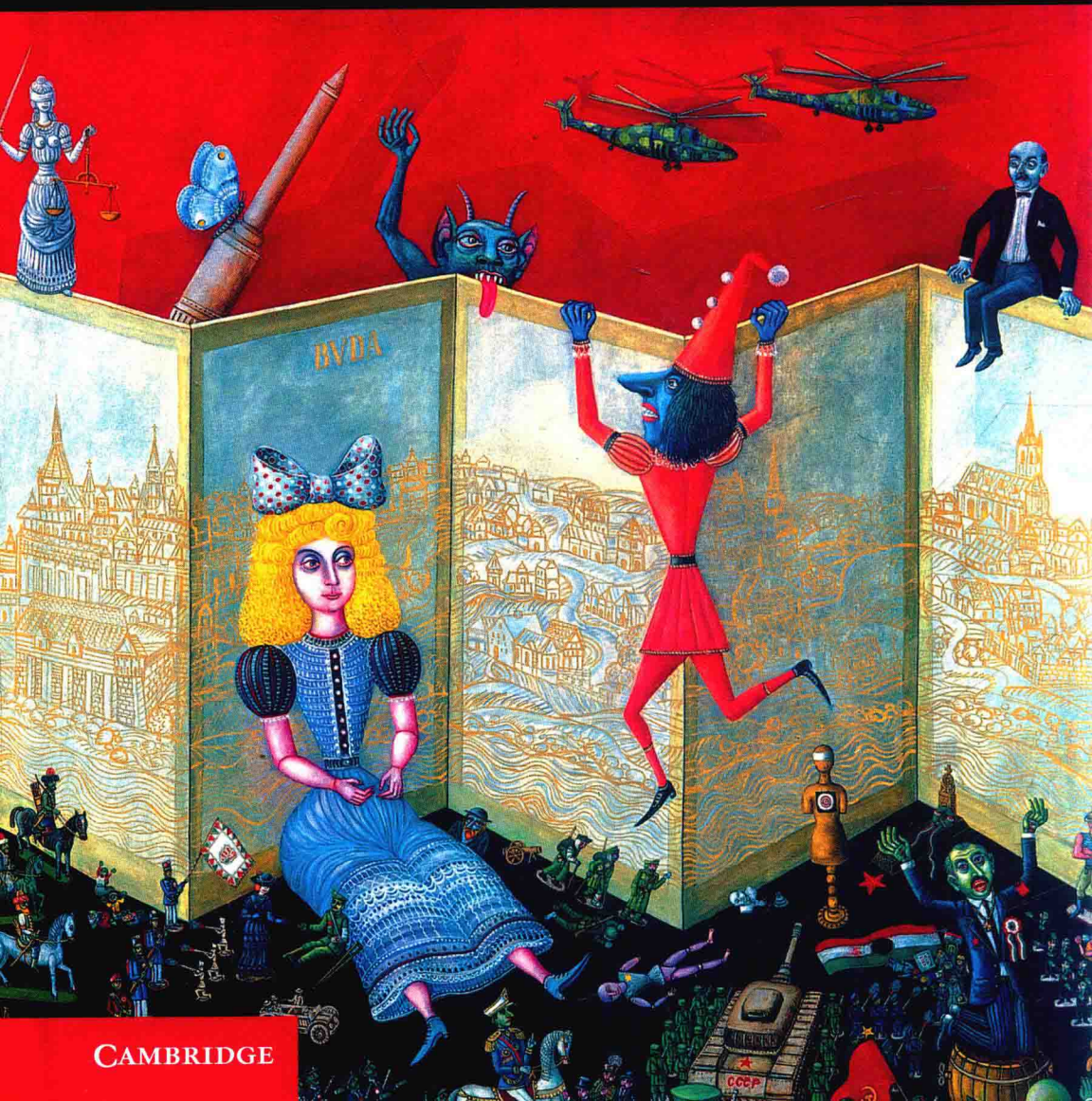
SURABHI RANGANATHAN

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Strategically Created Treaty Conflicts and the Politics of International Law



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Strategically Created Treaty Conflicts and the Politics of International Law

