Multi-Sourced Equivalent Norms in International Law

Edited by
Tomer Broude
and Yuval Shany

STUDIES IN INTERNATIONAL LAW

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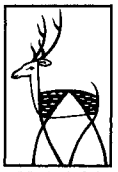

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Foreword

It has become common to highlight the risks arising from the fragmentation of international law. These risks are related, first, to increased conflicts between different norms and between different international legal regimes and, second, to inconsistencies in the application of international law. To a large extent this book addresses the same risks from a rather different perspective: similar rules or, as the authors put it, normative parallelism. By the latter, the authors refer to the multiplication of similar rules arising from different legal sources; the expression they have coined for this being multi-sourced equivalent norms.

One of the first virtues of this book is to map this often neglected reality and to better conceptualize the phenomena. To put it simply, these multi-sourced equivalent norms lead to competing (but similar) norms regulating the same situations of fact. To a large extent, this phenomenon can still be presented as a form of fragmentation in international law. At the core of this fragmentation is the existence of competing legal sources whose coordination within a single legal order is, at the minimum, contested and which are, in fact, applied by multiple legal regimes. The difference with respect to the traditional fragmentation discussion is that the focus is not on different competing rules but on competing equivalent norms. One might expect the latter not to be a source of tension but of harmony. That would ignore the fact that norms only acquire meaning in their context and that meaning is ultimately determined by who interprets and applies them. At the core of the issues raised by multi-sourced equivalent norms is the interpretation and application of equivalent norms to the same situations by different legal systems. This creates potential substantive conflicts in the resolution of the same or similar situations. One first question is whether there is a legitimate normative claim to have those conflicts arbitrated and solved by the law? In other words, does the rule of law require eliminating these inconsistencies and legal uncertainties in international law? Can we, in fact, talk about inconsistency and legal uncertainty in such cases? Aren't these concepts only to be assessed within a legal order? If so, can we talk about an international legal order composed of a plurality of international legal regimes and is it subject to the rule of law? The answers to these questions depend on our underlying assumptions of the nature of international law and the role to be played by different actors. One of the emerging trends is the central role to be played by courts. There are increased appeals for judicial bodies to actively promote integration and coordination between different legal orders. This could be done either by

international judicial bodies integrating, through interpretation, the rules of a particular international legal regime into another international legal regime or by domestic courts increased reliance on international law arguments in deciding domestic disputes. But that raises important institutional and legitimacy questions.

One of the attractions of the book is therefore that of presenting the current discussions on the nature and fragmentation of international law from a rather different perspective. The background is that of increased legal pluralism. First, increased economic and political integration has led to a multiplication of international legal regimes and jurisdictional fora. Second, there are increased conflicting jurisdictions among different legal orders (state, supranational and international). These conflicts may not necessarily be legal in formal terms but they are de facto. They generate instances of what we could label as interpretative competition and adjudication among courts. This context also gives rise to possible externalities (where the decision taken in a certain jurisdiction has a social and an economic impact, albeit not a binding legal impact, in another jurisdiction). Both of these phenomena can be constructed as being at the origin of fragmentation in international law. But this fragmentation is not simply a product of differentiation as the current book demonstrates. Pluralism may also lead to approximation by the contacts it promotes between different legal orders and their respective legal communities. This feeds a cross-fertilization of legal concepts. To a large extent, multi-sourced equivalent norms are a product of these two competing forces in pluralism: one pulling towards differentiation and the other towards harmonization.

The book is empirically thorough and normatively diverse. At the empirical level it describes the phenomena of MSEN, its different forms and shapes and how context matters in identifying different types of MSEN and their differentiated effects. But it also discusses the approaches adopted by different actors towards MSEN and how to address the potential problems they raise. At the normative level, the book addresses the challenges but also the opportunities raised by MSEN. Multi-sourced equivalent norms embody a paradox: they are, simultaneously, a source of approximation between different international legal regimes and of possible inconsistencies and conflicts between them. The book describes how different normative approaches to deal with MSEN are possible under international law while constantly highlighting that paradox. In this way, the book is a uniquely powerful and original contribution to the current debates on the future of international law.

Miguel Poiares Maduro

Acknowledgements

This book is the result of a group effort. It contains the products of the work of a study group that met four times over the course of a year and a half, for the purpose of exploring the concept of MSENs in international law. These meetings benefited from the participation of a number of world class experts, who presented to the group their work and thoughts on related subjects. The concepts and insights developed by the group were ultimately shared with other scholars at a broader conference that took place in Jerusalem in the spring of 2009 and generated, in turn, additional contributions for the present collection of essays. Obviously, the present publication would not have been possible without the intellectual and financial support of many people and institutions that supported the work of study group.

