Contested collisions

An introduction

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Regime collisions

International law has come a long way. The total number of international treaties in force today is near impossible to determine, and even multilateral treaties open for general signature have multiplied at a rate that would have been hard to imagine even sixty years ago.[1] International organizations have proliferated, and so have international courts and tribunals, charged with adjudicating conflicts arising under such treaties.[2] What is more, states have long ceased to be the only actors on the international stage. Not only have individuals been assuming their own position in international law as human rights continued to develop;[3] corporate actors, also, have carved out a place for themselves in the international legal arena. Transnational law, as it is called, has become one of the most dynamic areas of law beyond the nation-state.[4]

Crucially, these developments have involved the formation of a plethora of international regimes, which the Study Group of the International Law Commission on Fragmentation has defined as 'combination[s] of rules which [lay] down specific rights, obligations, competences, and

[1] There are over 50,000 treaties registered in the UN system, and of the 6,000 multilateral treaties concluded in the twentieth century, 30 per cent were open for all states to participate: Final report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law (ILC A/CN.4/L.682, 13 April 2006), para. 7.
[2] See, e.g., Mackenzie et al., *The Manual on International Courts and Tribunals.*
[3] Peters, 'Humanity as the A and Ω of Sovereignty', even argues that this is part of a radical shift in the perspective on international law.
[4] See, e.g., Teubner (ed.), *Global Law Without a State.*

rules on the administration of such rules, in particular including rules on the reaction to violations'.[5] This process has been described as 'fragmentation' of international law,[6] an uncoordinated growth, as each regime is created to address a specific problem or set of issues. No systematic efforts are made to make sure a new or developing regime fits into the order of existing regimes. As a result, regimes often overlap, containing different rules for the same issue.[7]

This is not just a technical matter that is only of concern to order-loving lawyers. Overlapping regimes often represent quite different sets of interests, or systemic rationalities.[8] For example, it makes a big difference whether shrimp fishing is approached from a market-oriented perspective geared toward securing the global free flow of goods, or within the framework of sustainable management of aquatic resources, or from the perspective of the conservation of endangered species.[9] Or, to use an example from the ILC Report on the Fragmentation of International Law, are the conflicts over a nuclear power plant at the shores of the North Sea, simultaneously brought before an Arbitral Tribunal under the UN Convention on the Law of the Sea, an OSPAR[10] dispute settlement mechanism, and the European Court of Justice, 'principally about the law of the sea, about (possible) pollution of the

[5] Outline of the Chairman of the ILC Study Group on Fragmentation of International Law: The Function and Scope of the lex specialis rule and the question of 'self-contained regimes' (2003), http://untreaty.un/ilc/sessions/55/fragmentation_outline.pdf. This concept is similar to the one dominant in international relations theory, referring to 'a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'; Krasner, 'Structural Causes and Regime Consequences', p. 185.

[6] Final report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law (ILC A/CN.4/L.682, 13 April 2006). See also: Koskenniemi, 'Legal Fragmentation(s)'; Koskenniemi and Leino, 'Fragmentation of International Law?'.

[7] See, e.g., Pulkowski, *The Law and Politics of International Regime Conflict*, on the trade, culture and human rights regimes; see also the contributions in Young, *Regime Interaction in International Law*. For a perspective on the relationship between two different economic regimes (trade and investment), see Puig, 'International Regime Complexity and Economic Law Enforcement'.

[8] Even if they involve similar sets of state parties, they will have been negotiated at different times, by different departments, in different bargains: Simma and Pulkowski, 'Of Planets and the Universe', p. 489.

[9] See Joyner and Tyler, 'Marine Conservation versus International Free Trade'.

[10] 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, combining two earlier instruments named after Oslo (OS) and Paris (PAR).

North Sea, or about inter-EC relationships?'[11] There is no inbuilt priority of one regime over the other(s), in the sense that one systemic perspective is more valid and thus might normatively trump the other. In the absence of an established hierarchy of norms in the international sphere – apart from some *ius cogens* norms – there is no pre-defined institutional mechanism that secures consistent decisions.[12] Such different systemic rationalities, different perceptions of what the matter is 'really' about, may therefore lead to irreconcilably different outcomes in judicial or arbitral procedures.

