CONFLICT OF NORMS OR CONFLICT OF LAWS?: DIFFERENT TECHNIQUES IN THE FRAGMENTATION OF PUBLIC INTERNATIONAL LAW

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INTRODUCTION

"International law is a legal system."[1] Thus begins the first of the forty-two conclusions formulated by the International Law Commission (ILC) Study Group on the fragmentation of international law.[2] The sentence is more a postulate than an actual conclusion, and a disputed one at that. After all, much of the current discussion on the fragmentation of international law is motivated precisely by the suspicion that international law might actually not be a system, at least not an internally coherent one the way we think of domestic legal systems. The Study Group thus postulates an answer to an *ontological* question—whether international law actually is a system—in order to answer the *technical* question of how to deal with conflicts and interrelation between its rules.[3]

This is difficult enough for the kind of conflicts that the report identifies as the most relevant ones: conflicts between "principles that may often point in different directions . . . new types of treaty clauses or

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This article is an attempt to see whether we can find common ground from our different starting points. For Ralf Michaels, this starting point lies in a project, currently pursued with Karen Knop and Annelise Riles, on Private International Law as a general theory of law. Some thoughts in this article draw on discussions from that larger project. *See* Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589 (2012). For Joost Pauwelyn, this work emerges from his earlier work on conflict of norms in international law, in particular the role of general international law for the WTO. *See infra* note 7. The article has previously been published. Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law*, *in* MULTI-SOURCE EQUIVALENT NORMS IN INTERNATIONAL LAW 19 (Tomer Broude & Yuval Shany eds., 2011).

1. U.N. GAOR, 61st Sess., Supp. No. 10, Rep of the International Law Commission, para. 251, U.N. Doc. A/61/10 (2006) [hereinafter ILC Fragmentation Report].

2. *Id.* at paras. 233-51.

3. *See generally* MARIO PROST, THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW (2012).

practices that may not be compatible with old general law or the law of some other specialized branch."[4] The discovery of Multisource Equivalent Norms (MSEN)[5] suggests that the challenge is even more fundamental: even where rules in different regimes do *not* point in different directions, the question which of them is applicable remains. This suggests that the fragmentation of international law does not only imply a plurality of values; it also implies a plurality of techniques.

The assumption for many participants in the debate, what we call here the ontological question—whether international law is a coherent system—has not only technical but predominantly normative implications, or is even itself, really, a normative question. There exists a widespread normative preference for coherence over fragmentation, order over disorder, system over plurality. We do not go so far as to claim that the question of whether international law is a coherent system or not is normatively irrelevant. However, we do think that its normative implications are overrated, and that the main problems with fragmentation are technical, not normative, in nature. If the resolution of conflicts were only possible within a coherent system, then the question of whether international law is such a system would have direct normative implications. If, by contrast, it can be shown that conflicts can be resolved also in the absence of one coherent system, then what looked like a normative question becomes a technical one: the prime question is then which of different types of technical rules we have to apply to deal with the conflict.

The ILC Report rightly points out that, in order to deal with fragmentation, it is "useful to have regard to the wealth of techniques in the traditional law."[6] The rules it refers to, and limits its inquiry to, are rules concerning conflicts *within* a legal system. We refer to this approach as "conflict of norms," with reference to the title and type of analysis conducted by one of us in an earlier book.[7] These rules are rules on hierarchical relations, presumptions of statutory interpretation, and principles of balancing (e.g., on how different rules *within* Belgian law interrelate). Use of these rules appears to presuppose that international law is a system comparable to a domestic legal system. Indeed, it appears

4. Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, para. 15, U.N. Doc. A/CN.4/L.682 (Apr.13, 2006) [hereinafter Koskenniemi Report].

5. For additional information on MSEN, see Tomer Broude & Yuval Shany, *The International Law and Policy of Multi-Sourced Equivalent Norms*, *in* MULTI-SOURCE EQUIVALENT NORMS IN INTERNATIONAL LAW 1 (Tomer Broude & Yuval Shany eds., 2011) .

6. ILC Fragmentation Report, *supra* note 1, para. 250.

7. *See generally* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW (2003). Note that 'norms' is here not opposed to law.

scholars often *want* to see international law as a system (rather than a pluralist or fragmented agglomeration) in part because this makes it possible to apply traditional conflict of norms rules (such as the principles of *lex posterior* or *lex specialis*). When the report of the ILC Study Group discusses ideas of legal pluralism, for example, it does so with the concern that such pluralism will be incompatible with the systematic approach and the rules on conflict of norms it encompasses.[8] Its main author, Martti Koskenniemi, has elsewhere expressed his normative concerns over such pluralism.[9]

As a matter of fact, rules to deal with pluralism exist, and conflict-of-norms rules are not the only set of rules for conflicts. Another set of rules in "traditional law" concerns conflicts *between* legal systems (which we will refer to as "conflict of laws" or "private international law" solutions). These rules are typically rules of domestic law that determine which of several domestic substantive laws should apply (e.g., whether Belgian or German law applies to a fact pattern), according to certain factors, for example, the location of the object in question or the nationality of the parties.

Both sets of rules—"conflict of norms" rules and "conflict of laws" rules—were traditionally developed with regard not to international law but to domestic legal systems. Rules on hierarchical relations between rules and on systematic statutory interpretation were created within the context of domestic legal systems. Rules on conflict of laws are also mostly rules of domestic law (though they have at least in part been derived from principles of international law[10]), but they have been applied to conflicts between the laws of different states, not to conflicts between different treaties. Such conflict-of-laws rules have occasionally been considered for public international law, too. In 1953, Wilfred Jenks argued that "some of the problems which [conflicts between treaties] involve may present a closer analogy with the problem of the conflict of laws than with the

8. *See* Koskenniemi Report, *supra* note 4, para. 488.

9. *See, e.g.*, Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought* (Mar. 5, 2005), *available at* http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf. A more positive assessment of such International Law pluralism is offered by David Kennedy, *One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L & SOC. CHANGE 641 (2006-2007). On relations between international law and legal pluralism, see, more generally, Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. LAW. & SOC. SCI. 243, 249-50 (2009); Iulia Voina-Motoc, *Conceptions of Pluralism and International Law*, *in* 2 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 401 (Hélène Ruiz Fabri et al. eds., 2008).

10. *See* Alex Mills, *The Private History of International Law*, 55 INT'L & COMP. L.Q. 1 (2006); *see also* Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 4 J. PRIV. INT'L L. 121 (2008).

problem of conflicting obligations within the same legal system."[11] Philip Jessup, in his famous lectures on transnational law, also discussed the problem of applicable laws before international tribunals as one of choice of law and compared it explicitly with the task of the national judge in determining which law to apply.[12] More recently, Andreas Fischer-Lescano and Gunther Teubner have developed the idea that the national differentiation of law is now overlain by a sectoral differentiation and that conflicts between sectoral laws—regimes—must, like conflicts between national laws, be dealt with through a system of conflict of laws.[13] One of us, in a relatively early book on the subject, briefly considered but rejected, for the time being, a private international law approach.[14]

That said, extensive discussions of when and how a private international law approach would actually work to resolve public international law conflicts do not exist. Jenks discusses conflict avoidance more than conflict resolution. Jessup uses tools that are not those of conflict of laws. Fischer-Lescano and Teubner argue that the special character of conflicts among regimes requires the development of substantive norms, without a satisfactory explanation as to why exactly this should be so.[15] Moreover, there is relatively little discussion on which of these two approaches is to be preferred under what circumstances. The reason may be that scholars writing in the field start from a certain assumption on the ontological challenge—in other words, that international law is or should be a coherent system, or that it is not—and derive rules from that assumption.

