The Principle of Rational Decision-Making – As Applied to the Identification of Normative Conflicts in International Law

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Abstract

The resolution of normative conflicts is a recurring issue for the application of international law, more so now than ever before. To help law-applying agents to justify decisions resolving a conflict between two norms, international law provides a host of different conflict rules. As several studies reveal, to apply such a conflict rule, law-applying agents often have to draw on political considerations. If international law gives priority to *lex specialis* over *lex generalis*, for example, it does not provide any criteria that can be used for classifying particular rules as either general or special. For this reason, rather than putting conflict rules to practical use, international courts and tribunals often choose the easy way out, simply denying that a conflict exists. As the author of this article argues, this is not a very effective strategy, since a decision determining the existence of a conflict is no less dependent on political considerations. The author believes that although a decision determining the existence of a conflict often cannot be founded on international law *simpliciter*, it should always withstand the test of rational reason. He ends the article by suggesting a mode of reasoning that would seem to meet this concern.

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I. Introduction

Because of the lack of a centralized international legislature, and because of the increased specialization of international legal regulation, the resolution of normative conflicts is a recurring question for the application of international law. The existence of a normative conflict inevitably raises issues of legal reasoning. If ever the coherence of international law and legal practice is a value, in a situation where two norms of international law are in conflict, and the application of law requires that the conflict be resolved, irrespective of the identity of the law-applying agent – whether a judicial body, such as an international court or arbitrary tribunal, or an organ of a state or an international organisation – a principled decision should be sought. Whatever the decision of the law-applying agent, observers should always be able to reconstruct it as a conclusion inferred from sound premises according to the accepted rules of inference.[1] Throughout this article, I will refer to this idea as the principle of rational decision-making.

Granted that the principle of rational decision-making is accepted, analytically speaking, any decision taken to resolve a conflict between two norms of law entails the justification of two separate decisions, each representing a separate stage in the decision-making process. First, there is the decision determining the existence of a conflict. The question for the law-applying agent to answer is whether a normative conflict exists or not. Second, there is the decision determining the relationship between the conflicting norms. If, in the first stage of the decision-making process, the law-applying agent comes to the conclusion that a conflict exists, obviously, the question next to be answered is whether this conflict should be resolved in favour of the one norm or the other.

To help a law-applying agent through the second stage of the decision-making process, and justify a decision determining the relationship between two conflicting norms, international law provides a host of different conflict rules. Examples include rules that implement the postulated superiority of peremptory international law (*jus cogens*); [2] rules that are established by treaty in specific conflict clauses, such as for instance Article 103 of the

[1] See e. g. *J. Wróblewski*, Legal Syllogism and Rationality of Judicial Decision, Rechtstheorie 5 (1974), 33, at 38 et seq. *Wróblewski* distinguishes between the internal and the external rationality of a legal decision, whereas obviously not only the soundness of the inference can be tested, but also the soundness of the premises.

[2] Comp. *U. Linderfalk*, Normative Conflict and the Fuzziness of the International ius cogens Regime, ZaöRV 69 (2009), 961, at 964 et seq.

Charter of the United Nations,[3] or Article 311, paragraph 1 of the 1982 UN Convention on the Law of the Sea (UNCLOS);[4] and rules that give priority to *lex specialis* over *lex generalis* and to *lex posterior* over *lex prior*.[5] As practice reveals, however, international judicial bodies are markedly reluctant to avail themselves of those rules and reach a decision determining the relationship between two conflicting norms.

Commentators have interpreted this reluctance to mean that international judicial bodies are unwilling to assume responsibility for the political decision often required to put the international conflict rules to use in particular cases.[6] For example, to apply the rule that gives priority to *jus cogens* over ordinary international law, law-applying agents have to choose the criterion by which a rule of *jus cogens* is to be identified. To apply the rules that give priority to *lex specialis* over *lex generalis* and to *lex posterior* over *lex prior*, law-applying agents have to choose the criterion by which a rule is to be classified as special and general, or later and earlier, respectively. Instead of fully accepting and confronting this political component inherent in the application of international conflict rules, and developing a principled way of managing and controlling it, as experience shows, international judicial bodies often choose the easy way out. They altogether deny that a conflict exists.

This setting helps explain the purpose of the present article. The purpose is twofold. First, the aim is to establish the pervasiveness of political considerations in the decision-making process operating to resolve conflicts between international legal norms. As the article will argue, a decision determining the existence of a conflict is no less dependent on political considerations than the decision determining the relationship between two conflicting norms. This is because in international legal language, there are several equally valid definitions of the concept of a normative conflict, and although particular contexts of use may sometimes help exclude the relevance of some such definitions, it is often at the discretion of each and every law-applying agent to decide on the appropriate interpretation. Consequently, if the reluctance of international judicial bodies to apply international conflict rules can indeed be explained by their unwillingness to assume responsibility for the political decision often implicated, then as this article suggests,

[3] The Article reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[4] 1833 UNTS 397. Art. 311, para. 1 reads: "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."

[5] Comp. e. g. *M. Shaw*, International Law, 6th ed. 2008, 123 et seq.

[6] See e. g. *J. Klabbers*, Treaty Conflict and the European Union, 2009, 104.

this is not a very good strategy. Secondly, the aim of the article is to inquire into the further implications of the principle of rational decision-making for the determination of the existence of normative conflicts in international law. The principle of rational decision-making requires that a decision determining the existence of a normative conflict be based on rational reason, even in those particular cases where it cannot be based on international law *simpliciter*.

This article will suggest a model of reasoning that would seem to meet this concern. For illustration purposes, it will depart from the decision recently handed down by the International Court of Justice (ICJ) in the *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*.[7]

The organization of the article will be as follows. Section II. will introduce the general background of the *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)* together with the findings of the ICJ relevant to a discussion of the conflict *problematique*. Section III. will inquire into the various definitions of the concept of a normative conflict applied in international law and legal discourse. Section IV., drawing on the earlier Sections II. and III., will suggest a model of reasoning that would help a law-applying agent like the ICJ to determine the existence of normative conflicts and still remain faithful to the principle of rational decision-making.

