

Adarsh Ramanujan, *Conflicts Over “Conflict”:
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CONFLICTS OVER “CONFLICT”: PREVENTING FRAGMENTATION OF INTERNATIONAL LAW

ADARSH RAMANUJAN*

Public international law does not envisage a single source of law; nor does it contemplate a single supreme law-creating body. Conflict between various norms, whatever be their nature, is therefore an inevitability. Such conflicts are one of the many causes that affect the ability of the legal system to maintain stability and accountability. Resolving such conflicts is essential to ensure that any system does not fall under its own weight. The importance of resolving conflicts is amplified in the context of the public international law regime, which consists of a number of sub-systems, thereby resulting in a higher probability of conflicts.

Equally important to the issue of resolving conflict is identifying when the solution is to be applied. After all, what good is any “ultimate answer” without identifying the “ultimate question”? In other words, one must first identify the existence of a conflict to resolve it. Very few publicists of international repute have, however, dealt with this issue, in particular, in sufficient substantive detail. Despite the limited number of opinions, there is, unfortunately, no consensus on this topic. The present comment portrays the author’s view on this issue. In this comment, the question has been analyzed with a very simple policy objective: avoiding fragmentation of international law. The author’s views are presented by way of critically examining the opinion of Joost Pauwelyn, a noted scholar in this field, who has most recently dealt with this issue in a comprehensive manner. Moulded into this critique are three hypothetical scenarios that would allow the reader to grasp the significance of the question.

* LL.M. Candidate 2010, University of California, Berkeley School of Law, USA. Address: A-19, Pradhan Pelican Apartments, Nyanappanahalli Main Road, Avani Sringeri Nagar, BTM VIth Stage, Off Bannerghatta Road, Bangalore - 68, INDIA. Telephone: +91-93148-10506. E-mail: adarshramanujan[at]gmail.com.

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I. INTRODUCTION

Conflict of norms currently occupies centre-stage in public international law, with the International Law Commission (ILC) having recently given its final conclusions on the subject of subject of fragmentation of international law in 2006¹. A careful researcher in public international law would be aware that the topic is actually not new; the ILC has been grappling with the issue since the drafting of the Vienna Convention of the Law of Treaties. Nor has the issue actually been settled. It is only now that academicians are approaching the topic in a full-fledged manner. The following short comment shall deal with the first-step in solving a conflict between norms – what is a “conflict”, and when are two norms said to be in “conflict?”

In order to achieve this end, the comment first presents three scenarios of conflict and proceeds to analyze the definition of conflict having these scenarios in the background. These examples have been placed for no other purpose than to help the reader understand the significance of the author’s opinion and conclusion. In Part III of the comment, the author’s opinion on the topic is presented in the form of a critique of the latest scholarly and authoritative opinion on this topic: that of Professor Joost Pauwelyn’s.² This way, the comment seeks to cover the existing definitions of conflict and their shortfalls in one simple structure.

II. THE SCENARIOS

Although the question (“When is there said to be a ‘conflict’ between norms?”) is quite an academic and a technical one, it has far-reaching practical implications. In order for the reader to appreciate the significance of these implications, the author shall present three hypothetical scenarios, which may reasonably occur in reality. The comment would be based on an

¹ International Law Commission, Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.702 (18 July, 2006).

² His most comprehensive work on the conflict of norms is JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003). For further discussion on the issue of fragmentation of international law see Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT’L L. 903 (2004); Joost Pauwelyn, *Fragmentation of International Law* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009) available at: www.mpepil.com.

“analysis” of the scenarios, in a very limited sense. Although these scenarios have been referred to very minimally later in the comment, the author believes that they would help in a broader understanding of the subject. This especially, since the issue addressed in this comment deserves an intricate analysis on account of its complexity. The following scenarios, thus, are suggested to help the reader better visualise the discussion on “conflict” that follows.

At the outset, the author has highlighted the policy-objective guiding him in this critique: avoiding fragmentation of international law. The three scenarios mentioned below involve highly significant treaty regimes with substantial global participation. The scenarios highlight as to how seemingly unconnected norms may result in a contradiction in a given factual situation. This, therefore, is intended as a *caveat* to the readers as to how careful one must be in defining the term “conflict”. In the next part, the consequences of taking any particular definition of conflict are presented in light of these scenarios. These practical examples may help the reader in applying the views presented in this comment.

1. First Scenario: Duty to Protect Environment *versus* Bilateral Investment Treaty (BIT).

There is a BIT in 2005 between States A and B and a private agreement under the same giving right to a state-owned entity of B to mine coal deposits from a reserve in A, with knowledge of possible harm to the environment as a result of the activity. One of the obligations under the treaty is as follows:

Neither Party shall take any measure of expropriation, nationalization, or other measures having effect equivalent to nationalization or expropriation against the investment of nationals or companies of the other Contracting Party unless the measures are taken for a purpose authorized by law, on a non-discriminatory basis, in accordance with its laws and in return for payment of just compensation, which shall be made without unreasonable delay.