In this article, we do not set out to place the ontological question of whether international law is a system at the beginning of the research. Rather, we begin with a presentation of the two different approaches and a discussion of the prerequisites for their respective applicability (Parts I and II). We then discuss how these two approaches map discussion of fragmentation of international law, without actually, at this stage, prioritizing one over the other. If anything, our claim would be that public international law conflicts are likely *sui generis*, with aspects of both conflict of norms and conflict of laws, and that to resolve this type of

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11. C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 403 (1953); *see also id.* at 405-06.

12. *See generally* PHILIP JESSUP, TRANSNATIONAL LAW, 72-113 (1956).

13. Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of International Law*, 25 MICH. J. INT'L L. 999, 1020-21 (2003-2004); GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 154-58 (2012).

14. Pauwelyn, *supra* note 7, at 8-10.

15. Fischer-Lescano & Teubner, *supra* note 13, at 1022-23.

conflict one can learn and borrow from both approaches (Part III). Finally, we take on the question of what this means for the systematic nature of international law (Conclusion). All through this article, we do not offer a systematic analysis, but rather a number of examples to demonstrate the existence, and usefulness, of two very different sets of conflict rules.[16]

An important message of this article for public international lawyers is this: the now frequently voiced unease amongst public international lawyers with traditional conflict-of-norms rules[17] is best answered with private-international-law solutions. Although certain traditional conflict-of-laws rules cannot be used *tel quel* because the connecting factors they rely on—places, people, governmental interests—cannot be applied to regimes, functionally refined conflict-of-laws rules promise to be more helpful. Another core message of this article, targeted this time at a private-international-law audience, is that conflict of laws can operate not only between the laws of states but also to resolve public international law conflicts, but not all of them and in a contextually adapted fashion.

I. INTERACTIONS WITHIN LEGAL SYSTEMS: CONFLICT OF NORMS

A. Solutions in Domestic Law

Legal systems provide their own tools to establish their internal coherence.[18] More than one rule may a priori be applicable to a set of facts. Institutionally, internal coherence is established mainly through highest courts. Doctrinally, the solution lies in legal rules that determine the

16. In all of this, we restrict our analysis to questions of applicable law. That is, we are not concerned with the question of which tribunal, if any, has jurisdiction. Nor do we address here the extent to which the jurisdictional question affects the question of the applicable law or vice versa. On questions of jurisdiction, *forum non conveniens* and other domestic law principles, see generally YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003); Tomer Broude, *Fragmentation(s) of International Law: Normative Integration as Authority Allocation, in* TOMER BROUDE & YUVAL SHANY, THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY (2008), and Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L. J. 77 (2009).

17. *See, e.g.*, Pauwelyn, *supra* note 7, at 367-80 (referring to "the fiction of 'legislative intent'" and difficulty of putting a time-label on a treaty in the context of the *lex posterior* principle as it applies in public international law); *see also* Koskenniemi Report, *supra* note 4, para. 255 ("[T]he argument from *lex posterior* or *lex specialis* [both conflict-of-norms rules] seems clearly more powerful between treaties within a regime than between treaties in different regimes. In the former case, the legislative analogy seems less improper than in the case of two treaties concluded with no conscious sense that they are part of the 'same project.'").

18. *See generally* Ken Kress, *Coherence*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 533 (D. Patterson ed., 1996).

relation between different norms. European law in the civil law tradition (which historically relied less on courts to establish internal coherence procedurally) has been particularly robust in developing a number of presumptions of statutory interpretation to resolve conflicts between norms, but similar solutions are found in the common law.

A first set of conflict rules acts at the level of hierarchy of norms. Thus, under the rule of lex superior *derogat legi inferiori*, the hierarchically superior rule trumps the hierarchically inferior. It is for this reason that constitutional law trumps ordinary statutory law, which in turn trumps common law rules. Mandatory rules of contract law trump party agreements and these agreements in turn trump subsidiary rules of contract law.

Where no such hierarchy of sources exists and rules are enacted in the same field, for example in contract law, a second set of conflict rules must be developed. As between more general and more specific rules, for example, the one with the more specific scope of application applies (*lex specialis derogate lege generali*). Thus, general contract law is trumped by the specific rules on consumer contracts on the one hand or by those on commercial contracts on the other. Under the rule of *lex posterior derogat lege anterior*, a later rule is presumed to trump an earlier rule. Both *lex specialis* and *lex posterior* are presumptions as to the intent of the lawmaker or legislator on the issue in question. Presumably, a lawmaker, in regulating a specific area, wants to create special rules that trump the general rules in the field. As a consequence, the presumption is that the latest and/or most specific legislative expression matters and prevails. According to the literal rule, similar terms in different statutes are in principle presumed to have the same meaning.

Finally, where rules with different functions are in conflict, the above, second set of conflict rules is of limited use. For example, rules of intellectual property may conflict with rules of antitrust law. Intellectual property rules give the owner a monopoly over a certain intangible good, whereas antitrust law sets out to combat monopolies. Rules on freedom of speech may conflict with rules on personal dignity. The solution in most legal systems is one of balancing of interests, though this has frequently been criticized.

B. Prerequisites

All of this is well-known. What is sometimes underappreciated is the extent to which the above ‘conflict of norms’ rules work smoothly only insofar as we can assume that (i) all legal rules in play coexist within a single overarching system and (ii) the decision which rule to apply can be

imputed, albeit by fiction, to a unitary lawmaker with a coherent legislative intent. This is why these rules are traditionally applied within legal systems, not between legal systems, and in a universe with a unitary lawmaker, not with many lawmakers.

Thus, the *lex superior* principle requires a common system within which a hierarchy of norms can be established; it does not function between systems. Take, for example, the famous Yahoo! Case decided in 2000.[19] In that case, French courts decided, essentially, that Yahoo!, a Californian company, could be banned from enabling the auctioning of Nazi literature on its internet auction site, even though such a ban would be in conflict with the First Amendment of the U.S. Constitution. Some authors have criticized this decision with the suggestion that the conflict between a statute and a constitutional rule should be resolved in favor of the constitution.[20] Such reasoning would be perfectly adequate if the conflict had arisen within one legal system, either between the French Constitution and a French statute, or between the U.S. Constitution and a U.S. statute. By contrast, where the conflict exists between a statute and a constitution of two different legal systems (with two 'lawmakers' independent from each other), the argument becomes unconvincing, because no hierarchical relation exists: the French legislator is not subject to the requirements of the U.S. Constitution, and the U.S. Constitution does not, on its own force, reach into France. This does not mean that the French court should not have considered the U.S. Constitution at all, nor that the status of the U.S. Constitution should play no role; only that the basis for this cannot be found in the *lex superior* principle.

Presumptions of statutory interpretation, which work well among rules on the same level of hierarchy within one system, are similarly dependent on the presumption of a uniform legislator, even if this presumption is fictitious. As between legal systems, they lose much of their plausibility. For example, the *lex specialis* rule is grounded in the presumption that a legislator, in regulating a specific case, wants to carve out an exception from the general rules existing for a set of matters.[21] As between countries or between national laws, it is hard to make a similar presumption. The French hate speech statute is more specific than the First Amendment, but

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19. L'Union des Etudiants Juifs de France v. Yahoo! Inc., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, JurisClasseur Periodique, édition générale – La Semaine Juridique 2000, 2219, obs. J. Gomez, *available at* www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf.