II. The *Case Concerning Jurisdictional Immunities of the State*

On 23.12.2008, the Federal Republic of Germany (Germany) submitted an application instituting proceedings in the ICJ against the Italian Republic (Italy).[8] The application was provoked by a series of decisions taken by Italian courts involving Germany as a respondent in civil proceedings, and in one case also directly affecting German state-owned property. Among other things, Italy had allowed tort claims to be brought against Germany based on violations of international humanitarian law committed by German armed forces and other organs of the German Reich during its occupation

[7] *Case Concerning Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening*), Judgment of 3.2.2012, currently available only through the web-page of the Court: <http://www.icj-cij.org>.

[8] As a basis for the jurisdiction of the Court, the applicant cited Art. 1 of the European Convention on the Peaceful Settlement of Disputes, ETS, No. 23.

of Italy between 1943 and 1945. Violations involved the large-scale killing of civilians as part of a policy of reprisals; deportation of members of the civilian population to slave labour in Germany; and the denial of a prisoner of war status to members of the Italian armed forces, who were similarly used as forced labourers. Certainly, Germany had itself taken several steps to ensure the reparation of victims of Nazi persecution during World War II. However, it had excluded from the scope of its national compensation schemes most claims by Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labour.[9]

In 1998, Mr. *Luigi Ferrini*, who had been arrested in 1944 and deported to Germany, where he was forced to work in a munitions factory for the remaining part of the war, instituted proceedings against Germany in the Court of Arezzo. This Court declared Mr. *Ferrini's* claim inadmissible on the ground that Germany, as a sovereign state, enjoyed jurisdictional immunity. The Court of Appeal of Florence dismissed the appeal of the claimant on similar grounds. In 2004, however, the Italian Court of Cassation held that Italian courts had jurisdiction over claims for compensation brought against Germany by Mr. *Ferrini*. The reason being that jurisdictional immunity cannot be invoked when the acts complained of constitute international crimes; and the case was referred back to the Court of Arezzo. Following this judgment of the Court of Cassation, several further claimants have brought proceedings against Germany in Italian courts. At the time when the ICJ delivered its decision, several claims were still pending.[10]

The ICJ began its consideration of the dispute between Germany and Italy by clarifying the issue before it. In its application to the ICJ – as repeated in the course of the subsequent written and oral proceedings – Germany had asked the Court to adjudge and declare that Italy, by allowing claims like those of Mr. *Ferrini*, had failed to respect the jurisdictional immunity of Germany under customary international law, and by so doing had engaged the international responsibility of Italy. Italy, for its part, had asked the Court to adjudge and to hold that the claims of Germany were unfounded.[11] Consequently, as the Court explained, it was not its task to decide whether the conduct of the German armed forces and other organs of the German Reich was unlawful or not. No doubt, several (if not all) of the Italian court proceedings that Germany was complaining of had their origin in acts that were contrary to international law. Even worse, in the terminology of Article 6 of the Charter of the International Military Tribunal convened

[9] *Jurisdictional Immunities of the State* (note 7), paras. 20-26.
[10] *Jurisdictional Immunities of the State* (note 7), paras. 27-29.
[11] *Jurisdictional Immunities of the State* (note 7), paras. 15-17.

at Nuremberg, they originated in the commission of *war crimes* and *crimes against humanity*. However, for the resolution of the dispute between Germany and Italy, in the final analysis, this legal classification was somewhat beside the point. The only question for the Court to decide was whether or not, in proceedings regarding claims of compensation arising out of the unlawful conduct of German state organs, Italian courts were obliged to accord Germany immunity.[12]

As the Court emphasized, the rule of state immunity occupies a prominent place in customary international law.[13]

> "It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1 of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[14]

Although both parties to the dispute agreed that states are generally entitled to immunity in respect of *acta jure imperii*, they had different opinions as to the rigidity of this rule. While Germany insisted that the rule had no exceptions relevant to the consideration of the case at hand, Italy maintained the existence of two such exceptions, each representing a separate line of argument.[15] First, as Italy argued, state immunity did not extend to torts or delicts occasioning death, personal injury, or damage to property committed on the territory of the forum state. Second, Germany was not entitled to immunity because the acts it had committed involved the violations of rules of international law having the character of *jus cogens*.

The Court concluded that irrespective of whether current customary international law recognized a tort exception to the rule of state immunity, like that invoked by Italy, this exception was not applicable to torts allegedly committed by the armed forces of one state on the territory of another in the course of an armed conflict. As to Italy's second line of argument, the Court noted that in the final analysis, it assumed the existence of a conflict between the rule of state immunity and the rules of armed conflict having the character of *jus cogens*.

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12 *Jurisdictional Immunities of the State* (note 7), paras. 52-53.
13 *Jurisdictional Immunities of the State* (note 7), para. 57.
14 *Jurisdictional Immunities of the State* (note 7), para. 57.
15 *Jurisdictional Immunities of the State* (note 7), para. 61.

"Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument goes, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way."[16]

In the opinion of the Court, no such conflict existed.

"The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of the proceedings are brought was lawful or unlawful."[17]

Forestalling this objection, in its Counter-Memorial, Italy had argued that in the determination of whether or not a conflict existed, focus should be less on the violations of humanitarian law committed by the German Reich between 1943 and 1945, and more on the duty of Germany to redress those violations.[18] It noted the provision laid down in Articles 51, 52, 131 and 148 of the four Geneva Conventions of 1949, respectively:

"No Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by any other High Contracting Party in respect of breaches referred to in the preceding Article [i. e. grave breaches of the Convention]."