As of 1992, both A and B are parties to the Convention on Biological Diversity³ (CBD). It may be argued that under the CBD, there is an

³ Convention on Biodiversity, 5 June, 1992, 1760 U.N.T.S. 79 (hereinafter CBD).

obligation upon the States to protect biological diversity and ecosystems. That apart, Article 3 of the CBD reads:

States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁴

A, therefore, is under an obligation not to expropriate the investment of B and at the same time has an obligation to protect biodiversity, even within its own jurisdiction. On the other hand, B has exercised its right to invest under the treaty, at the same time having an obligation under Article 3, CBD to not cause damage to A's environment.

2. Second Scenario: Duty to Reduce Greenhouse Gases (GHGs) and Duty to Protect Biodiversity.

States C and D, both developed countries, are parties to the Kyoto Protocol⁵ as well as the United Nations Framework Convention on Climate Change⁶ (UNFCCC). Under Article 4(2)(a) of the UNFCCC they are under an obligation to adopt national policies to reduce GHG emissions. They also have an obligation to take climate change considerations into account in their policies and to prevent or minimize the causes of such climate change and its adverse effects. Article 2(1)(iv) of the Kyoto Protocol further imposes an obligation to increase the use of renewable source of energy. States C and D are also parties to a bilateral agreement - the Migrating Bird Convention⁷ (MBC) to protect a bird species, which migrate back and forth between both nations. The MBC imposes an obligation upon both States to:

[T]ake appropriate measures to preserve and enhance the environment of migratory birds... prevent damage to such birds ... conserve migratory bird habitat⁸

⁴ *Id.* at art.3.

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December, 1997, 37 I.L.M. 22.

⁶ United Nations Framework Convention on Climate Change, 9 May, 1992, 31 I.L.M. 849, art. 3(3), 4(1)(f).

⁷ Migratory Birds Convention, signed between the USA and the U.S.S.R, 1978, 29 U.S.T. 4647 (hereinafter MBC).

⁸ The wording of this obligation is inspired from article IV(1) of the MBC. *Id.*

As a part of its effort in complying with the Kyoto Protocol, A decides to build a wind farm directly upon the habitat of a migratory bird species, which is also in the pathway of migratory route of the bird. A is aware of the fact there is a clear possibility of the wind farm directly resulting in the deaths of the bird, and also that the construction of the wind farm will destroy the habitat of the species.

3. Third Scenario: Duty under Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and World Trade Organization (WTO).

States E and F are both parties to the CITES⁹. State F is an African nation through which the river Nile flows. For the past 30 years, F has had a flourishing market for the leather products from the Nile Crocodile. However in 1996, the Nile Crocodile was included as an endangered species within Annexure I of the CITES. On the basis that the Nile crocodile products were used primarily for commercial purposes, E prohibits the entry of such goods into its territory. At the same time, a sub-species of the Nile Crocodile exists in F's neighbouring States that has not been classified as endangered and thus trade in products of that species between those countries and E flourishes.

F and E are members of the WTO as well. Article XIII of the General Agreement on Tariffs and Trade¹⁰ (GATT) obligates both parties that:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.¹¹

In all the above cases, it is evident that following one norm may lead to the breach of the other, although this may not necessarily be true. With

⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243.

¹⁰ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay round, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (hereinafter GATT).

¹¹ *Id.* at art. XIII.

these scenarios as the background, let us proceed to the discussion on conflict of norms.

III. CONFLICTS OVER “CONFLICT”

In light of the above scenarios, a discussion on conflict of norms would logically begin with Article 30 of the Vienna Convention on the Law of Treaties, 1969¹² (VCLT), which codifies the principle of conflict between successive treaty norms. For Article 30 to apply, however, two important conditions have to be fulfilled: (a) Both treaties must relate to the same subject-matter;¹³ and (b) There must be an incompatibility.¹⁴ It is important to discuss each of these criteria.

1. Same Subject-matter:

Few publicists of international repute state that the phrase “same subject-matter” must be construed strictly:

[T]he expression “relating to the same subject-matter” is not clear but should probably be construed strictly, so that the article would not apply when a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.¹⁵

This also seems to be the opinion held by Sir Ian Sinclair and the Expert at the Vienna Conference during the conclusion of the VCLT, which ensured

¹²Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (hereinafter VCLT).

¹³VCLT, *supra* note 12, art.30(1) reads: “Subject to article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.”

¹⁴ VCLT, *supra* note 12, art.30(3) reads:

When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

¹⁵ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 183 (2000); *See also* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 98 (1984).

that the application of doctrine of *lex specialis* is not completely overruled.¹⁶ Thus, according to this view, Article 30 cannot be applied to environmental treaties and trade treaties since they deal with different subjects.¹⁷

At the same time, others have a different opinion. For instance, Vierdag uses incompatibility to conclude sameness.¹⁸ If the attempted application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied.