Treaty conflicts are not merely the contingent or inadvertent by-products of the increasing juridification of international relations. In several instances, States have deliberately created treaty conflicts in order to catalyse changes in multilateral regimes. Surabhi Ranganathan uses such conflicts as context to explore the role of international law, in legal thought and practice. Her examinations of the International Law Commission's work on treaties and of various scholars' proposals on institutional action, offer a fresh view of 'mainstream' legal thought. They locate in a variety of writings a common faith in international legal discourse, built on liberal and constructivist assumptions. Ranganathan's three rich studies of treaty conflict, relating to the areas of seabed mining, the International Criminal Court, and nuclear governance, furnish a textured account of the specific forms and practices that constitute such a legal discourse, and permit a grounded understanding of the interactions that shape international law.

Surabhi Ranganathan is an Assistant Professor of Law at the University of Warwick. She was previously a Junior Research Fellow at the Lauterpacht Centre for International Law and King's College, Cambridge. She is the Assistant Editor of the *Cambridge Companion to International Law* (2012) edited by James Crawford and Martti Koskenniemi.

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelations.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention.

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Foreword

International legal scholarship tends to address the political substrate of international law in one of two extreme modes: either by not dealing with it at all and engaging only with the doctrinal surface; or by being entirely consumed with it and reducing doctrinal form to insignificance. In Dr Ranganathan's chosen field of inquiry – treaty conflict – these modes involve either the fixed assumption that treaty conflicts are inadvertent by-products of the increasing numbers of treaties, to be resolved by application of formal rules and procedures; or that treaty conflicts merely confirm the epiphenomenal character of international law.

Dr Ranganathan challenges both these approaches. Arguing that treaty conflicts are often strategically created by States for the purpose of catalysing changes in multilateral legal regimes, she builds upon, and finesses, existing understandings in four respects.

First, she departs from a long tradition of argument over the appropriate definition of the concept of 'treaty conflict' (does it include only instances where treaties provide for mutually exclusive obligation, or also those of incompatibilities between rights and obligations?), showing that from the perspective of their impact upon international relations there is no distinction between the two. A conflict between a right granted by one treaty and an obligation provided under another may, depending upon the context, involve a greater challenge to the stability and coherence of an existing legal regime than an outright conflict of obligations. Denying to the former the status of a treaty conflict properly so-called makes little difference. Dr Ranganathan, instead, calls attention to other features of treaty conflicts that may be more important: the strategic context; the lack of identity between their parties, bringing into play the doctrinal restrictions of the *pacta tertiis* rule; and

the possibility, through a cleverly leveraged conflict, of challenging a hard-won multilateral treaty regime through a bilateral or 'small-group' treaty.

Second, she shows that treaty conflicts that display these characteristics are not fully or adequately addressed through current legal rules, whether those provided in the Vienna Convention on the Law of Treaties or those suggested, in numerous works, as rules of thumb for reconciling or allocating priority between conflicting treaties. The problem does not lie with the rules themselves. Dr Ranganathan, following Jan Klabbers (*Treaty Conflicts and the European Union*, Cambridge University Press, 2009) argues that legal rules *cannot* address such conflicts unless they depart from foundational principles of treaty law. Alternative proposals, by Hersch Lauterpacht amongst others, infringe or ignore the *pacta tertiis* rule, the rule that treaties between different parties are *res inter alios acta*, and States' freedom to enter into treaties.

That legal doctrine cannot offer satisfactory solutions to a variety of treaty conflicts may lead to the conclusion that there is little point in further analysis, that international law can contribute little to regulating a phenomenon that nonetheless challenges its own systemic character and, worse still, that we must accept the critique that international law is reduced to a form of 'managerialism'. Dr Ranganathan's further contribution lies in challenging these conclusions.