As Italy maintained, this provision – based as it was on the idea that states should not be allowed to trade off rights of those protected by the Conventions by entering into derogatory post-war agreements –[19] reflected a rule of customary international law having the character of *jus cogens*.[20] If the acts committed by the German Reich between 1943 and 1945 involved violations of *jus cogens*, then the duty of Germany to make reparations for those violations must be *jus cogens*, too. Consequently, in maintaining the existence of a conflict between the rule of state immunity and peremptory international law, Italy primarily thought, not of the obligation of Germany to resist from acts constituting war crimes or crimes against humanity, but

16 *Jurisdictional Immunities of the State* (note 7), para. 92.
17 *Jurisdictional Immunities of the State* (note 7), para. 93.
18 *Case Concerning Jurisdictional Immunities of the State*, Counter-Memorial of Italy, 22.12.2009, currently available only through the web-page of the Court: <http://www.icj-cij.org>, paras. 5.7-5.26.
19 See ICRC Commentaries to each respective article of the four 1949 Geneva Conventions, available through the web-page of the ICRC: <http://www.icrc.org>.
20 Counter-Memorial of Italy (note 18), para. 5.18.

rather of the duty of Italy not to absolve Germany of any liability incurred in respect of such crimes. The ICJ, once again, declared itself not convinced:

> "The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump-sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted."[21]

As the Court eventually held, by allowing the claims of Mr. *Ferrini* and others to be brought in Italian courts, Italy had violated its international obligation to respect the immunity of Germany.

This decision certainly provokes a number of different questions concerning the interpretation and application of international law. In the present article, all attention will be focused on the proposition insisted upon by the Court that in the final analysis, no conflict existed between a rule of peremptory international law and the rule of immunity. The question concerning the relationship between *jus cogens* and rules of immunity is certainly not new to international lawyers. It has been raised earlier in the context of domestic court proceedings, and in the course of the consideration of complaints brought before the European Court of Human Rights.[22] However, never before has a judicial body as important as the ICJ taken such a clear stance in the matter. If we take the arguments of Italy seriously, obviously, there is more than one way to define the concept of a normative conflict in a context involving a rule of *jus cogens*. Considering how easily the ICJ discarded with Italy's understanding of the situation, the Court's findings provoke a fresh look at the concept of a normative conflict. Hence, the question to be addressed in the subsequent section of this article is this: Respecting the terminology of international law, in what sense or senses can we possibly speak about a conflict between two norms of law?

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[21] *Jurisdictional Immunities of the State* (note 7), para. 94.

[22] See e. g. the case law cited by the International Court itself. *Jurisdictional Immunities of the State* (note 7), paras. 85 and 90.

III. Possible Definitions of the Concept of a Normative Conflict

In the currently used terminology of international law, depending on the particular context of use, *normative conflict* may have many different meanings. This ambiguity inherent in the term would seem to owe to the fact that participants in international legal discourse (i. e. the users of the term) perceive of international law as a many-faceted system operating at different levels. At one level of analysis, international law is the logically well-orderly arrangement of a set of legally binding norms. At another level, international law is an instrument for the realisation of some certain states of affairs, often referred to as the objects and purposes of the law. At another level yet, international law is the expression of some certain set of social values. To denote those three fundamentally different ways of looking at international law, I will speak about the formalist's, the teleologist's, and the axiologist's definition of the concept of a normative conflict, respectively. To complicate things even further, the formalist's definition can be framed from different perspectives. Consequently, as will gradually transpire in the subsequent parts of this Section, I will also distinguish between, in turn, the formalist moderated duty-holder's definition, the formalist plain duty-holder's definition, the formalist law-maker's definition, and the formalist observer's definition of the concept of a normative conflict.

According to the formalist moderated duty-holder's definition of the concept of a normative conflict, conflict stands for the occurrence of a situation where two norms are both binding relative to two or more legal subjects at some particular point in time or during some particular time period; where both norms are applicable relative to some particular concrete conduct or state of affairs; and where the obligations entailed by the two norms relative to this concrete conduct or state of affairs are logically inconsistent.[23] For example, two states, say Slovakia and Hungary, may have concluded an agreement imposing upon each the obligation to contribute to the construction of a hydroelectric power plant in a river separating their respective territories.[24] Slovakia and Hungary may each also have an obligation under customary international law to ensure that activities within their jurisdiction or control do not cause damage to the environment of other

[23] See e. g. Indonesia – Certain Measures Affecting the Automobile Industry, WTO Panel Report, adopted on 2.7.1998, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.28.

[24] Comp. *Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgment of 25.9.1997, ICJ Reports 1997, 7.

states.[25] If it is established that the construction or operation of the power plant necessarily causes damage to the environment of the downstream state (i. e. Hungary), then according to the formalist duty-holder's definition of the concept of a normative conflict, the obligations owed by Slovakia under the agreement are in conflict with those owed by it under customary international law.

According to the formalist plain duty-holder's definition of the concept of a normative conflict, conflict stands for the occurrence of a situation where two norms are both binding on a particular legal subject at some particular point in time or during some particular time period; where both norms are applicable relative to some particular concrete conduct or state of affairs; and where the obligations entailed by the two norms relative to this concrete conduct or state of affairs are logically inconsistent.[26] This definition differs from the formalist moderated duty-holder's definition in so far as it focuses all attention to the situation of an obligated party, while ignoring completely the other party or parties of the relevant legal relationship: the holder or holders of the corresponding rights. For example, a sales agreement between two states, say Sweden and Yugoslavia, may impose on Sweden an obligation to deliver weapons or other military equipment to Yugoslavia at some particular agreed date, say 1.6.1992. If a resolution is adopted by the UN Security Council under Article 41 of the UN Charter imposing on all UN members states the obligation to immediately implement a general and complete embargo on all deliveries of weapons and other military equipment to Yugoslavia,[27] then according to the formalist plain duty-holder's definition of the concept of a normative conflict, the obligations owed by Sweden under the sales agreement are in conflict with those owed by it under the Charter of the UN. For the purpose of the assessment whether a normative conflict exists or not, if the membership of Yugoslavia in the UN is in doubt, this does not really matter. All that matters are the obligations of Sweden.