20. *See* Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing Yahoo! v. L.C.R.A.: Private Law, Constitutional Review, and International Conflict of Laws*, 25 CARDOZO L. REV. 2089, 2112 (2004).

21. *See* Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 485-87 (2006).

it does not follow at all that it should therefore take priority as an exception to the First Amendment. Similar limitations exist for the *lex posterior* rule. The rule makes sense within one legal system, because the legislator can be presumed to legislate with knowledge of prior laws and thus with reference to those laws. This assumption is less warranted between legal systems.[22] It seems quite implausible to argue, for example, that the U.S. Constitution must stand back merely because it is older than the French statute in question. Similarly, the assumption that similar terms in different statutes have a similar meaning (the 'literal rule') makes sense within one legal system that strives for internal consistency because we can presume that the unitary lawmaker means the same thing with similar terms. The assumption is much harder to make between different legal systems. For example, as comparative lawyers have often warned us, contract in English law is not the same as *contrat* in French law;[23] it is not even the same as contract in U.S. law.

Finally, the balancing between rules serving different functions (e.g., Belgian intellectual property law versus Belgian antitrust law) is in principle linked to intra-systemic reasoning as well. Rational balancing requires an objective standard for the respective weight of each principle to be balanced.[24] If that standard cannot be derived from the intent of a unitary legislator, it must come from somewhere else, for example, a uniform standard of welfare maximization. As between legal systems, the problem is that the difference between the conflicting norms is typically a consequence of the fact that each of the systems uses a different "objective standard" to define, weigh and ultimately balance the conflicting principles within its own system. Simplistically speaking, the U.S. values freedom of speech higher than the need to ban anti-Semitic speech; the result of balancing speech and dignity within French law is different. Since balancing is a function of the relative weight of different principles,[25] and this relative weight may be different within different legal systems, balancing between legal systems will often not resolve the conflict between

22. A partial exception exists where statutes are written in explicit reaction to foreign laws, for example British blocking clawback statutes against U.S. judgments. *See* LAWRENCE COLLINS, *Blocking and Clawback Statutes: The United Kingdom Approach*, *in* ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS, 333, 333-34 (1997). Here it is clear that these statutes trump U.S. law within the British legal system, though this in itself is obviously not binding on U.S. law.

23. *See* Catherine Valcke, *Divergence and Convergence among English, French, and German Conceptions of Contract*, 16 EUR. REV. PRIVATE L. 29, 34-35 (2006).

24. *See* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572, 574-75 (2005).

25. *See* Jacco Bomhoff, *Balancing the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L & COMP. L. REV. 555, 584-85 (2008).

these different balancing results. Brainerd Currie in particular, as the inventor of the governmental interest analysis in the field of conflict of laws, opposed such balancing between legal systems precisely for this reason, because it ignored the policy choice made by the forum's legislator. In his view, a judge cannot balance the interests of its own legislator against those of another.[26] Indeed, most methods of conflict of laws (though not all)[27] oppose open balancing of interests and instead focus on the relative strength of policies. Similarly, the idea of finding a mix between different regimes, which Fischer-Lescano and Teubner propose for public international law conflicts, has been proposed occasionally as a solution for traditional choice-of-law problems.[28] However, most conflict-of-laws approaches eschew a mixture or compromise between different laws and instead designate either one or the other state's law to apply.

II. INTERACTIONS BETWEEN LEGAL SYSTEMS: CONFLICT OF LAWS

A. Solutions in Domestic Law

One reason, then, for why conflicts between different legal systems are governed by different rules than are conflicts within one legal system, is that the rules developed for intra-systemic conflict do not work well in the context of inter-systemic conflict. There is no hierarchy among different legal systems, except for the relative hierarchy that each system may claim for itself over others. There is no overarching system within which rules on statutory interpretation could achieve coherence. There is no uniform legislative intent on which the resolution could be based. There is no neutral or mutually accepted standard under which different values could be balanced.

The alternative is not anarchy but private international law. In private international law, several methods exist on how to resolve conflicts *between* legal systems. With gross simplification, it may be appropriate to present three methods: the traditional method, governmental interest analysis, and functional analysis. While the first two are tied to conflicts between state laws, the third one is more promising for international law.

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26. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 177.

27. *See, e.g.*, J.H.C. Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881, 890 (1951) (endorsing "balancing of the interests of the states whose law is involved.").

28. *See, e.g.*, Arthur T. von Mehren, *Special Substantive Rules for Multi-State Problems*, 88 HARV. L. REV. 347, 370-71; Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 779-81 (2001).

The first method, here called the traditional method, exists in both Europe and the United States, with some differences that need not concern us here.[29] Under the traditional method, the applicable law is determined on the basis of conflict-of-laws rules designed for different areas of law in the abstract, without regard to the content of the substantive law. Essentially, determining the applicable law is a three-step endeavor. In a first step, the matter in question must be characterized as one of contract law, tort law, procedure, etc., so the applicable choice-of-law rule (e.g., that for contract or tort) can be determined. In a second step, application of this choice of law leads to the determination of the applicable law on the basis of a connecting factor. Most of these connecting factors are either territorial (the place of the tort for matters of tort, the place of performance for matters of contract law, etc.) or personal (the law of nationality or of domicile for matters of personal status, etc.). In a third and final step, the law so determined is applied unless its application would violate the public policy of the forum law.

A good example of this three-step analysis is provided by the Supreme Court of Delaware in *Folk v. York-Shipley*, which applied this inter-systemic method to a conflict between the laws of different U.S. states.[30] The plaintiff, a Delaware domiciliary whose husband had died in a car collision in Pennsylvania, sued for loss of her husband's consortium.[31] Such a cause of action existed in Delaware's law but not in Pennsylvania's law.[32] The court first had to characterize this issue as one of tort law (liability for a car accident) or one of family law (injury to a marriage): a tort claim would be governed by the law of the place of the injury, whereas a family law claim could arguably have been governed by the law of the common spousal domicile, which was Delaware.[33] Once the issue was characterized as one of tort law, in a second step the place of the injury had to be determined and was determined to be the place of the car accident (Pennsylvania), not the place where the wife lived and where arguably her consortium was lost (Delaware).[34] In a third step, finally, the Delaware court determined that the law of Pennsylvania applied.[35] The court did not

29. For some of these differences, see Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1610-16 (2008).

30. Folk v. York-Shipley, Inc., 239 A.2d 236 (Del. 1968). Note that private international law rules apply not only among the laws of different nation states but also among the laws of different states of the United States.

31. *Id.* at 237.

32. *Id.* at 238.

33. *Id.* at 238-39.

34. *Id.*

35. *Id.* at 239-40.

discuss, though it could have, whether Pennsylvania law would remain inapplicable because it violated a fundamental policy of Delaware.[36]

A second approach, developed in opposition to the traditional method described above, is called governmental interest analysis.[37] The starting point for this method is the "governmental" interest of a state in having its own law applied.[38] Hence, the substance of the respective laws provides the starting point of the analysis (though their respective quality or desirability is not normally a criterion). Here, the first step is to determine which rules of law claim applicability, in view of both their text and of whether the respective legislative intent would be furthered by their application. If more than one state is interested in having its law applied and their laws differ, the resulting "true conflict" must be resolved, and various suggestions have been made for how such a conflict can be resolved.

