expense of another interest that may not be important on that occasion.

It was due to this ranking, for example, that an individual's interests were given priority over interests arising from a larger defence alliance in *Short* and to the detriment of friendly state-to-state relations in *Soering*.[254] It was also due to this ranking of values that the ECJ found a trade restriction justified when the purpose of the restriction was to protect freedom of expression and assembly, and the ECtHR found that the democratic process is a better interest to be protected as against the interest of the EC.[255] Also, what norm is general or special in character (in every sense of the terms implied) does not make a difference when it comes to a conflict of values.[256] What matters is which value (protected by either norms) should be preferred over the other in a given time and space.

254. Klabbers, *supra* note 6 at 109–10 (referring to a Dutch High Court case).
255. *Schmidberger, supra* note 12.
256. Cf. *ILC's Report on Fragmentation*, *supra* note 1 at 33, para. 53.

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