As noted by several commentators, what I have here referred to as the formalist moderate and plain duty-holder's definitions of the concept of a normative conflict have drawn criticism, the reason being that they automatically give preference to commands and prohibitions over permissions.[28] In an earlier article on a partly related topic, to illustrate this proposition I

[25] Comp. Principle 21 of the Declaration of the UN Conference on the Human Environment, held in Stockholm, on 5.-16.6.1972.

[26] See e. g. Art. 30 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[27] See S/RES/713 (1991) of 25.9.1991.

[28] See e. g. *J. Pauwelyn*, Conflict of Norms in Public International Law, 2003, 169 et seq.

used the example of Russia and Norway.[29] I assumed a situation where each of the two states had established an exclusive economic zone (EEZ) in the Barents Sea. According to customary international law, that would prohibit Norway from conferring on Norwegian fishing vessels a license to catch fish in any part of the Barents Sea included in the Russian EEZ. It would similarly prohibit Russia from conferring on Russian fishing vessels a license to catch fish in the Norwegian EEZ. For the sake of illustration, in my article I also assumed that Russia and Norway had concluded a bilateral fishing agreement permitting each state to confer on its own nationals a license to catch fish belonging to some particular specie, say cod, in the EEZ of the other state up to some particular quota, say ten thousand tons yearly. Now, in this legal setting, I assumed that the registered owner of a Norwegian fishing vessel – we shall refer to him here as Mr. *Larsen* – applied to Norwegian authorities for a license to catch cod in the Russian EEZ. An approval of the application would not encroach upon the yearly limit of ten thousand tons. From the point of view of Norway, according to any of the two variants of the formalist duty-holder's definition of the concept of a normative conflict, this situation does not present the existence of a normative conflict. According to customary international law, Norway shall not confer on Mr. *Larsen* a license to catch cod in the Russian EEZ. According to the bilateral fishing agreement, Norway *may* confer on Mr. *Larsen* a license to catch cod in the Russian EEZ, but it is not obliged to do so. Since Norway can always abstain from doing what it is permitted to do, in this case, our definition of the concept of a normative conflict would seem to give preference to customary international law. This does not make sense, particularly since the outcome of the application of our definition will inevitably depend on whether the legal relationship between Norway and Russia is considered from the perspective of the one party or the other. For as much as the application of Mr. *Larsen* can be considered from the perspective of Norway, naturally, it can be considered from the perspective of Russia, too. According to customary international law, Russia may freely ignore any license to catch cod in the Russian EEZ conferred by Norway on Mr. *Larsen*. According to the bilateral fishing agreement, Russia shall acknowledge a license to catch cod in the Russian EEZ conferred by Norway on Mr. *Larsen*. Apparently, considered from the perspective of Russia, our definition of the concept of a normative conflict gives preference to the bilateral fishing agreement.

To avoid the obvious shortcomings of the two variants of the formalist duty-holder's definition, instead, international lawyers sometimes frame

[29] *U. Linderfalk* (note 2), 966 et seq.

their analyses from an observer's perspective. According to the formalist observer's definition of the concept of a normative conflict, conflict stands for the occurrence of a situation where two norms are both binding relative to two or more legal subjects at some particular point in time or during some particular time period; and where the implications of those two legal relationships relative to some particular concrete conduct or state of affairs are logically inconsistent.[30] Using this definition, a legal relationship is not any more considered from the perspective of an obligated party (i. e. a duty-holder), but from the perspective of an observer, who is trying to describe, from the point of view of the relationship between two or more legal subjects, the implications of the application of a rule of law to some particular conduct or state of affairs. Once again in the example of Norway and Russia, if Norway confers on Mr. *Larsen* a license to catch cod in the Russian EEZ, while according to customary international law, Norway shall be considered to have breached its international obligation owed to Russia, according to the bilateral fishing agreement, Norway shall be considered not to have breached its international obligations owed to Russia. In the light of the formalist observer's definition, obviously, this situation presents the existence of a normative conflict.

According to the formalist law-maker's definition of the concept of a normative conflict, conflict stands for the occurrence of a situation where two norms are both *prima facie* binding on some particular legal subjects at some particular point in time or during some particular time period; and where the obligations entailed by the two norms, if applied, would be logically inconsistent.[31] This definition compares with the formalist plain duty-holder's definition of the concept of a normative conflict in so far as it focuses all attention to the obligated party in a legal relationship. It differs from this same definition – and certainly also from the formalist observer's and plain duty-holder's definitions of the concept of a normative conflict – in so far as it is not concerned with the application of law relative to any particular conduct or state of affairs. Instead, it is concerned with the application of law potentially. The formalist law-maker's definition could perhaps be explained by saying that at the end of the day, it focuses more on the law-making competencies of states and international organizations than the substance of the conflicting norms. Rather than anything else, the sub-

[30] See e. g. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident of Lockerbie (*Libyan Arab Jamahiriya v. United States of America*), Provisional Measures, Order of 14.4.1992, ICJ Reports 1992, 114, para. 42.

[31] Comp. e. g. Arts. 53 and 64 of the 1969 Vienna Convention (note 26). *Pauwelyn* refers to this category as *inherent conflicts*. See *J. Pauwelyn* (note 28), 275 et seq.

stance of the conflicting norms is a means to determine whether states and international organizations have acted within the scope of their law-making competencies or not; hence the designation of the definition as that of the formalist law-maker.