Perhaps the most important such solution is that of "comparative impairment:" as between two conflicting laws, the judge should apply the law that would be more impaired by non-application.[39] An example can be seen in *Tucci v. Club Méditerranée SA*.[40] Tucci, a Californian citizen, had been injured during his employment at a vacation camp operated by French defendant Club Méditerranée in the Dominican Republic.[41] Under California law, Tucci had a tort claim because Club Méditerranée had no insurance with a company authorized in California.[42] Under the law of the Dominican Republic, by contrast, workers compensation was the only available remedy.[43] The court held that the law of the Dominican Republic established a quid pro quo between employers and employees by giving employers easy access to compensation while shielding employers from tort liability.[44] This quid pro quo would be severely impaired if Tucci was granted a tort claim under Californian law.[45] By contrast, if the law of the Dominican Republic applied and Tucci's claims were limited to those under workers compensation, California's interest would be insignificantly impaired: California's interest in making sure that employers are

36. *See id.*

37. SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 95-102 (2008); *see generally* Currie, *supra* note 26.

38. *See* SYMEONIDES, *supra* note 37.

39. *See* William A. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17-18 (1963).

40. Tucci v. Club Mediterranee, S.A., 89 Cal. App. 4th 180 (2001).

41. *Id.* at 184.

42. *Id.*

43. *Id.*

44. *Id.* at 187.

45. *Id.* at 190-92.

adequately insured was fulfilled because Club Méditerranée in fact had insurance, albeit with a French, not a Californian insurer.[46] Except for the insurance requirement, California provides for a quid pro quo comparable to that in the Dominican Republic.[47] As a result, the law of the Dominican Republic was applied.[48] Note that the court was not balancing policies; it balanced governmental interests.[49]

Finally, more recent methods of conflict of laws adopt variants of a functional perspective, even though the meaning of such a term and the method discussed under it differ among different authors and courts. In England, this means that the court should look for the proper law, the law most appropriate to govern the issue in question.[50] In the United States, Arthur von Mehren and Donald Trautman developed a multifaceted method to determine the applicable law on the basis of a number of factors, including the relevant strength of the policies of the involved states, a comparative evaluation of the asserted policies, a commonly held multi-state policy, and the degree of effective control each state has over the matter.[51] In Europe, a functional approach led not to a rejection but a refinement of the traditional approach.[52] The three steps of the European approach outlined above were maintained but disentangled from the idea that the applicable law should be based on the power of the state over its territory and its citizens. In all of these functional approaches, the search is ultimately for the most appropriate law, the law with the closest connection to the facts, considering a variety of factors.

B. Prerequisites

The above conflict-of-laws methods, different though they are, are quite closely linked to relations between different legal systems. They do not function well for intra-systemic conflicts. To explain why this is the case we must engage in a somewhat more elaborate discussion because the reasons are slightly different for each of the approaches discussed.

The traditional method is hard to apply to intra-systemic conflicts for two reasons. First, the approach presumes that the conflict occurs between

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46. *See id.* at 190-91.

47. *See id.* at 193-94.

48. *Id.* at 194.

49. *See id.* at 191-94.

50. *See* F. A. Mann, *The Proper Law in the Conflict of Laws*, 46 INT'L & COMP. L.Q. 437, 437-38 (1987).

51. ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 76-79 (1965) *summarized in* SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 28-29 (2006).

52. *See* Michaels, *supra* note 29, at 1612-16.

two legal orders that are essentially complete, insofar as each of them must have rules in the same area of law: tort law, contract law, etc. Where, for example, the issue is characterized as one of tort law, the conflict is between two tort laws (e.g., those of Pennsylvania and Delaware). Although such situations exist also, occasionally, within legal systems (e.g., between general contract law and consumer contract law), a second reason makes the traditional approach difficult to apply to almost all intra-systemic conflicts. Under the traditional approach, the applicable law is determined through either a territorial or a personal connecting factor, and such factors are often absent within legal systems.[53] The distinction between general contract law and consumer contract law, for example, cannot be made on the basis of territorial factors because they are not territorially distinct. It can be made on the basis of personal factors, depending on whether one party is a consumer or not.[54] Yet other conflicts—that between nuisance as a tort and property, for example—cannot.

Governmental interest analysis, in turn, is hard to apply to intra-systemic conflicts for a related reason: it assumes the coexistence of two governments whose interests are in question and potentially in conflict. As between two systems, each with its own government, it may be possible to determine which government has the greater interest. Within one legal system, this is impossible, as long as, at least in theory, the same government or "lawmaker" is concerned.

The relative inadequacy of conflict-of-laws approaches for intra-systemic conflicts is no coincidence. Both the traditional method and governmental interest analysis are catered specifically to conflicts between states. The choice of connecting factors—territory, citizenship, governmental interests—mirrors closely the classical definition of the state as based on three elements: a territory, a population, a government structure.[55] In international law, by contrast, even where we can speak of different sub-systems or branches of international law, such as World Trade Organization (WTO) law and human rights law, these are not defined by territory or personality; and, neither WTO law nor human rights law has its

53. They have become problematic also for conflicts between domestic laws because of the diminished role of territoriality. *See* Ralf Michaels, *Territorial Jurisdiction After Territoriality*, *in* GLOBALISATION AND JURISDICTION 105, 115-17 (Piet Jan Slot & Mielle Bulterman eds., 2004).

54. Strictly speaking, the relevant factor is not a personal one, because what is characterized is not the person (is the person a consumer or not?) but the transaction (is it a consumer contract or not?).

55. Ralf Michaels, *Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization*, *in* AKTUELLE FRAGEN ZU POLITISCHER UND RECHTLICHER STEUERUNG IM KONTEXT DER GLOBALISIERUNG 119, 128-37 (Michael Stolleis & Wolfgang Streeck eds., 2007).

own government with conceivable governmental interests, so the criteria developed in these particular conflict-of-laws approaches are not applicable as such. Moreover, in conflicts between states, the use of such factors makes it possible to allocate issues among states precisely because these states resemble each other structurally and functionally—each state displays these abstract criteria, each state generally performs the same functions. Within one system this method is often inapplicable because different statutes, or different sectors of the law, do not display the same structure and do not perform the same function. If, for example, Belgian general contract law and Belgian consumer law performed the same functions, one of them would be redundant and likely abolished.

The functional approach to conflict of laws appears to be less open to such criticism. The search for the proper law (or norm) and the designation of the applicable law (or norm) on functional grounds, appear, to some extent, to be possible regardless of whether we are within one system or between systems. Indeed, in this sense, the functional approach to inter-systemic conflicts is in many ways not so different from the functional approach to intra-systemic conflicts discussed above. However, differences do exist. First, in intra-systemic conflicts, the focus is on balancing laws (recall the IP versus antitrust law example); in inter-systemic conflicts, it is on balancing respective regulatory interests (recall the notion of comparative impairment). Second, in intra-systemic conflicts, the functional approach aims at coherence; in inter-systemic conflicts, it aims at coordination. Third, in intra-systemic conflicts, a functional approach can lead to mixed or compromise solutions; in inter-systemic conflicts, the aim is to maintain the internal integrity of each system by designating one or the other, and to minimize the consequences of frictions.

