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Strategically Created Treaty Conflicts and the Politics of International Law

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In October 2015, one week before Pakistan's Prime Minister, Nawaz Sharif, visited the United States, it emerged that the United States may be exploring the possibility of reaching a nuclear deal with Pakistan. While it is too early to speculate on the exact character and content of such an agreement, it has been reported that the United States is seeking guarantees from Pakistan to restrict its nuclear programme in a manner that is proportionate to the defence needs of the country.[1] In exchange, the United States might attempt to convince the Nuclear Suppliers Group[2] (NSG) to exempt Pakistan from the NSG's rules enabling nuclear trade with Pakistan, which would otherwise be prohibited because of Pakistan's continued opposition to the Nuclear Non-Proliferation Treaty (NPT).[3] The tension between such an agreement and the United States' existing obligations under international law, for example,

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1 David Ignatius, 'The U.S. Cannot Afford to Forget Afghaistan and Pakistan' *The Washington Post* (Washington DC, 6 October 2015) <https://www.washingtonpost.com/opinions/the-dangers-that-still-lurk-in-south-asia/2015/10/06/e3adf016–6c73–11e5-b31c-d80d62b53e28_story.html> accessed 6 November 2015; David E Sanger, 'U.S. Exploring Deal to Limit Pakistan's Nuclear Arsenal' *The New York Times* (New York, 15 October 2015) <http://www.nytimes.com/2015/10/16/world/asia/us-exploring-deal-to-limit-pakistans-nuclear-arsenal.html> accessed 6 November 2015.

2 'Nuclear Suppliers Group—Home' <http://www.nuclearsuppliersgroup.org/en/> accessed 6 November 2015.

3 Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161.

under the NPT, could be analysed in terms of a conflict of norms,[4] conflict of laws,[5] or conflict of regimes.[6] In her new book, *Strategically Created Treaty Conflicts and the Politics of International Law*, Surabhi Ranganathan presents a novel approach that suggests that the conclusion of a US–Pakistan nuclear deal might represent a strategic treaty conflict, although the deal itself is not considered.

According to Ranganathan, a strategic treaty conflict exists when States conclude agreements specifically in order to 'displace, compete with, carve exceptions from, or alter, the regime established' by an existing treaty or treaty regime.[7] Ranganathan identifies two core features of strategic treaty conflicts. First, strategic treaty conflicts often exist between multilateral and bilateral or small-group treaties. Second, strategic treaty conflicts often concern treaties with non-identical parties. Raganathan's thesis is that treaty conflicts of this kind are much more than a mere deontological incompatibility of legal norms that could be resolved by means of traditional norm conflict resolution devices, as contained, for example, in the Vienna Convention on the Law of Treaties (VCLT).[8] Instead, she argues that strategic treaty conflicts are a reflection of the complex relationship and inter-dependency of law and politics in the international affairs of states.

In her book, Ranganathan introduces and develops this argument in two parts and seven chapters including a short conclusion. The first part (Chapters I–III) considers numerous conceptual and historical issues. The second part (Chapters IV–VI) consists of three case studies analysing strategic treaty conflicts in practice. In the first chapter, Ranganathan introduces the idea and the problem of strategic treaty conflicts. She observes that treaty conflicts occur frequently and perceptively acknowledges the various challenges that intentional departures from established legal norms pose to the integrity of international law and its relationship with politics and international relations.[9] Subsequently, Ranganathan situates strategic treaty conflicts in the maelstrom between two critical narratives. The first such

4 See, eg, Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003).

5 See, eg, Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 Duke J Comp & Int'l L 349.

6 See, eg, Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014).

7 Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014) 7.

8 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

9 Ranganathan (n 7) 17.

narrative is epiphenomenality—which holds that treaty conflicts merely express underlying State interests—as advanced *inter alia* by Goldsmith and Posner.[10] The second narrative is lawfare—namely, that treaty conflicts reflect the instrumental use of law by States—as developed in the writings of David Kennedy.[11] Without committing fully to either one of the two narratives, Ranganathan sets out to assess the strength of both accounts with respect to legal doctrine and the practice of international law.

Chapter II focuses on the genesis of international treaty law's 'political decision principle' as reflected in the VCLT's Article 30(4)(b). The political decision principle stipulates that States owing conflicting international obligations to different treaty parties pursuant to different treaties are entitled to elect to which of the two conflicting norms they wish to comply, subject to compensating any detrimentally affected treaty party.[12] In the context of treaty conflicts, the VCLT's Article 30(4)(b) is highly relevant because it is only due to the article's insistence on the continued legal validity of conflicting treaty obligations owed to non-identical parties that strategic treaty conflicts can arise. In contrast to attempts to construe Article 30(4)(b) as a concession to sovereign power, Ranganathan argues that the choice of the principle was informed both by the liberal (in the sense that Article 30 would encourage recourse to international law) and constructivist (in the sense that recourse to international law would strengthen respect for international law) motives of the VCLT's authors.[13]

In Chapter III Ranganathan considers three managerial understandings of, and approaches to, treaty conflicts that all envision institutional modifications of conflicting treaties. First, Ranganathan considers Lauterpacht's[14] doctrine of the approximate application of treaties by courts.[15] Second, she evaluates approaches relying on compliance management by treaty bodies[16] favoured *inter alia* by Chayes and Chayes.[17] Finally, Ranganathan evaluates accommodation attempts by

10 See, eg, Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2006).

11 See, eg, David Kennedy, *Of War and Law* (Princeton UP 2006).

12 See Manfred Zuleeg, 'Vertragskonkurrenz Im Völkerrecht. Teil I: Verträge Zwischen Souveränen Staaten' (1977) 20 German YB Int'l L 246.