To illustrate, take the example of Indonesia and East Timor. In the late 1980s, Indonesia was still illegally occupying the Non-Self Governing Territory of East Timor. In 1989, Australia concluded a treaty with Indonesia ("the Timor Gap Treaty"), according to which among other things the exploration and exploitation of petroleum resources in a particular area designed as "Area C" lying just off the coast of the territory of East Timor would be under the control of Indonesia. For Australia this treaty created an odd situation. According to customary international law, as a result of the right of the East Timorese people to self-determination, Australia was under an obligation not to deprive the people of East Timor of its right to freely dispose of natural resources, including the petroleum resources in Area C. This obligation followed from a rule of *jus cogens*.[32] According to the Timor Gap Treaty, on the other hand, Australia had an obligation to acknowledge the right of Indonesia to control the exploration and exploitation of petroleum resources in Area C. In a situation like this, the Timor Gap Treaty shall be void. This conclusion follows from Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT): "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." It should be noted that the Timor Gap Treaty was never applied, while legally speaking it was a nullity from the very beginning. If it had been applied, however, the obligations of Australia under the Timor Gap Treaty would have been found logically inconsistent with the obligations incumbent upon it under a rule of *jus cogens*. Because of this mere potentiality inherent in the Timor Gap Treaty, according to the terminology of Article 53, the Treaty and the rule of *jus cogens* may be said to be in conflict.

According to the teleologist's definition of the concept of a normative conflict, conflict stands for the occurrence of a situation where two norms are both binding on some particular legal subject at some particular point in time or during some particular time period; where both norms are applicable relative to some certain concrete conduct or state of affairs; and where the application of the one norm would be contrary to the teleological prin-

[32] See e. g. the Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, Report of the International Law Commission on the Work of its 53rd Session, 23.4.-1.6.2001 and 2.7.-10.8.2001, UN Doc. A/56/10, p. 20, at 85 (Draft Art. 26).

ciple underlying the other.[33] As is commonly accepted, a rule of international law is typically created for the realization of some assumed state of affairs, often referred to as the object and purpose of the rule, or its *telos*. For example, Article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was created for the purpose of effectively preventing and punishing genocide.[34] Article 4 of the 1921 Convention Respecting the Non-Fortification and Neutralisation of the Åland Islands (the Åland Islands Convention) was created for the purpose of ensuring that the territory of the Åland archipelago never becomes a cause of danger from the military point of view.[35] Part V of the 1982 UN Convention on the Law of the Sea, establishing the legal regime of the EEZ, was created, among other things, for the purpose of ensuring freedom of navigation. Another way of describing this relationship between a rule of law and its object and purpose would be to say that the justification of a rule of international law typically includes one or several teleological principles. The justification of Article 1 of the Genocide Convention includes the principle that acts of genocide should be prevented. The justification of Article 4 of the Åland Island Convention includes the principle that no part of the territory of the Åland Archipelago should ever be allowed to become a cause of danger from the military point of view. The justification of Part V of the UNCLOS includes the principle that in an EEZ, all states should enjoy freedom of navigation.

Drawing on those observations, the implications of the teleologist's definition of the concept of a normative conflict can be illustrated by the following three examples:

- If it can be shown that a weapon embargo decided by the UN Security Council under Article 41 of the Charter of the UN inhibits a party in an on-going armed conflict to take measures to effectively prevent genocide,[36] then because of the teleological principle underlying Article 1 of the Genocide Convention, we have reason to argue that a normative conflict exists.

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[33] See e. g. Art. 41, para. 1 of the 1969 Vienna Convention (note 26). For an in-depth analysis of the concept of teleological conflicts, see *N. Matz-Lück/R. Wolfrum*, Conflicts in International Environmental Law, 2003, 8 et seq., et passim.

[34] 78 UNTS 277. The Article reads: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

[35] 9 LNTS 211. The Article reads: "Aucune force militaire, navale ou aèrienne d'aucune Puissance ne pourra pénétrer ni sojourner dans la zone".

[36] Comp. the argument of Bosnia-Herzegovina in its further request for provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, discussed at some length by Judge *Lauterpacht*. See Separate Opinion of Judge *Lauterpacht*, Order of 13.9.1993, ICJ Reports 1993, 325, at 440.

- If Finland is a party to the 1992 Treaty on Open Skies,[37] which implies that it has to accept the conduct by other parties to that treaty of observation flights using military aircrafts over its entire territory, including the Åland archipelago, then irrespective of the wording of Article 4 of the 1921 Åland Island Convention, because of the teleological principle underlying this Article, the two treaties are not in conflict.[38]

- If Article 8 of the Convention on Biological Diversity is interpreted to allow for the establishment of areas of environmental protection in an EEZ,[39] although this might exclude the passage through that area of all maritime traffic, then because of the teleological principle underlying Part V of the 1982 UNCLOS, the two treaties may be said to be in conflict.

According to the axiologist's definition of the concept of a normative conflict, conflict stands for the occurrence of a situation where two norms are both binding on some particular legal subject at some particular point in

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[37] E102747 – CTS2002 No. 3. The Treaty is deposited with the Canadian Government. The full text can be accessed through the Treaty Series web-page of this Government: <http://www.treaty-accord.gc.ca>. In explaining the creation and existence of the regime established by this Treaty, commentators typically refer to it as a confidence- and security-building measure. By providing participating states with the possibility of obtaining military information on equal terms – whether they have access to military satellite surveillance systems or not – as stated in its preamble, the Treaty promotes "openness and transparency"; it facilitates "the monitoring of compliance with existing or future arms control agreements"; and it strengthens "the capacity" of the participating states for "conflict prevention and crisis management" in the framework of relevant international institutions.

[38] This possible conflict is discussed at length in *U. Linderfalk*, International Legal Hierarchy Revisited: The Status of Obligations *Erga Omnes*, NJIL 80 (2011), 1 et seq. Interestingly, in ratifying the 1992 Treaty on Open Skies, the Government of Finland expressed an opinion arguing this proposition exactly: The purposes of the Treaty on Open Skies are consistent with the purposes of the Åland Islands Convention; for this reason, normative conflicts need not occur in the application of the two agreements. See "Regeringens proposition till Riksdagen om godkännande av fördraget om observationsflygningar samt med förslag till lag om ikraftträdande av de bestämmelser i fördraget som hör till området för lagstiftningen och till lag om ändring av 14 § territorialövervakningslagen", 24.5.2002, the Bill is available through the webpage of the Åland Islands Peace Institute, but regrettably only in Finnish and Swedish: <http://www.peace.aland.fi>, search-path "Debatten om Open Skies over Åland".