III. INTERACTIONS IN PUBLIC INTERNATIONAL LAW

Which of the above approaches is more adequate for conflicts within public international law or for fragmented public international law? At first sight, the core question may seem to be whether international law is more like one system or more like the combination of several systems: if it is one system, we should use a conflict-of-norms approach; if it is a combination of systems, we should use a private international law approach.

We do not think this is the most useful order of steps. Whether international law behaves like a system or not is in no small part determined by the very way in which relations between rules are handled. If we choose intra-systemic rules to govern relations between, say, the international trade and climate change regimes, this very choice constructs international law as a system. If we choose inter-systemic rules to address

interactions, this constructs public international law as a plurality and a uniform system of public international law no longer emerges. This suggests, however, that we need not start with the ontological question (Is public international law one system or not?). Instead, we can start by addressing the pragmatic question of which rules work best for different contexts (conflict of norms or conflict of laws?) and determine in the light of the answers how to understand public international law.

A. General International Law and Treaties

One important type of interaction between rules of international law is that between treaties and general international law. Treaties, ratified by explicit consent by a certain number of states, are akin to contracts or contractual regimes. For example, the WTO Treaty[56] and the Kyoto Protocol[57] bind only the states that agreed on and ratified those treaties. General international law (to some extent akin to codes and statutes or common law) encompasses the rules that states are "born into'" and that are binding on all states irrespective of explicit consent and subject matter. For example, general international law rules on treaty interpretation or state responsibility are by default applicable in both the context of the WTO and the Kyoto Protocol. General international law includes customary international law and general principles of law. To some extent, it includes also quasi-constitutional norms, in particular, *jus cogens*, from which no treaty can deviate.

For interactions and conflicts between treaties and general international law, intra-systemic conflict rules work well. The reason is simple but deserves repeating: this type of interaction closely resembles the interaction of rules within a single legal system. If general international law and, in particular, rules of *jus cogens* exist at all, they must by necessity, in order to be general, exist within—or constitute—a legal system. Denying the systemic character of international law implies denying the existence of general international law. Notably, the absence of a unitary lawmaker or source of authority is no counterargument—the unitary lawmaker is assumed as a fiction, as in Article 53 of the Vienna Convention, which refers, to the 'international community of States' as the creator of *jus cogens*.[58]

56. *See, e.g.*, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

57. *See, e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148.

58. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344 [hereinafter VCLT]. For the counterfactual nature of international community, see David C. Ellis, *On*

In this intra-systemic constellation, the *lex superior* rule as we know it within domestic legal systems can be used for hierarchical relations. *Jus cogens* is then the "higher law" prevailing over all other rules of the international law "system." In this sense, Article 53 of the Vienna Convention, which provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law,"[59] states little more than a definitional truism. This hierarchical structure—*jus cogens* trumps treaties—does not, in and of itself, resolve conflicts, because it does not define whether a given rule of general international law is *jus cogens* (and thus trumps treaties) or not. The notion of hierarchy itself does not even implicate that there must be any rules of *jus cogens* at all. However, it does capture that to the extent that rules belong to *jus cogens*, conflicts between them and treaties are questions of hierarchy within a legal system.

Similarly, *lex specialis*, another intra-systemic conflict rule discussed above, works well for interactions between general international law and specific treaties (such as the WTO treaty). This is made explicit, for example, in Article 55 of the ILC Draft Articles on State Responsibility (generally considered part of customary international law), which explicitly confirms, under the heading of "*lex specialis*," that "[t]hese [Draft] articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[60]

Finally, the presumption against conflict and the principle of "systemic integration," as they are known in international law,[61] are (much like the intra-systemic literal rule discussed earlier') built on the premise that the legislator or specific group of contracting states must be presumed not to want to deviate from, or contradict, an earlier expression or rule. Again, for the intra-systemic type of interaction between general international law and treaties, this presumption fits well. We can presume that, for example, two states that conclude a treaty did so with the

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the Possibility of ''International Community'', 11 INT'L STUD. R. 1 (2009). *See also* Berit Bliesemann de Guevara & Florian P. Kühn, *The "International Community" – Rhetoric or Reality?*, 27 SICHERHEIT UND FRIEDEN/SECURITY AND PEACE 73 (2009).

59. VLCT, *supra* note 58, at art. 53.

60. Rep. of the Int'l Law Comm'n, 53 sess, Apr. 23-June 1, July 2-Aug. 10, 2001, UN Doc A/56/10, at 58 (2001); *see also id.* at 140-41.

61. *See* VCLT, *supra* note 58, at art. 31(3)(c), 1155 U.N.T.S. at 340 (directing that when interpreting treaties there must be "taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties"). On systemic integration, see also ILC Fragmentation Report, *supra* note 1, at para. 17.

background of general international law, to which they are both bound, in mind.

B. Conflicts Within One Branch of International Law

Similar considerations apply to norm relations within one branch of international law, such as within the WTO system or within the realm of the law of the sea.[62] For example, pursuant to Article XVI:3 of the Agreement Establishing the WTO, this Agreement prevails over all other agreements within the WTO—an application of the intra-systemic *lex superior* principle.[63] Pursuant to the *lex specialis* rule, specific agreements on trade in goods (say, Agriculture) prevail over the more general rules in the General Agreement on Tariffs and Trade (GATT). Article 311.1 of the 1982 UN Convention on the Law of the Seas (UNCLOS)[64] confirms the *lex posterior* principle when stating that "[t]his Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958." In these cases, it is possible to assume a fictitious WTO or UN law of the sea "legislator." Granted, the actual negotiating parties change constantly—countries join and leave treaties as the United States did with UNESCO, withdrawing in 1984 and rejoining in 2003,[65] or China, which left the GATT in 1950 and joined the WTO in 2001.[66] Nonetheless, there is still enough institutional coherence, continuity, and memory to make the fiction of a unitary lawmaker plausible.

A broader application of the intra-systemic *lex posterior* rule is found in Article 30 paragraph 3 of the Vienna Convention: for parties bound by two treaties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." Interestingly, the very title as well as paragraph 1 of Article 30 state explicitly that this *lex posterior* rule applies only between "treaties relating to the same subject matter." This suggests that the rule was written mainly with intra-systemic conflicts in mind, that is, successive treaties, within the same field or branch of

62. We leave open the question what exactly constitutes a sub-branch of international law.

63. "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict." Agreement Establishing the World Trade Organization , Apr. 15, 1994, 1867 U.N.T.S. 154, art. XVI at para. 3.

64. "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958." United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 at art. 311, para. 1.

65. *See* U.S. Support to UNESCO: Past and Present, U.S. MISSION TO UNESCO, available at http://unesco.usmission.gov/mission/support.html (last visited Mar. 16, 2012).

