Normative Conflict in International Law

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I. INTRODUCTION

The vast expansion of international law over the last three decades has highlighted various tensions among the different norms of international law.[1] Commitments to liberalize trade barriers under World Trade Organization (WTO) agreements clash with trade restrictions justified

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1. *See generally* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); RÜDIGER WOLFRUM & NELE MATZ, CONFLICTS IN INTERNATIONAL ENVIRONMENTAL LAW (2003); Jan B. Mus, *Conflicts Between Treaties in International Law*, 45 NETH. INT'L L. REV. 208 (1998).

under environmental treaties.[2] Self-determination rights for national minorities clash with states' rights to territorial integrity.[3] The efforts of international institutions to protect the human rights of individuals or groups in abusive regimes are in tension with these regimes' demands for respect for sovereign independence. Debates over the legitimacy of humanitarian intervention confront precisely this last case of conflict.[4]

Legal conflicts may reflect deeper conflicts of moral values: individual human rights and collective self-determination, economic freedom and environmental protection, human health and economic freedom, and so on. Legal conflicts can be traced to more fundamental moral conflicts, which are deeply entrenched in the structure of our moral universe. This fact has profound consequences for the way that we understand and settle legal conflicts. Domestically, legal conflicts are settled in part by resorting to legal and institutional hierarchies, such as a constitution and a supreme court. No such formal hierarchies are available at the international level. Once we acknowledge the potential intractability of legal conflict and the distinct institutional structure of international law, the question of how to settle legal conflicts takes on a new urgency.

In this paper, I will engage this question in several steps. In Part II, I will illustrate the problem of conflict in international law by drawing on two cases in international trade law. I will then argue in Parts III and IV that legal conflict often represents a genuine normative conflict grounded in our multiple, incommensurable, and potentially conflicting moral commitments. In doing so, I will deflect potential skepticism about the reality of normative conflict in international law. Drawing from existing international legal practice, I will show in Part IV that we can resort to a substantial toolbox of rules and principles to reconcile legal norms that are in tension with one another. Finally, in Part V, I will evaluate the institutional implications of these normative tensions for international law.

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2. PAUWELYN, *supra* note 1, at 20.

3. Kosovo's disputes with Serbia over its right to territory are a case in point. For an analysis of the historical evolution of the right to self-determination using Kosovo as an example, see Helen Quane, *A Right to Self-Determination for the Kosovo Albanians?*, 13 LEIDEN J. INT'L L. 219 (2000).

4. Whether or not it is acceptable to hold political leaders of a country accountable for inflicting harm on their own citizens in international tribunals in order to protect human rights is a normative question central to the entire body of international criminal law. On this point, see LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (2005); Andrew Altman & Christopher Heath Wellman, *A Defense of International Criminal Law*, 115 ETHICS 35 (2004).

II. THE CONFLICTS

International law has a distinct character. Unlike domestic law systems, it does not have a hierarchical, centralized institutional structure for legislating, adjudicating, and enforcing the law. The international law system is comprised of general international law, such as the U.N. Charter, and special law, such as trade law, human rights law, environmental law, law of the sea, and international refugee law. Groups of treaties on the same topic are considered legal regimes, and often have their own lawmaking, dispute resolution, and law enforcement mechanisms.[5] The legal regimes that make up international law develop in relative isolation from one another, and have their own set of goals and concerns embodied in their legal norms. Consequently, it is not always clear how these different norms will interact with one another.

Inevitably, conflicts occur between two laws that are part of general law, between general law and special law, between the laws of two different regimes, and even between the laws of the same regime—say, between two norms of WTO law.[6] The increased scattering in international law has provoked concerns about its ability to work as a coherent body of rules. Acknowledging this challenge, the General Assembly of the U.N. authorized its International Law Commission to produce a study entitled *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*.[7]

Whether directly or indirectly, the legal regimes that make up international law protect significant moral interests and therefore reflect moral values. Human rights, the protection of the environment, and

5. Stephen D. Krasner used the term *regime* to describe treaty subsystems. *See* Stephen D. Krasner, *Preface* to INTERNATIONAL REGIMES, at vii, viii (Stephen D. Krasner ed., 2d prtg. 1984).

6. This last case of conflict of legal norms within a regime, although much less prevalent, can be explained by the fact that international legal regimes are themselves very complex bodies of law made up of multiple treaties that change and evolve over time. These treaties give rise not only to rights and obligations, but also to permission and restrictions, all of which can come into conflict. This phenomenon reflects the dynamic character of international law, still considered to be in the early phases of its development and marked by rapid expansion and frequent change.

7. U.N. Gen. Assembly, Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (*finalized by* Martti Koskenniemi) [hereinafter *Fragmentation Study*].

collective self-determination are values that correspond to human rights law, environmental law, and laws protecting sovereign immunity, respectively. These three examples show that moral values can be plainly traced to specific treaties or regimes in international law. Nonetheless, the connection between moral values and legal norms or regimes is not always this obvious. Trade law, for instance, is instrumental to the promotion of a number of other values: individual autonomy, freedom of contract, human well-being, and increased living standards. Diplomatic law regulates the obligations of states regarding the facilities, privileges, and immunities to be accorded to diplomatic missions, and specifies the acceptable means at their disposal to respond when other states fall short in their diplomatic obligations. As such, diplomatic law indirectly supports the peaceful coexistence among diverse people, which is itself a moral goal.

Legal conflict among different norms of international law does not always amount to a normative conflict. First of all, not all cases that seem like a conflict at first glance are actual conflicts of legal norms in international law. Sometimes the apparent conflict is only a divergence that can be streamlined by means of treaty interpretation.[8] Second, not all legal conflict is normative conflict. Different treaties in international law can specify different norms of due process, for instance, that may come into conflict. The conflict in this case is not between two different moral values but between two ways of realizing the same value.