[39] 1760 UNTS 79. The Article reads in relevant parts:

"Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; …

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; …

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies; […]."

This possible conflict is discussed at length in *N. Matz-Lück/R. Wolfrum* (note 33), 22 et seq.

time or during some particular time period; where both norms are applicable relative to some particular concrete conduct or state of affairs; and where the application of the one norm to this conduct or state of affairs would be contrary to the value claim or value postulate underlying the other.[40] Just as a rule of law may serve to articulate a teleological principle, it may serve to articulate a value claim or value postulate. For example, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is founded on the postulate that human dignity is a good.[41] The principle of equidistance is founded on the postulate that the equitable division of maritime zones is a good.[42] Similarly, Article 63 of the VCLT is founded on the postulate that treaty relations are a good.[43] Naturally, although teleological principles are not necessarily consequential on value postulates, to the extent that they are, a situation meeting the description of the teleologist's definition of the concept of a normative conflict would typically meet also the description of the axiologist's definition. For example, since the effective prevention of acts of genocide is a necessary component of the idea of human dignity as a good, in cases where the full implementation of a UN Security Council resolution would be contrary to the object and purpose of Article 1 of the Genocide Convention, it would be contrary to the concept of human dignity, too.

As should be realized, however, value postulates have a role to play in the determination of normative conflicts independently of teleological principles, for several reasons. Most importantly, first, when a rule of law is founded on a teleological principle, this principle will often serve to mediate between different potentially conflicting value postulates. Secondly, depending on the subject-matter governed by a rule of law, the articulation by a rule of law of a value postulate can sometimes be achieved without the

40 See e. g. "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the ILC Study Group, UN Doc. A/CN.4/L.682, 13.4.2006, 19; *J. Klabbers* (note 6), 33 et seq.

41 ETS, No. 5. The Article reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

42 According to the principle of equidistance, in so far as the delimitation of the territorial sea, EEZ, or continental shelf between states with opposite or adjacent coasts, neither state may extend the boundary of any such zone beyond the median line every point of which is equidistant from the nearest point on the baselines from which the zone is measured. See e. g. Article 15 of the 1982 UN Convention on the Law of the Sea (note 4).

43 The Article reads: "The severance of diplomatic or consular relations between parties to a treaty does not alter the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty." (note 26).

need for any intermediate teleological principle.[44] Consequently, international lawyers continue to speak about normative conflicts in the sense of the axiologist's definition. The practical implications of the definition can be illustrated by the following two examples:

- According to Article 3 of the ECHR, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". As earlier stated, Article 3 of the ECHR is founded on the postulate that human dignity is a good. Hence, if the application of an extradition treaty between the UK and the US would result in the exposure of an extradited person to treatment pervasive to human dignity, the extradition treaty would be in conflict with Article 3 of the ECHR.[45]

- According to Article 27, paragraph 1 of the Statute of the International Criminal Court (ICC), "[t]his Statute shall apply equally to all persons without any distinction based on official capacity". This Article is founded on the value claim that the non-discriminatory application of international criminal law is a good. Consequently, if the UN Security Council has requested the ICC not to commence or proceed with investigations or prosecution of a case involving current or former officials or personnel from a state not a party to the ICC Statute, over acts or omissions related to a UN peace-keeping operation,[46] the possible obligations incumbent upon the ICC under this request are in conflict with its obligations under Article 27 of the ICC Statute.

IV. The Role of Political Considerations for the Determination of the Existence of a Normative Conflict

If apparently international legal language allows more than one definition of the concept of a normative conflict, then this still does not answer the question whether there is also more than one way to define this concept in the particular context of the *Jurisdictional Immunities of the State (Germany v. Italy).* For the purpose of the resolution of this dispute, the concept of a normative conflict is not to be considered in the abstract. It is to be considered in the context of a particular conflict rule referred to by the Court as follows:

[44] Art. 3 of the ECHR would seem to be a case in point.

[45] Comp. the *Soering Case*, Judgment of 7.7.1989, Publications of the European Court of Human Rights, Ser. A, Vol. 161.

[46] See UNSC Res. 1422 (2002) and 1487 (2003).

> "*[J]us cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law."[47]

Clearly, not all uses of the term normative conflict accepted in international legal discourse fit with this context. To begin with, the formalist lawmaker's definition can be immediately excluded. It is applicable only in the context of conflict rules, where the anticipation of logically inconsistent obligations in the application of two norms of law is a reason for considering the one norm a nullity. The situation confronting the International Court is quite another. If, as Italy argued, the rule of state immunity had to yield – whether to the obligation of Germany to resist from acts constituting war crimes or crimes against humanity, or to the duty of Italy not to absolve Germany of any liability incurred in respect of such crimes – then according to the relevant conflict rule, this would still not have made the rule of state immunity a nullity. Certainly, the rule would not have been applicable for the purpose of the assessment of the Italian court proceedings in the cases of *Ferrini* and others, but nothing would have prevented its application to the assessment of any other future proceedings, whether they involve the same two states or not.

The formalist moderated duty-holder's and formalist observer's definitions remain problematic, too, given that we accept the nowadays commonly held assumption that rules of *jus cogens* always express obligations *erga omnes*.[48] Typically, international legal norms express bilateral obligations. A bilateral obligation is an obligation like the fishing agreement between Russia and Norway, or the rule of customary international law that prohibits Norway from conferring on Norwegian fishing vessels a license to catch cod in any part of the Russian EEZ. It is held on a basis of reciprocity: the obligation owed by the one legal subject (S_1) to the other (S_2) corresponds to an obligation owed by the other (S_2) to the one (S_1), and the performance of the obligation owed by S_1 is a necessary condition for the performance of the equivalent obligation owed by S_2.[49] An obligation *erga omnes*, on the other hand, is an obligation owed to the "the international community as a whole".[50] Such obligations are not owed on a basis of reciprocity: the obli-

[47] *Jurisdictional Immunities of the State* (note 7), para. 92.

