

Valentin Jeutner. ***Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma***. Oxford: Oxford University Press, 2017. Pp. xxii + 182. £70. ISBN: 9780198808374.

Contemporary international law often presents itself as an almost impenetrable thicket of overlapping legal regimes that materialize through multilateral treaties at the global, regional and sub-regional levels, customary law and other regulatory orders. Often, overlaps between different regimes manifest themselves as constellations of norms that appear to be conflictual. Valentin Jeutner's book entitled *Irresolvable Norm Conflicts in International Law*, based on his doctoral thesis defended at Cambridge University in 2015, is the latest in a recent series of monographs that address norm conflicts in international law.<sup>1</sup> On his own account, his work differs from other studies in that it explores certain constellations of public international law where 'the legal order confronts legal subjects with seemingly impossible expectations', where 'a state of legal superposition' exists (at 6). As indicated in the title, Jeutner is not concerned with norm conflicts in general but, rather, with a specific subset of conflicts: those that are, legally speaking, irresolvable. Jeutner proposes that such irresolvable conflicts ought to be called 'legal dilemmas' and argues that such dilemmas ought to be solved by the sovereign actor facing a dilemma: the state. His book is informed by deontic logic and formulates an abstract theory of the legal dilemma as a novel concept for international law, which the author explicitly introduces as a stipulative definition – a term of art (at 19).

## 1 Defining the 'Legal Dilemma'

Jeutner's clearly structured and highly readable argument proceeds in three steps. After proffering a definition of the 'legal dilemma' and clarifying its composite parts (Part 1), he defends its validity, arguing that conflicts between norms exist that public international law cannot satisfactorily resolve (Part 2), before he proposes, in the third and last part, that it ought to be the state facing a legal dilemma who should decide on the appropriate course of action and not judicial actors.

Part 1 sets out with the following definition: 'A legal dilemma exists when an actor confronts an irresolvable and unavoidable conflict between at least two legal norms so that obeying or applying one norm necessarily entails the undue impairment of the other' (at 20). The remainder of the first part elaborates the various components of this definition: the actor facing the conflict is a sovereign state (at 21), a conflict is unavoidable when it could not have been, or simply was not, avoided by the authors of the legal norms in question (at 33) and it is irresolvable when there are no means of international law that might bring the conflict to a solution (at 34; Part 2). Undue impairment exists when complying with one norm will deprive the other norm of its intended effect (at 35–36).

Two points merit specific attention: Jeutner's notion of legal norms and his classification of different types of conflicts. Legal norms are understood as norms that unequivocally make a conduct permissible, prohibited or obligatory. He thus conceives of conflictual relationships in terms of deontic logic on which his account explicitly draws; hence, the three attributes of

<sup>1</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003); R. Wolfrum and N. Matz-Lück, *Conflicts in International Environmental Law* (2003); D. Pulkowski, *The Law and Politics of International Regime Conflict* (2014); S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (2014).

conduct (obligatory to x, prohibited to x, permissible to x/not x) are identical with the three modalities of deontic logic (at 22, n. 40).<sup>2</sup>

Using the modalities of deontic logic brings into focus a particularly contentious case: the relationship between prohibitive and permissive norms, which, according to deontic logic and Jeutner's proposal, ought to be considered as conflictual. While Jeutner is not the first to level an argument against the long-standing dictum that 'direct incompatibility arises only where a party ... cannot simultaneously comply with its obligations under [two] treaties',<sup>3</sup> he provides a particularly clear and convincing argument in favour of including conflicts between prohibitive and permissive norms, especially for such permissions that are rooted in rights: accepting that a prohibition prevails over a permission unduly favours prohibitive norms over permissive norms and, in the case of rights, consequently impairs the choice of the rights-holder whether or not to exercise a given right (at 30).