Nonetheless, as long as certain moral values are enshrined in the law, one can identify a link between legal conflict on the one hand—which is conflict of legally binding norms of international law—and normative conflict on the other hand—which is a conflict between the values protected by those legal norms. Two cases that have been submitted for arbitration before WTO panels can help to illustrate the normative conflict between trade law and environmental law. The WTO dispute settlement system is invoked whenever a member country believes another country has violated a WTO agreement. It represents a formal process that involves several stages. First, countries are asked to resort to consultation and mediation within a certain time frame in an effort to solve their disagreements amicably. If consultation is not successful within the give time frame, the next stage involves submitting the dispute to a panel that will rule on it. The parties can appeal the ruling of the panel to the permanent, seven-member Appellate Body, of which three members are assigned to each case. After reconsidering the legal

8. PAUWELYN, *supra* note 1, at 6.

matters at hand, the Appellate Body can uphold, modify, or reverse the panel's legal findings and conclusions.[9] The following cases, *EC—Asbestos* and *United States—Shrimp*, can help to explain the general implications of normative conflict for international law.

A. EC—Asbestos[10]

Chrysotile asbestos is a material with resistance to high temperature that provides good electrical and acoustic insulation, properties that make it valuable for uses in various industries.[11] But asbestos is also considered a carcinogen associated with lung cancer, and as such it can pose serious threats to human health.[12] Canada, the second largest producer of chrysotile asbestos in the world,[13] initiated this case against the European Communities (EC) to reverse a French ban on asbestos fibers and products containing asbestos.[14] The EC defended the ban on the grounds that asbestos is not only harmful to workers subject to prolonged exposure but also to those who are casually exposed to it.[15] The WTO panel ruled in favor of the EC and the Appellate Body affirmed the ruling on appeal.[16]

9. For a more detailed description of the WTO dispute settlement procedure, see KEVIN BUTERBAUGH & RICHARD FULTON, THE WTO PRIMER: TRACING TRADE'S VISIBLE HAND THROUGH CASE STUDIES 72–78 (2007).

10. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Appellate Body Report, *EC—Asbestos*]. For a discussion of the ways trade and environmental legal norms interact and summaries of cases, see NATHALIE BERNASCONI-OSTERWALDER ET AL., ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE (2006); KEVIN C. KENNEDY, INTERNATIONAL TRADE REGULATION (2009).

11. Appellate Body Report, *EC—Asbestos*, *supra* note 10, para. 114.

12. *Id.*

13. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, para. 3.20, WT/DS135/R (Sept. 18, 2000).

14. Appellate Body Report, *EC—Asbestos*, *supra* note 10, para. 1.

15. *Id.* para. 19.

16. *Id.* para. 193.

B. United States—Shrimp[17]

In this case, India, Pakistan, Malaysia, and Thailand challenged the United States ban on shrimp captured without turtle excluder devices (TEDs) before the WTO. The United States invoked a number of multilateral environmental treaties in defense of its ban on shrimp coming from countries that did not take sufficient measures to protect endangered animals such as turtles.[18] The WTO Appellate Body decided that the United States could restrict trade for environmental reasons—to protect human health, endangered species, and plant life.[19] The Appellate Body claimed: "We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should."[20] The United States was ordered however to temporarily lift the ban on grounds of discrimination. The reasoning was that the United States provided countries in the Caribbean with technical and financial assistance and longer transition periods to start using TEDs; however, it failed to give the same advantage to the four Asian countries that filed the complaint.[21] The United States was asked to give to the Asian countries time to adjust to the new import requirements.[22]

Both of these cases reflect conflicts between two values enshrined in two different international law subsystems. On the one hand, the WTO promotes trade liberalization as a path to economic development. Open trade gives more access for developing countries to the vast markets of developed countries. Trade is promoted by the WTO as a means to provide better employment opportunities, to give underdeveloped and developing countries access to medicine and education, and to raise the standards of living and improve overall human well-being. On the other

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17. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter Panel Report, *Shrimp 1*]; Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Panel Report, *Shrimp 2*].

18. Panel Report, *Shrimp 1*, *supra* note 17, para. 3.94.

19. Panel Report, *Shrimp 2*, *supra* note 17, para. 185. The WTO Appellate Body referred in its decision to a number of international treaties in order to interpret the notion of "exhaustible natural resources" at the heart of this debate. Sources included the Rio Declaration and Agenda 21, the Biodiversity Convention of 1992, and the United Nations Convention on the Law of the Sea. *Fragmentation Study*, *supra* note 7, para. 168.

20. Panel Report, *Shrimp 2*, *supra* note 17, para. 185.

21. *Id.* paras. 175–176.

22. *Id.*

hand, environmental treaties protect the integrity of ecosystems, natural resources, animal and plant life, and human health.

Caring for our planet's resources and creating economic prosperity through trade are both valuable goals, but the relationship between them is complex. Although these two goals are in tension with one another, it would be an overstatement to say that an inherent conflict exists between them. By inherent conflict, I mean that the values themselves are always impossible to reconcile and any two practical instantiations of those values are going to be incompatible. Rather, the two values are in potential conflict, and whether a conflict emerges at all depends on the nature of the legal rules and the context in which those rules are applied. To understand why this is a potential and not an inherent conflict, consider the following. There are ways in which trade and environmental protection can reinforce each other. As technology and science develop, economic growth can generate products that can significantly reduce pollution, minimize resource use, and substitute safer substances for toxic ones. Economic development can thus contribute to environmental improvements.