[48] See e. g. *S. Kadelbach*, *Jus Cogens*, Obligations *Erga Omnes* and other Rules: The Identification of Fundamental Norms, in: C. Tomuschat/J.-M. Thouvenin (eds.), The Fundamental Rules of International Legal Order, 2006, 21, at 25.

[49] Comp. *L. A. Sicilianos*, The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility, EJIL 13 (2002), 1127 et seq.

[50] Comp. Articles on Responsibility of States for Internationally Wrongful Acts, Art. 48, para. 1(b).

gation owed by a legal subject (S_1) to the international community does not correspond to any obligation owed by the international community to S_1. For the very same reason, the performance of the obligation owed by S_1 to the international community is not a necessary condition for the performance of the equivalent obligations owed by any other legal subjects.[51]

The formalist moderated duty-holder's and formalist observer's definitions both require the occurrence of a situation where two norms are binding relative to two identical legal subjects. Not only must the obligated party be the same, but also the right-holder. By this requirement, the formalist moderated duty-holder's and formalist observer's definitions seem to envisage mainly situations where the two norms involved express bilateral obligations. Clearly – if we accept that a rule of *jus cogens* inevitably expresses obligations *erga omnes* – those same definitions do not envisage situations where the two norms involved are the rule of state immunity and a rule of *jus cogens*, the former of which expresses obligations of a bilateral character. In such a situation, right-holders remain different by the very definition. As long as we confine analyses to the formalist moderated duty-holder's and formalist observer's definitions of the concept of a normative conflict, in fact, no rule of *jus cogens* can ever be in conflict with the rule of state immunity. On further scrutiny, then, if the formalist law-maker's definition does not fit with the context of the relevant conflict rule that gives priority to rules of *jus cogens* over rules of ordinary international law, neither do the formalist moderated duty-holder's and formalist observer's definitions.

This leaves us with the teleologist's, axiologist's, and formalist plain duty-holder's definitions of the concept of a normative conflict. Of course, none of those three definitions will be applicable to the case of *Jurisdictional Immunities of the State*, as long as we conceive of the relevant situation as one where the prohibitions of war crimes or crimes against humanity are involved. Obviously, the prohibitions of war crimes and crimes against humanity can never be applicable relative to the same particular concrete conduct as the rule of state immunity. In the words of the ICJ, "[t]he two sets of rules address different matters".[52] To this extent, the conclusion of the Court seems undeniable.

Things get more complicated, however, if instead we conceive of the situation in line with how Italy argued in its Counter-Memorial, focusing upon the relevant secondary norms of international law rather than the primary ones. According to the one norm involved, Italy has an obligation not to exercise jurisdiction over Germany. According to the other relevant norm,

[51] Comp. *L. A. Sicilianos* (note 49).
[52] *Jurisdictional Immunities of the State* (note 7), para. 93.

Italy has the duty not to absolve Germany of any liability incurred in respect of war crimes and crimes against humanity. Considered from the perspective of the formalist plain duty-holder's definition of the concept of a normative conflict, those two obligations are not logically inconsistent. They are not for the simple reason that allowing tort claims to be brought in Italian courts is not the only way for Italy to make sure that the war crimes committed by German armed troops during World War II are properly redressed. Hence, the rule of state immunity is not in conflict with the assumed rule of *jus cogens*.

Now, if instead we consider the two norms from the perspective of the teleologist's and axiologist's definitions of the same concept, a fundamentally different picture emerges. It is the teleological principle underlying the assumed rule of *jus cogens* that war crimes and crimes against humanity should be redressed. The rule is founded on the value postulate that effective reparation is a good. If Italy would have applied the rule of state immunity, and abstained from exercising jurisdiction over Germany, then this would clearly have been contrary to both. This conclusion applies irrespective of whether or not allowing tort claims to be brought in Italian courts is the only way for Italy to make sure that the violations committed by the German Reich are properly redressed. Consequently, considered from the perspective of both definitions, the rule of state immunity is certainly in conflict with the assumed rule of *jus cogens*.

Of course, Italy's line of argument had a weak point. It built on the assumption that the alleged obligation of Italy not to absolve Germany of any liability incurred in respect of war crimes and crimes against humanity ensued from a rule that had the character of *jus cogens*. It could be argued that Italy failed on this point exactly. Indeed, the ICJ remarked that …

> "… against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump-sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted."[53]

The important point to note, however, is the functional relationship between this proposition and the earlier remark made by the ICJ that in the end, no conflict existed. For the Court, obviously, the difficulty of establishing the *jus cogens* character of the relevant obligation, and the assumed

[53] *Jurisdictional Immunities of the State* (note 7), para. 94.

non-existence of a conflict, worked as separate reasons to reject Italy's *jus cogens* argument. This is why this latter assumption provokes further discussion.

In refusing to recognize the existence of a normative conflict, considering the analysis performed earlier in this Section, the International Court quite clearly conceived of the situation using the formalist plain duty-holder's definition. It did not to conceive of the situation using either the teleologist's or the axiologist's definition. Since there is nothing in the relevant conflict rule to suggest that from the point of view of international law, the formalist plain duty-holder's definition is any more valid than the teleologist's or the axiologist's definition, the inevitable conclusion is that the Court's finding does not follow directly from international law. It is based partly on political considerations. This observation raises a normative question. Did the ICJ conceive of the situation correctly?

The principle of rational decision-making suggests that in answering this question, we look further into the justification of the relevant conflict rule as applied to the circumstances of the particular case at hand. The crucial question to be addressed is the following:

> If circumstances call for a choice between, on the one hand, the rule requiring Italy not to exercise jurisdiction over Germany, and on the other hand, the rule requiring that same state not to absolve Germany of any liability incurred in respect of war crimes and crimes against humanity, then why exactly should the one or the other be preferred?

