

Cambridge University Press

978-1-107-04330-5 - Strategically Created Treaty Conflicts and the Politics of International Law

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Introduction

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1 Strategically created treaty conflicts

On treaty conflict and the questions that follow

‘Strategically created treaty conflicts’ – a notion introduced in this monograph – may seem an odd choice of subject-matter for a book. ‘How many can there be, and are they even a category?’, has been a common response to my presentations of the topic. Yet such conflicts are fairly common, and have catalysed changes in various legal regimes. Moreover, they provide a fruitful context for a dual analysis of the relationship between international law and politics. Firstly, they offer a straightforward illustration of key themes in critical legal literature: the limits of a formal conception of international law, the legal field’s turn to managerial solutions, and the ultimate co-option of both legal forms and managerial processes by powerful actors. In other words, strategically created treaty conflicts reveal international law as contingent upon, or instrumental to politics, and legal doctrine’s inability to transcend these features of international law. But, secondly, such conflicts also complicate the conclusions reached in the first analysis: they call into question the existence of any purely formal or managerial account of international law, and illuminate the complex assumptions and conceptions that underlie key doctrinal turns. Most importantly, they show the various ways in which international legal practices enable but also limit international politics (and not always for the better). This chapter expands upon these points, beginning with an overview of the incidence and key features of strategically created treaty conflicts.

The challenged Court, and other stories

The International Criminal Court (ICC or ‘Court’) is now over a decade old, and many regard it as an established component of the

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international legal landscape. But the situation was different only a few years ago: in its early years, particularly between 2002 and 2005, the Court was fiercely opposed by the United States. The United States was concerned that the Court might attempt to exercise jurisdiction over US nationals, including government and military officials; its participation in peacekeeping missions and in the armed conflict in Afghanistan seemed to afford the requisite opportunities. It was not convinced by provisions of the Rome Statute – the Court’s founding treaty – that limited the Court’s jurisdiction in situations where a State was able and willing to conduct its own investigations and trials.

The United States manifested its hostility to the Court in a number of ways: public criticism, blocking funds to the Court from the United Nations, even deleting references to it from international documents. The centre-piece of its ‘campaign’¹ against the Court was its conclusion of bilateral immunity agreements (BIAs) with 102 other States, stipulating non-surrender of US persons to the Court even where the Court had made a request for such surrender. These agreements were concluded both with States that were party and non-party to the Rome Statute, and often couched in reciprocal terms – that is, providing also for the non-surrender of that other State’s persons to the Court. The agreements were backed by US legislation.

Many signatories to these BIAs claimed that these treaties were consistent with the Rome Statute. They cited Article 98(2) of the Statute, which requires the Court not to press a State to surrender a person sent to its territory by another State without that State’s consent where the first State is under a treaty obligation to seek consent from the other State; the preambles of most BIAs refer to this provision. However, members of the European Union and commentators,² disputed the claim of consistency, arguing that the BIAs not only sought protection for a broader category of persons than Article 98(2) allowed, but also undermined the Rome Statute’s object of ‘no impunity’ by failing to make reference to specific alternative procedures for investigation and

¹ P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London, Penguin 2005) 48.

² Council Conclusions on the International Criminal Court, 30 September 2002, www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf. See also J. Crawford *et al.*, Joint Opinion in the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Rome Statute, 5 June 2003, www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf.

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prosecution of the persons sought by the Court. Amnesty International termed the BIAs ‘impunity agreements’.³

The BIAs were treaties in conflict with another treaty, the Rome Statute. Now, treaty conflicts as such are not remarkable occurrences in the international legal system: there are (at least) 193 States and several international organisations capable of entering into treaties with each other and they do so on all manner of issues – to the extent that some argue international law suffers from ‘treaty congestion’.⁴ In such a context, overlap between treaties is only to be expected, though it may lead to considerable confusion and uncertainty as to the rules applicable to particular States and the requirements of specific legal regimes.⁵ Jan Klabbers observes:

Chances are that those who negotiate a trade agreement are so focused on trade, that possible environmental ramifications or human rights ramifications do not enter their minds – something that will be strengthened by the fact that, typically, trade agreements will be the work of trade experts.⁶

In other words, treaty conflicts may often be contingent and inadvertent by-products of the increasing juridification of international relations.

However, the conflict between the BIAs and the Rome Statute was not inadvertent, or the result of an oversight or a misreading of the Statute. The BIAs were concluded to restrict the Court’s access to possible suspects and to limit the assistance offered by States. Against the regime for

³ Amnesty International, Letter to the EU Presidency, 30 August 2002, www.amnesty.eu/en/press-releases/human-rights-in-the-eu/police-and-judicial-co-operation/u-s-agreements-violate-international-court-treaty-0075.