However, there are numerous instances in which the two goals are in conflict. On the one hand, many industries pollute heavily, economic growth sometimes leads to resource depletion, and as human activities expand geographically, entire natural habitats are affected. On the other hand, environmental regulations are often costly on businesses because environmental standards affect the level of productivity and the volume of trade. This conflict between economic development and environmental protection is most acute in developing countries, which severely need both. Empirical research has identified an inverted U-shaped relationship between economic development and environmental health.[23] This phenomenon is called the "Environmental Kuznets Curve." Especially concerning local pollutants, early stages of economic development are correlated to higher levels of pollution.[24] As economic productivity and GDP per capita increase, the studies found a turning point at which the trend reverses and pollution decreases.[25] This means that at least in the early stages of economic development, high

23. Hemamala Hettige et al., *The Toxic Intensity of Industrial Production: Global Patterns, Trends, and Trade Policy*, AM. ECON. REV., May 1992, at 478, 478–79.

24. *See* Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110 Q.J. ECON. 353, 366–68, 370 (1995).

25. *See generally id.*; Hettige et al., *supra* note 23.

pollution is strongly correlated with economic development, but the correlation weakens as a country's economy progresses.

Just as environmental protection and trade are in potential conflict, other moral values are potentially conflicting. Legal norms that realize a certain value interact with legal norms that realize other values in complex and often unpredictable ways. Even if some conflicts can be anticipated and addressed in the law, it is impossible to foresee how a new norm will interact with every existing norm, given the sheer number of norms and their sometimes vague nature, so normative conflict in the law is inevitable.

III. SKEPTICISM ABOUT NORMATIVE CONFLICT

If the conflict between trade law and environmental law reflects a deeper conflict of moral values, this suggests that, at least partially, legal conflict is explained by a more general pattern of conflict in moral reasoning. Normative conflict itself is the result of the pluralistic nature of the moral universe. Our moral world is made up of many incommensurable values that come into conflict with one another at times. Justice and friendship, duties to others and obligations to oneself, hedonism and frugality are examples of goods or values that come into conflict. This idea is, of course, recognizable from Isaiah Berlin's work.[26] He has made the idea of moral pluralism vivid to the moral imagination of twentieth-century moral philosophy. Berlin strongly believed in the reality of moral conflict, and so did those thinkers inspired by Berlin who have subsequently embraced pluralism.[27]

Pluralism is an attractive view precisely because it resonates better with our everyday moral experience, its defenders claim. If this deep, underlying conflict of moral requirements is part of the structure of the moral universe, and not just a result of muddled thinking, or apparent conflict easily cleared up by more sustained rational scrutiny, then we

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26. *See generally* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).

27. *See, e.g.*, GEORGE CROWDER, ISAIAH BERLIN: LIBERTY AND PLURALISM (2004); WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002); WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM (2005); STUART HAMPSHIRE, MORALITY AND CONFLICT (1983); JOHN KEKES, THE MORALITY OF PLURALISM (1993); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); STEVEN LUKES, MORAL CONFLICT AND POLITICS (1991); THOMAS NAGEL, MORTAL QUESTIONS (1979); MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (rev. ed. 2001); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES (1990); BERNARD WILLIAMS, MORAL LUCK (1981).

should strive for a view of morality that more accurately reflects this reality.

However, the idea that legal conflict is derived from a deep and fundamental moral conflict is unsettling. Conflicts lead to indeterminacy, and indeterminacy leads to uncertainty about what the law requires. Therefore, the first reaction one may have to claims of normative conflict is one of skepticism. Skepticism can take several forms. It may be tempting to treat all cases of normative conflict, including the conflict between trade and environmental values, as illusory conflicts that may be cleared up by appropriate reflection on the nature of those values, on the proper hierarchy between them, or on the necessity of the laws that ensure their achievement in practice. Thus conflict is merely the result of (1) an improper understanding of the reality of those values, (2) the relationship between them, or (3) the way they are expressed and interpreted in legal practice.

Let me address these skepticisms in turn. Let us call the first form of skepticism the "genuine values" view. In the case in which two values seem to be in conflict, the conflict is apparent because only one of the values is an actual or genuine value and the other is not. If only one is a value, then the apparent conflict dissolves because the proper course of action is to follow the legal norm that upholds the genuine value. For example, the conflict between environmental protection and trade would dissolve if we acknowledge that only environmental protection has value and trade has none. Conflict is nonexistent in this case.

According to a second form of skepticism, which I shall call the "hierarchical view," a proper understanding of the relationship between the two values can easily clear up the conflict. Adequate reasoning would show that there is no actual indeterminacy as to which is more valuable: either environmental protection trumps trade or vice versa. And real-life debates about the merits of these two goals are rife with extreme positions on both sides, which reflect this kind of hierarchical understanding of morality. For example, radical supporters of the environment argue that economic activity needs to be significantly curtailed in order to preserve our natural habitat.[28] The preservation of

28. Supporters of "deep ecology" argue, for instance, that nature has an intrinsic value, which exists independently of humans' recognizing its importance. Because economic development has no such intrinsic value, it often follows that it must be subordinated to preserving the environment. *See* MARIA MIES & VANDANA SHIVA,

the Earth must come first, even if it confines humanity to poverty. On the other side, those who believe trade and economic development should be the primary goal argue that any environmental damage is offset by economic benefits.[29] Both are unreasonable in my view.

I grouped the two kinds of skepticism together because the pluralist has the same reply to both. On the pluralist account, the idea that economic development must be strictly subordinated to environmental protection, or that economic benefits always offset environmental costs, are both problematic. Both ends are valuable, and there is no way to judge the relative value of one versus the other and establish a permanent order of priority. The two ends are *incommensurable*. That is, there is no common measure of value or medium in terms of which values can be expressed and ranked across all possible situations.