66. *See* Press Release, WTO Secretariat, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

international law, broadly speaking.[67] Indeed, although the *lex posterior* rule has occasionally been used to resolve conflicts between two branches of international law, this creates some unease. Take GATT for example. The original GATT[68] was concluded in 1947 so that the later Treaty of Rome[69] or Montreal Protocol[70] would arguably prevail over it; yet, when GATT 1994[71] was concluded, did this mean that GATT rules now all of a sudden trump the earlier mean that GATT rules now all of a sudden trump the earlier EC Treaty or Montreal Protocol? And that with the recent Lisbon Treaty[72] GATT must in turn give way? One way to alleviate this unease is to rank the *lex specialis* principle above the *lex posterior* rule, so the more specific EC Treaty then prevails over GATT irrespective of GATT's timing. Yet, on what basis is one to decide that a treaty or specific norm is "more specific"? Another option is to deny that in those situations we are talking about "successive" treaties in the first place (so that Article 30, by its very terms, does not apply) on the ground that either or both of these treaties are 'continuing' or 'living' treaties without a single time-label on them, making it impossible to rank the treaties chronologically.[73] Another, perhaps easier, explanation follows from our discussion earlier: Article 30 and *lex posterior* should presumptively not apply to interactions between different branches of international law because those interactions are more akin to inter-systemic conflict, a type of conflict not well-suited for application of the *lex posterior* principle.

C. Conflicts Between Branches of International Law

The most pressing problems of public international law fragmentation concern conflicts between functional sub-systems or branches of

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67. That said, the "same subject matter" in Article 30 could also be interpreted more broadly as covering any situation where two norms conflict or overlap including, for example, norms from different branches, such as trade and environmental treaties or NAFTA and WTO law. If they so conflict, can one not presume that they cover the "same subject matter"? *See* Pauwelyn, *supra* note 7, at 364. However, when applying the *lex posterior* rule to successive treaties in different fields or branches, the rule is often less convincing. *Id.* at 377; Koskenniemi Report, *supra* note 4, at 15; *see also* discussion *supra* note 16.

68. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT].

69. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

70. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3.

71. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187.

72. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007 O.J. (C 306) 50.

73. *See* Pauwelyn, *supra* note 7, at 489-90; Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903, 908-09 (2004).

international law—trade and environment, finance, and human rights, etc. This is the context in which traditional intra-systemic conflict rules have proven unsatisfactory. As noted earlier, the mechanical *lex posterior* rule does not work well for conflicts between EU and WTO law or between GATT and multilateral environmental treaties and leads to surprising and often unconvincing results. The same is often true with respect to the *lex specialis* principle. How is one to decide whether, for example, a restriction on trade in an endangered species is more specifically covered by a WTO rule (as a trade matter) or by a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) provision (as an environmental matter), given that no neutral higher authority exists to make this decision? And should treaty parties be able to undermine their WTO obligations merely by formulating a specific rule? This is, in our view, in no small measure due to the fact that this type of conflict is more akin to inter-systemic conflict for which intra-systemic conflict rules such as *lex posterior* and *lex specialis* were not designed.

There are two reasons for why intra-systemic rules may be inadequate. The first is that the fiction of the unitary lawmaker, a prerequisite of these rules as we saw earlier, becomes increasingly implausible in the modern context of highly specialized, functional regimes. International trade, investment, environment, and human rights law, with each of their own international institution and/or club of negotiators, enforcement mechanisms, epistemic communities, related national ministries, NGOs, and even academics, make it increasingly difficult to assume a unitary lawmaker with a sufficient sense of institutional coherence, continuity, and memory across these different branches. As a result, application of the intra-systemic rules of *lex superior*, *lex posterior*, or *lex specialis* and the related quest for the genuine intent of international law's "unitary lawmaker" have become increasingly strenuous.[74] This raises the obvious question whether and when to shift from such conflict-of-norms rules to conflict-of-laws rules.

The second reason, related to the first, is that when it comes to tensions between branches of international law, it becomes difficult to devise a neutral perspective from which neutral conflict solutions could be formulated. Instead, each branch typically has its own rules or perspective for dealing with conflicts, and these rules or starting points often differ. For example, as noted earlier, there may be little point in trying to define the *lex specialis* in the interaction between trade agreements and environmental agreements. From the perspective of the trade agreement, the trade rule will

74. *Cf.* Simma & Pulkowski, *supra* note 21.

be more specific (as in "trade in" environmentally sensitive goods); from the viewpoint of the environmental treaty, the environmental rule will be more specific (as in "environmental concerns" related to trade).

Sometimes, this neutrality problem becomes explicit in the text of conventions. GATT Article XXIV, for example, states that regional trade agreements such as the North American Free Trade Agreement (NAFTA) are subject to certain GATT principles, thereby setting up the GATT as *lex superior*. Article 103 of NAFTA, in contrast, explicitly states that in the event of conflict between GATT and NAFTA, NAFTA prevails. A similar tension exists between Article 103 of the UN Charter, setting up Charter obligations as *leges superiores*, and the WTO rule that WTO panels may not "add to or diminish" from WTO covered agreements which some have read as a conflict rule defining WTO law as *lex superior*.[75] Other examples illustrating the problematic nature of *lex superior* in inter-systemic-type conflicts encompass interactions between UN and EC treaties, EC law and the European Convention on Human Rights, UNCLOS and WTO law, etc. The problem of applying *lex superior* in this context is reminiscent of the Yahoo! example discussed earlier and the impossibility of establishing a hierarchy between a French statute and a U.S. constitutional rule.[76]

Sometimes, balancing is suggested as a solution. However, as discussed earlier, balancing as a conflict rule may work well within a system but not between sub-systems or branches of international law. If both international trade tribunals and environmental tribunals each engage in rational balancing, in the absence of a common, objective standard (available essentially only within a single "system") the value judgments involved in balancing are likely to lead to different results, depending on the values or perspectives inherent in the trade system as opposed to the environmental system. For example, when the WTO balances trade against environmental protection under GATT Article XX, the environment is set up as an exception for which the burden of proof rests on the country attempting to protect the environment. In addition, environmental measures may only trump trade liberalization rules in case they are "necessary" and there is no "less trade restrictive alternative" available.[77] Before an environmental tribunal, the opposite would likely be true, with, for example, environmental protection as the rule, and trade liberalization as the exception.

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75. Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J. WORLD TRADE 499, 507-09 (2001).

76. *See generally* L'Union des Etudiants Juifs de France v. Yahoo! Inc., *supra* note 19.

77. *See* GATT, *supra* note 68, at Article XX3(b).

This suggests that to the extent conflicts between sub-branches of international law become more akin to inter-systemic conflicts, applying the intra-systemic conflict rules of *lex superior*, *lex specialis*, *lex posterior*, or balancing becomes more strenuous. If scholars have clung to such rules nonetheless, the reason may well be their fear that the alternative would be some unorganized legal pluralism. If it can be shown that inter-systemic rules, if and where appropriately applied, can provide a certain degree of coordination, such fears might be alleviated.

Here, we can only sketch some such possibilities. One would be to develop private-international-law rules on the basis of connecting factors, except that these connecting factors cannot be those of territory or personality (as in domestic, inter-systemic-conflict rules) but must be functional, institutional, and/or procedural connecting factors pointing toward one branch of international law rather than the other (e.g., as the "proper law"). Fischer-Lescano and Teubner, who advocate a somewhat comparable approach, argue that any solution of the conflict cannot result in an either/or decision but must somehow combine aspects of both regimes, because most conflicts have relevant effects within more than one sub-system.[78] But effects within more than one system are characteristic of traditional private-international-law situations between states, too. In the example from the Delaware court discussed earlier,[79] the claim for loss of consortium undoubtedly has effects in both tort and family law, and in both Pennsylvania and Delaware. Here, the goal is not to determine whether the issue is "really" one of tort or one of marriage law (it clearly touches on both), but instead which law is more appropriately applied. Similarly, in international law, we would not ask whether an issue "really" belongs to trade or environmental law, but rather, which regime is more appropriate to be applied to the particular fact pattern. Applying the trade rather than the environmental regime is not a simple preference of trade interests over environment interest, but a preference of the decision in the trade regime on the role of environmental concerns over the decision within the environmental regime on the role of trade. This is a question not confined to "true conflicts;" it is a question also where the different regimes provide norms that are equivalent, in other words, the case of multi-sourced equivalent norms (MSEN), discussed below.