A contested matter: interdisciplinary perspectives

In a systems theoretic account, such fraught constellations can be described as 'regime collisions',[13] which are much more than mere legal conflicts to be resolved by legal rules. Systems theory describes global society as functionally differentiated into 'social systems', such as the political or the economic system, the ecological system, and so on. Operating on a binary code, such as 'pay/don't pay', in the case of the economic system, each of these systems pursues its own rationality (*Eigenrationalität*). At their intersections, these autonomous systems seek to integrate the other system's operations into their own coded logic. In that very manner, the legal system forms legal regimes around other social systems, subjecting them to its particular binary code of 'law/illegality'. As a result, global law is necessarily and irreversibly fragmented into different legal regimes that follow different normative logics, such as trade, security, environmental protection, and so on. Just like the social systems underlying them, each of these regimes seeks to universalize its *Eigenlogik*[14] at the expense of the others. It is thus not only normative orders that collide, but also underlying conflicting

[11] Final report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law (ILC A/CN.4/L.682, 13 April 2006), para. 10.

[12] See, e.g. de Wet and Vidmar (eds.), *Hierarchy in International Law*, in particular the 'Introduction', but also Vidmar 'Norm Conflicts and Hierarchy', pp. 13–40. On the relationship between specialized regimes and general international law, see Simma and Pulkowski, 'Of Planets and the Universe'.

[13] First published in 2004 as: Fischer-Lescano and Teubner, 'Regime-Collisions'; expanded to book length in German: Fischer-Lescano and Teubner, *Regime-Kollisionen*.

[14] Fischer-Lescano and Teubner, 'Regime-Collisions', p. 1006 ff.

societal goals and interests:[15] 'At core, the fragmentation of global law is not simply about legal norm collisions or policy-conflicts, but rather has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve.'[16]

Regime collisions, of course, are not just a topic for legal scholars or even systems theorists. Regime theory, for example, a neo-institutionalist theory of international relations, is also concerned with 'overlaps' between different regimes. Using terms such as 'institutional linkage',[17] 'institutional interaction',[18] 'regime overlap',[19] 'regime interplay',[20] or 'regime complexes',[21] these approaches focus on identifying the positive (synergetic) or negative effects of different types of interaction on the efficiency of the interacting institutions.[22] In the case of 'regime overlaps', where 'the functional scope of one regime protrudes into the functional scope of others',[23] conflicts tend to arise where the overarching goals and norms of the regimes or the concrete rules on the attainment of these goals diverge, or are even mutually exclusive,[24] as in the case of the WTO free trade regime and international environmental regimes.[25]

Not only do the perspectives on regime collisions vary, though. Approaches also differ in whether such overlaps are necessarily to be seen as problematic. Thus, in their contributions to this volume, *Jeffrey Dunoff* and *Sebastian Oberthür* argue that most regime interactions actually work out well, and that a focus on collisions tends to reduce the larger picture of different interactions to the pathological cases. *Stefan Oeter* even points out that collisions and the contestations they entail can contribute to a promotion of the larger project of constitutionalizing the global order. *Kolja Möller* cautions against this optimism; in this struggle for hegemony between different regime rationalities, he argues, there is no space to question the very existence of a regime and its logic, rather than to merely manage its expansionist tendency.

[15] Ibid., p. 1017. [16] Ibid., p. 1004.
[17] Young, 'Institutional Linkages in International Society'.
[18] Gehring and Oberthür, 'Causal Mechanisms of Interaction'.
[19] Rosendal, 'Impacts of Overlapping International Regimes'.
[20] Stokke, 'The Interplay of International Regimes'.
[21] Gehring and Faude, 'Dynamics of Regime Complexes'.
[22] Gehring and Oberthür, 'Causal Mechanisms of Interaction', pp. 135ff.
[23] Rosendal, 'Impacts of Overlapping International Regimes', p. 96, following Young.
[24] Ibid., p. 100–01.
[25] Gehring and Oberthür, 'Causal Mechanisms of Interaction', p. 137; see also Gehring and Faude, 'Dynamics of Regime Complexes', p. 125.