⁴ C. Borgen, ‘Resolving Treaty Conflicts’ (2005) 37 *George Washington International Law Review* 573, 574; B. L. Hicks, ‘Comment: Treaty Congestion in International Environmental Law: The Need for Greater International Coordination’ (1998–9) 32 *University of Richmond Law Review* 1643, 1644; G. Handl, ‘Compliance Control Mechanisms and International Environmental Obligations’ (1997) 5 *Tulane Journal of International and Comparative Law* 29. See also K. Alter and S. Meunier, ‘The Politics of International Regime Complexity’, Framing Paper, Conference on the Politics of International Regime Complexity, Princeton University, 1 March 2007, www.princeton.edu/~smeunier/AlterMeunierFramingPiece2.pdf.

⁵ The International Law Commission has highlighted several concerns including ‘the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security’: ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (chaired by M. Koskenniemi), A/CN.4/L.682 (2006), 12.

⁶ J. Klabbers, *Treaty Conflicts and the European Union* (Cambridge University Press 2009) 12.

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cooperation set out in the Rome Statute, the BIAs outlined provisions on non-cooperation. Through them, the United States aimed to impede the effective functioning of the Court, possibly even to undermine the Court altogether. Claims that the BIAs were compatible with Article 98(2) of the Statute were window-dressing.

In sum, the United States, a non-party to the Rome Statute, used BIAs as an expedient to influence the functioning of the Court. The conflict between the Rome Statute and the BIAs was not merely a treaty conflict, but one strategically created to challenge the legal regime established by the Statute. It consisted in the use of one legal form (a series of bilateral treaties) to limit the operation of another (a multilateral treaty).

Nor by any means was it the only example of such a practice. Consider the following examples.⁷

- (1) In 1990, the United States and the European Union withdrew from the Uruguay Round on the expansion of the 1947 General Agreement on Tariffs and Trade (GATT). They concluded, bilaterally, a modified trade agreement, which they 'invited' other States to join. This grew into the World Trade Organization (WTO), including the 1994 GATT.⁸
- (2) More recently, the United States and the European Union have pressed developing countries to sign bilateral 'TRIPs-plus' agreements whose standards of intellectual property protection exceed those provided in the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights, and, *inter alia*, seriously limit access to affordable medicine.⁹
- (3) The 1982 United Nations Convention on the Law of the Sea (LOSC) provided for a regime for deep seabed mining based on the principle that the seabed and its resources were the common heritage of mankind. This was immediately challenged by eight States (the United States, the United Kingdom, France, Germany, the Netherlands, Belgium, Japan and Italy), which concluded an alternative treaty regime which described seabed mining as a freedom of the high seas.¹⁰
- (4) Some years earlier, the movement for a New International Economic Order had seen the adoption of the 1976 Bogotá Declaration by eight

⁷ These are also listed in S. Ranganathan, 'Responding to Deliberately Created Treaty Conflicts', in C. Tams *et al.* (eds.), *Research Handbook on the Law of Treaties* (Cheltenham, Edward Elgar 2014) Chapter 15.

⁸ See E. Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595, 616.

⁹ See L. Helfer, 'Regime Shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1, 24.

¹⁰ See R. R. Churchill and A. V. Lowe, *Law of the Sea* (3rd edn, Manchester University Press 1999) Chapter 12. See also Chapter 4 of this book.

developing equatorial States (Brazil, Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda and Zaire). These States claimed sovereignty over the geostationary orbit, and asserted that the conflicting 1967 Outer Space Treaty 'cannot be considered as a final answer to the problem of the exploration and use of outer space, even less when the international community is questioning all the terms of international law which were elaborated when the developing countries could not count on adequate scientific advice and were thus not able to observe and evaluate the omissions, contradictions and consequences of the proposals which were prepared with great ability by the industrialized powers for their own benefit.'¹¹

- (5) In 2005, the United States and India announced plans to conclude a civil nuclear cooperation agreement under which the United States would supply nuclear fuel and technology to India. India maintains a nuclear weapons programme but, unlike the United States, is not a party to the 1968 Nuclear Non-Proliferation Treaty (NPT). The NPT recognises the United States as a nuclear weapons State but does not endorse India's programme. Moreover, its provisions on nuclear energy assistance seem to exclude the sort of nuclear cooperation envisaged by the two States in 2005 and finalised in a 2007 bilateral agreement.¹²