The interesting point that this question helps to highlight is, of course, that depending on which one of the three definitions we apply for our understanding of the relevant conflict rule, we will be assuming a different answer, each relying on a separate source of authority. Applying the teleologist's definition, we will be relying on international law-makers' assumed assessment of the relative weight of the two principles involved: international law-makers conceive of the principle that no state should be sued in courts of another country as weightier than the principle that war crimes and crimes against humanity should be redressed, or *vice versa*. Applying the axiologist's definition, we will be relying on international law-makers' assumed assessment of the relative strength of the two value claims involved: international law-makers recognize that sovereign equality poses a stronger value claim than the claim for effective reparation, or *vice versa*. Applying the formalist plain duty-holder's definition, on the other hand, we will be relying solely on an assumed rule of positive international law: international law-makers recognize that in the case of a conflict between the

rule requiring Italy not to exercise jurisdiction over Germany, and the rule requiring that same state not to absolve Germany of any liability incurred in respect of war crimes and crimes against humanity, either the one rule or the other should be given priority.

This analysis sets the circumstances of *Jurisdictional Immunities of the State* in perspective. To explain an adoption of either the teleologist's or the axiologist's definition of the concept of a normative conflict, inevitably, the Court would have had to engage with questions concerning the justification of *jus cogens* rules generally. In applying the teleologist's definition, the Court would have been forced to explain why international law-makers think it more important that the object and purpose of a rule of *jus cogens* be realized than the object and purpose of any rule of ordinary international law. In applying the axiologist's definition, on the other hand, the Court would have been forced to explain why international law-makers think that rules of *jus cogens* make a stronger value claim than rules of ordinary international law. The problem is that whatever explanation the ICJ would have attempted in this respect, inevitably, this explanation would have been contentious. As is commonly known, international law-makers have widely different opinions about the ultimate justification of *jus cogens* norms. This is why, almost forty-five years after the adoption of Article 53 of the VCLT, there is still no generally recognized criterion that can be used for the identification of *jus cogens* norms in particular cases.[54]

The definition of *jus cogens* laid down in Article 53 of the Vienna Convention is based on the assumption that international law-makers can agree on the hierarchically superior status of a *jus cogens* rule, although they have different opinions about its ultimate justification. This assumption has proven correct. Otherwise, the current consensus treating rules like the prohibition of aggressive warfare or the prohibition of genocide as peremptory would never have been possible.[55] For this reason, I think most commentators can agree with my conclusion that in opting for the formalist plain duty-holder's definition, rather than any other of the two alternatives, the ICJ decided correctly. Only a reference to the hierarchically superior status of *jus cogens* in international law can convincingly explain why the rule requiring Italy not to exercise jurisdiction over Germany should be preferred over the rule requiring that same state not to absolve Germany of

[54] This was the reason for why the drafters of the Vienna Convention opted for the rather peculiar definition of the concept of *jus cogens* laid down in Article 53. See Draft Article on the Law of Treaties with Commentaries, Report of the International Law Commission covering the work of its 15th session, 6.5.– 12.7.1963 (UN Doc. A/CN.4/163), 189, at 198 et seq.

[55] Comp. the ILC Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Art. 26) (note 32).

any liability incurred in respect of war crimes and crimes against humanity. International lawyers may have different opinions about the *desirability* of applying the formalist plain duty-holder's definition for the purpose of the interpretation of a conflict rule like the one that gives priority to *jus cogens* over ordinary international law.[56] The fact remains, however, that in so acting, the ICJ secured a decision in conformity with the principle of rational decision-making. As far as this article is concerned, this should be sufficient to avert criticism.

V. General Conclusions

Increasingly often law-applying agents find themselves faced with situations where two or more equally applicable norms of international law cannot be easily reconciled. To help overcome such situations, international law provides a wide variety of conflict rules. According to customary international law, for example, rules of *jus cogens* shall have priority over rules of ordinary international law; *lex specialis* shall have priority over *lex generalis*; and *lex posterior* shall have priority over *lex prior*. The application of any such conflict rule presupposes the decision that a normative conflict exists. This simple observation highlights the great ambiguity of international legal language, which confers on the term *normative conflict* several distinct meanings. Obviously, as with ambiguity of language in general, particular contexts of use may help limit the possible interpretations of the term when used at particular occasions. The fact remains, however, that although the particular context of a conflict rule will often exclude the relevance of some or several definitions of the concept of a normative conflict, it cannot always bring the number of relevant definitions down to one, and one only. The decision whether to apply the one or another definition will then be a matter left to the discretion of the law-applying agents themselves.

In such situations, a normative question will inevitably be raised. If circumstances call for a choice between two equally applicable rules of international law (R_1 and R_2), then why exactly should the one or the other be preferred? As shown in Section IV., depending on which definition is applied in the understanding of a conflict rule, law-applying agents will assume a different answer to this question. In applying the teleologist's definition, law-applying agents will assume that according to the makers of the relevant conflict rule, R_1 entails a weightier teleological principle than R_2, or

[56] See e. g. *C. Espósito*, *Jus Cogens* and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict Does Exist", Ital. Y.B. Int'l L. 21 (2011), 161 et seq.

vice versa. In applying the axiologist's definition, law-applying agents will assume that according to the makers of the relevant conflict rule, R_1 poses a stronger value claim than R_2, or *vice versa*. In applying any of the formalist's definitions, law-applying agents will assume that according to the relevant conflict rule, R_1 should be given priority to R_2, or *vice versa*, irrespective of what other reasons the makers of that conflict rule may have for preferring the one rule to the other. The principle of rational decision-making suggests that law-applying agents adopt the definition that overall commits them to the sounder of those answers, based on what can reasonably be assumed about the relevant law-makers relative to the concrete issue of conflict at hand. Naturally, this implies recognition of the role of practical reasoning for the justification of legal decisions.