Jeutner further distinguishes three different types of conflict. Conflicts can arise between two norms that were authored by the same group of states (for example, conflicting norms within the same treaty or between treaties with the same membership), between two norms that were authored by different groups of states (for example, conflicting norms between treaties with different sets of state parties) and between what he calls 'twin norms' – that is, situations where the same (obligatory) norm (for example, to save a person in distress) applies to different objects simultaneously and the resulting obligations can only be complied with towards one object (for instance, a shipmaster at sea sees two people in distress but can only save one). This distinction is important because certain conflict resolution norms, such as *lex specialis* or *lex posterior*, only apply to conflicts where the norms were authored by the same group of states.<sup>4</sup> In a last step, Jeutner distinguishes between what he calls contingent and intrinsic conflicts (at 31–32). The distress scenario, for instance, is a contingent conflict in this understanding, as the norms do not intrinsically conflict, but only do so when specific factual circumstances arise (namely, when two people find themselves in distress at the same time, and the shipmaster is factually incapable of saving both lives). An example of an intrinsic conflict would be a treaty that prohibits a specific conduct explicitly without exceptions and that simultaneously allows this conduct.<sup>5</sup>

Recall that Jeutner defines a legal dilemma as a situation in which an actor confronts an irresolvable and unavoidable conflict between at least two legal norms so that obeying or applying one norm necessarily entails the undue impairment of the other. In light of the various explanations and clarifications, his definition can be rephrased as follows. A legal dilemma exists when a sovereign state faces two norms of international law that are irreducible and concretized so that they each contain an unequivocal obligation, permission or prohibition of a certain conduct

<sup>2</sup> Jeutner draws on the classical account of deontic logic proposed by von Wright in order to depict certain conflicting norm constellations while also acknowledging its limits for jurisprudential reasoning (at 35). Cf. von Wright, 'Deontic Logic', 60 *Mind* 1, at 1; for international law, cf. Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', 17 *European Journal of International Law* (2006) 395.

<sup>3</sup> The oft-quoted traditional definition of a legal conflict in international law is Jenks, 'The Conflict of Law-Making Treaties', 30 *British Yearbook of International Law* (1953) 406, at 426. For other recent challenges to Jenks' dictum, see, e.g., Pauwelyn, *supra* note 1, at 170–172, 407–410; Pulkowski, *supra* note 1, at 150–152; Vranes, *supra* note 2, at 409–410.

<sup>4</sup> Cf. Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 30(4). On the contentious drafting history of this provision and the (in)adequacy of considering it as a conflict rule *stricto sensu*, see Ranganathan, *supra* note 1, ch. 2.

<sup>5</sup> Jeutner provides the example of the Treaty Relating to the Use of Submarines and Noxious Gases in Warfare 1922, 25 LNTS 202, which contains both a right for submarines to destroy merchant vessels under specific circumstances as well as an unqualified prohibition for submarines to destroy any commerce at any time. The Treaty never entered into force.

so that the state cannot conduct itself in conformity with one norm without simultaneously depriving the other conduct norm of its intended effect, and no means of international law are available to settle the relationship between the two norms.

How do such dilemmas emerge? After a brief section in which Jeutner distinguishes his concept of the dilemma from related concepts – moral dilemmas, legal indeterminacy, gaps, paradoxes, disagreement and hard cases – he considers a number of factors that might cause legal dilemmas. While not all causes can be abstractly identified, some of the most common causes involve the prior fault of actors – for example, contracting into conflicting treaties<sup>6</sup> – imperfect drafting, the non-hierarchical nature of international law and international law's fragmentation (at 43–52).

## 2 The Added Value of the Legal Dilemma

While the first part offers a definition of his concept of a 'legal dilemma' and distinguishes it from related concepts, the second part sets out to defend this novel term of art. To this end, international law's various existing means of dealing with normative conflict are each examined in turn, and their deficiencies are exposed. Jeutner distinguishes norm conflict resolution devices, norm conflict accommodation mechanisms and measures of last resort. As the name indicates, norm conflict resolution devices are rules that solve conflicts by giving priority to one norm over the other in case of conflict: international law is no stranger to the traditional rules of *lex specialis*, *lex posterior* and *lex superior*. However, Jeutner argues that none of these rules can be applied if we encounter a conflict between norms that were created at the same time and have the same rank and the same degree of specificity. Similarly, conflict-of-laws approaches known mainly from private international law are unable to solve conflicts between norms that belong to the same legal regime.<sup>7</sup> And the last norm conflict resolution device considered by Jeutner – the principle of proportionality – fails in cases where the norms in question are non-derogable and, as such, categorically immune from balancing, where norms are incommensurable or where the norms in question are of exactly the same importance within the parameters of a given legal regime. While some conflicts can thus be resolved through the application of norm conflict resolution devices, these devices cannot in principle preclude irresolvable norm conflicts.