This is not to say that the two ends can never be *comparable*.[30] States need and can ascertain their relative importance so that they have a useful guide for policy. One way of ranking is to measure them along a one-dimensional scale, such as money. One can judge losses to the environment and economic gains in monetary terms, and compare them along this line. Cost-benefit analysis is one way to compare the two ends, and there may be others equally helpful in ascertaining the proper course of action when the two ends come into conflict. Still, cost-benefit analysis fails to capture the fact that the two ends are not substitutable in any simple sense. There is gain and loss that comes with any possible trade-off, and "[w]hat one loses is of a different kind from what one gains."[31] More economic development does not "make up" for a damaged environment; it just responds to other things that people need and value.

The hidden assumption prevalent in some cost-benefit calculations is that so long as one plans correctly and succeeds, there is no loss of any kind. This is simply wrong when one deals with heterogeneous values.

ECOFEMINISM 57–64 (1993); *see generally* ARNE NAESS, ECOLOGY, COMMUNITY AND LIFESTYLE: OUTLINE OF AN ECOSOPHY (David Rothenberg trans., 1989); Freya Mathews, *Letting the World Grow Old: An Ethos of Countermodernity*, 3 WORLDVIEWS: ENV'T, CULTURE, RELIGION 119 (1999) (advocating a "countermodernist" approach); *cf.* Murray Bookchin, *Social Ecology Versus Deep Ecology*, SOCIALIST REV., July–Sept. 1988, at 9, 13–25 (expressing a critical view of deep ecology).

29. *See, e.g.*, WILFRED BECKERMAN, THROUGH GREEN-COLORED GLASSES: ENVIRONMENTALISM RECONSIDERED 197 (1996).

30. For a discussion of commensurability and comparability, see the collection of essays in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997).

31. JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 170, 179 (rev. ed. 2001).

Monetary evaluations are at best imperfect approximations of value. Some benefits of a clean environment, such as aesthetic appreciation or health benefits to individuals, are not even translatable in monetary terms. However useful the cost-benefit analysis is for some purposes, it remains a partial evaluation of trade-offs and does not adequately capture the full, multidimensional value of each end. Crucially, even if we compare the relative worth of the two ends, those calculations are bound to take different factors into account in different contexts, such as the level of environmental damage present in a region, the state of natural resources, their rate of regeneration, and also the relative level of economic development, all of which will differ from area to area. These differences will in turn generate a whole range of trade-offs between the two ends that cannot be easily reduced to a simple formula applicable in all cases. Ultimately, there is no common measure of value or medium in terms of which values can be expressed and ranked. We simply cannot rely on the ultimate commensurability of various goods if we seek to maximize the one true value. "Even in success," Raz says, "there is a loss, and quite commonly there is no meaning to the judgment that one gains more than one loses."[32] And this is what it means to say that environmental protection and economic development are incommensurable across circumstances: there is no universal, transcendental algorithm to establish a ranking between them.

The tension between economic development and environmental protection is just one example of two goods or values that may come into conflict. But one can imagine other instances in which real values conflict. For instance, state territorial integrity and minority self-determination also come into conflict. Groups' claims for self-determination through political autonomy or secession often face oppositions from states that are claiming to defend their territorial integrity. Both norms are protected in international law.[33] Skeptics can always argue that it would be relatively easy to

32. *Id.*

33. For an illuminating introduction into the legal conflict, see Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991). Brilmayer proposes a solution to the normative conflict that recasts self-determination claims as claims to territory. *Id.* at 178. It may well be possible to recast this conflict as a territorial dispute, but as she acknowledges, right now international law norms that uphold the principle of self-determination do not ground it in a territorial claim but on whether the group constitutes a distinct people. In addition, there are reasons to think that self-determination claims cannot always be recast as historically

figure out an order or precedence between state territorial integrity and minority self-determination in the abstract. Once the normative priority has been established, the priority of legal norms follows and the legal conflict is dissolved.

This strategy is not persuasive. There may be cases in which one of the values in conflict is not an actual, genuine moral value, making the apparent normative conflict dissolve, or where the two values can be rank ordered. Although I do not have space to defend the claim here, I believe that this is not the case with self-determination and territorial integrity, and that many other values in international law come in incommensurable, conflicting pairs. By subordinating one value to the other in the abstract, we fail to take seriously the proper moral weight of significant human interests that each one of the laws in question purports to protect.

Nonetheless, the reality of normative conflict is still vulnerable to a different form of skepticism, which I will call "the legal contingency view." For every moral value, there are a number of ways to achieve the value through law, some of which are better than others. Therefore, the relationship between morality and law has an element of contingency. In the *United States—Shrimp* case, one could imagine an argument that environmental protection is ill-served by trade restrictions. Pushing this claim further, one could argue that changing the property regimes through which public fisheries and waterways are managed represents a more effective legal measure to protect endangered species. If environmental treaties do not call for trade restrictions, they would not conflict with WTO agreements to liberalize trade. Alternatively, instead of viewing free trade as a route to human prosperity, one could imagine other effective measures to promote human prosperity and would promote those instead. International treaties that encourage good governance in poor countries provide one such example. Then, if treaties that promote measures for good governance in poor countries were to replace trade liberalizing treaties, there would be no conflict with environmental law.

Summing up, the "legal contingency" objection is that legal conflict is contingent on the particular norms promoted in international law, and changing those norms will help us to avoid conflict. This is an important objection to the reality of normative conflict, and it raises a fundamental question about the path from moral norms to the legal

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disputed claims to territory. For a review of what other, nonterritorial justifications may be offered for self-determination, see Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352 (1995).

means necessary to realize them. I will not settle the question about this important theoretical and practical matter here. But I believe this objection is overstated. It may be possible to avoid certain legal conflicts by reframing or reworking agreements in international law, such that when we change certain legal norms, the value expressed in them is no longer in conflict with the value expressed in other norms in international law. However, we cannot solve all normative conflicts in international law this way.