These cases relate to a wide range of subjects. But they have in common that, in each, the alternative treaty (or treaties) sought to displace, compete with, carve exceptions from, or alter, the regime established by the existing treaty. Drawing on the description of fragmentation by the International Law Commission (ILC), as conflicts of treaty rules, institutions and regimes,¹³ these cases may be described as the *strategic* fragmentation of international law.¹⁴

Two further parallels may be drawn between such cases of treaty conflict. First, in each case, the alternative, conflicting treaty took the form of a bilateral treaty, a series of bilateral treaties, or a small-group treaty, while the challenged treaty was a multilateral one. Second, in many of these examples, the small treaty included a few States not party

¹¹ Conclusion 4, Declaration of the First Meeting of Equatorial Countries, Bogotá, Colombia, 3 December 1976. In his book, space law expert Ricky Lee treats the Bogotá Declaration as a treaty, using provisions of the 1969 Vienna Convention on the Law of Treaties to assess its implications: R. Lee, *Law and Regulation of Commercial Mining of Minerals in Outer Space* (London, Springer 2012) 172.

¹² See S. Ranganathan, 'Visions of International Law: Lessons from the 123 Agreement', Special Issue on India, the 123 Agreement and Nuclear Energy: Issues of International Law (2011) 51(2) *Indian Journal of International Law* 146. See also Chapter 6 of this book.

¹³ ILC, 'Report of Study Group on Fragmentation', 10–11.

¹⁴ See also Benvenisti and Downs, 'The Empire's New Clothes'.

to the multilateral treaty. India was not a party to the NPT, while the United States was. The United States was not party to the Rome Statute, but some of its bilateral co-signatories were. Brazil, Colombia and Ecuador were parties to the Outer Space Treaty, the other five were not. France and the Netherlands were party to the LOSC, the other States were not. In other words, the conflicting treaties in most of the above cases had 'non-identical' parties.

We might call the first of the two parallel features the small treaty/large treaty dynamic. The second parallel feature denotes a specific category of treaty conflicts: those between treaties with non-identical parties – or treaties with some common and some distinct parties – referred to, in shorthand, as AB/AC conflicts (the letters indicate common (A) and distinct (B and C) parties to the treaties; conflicts between treaties with identical parties may be called AB/AB conflicts).

As the next section explains, both features contribute to the success of the strategy of challenging or changing existing legal regimes by means of treaty conflict.

Legal doctrine on treaty conflict

To begin with, the two features exploit key tenets of international law that flow from the idea that it is a horizontal system between formally equal States. Founded on this idea, international law places all treaties at par: it does not consider a multilateral treaty more important than a bilateral one, nor – but for the UN Charter, which enjoys primacy¹⁵ – does it endorse any other hierarchy between treaties. It demands that all treaties be taken seriously as sources of legal rights and obligations for the states parties. In general, it does not forbid States from creating new treaties, even if such treaties conflict with existing ones. Nor does international law impose particular solutions in case of treaty conflicts. The last two points are relevant *a fortiori* for conflicts between treaties with non-identical parties.

These fundamental characteristics of international law may be seen in the 1969 Vienna Convention on the Law of Treaties (VCLT).¹⁶ The VCLT includes rules to protect all treaties: Article 26 restates the principle of *pacta sunt servanda*, that agreements must be observed in good faith; while other provisions direct the sanction of invalidity only at exceptional cases of treaty conflict – where a treaty conflicts with a peremptory norm,¹⁷ and possibly where one of the two treaties is an

¹⁵ See Article 103, Charter of the United Nations, 1945; Art. 30(1), VCLT.

¹⁶ 8 ILM 679. ¹⁷ Article 53, VCLT.

inter se agreement between some parties to the other treaty, and is prohibited by that treaty, infringes upon rights or obligations of other parties to that treaty, or is inimical to its object and purpose.¹⁸ Article 30 deals with the other cases of treaty conflict. For AB/AB conflicts, it provides that, in the absence of more specific rules regulating the relationship of the two treaties, the later of the two should prevail over the earlier. For AB/AC conflicts, it merely notes that each treaty remains effective between its parties, though a State may be responsible for any breach of obligation resulting from the conflict; this rule neither blocks States from concluding new treaties, nor specifies which treaty takes precedence.