In contradistinction to norm conflict resolution mechanisms, norm conflict accommodation mechanisms do not prioritize one norm over the other. Rather, Jeutner has in mind situations where the infringement of a norm will be left without sanction, even though the norm infringement is acknowledged. This idea materializes through different legal concepts: the law of state responsibility knows various circumstances under which the wrongfulness of an act is precluded,<sup>8</sup> the Vienna Convention on the Law of Treaties allows for an otherwise unlawful suspension or termination of a treaty in the event of factual impossibility due to the disappearance or destruction of an object central to the execution of the treaty or in the event of a fundamental

<sup>6</sup> Ranganathan, *supra* note 1, has shown that treaty conflicts are often the result of strategic political decisions.

<sup>7</sup> It has been suggested that public international law might benefit from private international law approaches when faced with multiple regime complexes. Michaels and Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law', 22 *Duke Journal of Comparative and International Law* (2012) 349.

<sup>8</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001, Annex, ch. V.

change of circumstances.<sup>9</sup> Lastly, many treaty regimes provide for derogations under specific conditions. However, as Jeutner argues, none of these mechanisms rule out the possibility of a legal dilemma in principle, especially not when non-derogable norms collide. Or, phrased in the author's words, 'it is, in principle, not possible for an actor to justify or to excuse ... non-compliance ... merely by pointing towards a conflicting norm that compelled the actor to do so' (at 78).

Lastly, Jeutner argues that neither the application of residual rules, most importantly of the *Lotus* principle,<sup>10</sup> nor the possibility for international courts of issuing *non liquet* declarations are satisfactory answers to dilemmatic situations. This argument shifts from the analytical to the normative; Jeutner does not argue that such 'measures of last resort' (at 85) are in principle unable to provide a solution for legal dilemmas but, rather, that they are conceptually inadequate to do so and therefore should not be used. Two reasons are given: first, both residual rules and *non liquet* declarations respond to situations where no legal rule exists, rather than a state of legal superposition as represented by a dilemma. Second, Jeutner fears that the application of residual rules or *non liquet* declarations might unduly favour one norm over the other.

### 3 On Dilemmatic Declarations and the Role of Courts

The discussion of *non liquet* declarations subtly moves the perspective to courts, which are central to the author's argument in Part 3. Jeutner proposes in this last part of his book that judicial actors ought to issue a 'dilemmatic declaration' (at 94–97) when faced with a legal dilemma, rather than deciding the legal dilemma themselves. This decision, Jeutner argues, ought to be taken by the state, primarily because the state has both the better empirical as well as moral competence to do so: the state is closer to the situation and therefore possesses more information about a given situation, and it can include non-legal considerations in the decision-making process. In that sense, we can read Jeutner's book not only as a plea for conceptual clarity and coherence but also as a plea for judicial restraint.

The legal dilemma, as defined by Jeutner, necessarily implies that the state will unduly impair one norm by giving way to the other norm. If such impairment coincides with the violation of an obligation, Jeutner proposes that the state ought to incur its legal responsibility, but other states might consider showing mercy (at 120–121).<sup>11</sup> The section closes with a number of theoretical and practical objections that might be levelled against this proposal. Most importantly, Jeutner argues that his proposal does not violate the law of non-contradiction or the ought-implies-can maxim but, rather, that it offers a decidedly judicial answer to legal dilemmas and that international courts (shown with reference to the International Court of Justice) generally have jurisdiction to issue a 'dilemmatic declaration'.