At the heart of normative conflict is the idea that the values themselves are in potential conflict. In some cases, the legal norms or the context in which the conflict occurs can change and thus dissolve the conflict. But one cannot avoid normative conflict altogether. At the end of the day, economic activity can deplete natural resources and harm human health to the point where it must be curtailed, and conversely, environmental restrictions can be too severe, such as to strangle efforts for economic development. Focusing on the contingent nature of legal norms misses the underlying reality of moral conflict. The dependence of legal conflict on contingent laws and regulations does not render it completely avoidable. Even if one has reservations about the particular shape that these normative commitments take in international law—about the WTO and the environmental protection treaties, which are all certainly imperfect—better treaties will not do away with conflict between genuinely different normative commitments. Better treaties can anticipate the possibility of conflict and offer recommendations about the appropriate procedures for dealing with them, but this option is bound to be limited by the difficulty of anticipating the myriad ways in which legal norms from different regimes will interact in practice.

Promoting diverse values in the law with divergent applications in practice is bound to create tensions. This is why many legal experts come to realize that conflict is not an anomaly in law. In fact, the *Fragmentation Study* claims that normative conflict is endemic in international law.[34] The potential for conflict is inherent in any system of law, not just in international law.[35] In domestic law, many conflicts are avoided because the lawmaker will specifically regulate the hierarchy among different legal norms. Still, it is impossible to foresee

34. *Fragmentation Study*, *supra* note 7, para. 58.
35. PAUWELYN, *supra* note 1, at 12.

how a new norm will interact with every existing norm, and the potential for conflict is always there. This is even more true in international law, in which there are no formal hierarchies among all of the legal treaties, and consequently among the principles and values expressed in them. We are then left with the question of how to handle these legal conflicts in practice.

IV. IMPLICATIONS FOR LEGAL NORMS

Three types of solutions can be invoked to address conflicts in international law: normative, procedural, and institutional. A normative solution to legal conflict involves resorting to an a priori rank ordering of the values embodied in international law. To the extent that reasoning about the ways moral values interact in the abstract arms us with an a priori normative hierarchy, this hierarchy could simply be transferred to legal treaties to establish priorities among different norms of international law that embody those values. In the domestic case, constitutions routinely transpose this type of a priori hierarchy of fundamental values and principles into law. Constitutions are conceived as legal documents that protect fundamental values and principles in liberal political societies, whose role is to regulate conflicts that ensue between those fundamental norms and other practices, laws, and regulations. Constitutions establish formal legal hierarchies based on prior normative hierarchies.

Can legal conflict in international law be handled by normative priorities? This question is particularly pertinent because there is no international constitutional order, and consequently no formally recognized hierarchies in international law that establish orders of priorities among its different values and principles. The possibility of normative priorities should be explored, but enthusiasm for such a solution should be tempered by a proper appreciation of pluralism and the limits it places on ordering moral values.

Normative conflict in international law reflects the underlying pluralism of the moral universe. If moral values are many, irreducible, and incommensurable, one cannot integrate all of them into an ordered structure that gives us a complete picture of moral priorities. However, pluralists such as Berlin typically insist that just because morality is not tightly integrated that way, it does not mean that "anything goes."[36] In particular, human action must not fall below a minimum threshold of

36. *See* BERLIN, *supra* note 26.

human decency. That means that there is a class of values that represent human interests so fundamental that few situations, if any, could justify departing from them. Which values should be part of the threshold is disputed, but we certainly need to count the most basic human rights, such as rights to life and physical integrity, among the possible candidates for inclusion. This minimal standard establishes a normative hierarchy. In cases in which the protection of basic human rights conflicts with other norms of international law, those other norms must give way. For example, when the protection of human rights conflicts with sovereign immunity, sovereign immunity has to give way.[37]

Interestingly, although there are no formally recognized hierarchies, informal hierarchies do exist in international law. They can help to address legal conflicts, and perhaps serve as the basis of a future formal hierarchy of international law norms. These informal hierarchies rely precisely on this distinction between values that protect fundamental, nonnegotiable human interests, and values that are important but can be trumped. *Jus cogens* norms represent a category of norms that are considered so important that derogation is never allowed. The Vienna Convention on the Law of Treaties (VCLT), Articles 53 and 64, defines norms of *jus cogens*—also known as peremptory norms—as norms accepted by the entire community of states and from which no derogation is acceptable.[38] Norms of *jus cogens* exist above the will of states and limit what states can do to each other and to their own citizens. A number of commonly accepted *jus cogens* norms begin to emerge despite ongoing disagreements over their scope and content: "prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture (as defined by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984), basic rules of international

37. There are important questions about the level of human rights violations necessary to limit sovereign immunity. I think there are good practical and moral reasons to set the level of violations high such that only severe and widespread human rights violations trigger a limitation of sovereign immunity for heads of state, but I will leave that discussion aside.

38. Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

humanitarian law applicable in armed conflict, and the right to self-determination."[39]

The role of *jus cogens* in international law is significant, and it is part of a larger toolbox of rules—primary and secondary—that are used by legal practitioners to bring conflicts under familiar patterns of legal reasoning. Primary rules are those that lay down rights and obligations for the subjects of international law, and they presuppose secondary rules, which are rules that stipulate how primary rules can be enacted, modified, and terminated. The VCLT, which is a document drafted by the U.N.'s International Law Commission, represents one very important group of secondary rules in international law. The VCLT lays out the rules under which treaties among states may be created, ratified, and modified. The VCLT defines, for instance, what counts as a treaty, the requirements for formal consent, the procedures for determining when breaches of treaties have occurred, and the role and nature of *jus cogens* norms. Norms of *jus cogens* have priority in two possible types of legal conflicts: with treaties and with customary law. In these cases, the treaty or customary norm that comes into conflict with a *jus cogens* norm is simply invalidated. There is no automatic resolution in a third type of case in which two norms of *jus cogens* clash. According to VCLT, disputes that involve clashes of this sort must be submitted to the International Court of Justice (ICJ) or to common arbitration.[40]