Arguably, this is what really goes on when international tribunals exercise the jurisdiction to "interpret the submissions of the parties" so as to "isolate the real issue in the case and to identify the object of the

78. Fischer-Lescano & Teubner, *supra* note 13, at 1021-22; see now, for further discussion, TEUBNER, *supra* note 13, at 154-58.

79. *See* Folk v. York-Shipley, Inc., 239 A.2d 236, 238 (Del. 1968).

claim."[80] We can also find such a search for the "closest connection" in the decision in *Southern Bluefin Tuna.*[81] The tribunal in that case did not think the conflict belonged only to one or the other regime, as "it is a commonplace of international law and State Practice for more than one treaty to bear upon a particular dispute."[82] Nonetheless, because the dispute was "centred" in the 1993 Convention for the Conservation of Southern Bluefin Tuna, that Convention became the basis for the decision. The tribunal did not deny that the conflict also "arose" under UNCLOS.[83] Rather, it concluded that "[t]o find that, in this case, there is a dispute actually arising under UNCLOS which is *distinct* from the dispute that arose under the [1993 Convention] would be artificial."[84]

Another example of an inter-systemic-conflict rule operational in international law can be derived from Article 22 of the Convention on Biological Diversity (CBD), which holds that

> [t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.[85]

The provision shows that the CBD does not claim absolute superiority over other treaties (as noted earlier, in inter-systemic-type conflicts this self-positioning as *lex superior* would likely be futile). The CBD does claim priority only where a serious damage or threat to biological diversity must be expected. This rule can be explained as an application of the public policy exception. Article 22 does not resolve conflicts universally, because the competing treaty might simultaneously claim priority, but it does provide a structure for addressing these conflicts from the perspective of one regime in a way to minimize the conflict.

A different kind of hands-off-approach-within-limits for inter-systemic-type conflicts can be found in the now well-established *Solange II* approach to the interaction between German constitutional law and EC law,

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80. Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, 262 (Dec. 20); Nuclear Tests Case (N.Z. v. Fr.) 1974 I.C.J. 457, 466 (Dec. 20); Fisheries Jurisdiction (Spain v. Can.) 1988 I.C.J. 432, 448 (Dec. 4).

81. Southern Bluefin Tuna (N.Z. & Austl. v. Japan) Award on Jurisdiction and Admissibility, 13 R.I.A.A. 1, 40-44 (2000).

82. *Id.* at 40. But see the forceful separate opinion by Sir Kenneth Keith. *Id.* at 49-57.

83. *See id*. at 41.

84. *Id.* at 42 (emphasis added).

85. Convention on Biological Diversity art. 22, June 5, 1992, 1760 U.N.T.S. 79.

as well as between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) in the *Bosphorus* case.[86] Each of those regimes could have a legitimate claim to superiority; yet, as discussed, when faced with inter-systemic conflicts, such claim risks having little effect. Instead, a certain accommodation was found where each of these regimes or courts recognized the other but added that, where the encroachment becomes too serious, superiority will be reclaimed—not with binding force for the other regime, but only by each side for itself. Where the encroachment is not serious, there is a presumption of equivalence among the different regimes (a case of MSEN) that facilitates deference.

Consider finally the Preamble of the Cartagena Protocol on Biosafety.[87] The Preamble first invokes the principle of mutual support among trade and environment agreements.[88] Applying this principle, it maintains that the Protocol "shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,"[89] especially the WTO. However, in the very next paragraph, we find that the Protocol is not subordinated to the WTO.[90] This text displays a desire to maintain intra-systemic coherence and consistency, and in its great abstraction also shows the limits of such a desire. It may, at times, be more appropriate to treat the conflict between trade and environment as one more akin to inter-systemic conflict. From this perspective, the principle of mutual support could then be read as the principle of comity which provides the historical basis for conflict of laws between states. Conflict of laws has become much more refined; an invocation of comity is rarely necessary in view of the fine-grained conflict-of-laws rules and approaches we have.[91] A similar development may be more attractive for the relationship between trade and environment, instead of the solutions centred in interpretation and hierarchical subordination, which the Protocol has in mind, and which tend towards circularity.

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86. *See generally* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 22, 1986, BVerwGE 73, 339 (Ger.), translated in 3 COMMON MKT. L. REP. 225 (1987); Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, App. No. 45036/98 42 EUR. H.R. REP. 1 (2005); *cf.* Karen Knop, Ralf Michaels & Annelise Riles, *International Law in Domestic Courts: A Conflict of Laws Approach*, 103 ASIL PROC. 269 (2010).

87. *See generally* Cartagena Protocol on Biosafety, Jan. 29, 2000, 2226 U.N.T.S. 208.

88. *Id.* at pmbl., para. 9.

89. *Id.* at pmbl., para. 10.

90. *See id.* at pmbl., para. 11.

91. *See, e.g.*, Michaels, *supra* note 9, at 247-49.

D. Multi-sourced Equivalent Norms

Finally, what does all of this mean for multi-sourced equivalent norms? In our view, a method borrowed from conflict of laws appears particularly fruitful for MSEN, because the problem addressed by MSEN is familiar in that field. MSEN have been defined as rules that are "(1) binding upon the same international legal subjects; (2) similar or identical in their normative content (in the words of the ILC, 'point in the same direction'); and (3) have been established through different international instruments or 'legislative' procedures or are applicable in different substantive areas of the law."[92] In focusing on rules that point in the same direction, they fill a gap left open by the ILC Fragmentation Report that is addressed almost exclusively at rules pointing in different directions.[93] This distinction between rules pointing in different directions and rules pointing in the same direction is discussed, in governmental interest analysis (explained earlier), as the distinction between true and false conflicts. True conflicts describe situations in which the policies of different states are in conflict. (This definition is in accordance with more recent definitions of conflict in international law, which go beyond rules that cannot be obeyed at the same time and include rules that pursue different goals.)[94] False conflicts, by contrast, describe situations in which either only one of the two policies is implicated, or—and this makes for the parallel with MSEN—where the policies of both states or of both regimes are congruent.[95] The typical solution is then for the court to apply forum law.

MSEN exist both within and between sub-systems of international law. For example, "national treatment" as MSEN can be found in the WTO and in the North American Free Trade Agreement (NAFTA), spread across the branches of trade and investment law. At the same time, national treatment is also sprinkled as a principle in various WTO agreements within the WTO regime. Equivalent rules on the use of force, as addressed in the Nicaragua case,[96] are set out in custom and in treaties, within the same "system" or in the intra-systemic interaction between general international law and treaties defined earlier. In the context of investment arbitration, similar principles may be set out in an investment contract

92. Broude, *supra* note 5, at 5.

93. *See* Koskenniemi Report, *supra* note 4, at paras. 23-24.

94. *See generally* Erich Vranes, *The Definition of "Norm Conflict" in International Law and Legal Theory*, 17 EUR. J. INT'L L. 395 (2006).

95. *Cf.* Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881 (2009) (discussing false conflicts and suggesting a different application in international law).

96. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility 1984 I.C.J. 392, 435 (Nov. 26).

under domestic law as well as in the bilateral investment treaty (BIT) under international law, that is, across the national and international "systems." Yet, we submit that the problem dealt with under the title of conflict of norms or conflict of laws is structurally capable of accounting at least for some types of MSEN as well.

One example for the treatment of MSEN can be found in Art. 189.4(a)-(c) of the EC Chile Free Trade Agreement (Chile-EU FTA):[97]

> (a) When a Party seeks redress of a violation of an obligation under the WTO Agreement, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement.
>
> (b) When a Party seeks redress of a violation of an obligation under this Part of the Agreement, it shall have recourse to the rules and procedures of this Title.
>
> (c) Unless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is *equivalent in substance* to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement.

The rule seems to have been written under the assumption of a relation of hierarchy vis-à-vis the WTO. Such a relation is not necessary, as the example of NAFTA-WTO showed. And indeed, rules 4(a) and 4(b) display a strong sense of an inter-systemic approach more prone to conflict-of-laws rules than conflict-of-norms rules. Thus, both Articles 4(a) and 4(b) base the applicable law on the close connection between obligations under a treaty and the rules and procedures connected with them, an approach in tune with the traditional method of conflict of laws that designate entire legal systems, not just individual norms, to apply.

The most interesting provision in this context, however, is Art. 4(c) of the Chile-EU FTA with its special regime for MSEN. Here, the otherwise necessary connection between rule and context is given up. Instead, the provision adopts an approach comparable to governmental interest analysis of laws, where the situation described would be viewed as a false conflict: not a situation in which only one regime is interested in the application of its law, but a situation in which the application of one law in fact furthers the interests of the other regime as well. Under governmental interest

97. Agreement Establishing an Association Between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part art. 189, para. 4(a)-(c), Nov. 18, 2002, *available at* www.trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf (emphasis added).

analysis, such situations are typically resolved in favor of forum law: New York is free to apply its own wrongful death statute if doing so furthers also the policies of Massachusetts. Here, the resolution is in favor of the rules of the WTO, but structurally this is not different. In both cases, one law—forum law in the domestic conflict-of-laws analysis, WTO law in the WTO-FTA context—is presumably applicable, but under certain conditions, in particular a difference in the relevant policies, a deviation can be justified.

This example suggests more generally that, at least for some types of MSEN, a conflict-of-laws approach may be appropriate. The idea that equivalent rules exist in different regimes (such as national treatment in the WTO and Chile-EU FTA) is familiar from an inter-systemic context, namely from comparative law. In comparative law, the functional method presumes that different legal systems will contain, if not similar then at least functionally equivalent, rules (e.g., on contracts or tort), because each legal system is internally complete and thus needs to respond to essentially the same challenges as every other legal system.[98] Both the French and the English have laws dealing with questions of enforcing contractual consensus; the question in conflict of laws is which of the two is applicable. The same situation occurs in international law, for example, as between NAFTA and the WTO, or the Chile-EU FTA and the WTO: both aim at resolving, essentially, the same challenges (in this case, nationality-based discrimination in an economic context). They contain MSEN because they are not perfectly integrated. Thus, to the extent international law develops more or less complete regimes in parallel (albeit centered on limited principles such as national treatment or non-discrimination), a conflict-of-laws approach seems most promising. This is the link between MSEN and the conflict-of-laws alternative, suggested in this article.

CONCLUSION: IS INTERNATIONAL LAW A SYSTEM

So far, we have deliberately discussed the technical question—the respective adequacy of different sets of rules for different types of public international law conflicts—without addressing the ontological question whether international law is a system. The result has been that international law can actually borrow rules from both, and that different sets of rules are better for different types of conflicts. This means that the normative implications of whether international law is a system are actually not that

98. *See generally* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006) 339.

great. Nonetheless, the question remains relevant, and some implications emerge from our analysis.

One tendency seems to be this: interactions between treaty-regimes (e.g., the WTO) and general international law (e.g., the law of treaties or state responsibility) are better resolved with rules made for intra-systemic conflicts and relate to international law as a "system." Similarly, conflicts *within* branches of international law, for example within the WTO treaty, appear to benefit from intra-systemic rules and thereby suggest that it makes sense to conceive of the WTO as a (sub-)system.

In contrast, for interactions between specialized treaty regimes (say, environmental law versus trade law), traditional intra-systemic rules do not always provide satisfactory frameworks for analysis. However, as we demonstrate above, this emergence of different sub-systems or legal pluralism need not result in anarchy. Rather, coordination between these branches or sub-systems can occur, albeit imperfectly, through inter-systemic conflict-of-laws rules. This suggests that in these aspects international law is better seen as an unsystematic plurality of systems or regimes, without the need for conceiving of these systems as self-contained.

What does this mean for the question whether international law is a system or not? First, we have seen that the question is far less important than the drafters of the ILC Fragmentation Report appear to have thought, because the technical question—which set of rules is adequate for which type of interaction between rules—can be answered without recourse to this ontological question. Second, to the extent that the answers to the technical question allow for conclusions, they suggest that it is useful to conceive of international law as a system for some aspects and as the interaction of various systems in others. It suggests that one set of conflicts rules—conflict-of-norms rules—is appropriate for one set of conflicts, and another set of conflicts rules—conflict-of-laws rules—is appropriate for the other. The criticism of international law as a system thus has it half right: international law is not a full-fledged system, and traditional conflict-of-norms rules are not always appropriate to resolve public international law conflicts. However, this finding does not lead to anarchy but instead into another set of conflicts rules.

International law may, therefore, be a system at some level (in the sense, for example, that all of its rules and branches interact and are governed by certain general rules without there being so-called self-

contained regimes),[99] but a universe of different systems, sub-systems or branches at another level (in the sense, for example, that rules within the WTO treaty interact differently than a WTO rule interacts with the Kyoto Protocol). The outcome is not chaos and anarchy but a more sophisticated legal landscape, consequence of, to use the very title of the ILC Study Group, "the diversification and expansion of international law." Put differently, applying private international law solutions to public international law conflicts—or recognizing that certain conflicts of international law may be more akin to a conflict between Belgian and German law than a conflict between one Belgian norm and another—need not mean the end of international law. On the contrary, it highlights the increased maturity and complexity of international law and its unique, hybrid features as a *sui generis* type of legal order.

If all of this is correct, then the first question for relations between international law norms, or regimes, is neither whether international law is a system or not, nor which norm or which regime should prevail, if any. The first question is which approach should be used to resolve the conflict, that of conflict of norms or that of conflict of laws. This question cannot and need not be determined with regard to an ontology of international law; it must be established anew for many new conflicts. The dynamic and evolutionary character of international law makes it unlikely that the internal differentiation of international law either is static or follows a predetermined path. The dependence of international law on its actual practice suggests that how we resolve certain conflicts has an effect on the very nature of these conflicts. How we resolve conflicts determines what international law is. This is one more reason for why we should think hard before blindly applying the conventional wisdom of conflict-of-norms. As international law diversifies and matures, some public international law conflicts may well be best resolved through private international law solutions. This article opens the way for such an alternative approach. Elaborating specific conflict-of-law rules for certain public international law conflicts is the logical next step.

99. Or as the ILC Study Group puts it: 'Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles.' *See* ILC Fragmentation Report, *supra* note 1, at para. 251.