13 Ranganathan (n 7) 94.

14 *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (Advisory Opinion) [1956] ICJ Rep 35 (Separate Opinion of Sir Hersch Lauterpacht).

15 Ranganathan (n 7) 99.

16 ibid 113.

17 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (rev edn, HUP 1998).

means of treaty coordination or regime interaction[18] as advanced by Young,[19] and Wolfrum and Matz.[20] Although Ranganathan acknowledges that each of the three approaches is informed by distinct objectives, she shows that they share an interest in facilitating discourses framed in terms of international law—again, in pursuit of a constructivist and liberal understanding of international law.

Chapters IV, V and VI then respectively consider strategic treaty conflicts concerning the deep seabed mining regime of the United Nations Convention on the Law of the Sea,[21] the tensions surrounding the establishment of the International Criminal Court and the subsequent conclusion of numerous Bilateral Immunity Agreements by the United States, and concerning the agreement of the India-US Civil Nuclear Deal. Each of the case studies offers an extremely rich account of both the legal and political genealogy of the respective conflicts. While the level of detail in the case studies might not always be easy to digest for those who are not experts in the law of the sea, international criminal law or the international nuclear regime, Ranganathan generally takes great care to relate the case studies back to the conceptual observations introduced in the earlier chapters.

At times, however, the sheer density of presented facts and ideas makes it difficult to keep track of the book's central thesis. For example, towards the end of Chapter I the reader is introduced to the works and thoughts of numerous authors, namely Higgins, McDougal and Lasswell, Kratochwil, Koskenniemi, Thompson, Onuf, Brunnée Toope and Fuller within the short space of ten pages. Similarly, the presentation of the three strands of managerial thought in Chapter III might have deserved at least as much space as some of the subsequent case studies. As a result, Ranganathan's otherwise very clearly presented arguments are at risk of getting lost in the thicket of authors, cases and ideas. Yet, given the remarkable interdisciplinary ambitions of the book, the corresponding necessity to discuss and introduce a large variety of materials, and considering that the book already reaches the 500 page mark, a certain level of compactness is excusable.

Another criticism relates to Ranganathan's perhaps too quick dismissal of attempts to distinguish between true and false conflicts.[22] There is no doubt that

18 Ranganathan (n 7) 125.

19 Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP 2011).

20 Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003).

21 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November, 1994) 1833 UNTS 3.

22 Ranganathan (n 7) 10.

such attempts may often be no more than 'red herrings'.[23] However, unless the notion of treaty conflict is to lose all meaning, it is in principle still very important to distinguish between actual and merely apparent conflicts. Ranganathan rightly observes that international law's traditional refusal to accept that contradictory relationships between permissive and prescriptive norms can give rise to true norm conflicts is unhelpful.[24] Distinctions on this basis often fail adequately to capture the challenge that particular conflicts pose to specific treaties and they unduly subordinate entitlements to obligations.[25] But this does not mean that the distinction between true and false conflicts is flawed in and of itself. Otherwise it might become difficult to draw a line between a State's outright contestation of an established treaty and an actual (legal) strategic treaty conflict. Thus it might be more constructive to criticise on what basis true and false conflicts are distinguished from each other, rather than calling into question the distinction itself.[26]

However, these observations should not in any way distract readers from the fact that Ranganathan's thoughtful book immensely enriches the existing literature on both treaty and norm conflicts. Her unique interdisciplinary approach not only problematises treaty conflicts, but also, and importantly, considers their wider implications for the role of international law in the international affairs of states. Going forward, Ranganthan's concept of a strategic treaty conflict will be of great help to those analysing the political and legal implications of past and present, actual or potential strategic treaty conflicts, such as the proposed US–Pakistan Nuclear deal. Even beyond the treaty context, the strategic-conflict-concept may shed considerable light on other established norm-challenging phenomena, such as persistent objectors in customary international law or the practice of the (strategic) non-recognition of states.

23 ibid 225.

24 ibid 11.

25 ibid 303.

26 Note also that international law scholars increasingly recognise the possibility of true contradictory norm conflicts: See, eg, Christopher J Borgen, 'Treaty Conflicts and Normative Fragmentation' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 455–56; Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17 EJIL 395, 415; Pauwelyn (n 4) 176, 199.