One example offered by recent debates over the immunity of Augusto Pinochet will illustrate just how *jus cogens* norms can work. Augusto Pinochet was a former head of state of Chile, and he was alleged to have tortured and killed thousands of citizens of Chile and of other nations, including Spain and the United States, as part of an operation to eliminate political opponents while in office.[41] Pinochet was living in Great Britain at the time when Spain asked the British courts to extradite him to be tried under the universal jurisdiction principle.[42] Traditionally, heads of state were granted immunity under international law for acts committed while in office.[43] The British high court, however, decided

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39. *Fragmentation Study*, *supra* note 7, para. 374; *see also* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 50–54 (2006); Stefan Kadelbach, Jus Cogens, *Obligations* Erga Omnes *and Other Rules—the Identification of Fundamental Norms*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 21, 27 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

40. *Fragmentation Study*, *supra* note 7, para. 368.

41. *Id.* para. 370.

42. *See id.*

43. *See id.* para. 371.

that *jus cogens* in the prohibition of torture overrides immunity for heads of state, and Pinochet was denied immunity on those grounds.[44]

Jus cogens acts then as a minimal moral standard that establishes an order of importance for values that are too fundamental to human interests to be overridden. So what of the other moral values in international law and the possibility of conflict between them? Normative hierarchies can be helpful to a certain extent, but are undesirable as a comprehensive methodology for dealing with legal conflict. Beyond a rudimentary but weighty moral baseline, conflicts cannot be settled a priori, and the necessity to deal with them in legal practice will remain. That means that for most values that fall outside the scope of the minimal standard, the possibility of legal conflict is both real and enduring. If the moral world is fractured, as pluralists would have us believe, then it is inadvisable to establish hierarchical relationships within law that rely on precarious orders of precedence. To establish environmental concerns as taking precedence over trade concerns or vice versa at the level of abstract principles, so that every case that involves a conflict between the two are always settled in favor of the one true value, would be a mistake. This move would fail to take into account the fact that protecting the environment and allowing trade each involve their own morally important interests. A legal order that would permanently subordinate one interest to the other would rob us of the opportunity to try to distinguish how different interests interact in various contexts, and of the moral clarity necessary to give each interest its due.

In addition to normative solutions, procedural norms and principles can also help to settle legal conflicts. Anticipating legal conflict among various norms in international law, the signatories of treaties often articulate procedures according to which conflicts can be settled in international courts and tribunals. Who may file a complaint for an alleged breach of treaty; the rules of evidence; whether amicus briefs may be submitted on behalf of either party; and terms and deadlines according to which all conflicts will be settled are some examples of procedural norms.

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44. *Id.* para. 370. In the end, although he lost his immunity, Pinochet was considered to be unfit to stand trial in Spain for health reasons. He was set free by Britain and returned to Chile. In Chile, he managed to avoid being tried for human rights violations for the rest of his life. *See* Jonathan Kandell, *Augusto Pinochet, 91, Dictator Who Ruled by Terror in Chile, Dies*, N.Y. TIMES, Dec. 11, 2006, at A1.

International law practitioners have developed procedural principles that allow them to respond in flexible ways to substantive problems of legal conflict. International law contains interpretative maxims and conflict resolution techniques such as *lex specialis*, *lex posterior*, and Article 103 of the U.N. Charter. Treaties are considered special law—*lex specialis*—with respect to general law, and there is an established principle in international law that says *lex specialis derogat lege generali*—special law takes priority over general law. This means that if general law does not have the status of *jus cogens*, from which no derogation is permitted, then treaties supersede general law. So for instance, the ICJ decided that both human rights law, which is general international law, and the laws of armed conflict apply in times of war, but what counts as arbitrary deprivation of life in times of war comes from the law of armed conflict.[45] The principle of *lex specialis* establishes an informal hierarchy in international law. *Lex posterior* helps to establish temporal relations between treaties. *Lex posterior derogate legi priori* means that more recent law prevails over earlier law. Similarly, Article 103 of the U.N. Charter, signed by and binding on all U.N. members, also establishes orders of priority. It states that in case of conflict between members' obligations under the Charter and their obligations under any other international agreements, the Charter obligations shall prevail.[46]

To conclude, normative conflict in international law does not cripple the proper functioning of international law. There is good reason to believe that the lack of formal legal hierarchies, the multiplication of treaties, and the general fragmentation of international law do not undermine legal security, predictability, or the equality of legal subjects. This is also the optimistic conclusion of the *Fragmentation Study*.[47] This is because legal conflict can be addressed first, by establishing a priori hierarchies among norms that protect fundamental human interests and other norms of international law. Second, when such hierarchies are not available, the legal principles and interpretive maxims developed by international law practitioners for dealing with conflict allow for a flexible, contextual, and balanced procedural approach to recurring normative conflicts, which is a positive feature of the international law system that we should try to preserve and enhance. And a third and final option, the institutions of international law can

45. *Fragmentation Study*, *supra* note 7, para. 96.
46. *Id.* para. 329.
47. *Id.* para. 492.

themselves be a source for settling legal conflicts. To put this final option in proper context, we first need to consider the benefits and limitations of the existing institutional arrangements in international law.