As noted in *Oppenheim's International Law*:¹⁹

[I]t is not clear what this limitation involves, since in a sense if a course of conduct is such as to attract the application of two different treaties they can be said to be related to the same subject-matter.²⁰

The ILC in its most recent study on fragmentation of international law seems to have dismissed that the terms must be construed narrowly.²¹ This is due to the fact that there is neither any normative value *per se* in classifications of treaties, such as “trade”, “environment”, “human rights” *et cetera*,²² nor any basis of concluding on the subject-matter of any treaty, apart from what appears to be a wholly arbitrary choice between what interests are relevant and what are not.²³ At the same time, by adopting the definition given by Vierdag,²⁴ the later part of Article 30 becomes redundant, since it would amount to a repetition of incompatibility. The definition given in *Oppenheim's International Law*, on the other hand, seems logical and is

¹⁶ See JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 364 (2003) (hereinafter PAUWELYN).

¹⁷ Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 603-604 (2005).

¹⁸ E.W. Vierdag, *The Time of Conclusion of a Multilateral Treaty*, 59 BRIT. Y.B. INT'L L. 75, 100 (1988).

¹⁹ 1 OPPENHEIM'S INTERNATIONAL LAW (R. Jennings & A. Watts eds., 1992).

²⁰ *Id.* at 1212 and fn.2

²¹ See International Law Commission, Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 17-18, 129-131, U.N. Doc. A/CN.4/L.682 (13 April, 2006) (Hereinafter ILC Report).

²² *Id.* at 129-130.

²³ *Id.* at 18.

²⁴ *Id.* at 18-19; See also PAUWELYN, *supra* note 16, at 365; For Vierdag's definition, see *supra* note 18 and accompanying text.

therefore useful for the purpose of the following analysis. In all the case scenarios mentioned at the start of this critique, the two treaties clearly relate to the same subject-matter, in that the same factual situation/action would involve the application of the two (or more) treaties mentioned in each scenario.

2. Incompatibility:

Article 30(3) of the VCLT reads:

When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.²⁵

This provision deals with a case of identical parties and holds that the earlier treaty applies only to the extent that it is *compatible* with the later treaty. However, the degree of incompatibility that is required under Article 30 is unspecified and the commentary of the ILC is unnaturally silent on this issue. While discussing this topic, it is pertinent to note the distinctions between the approaches taken by Sir Lauterpacht, the original propounder of this provision, and Sir Waldock, the Special Rapporteur who substantially changed the provision, giving it its present form. While the former was of the view that a later treaty in conflict with the previous one was invalid,²⁶ the latter considered it merely a matter of treaty interpretation.²⁷

Sir Lauterpacht, in his commentary to the Draft Articles submitted by him, opined that a case of “conflict” was distinct from an overlap in subject-matter:

Very often, an inconsistency — a conflict — will, upon closer scrutiny, prove to be no more than a divergence or variation... Thus, from this point

²⁵ VCLT, *supra* note 12, at art.30(3)

²⁶ Hersch Lauterpacht, Special Rapporteur, *Report by the Special Rapporteur on the Law of Treaties*, U.N. Doc. A/CN.4/87 (1954), *reprinted in* [1954] 2 Y.B. Int'l L. Comm'n 123, 133 (Hereinafter Lauterpacht).

²⁷ Humphrey Waldock, Special Rapporteur, *Second Report on the Law of Treaties*, U.N. Doc. A/CN.4/156 (1963), *reprinted in* [1963] 2 Y.B. Int'l L. Comm'n 36, 53 (Hereinafter Waldock).

of view, there is no conflict — even if the resulting situation amounts to more than mere overlapping....²⁸

Citing further examples, he held the view that mere overlapping or divergence in provisions will not lead to the conflict or inconsistency required under the Draft Articles.²⁹ To him, a true conflict is only when the performance of the later treaty "... involves a breach of a treaty obligation."³⁰ On the other hand, Sir Gerald Fitzmaurice defined "conflict" as a situation where the two treaties "... set-up mutually discordant systems."³¹ When Sir Waldock was appointed as the Special Rapporteur, keeping in mind the capacity of the parties to a treaty to abrogate and revise an earlier treaty, he bifurcated the provision into two separate articles: One dealing with implied termination (Article 59, VCLT) and the other dealing with successive treaties (Article 30, VCLT).

As per Article 59 (1)(b), a later treaty may override an earlier treaty when *the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time*. In such a case, the earlier treaty shall be considered as terminated or suspended according to the intention of the parties. This test, popularly known as the "Impossibility-of-Joint-Compliance Test" (IJC test), was, arguably, first advocated in 1953 by Wilfred Jenks in his work on conflict of law-making treaties.³² The test checks whether one may comply with both treaties at the same time; that is, whether the performance of one obligation results in not being able to perform the other obligation. This definition of conflict enjoys wide support from other academicians of international repute.³³

But this is merely the test, which has been used for Article 59. What then is the relationship between Articles 59 and 30? In this regard, it is

²⁸ Lauterpacht, *supra* note 26, at 136.

²⁹ Lauterpacht, *supra* note 26, at 136-137.

³⁰ Lauterpacht, *supra* note 26, at 133.