From yet another angle, it could be asked whether the focus on collisions between *legal* regimes might be too narrow, and whether collisions between the legal system and other spheres should not also be taken into account. Thus, *Christoph Menke* examines the conflictual relationship between law and the non-legal sphere, while *Sonja Buckel* more specifically looks into law's relationship with the economic system. In his case study on whistle blowing, *Andreas Fischer-Lescano* shows how the legal system must secure spaces in the political system for democratic deliberation by ensuring autonomy.

Finally, the solutions proposed are quite different. Assuming that overlapping legal regimes are not a mere consistency problem, but a reflection of underlying conflicting societal goals and interest, this casts doubt on 'one-dimensional solutions'.[26] Given the nature of fragmentation of international law, the hope for normative unity must be seen as illusory, a paradise lost[27] – especially since the involvement of autonomous private regimes in the 'interlegality' or heterarchical co-existence of such regimes brings down any hope for a classic hierarchy of norms.[28] From a systems theory point of view, regime collisions can therefore only be resolved via 'heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law'.[29] Such network structures function by means of mutual observation and mutual irritation: Systems and regimes interact with and react to one another, each in their own logic but responding to the other's logic, in order to establish compatibility between different rationalities.[30] Formulating a common good in this process, even in the specific terms and norms of the respective regime – for example in the way that *Stefan Oeter* describes – promotes an alterity orientation, a responsiveness or *comitas*[31] to the *Eigenrationalität* of the other regime. Regime collisions therefore require a legal form for autonomous regimes to reflect other regimes' interests. In this vein, *Lars Viellechner* proposes a 'duty to consider' or deference clauses on both sides, which will secure a default deference to another regime's decisions in order to prevent clashes, and

[26] Fischer-Lescano and Teubner, 'Regime-Collisions', pp. 1003–04.
[27] Ibid., p. 1007. Tomuschat, 'International law as a coherent system', pp. 323–30, points out that international law has no 'golden past'; to the contrary, it was always fragmented and has only recently started growing together to some extent.
[28] Fischer-Lescano and Teubner, 'Regime-Collisions', pp. 1007ff.
[29] Ibid., p. 1017.
[30] Ibid., pp. 1018, 1024, 1030. This responsive interaction is described as 're-entry' of another system's logic into the first system.
[31] Teubner and Korth, 'Two Kinds of Legal Pluralism', p. 37.

a duty to take the other regime's solutions into account and to integrate them as much as possible.[32]

As Viellechner demonstrates, such horizontal, network-like structures have already developed between different courts charged with securing constitutional and human rights in different settings, such as a constitutional system, a regional human rights regime, and the European Union. Other, more recent regimes have sought to actively address possible collisions by incorporating collision norms. For example, the 1998 Rome Statute (RS) governing the work of the International Criminal Court (ICC) contains clauses on its relationship to the UN Security Council. Both the ICC and the Security Council deal with international crimes: The ICC was established to prosecute 'the most serious crimes of concern to the international community as a whole' (Article 5 RS), and the Security Council addresses them with diplomatic means or forceful measures, as part of its 'primary responsibility for the maintenance of international peace and security' (Article 24 of the UN Charter). This is particularly obvious in the case of the future crime of aggression.[33] Often, these legal and political concerns will go hand in hand, as transitional justice is usually seen as promoting a stable peace. Therefore, the UN Security Council can charge the Court with investigations under Article 13 RS, even if the state concerned has not acceded to the Statute. However, criminal investigations can also be seen as threatening a peace process. For example, this was a criticism of the African Union (AU)[34] in the case of Sudan, where an ICC arrest warrant was issued against the Acting Head of State, Omar Al-Bashir[35] (the investigations have recently been put on hold[36]). As the ICC is not a UN organ but an independent international organization of its own, Security Council resolutions as

[32] Viellechner, 'Berücksichtigungspflicht als Kollisionsregel'.

[33] The definition of the crime of aggression and its 'trigger mechanism' were adopted at the first Review Conference in Kampala in 2010 and cannot enter into force before 2017; ICC Res. RC/Res.6 of June 11, 2010.