V. IMPLICATIONS FOR LEGAL INSTITUTIONS

Normative conflicts in the law have an important institutional dimension. Normative conflicts come to light when disputes are submitted for adjudication in international tribunals. Adjudication goes hand in hand with interpretation of norms, and the conflict takes shape and is made explicit in the process of interpretation. Tribunals are not only instrumental in solving conflicts of legal norms but also in defining what constitutes a conflict of legal norms in the first place. Judicial decisions are considered accurate statements of what the law is "between two parties and as applied to a particular set of circumstances, at a particular point in time."[48]

In the domestic case, courts play a major role in settling legal conflicts.[49] In the United States, domestic courts settle conflicts, and a hierarchy of appeals to higher courts, culminating with the Supreme Court, seeks to ensure a consistent, uniform, and coherent interpretation of the law. For example, in *Wisconsin v. Yoder*, the Supreme Court had to settle a case in which the mandatory public school attendance law in Wisconsin conflicted with the right of the Old Order Amish community to practice and pass on their religion to their children, a right protected by the Free Exercise Clause of the First Amendment.[50] The Supreme Court decided in favor of the Amish, holding that the State of Wisconsin had not established a compelling interest in mandating compulsory attendance for the Amish children, an interest that would override the interest of the Amish parents in the continuing survival of their community and religion.[51]

In this and other cases, the conflict settling function of the Supreme Court derives from its authority to give final and binding judgments. And insofar as the Supreme Court does not challenge the decision of

48. PAUWELYN, *supra* note 1, at 110.
49. Obviously, not all cases settled in domestic courts are cases of legal conflict. Often legal disputes merely call for establishing evidence that the law has been broken—"did he or did he not commit murder?"
50. Wisconsin v. Yoder, 406 U.S. 205, 207–09 (1972).
51. *Id.* at 235–36.

lower courts, their authority too is binding and final. The decision on a particular case can be reconsidered, reversed, and modified by the courts in subsequent cases, so all legal decisions are in principle revisable. Still, courts settle conflict by virtue of their institutional legitimacy as legal arbiters, with the Supreme Court being a legal arbiter of the last resort.

No court of last resort exists in international law. International law contains many dispute resolution mechanisms, and the forms they take vary from arbitration panels to ad hoc tribunals to permanent courts. What are the implications of this institutional pluralism for addressing normative conflict in international law? Does it have implications for the likelihood of normative conflict? Are conflicts more likely to occur as the number of international tribunals soars? Would conflicts be more effectively resolved if the international legal system were structured hierarchically, in the mold of the U.S. system?

These questions are particularly pressing given the swift development of international law. Of the approximately 6000 multilateral treaties signed in the twentieth century,[52] many have their own court or adjudication procedure. This proliferation of legal forums has effects on the spread and likelihood of legal conflict. For instance, different courts or arbitration procedures can produce conflicting judicial decisions. There are two types of situations that can lead to conflicting judicial decisions. In the first type of situation, two tribunals could judge a case between the same parties on the same issue. This would happen, for example, if the *EC—Asbestos* case were simultaneously submitted both to a WTO panel and an environmental treaty court. The two tribunals could reach different decisions about which of the norms in conflict prevails. The WTO panel may give a favorable decision for Canada, the complainant in this case, and ask the EC to lift its import ban on asbestos fibers and products containing asbestos. At the same time, the court of the environmental treaty could decide the opposite, namely, that the EC was right to institute its ban and that it should maintain it. This would create two types of problems. First of all, it would create a difficulty for the parties to the dispute over which decision to follow because they are both binding but contradictory. Second, over the long run it would induce the temptation for forum shopping. A country will want to submit its

52. *Fragmentation Study*, *supra* note 7, para. 7 n.10 (citing CHARLOTTE KU, GLOBAL GOVERNANCE AND THE CHANGING FACE OF INTERNATIONAL LAW 45 n.1 (ACUNS Reports & Papers No. 2, 2001), *available at* http://www.acuns.org/researchli/johnholmes/2001holmes/ 2001holmes).

dispute to the court it believes will rule favorably. These problems affect the coherence and fairness of international law. But according to Joost Pauwelyn, none of these problems are likely to become significant.[53]

On the problem of contradictory decisions, Pauwelyn claims that this situation of conflicting decisions has not arisen yet, nor it is likely to arise in the future, and there are ways in which it can be prevented.[54] The problem may be first avoided by addressing the problem of overlapping jurisdictions in the treaties that give rise to the legal norms themselves. States may give precedence to one tribunal over another in a conflict. For instance, Article 2005 of the North American Free Trade Agreement[55] (NAFTA) states that NAFTA dispute settlement courts are preferred over the General Agreement on Tariffs and Trade[56] (GATT), the former name for the WTO, on standards-related issues—such as sanitary and phytosanitary measures—or the environment.[57] It obliges a complainant state to withdraw from a GATT dispute if the defending NAFTA state prefers to settle the dispute under NAFTA.[58] In addition, the general international law principles of res judicata, "a matter already judged"; *lis alibi pendens*, "dispute pending elsewhere"; and abuse of process enable courts to refuse to hear a case if another court has already decided, or is in the process of deciding, the same dispute.[59] *Lis alibi pendens* says that if a similar case is pending before a different tribunal, a new tribunal may refuse to exercise jurisdiction. The doctrine of abuse of process, in turn, enables a tribunal to refuse to hear a case if "the purpose of the litigation is to harass the defendant, or the claim is frivolous or manifestly groundless, or the claim is one which could and should have been raised in an earlier proceeding."[60] These principles, if applied consistently, will ensure that forum shopping is discouraged as a general state practice in international law.

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53. PAUWELYN, *supra* note 1, at 114.
54. *Id.*
55. North American Free Trade Agreement, U.S.-Can.-Mex., art. 2005, Dec. 17, 1992, 32 I.L.M. 289 (1993).
56. For a history of GATT and the WTO, see JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO (2006).
57. PAUWELYN, *supra* note 1, at 114–15.
58. *Id.* at 115.
59. *Id.* at 115–16.
60. *Id.* at 116.

