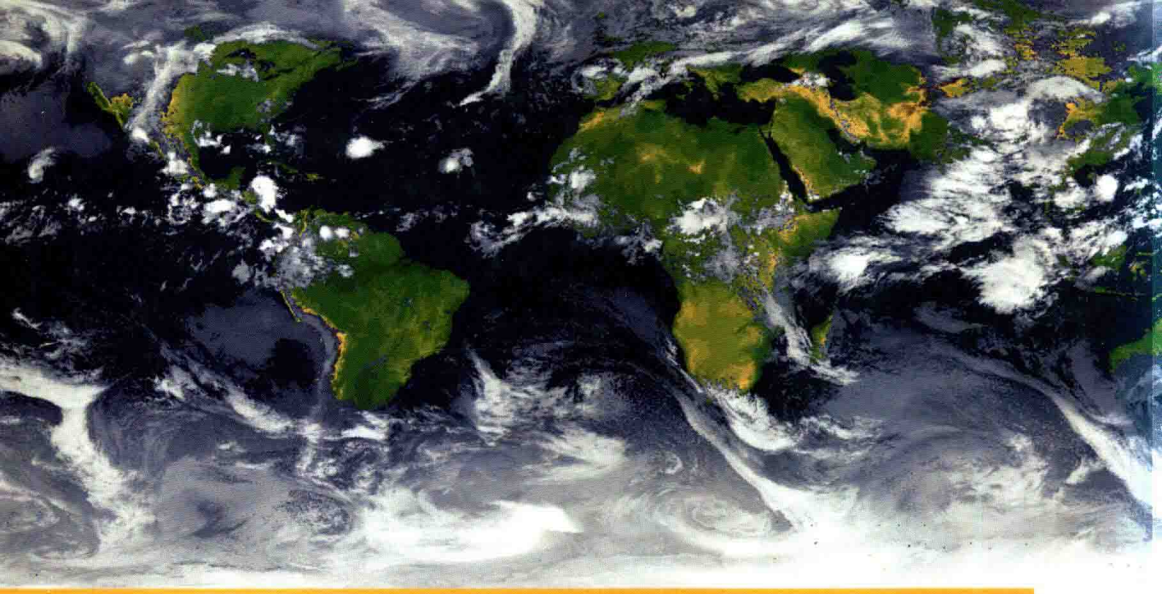

ASIL STUDIES IN INTERNATIONAL LEGAL THEORY

Normative Pluralism and International Law

Exploring Global Governance

Edited by Jan Klabbers and Touko Piiparinen

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Normative Pluralism and International Law

Exploring Global Governance

Edited by

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NORMATIVE PLURALISM AND INTERNATIONAL LAW

This book addresses conflicts involving different normative orders: What happens when international law prohibits behavior, but the same behavior is nonetheless morally justified or warranted? Can the actor concerned ignore international law under appeal to morality? Can soldiers escape legal liability by pointing to honor? Can accountants do so under reference to professional standards? How, in other words, does law relate to other normative orders? The assumption behind this book is that law no longer automatically claims supremacy, but that actors can pick and choose which code to follow. The novelty resides not so much in identifying conflicts, but in exploring whether, when, and how different orders can be used intentionally. In doing so, the book covers conflicts between legal orders and conflicts involving law and honor, self-regulation, *lex mercatoria*, local social practices, bureaucracy, religion, professional standards, and morality.

Jan Klabbers has taught international law at the University of Helsinki since 1996 and has held visiting professorships in New York, Geneva, and Paris. He was director of the Centre of Excellence in Global Governance Research from 2006 to 2011 and has won a number of awards for excellence in teaching. He received his doctorate from the University of Amsterdam (with distinction), and his main publications include *The Concept of Treaty in International Law* (1996), *An Introduction to International Institutional Law* (2nd ed. 2009), *Treaty Conflict and the European Union* (2008), and, as coauthor, *The Constitutionalization of International Law* (2009).

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ASIL Studies in International Legal Theory

The purpose of the ASIL Studies in International Legal Theory series is to clarify and improve the theoretical foundations of international law. Too often the progressive development and implementation of international law has foundered on confusion about first principles. This series raises the level of public and scholarly discussion about the structure and purposes of the world legal order and how best to achieve global justice through law.