[34] AU Peace and Security Council, Communiqué PSC/MIN/Comm(CXLII), Rev. 1, July 21, 2008; reports on the Arab League Council's statement of July 19, 2008 available at www.iccnow.org/?mod=newsdetail&news=2783. The AU subsequently pushed for a reform of Article 16: AU Executive Council, 16th Ordinary Session, January 25–29, 2010, Report on the Ministerial Meeting on the Rome Statute, EX.CL/568 (XVI) Annex 1.

[35] The warrant was issued in March 2009 for crimes against humanity and war crimes, a second one was issued for genocide in 2010 (*Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09).

[36] OTP, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), December 12, 2014.

such have no binding effect on the Court. In its Article 16, the Rome Statute therefore provides for a possibility for the Security Council to request a (renewable) six-month deferral of investigations in the interest of international peace and security. By preventing clashing decisions or regime logics, such collision norms can prevent threats to the legitimacy and effectiveness of either regime. On the other hand, arguably, this effect will only be achieved if such norms and the solutions they prescribe are themselves perceived as legitimate.[37]

The law can, however, also take the back seat and merely secure the conditions for collision management within the regimes on their own terms. Thus, the contributions of *Isabell Hensel* and *Gunther Teubner*, *Larry Catá Backer* and *Sebastian Eickenjäger* explore ways of self-regulation that are merely structured by law. Hensel and Teubner propose the registration of medical trials as a way to secure the integrity of the scientific system against the pressures of the economic system, while securing the fundamental rights of patients. At the intersection of the economic system and the human rights regime, Backer looks at governance mechanisms and Eickenjäger at non-financial reporting as ways to make sure competing regime logics are taken into account.

From a more radical theoretical perspective, however, such efforts at managing collisions can be seen as 'creeping managerialism'. Instead of just accepting the different regime logics and merely seeking to work out a stable balance, *Kolja Möller* asks how destituent constituencies can establish a sustainable counterweight to hegemonic regimes and challenge their logics from below. Meanwhile, it should be borne in mind that, given that regime collisions are expressions of larger systemic interactions, solutions must not necessarily be legal, but might equally validly occur in other social systems. Thus, Fischer-Lescano and Teubner also consider 'giving back' decisions to the political system.[38]

While talk of the fragmentation of international law and of 'regime collisions' has therefore spread to an extent that it can be considered a matter of common concern, the descriptions, analyses and solutions proposed remain contested. This volume therefore unites theoretical approaches from a variety of disciplines as well as theoretically informed case studies in order to push our understanding of this phenomenon further, to highlight some of their problematic consequences, but also to examine possibilities of addressing them in a productive way.

[37] See Blome and Markard, 'Contested Collisions'.
[38] Fischer-Lescano and Teubner, *Regime-Kollisionen,* p. 130.

The organization of this volume

In taking up the phenomenon of 'contested collisions' from an interdisciplinary perspective, this volume seeks to illuminate aspects thus far neglected by the literature on fragmentation and to initiate a shift in the terms of debate that characterize the field. The contributions to this volume therefore present a combination of theoretical approaches to the phenomenon of regime collisions, and case studies that illustrate the value of the theoretical reflections for understanding what is at stake in these collisions. The collection unites a group of international scholars who impart approaches from international law, legal philosophy, the social sciences, and postcolonial studies to the volume. By bringing together contributions from Latin America, the United States and Europe, we seek to attend to the fact that collisions between various institutional and legal orders can affect world regions in different ways.

The contributions in this volume are clustered into three main parts, according to the perspective they take on the phenomenon of regime collisions. Each part combines theoretical explorations as well as theoretically informed and/or theory-generating case studies that demonstrate the relevance and implications of the adopted perspective.

Part I Between collisions and interaction

The first part of this book critically examines the phenomenon of regime collisions and puts it into perspective. The chapters point out potentialities produced by collisions and highlight instances of productive regime interaction in a fragmented legal order, thereby challenging the prevailing assumption that the emergence of transnational legal regimes, and the lack of a hierarchical order in the international sphere, is inherently problematic.