³¹ Gerald Fitzmaurice, Special Rapporteur, *Third Report on the Law of Treaties, reprinted in* [1958] 2 Y.B. Int'l L. Comm'n 21, 44.

³² Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 British Yearbook of International Law 401, 426 (1953).

³³ See Erich Vranes, *The Definition Of 'Norm Conflict' In International Law And Legal Theory*, 17 EUR. J. INT'L L. 395, 401-402 & n.38-54 (Apr 2006) (hereinafter Vranes); MARK VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES, A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* para.322 (1997).

appropriate to refer to the Commentary of the ILC:

[B]ut *Article 26 (now Article 30) deals only with the priority of inconsistent obligations of treaties both of which are to be considered as in force and in operation. That Article does not apply to cases where it is clear that the parties intended the earlier treaty to be abrogated or its operation to be wholly suspended by the conclusion of the later treaty; for then there are not two sets of incompatible treaty provisions in force and in operation, but only those of the later treaty. In other words, Article 26 comes into play only after it has been determined under the present Article (Article 56, now Article 59) that the parties did not intend to abrogate, or wholly to suspend the operation of, the earlier treaty. The present Article, for its part, is not concerned with the priority of treaty provisions which are incompatible, but with cases where it clearly appears that the intention of the parties in concluding the later treaty was either definitively or temporarily to supersede the regime of the earlier treaty by that of the later one...In short, the present Article is confined to cases of termination or of the suspension of the operation of a treaty implied from entering into a subsequent treaty.*³⁴

Thus, if according to the *travaux préparatoires* Article 30 would apply only after exhausting Article 59, and if Article 59 uses the IJC test, is it not logical to assume that a different test of checking for incompatibility must be applied to prevent redundancy of Article 30?

However, this is not a necessary conclusion. A careful perusal of the wording of Article 59 (1)(b) would indicate that it is necessary to check if the *provisions* (in plural) are so far incompatible so that *two* treaties as a *whole* are not capable of being applied at the same time. Even under Article 59(1)(a), the second clause that deals with implied termination, one must verify if the intent of the parties was to regulate the subject-matter by the later treaty as a whole. The emphasis, in the author's opinion, suggests that one must consider the treaty as a whole when applying the IJC test under Article 59. Sir Waldock indicates a similar opinion in his commentary to Draft Article 65 (now Article 30):

But the Special Rapporteur believes that a minor modification of Article 41 (now Article 59) may be desirable, so as to *transfer cases of a partial conflict* between two treaties to the present Article.... However, the Special Rapporteur is inclined to think that the appropriate course may be to eliminate the words 'in whole or in part' from Article 41 and to assign to the

³⁴ Draft Articles on the Law of Treaties with Commentaries, U.N. Doc. A/CN.4/191 (1966), reprinted in 2 Y.B. Int'l L. Comm'n 187, 253 (1966), (emphasis supplied).

present Article cases of partial conflict in which there does not appear to be any intention to terminate the earlier treaty.³⁵

Thus, what is tested under Article 59 is the incompatibility between treaties as a whole, whereas under Article 30 the test is for incompatibility between each provision, though how this incompatibility is to be tested is not yet clear. As stated earlier, the IJC test is a possible option but not a necessary conclusion. Two alternative guideposts exist to assist in answering this question – Article 53 of the VCLT, dealing with *jus cogens* norms, and Article 103 of the United Nations Charter (UN Charter).

Article 53 is relevant because it was considered alongside Article 30 throughout the drafting process. Unlike Article 59, Article 53, apart from mentioning “conflict,” does not seem to indicate any test; this is a position similar to Article 30. As the ILC Commentary indicates, the fundamental object behind this provision is that, despite the all-pervading nature of sovereign will of States, there were certain principles of public policy, *jus cogens*, which States cannot at their own free will contract out.³⁶ The significance of this provision lies in the fact that the sovereign will of a State, expressed in the form of an instrument, is considered void. Suppose a treaty is entered into between States A and B permitting slave trade *inter se* themselves and there exists a *jus cogens* norm prohibiting slave trade.³⁷ Pauwelyn argues that the IJC test will lead to an absurdity in this case because when State A engages in slave trade, A is exercising its right, whereas the *jus cogens* is in the form of a prohibition and thus joint compliance is possible by not exercising such right under the treaty.³⁸ In such a circumstance, application of the IJC test will not result in a “conflict” and thus Article 53 will not be attracted and the treaty is not void. By underscoring this absurdity, he argues that one must undertake a broader approach and move away from the IJC test. However attractive this argument may sound, there is a fundamental error in equating a “conflict” under Articles 59 or 30 and a “conflict” under Article 53.

³⁵ Humphrey Waldock, Special Rapporteur, *Third Report on the Law of Treaties*, U.N. Doc. A/CN.4/167 (1964), reprinted in [1964] 2 Y.B. Int'l L. Comm'n 6, 40 (emphasis supplied).

³⁶ ILC Report, *supra* note 21, at 247.

³⁷ PAUWELYN, *supra* note 16, at 174.