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Introduction to the Volume

Jan Klabbers and Touko Piiparinen

I. INTRODUCTION

This is a volume on normative pluralism, born within the Academy of Finland Centre of Excellence on Global Governance Research 2006–2011.[1] Having studied global governance from a variety of disciplinary perspectives and on a variety of topics, it transpired that at least one characteristic of global governance, at present, seems to be that actors can be considered to fall within the reach of norms stemming from a multitude of directions. Individuals, companies, international organizations, states, and other entities are, as before, subject to the law, whether this be the law of the state in which they reside or, more broadly, international law. But those entities also have to pay some respect to norms stemming from elsewhere. Businesses are subject not just to law, but also to professional standards and codes of self-regulation. The behavior of states can be evaluated with the help of international law but also, increasingly so it seems, by standards of morality. Individuals have long recognized that their religion may tell them to do things that may not immediately be reconcilable with legal prescriptions, and immigrants in particular may carry social norms with them wherever they settle and find that those norms exist in tension with local legislation. And that says nothing still about a possible role for that most amorphous of concepts: legitimacy, which seemingly can spring from each and every normative order without properly being part of any single one.

In short, we felt that there would be a topic here, one of relative novelty, moreover, that would warrant further study. We invited two leading scholars

[1] The Centre of Excellence came to an end on New Year's Eve 2011, when its funding period expired. This volume was completed with the editors affiliated with the Erik Castrén Institute of International Law and Human Rights (University of Helsinki) and the Finnish Institute of International Affairs.

working on similar issues, John Bowen and William Twining, for a brainstorming session in Helsinki, and their feedback – while not uncritical of some of our initial assumptions and intuitions – suggested that, indeed, there might be a topic here.

Subsequently, we asked several individuals, working both in practice and in academia, to shed light on how they experience normative conflict. We also had a number of structured discussion meetings within the Centre, which, being a transdisciplinary venture involving lawyers, political scientists, and anthropologists, with a sprinkling of theologians and moral philosophers, seemed the appropriate setting for a transdisciplinary exercise. The result is this volume.

In the process, a number of individuals provided comments, conceptual as well as thematic, on normative pluralism, how it relates to the governance of global affairs, and how it can possibly be studied. These include the authors of the chapters in this volume, but numerous others as well. We are heavily indebted to Mika Aaltola, John Bowen, Kirsten Fisher, Andreas Fischer-Lescano, Martti Koskenniemi, Anssi Leino, Anne-Charlotte Martineau, Jamie Morgan, James O'Connor, Heikki Patomäki, Pamela Slotte, Jukka Siikala, Teivo Teivainen, Reetta Toivanen, Kaius Tuori, William Twining, Hannele Voionmaa, Henri Vogt, and Åsa Wallendahl for sharing their insights with us; to Damarys Vigil Nolasco and Christiane Fürst for their editorial assistance; and to Betsy Andersen, John Berger, and Tim Sellers for their unwavering support.

This volume is, first and foremost, a study in global governance, written from the perspective, mostly, of academics working in the legal field but aspiring to look beyond disciplinary boundaries. A majority of the authors have been affiliated with the Centre of Excellence in Global Governance Research 2006–2011, located at the University of Helsinki, where this project was conceived. There are some exceptions to the legal background: Timo Kallinen was trained as an anthropologist, Touko Piiparinen's background is in political science, and Pontus Troberg has a background in economics and accounting. And some of authors have been trained not just in the law, but in other disciplines as well. Katja Creutz, Jan Klabbers, André Nollkaemper, and Silke Trommer all hold degrees in political science in addition to their law degrees, while Larry May was already an established and highly respected moral philosopher before he entered the field of law.

II. THE FOCUS OF THIS VOLUME

There are various ways in which people can speak about normative pluralism, but to state this is not yet saying much. What is of interest is how this pluralism

plays out in a (fairly limited) number of situations. Potentially, there could be manifold conflicts to study, and manifold ways to study them. One might, for instance, think of a conflict between religion and morality: if it would be morally allowed these days to covet thy neighbor's wife, where does that leave the sixth of the Ten Commandments? Likewise, one could think of a conflict between morality (whether under the heading of business ethics or corporate social responsibility) and the internal self-regulation of companies when it comes to, say, utilizing child labor, or paying kickbacks to officials in countries of investment. These, however interesting, do not primarily concern us in this study: our concern is with normative conflicts involving law.

We are also not particularly interested, for present purposes, in how normative orders come to influence each other. Sometimes (well, quite often, perhaps), law contains traces of moral thought or religious injunctions. Leaving theocracies aside, a colorful example is that of South Korea, where, it transpires, adultery is illegal and can land one in jail. In particular, the relationship between law and morality has given rise to a vast body of scholarship and ranks as one of the main points on which lawyers identify themselves. If they feel that law and morality are essentially separate orders, they tend to think of themselves as positivists; if they feel that law should be morally acceptable (in other words: that the moral acceptability of a rule is a condition for its validity), then they tend to view themselves as working in the natural law tradition.

Those debates are fascinating in their own right but do not concern us here. Instead, our interest in this volume is with conflicts within the law, and conflicts between law and other normative orders. First, we are interested in conflicts within the law, in particular conflicts between different emanations of international law, and conflicts between international law and domestic law. While conflicts within domestic legal systems would also be of great interest, this, we felt, would be too vast a topic to study for our purposes. After all, with some two hundred states in the world, there are potentially two hundred settings to study, and even narrowing it down, as comparative lawyers typically do, to broad legal families would still result in too much ground to cover.