### 4 Who Decides? Who Interprets? Two Concluding Remarks

In addition to the objections addressed by Jeutner himself, two further critical points can be raised. First, one may wonder to what extent the existence of a legal dilemma is contingent upon a particular legal interpretation and to what extent Jeutner's conception is based on interpretation being

<sup>9</sup> Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Arts 61, 62.

<sup>10</sup> The *Lotus* principle is commonly understood to provide that if there is no explicit prohibition of a conduct, international law generally allows it. Cf. *The Case of the S.S. Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10, paras 46, 47.

<sup>11</sup> This reader wonders whether incurring responsibility might not *de facto* favour the application of prohibitive over permissive norms, something that the author has tried to avoid at an earlier stage.

unequivocal – not only, but especially, in international law. Second, it is unclear under which conditions courts would be seized to decide upon the dilemma as presented in Jeutner's account in the first place, lest they be called upon to issue advisory opinions. Both points will be considered in turn.

As previously noted, Jeutner considers conflicts to exist exclusively between irreducible and concretized conduct norms of international law. Of course, in many cases, the conflicting norms will be subject to interpretation or, in the author's words, 'norm interpretation precedes the existence of a conflict' (at 23). Jeutner is aware that interpretation is by no means unequivocal and that the line between legal norm interpretation and judicial law-making is thin and sometimes not quite discernible (at 23–26). But then it is not clear that we might not encounter situations in which the content of the two conflicting norms is subject to dispute so that according to one interpretation a legal dilemma exists whereas another interpretation would lead to a different result. Consider the example of the much-discussed question of whether a state might 'in an extreme circumstance of self-defence in which the very survival of the state is at stake' resort to the use of nuclear weapons.<sup>12</sup> A dilemma only exists if we frame the norms as follows: (i) there is a norm containing an inherent right to self-defence, including the use of nuclear weapons under extreme circumstances, and (ii) there is a norm containing a prohibition of the use of nuclear weapons under all circumstances – and if we rank both norms at the same level. However, one could consider that the norm prohibiting the use of nuclear weapons is peremptory, which would establish a hierarchy between the two norms and, thus, resolve the conflict at hand<sup>13</sup> or, in turn, that the norm prohibiting the threat or use of nuclear weapons is not absolute and knows an exception, which again would resolve the conflict.<sup>14</sup>

Second, Jeutner conceptualizes legal dilemmas from the point of view of the state. This brings the relationship between a legal subject and two or more norms into sharp focus. What slips from view, however, is that norms create relationships between two (or more) actors and that a situation that might appear as dilemmatic to one actor does not necessarily pose a dilemma for the other actors as well. Put differently, norm conflicts do not exist abstractly but can only be described from the perspective of a subject applying the law.<sup>15</sup> Again, it is useful to consider an example, which I take once more from Jeutner's own cases. Egypt is party to both the regional 1950 Joint Defence Treaty<sup>16</sup> and the bilateral 1979 Peace Treaty with Israel.<sup>17</sup> Under the Joint Defence Treaty, a multilateral military alliance treaty with members of the Arab League, Egypt is under an obligation to aid any state party to the treaty in the case of aggression against that state, whereas the 1979 Peace Treaty with Israel puts Egypt under an obligation to refrain from any direct or indirect use of force against Israel. Should Israel now use force against an Arab League state and should that state invoke the Joint Defence Treaty, Egypt might find itself facing two potentially conflicting treaty obligations: to aid the Arab League state through the use of force against Israel and to refrain from the use of force against Israel (at 12–13).

This situation is dilemmatic only from Egypt's point of view (aside from the rather contentious issue whether an unjustified attack from Israel against an Arab League state might be

<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226. While Jeutner's argument is principled and theoretical in nature, he uses five scenarios throughout the book that constitute dilemmatic situations in the sense of his definition and are used by way of example (at 10–16). The question of nuclear weapons is the most prominent among those five examples and serves as the opener for the book.

<sup>13</sup> Cf. for an argument in that sense *Nuclear Weapons*, *supra* note 12, at 562, Dissenting Opinion of Judge Koroma.

<sup>14</sup> *Ibid.*, at 323, Dissenting Opinion of Vice-President Schwebel.