In the first chapter, *Stefan Oeter* brings to bear debates from the field of global constitutionalism on the problem of regime collision, arguing that such a perspective allows us to see in which way regime collisions actually enable debates about fundamental norms. He points out that the mobilization of the public in favour of competing regime logic in cases of collision can create a counterweight to the institutional asymmetries generated by uneven judicialization. Oeter starts from the observation that the term 'constitutionalism' does not merely describe processes of constitutionalization but also refers to the legitimacy of a legal order. Merely observing processes of constitutionalization does not yet impart

information about the constitutional *quality* of the emerging order. Such legitimacy, Oeter argues, is subject to struggles of contestation – and it is here that regime collisions can be brought into the project of global constitutionalism, by providing a decisive source of principled contestation. Actors that feel threatened with 'colonisation' by an alien regime raise principled objections against the legitimacy of the hegemonic regime invoking what they consider to be fundamental values and basic principles of the global community. The public contestation of these values forces stronger regimes to take into account arguments and/or values of the weaker institutionalized regime. In so far as regime collisions promote contestations in support of fundamental values, Oeter argues, they should be not perceived as a problem, but as a possibility to question the constitutional quality of the global order.

In a more practical vein, *Jeffrey L. Dunoff* develops a typology of positive regime interactions, which, in his view, have been under-theorized thus far. His contribution shifts the focus away from conflicts or collisions to regime interactions more generally, emphasizing that collisions between legal orders represent only a small slice of the universe of regime overlaps and interactions. He argues that the literature on regime collisions has emphasized normative conflict at the expense of the study of institutional interaction. Dunoff draws on the concept of relational interactions to develop a typology of regime interactions. In particular, he identifies two different axes by which regime interactions can be categorized. The first one focuses on the various forms that regime interactions assume, namely operational, regulatory, and conceptual interactions. The second axis focuses on the nature of the interaction, which spans a continuum from rationalization of parallel or overlapping efforts, expansions of powers or jurisdiction, to conflictual interactions. Considered together, these axes can be conceptualized as a three-by-three matrix, which captures much of the universe of regime interaction.

This line of argument is taken up in the third chapter of this part, in which *Sebastian Oberthür* draws on his extensive research in the field of global environmental policy to show that international organizations have been effectively creating synergies through regime interplay. Looking into the mechanisms designed to collectively shape institutional interplay and regime complexes, Oberthür asks what they have delivered so far and how their potential may be further enhanced and exploited. His answer consists of six theses: He argues that (1) discussions about conflict and 'collisions' in the fragmented world of international law and politics should be balanced by attention to the potential for synergy; (2) the

fragmented world of international law and institutions is characterized by a significant degree of order; (3) this order is shaped and advanced by collective interplay management that has become the 'daily bread' of international law makers; (4) this interplay management itself is shaped and constrained significantly by international power and interests as well as normative mechanisms that privilege status quo forces and path-dependent developments over fundamental change; (5) It is in principle possible to devise international (meta-)norms that could significantly strengthen and substantiate the international legal framework of regime interplay, but such an effort may not be politically feasible and (6) Advances can and have to be made on the basis of the existing interplay management structures that can be developed gradually/incrementally.

Finally, *Lars Viellechner* introduces a theory of responsive legal pluralism that takes active care of mutual adaptation, by means of a horizontal coordination of the different legal orders, through which the negative consequences of the fragmentation of law could be remedied. Viellechner puts forward a theory of responsive legal pluralism that guarantees the coherence and legitimacy of law in the face of collisions provoked by the fragmentation of law. Such a responsive legal pluralism would be characterized by a horizontal coordination among the different legal orders that open themselves for each other by internally reflecting their mutual impact. Indeed, he observes, a new kind of conflict law required to this end is already gradually evolving. In accordance with the spirit of some express provisions in treaties and constitutions, courts and tribunals are dialectically developing rules of complementarity and subsidiarity without however relinquishing their own identity. A 'responsive legal pluralism' of this kind offers a promising fourth way to overcome both the out-dated dualist doctrine of sovereigntism and the unattainable monist vision of universalism, while at the same time avoiding radical legal pluralism.

Part II Addressing collisions: regulation and self-regulation

The second part of this collection aims to deepen our understanding of existing regime collisions. While engaging with judicial or quasi-judicial mechanisms, all four contributions break with the assumption that regime collisions could be solved through a centralized or hierarchically organized court order. Instead, they look into legal mechanisms that resolve regime collisions either through meta-collision norms or by rules created on a case-by-case basis.