Second, our interest resides with conflicts between law and different normative orders: in abbreviated form, these can be presented as law versus religion, law versus chivalry or honor, law versus accountancy standards, et cetera. Our perspective is, to some extent, informed by empirical analysis of those "normative encounters" in which an individual or other agent is confronted with various normative demands: what to do when the law says one should do A, but some other normative order says one should do B. That is not to say that we rigidly stick to this question: it serves as the starting point for reflection rather than as a strict methodological device.

The latter is an important point: we think we have stumbled on a topic that has remained hitherto relatively unexplored, and for that reason, we feel that much is to be gained, at this juncture, from reflecting on basic issues, rather than insisting on a strict methodological framework in order to test hypotheses. Put differently, we hope that by allowing our authors a relatively free hand, we can start to generate and formulate hypotheses in this volume.

Nonetheless, we should explain where our focus lies. We are not all that interested (for present purposes, we hasten to add) in figuring out whether law should be morally respectable, or whether and to what extent it should be in harmony with the society it aims to regulate, or whether it can or should have any effects on that society, or even, as Aristotle thought, whether law should be such that it helps to shape individual moralities. Instead, our interest resides, first of all, with the question how to act when confronted with different commands stemming from different normative orders. On that basis, a second interest enters the picture: if it is possibly the case that different normative orders serve as justifications for different acts, is it then possible to choose? In other words (arguably more fancy words), this leads us to the politics of framing: what determines whether, say, the intervention over Kosovo is judged by moral standards or legal standards? Or what determines whether business transactions are subjected to state-ordained rules or to the *lex mercatoria*?

This is something to be clear – and frank – about. We are not trying to analyze how law is influenced by morality, chivalry, or other normative orders. Nor are we trying to discuss how those normative orders, in turn, influence the law. We are also not trying to solve normative conflicts: ours is not a mission to present possible solutions, if only because the *problematique* requires investigation before the viability of any practical suggestions can meaningfully be discussed.

Instead, our main interest resides with conducting this preliminary investigation. It resides with the possibility of normative conflict (i.e., different normative orders providing different injunctions). We stipulate the existence of various normative orders and zoom in on how conflicts may arise, and whether any ways have been developed to solve such conflicts. Additionally, we hope to signal common problems, so as to foster a future research agenda.

The plan of this book is to describe the coexistence of various normative orders in their relations with law, discuss the possible tensions, and, where possible or appropriate, suggest possible solutions. Thus, the authors inquire into relations between law and witchcraft, law and religion, law and bureaucratic standards, law and spontaneous norms. Such coexistence of normative orders has probably always given rise to conflicts: traces of it can be found in

the biblical story of Abraham's being about to sacrifice his son, or the Greek drama *Antigone*.

The one area where this was most difficult is the relationship between law and morality: this can be – and has been – studied from so many angles and through so many different prisms that we felt it better to zoom in on one particular aspect rather than try to capture the entire debate in a few handfuls of pages. Moreover, as discussed in Chapter 1, morality is different in kind from other normative orders, in that it is not traceable to individual human agency in quite the same way as religion, law, or other normative orders are. Hence, we invited a highly respected lawyer and moral philosopher, Larry May, to focus on a particular emanation of the relationship between law and morality: the emerging concept of responsibility to protect. Needless to say, the structure and tone of his contribution therewith differ somewhat from those of the other contributions, but we felt this was preferable (by far) to excluding morality altogether.

III. THE SETTING OF THIS VOLUME

Normative pluralism is, in a way, hardly a novel phenomenon. Max Weber could already write, almost a century ago, that each and every individual and social group is subjected to a "plurality of contradictory systems of order" and that "it is even possible for the same individual to orient his action to contradictory systems of order," and his archetypical example was that of the duel: the gentlemen involved in a duel (we presume, for the time being, that duels mostly concerned gentlemen) would be bound to respect the appropriate code of honor, as well as applicable criminal law.[2] Yet, he did not go so far as to suggest that actors could actually choose which of these normative control systems should guide their actions: for Weber, the dueling gentleman was subject to both criminal law and the code of honor, but the dueling gentleman was not in a position to claim that one of these ought not to apply, let alone that both would not apply and ought to be replaced by, say, religion.