Finally, even if two tribunals will decide the same case—the WTO and an environmental court—legal scholars have made the argument that each tribunal should decide the case in the context of all other special and general international law. A WTO panel should take into consideration its decisions not just WTO treaties, but also general rules of international law such as the VCLT and environmental treaties. The claims submitted to the WTO cannot be considered in isolation. We should distinguish then between the area over which a certain international tribunal has jurisdiction and the scope of applicable laws that the tribunal considers in its decisions. The WTO, for instance, would not have jurisdiction over territorial disputes among states but only to matters related to international trade. However, when deciding cases that pertain to trade, it should consider not just the WTO treaties and agreements but all of the applicable and relevant international treaties, including general international law and special treaties.[61] And it is important to note that the WTO in both the *EC—Asbestos* and *United States—Shrimp* cases took note of other applicable international law beside the WTO treaties, and it concluded that environmental concerns could trump an interest in free trade. If two courts look at the same applicable law, the conclusions they reach should be similar, Pauwelyn argues.[62] This is because the applicable law for a particular set of facts should be the same, no matter where the case is submitted.[63] In addition to ensuring the consistent application of the law, the legal uniformity generated this way should also discourage forum shopping.

In the second type of situation, in addition to the conflict between the decision of two tribunals on the same matter between the same two parties, conflicts could arise when two tribunals interpret the same applicable law differently. Two tribunals can make different pronouncements of what the law means, even if the disputes are different and they arise at different points in time. This problem could be partially avoided if international tribunals refer to other tribunals' decisions and ask for each other's opinion when deciding their cases. There is evidence that this is already happening.[64] The WTO panel on India's quantitative restrictions on imports of various products asked for the opinion of the International

61. Isabelle Van Damme claims that the WTO has consistently and effectively integrated general international law in the interpretation of its own treaties. *See* ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY (2009).

62. *See* PAUWELYN, *supra* note 1, at 117.

63. *Id.*

64. *Id.* at 119.

Monetary Fund for assessing balance of payment matters.[65] However, the possibility of different tribunals interpreting the law differently remains. How big of a problem this is for international law is disputed. The opinions range from optimistic to alarmist.[66] The optimists believe that the increased number of international tribunals does not threaten the viability of international law.[67] Pauwelyn ends on a cautious note, saying that at the very minimum, one needs to pay attention to how the proliferation of international tribunals affects the unity and coherence of the law.[68] We should at least think about how different ways of structuring the institutions of the international legal system—formally hierarchical, loosely hierarchical, or completely decentralized—affect the possibility of normative conflicts and the solutions of those conflicts in practice.

Some treaty regimes, such as trade law under the WTO, have internal judicial review procedures, meaning each case is settled by a panel and can be reviewed by the appellate body. Strengthening such intraregime review procedures would ensure the consistent interpretation and application of the legal norms of the treaties that make up the regime. At the same time, judicial review can be taken a step further. Interregime or intertreaty legal conflicts could also be dealt with by higher order appeals courts. An international appeal board to review decisions taken by environmental law courts and WTO panels could strengthen impartiality, and could ensure that specific laws are considered in the context of general international law. It is not necessary to have a unique global legal authority, such as a U.S.-type Supreme Court, that has the last word on all international legal conflicts. Different cross-treaty appeals courts with authority divided along functional or geographical lines could serve the role of final arbiter. But overall, the possibility of reviewing and checking the decisions of legal subsystems within international law through formal institutional hierarchies has the potential to produce more predictable and consistent international law.

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65. *Id.*
66. *Id.* at 123.
67. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, *in* 271 RECUEIL DES COURS 101, 373 (1998), *quoted in* PAUWELYN, *supra* note 1, at 123.
68. PAUWELYN, *supra* note 1, at 123–24.

Finally, it is important to note that moral pluralism itself does not recommend an unambiguous institutional solution. In general, moral theory underdetermines institutional choices. The connection between moral theory and institutional design is not straightforward, as different institutional structures could achieve the same set of values and principles. A commitment to pluralism rules out certain options, such as a comprehensive normative ordering of the values encrusted in international law. However, it does not recommend any direct path from pluralism to a given institutional arrangement; therefore, the institutional solution necessary for dealing with conflict in international law is open-ended from a pluralist standpoint.

VI. CONCLUSION

Normative conflict in international law is real. It cannot be eradicated by a proper reflection on the nature of the moral values, the nature of their relationship, or the form they take in the law. Normative conflict is grounded in the pluralistic nature of the moral world, and pluralism defies attempts to find the ultimate unity and coherence of morality. Significant, however, is the fact that normative conflict does not lead to legal paralysis or confusing legal contradictions. It can be addressed in several ways. First, one can address normative conflict in the abstract by establishing a minimum baseline of values for which violations are not acceptable. In addition, legal procedures and principles can significantly mitigate the effect of conflict in the law and bring disputes among conflicting legal requirements under familiar patterns of legal reasoning. Crucially, it may be counterproductive to come up with rigid moral priorities for all of the values enshrined in international law. A legal order that would permanently subordinate one concern to the other would deprive us of the ability to distinguish how these two different interests interact in different contexts and of the moral clarity necessary to give each of the two interests their dues.

Finally, the institutional implications are more complicated, but the proliferation of international tribunals in a decentralized institutional space need not lead to contradiction in the law or to forum shopping. Both can be avoided by treating special international law in the context of general international law. The challenge for the current institutional system is to reform in a way that will lead to a more productive interplay of conflicting norms, one that takes pluralism seriously but also attempts to preserve the coherence of the international law as a system. Although efforts to render coherent different parts of international law should

continue, it is important to note that currently, institutional fragmentation does not seem to disable the proper functioning of international law. Formal legal and judicial hierarchies could help to strengthen the ability of states to navigate their way through legal norms with conflicting implications, although the best form that hierarchy should take remains open.