³⁸ *Id.*

It must be remembered that the conflict mentioned in Article 53 is at the theoretical level – the *very existence of a provision* in conflict with a *jus cogens* norm will suffice. The concept of conflict mentioned in Articles 30 and 59, however, is at the *application level only*; the provision in itself is valid and binding. The following quote from Sir Waldock’s report is quite appropriate:³⁹

The Commission has already specified in Articles 37 and 45 (now Articles 53 and 64), adopted at its fifteenth session that a treaty which conflicts with a peremptory norm of general international law having the character of *jus cogens* is void, and this provision clearly applies whether or not that norm has its origin in customary law or in a treaty provision. *If one of two conflicting treaties is void, it is not a treaty in force and there is no question of its application. It does not therefore seem necessary to repeat the jus cogens rule in the present Article, which concerns the application of treaties.*⁴⁰

If the *raison d’être* of having a separate provision for *jus cogens* and conflict between two successive treaties lies in the fact that they apply at two different levels, it would be inappropriate to use the same test for both Articles 59 and 53. In fact, Pauwelyn himself highlights this distinction as “inherent normative conflict” and “conflict in the applicable law.”⁴¹ It seems illogical to assume the same origin for two issues if the proposed solutions for them are totally divergent – one leading to illegality and the other leading to mere priority without affecting the validity of the norm. Another interconnected reason as to why it would be inappropriate to refer to Article 53 is the fact that conflict in terms of *jus cogens* is fundamentally based on hierarchy in norms, whereas in the case of two successive treaties between identical parties, both retain their normative value.

Article 103 of the UN Charter still remains to be examined. Article 103 is much more relevant for the discussion concerning the interpretation of Article 30 for two specific reasons: (1) Unlike Article 53 of the VCLT, this provision directly deals with priority and not the legality of the provision; and (2) during the discussions of the ILC, Sir Waldock expressly referred to Article 103 of the UN Charter as the source of the word “conflict” under Article 30 when he stated that the word conflict in Draft Article 65 (now

³⁹ Humphrey Waldock, Special Rapporteur, *Third Report on the Law of Treaties*, U.N. Doc. A/CN.4/167 (1964), reprinted in [1964] 2 Y.B. Int’l L. Comm’n 6, 36.

⁴⁰ *Id.* at para.7, (emphasis supplied.)

⁴¹ PAUWELYN, *supra* note 16, at 176-177.

Article 30) *was used in the same general sense as used in Article 103.*⁴² Article 103 deals with priority to the obligations under the UN Charter, the phrase used being “conflict between obligations”.⁴³ What about a situation of right/permissive conduct versus obligation? Suppose the UN Security Council mandates economic boycott over State A and at the same time there is a BIT between States A and B granting the right to invest in each other’s country.⁴⁴ In an effort to prove that even this phrase under Article 103 will take care of a conflict between permission and a prohibition, Pauwelyn argues that since every *right* always has a corresponding *obligation*, the above case will still be covered under Article 103.⁴⁵ This is, however, not entirely true and to explain why, a small deviation is required.

In his seminal 1913 work, Wesley Hohfeld proffered a system of legal analysis necessitated by the fact that critically important words in law have no agreed meaning that is consistent across legal disciplines.⁴⁶ By analysis, he set to involve eight particular terminologies or concepts, “right” being one of them, in a particular relationship.⁴⁷ If any of these eight conceptions represent one corresponding side of any bilateral legal relationship of any person or a class of persons, under his taxonomy a jural correlative is related to the other person who is on the opposing end of the relationship.⁴⁸ The jural correlatives are as follows:

JURAL CORRELATIVES			
Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

⁴² *Summary Record of the 743rd Meeting*, [1964] 1 Y.B. Int’l L. Comm’n 126, 132, U.N. Doc. A/CN.R/SR.743.

⁴³ UN Charter, art.103.

⁴⁴ The example is taken from the statement of United Kingdom (Mr. Crook) at the public sitting of the ICJ in *Lockerbie* case on 15 October, 1997. International Court of Justice, *Verbatim Record of Public Sitting Held on 15th October, 1997*, para.3.35, available at www.icj-cij.org/docket/index.php?p1=3&p2=3&k=82&case=89&code=lus&p3=2 (last visited 30 June, 2009).

⁴⁵ PAUWELYN, *supra* note 16, at 341-342 .

⁴⁶ Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

⁴⁷ *Id.* at 55.

⁴⁸ *Id.* at 30.

Figure 1: Hohfeld's jural correlatives

Returning to the hypothetical situation posed above, it is clear there are actually two possibilities: (1) When A exercises its right to invest under the Treaty in B, it necessarily involves a corresponding obligation on B to allow the investment. With reference to B, there is clearly a conflict of obligations; (2) When, however, B invests in A, the corresponding obligation is on A. Thus in the second case, when B is exercising its right, there is no “conflict of obligations” as required under Article 103 with reference to B. Another illustration would be: Article 2(5) of the UN Charter obligates all member states to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. State A signs an agreement with B to the effect that A may economically aid it at a time when preventive actions have been sanctioned by the Security Council. When A acts upon the agreement, it is taking up a conduct permitted by the treaty, though it is in violation of an obligation under the UN Charter. Even here there is really no “conflict between obligations”, and thus Article 103 does not apply.

