

Normative conflict in the law of treaties: techniques of resolution

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Proliferation of international tribunals and emergence of specialized treaty-regimes with no clear relation to each other have led to the growth of normative conflicts, *stricto sensu* defined as situations when an obligation under one treaty cannot be fulfilled without a breach of an obligation under another treaty. For instance, in the *Shrimp-Turtle case*, such conflict arose when the United States' ban on shrimp under a number of environmental treaties was incompatible with prohibition on quantitative import restrictions under the GATT agreement.

Generally, normative conflict exists when a State has mutually exclusive obligations under treaties to which it is a party, or when the same obligation is interpreted in a contradictory way by different international bodies. International law provides several basic techniques dealing with normative conflict in the law of treaties, which are called either conflict-resolution or conflict-avoidance techniques, and include general principles of law as well as interpretive rules. At the same time, these techniques cannot be considered universally applicable for the reasons addressed below.

The first technique among general principles of law- *lex superior* - establishes priority of norms with higher legal rank. In particular, article 103 of the United Nations Charter ("UN Charter") obliges Member States to perform their obligations under other international treaties insofar as compatible with obligations under the UN Charter. The International Court of Justice ("ICJ") in the *Lockerbie case* confirmed that obligations arising out of the Security Council Resolution 731 adopted under Chapter VII of the UN Charter prevailed over obligations under the Montreal Convention. However, it can be concluded from the European Court of Justice decision in the *Kadi v. Council case*, that "autonomous legal systems" such as the European Union law, can be separate from the system of international law, including the UN Charter as a source of general international law.

Another example is articles 53 and 64 of the Vienna Convention on the Law of Treaties ("VCLT"), which render a treaty - or its certain provisions - void if it is in conflict with *jus cogens* rules. However, it should be noted that *jus cogens* norm does not simply override any other norms. In a number of cases, such as *Jones and ors. v. United Kingdom* and *Al-Adsani v. United Kingdom*, the European Court of Human Rights ("ECtHR") held that the prohibition of torture, a *jus cogens* norm, cannot deprive the procedural rule of sovereign immunity of its legal consequences.

Other traditional techniques are *lex specialis*, *i.e.* the specific norm shall prevail over more general one, and *lex posterior*, *i.e.* the latter treaty supersedes the earlier. For example, in the *Mavrommatis Palestine Concessions* case the Permanent Court of International Justice found that "in case of doubt 1923 Protocol XII of the Treaty of Lausanne, being a special and a more recent agreement to the 1922 Mandate for Palestine should prevail". These maxims are codified in article 30 of the VCLT with respect to treaties relating to the same subject matter. To resolve normative conflict effectively, all the above-mentioned techniques should be applied in conjunction.

According to § 412 of the International Law Commission (“ILC”) *Report on fragmentation of international law*, normative conflict does not exist until it is confirmed by interpretation of the treaties at hand. From this perspective, interpretive rules distinguish genuine normative conflicts from cases that only seem like a conflict at first glance.

The ILC Rapporteur, Fitzmaurice, suggested the following principles of interpretation: actuality of textuality, the natural and ordinary meaning, integration of treaty interpretation, effectiveness with reference to object and purpose of a treaty, subsequent practice and contemporaneity (“with reference to linguistic usage at current time the treaty was concluded”).

The purpose of these principles is harmonization of conflicting treaty provisions. The ICJ in the *Right of Passage* case supported this conclusion by stating that a treaty “must be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it”.

Article 31 (1) of the VCLT codifying these principles envisages that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose”. According to article 31 (3) of the VCLT, subsequent practice in the application of a treaty and relevant rules of international law applicable in the relations to parties must be taken into account. In the *United States-Gasoline case* the Appellate Body found that the WTO law cannot be read in “clinical isolation from public international law”, while the ECtHR in the *McElhinney v. Ireland* stated that the European Convention on Human Rights cannot be interpreted and applied in a vacuum.

To conclude, systematic treaty - interpretation and general principles of law (*lex prior*, *lex specialis* and *lex posterior*) applied in conjunction remain useful techniques in normative conflict resolution.

Источники и литература

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