First and foremost, we would like to thank our academic collaborators – the other members of the study group – Dr Lorand Bartels, Dr Guy Harpaz, Professor Moshe Hirsch, Professor Andre Nollkaemper, Professor Joost Pauwelyn and Dr Isabelle Van Damme; the experts who participated in the three meetings leading up to the final conference – Professor Georges Abi-Saab, Professor Laurence Bossion de Chazournes, Professor James Crawford, Dr Zachary Douglas, Professor Ralf Michaels (who also participated in the final conference) and Dr Marieke Oderkerk; the rest of the participants in the project's concluding conference – Professor Eyal Benvenisti, Claire Charters, Professor Tarcisio Gazzini, Professor Robert Howse, Gil Limon (who also participated in two study group meetings), Professor Miguel Maduro, Martins Paparinskis, Professor Ruti Teitel; and other contributors to this volume – Dr Erik Denters, Professor Jurgen Kurtz and Dr Nikolaos Lavranos. During its work, the study group held meetings with the support of hosting institutions and faculties at the Lauterpacht Centre at the University of Cambridge, at the Amsterdam Centre for International Law (University of Amsterdam) and at the Graduate Institute in Geneva. We are grateful to these institutions and local interlocutors for hosting us (special thanks are due in this regard to Professor James Crawford for his gracious hospitality).

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TB and YS
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List of Contributors

Lorand Bartels University lecturer in Law and Fellow of Trinity Hall, University of Cambridge.

Tomer Broude Senior lecturer in the Faculty of Law and Department of International Relations, and the Academic Director of the Minerva Center for Human Rights at the Hebrew University of Jerusalem.

Claire Charters Ngati Whakaue, Ngati Tuwharetoa, Tainui and Nga Puhi. Fellow, New Zealand Centre for Public Law at Victoria University of Wellington and PhD Candidate, University of Cambridge.

Erik Denters Associate Professor, Faculty of Law, Vrije Universiteit Amsterdam.

Tarcisio Gazzini Associate Professor, Faculty of Law, Vrije Universiteit Amsterdam.

Guy Harpaz Senior lecturer and Jean Monnet Lecturer, Law Faculty and Department of International Relations, Hebrew University of Jerusalem; President of the Israeli Association for the Study of European Integration.

Moshe Hirsch Maria Von Hofmannsthal Chair in International Law, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem; Global Faculty, Centre for Energy, Petroleum, Mineral Law and& Policy, Faculty of Law, University of Dundee.

Robert Howse Lloyd C. Nelson Professor of International Law, New York University School of Law.

Jürgen Kurtz Senior lecturer and International Investment Law Research Programme Director, Institute for International Law and the Humanities, University of Melbourne Law School, Australia. Email: j.kurtz@unimelb.edu.au.

Nikolaos Lavranos Dr iur, LLM, former Max Weber Fellow (2008–2009) EUI; currently senior trade policy adviser, Dutch Ministry of Economic Affairs.

Luis Miguel Poiares Maduro Joint Chair, Robert Schuman Center for Advanced Studies and Department of Law, European University Institute, Florence; formerly, Advocate General to the European Court of Justice.

Ralf Michaels Professor of Law at Duke University School of Law and currently Visiting Professor and Research Fellow at the Program in Law and Public Affairs, Princeton University

André Nollkaemper Professor of Public International Law, the Faculty of Law, University of Amsterdam.

Martins Paparinskis D Phil candidate, University of Oxford, the Queen's College; Hauser Research Scholar, New York University. Previously, Arts and Humanities Research Council and Commercial Bar Scholar at the University of Oxford.

Joost Pauwelyn Professor of International Economic Law and WTO Law at the Graduate Institute of International Studies in Geneva, Switzerland and Director of its Centre for Trade and Economic Integration.

Benedikt Pirker Teaching Assistant, College of Europe, Bruges.

Yuval Shany Hersch Lauterpacht Chair in Public International Law at the Faculty of Law of the Hebrew University of Jerusalem and a director in the Project on International Courts and Tribunals.