The above analysis, however, begs the question of what is the definition and meaning to be given to the term “conflict” under Article 103? Does the IJC test apply under Article 103? The only weapon that Pauwelyn levelled against the IJC test is the fact that it does not contemplate a situation of permissive conduct versus a prohibition. Article 103 trumps this argument by using the phrase “conflict between obligations”. At this juncture, it would be logical to analyse the typology of conflicts that Pauwelyn discusses in his treatise:⁴⁹

S.No.	Norm 1	Norm 2
1.	<u>Command</u> : State ‘A’ shall do ‘X’	A. <u>Command</u> : State ‘A’ shall do Y, where Y is mutually exclusive of X B. <u>Command</u> : State ‘A’ shall do ‘Y’, where X and Y are merely different/divergent
2.	<u>Command</u> : State ‘A’ shall do ‘X’	<u>Prohibition</u> : State ‘A’ shall do not ‘X’
3.	<u>Command</u> : State ‘A’ shall do ‘X’	<u>Right (Exemption)</u> : State ‘A’ need not do ‘X’
4.	<u>Prohibition</u> : State ‘A’ shall not do ‘X’	<u>Right (Permission)</u> : State ‘A’ may do ‘X’

⁴⁹ PAUWELYN, *supra* note 16, at 179.

Figure 2: Pauwelyn's Typology of Conflicts

Cases that fall under 1.A and 2 are covered even under the IJC test. These are “necessary conflicts” – complying with one norm will necessarily result in the breach of the other.⁵⁰ According to Pauwelyn, conflict situation 1.B is also a necessary conflict though complying with both norms is possible.⁵¹ The remaining two situations (cases 3 and 4) are what he calls “potential conflicts”; the conflict arises only when the State decides to invoke its right or use its exemption.⁵² These two cases of potential conflicts would not always fall within the phraseology of Article 103 and it is futile to argue the same in all circumstances. But the confusion lies with respect to Case 1.B. Application of the IJC test would not imply any consequence. Both involve obligations and thus would attract Article 103, if it is agreed a “conflict” exists between them. As per Pauwelyn, this would amount to a “conflict” who notes:

Essentially, two norms are, therefore, in relationship of conflict if one constitutes, has led to, or may lead to a breach of the other. Such a conflict or potential for breach is, however, not real when the relationship between two seemingly contradictory norms is explicitly regulated in the form of a rule-exception relationship.⁵³

But why take such a definition of conflict? What is the need to define conflict under Article 103 in this manner? No answer is provided by Pauwelyn in this regard. Let us analyse the consequence of taking up either stance, the hypothetical situation being that there is an obligation under the UN Charter for State A to do X under a particular circumstance and, as per a bilateral agreement with State B, an obligation to do Y under the same circumstance.

1. IJC test:

A will have to comply with both norms, since Article 103 does not apply. Failure to comply with either norm/obligation would amount to breach and consequential state responsibility of A.

⁵⁰ PAUWELYN, *supra* note 16, at 176.

⁵¹ PAUWELYN, *supra* note 16, at 180.

⁵² PAUWELYN, *supra* note 16, at 176, 180.

⁵³ PAUWELYN, *supra* note 16, at 175-176.

2. Pauwelyn's test:

If, however, we assume that a conflict does exist, then Article 103 would apply and the obligation under the UN Charter shall prevail. The consequence of this would be that A is duty bound to fulfil only its obligation under the UN Charter and not the bilateral treaty.⁵⁴ In other words, B *cannot* invoke the responsibility of A for breach of their bilateral obligation under the treaty, but A can be made responsible for breach of its obligation under the UN Charter.

However, was it not the intent of parties to regulate their relationships through the bilateral agreement? In fact, in arguing the need for a shift from the IJC test, Pauwelyn offers the following example:⁵⁵ if States A and B conclude a bilateral treaty prohibiting X, and sign a later treaty permitting X, application of the IJC test would not result in an incompatibility since both States may comply with the earlier treaty by not exercising their right or permission under the second treaty. Thus, the States would have to apply the earlier treaty despite the contrary intention of the parties.⁵⁶ We thereby see how, in a very similar circumstance to that which Pauwelyn uses to highlight the need to overthrow the IJC test (giving importance to the intent of the parties or contractual freedom), the test is actually contributing to his policy – making sure that the bilateral treaty and the UN Charter are upheld.