<sup>15</sup> C. Möllers, *Die Möglichkeit der Normen* (2015), at 350.

<sup>16</sup> Joint Defence and Economic Co-Operation Treaty between the States of the Arab League (Joint Defence Treaty) 1950, 49 AJIL Supplement 51 (1955).

<sup>17</sup> Peace Treaty between the State of Israel and the Arab Republic of Egypt 1979, 18 ILM 362.

considered an attack against Egypt as well, thus triggering Egypt's inherent right to self-defence and creating an exception from Egypt's obligation to not use force against Israel).<sup>18</sup> Should Egypt decide to not comply with its obligation towards Israel to not use force, it might incur responsibility for an internationally wrongful act towards Israel. If Egypt decides to not honour its obligation towards the Arab League State requesting help, then responsibility would be towards that state. The situation is not dilemmatic for either of them. And a court, faced with the question of 'Did Egypt violate its obligation towards Israel/the Arab League state?', would need to answer in the affirmative. It could acknowledge that Egypt was facing two incompatible obligations, but, ultimately, the legal issue at hand would be phrased from the perspective of the injured party, not from the point of view of the state facing the dilemma.<sup>19</sup> This is where the first and the second issue raised in this short review find a common institutional site: the court. The court will need to exercise an interpretatory function, and the interpretation will probably hinge upon the concrete question submitted to it.<sup>20</sup> Therefore, it might not actually come to interpret obligations that are in conflict with each other. In order for a court to issue a dilemmatic declaration in the sense that Jeutner proposes, it would need to be the state facing the conflicting obligations to submit the conflict to the court. This seems rather unlikely in contentious proceedings.<sup>21</sup> In turn, the actors who will probably most likely be confronted with dilemmatic situations of the kind described by Jeutner are not international courts but, instead, legal advisers of a given state. And it might indeed be desirable for legal advisers (or legal advisory committees) to not establish a hierarchy between two norms where the law does not provide for it but, rather, cautiously point out irresolvable conflicts a state is facing.<sup>22</sup>

These concluding remarks should not detract from the importance of Jeutner's contribution. His analytical clarity is exemplary, and the introduction of the concept of a legal dilemma is useful especially for the decision-making processes of states. His extensive consideration of deontic logic for conceptual thinking about international law is a contribution to the theory of international law in its own right. Rather, these remarks show the potential of this latest addition to international law scholarship to provide new input to debates on normative conflict.

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doi:10.1093/ejil/chx080

<sup>18</sup> Cf. the wording of the Joint Defence Treaty, *supra* note 16, Art. 2: 'The Contracting States consider any [act of] armed aggression made against any one or more of them or their armed forces, to be directed against them all. Therefore, in accordance with the right of self-defense, individually and collectively, they undertake to go without delay to the aid of the State or States against which such an act of aggression is made.'

<sup>19</sup> Another example given by Jeutner is structurally similar. Nicaragua had a treaty obligation to consult Costa Rica prior to granting canalization or transit rights for the San Juan River on the border between the two countries. Subsequently, it granted exclusive proprietary rights on that river without consulting Costa Rica. Seized by Costa Rica, the Central American Court of Justice could only pronounce that Nicaragua had violated its obligations towards Costa Rica but could not make any pronouncement regarding Nicaragua's conflicting obligation towards the USA. Had Nicaragua chosen to instead violate its obligation towards the USA and had the USA seized a court, the same would have been true, *mutatis mutandis*. Cf. Central American Court of Justice, *Costa Rica v. Nicaragua*, 30 September 1916, reprinted in 11 *American Journal of International Law* 1 (1917) 181, at 229.

<sup>20</sup> Of course, to what extent a court will be able to exercise an interpretatory function in the first place is dependent on its jurisdiction.

<sup>21</sup> It is probably no coincidence that the only example Jeutner gives where a court has come close to the idea of a dilemmatic declaration is the International Court of Justice's Advisory Opinion in *Nuclear Weapons*, *supra* note 12.

<sup>22</sup> Jeutner acknowledges the viability of his work for legal advisers in passing (at 21, n. 32).