Third, by way of detailed studies of treaty conflicts strategically created in order to challenge, respectively, the deep seabed mining regime under the UN Convention on the Law of the Sea, the International Criminal Court established by the Rome Statute, and the nuclear-governance regime underpinned by the Nuclear Non-Proliferation Treaty, she shows that international law is neither purely epiphenomenal nor purely instrumental to politics. In truth, legal forms play a role in framing the scope and terms of the conflict, mediating interactions and moderating outcomes. She is careful not to suggest that the limits introduced by international legal practices are necessarily for the good – they may indeed be obstructive to some interests and from some perspectives – but she does maintain that they are real, significant and not easily wished away; reminders that there is indeed a 'system' of international law, that becomes visible precisely in the moments of challenge that arise from treaty conflicts. The three studies encompass a range of socio-legal materials, and offer rich analyses of three distinct and topical issues.

Dr Ranganathan, finally, uses treaty conflicts as a prism to explore the conceptions of international law underlying a range of scholarship that she describes as 'mainstream': writings in the context of the International Law Commission's efforts to identify an appropriate conflict rule, and works on treaty implementation – from Lauterpacht and Rosenne's doctrine of approximate application to the compliance scholarship of the US academy, to recent work on regime interaction (for instance, Margaret Young, *Saving Fish, Trading Fish*, Cambridge University Press, 2011). These works are dispersed in time and tradition, but, as she shows, they have in common their engagement with the politics of international law and their ultimate conception of law, not as rules or procedures, but as a discourse anchored in both. She argues that this conception is founded on liberal and constructivist assumptions about international law; on this view, engaging in a legal discourse has (or at least can have) the effect of advancing the rule of law by moderating positions and outcomes; the very experience of engaging through law can strengthen respect for the rule of law. She is largely sympathetic with, though occasionally sceptical of, the liberal assumption; she rightly does not seek to prove or disprove constructivist positions. But her reading finesses summary judgments, whether of naïve idealism or rigid doctrinalism, often visited upon international law's mainstream.

In these ways, her work aims to get to the heart of what makes international law, in legal thought and in the practice of international relations. It will be for readers to judge its success; but it is on any view a fine first achievement by a promising scholar.

James Crawford
Lauterpacht Centre for International Law
University of Cambridge
7 April 2014

Preface

It is difficult – for anyone, I imagine – to reconstruct the process by which one comes to write the book that one writes. Many factors shape the choice of a project and the way one goes about developing it. I *think* the early trigger for this book was my desire to explore the paradoxes revealed by one event: the India–US Nuclear Deal. But that exercise grew into a much larger exploration of strategically created treaty conflicts and what they might teach us about the politics of law.

The Nuclear Deal was announced in 2005, revealed in specific bilateral form in August 2007, and pronounced nearly dead a few weeks later. In the course of these developments, it had made some news in the United States, where I was then based, and had a compelling hold on public debate back home, in India, where it was variously regarded as a major foreign policy triumph (in his January 2014 exit interview, the two-term Indian Prime Minister, Manmohan Singh, identified it as his greatest moment in office), and as a foreign policy disaster that had signed away India's autonomy in international relations to the United States. In a country dogged by massive corruption scandals, rocketing inflation, fierce debates over social and economic spending, and controversies relating to the deployment of the military in Kashmir, the northeast, and against Maoists, the Nuclear Deal was the *only* issue on which the government was challenged through a no-confidence motion.

The delirium surrounding the Deal was to a large extent connected to expectations that, energy benefits aside, it would boost India's nuclear weapons programme and imply US, and international, acceptance of the same, paving the way perhaps for that sixth seat on the UN Security Council. But here was the paradox. While neutralising domestic opposition entailed emphasising, in India, these aspects of the Deal, the bid

for international acceptance was based on the claim that the Deal was unconnected to India's nuclear weapons programme and left unaffected the international legal regime for nuclear non-proliferation and disarmament, underpinned by the Nuclear Non-Proliferation Treaty (NPT).

I became interested in the question whether there *was* indeed, legally speaking, a treaty conflict between the Deal and the NPT – it seemed to me that I could build a strong argument both in favour, and against (and indeed some of these arguments were being made in public debate) – and, if so, whether there was any particular legal solution that could be applied to it. Gradually, the complexities in answering both questions became apparent: the 'conflict' was less a matter of determination than perception and representation, but, even accepting that there was a conflict, there was no easy way of getting around the attributes that made it legally intractable: it was a strategic conflict, and one State party to one treaty (the Deal) – India – could claim to have no legal obligation to respect the other (the NPT). What kind of legal 'solution' could be proposed for such a situation? Even if one was proposed, would it be regarded by the relevant parties?