Making the choice between either approach is a difficult decision. However, as Pauwelyn himself highlights, Article 103 is a special case.⁵⁷ This is clear from the fact that, as per Article 30(1), the *lex posterior* rule under Article 30 is subject to Article 103. In this background, is it reasonable to take Article 103 as the basis for testing compatibility under Article 30? It is also to be noted that the use of the word “provisions” under Article 30 (“provisions are compatible”) as opposed to the word “obligations” under Article 103 (“conflict between obligations”) is another reason for discomfort in equating the tests in Article 103 and Article 30. Moreover, the drafting history of Article 30 adds further confusion: Robert Ago (as Chairman) specifically noted that it would be advisable to replace the term “obligation” to “provisions of a treaty” in paragraph 2 of the then Draft

⁵⁴ PAUWELYN, *supra* note 16, at 327.

⁵⁵ Hereinafter Pauwelyn's Example.

⁵⁶ PAUWELYN, *supra* note 16, at 173-174.

⁵⁷ PAUWELYN, *supra* note 16, at 337-342.

Article 65. The same was carried forward to the 1969 convention as well.⁵⁸ In fact, Article 30(4)(b) expressly refers to both rights and obligations. One may argue that if the IJC test is applied to Article 30 despite conceding that incompatibility between a right and an obligation is also contemplated under that provision, it would result in an absurdity.

When Pauwelyn's example for Article 30 is re-examined, his argument seems to neglect Article 59. If the intent of the parties was as he concludes, then it is very clear that Article 59(1)(a) will apply and the earlier treaty would stand terminated, without any question of conflict arising. In fact, all the conflict situations highlighted by Pauwelyn will be governed by Article 59. In every case of conflict indicated by him, the intent of the parties seems to be that the later treaty be the controlling agreement. The exact relation between Articles 30 and 59 is unsettled. But consider the following statement of Sir Waldock:

[T]he Commission recognized that there is always a preliminary question of construction of the two treaties in order to determine the extent of their incompatibility and the intentions of the parties with respect to the maintenance in force of the earlier treaty...The Commission, however, decided that, even if there were a preliminary question of interpretation in these cases, there was still the question of the conditions under which that interpretation should be regarded as leading to the conclusion that the treaty has been terminated.⁵⁹

This statement does not make sense when read in light of Sir Waldock's statement regarding cases of "partial conflict", unless we apply the logic that the difference between Articles 59 and 30 is to test whether the entire treaty is in conflict or just few provisions are in conflict. In other words, the phrase "extent of their incompatibility" must refer to the quantitative nature of the conflict in the treaty and *not* the magnitude or degree of incompatibility in each provision. If that be the conclusion, then the test to be applied in both Article 59 and 30 must be the same – the IJC test.

However, there also exists the view that the term "conflict" can, and must, be defined in a broader manner.⁶⁰ Referring back to the typology of conflicts discussed by Pauwelyn,⁶¹ the first question that haunts the reader is

⁵⁸ VCLT, *supra* note 12, art.30(2).

⁵⁹ Humphrey Waldock, Special Rapporteur, *Third Report on the Law of Treaties*, U.N. Doc. A/CN.4/167 (1964), *reprinted in* [1964] 2 Y.B. Int'l L. Comm'n 6, 35.

⁶⁰ Vranes, *supra* note 33, at 406-407 and notes 67-76.

⁶¹ See Figure 2, *supra* note 49 and accompanying text.

– Why does Pauwelyn argue that potential conflicts and the situation mentioned under case I.B must also be part of the study of conflict of norms? There apparently is no particular reason for this except that otherwise, according to him, it would amount to confusing between *definition* of conflict and *how to resolve* a conflict.⁶² Pauwelyn does not mention the requirements of maintaining such an approach and the criticisms of following any different approach. Apart from reasoning that the narrower definition does not contemplate permissions, and that it confuses definition of conflict and how to resolve a conflict, he offers no other rationale. The first reason has been discussed earlier.

The second reason is more of a policy approach and has no particular legal or logical basis. The specific issue here is that Pauwelyn extends the study of conflict of norms to include so called potential conflicts of possible breaches. Pauwelyn's potential conflict moves beyond this test to include possible breaches as well. The focus is thus shifted to breach, an approach that was also taken by Kelsen.⁶³ He categorized conflicts into various kinds:

[A] conflict is bilateral if in obeying or applying each of the two norms, the other one is (possibly or necessarily) violated. The conflict is unilateral if obedience to or application of only one of the two norms violates the other one. The conflict is a total one if one norm prescribes a certain behaviour which the other forbids (prescribes the omission of the behaviour). The conflict is a partial one if the content of one norm is only partially different from the other one.⁶⁴

In all cases, where the definition includes a *possible breach*, it overlaps with the concept of *potential conflicts*, as indicated by Pauwelyn. One scholar does mention in the course of his article as to the need to take the Kelsinian approach.⁶⁵ According to this scholar, the joint compliance test is unsuitable in many ways and takes the following hypothetical example of two divergent provisions on copyright protection:

[L]et us assume that a given norm prescribes a minimum term of copyright protection of 40 years, whereas another norm prescribes a minimum duration of 50 years....After 40 years, according to the criterion of joint compliance, it is still possible to protect copyrights for ten more years and

⁶² PAUWELYN, *supra* note 16, at 170.