This element of choice then would seem to be a novel element, and it would seem that this owes much to what has become generally referred to as globalization. Globalization, many would agree, has introduced in its wake fragmentation. The leading anthropologist Thomas Hylland Eriksen submits that globalization involves both disembedding and reembedding and is better seen as a way of organizing heterogeneity than homogeneity: it involves

[2] See Max Weber, *The Theory of Social and Economic Organization*, Parsons ed. (New York: Free Press, 1964 [1947]), at 125.

a dialectic between global and local.[3] To him, identity politics (a clear manifestation of fragmentation) is properly a "trueborn child of globalization."[4] Anthony Giddens already observed as much more than two decades ago, noting that "radicalized modernity" (the term he used to describe what is now commonly referred to as globalization) had "a sense of fragmentation and dispersal."[5] Not only is the world becoming a "global village," in Marshall McLuhan's felicitous phrase[6]; it is also becoming a fragmented set of global villages: globalization and fragmentation go hand in hand, sometimes in the form of an emphasis on localization (or the more ephemeral "locality"),[7] sometimes also in other guises. The world might be subject to McDonaldization, but McDonald's is not above catering to local tastes.[8]

A most obvious form is that fragmentation entails the coexistence of cultures, and it was in this sense that the first recorded use of the adjective "global" made an appearance, in a *Harper's Magazine* article dating back to 1892 and detailing the travels of a distinctly cosmopolitan gentleman, Monsieur de Vogüé. Monsieur de Vogüé loved to travel and traveled many foreign lands in his quest to be "global."[9] In our days, and in particular perhaps among international lawyers, "fragmentation" has become a byword for the coexistence of several fields of activity (trade, environment, security, etc.).[10] This follows, to some extent, the analysis of society as having dispersed into several fragmented subsets, each with its own logic and rationality: the economy, the social, the military, et cetera.[11] Our intuition now is that the fragmentation also covers

[3] See Thomas Hylland Eriksen, *Globalization: The Key Concepts* (Oxford, UK: Berg, 2007).

[4] Ibid., at 146.

[5] See Anthony Giddens, *The Consequences of Modernity* (Cambridge, UK: Polity, 1990), at 150.

[6] See Marshall McLuhan, *The Gutenberg Galaxy* (Toronto: University of Toronto Press, 1962).

[7] See Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996).

[8] See George Ritzer, 'An Introduction to McDonaldization', in George Ritzer (ed.), *McDonaldization: The Reader*, 2nd ed. (Thousand Oaks, CA: Pine Forge Press, 2006), 4–25. In his entertaining study of soccer, Foer notes how globalization exacerbates local feuds and corruption: see Franklin Foer, *How Soccer Explains the World: An (Unlikely) Theory of Globalization* (New York: Harper, 2004).

[9] The story is recounted with gusto in Alex MacGillivray, *A Brief History of Globalization* (London: Robinson, 2006), at 10–11.

[10] See in particular Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission* (Helsinki: Erik Castrén Institute, 2007).

[11] This owes much to the work of the German sociologist Niklas Luhmann. For a Luhmannian discussion of international law, see Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006).

normativity as such: a fragmentation into morality, law, social norms, honor, witchcraft, professional standards, et cetera. And much as with the fragmentation of international law, there is no immediate response available to those who claim that one normative order should be preferred over other orders.

IV. THE CONTRIBUTIONS

For practical purposes, this book is divided into three different parts. The first part will begin with an introductory chapter, written by Jan Klabbers and Touko Piiparinen under the title "Normative Pluralism: An Exploration." The chapter posits some initial reflections on the concept of normative pluralism, the idea of what constitutes a normative order, connections between normative pluralism and global governance, and the curious role of legitimacy. While it helps to place the subsequent chapters in context (and was conceived with that purpose in mind), it can also be read independently. In the second chapter, Piiparinen suggests a methodology for the study of normative pluralism, also exploratory in nature. Piiparinen aims to create a possible way to look at normative pluralism from the perspective of critical realism. Therewith, his chapter serves as a possible prism for further study. It is important to realize, though, that neither of these two chapters aims to lay down a template for the subsequent chapters: we felt that, given the relative novelty of the topic, it would be more useful to ask our authors to apply their expertise to their understanding of normative pluralism, rather than to tell them what to do and how to do it. The price to pay for this is that the volume as a whole will, no doubt, be less unified in approach than a single-author monograph or tightly edited collection would be; on the plus side, though, asking intelligent authors freely to work on a topic is bound to result in a broader array of interesting insights.

The next part addresses intralaw conflicts and does so through two chapters. The first, written by Jan Klabbers and Silke Trommer, addresses normative conflicts within international law: conflicts between treaty provisions, or between a treaty provision and a settled rule of customary international law, or a normative conflict that in some other way involves the sources (or possible sources) of international law. They conclude that while normative conflicts are quite (and increasingly) common in international law, international law has precious little to offer such conflicts, other than the creation of tribunals or committees to decide or massage issues of normative conflict. While that may be an underwhelming conclusion, it is not unimportant to draw attention to the circumstance that international law offers no substantive solutions to this most pressing issue. Therewith, the chapter sets the tone for much of what follows. The second part also includes a chapter by André