I began to see, also, that the small question, of treaty conflict between the Deal and the NPT, actually provided a context in which to explore many other questions, and anxieties, that no doubt all students of international law feel from time to time, and most of all when faced with the fragility of, and political subtext to, legal rules: what actually *is* international law? Is it really *law*, if States simply replace rules with others when it suits them to? How does it work? Why have so many believed it is for so long? And then more specifically: What happens when States seem to replace one treaty by another? Particularly when only some States party to one treaty replace it with another in their dealings with each other, or with third States? Is there an appropriate definition of treaty conflict? Are there effective legal solutions to such conflicts? How else are treaties to be protected? Why does the Vienna Convention on the Law of Treaties (VCLT) take the approach it does? Does the VCLT approach have any relevance to practice? And to square the circle: What is the practice of treaty conflicts? Does it tell us anything about the role and influence of international law?

These questions form the subject of this book. I do not pretend to have provided *the* answers to them, but I have offered *my* answers, in the hope of perpetuating that broad conversation that – I have suggested – sustains and enriches international law. There are many people who

guided and helped me in developing both questions and answers, and in completing this work, and I owe them my sincerest thanks.

First, and above all, to James Crawford. James supervised the PhD thesis on which this book is based with exceptional patience and encouragement, and continued to advise on the development of the book. Without his careful scrutiny of my writing and his exhortations to 'finish!', I would not have reached the point of writing this preface.

Several others also played a role in guiding my thoughts, on the book as a whole, or on specific sections of it. I owe thanks, in particular, to Jan Klabbers, Martti Koskenniemi and Guglielmo Verdirame, for generous discussions on the project as a whole, and for very insightful comments on specific chapters. Many friends provided careful assessments of specific portions: no doubt, if and when they read this book, Douglas Guilfoyle, Jessie Hohmann, Sarah Nouwen, Federica Paddeu, Tiina Pajuste, Mieke van der Linden and Sara Wharton, will recognise portions where their comments have joined the text. In addition to James, Rohit De and T. C. A. Ranganathan read through the full manuscript and provided valuable feedback on the argument as a whole. Sumati Dwivedi's edits were a marvel; her several hundred comments, suggestions and corrections, for each chapter, have shaped both language and substance.

Many more gave generously of their time. I am very grateful to the late R. P. Anand (who met me despite his failing health and gave both advice and books), Ben Batros, Giovanni Bassu, P. R. Chari, B. S. Chimni, P. S. Das, Matthew Heaphy, David Koller, Sunil Pal, Rod Rastan, Manpreet Sethi, O. P. Sharma, Yogesh Tyagi, Siddharth Varadarajan, John Washburn, and a few others who prefer to remain unnamed, for their advice on both conceptual and factual matters.

While a book takes shape in the mind, it needs material conditions to flourish. My doctoral research and travel were made possible by the Gates Trust, the J. C. Hall Scholarship at St John's College, and an Overseas Research Scholarship, and by the excellent working and living environments provided by the Cambridge Faculty of Law and St. John's College. My post-doctoral time at King's College, and at the Lauterpacht Centre for International Law, has been absolutely fantastic: each has provided both intellectual stimulation and companionship, and very generously accommodated the disturbances caused by my book writing. I especially owe thanks to Eva Nanopoulos for relieving me from admissions work, my office-mate Tiina for monitoring my progress, and Karen Fachechi and Anita Rutherford for providing administrative guidance and support at various points.

I have benefitted enormously from presentations and discussions at workshops in America, Europe and India. The book draws upon these conversations, and on publications that grew from them, and I am extremely grateful to all who contributed to both. Among others, and in addition to those already named, Eyal Benvenisti, Samantha Besson, Lucas Lixinski and Michael Waibel provided instructive chats on specific conceptual points, and Sophie Chapman, Mirina Grosz, Paula Haas, Nayanika Mathur and Pallavi Raghavan provided perspectives from the vantage point of their own disciplines. I also owe thanks to Lorenzo Cassini, Simon Chesterman, Angelina Fisher, the late Thomas Franck, Kirsty Gover, Benedict Kingsbury and Euan Macdonald for development of the early research proposal while I was at NYU, and for their mentorship. Gauri and Gittu Modi in New York, Anubhuti Agrawal and Avirup Nag, Sumona Bose and Ashwin Bishnoi, Shivani Mathur, and Kriti Kapila in London, provided house room and home comforts on several research trips.