⁶³ Hans Kelsen, *Derogation*, in 2 DIE WIENER RECHTSTHEORETISCHE SCHULE 1429 (H. Klecatsky, R. Marcic, and H. Schambeck eds., 1968)

⁶⁴ *Id.* at 1438.

⁶⁵ See Vranes, *supra* note 33.

thereby to comply with the second norm. Hence, the test of joint compliance would not designate this situation as one involving conflict. *Yet one could argue that after 40 years, i.e. after compliance with the first norm, there is a--at least implicit, if not, depending on the circumstances of a concrete treaty, explicit--permission not to protect copyrights.*⁶⁶

The reasoning is cyclical – the need to broaden the definition to include potential conflicts is because the narrower definition does not include potential conflicts! Why potential conflicts must also be included within the study of conflict of norms has not been explained or discussed. On the other hand, there are reasons why potential conflicts must not be brought into picture. At this juncture, it shall be appropriate to make a brief comment as to the three scenarios discussed at the beginning of the paper. In all three cases, there certainly is an overlap of subject-matter in the sense that the relevant activity would automatically call into effect the treaties involved in each scenario respectively. Also, in each scenario, there is a clear possibility of complying with both the norms simultaneously though the State involved has failed to do the same.

Interestingly, Pauwelyn is of the opinion that the phrase “same subject-matter” in Article 30 merely re-iterates the definition of “conflict” and thus, the very fact that it falls within any one of the typologies of conflict mentioned by him, both the treaties automatically relate to the same subject-matter.⁶⁷ When applied to the three scenarios mentioned in Part II of this comment, since they clearly fall within his description of “conflict”, Article 30 automatically applies (the requirement of same subject-matter is automatically fulfilled). Yet in the terms of Pauwelyn’s definition, there is clearly a case of conflict, meaning thereby that one norm will have to be given priority over the other. Since both States are parties to both treaties, as per Article 30(4)(b), the rule under Article 30(3) applies. Thus the later provision shall prevail to the extent of incompatibility.

But why the need to give priority to provisions or treaties when it is possible to comply with both? Such an approach lacks a coherent system of reasoning. The examples taken up by Pauwelyn specifically involve: (a) The intent of the parties is to revise or abrogate a prior provision or treaty; and (b) the subject-matter covered is exactly the same. In Scenarios 1, 2, and 3,

⁶⁶ See Vranes, *supra* note 33, 413-414, (emphasis supplied).

⁶⁷ PAUWELYN, *supra* note 16, at 364-365.

as aforementioned, the intention is clearly not to revise or abrogate the treaty and there is also a clear case of conflict in his taxonomy. The consequences of this are extremely significant. Not only will the States be in a position to override any prior obligations by merely concluding another treaty (which may have an overlapping area and be of divergent content), but chaos would ensue when it comes to various multilateral agreements. This is precisely what will result in a “threat to the reliability and the credibility of international law”.⁶⁸

There is a need to limit conflict between norms in any legal system. Pauwelyn suggests that this a wrong approach.⁶⁹ However, deconstructing his argument would suggest that the opposite conclusion is, in fact, the correct one. It must be understood that the international legal system is not “one system”; it is multitude of sub-systems with different objectives and purposes interacting with one another. One sub-system cannot be allowed to override any other. All norms in public international law (except possibly *jus cogens*) are merely the result of sovereignty of states. They enjoy equal status and this is one of the reasons why there cannot be an *a priori* hierarchy in the norms of international law. In all the scenarios highlighted above, we see different sub-systems interacting with one another. It would be absurd to suggest that any one should prevail over the other. In constructing his argument, Pauwelyn does not, perhaps, realize the consequences of his theory: The scope for inconsistency in the application of international legal norms.⁷⁰

If we allow the creation of a multitude of competing institutions with overlapping responsibilities, it would dramatically limit the ability of international legal bodies to reintegrate the system. It raises the costs of negotiating a detailed agreement dramatically and makes it more difficult to achieve even an informal consensus. Worse, fragmentation provides powerful states with the opportunity to abandon — or threaten to abandon — any given venue for a more sympathetic one, which further exacerbates the competition between institutions.

⁶⁸ See Gerhard Hafner, *Pros and Cons Ensuing from the Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 856 (2003-2004).

⁶⁹ PAUWELYN, *supra* note 16, at 172.

⁷⁰ Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law: Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 556–67 (2002).

IV. CONCLUSION

In this short comment, the author has, more or less, covered the entire spectrum of existing opinion on the definition of “conflict” of norms. The author has also provided a substantial critique of Pauwelyn’s opinion on the definition of conflict of norms. In conclusion, considering that Pauwelyn’s analysis is an attempt to maintain the unity of international law, it is ironic that Pauwelyn’s reasoning as regards the definitional underpinnings of “conflict” would, in fact, unwittingly lead to more chaos and conflict. In light of this critique, it may be concluded one must be very cautious in rendering any opinion on the definition of conflict. Further, avoiding fragmentation of international law must be the foremost consideration while attempting to define the term “conflict”. With this as the guiding principle, the author concludes that having a stricter definition of conflict is more logical and reasonable.