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The International Law and Policy of Multi-Sourced Equivalent Norms

Tomer Broude and Yuval Shany

> But let judgment run down as waters,
> and righteousness as a mighty stream.
>
> Amos 5:24[1]

I THE PUZZLE OF NORMATIVE PARALLELISM IN INTERNATIONAL LAW

THE EPIGRAPH, A passage now almost three millennia old, is a plea for social justice and the rule of law that reverberates with equal force in our day and age. However, we cite it here not only for its substance, but mainly for its rhetorical structure. The phrase reflects the puzzle of parallelism that is analogous to the set of legal problems that this book is devoted to. The verse is a simple couplet, and its two constituent phrases obviously echo each other. But what is the true logical relation between them? Repetition? Augmentation? Differentiation? Contradi(stin)ction? Some combination of all the above? Surely the two parts of the verse are equivalent, but they are neither identical, nor fully equal. The prophet's intentions are effectively and independently captured in each part of the verse, yet there is a supplementary effect in their separate existence, as the two parts appear to reflect upon each other somehow.

Such parallelism has long been the object of study among scholars of the Bible, who not only identify several distinct types and dynamics of parallel relationships between verses, but use this 'parallelism of members' – *parallelismus membrorum*[2] – as an aid in interpreting one part of a verse in

[1] King James Bible translation. The original script in Hebrew is written: 'ויגל כמים משפט וצדקה כנחל איתן'

[2] The term was first used by Robert Lowth in *De Sacra Poesi Hebraeorum* (1753), translated into English by G Gregory in *Lectures on the Sacred Poetry of the Hebrews* (1787). Lowth identified three species of parallelism in biblical verse: the synonymous, the antithetic and the

the light of the other.[3] Moreover, these verses are not only part of ancient Hebrew poetry; they often contain a strong normative element. If viewed as legal imperatives or prescriptive rules, do the two branches of the sentence copied above – deceptive in their likeness – simply repeat the same rule, or do they provide subtly different commands, whose divergence might become decisive in particular circumstances? What is the legal significance of this parallelism and how does one rule reflect on its erstwhile equivalent? What, indeed, is the relationship between two norms that are so similar to each other, yet different? Do they create normative inconsistency, and if so, what is the consequent effect on legal certainty and the political legitimacy of law?

This book is about normative parallelism and equivalence, as it exists – and this is increasingly the case – in contemporary international law, bringing with it a slew of legal questions regarding the relationship between equivalent norms. We have opted to label the situations in which equivalent rules co-exist in the international legal sphere as 'Multi-Sourced Equivalent Norms' or MSENs for short. They are 'equivalent' because like the parallel parts of a biblical couplet, they are not always identical, and an understanding of their interrelationship requires deeper study. They are 'multi-sourced' because unlike the biblical 'parallelism of members', equivalent international norms are rarely conjoined like the analogous parts of a verse. Rather, equivalence is found between distant sources of international law, and across fields of international law that otherwise might have little in common with each other.[4] Furthermore, normative parallelism often exists unnoticed and unacknowledged, although pregnant with problems of law and policy, that lie dormant until unexpected contexts and unintended developments bring them to the fore.[5] In this chapter we will define and discuss MSENs as a conceptual introduction to the particular studies that follow.

synthetic. We shall return to these distinctions shortly. At this stage we only emphasize that parallelism and equivalence are not always of a synonymic nature.

[3] An interpretative technique used by Lowth himself in *Isaiah: A New Translation with a Preliminary Dissertation and Notes* (London, J Dodsley for J Nichols, 1778) (reprinted with an introduction by D Reibel); *Robert Lowth [1710-1787]: The Major Works* (1995). See also A Berlin, *The Dynamics of Biblical Parallelism* (Bloomington, Indiana University Press, 1985).

[4] Eg, in her study of MSENs relating to Indigenous peoples' rights, Claire Charters refers to the work of diverse international institutions, and a broad range of otherwise unrelated international instruments, ranging from the United Nations Human Rights Council to the World Bank. See in this volume, C Charters, 'Multi-Sourced Equivalent Norms and the Legitimacy of Indigenous Peoples' Rights under International Law' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford, Hart Publishing, 2011) p 189.

[5] Eg, one of the most intensely debated international MSEN instances in recent years – the relationship between the customary plea of necessity, as expressed in art 25 of the ILC 'Draft Articles on State Responsibility' (2001) GAOR 56th Session Supp 10 UN Doc A/56/10 on the one hand, and the 'public order' and 'essential security interests' exceptions in bilateral investment treaties on the other – might have remained a hypothetical issue of purely academic interest, if not for the 2001–02 financial crisis in Argentina. For detailed analysis, see in this volume, J Kurtz, 'Delineating Primary and Secondary Rules on Necessity at International Law'.