This book would not exist at all if it had not been for the stellar support given by Cambridge University Press. I am extremely grateful to Finola O' Sullivan, Elizabeth Spicer, Elizabeth Davey, Gillian Dadd, Martin Gleeson, Richard Woodham and others for encouraging the work and accommodating delays.

Without Rohit's arguments, encouragement and very good cooking, the process of research and writing would have lacked sparkle. Without my family's affection, support and humour, the book could not have been completed. I am grateful to my nana and nani, Yashbir and Nirmal Das, for cheerfully tolerating the many times I shut myself up to work during my (and their trips) to Bombay, and to my father Ranganathan, my mother Namita and my brother Jayant for putting up with all my grouching and hair-tearing in Bombay *and* Delhi. This book is dedicated, with my love, to them, and to 15C Shanaz, where it had its start and its end.

Abbreviations

123 Agreement	Bilateral agreement for nuclear cooperation concluded by the United States
ASIL	American Society of International Law
ASP	Assembly of States Parties
ASPA	American Servicemembers' Protection Act
AU	African Union
BIA	Bilateral immunity agreement
CACJ	Central American Court of Justice
CAR	Central African Republic
CICC	Coalition for the ICC
CJEU	Court of Justice of the European Union
CTBT	Comprehensive Test Ban Treaty
Deal	India–US Nuclear Deal
DRC	Democratic Republic of the Congo
EC	European Community
ECJ	European Court of Justice
EES	Group of Eastern European States
ENDC	Eighteen Nation Committee on Disarmament
EU	European Union
Euratom	European Atomic Energy Community
FMCT	Fissile Materials Cut-off Treaty
FRG	Federal Republic of Germany
G8	Group of 8
G77	Group of 77
GAL	Global Administrative Law
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GNEP	Global Nuclear Energy Partnership

IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Legal Materials
INFCIRC	Information Circular
Interim Agreement	Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Seabed
ISA	International Seabed Authority
ISSA	India-Specific Safeguards Agreement
ITER	International Thermonuclear Experimental Reactor
LOSC	United Nations Convention on the Law of the Sea
LRA	Lord's Resistance Army
MTCR	Missile Technology Control Regime
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
NIEO	New International Economic Order
NNWS	Non-nuclear-weapons States
NPT	Nuclear Non-Proliferation Treaty
NSG	Nuclear Suppliers Group
NSSP	Next Steps in Strategic Partnership
NWS	Nuclear-weapons States
OSPAR Convention	Convention on the Protection of the Marine Environment of the North-East Atlantic
OTP	Office of the Prosecutor
Part I Guidelines	NSG Guidelines for Nuclear Transfers
Part II Guidelines	NSG Guidelines for Transfer of Nuclear-Related Dual Use Equipment, Materials, Software, and Related Technology
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Commission
Provisional Understanding	Provisional Understanding Regarding Deep Seabed Matters between Belgium, France, Germany, Italy, Japan, the Netherlands, the United Kingdom and the United States
PSI	Proliferation Security Initiative
PTC	Pre-Trial Chamber

Rome Statute	Rome Statute of the International Criminal Court
RSR	Reciprocating States Regime
SCN	Special Commission
SIPRI	Stockholm International Peace Research Institute
SOFA	Status of Forces Agreement
TRIPs	Trade-Related Aspects of Intellectual Property Rights
UAE	United Arab Emirates
UNCLOS III	Third United Nations Conference on the Law of the Sea 1973–82
UNEP	United Nations Environmental Programme
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UPDF	Ugandan People's Defense Forces
USSR	Union of Soviet Socialist Republics
UST	United States Treaties and Other International Agreements
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

Table of cases and procedural documents