Legal doctrine outside of the VCLT goes only a little further. Silent on strategically created treaty conflicts,¹⁹ and minimally attentive to AB/AC conflicts,²⁰ it embraces two conflict-solving techniques – ‘reconciliation’ and ‘priority’.²¹ However, these techniques are not ordinarily applicable to AB/AC conflicts, and in any event their use only gives ballast to the

¹⁸ Article 41, VCLT. Article 41 is stated as a permissive rule:

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

¹⁹ Only one article offers an examination of ‘strategic fragmentation’: Benvenisti and Downs, ‘The Empire’s New Clothes’. A very few other works refer to strategic regime shifting – i.e. pushing discussions of an international issue from one international regime to another, more favourable one: see Helfer, ‘Regime Shifting’; see also N. Krisch, ‘International Law in Times of Hegemony’ (2004) 16 *European Journal of International Law* 369.

²⁰ We only find two book-length studies on such conflicts between treaties with non-identical parties: G. Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity* (New York, Praeger 1989); Klabbers, *Treaty Conflicts and the European Union*. The first of these, i.e. Binder’s, finds no mention in many later works, including J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003); R. Wolfrum and N. Matz, *Conflicts in International Environmental Law* (London, Springer 2003); and S.A. Sadat-Akhavi, *Methods of Resolving Conflict between Treaties* (Leiden, Martinus Nijhoff 2003).

²¹ A selection of the literature on treaty conflicts includes: Q. Wright, ‘Conflicts between International Law and Treaties’ (1917) 11 *American Journal of International Law* 566; C. Rousseau, ‘De la compatibilité des normes juridiques contradictoires dans l’ordre

strategy of creating treaty conflict in order to alter an existing legal regime.

First, I will take up the latter point, that is, the ballast given by techniques of reconciliation and priority to the strategy of creating treaty conflicts. The literature on treaty conflict reveals an overwhelming preference for reconciling conflicting treaties by means of interpretation, and draws distinctions between ‘true’ and ‘false’ conflicts. True conflicts are described as those where the treaties have irreconcilable, mutually incompatible obligations; all other cases fall into the category of false conflicts. False conflicts, then, include situations where a State’s rights under one treaty clash with obligations under another, or two treaties deal with the same subject from different perspectives, or one treaty embodies more far-reaching obligations than another. Such conflicts are seen as less serious because they do not necessitate the breach of an obligation by a State. Instead, the treaties may be interpreted in harmony, or a State may simply forgo its rights for the sake of its obligations, or recourse may be had to practical principles of coordination, effectiveness, and mutual support.²² While the trend of distinguishing true and false conflicts was probably initiated by Wilfred Jenks’ landmark 1953 article;²³ it has since been taken up in a vast

international’ (1932) 39 *Revue Générale de Droit International Public* 153; J. Garner, ‘Harvard Research in International Law: Draft Convention on the Law of Treaties’ (1935) 29 *American Journal of International Law Supplement* 1024; H. Aufricht, ‘Supersession of Treaties in International Law’ (1951–2) 37 *Cornell Legal Quarterly* 698; C. W. Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *British Yearbook of International Law* 401; A. D. McNair, *Law of Treaties* (Oxford, Clarendon Press 1961); M. Zuleeg, ‘Vertragskonkurrenz in Völkerrecht. Teil I: Verträge zwischen souveränen Staaten’ (1977) 20 *German Yearbook of International Law* 246; W. Czapliński and G. Danilenko, ‘Conflicts of Norms in International Law’ (1990) 21 *Netherlands Yearbook of International Law* 12; W. Karl ‘Conflicts between Treaties’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. VII (1984) 468; J. Mus, ‘Conflicts between Treaties in International Law’ (1998) 15 *Netherlands International Law Review* 214; Pauwelyn, *Conflict of Norms in Public International Law* Wolfrum and Matz, *Conflicts in International Environmental Law*) Sadat-Akhavi, *Methods of Resolving Conflict between Treaties*; Borgen, ‘Resolving Treaty Conflicts’ 574; C. Borgen, ‘Treaty Conflicts and Normative Fragmentation’, in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press 2012) 448–70. Numerous works also address treaty conflict as part of wider explorations of the law of treaties, fragmentation of international law, norm conflicts, regime collisions and dispute settlement.

²² Such calls appear, for instance, in Mus, ‘Conflicts between Treaties in International Law’; Karl, ‘Conflicts between Treaties’; Wolfrum and Matz, *Conflicts in International Environmental Law*; Sadat-Akhavi, *Methods of Resolving Conflict between Treaties*.

²³ Jenks, ‘Conflict of Law-Making Treaties’, 425–7.